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GOVERNMENT LAW COLLEGE, MUMBAI

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ABOUT
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DEDUCING AN INVESTOR'S FET EXPECTATION IN INTERNATIONAL INVESTMENT LAW

-Ahan Gadkari[1]

ABSTRACT

The 'fair and equal treatment' provision is prevalent in the great majority of bilateral investment agreements. In recent years, the FET standard has been the subject of several significant research. The idea of justifiable expectations has a limited relationship to the occurrence of regulatory changes enacted by governments that may harm foreign investment. Scholars are becoming more interested in this subject. The debate remains as to whether the notion achieves a fair balance between the interests at issue in investment treaty arbitration, or does it offer an unfair advantage for one side over the other? After more than 10 years of intense usage, do we truly understand what the theory of "legitimate expectations" stands for and what it aims to accomplish? These conventional risks give investors' interests disproportionate weight at the expense of public interests and a State's regulatory authority. In addition, while considering whether expectations are "fair," the level of development of the host country must be considered with additional care. This article examines the origins and history of the word "legitimate expectations," analyses how it has been employed by arbitral tribunals deciding investment claims over the last ten to fifteen years and defines "Legitimate Expectations."

INTRODUCTION

The need that a foreign investment be provided "fair and equitable treatment" (FET) has become the central criterion in investment treaty law, safeguarding foreign investors from harm caused by arbitrary, discriminatory, or abusive governmental conduct. The norm is reflected in the great majority of international investment agreements (IIAs), bilateral trade agreements (BITs), and free trade agreements (FTAs) that govern foreign investment between nations, such as the North American Free Trade Agreement (NAFTA). As a result of the exponential increase

[1] Student at the Jindal Global Law School, Sonepat.

in the number of investment disputes covered by investment treaty law throughout the latter half of the 2000s, FET under investment treaty law has become the most disputed and debated part of this corpus of international law.[2]

Additionally, it has garnered the most unfavourable attention.[3] FET is inherently a nebulous term and is often expressed in minimum wording in IIAs.[4] This allows a great deal of leeway for ad hoc courts using the norm to assign meaning to the text, and some have not hesitated to take an expansive stance. The fact that these tribunals are not susceptible to effective appellate review increases the likelihood of inconsistency in interpretation. Indeed, the system has been accused of exceeding its power in limiting regulatory autonomy and for delivering uneven outcomes.[5]

This article explores the FET criterion that has been articulated as "transparency and protection of legitimate expectations." The regulatory framework impacting investments must be easily discernible, and choices affecting investments must be traceable to this framework. When state regulatory activity changes counter to the reasonable expectations of the investor, therefore having a detrimental impact on the investment, this may violate FET requirements. This idea is basically an arbitral creation, since it is not mentioned in any IIA rules. These standard risks giving the interests of investors undue weight at the cost of public interests and a State's legal power to regulate. In addition, while using such a concept, extra care must be taken to consider the degree of development of the host nation when evaluating whether expectations may be "reasonable."

According to the Organisation for Economic Co-operation and Development (OECD), the requirement of transparency is a "relatively new concept not generally considered a customary

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[2] U.N. Conf. Trade & Dev., *World Investment Report 2010: Investing in a Low- carbon Economy* 84 (U.N. Conf. Trade & Dev. 2010). *See also*, Stephen Fietta, *Expropriation and the 'Fair and Equitable' Standard: The Developing Role of Investors Expectations' in International Investment Arbitration*, 23 J. Intl. Arb. 375–99, 376 (2006).

[3] Anthony De Palma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes but Go Too Far Critics Say*, N.Y. TIMES (Mar. 11, 2001), HTTPS://WWW.NYTIMES.COM/2001/03/11/BUSINESS/NAFTA-S-POWERFUL-LITTLE-SECRET-OBSCURE-TRIBUNALS-SETTLE-DISPUTES-BUT-GO-TOO-FAR.HTML.

[4] Matthew Porterfield, *An international common law of investor rights*? 27 U. Pa. J. Intl. Econ. L . 79–113, 88 (2006).

[5] Susan D. Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 Va. J. Intl. L. 767, 768 (2007–2008).

international law standard."[6] However, according to Dolzer and Schreuer, "[b]oth the requirement of transparency and the protection of legitimate expectations are by now firmly rooted in arbitral practice."[7] This article asserts that this should not be the case.

This article is divided into five sections. Section 1 introduces the subject and sets the scope for the rest of the paper. Section 2 analyses the background and purpose behind FET provisions in investment treaties. Section 3 analyses the protection of legitimate expectations of investors. Section 4 delves into the legal status of protection which investors can expect from legitimate expectations provisions in investment treaties. Finally, section 5 sums up the article and concludes.

TRACING THE ORIGIN OF THE FET OBLIGATION

In investment treaty law, the FET obligation is a non-contingent norm. In other words, it is an absolute criterion that must be applied to nations without regard to situation or other 'relative' elements, such as those included in 'national treatment' or 'most-favored country' provisions. The objective of a non-contingent standard, according to Fatouros, is that "the treatment they prescribe is determined beforehand and thus, presumably, does not fall below a minimum standard"; however, the disadvantage of such a standard is clear: "the generality and abstraction of these standards remains an important drawback." It is often difficult to evaluate whether a certain metric is "just," "reasonable," or "fair."[8]

There is no unanimity among courts or academics over the precise substance of FET. While parts and specific needs of the standard have been elucidated, the precise liability level for how destructive a state's acts must be in order to violate the norm has remained elusive. In this regard, Schill remarks:

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[6] Org. Econ. Co-operation & Dev., *Fair and Equitable Treatment Standard in International Investment Law*, in *International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives*, 118 Org. Econ. Co-operation & Dev. Publg. (2006), HTTPS://DOI.ORG/10.1787/9789264011656-EN.

[7] RUDOLPH DOLZER & CHRISTOPHER SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 134 (Oxford U. Press 2008).

[8] ARGHYRIOS A FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 135–141 (Columbia U. Press 1962).

"Fair and equitable treatment does not have a consolidated and conventional core meaning as such nor is there a definition of the standard that can be applied easily. So far it is only settled that fair and equitable treatment constitutes a standard that is independent from national legal order and is not limited to restricting bad faith conduct of host States. Apart from this very minimal concept, however, its exact normative content is contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretative syllogism."[9]

Further, Muchlinski declares:

"The concept of fair and equitable treatment is not precisely defined. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most, it can be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors."[10]

Moreover, nations have given little thought to the legal duties that their IIAs may imply, indicating that they did not think that the standards they were agreeing to would be so stringent.

In the vast majority of instances, FET obligations in BITs are among the treaty terms that have not been adequately drafted. These lead to nations not expecting the obligation which they have signed up for. Schneur described this in his oral testimony as:

"[M]any times, in fact in the majority of times, BITs are among clauses of treaties that are not properly negotiated. BITs are very often pulled out of a drawer, often on the basis of some sort of model, and are put forward on the occasion of state visits when the heads of states need something to sign and the typical two candidates in a situation like that are Bilateral Investment Treaties, and treaties for cultural cooperation. In other words, they are very often not negotiated at all, they are just being put on the table, and I have heard several representatives who have actually

[9] STEPHAN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 263 (Cambridge U. Press 2009).
[10] PETER MUCHLINKSKI, MULTINATIONAL ENTERPRISES AND THE LAW 625 (Oxford Intl. 1995).

> *been active in this Treaty-making process, if you can call it that, say that, 'We had no idea that this would have real consequences in the real world'."*[11]

Consequently, the FET norm has evolved into the twenty-first century's version of John Selden's equity, with its measure varying on the size of the Chancellor's foot.[12] Given the varying formulations of FET in different IIAs, the generally vague wording, and the disagreement over the exact relationship between the international FET standards, in a system without a coherent appellate mechanism or system of binding precedent, it is surprising that arbitral tribunals have displayed such coherence in identifying and applying the principles encompassed by the fair and equitable standards.[13] It is customary for arbitral courts to cite past verdicts, so reaffirming lines of reasoning in investment treaty law that have become commonplace.

PROTECTING LEGITIMATE EXPECTATIONS IN INTERNATIONAL ARBITRATION

Customary International Law: The NAFTA Experience

1. Introducing Transparency Obligations

Metalclad v. Mexico is the first lawsuit brought under NAFTA concerning transparency and legitimate expectations, as well as the first case in which a claimant was victorious under Article 1105.[14] The complaint had obtained federal building and operating licenses to construct and run a landfill. It relied on assurances from federal authorities that it had the necessary authorizations. The local government ultimately denied a development permission.

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[11] Prof. Christopher Schreuer, oral testimony on behalf of the Claimant, Wintershall Aktiengesellschaft v. Argentina, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), at 85.
[12] J. Selden, *Table Talk*, from EVANS AND JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 223–224 (Butterworths 1984).
[13] Dolzer & Schreuer, *supra* note 7, at 133–147. *See also* U.N. Conf. Trade & Dev., *Series on Issues in International Investment Agreements II*, at xvi and 61–83; Roland Kläger, *Fair and equitable treatment: A look at the theoretical underpinnings of legitimacy and fairness*, 11 J. World Inv. & Trade 435, 443 (2010).
[14] Metalclad Corp. v. Mexico, Award, 30 Aug. 2000, 5 ICSID Rep. 209.

Article 1105(1) of the North American Free Trade Agreement states that "each Party must grant to investments of investors of the other Party treatment consistent with international law, including fair and equitable treatment and complete protection and security."

The tribunal determined that Metalclad had the right to rely on the testimony of federal authorities,[15] and ruled that the actions of the state and municipality violated Article 1105's FET obligation. The tribunal ruled that:

> *"Prominent in the statement of principles and rules that introduces the Agreement is the reference to 'transparency' (NAFTA Article 102(1)). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws."*[16]

This paragraph merits additional examination. The first need is a clear regulatory structure. However, the regulatory structure was clear at the time of investing. When deciding to continue with an investment, the investor is cognizant of the regulatory structure. Unless NAFTA requires a reform of the regulatory structure to enhance openness upon joining the FTA, this is of little relevance to the argument at hand. Even then, this would be a commitment owed by Mexico to its NAFTA free trade partners; it would be a stretch to extend this obligation to a foreign investor that entered Mexico lawfully.

[15] *Id.* at p. 89.
[16] *Id.* at p. 76.

If this is not a NAFTA requirement, the investor must accept the regulatory environment at the time the transaction was made. A claimant is not permitted to later assert that the legal system they encountered when they decided to invest was insufficiently transparent if the system has not undergone significant change. Later, in *GAMI v. Mexico*, it was established unequivocally that NAFTA arbitrators do not have the authority to review rules and regulations that precede a foreign investor's investment choice.[17] In *S.D. Myers v. Canada*, the tribunal reaffirmed that parties must operate in accordance with the law as it existed at the time of the investment.[18] Outside of NAFTA, it is clear that investors must not only analyze the regulation as it exists, but also the degree of development of the host nation, in order to determine what expectations may be reasonable. Thus, in *Genin v. Estonia*, the panel found no violation of the criterion of fairness and equity and deemed it relevant that the claimant had agreed to invest in:

> *"a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown."*[19]

Metalclad recognized the regulatory system in Mexico as it existed at the time of its investment, presumably after obtaining legal counsel on the relevant legislation influencing its investment. The statements made by the tribunal on the level of openness needed by the "relevant legal requirements" were clearly flawed. This is not to say that a State may keep legal requirements secret or introduce new requirements arbitrarily affecting the value of a foreign investment; rather, a claimant cannot establish that they were not accorded fair and equitable treatment because the legal system they found and accepted when they made the investment was not sufficiently transparent. The second part of the above-quoted case passage imposes on governments of host states a 'duty' to ensure that they clearly state the correct legal position regarding an investment, not just when they become aware of a misunderstanding or confusion, but whenever there is any 'scope' for such a misunderstanding or confusion. This is a considerable load, especially for a developing nation.[20] Furthermore, it is difficult to imagine any commercial or economic connection in which one party is obligated to function as legal

[17] GAMI v. Mexico, Award, 15 Nov. 2004 (2005) 44 I.L.M. p. 93.
[18] S.D. Myers v. Canada, Second Partial Award, 21 Oct. 2002.
[19] Genin v. Estonia, ICSID Case No. ARB/99/2, Award, 25 Jun. 2001, p. 348.
[20] International Monetary Fund, *Growth Resuming Danger Remains*, World Economic Outlook (April 2012).

counsel for the other, and it is much more difficult to see a court or tribunal encouraging one party to depend only on legal advice from the other. It is implausible for the court to assert the existence of such a burden. At no time did the court imply that Metalclad may have deemed it advisable to retain independent counsel.

"Metalclad was led to believe, and did believe, that the federal and state permits allowed for the construction and operation of the landfill."[21] This fact was cited by the tribunal while providing its rationale for its ruling in Metalclad's favor. This image inspired Metalclad to continue with its construction in the manner that it did. This fact does suggest unfair treatment; however, the tribunal provided no legal authority for the proposition that Metalclad was entitled to rely on these representations, nor did it question whether independent counsel would have clarified the misunderstanding or whether Metalclad had sought such counsel.

In its conclusion regarding the FET criterion under NAFTA Article 1105[22] the tribunal made no reference to any legal source other than Article 1105(1),[23] and the use of the phrase "transparency" in Article 102(1). Despite the clear reference to "international law" in Article 1105(1), the tribunal did not explain what this meant for the fair and equitable criteria under NAFTA. The award was later overturned by the Supreme Court of British Colombia.[24]

2. Response under NAFTA and Clarification of the International Customary Standard

Shortly after the wide interpretation of Article 1105(1) in *Metalclad*, the case of *Pope & Talbot v. Canada* was decided.[25] In this case, the tribunal rejected Canada's claim that a violation of the FET norm requires "egregious" behavior.[26] The court proceeded by stating that Article 1105 requires "that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries."[27] The NAFTA Free Trade

[21] Metalclad Corp. v. Mexico, *supra* note 14, at p. 85.
[22] *Id.* at p. 74-101.
[23] *Id.* at p. 74.
[24] *Metalclad Corp. v. Mexico*, Review by British Columbia Supreme Court, 2 May 2001, 5 ICSID Rep. 238, paras 57–76.
[25] *Pope & Talbot Inc. v. Government of Canada (Merits, Phase 2),* 13 World Trade & Arbitration Materials 61 (10 Apr. 2001).
[26] *Id.* at p. 108.
[27] *Id.* at p. 118.

Commission, which is comprised of officials from the three NAFTA countries, responded immediately to the tendency toward wide interpretation in these decisions. It released a note of interpretation explaining that NAFTA Article 1105 includes the following provisions:

> *"The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."*[28]

The inference is clear. The minimum bar for FET under NAFTA is customary international law. Clearly, tribunals interpreting these clauses had exceeded the intent of the nations parties to the treaty. The interpretations of the tribunals in *Metalclad* and *Pope & Talbot* should be rejected since they are contrary to the law.

Since then, NAFTA case law seems to have accepted that customary international law has neither responsibility of transperancy or obligation to legitimate expectations under custimary international law. Since *Metalclad*, no tribunal has ruled that a lack of transparency violated NAFTA Article 1105, and that portion of the judgment has been annulled. Under *Glamis Gold v. United States*, the United States said that "all three States Parties to the NAFTA have agreed that there is no general transparency requirement in Article 1105 and have expressly rejected the notion that transparency forms part of customary international law."[29] In *Cargill v. Mexico*, the court held, "the Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment"[30]

Therefore, it seems, based on declarations by NAFTA nations and tribunal judgments, that responsibilities related openness and safeguarding of investor expectations are not part of customary international law. In regards to IIAs that are not directly related to the customary international law norm, the law is less clear. There, the notion that fair and equal treatment necessitates openness and the safeguarding of investor expectations is maintained.

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[28] North American Free Trade Agreement, *Notes of Interpretation of Certain Ch. 11 Provisions, NAFTA Free Trade Commission*, 31 Jul. 2001, HTTP://WWW.SICE.OAS.ORG/TPD/NAFTA/COMMISSION/CH11UNDERSTANDING_E.ASP .

[29] Glamis Gold Ltd. v. United States, UNCITRAL (NAFTA), Award, 8 Jun. 2009, p. 580.

[30] Cargill Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2 (NAFTA), Award, 18 Sep. 2009, at 294.

Experience outside of NAFTA: The Positive Development of Transparency in Arbitration

1. Standard for Transparency

Outside of NAFTA, tribunals may be obliged to apply two forms of FET provisions that are unrelated to the international minimum standard. Firstly, an unqualified FET provision and secondly, FET clauses connected to international law.

Transparency and the safeguarding of reasonable expectations have been consistently cited by courts as fundamental components of the FET obligation. In reality, tribunals have avoided analysis of the many meanings the two kinds of clauses described above may have, or their link to the international minimum standard, and have instead chosen to concentrate on identifying the particular parts forming the standard.[31] Thus, the variation in meaning between different formulations of FET clauses has been disregarded, with the emphasis on the aspects of the standard as applied to various factual contexts providing the sense of content uniformity.

In *Tecmed v. Mexico*, the 'definitive' assertion of the obligation of transparency was made.[32] The tribunal found a violation of FET in the Spain-Mexico BIT, pursuant to Article 4(1) stating that a contracting party is obligated to guarantee FET "pursuant to international law."[33] The tribunal further stated that:

> *"The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and*

[31] UNCTAD, Investor-State Arbitral Practice, at 61.
[32] *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.
[33] Xiuli Han, *The Application of the Principle of Proportionality in Tecmed v. Mexico,* 6 Chinese J. Int'l L. 635, 650 (2007).

administrative practices or directives, to be able to plan its investment and comply with such regulations."[34]

The method necessitates that state behaviour be consistent, ambiguity-free, and transparent, ensuring that the investor is aware in advance of the regulatory and administrative framework and policies that will impact it. The Tecmed "standard" is not only burdensome; it has been famously defined as '[a]ctually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain'.[35]

It is noteworthy that the tribunal arrived at such a high threshold to define FET, and it is more astounding that it did not cite any source to back its conclusion. Douglas goes on to explain that this comment was obiter dictum, as recognized by common law attorneys; it did not form the foundation of the ruling since Mexico had failed to achieve a far lesser bar in this instance.[36] More astonishing is the fact that this line from *Tecmed* has been frequently considered as the canonical source for the FET standard.[37]

Using this strategy, the tribunal in *CMS v. Argentina*, purely relying on the Preamble to the Argentina-United States BIT[38] which stipulated that FET treatment of investment is desirable to maintain a stable framework for investment was able to discern that the FET standard included a requirement to maintain a "stable framework for the investment"[39] despite the unprecedented financial crisis.

Van Harten characterized the CMS court's interpretation as "[f]rankly...nothing short of adventurous."[40] Nonetheless, the tribunal proceeded with courage (without reference to state practice, *opinio juris*, other instances, or scholarly opinion) to conclude that this approach was

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[34] *Tecmed v. Mexico, supra* note. 33, at para. 154.

[35] Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, 22 Arb. Intl. 27, 28 (2006).

[36] *Id.* at 28.

[37] Eureko B.V. v. Republic of Poland, Partial Award, 19 Aug. 2005, p. 235; Occidental Exploration & Production Co. v. Republic of Ecuador, LCIA Case UN 3467, Final Award, 1 Jul. 2004, p. 185; MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case ARB/01/7, Award, 25 May 2004, p. 114.

[38] Treaty between United States of America and The Argentine Republic concerning the reciprocal encouragement and protection of investment.

[39] CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, at 274 and 280.

[40] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 136 (Oxford U. Press 2007).

"not different from the international law minimum standard and its evolution under the customary international law."[41]

The tribunal in *Enron v. Argentina*, adopting a similar line of reasoning, also determined that the investment required a solid framework.[42] Both verdicts were reversed by ICSID Review Committees on different reasons, and the Committees recognized that the tribunals had not plainly exceeded their authority in interpreting FET.[43]

In *Occidental v. Ecuador*, the tribunal linked the FET criterion to a stable and predictable legal and business environment for investment with the international law criteria, holding that Ecuador's reforms to its tax system violated FET by altering the legal and economic foundation for the investment.[44] Further, the United Nations Conference on Trade and Development (UNCTAD) has stated that:

> *"In these cases, tribunals have gone so far as to suggest that any adverse change in the business or legal framework of the host country may give rise to a breach of the FET standard in that the investors' legitimate expectations of predictability and stability are thereby undermined. This approach is unjustified, as it would potentially prevent the host State from introducing any legitimate regulatory change, let alone from undertaking a regulatory reform that may be called for. It ignores the fact that investors should legitimately expect regulations to change over time as an aspect of the normal operation of legal and policy processes of the economy they operate in."*[45]

[41] *Id.* at p. 284.
[42] Enron v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007, p. 259–60.
[43] Enron v. Argentina, Decision on the Application for Annulment, 30 Jul. 2010, p. 298–316; CMS Gas Transmission Co. v. Argentine Republic, Annulment Proceeding, p. 85.
[44] Occidental Exploration & Production Co. v. Republic of Ecuador, *supra* note 37, at p. 190-196.
[45] U.N. Conf. Trade & Dev., *Fair and Equitable Treatment: UNCTAD Series on international investment agreements II* 67 (New York & Geneva 2012).

2. Finding the Limitations on the FET Standard

In the wake of these rulings, several tribunals have articulated eligibility limitations or requirements, therefore slightly reducing the lofty standards of review articulated in the preceding judgements. It was long overdue for tribunals to emphasize that an investor's legitimate expectations must be "legitimate and reasonable" and grounded in the circumstances surrounding the investment, including not only the facts surrounding the investment, but also the political, socio-economic, cultural, and historical conditions of the host state. In addition, such expectations must be based on the terms that the state presented to the investor, and the investor must have relied on them when selecting to invest.[46]

i. Representations

Limitations on the theory include the necessity that the expectations be drawn from precise representations. This is not a difficult criterion to meet, and courts have concluded that valid expectations might be formed from non-investment-specific policies that attract foreign investment and on which the investor relied;[47] or specific obligations such as a stabilization provision.[48] Courts have concluded that a violation of contractual rights is insufficient to support a claim of FET violation.[49]

ii. Knowledge of the Regulatory Environment

Investors should be aware of and analyze the regulatory framework and degree of development of the state they have chosen to invest in. For instance, In *Genin v. Estonia*, the panel considered the claimant's decision to intentionally invest in:

> *"a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state*

[46] Duke Energy v. Ecuador, ICSID Case No. ARB/04/19, Award, 18 Aug. 2008, p. 340.
[47] Methanex Corp. v. United States, UNCITRAL (NAFTA), Final Award, 3 Aug. 2005, p. 7.
[48] U.N. Conf. Trade & Dev., *Investor-State Arbitral Practice*, *supra* note 31 at 95.
[49] Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 Sep. 2007; Hamester v. Ghana, ICSID Case No. ARB/07/24, Award, 18 Jun. 2010.

institutions responsible for overseeing and regulating areas of activity perhaps previously unknown."[50]

iii. Stabilizing the Expectations of Investors and Genuine Regulatory Action

In *Saluka v. Czech Republic*, it was determined that in order to be protected, legitimate expectations:

> *"must rise to the level of legitimacy and reasonableness in light of the circumstances...No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well...The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."*[51]

This paragraph recognizes that it is unreasonable for legitimate expectations to completely restrict a state's ability to regulate in the public good.

3. Limitations on the Transparency and Protection of Legitimate Expectations Requirements: Are They Sufficient to Save the Requirement?

Many, including states, will see the imposition of restrictions on the extent of the requirement as a necessary counterweight to the onerous *Tecmed* norm. In developing countries, where the regulatory framework may not be as evolved as in industrialized nations, the last two constraints described above are of particular significance.

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[50] Genin v. Estonia, *supra* note 18, at p. 348.

[51] Saluka v. Czech Republic, UNCITRAL Rules, Partial Award, 17 Mar. 2006, p. 304. For similar jurisprudence from other tribunals: Parkerings-Compagniet AS v. Lithuania, *supra* note 48; Continental Casualty v. Argentina, ICSID Case No. ARB/03/9, Award, 5 Sep. 2008; EDF v. Romania, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009.

Nevertheless, these restrictions are often noted as limits of the *Tecmed* standard. This requirement is irrational, has no legal basis, and should be abandoned. This standard's subsequent limits offer a veneer of validity, but nothing more. While courts continue to believe that FET includes openness and preservation of reasonable expectations, reiterating this declaration will not make it real unless an acknowledged legal basis for this assumption is provided.

LEGAL BASIS FOR PROTECTION OF LEGITIMATE EXPECTATIONS AND TRANSPARENCY

Identification of the FET Obligation

While the phrase "fair and equitable treatment" appears in several treaties regulating foreign investment, it is not often expressed. This may be the first challenge in determining the precise meaning of FET. Four basic formulations of FET in investment treaty practice have been recognized by the UNCTAD. First, an absolute responsibility to provide FET. Second, the obligation to provide FET based on international law. Third, the FET responsibility tied to the minimal level of treatment of foreigners under international customary law. Finally, the FET requirement with added subject matter, such as denial of justice.[52]

The fact that the standard is expressed in several ways hinders the development of a clear and consistent set of standards. Various source treaties necessitate that FET tribunals adopt distinct criteria, since they locate the law in different source treaties. The contention that some parts constitute FET is thus immediately problematic, given that an unqualified FET requirement, as defined by arbitral tribunals, differs significantly from the international minimum standard.

Interpreting the FET within the International Minimum Standard

Continually, there is disagreement on whether modern FET is reflected by the international minimum standard, is connected to the international minimum, or is fully independent of customary international law. This is significant because the test for a violation of the norm is

[52] U.N. Conf. Trade & Dev., *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II, United Nations* xiiv–xiv (New York & Geneva 2012).

basically twofold: state activity will be evaluated first against the principles of good governance and then against the threshold of responsibility or the gravity of the state's wrongdoing.[53] Regarding the second, the origin of the FET duty is essential. If it is linked to the global minimum standard or according to customary international law, state action is not held to such a high level.

1. FET Connected to the International Minimum Standard

The FET has its roots in the international minimum standard for the treatment of aliens, wherein historically developed nations held that governments were required to maintain this standard to safeguard foreign citizens regardless of how a state treated its own residents. This international minimum norm evolved over the nineteenth century[54] and is considered to have solidified with the *Neer v. Mexico* declaration that the treatment of a foreigner constitutes an international wrong:

> *"[S]hould amount to an outrage, to bad faith, to wilful neglect of duty, or do an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency."*[55]

It is accepted that the international minimum standard does not contain obligations for openness and protection of reasonable expectations. This does not imply that the minimal international standard is as low as it was in *Neer v. Mexico*. It is often claimed that it has undergone some evolution subsequently. In *Mondev*, the court summarized this approach effectively:

> *"To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."*[56]

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[53] W. Micheal Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 30 ICSID Rev. 616, 624 (2015).
[54] 8, MALCOLM SHAW, INTERNATIONAL LAW 823–827 (Cambridge U. Press 2008).
[55] L.F.H. Neer v. United Mexican States (1926) IV RIAA 60 at 65.
[56] Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF) 99/2, Award, 11 Oct. 2002, p. 116.

It is believed that Judge Nikken's approach is the most thorough analysis of the link between FET and the international minimum standard:

> *"In my opinion, the most reasonable interpretation on the content of fair and equitable treatment should be to give it the same meaning as the current minimum standard at the time the pertinent BIT was entered into and not in 1926 (Neer). During the twentieth century there was increasingly less tolerance in the face of abuse of power, so that arbitrary treatment need not be hideous, egregious or outrageous to be considered unjust or inequitable...some arbitral tribunals, such as the Saluka Tribunal, have suggested that the theoretical discussion on the relationship between the two standards is, in practice, superfluous, and when applied to the specific facts of a case, may be more apparent than real."*[57]

2. Unqualified FET Provision

In a comprehensive examination of FET's historical antecedents, the OECD documents the origins of the standard in several sources of international law.[58] According to the United Nations Centre for Transnational Corporations[59] and a WTO publication for the Working Group on the Relationship of Trade and Investment,[60] the FET obligation is rooted in customary international law.

According to Montt, if the historical context is taken seriously, the FET standard could not have originally referred to anything greater than the international minimum standard of care.[61] Despite this, the UNCTAD concludes that 'many arbitral tribunals have decided otherwise and gave the FET standard a life and a source of its own.'[62] Haeri's documentation indicates:

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[57] Separate Opinion of Judge Nikken in AWG Group v. Argentina, UNCITRAL, Decision on Liability, 30 Jul. 2010, p. 18.
[58] Org. Econ. Co-operation & Dev., *Fair and Equitable Treatment Standard in International Investment Law*, *supra* note 5.
[59] U.N. Ctr. Transnatl. Corporations, *Bilateral Investment Treaties* 42 (1988).
[60] World Trade Org., Working Group on the Relationship between Trade and Investment, Non- Discrimination, Most- Favoured-Nation Treatment and National Treatment, Note by the Secretariat, WT/WGTI/W/118 (4 Jun. 2002).
[61] 1 SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 69 (Hart Publg. Oxford 2009).
[62] U.N. Conf. Trade & Dev., *Series on Issues in International Investment Agreements II*, at 6.

> *"Investment treaty jurisprudence suggests that the fair and equitable treatment standard could be interpreted as an autonomous treaty standard that differs from the international minimum standard (despite the fair and equitable treatment standard's apparent origin in the international minimum standard), particularly where treaty language permits."*[63]

This comment from Haeri best exemplifies the current stance,[64] which is that arbitral jurisprudence describing FET as an unaffiliated independent international norm contradicts all other evidence of FET's origin. Consequently, when a tribunal is tasked with interpreting and applying a FET provision, failing to provide any international law sources to support their interpretation, or failing to cite any authority to justify their deviation from international law standards, as in *Tecmed*, is a significant omission. Such decisions are a cause for worry.

3. Nexus with International Law

Clauses tying FET to international law seem to necessitate referencing FET as it appears in international law. However, various interpretations have been presented by certain courts, who find no purpose to resort to international law.[65] Tribunals have argued that in such provisions the reference is merely to the principles of international law and not to "the minimum standard under customary international law"; and secondly, that the formulation "minimum international standard" is so well-established in international law that it is reasonable to assume that states parties would have used this formulation specifically if they had intended to apply it.[66]

The second point is immediately contradicted by the experience under NAFTA (Article 1105: 'each Party shall accord to investments of investors of another Party treatment in accordance

[63] Hussein Haeri, *A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law*, 27 Arb. Intl. 27, 45 (2011).
[64] Haeri, *supra* note 62; Montt, *supra* note 60; Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Lawand Practice*, 70 Brit. Y.B. Intl. L. 99, 99–164 (1999); JC. Thomas, *Reflection on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators,* 17 ICSID Rev.– For. Inv. L.J. 21, 21–101 (2002).
[65] Tecmed v. Mexico, *supra* note 31.
[66] Christopher Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Inv. & Trade 357, 360 (2005).

with international law'), where the states explicitly stated that this meant the customary international law standard.

In his fiercely stated separate opinion in the case of *AWG v. Argentina*, Judge Nikken argued further:

> *"This has led to the interpretation somewhat a contrario, applied by the Tribunal to this case, according to which that omission would prove that both standards are different, since the concept of minimum standard is well known and well established in international law, so that if the parties had intended to refer to it, it would have been explicitly mentioned...[but] [t]he question of why there is no mention in the BITs of the international minimum standard cannot be answered properly if the historical controversy on the concept of minimum standard is completely ignored as done in this decision."*[67]

Further elaborating on the historical hostility of economically weaker nations to the minimum standard, Nikken casts serious doubt on the legitimacy of the minimum standard as customary international law.[68] He concludes, then, that it cannot be said with such assurance that "the concept of international minimum standard was a well-established concept."[69]

The reasoning behind Judge Nikken's conclusion that the reference to "international law" in these types of FET provisions relates to the customary international law norm is unquestionably superior to those of his tribunal colleagues who disagree. In addition, it is reinforced by governmental expressions of *opinio juris* on the subject, which gives it considerable weight.

Significance of the Object and Purpose of the Treaty

Some courts have claimed to give effect to treaty provisions in light of the goal and purpose of the relevant treaty in accordance with Article 31 of the Vienna Convention on the Law of Treaties, with the object and purpose being the maintenance of a stable legal and commercial

[67] Separate Opinion of Judge Nikken in AWG Group v. Argentina, Supra Note 56, at p. 11–12.
[68] *Id.* p. 12. Also see Stephen Vasciannie, *supra* note 63, at 105; Andrew Newcombe & Lluís Paradell, *Lawand Practice of Investment Treaties: Standards of Treatment*, Kluwer L. Intl. 1, 269 (2009).
[69] Separate Opinion of Judge Nikken in AWG Group v. Argentina, *supra* note 57, at p. 14.

framework. Awards have relied on this strategy to support investor-friendly interpretations, such as the establishment of legitimacy criteria and the preservation of genuine expectations.[70] In *MTD v. Chile*, the court determined that FET required:

> *"treatment in an even-handed and just manner conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement 'to promote', 'to create', 'to stimulate' rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors."*[71]

However, a biased view will result from a singular emphasis on investment security. The fundamental objective of IIAs is to foster growth by establishing appropriate conditions for foreign investments (as opposed to investors). This was acknowledged in *Joseph C. Lemire v. Ukraine*:

> *"the object and purpose of the Treaty [Ukraine-United States BIT] is not to protect foreign investments per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest."*[72]

In any case, the goal and purpose of a treaty cannot introduce a demand that is lacking from the treaty according to its usual meaning. To safeguard an investor, the goal and purpose of a treaty cannot permit the introduction of additional conditions.

Analysing State Practise

While it would be improper to regard a state's assertions supporting a claim as authoritative, outside the framework of tribunal proceedings, states' perspectives on the criteria they meant

[70] Occidental Exploration & Production Co. v. Ecuador, *supra* note 36, at p. 183; Enron v. Argentina, *supra* note 41, at p. 260; Bayindir v. Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction.
[71] MTD v. Chile, Case No. ARB/01/7, 25 May 2004, p. 113.
[72] Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 Jan. 2010.

to be governed by, particularly joint declarations, should be given significant weight. It is improbable that nations would seek to be bound by a higher norm than "goof governance." The explanation made by the NAFTA Commission has been mentioned before. Other states have issued explanations of a similar kind.[73] Judge Nikken noted:

> *"[N]o other State has made any statement to the effect of giving fair and equitable treatment a meaning different from the international minimum standard (let alone linking it to the 'legitimate expectations' of investors and the stability of the legal environment for investment)."*[74]

Relevant state practise and *opinio juris* is almost unanimously of the conclusion that FET refers to the international customary law norm.

Using Arbitral Practise as Precedent

There is no precedent system in either international law or arbitration practice.[75] Despite this, arbitral tribunals have been increasingly inclined to cite the authority of previous tribunal rulings. However, it is evident that arbitral tribunal rulings neither establish international law nor bind later tribunals.[76] The importance of jurisprudence in arbitration was underlined by Judge Nikken:

> *"I agree, however, with the notion that like cases should be resolved in the same manner or, as stated by a distinguished scholar and member of this Tribunal, although there is no legal obligation to follow decided cases there is indeed a moral obligation to follow decided cases in order to promote a predictable legal environment. However, great caution is needed when identifying cases as alike, especially when dealing with factual issues like*

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[73] Matthew Pountney, *States weigh-in on DRCAFTA claim*, Global Arb. Rev. (23 Feb. 2012), https://globalarbitrationreview.com/article/states-weigh-in-dr-cafta-claim.

[74] Separate Opinion of Judge Nikken in AWG Group v. Argentina, *supra* note 56, at p. 7.

[75] Shaw, *supra* note 53, at 109–112; Zachary Douglas, *Can a Doctrine of Precedent be Justified in Investment Arbitration?* 25 ICSID Rev.– For. Inv. L.J. 104, 104–110 (2010); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* 23 Arb. Intl. 200 (2010); Porterfield, *supra* note 3, at 79; Mark C. Weidemaier, 51, *Toward a theory of precedent in arbitration*, William & Mary L. Rev. 1895, 1895 (2010).

[76] Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. Intl. Arb. 129, 130 (2007).

fair and equitable treatment and when, moreover, the BITs often contain significant differences despite their similarity. Furthermore, I understand that moral obligation includes looking critically at decided cases, precisely because they are not binding."[77]

CONCLUSION

In conclusion, the openness and preservation of reasonable expectations provisions that have made their way into FET in investment treaties should be disavowed. They demand an excessively high standard of governmental behaviour. It is improbable that nations throughout the globe would have voluntarily agreed to the spread of IIAs demanding FET and deliberately committed themselves to a norm so far beyond what good governance would need. In addition, the expectations of foreign investors are an entirely unsuitable criterion for determining whether state action has been fair and equitable. In any case, the ban on evident arbitrariness in FET is adequate without the addition of a brand-new concept.

Not only is the openness and preservation of legitimate expectations requirement inappropriate on this basis, but neither treaty provisions nor international law provide any justifiable ground for it. It's an innovation. Perhaps the corpus of arbitral jurisprudence can provide creative reasoning assistance, but it cannot establish law. The growth of this line of reasoning by arbitral courts is like to constructing a house of cards on an unstable table - it is weakened by the lack of a strong base, a legal foundation; adding more levels will not make the structure secure.

[77] Separate Opinion of Judge Nikken in AWG Group v. Argentina, *supra* note 57, at p. 24.

LEGAL CONFLICT ENCOUNTERS WITHIN PRIVATE LAW AND JUSTICE MECHANISM

-Kelly Ngyah[1]

ABSTRACT

Due to obvious conceptualised legalist impasses between incongruent national judicial systems and instituted international cooperation stances for managing the 'conflict of laws', sovereignt opportunism of national judicial positions with regards to issues of private international law noticeably play a preponderant role against the ethical will of international justice. Should the international justice system therefore scrounge from the national justice opportunism? Using existing instances, analyses are made, progress acknowledged with regards to the advisory positions for nations to international law and justice issues arising from the premise of 'conflicts of laws' and the dangers of their incomplete or inconsistent framework highlighted as they are. The problematic therefore seeks solutions for sufficient and independent conventional initiatives that should effectively address justice issues within the international private law milieu.

INTRODUCTION (UNDERSTANDING THE INTERNATIONAL JUSTICE SYSTEM)

Within International Statutes

The primary consideration of the international justice system is established within Article 1 of the Statute of the International Court of Justice (ICJ)[2]. According to this statute, only State parties may be involved before the courts' adjudication and this is subject to the special provisions contained in treaties in force[3]. The preponderant discussion of international justice mechanisms, if held only within the limits of the ICJ statute, will entail an all-inclusive framework of public international law that regulates disputes within the domains of international conventions and international customs to which State parties are the main contenders.[4]

[1] Chief Executive Officer (CEO) at MAHSRA.
[2] ICJ, Article 1
[3] Rome Statute, Art. 17 (1).
[4] Article 38 (1) a, b, c, d indicates the areas of the Court's function to decide in accordance with international law for the disputes submitted to it.

However, the secondary consideration of the international justice system which is specific to criminality within the international legal sphere, according to the Rome Statute[5], goes beyond issues of international justice as a simple phenomenal conception of the differences between sovereign State parties as subjects to international law. It extends to individual persons (especially State representatives) whom the sovereign States lack the propensity to inculcate for their derogatory actions against the principal values of international law. Article 5 (1) of the Rome Statute indicates four areas at the jurisdictional reach of the International Criminal Court (ICC), Criminal Court (ICC), including genocide crimes, crimes against humanity, war crimes and the crime of aggression usually perpetrated by the said State representative authorities.

Meanwhile international justice sets a comprehensive pattern for the prosecution of criminal aspects to which the sovereign States may willingly or unwillingly fail to address, it however poses a problem of 'judicial inadequacy' [6] . The issue is that most States would always willingly fail to redress issues within article 5 (1) provided the perpetrators are most often State representatives. The international justice system therefore provides laisser-faire opportunism to sovereign States who are at the same the subjects to its legal framework and more often the culprits. The overall question is whether international justice a viable means to address the sufferings and ill-treatments of the vulnerable majority in the society? To some extend true in the literary context, but very contrary in the practical sense. The sovereign concept of nation-States places them as the primary locus of political legitimacy within the international community and as well as in the pursuit of justice which is more advantageous within the domestic concept of the State. But in the case where these nation-States fail in their duty to enhance their task for rendering justice to their citizens, the international community only becomes a comparable role player.[7] Meanwhile the concept of justice as a whole mean the evaluation of several different issues that arise from both criminal and economic perspectives, the international requirements for justice is most often tilted towards standards that govern the justification and conduct of war and standards that define the most basic human rights.[8] Also, besides ICJ and the ICC, the international justice statutory system per se

[5] *ibid.*
[6] When the law defines acts that merit sanctioning within a particular jurisdiction and yet at the same time limits its consideration for action at gravity measures then, it denies justice to the victims it ought to protect see Article 17 (1) of the Rome Statute.
[7] Thomas NAGEL, The Problem of Global Justice. (Philosophy & Public Affairs Blackwell Publishing, Inc. Philosophy & Public Affairs 33, no. 2, 2005) p.1
[8] *ibid.*

comprises a broader inclusive framework of internationalinstances involved in settling social, economic, political and geographical disputes between nations. Examples include: the European Court of Justice (ECJ), the International Centre for the Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), The African Court on Human and Peoples' Rights(AfCHPR), etc.

Within Philosophical Concepts

The virtues of international justice lie behind some moral and philosophical conceptions which pre-empt a considerate degree of global sharing and mutuality over nature's resources as assessed by the human equalitarianism and existentialism value on the earth's surface. The achievement of such prospects can however be closely attained in a medium where the human being's erratic nature is under control by a sovereign existence. In other words, we may be able to live on just terms only with the others who are fellow members of sufficiently robust and well-ordered sovereign States. The moral and philosophical virtue of justice that should govern States is universal in scope: it is a concern for the fairness of the terms on which we share the world with anyone.[9] From a political angle, Ronald Dworkin is of the opinion that a political community that exercises dominion over its own citizens and further demands from them the respect and allegiance to its laws, needs to employ an impartial objectivist attitude towards all of them, and each of its citizens must vote, and its officials must enact laws and form government policies with such a responsible mind frame. This implies that equal concern is the special and indispensable virtue of sovereigns.[10]

The moral and philosophical discern of international justice is also expected to be active within a broader scope and medium to that which is found within international law in the sense that it needs equal consideration for all human populations across the globe. According to Rawls, the duties governing the relations among peoples does not only include non-aggression or fidelity to treaties but also bring-in development assistance to people 'peoples living under unfavorable conditions that prevent their having a just or decent political and social regime'.[11]

[9] Thomas Pogge, Realizing Rawls, Ithaca, N.Y.: Cornell University Press, (1989), 240-80.
[10] Ronald Dworkin, Sovereign Virtue, Cambridge, Mass.: Harvard University Press, (2000), p. 6.
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[11] John Rawls, A Theory of Justice, rev. ed., Cambridge, Mass.: Harvard University Press, (1999), p. 25

These considerations therefore provide the systemic ethics and framework under which the international justice system is construed. Several philosophers have purported supportive positions within the same context but from different angles that could be summarized in the prospects of human dignity. Within his philosophical publication, Al-Rodhan argues that human well-being is dependent on the preservation and promotion of human dignity and that human dignity is directly linked to global justice. [12] To this, Rodhan presents eight minimum criteria to be met in the attainment process of global justice including

1) dialogue,

2) effective and representative multilateral institutions,

3) representative decision-making structures,

4) fair treatment,

5) empathy,

6) accountability,

7) transparency, and

8) adherence to international law;

to which he maintains that justice is a centrality to human dignity, individual geo-cultural triumph, and the overall well-being of human civilization. [13] Other philosophical arguments with respect to international or global justice are found within realist, particularist, nationalist, the society of States tradition, and cosmopolitanism perspectives.

Meanwhile (Donnelly 2008)[14] presents the realist tradition of the international theory to be centered upon four propositions accordingly: the anarchic nature of the international system considering the Sovereign privileges of the States; States being the most important actors; the egoistic aims of such sovereign States as the most important actors; and their primary concern which is survival, other realists such as Charles Yeo, Hashim Tilab argue

[12] Nayef Al-Rodhan, Sustainable History and the Dignity of Man: A Philosophy of History and Civilisational Triumph.(2009), ISBN-10 : 3643800053.
[13] *ibid.*
[14] Jack Donnelly, "The Ethics of Realism", in Christian Reus-Smit, Duncan Snidal (eds.), The Oxford Handbook of International Relations, Oxford University Press (2008) p. 150.

that there are no global ethical standards, and that to imagine thus is a dangerous fantasy especially when realism is an international relations theory which states that world politics is driven by competitive self-interest.[15] However, from a critical angle, realists complain that States that pursue utopian moral visions through intervention and humanitarian aid, instead of minding their own strategic interests, do their subjects harm and destabilize the international system.[16] Particularists, such as Michael Walzer and James Tully, argue that ethical standards arise out of shared meanings and practices, which are created and sustained by discrete cultures or societies mentioning that, if a society is egalitarian, for instance, its citizens can be morally wrong, and can meaningfully criticize each other if they do not live up to their own egalitarian ideals; but they cannot meaningfully criticize another, caste-based society in the name of those ideals.[17] 'A given society is just if its substantive life is lived in a certain way—that is, in a way faithful to the shared understandings of [its] members. [18]Walzer's argument therefore projects international justice as a multidimensional concept whose realization instance is only possible within concerned community particularities. To this, a Particularist such as (Tully 1995) objected to the destruction of traditional cultures by cultural colonialism, whether under the guise of economic liberalism or defense of human rights.[19]

The nationalism conception of international justice is supported by the arguments of nationalists such as David Miller and Yael Tamir who position that demanding mutual obligations are created by a particular kind of valuable association, the nation.[20] The perceptive notion within the nationalist consideration ties within the marginal humanitarian instincts expressed vis-à-vis ones' fellow citizens against the foreign broader world at large. Nationalism has traditionally included this assumption of differing moral obligations to those within and those outside the nation, reflected for example in the fact that the benefits of the welfare State are not available to citizens of other countries.[21] As such, within this school of thought, moral universalism becomes too

[15] Rourke, John (30). Michael, Ryan, ed. International Politics On The World Stage. Boyer, Mark A,. (New York, New York: McGraw Hill. (2010) p. 16.
[16] E.H. Carr , The Twenty Years Crisis 1919-1939. (London: Macmillan, 1961).
[17] Michael Walzer. Spheres of Justice, New York: Basic Books. (1983) p. 313.
[18] *ibid.*
[19] James Tully. Strange Multiplicity. Cambridge: CUP, (1995). ISBN 0-521-47117-6.
[20] David Miller. On Nationality.(Oxford: Clarendon Press, 1995). ISBN 0-19-828047-5.
[21] This option is widely practiced across several national policies, especially with regard to the integration into the public service, e.g the case of Cameroon.

simple, because the ethical standards that apply between compatriots differ from those that apply between strangers. The context can therefore pin the concept of 'international distributive justice' as an issue within nations but not necessarily between them through which by following Miller's position, it will entail that a world-system of nation-States is the appropriate organizer of justice for all, in their distinct associational groups.[22] However, nationalists such as (Miller 1995) deplore the fact that so many people are Stateless or live under inefficient and tyrannical regimes that may disqualify or deny them the benefits of justice within the nationalistic precepts.[23]

Within the fourth global justice perspective that concerns the society of States of tradition, the States are regarded as individual entities which can mutually agree on common interests and rules of interaction in much the same way as individual persons. The leader example of this philosophical conception is given by John Rawls in *The Law of Peoples*, in which he extends the method of his *Theory of Justice* to the question of global justice. Rawl's argument serves to justify a global regime of which the representatives are chosen from an original position that prevents them from knowing which particular People they represent and to which such a decision-in-ignorance would model fairness and exclude selfish bias. With regards domestic justice, Rawls method with political parties in the original position that represent individual members of a single society, supports a redistributive and egalitarian liberal politics, while, still in contrast, he argues that when his method is applied to global justice, it supports a quite traditional, Kantian international ethics wherein duties of states include obeying treaties and strict limits on war making, but no global repossession of private property. In line with the particularism's philosophies on international justice precepts, Rawls's method employs that different justices apply to domestic and international cases, an ideal which he describes as a 'realistic utopia'.[24] This position has thus placed advocates of the society of States with much concern about rogue States and about the imperial ambitions of the powerful.[25]

The Cosmopolitanism perspective of international justice is conceived within the field of moral universalism that outlines that the moral standing of individuals is based on some

[22] Miller op cit.
[23] *ibid.*
[24] John Rawls (1999b). The Law of Peoples (Cambridge, Mass.: Harvard University Press, 1999), pp 37. ISBN 0-674-00079-X
[25] *ibid.*

morally significant characteristics which are shared by *all* humans without any due limits to the members of some nation, culture, society, or state particularities; and therefore implying that all humans have moral standing (and the boundaries between nations, cultures, societies and states are morally irrelevant).[26]

The Cosmopolitans believe is directed at the fact that the contemporary world badly fails to live up to their standards, and that the quest to meet up to the required standards would require considerable changes in the actions of wealthy individuals and States.[27]

The Problem Within Both Statutes And Philosophical Understanding Of The International Justice System

With respect to the philosophical perceptions earlier examined, a general consensus would be drawn towards the behavioral and legal pattern of the international statutes for justice. The philosophic school expects the legalist internationals to build an ideal framework that should be all-inclusive of what global justice should reflect, yet at the same time, they criticize the possibility of such a utopian perception. The international legalists on their part leave a very open and highly criticized medium for the major perpetrator players to decide and manipulate some particularist philosophies of justice. Within this thought, we can cite examples of international legalist lapses and/or denial of justice based on procedural undulations.[28] The philosophical expectations of international justice are based on accessible phenomena that are priceless and should be applied to both the rich and the poor on equal measures, but this is not the same process within the statutory provisions.[29] Also, the philosophical concepts of international justice require a

[26] Simon Caney, Justice Beyond Borders. Oxford: OUP, (2005) Chapter Two. ISBN 0-19-829350-X.
[27] *ibid.*
[28] Article 34 (1) of the ICJ Statute: "The Court shall be open to the states parties to the present Statute." Also after a series of obligations levied to individual states at promoting the sociopolitical, economic and cultural empowerment (some sort of socio-cultural justice) the international legalists still at the same time provided that the sovereign prerogatives of the independent States were to be kept intact. See (Article 46.1 of the United Nations Declaration on the Rights of Indigenous Peoples).
[29] Article 34 (3) of the ICJ Statute writes that: When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court. '. Also, article 12 of the ICC Rome Statute specifies on the preconditions to the exercise of its jurisdiction thus: '...State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with.....the Court may exercise its

very vast justice searching and rendering context to which the international or global legalists would still need a long way to identify and manipulate their applicative phases.

One particular worry with the legal framework of the international arena and its justice mechanisms lies in the fact that States which ought to be the allegiant subjects to the precepts of international law in order to ensure the global justice goals, detain and employ sovereign privilege '*opinio juris*'[30]options at the encounter to the international norms. These options make the States to become decisive on which norms to follow and which not to, thus fostering a chaotic nature within the international legal system. Also, while the distinction between public and private international law has made it easier for international legalists to distinguish between matters of the international justices' concern, it has also blurred and additionally complicated the distinctions between the applied and practical international justice and the imaginary theoretical assumptions of the international justice system. Briefly, there is hardly any real certainty between what should be considered and/or tackled as a discretionary international justice rendering framework outside the scope of the public international law. As such, the confusions and left unaddressed legal lapses within the sphere of private international law, most often addressed as 'conflict of laws' becomes a preoccupying issue to consider within the global justice spectrum.

PRIVATE INTERNATIONAL LAW AND ITS PROBLEMATIC JUSTICE SYSTEM

In Contrast to the Public International Justice-hood

Unlike public international law which has a scope and an international justice understanding within international conventions and agreements made between State parties, private international law is faced with an unclear and inconsistent justice rendering mechanism pending on the fact that its justice system is highly dependent on the sovereign State's

jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court...'which implies that justice is probably being denied to those not yet parties to the Statute.

[30] The precept of 'opinio juris' was raised by the ICJ to which it implied that States must accord immunity because they believe they have a legal duty to do so, rather: 'Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it.… The States concerned must feel that they are conforming to what amounts to a legal obligation.' See North Sea Continental Shelf cases, ICJ Reps, 1969, p. 3 at 44. HTTP://WWW.ICJ-CIJ.ORG/DOCKET/FILES/51/5535.PDF

jurisdictional opportunism. From the definitional conception of the term, international private law is considered as a 'branch of Jurisprudence arising from the diverse laws of various nations that applies when private citizens of different countries interact or transact business with one another'[31]. The worry in the stance lies in the fact that these private citizens are in turn governed and/or protected by the citizenry rights and obligations of different sovereign entities within the international legal sphere. Sovereign entities are States and subjects to public international law whose political independence and autonomy are duly recognized and enforced by almost all international norms which is also linked to the concept of equality of nations. However, the idea of sovereignty is engaged with the idea that there is no higher power than the nation-state thereby, negating the idea that there is a higher power, whether foreign or international (unless consented to by the nation-state). In the opinion of Judge *ad hoc* Bula-Bula, 'sovereignty' also plays a role in defining the status and rights of nation-states and their officials thereby recognizing the 'sovereign immunity' and the consequential immunity for various purposes of the officials of a nation-state.[32] Through this sovereign immunity prospects of the national citizenry within foreign territories in the international community, the concerns of rendering justice become problematic due to the fact that, though the foreign nationals are to be protected by the sovereign responsibilities of their own independent States, they may still be in a dilemma position of obtaining such protection that may be detrimental to the sovereign integrity of the host nation-State. It is thus that if issues of justice rendering were to be of the nature of public international law (between State parties), they would accommodate the arbitral instances of the international justice courts' jurisdictions whose decisions will be binding to both sovereign State entities, but because it is derived of the nature of private international law, it becomes an issue of 'conflict of laws' between the host State and the litigants' citizenry State. It remains an issue of uncertainty. To this, we can attribute that the jurisprudential nature of the international private law therefore fits appropriately with the public international law's 'non-classified' justice rendering instance across sovereign nation-states instance across sovereign nation-States.

> Private international law refers to that part of the law that is administered between private citizens of different countries or regarded as a set of rules and regulations that are established or agreed upon by citizens of different nations who privately enter into a

[31] HTTP://LEGAL-DICTIONARY.THEFREEDICTIONARY.COM/PRIVATE+INTERNATIONAL+LAW
[32] See separate opinion of Judge ad hoc Bula-Bula , Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 41 ILM 536 (2002) (Int'l Ct. Justice, Feb. 14, 2002) at 597

transaction that will govern them in the event of a dispute, and is however different from the set of rules entered into by the governments of various countries that determine the rights and regulate the intercourse of independent nations (as public international law).[33] As such, those justice-seeking aspects that do not arise as a result of the sovereign State's commitments within public international law mechanisms, in the case of criminal issues, are of the nature of another comprehensive phase to which we can presume to be 'private international law crimes'.[34] To properly address this distinction, there is need to examine the global appreciation of international crimes and then determine their placements within the public or private international law jurisdictions. Private International law therefore strongly fosters a contradictory facet within the international justice rendering mechanism.

Private International Law as Promoter Opportunism for the Law of Contradiction

From some logical reasoning precepts, the principle of 'whose subject is existing things qua existing (who) must be able to state the most certain principle of all things, . . . that regarding which it is impossible to be mistaken, . . . that which everyone must know who knows anything'.[35] Aristotle states that: 'It is, that the same attribute cannot at the same time belong and not belong to the same subject and in the same respect.'[36] Though, several writers have argued that the law of contradiction as a matter of fact is barely a conceptual holding whose existence and lifetime is held only within the conventional possibility of Language rhetoric, a practical perceptive stance is most often than not perceived within the international justice system and most probably within the private international law domain. The connection with this legal supposition is drawn from some logical reasoning that exists between the rhetorical autonomies and political independency of sovereign States within the international law atmosphere and the national judicial priorities within the territorial limits of the State. From a logical perspective, A. J. Ayer in his book *Language, Truth and Logic* wrote that 'the principles of logic . . . are universally true

[33] HTTP://LEGAL-DICTIONARY.THEFREEDICTIONARY.COM/PRIVATE+INTERNATIONAL+LAW
[34] This is implied to those aspects of criminality within the spectrum of international law that does not fall within the scope of public international law but are however adjudicated by the criminal jurisdictions within national laws.
[35] Aristotle, Basic Works, ed. Richard McKeon, trans. W. D. Ross, New York: Random House, (1941) p. 736.
[36] *ibid.*

because we never allow them to be anything else'.[37] The Law of Contradiction is universally true because of the rules that govern the use of language. Rules of language are nothing other than conventions; thus, Ayer's position amounts to conventionalism in logic that could be transcribed as the Law of Contradiction is neither a law of reality nor thought but, rather, an empty tautology which is necessarily true solely because of linguistic rules.[38] Ayer's position is somehow not very dynamic with regards to the thoughtful and objectivist realities within the context of private international justice mechanisms but it binds with the uncertainties instituted therein. However, it is because of the Law of Contradiction's status as a law of reality that it is considered a law of thought and not because of anything else. (Joseph 1916) in an *Introduction to Logic* writes that:

> *we cannot think contradictory propositions, because we see that a thing cannot have at once and not have the same character; and the so-called necessity of thought is really the apprehension of necessity in the beings of things . . . the Law of Contradiction then is metaphysical or ontological*.[39]

As sovereign entities, nation-states therefore need to obtain a ruling only within the legal jurisdictional scope of the international community and not otherwise as is the case with private international law. Yet, the otherwise is possible through Joseph's state of 'necessity in the being of things'.[40]

The long and comprehensive introductory discussion on the problematic issues over the international justice requesting and rendering instances has served to pave the way for a more efficient justice system proposal with regard to the private international law's incertitude. This is done through a methodological enlightenment path on several jurisprudential impasses that have highlighted the need for this article.

JURISPRUDENTIAL TRACING AS CONFLICT CATALYSTS EVIDENCE OF

[37] A., J. Ayer, Language, Truth and Logic, 2nd ed. New York: Dover Publication, Inc., (1946) p. 77.
[38] *ibid.*
[39] H. W. B. Joseph, An Introduction to Logic, 2nd ed. Oxford: Clarendon Press, (1916) p. 13.
[40] *ibid*

DENIAL OR NEGLECT OF INTERNATIONAL JUSTICE

The examination of the frustrations felt by conflicting sovereign State parties at the encounter of international justice; can be deemed as momentums of dismay that continue to build diplomatic tensions between nations. The fact that most international justice mechanisms available for addressing cases within an international order are only able to attend to a limited number of issues due to the jurisdictional constraints held within the court's Statutes, is a major barrier to justice within the international community.[41] In the case where legal issues arise between two or more sovereign entities that are facing severe political tensions, what happens to the spirit of mutual cooperation? Does this mean that victims caught up in issues that require international justice in the domain of private international law will be left unaddressed or denied justice?[42] The jurisprudential trial of the International Court of Justice plays host to a number of these neglectful instances.

Example case study Concerning Rights of Nationals of the United States of America in Morocco

The International Court of Justice hearing on behalf of the French government against the government of the United States of America concerning Moroccan nationals demanded the court to declare that the latter is not within its rights to make a claim on certain entitlements of enjoying preferential treatment, and not be subject to the laws and regulations in force within the Shereefian Empire, in particular as regards imports and not involving the currency.[43] As a result, the Court's rejection decision failed to mention its reasons with respect to jurisdictional incompetence or lack of substantial evidence or

[41] International agreements generally, such as the Statute of the Hague Conference on Private International Law of 15th July, 1955 and specifically, such as Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; and the United Nations Congress on the Prevention of Crime and the Treatment of Offender of 8 May 1995, serve as guide to sovereign States through mutual cooperation in handling legal issues arising from the domain of private international law.

[42] In several cases, this situation have been left unattended to pending that the States are sovereign entities and according to article 2 (4) of the 1945 UN charter that requires 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...".

[43] Rights of Nationals of the United States in Morocco, France versus United States of America – Followed by the Judgement of 27 th of August 1952, I.C.J, Communiqué no 50/41, and
Communiqué no. 52/ 19.

proof of the nature of private international law, but rather, it overlooked the worry and rejected the legal opportunity. This is seemingly not sufficient. The ICJ Statute specifies the jurisdictional opportunity of the court and national aspects that intercede with international legal opportunism.[44] Another example, is the right to levy taxes on nationals of the United States in Morocco contrary to the decision of the Residential Decree of December 30th, 1948, the preceding decisions concerning the Shereefian Dahir of February 28th, 1948 are good examples of which the international court of justice actually displayed the consumption of the instances of "lack of substantial evidence". [45]The judicial opportunistic discrepancies imply that considered exemptions not achieved in the form of a treaty or any bilateral deed provides room for room for legal conflicts arising from unclear jurisprudential dictatorial force over sovereign entities. A thought andneed for a separate and more specialised international justice jurisdiction.

Example Case Study Concerning "Preliminary Observations: Refusal by the Imperial Government to Recognise the Jurisdiction of the Court"

The court's decision was rooted in the fact that the contention was a priori on matters that arose from the domain of private international between Iran and the Anglo-Iranian oil company; and was only later joined by the United Kingdom government.[46] Though the Iranian courts were obviously apt in handling the issue, the government of the United Kingdom had to intervene because it had the sovereign obligations to protect the rights of its citizen's businesses, and the privilege to do that even within the sovereign territories of another State, but yet not to use force or threats against such foreign territory.[47] In another consideration, the judgment had been based on the principle according to which the will of the parties on the basis of the court's jurisdiction was of primary concern. To this, article 36 (2) of the Court's Statute[48] has been evoked and considered. This therefore

[44] Article 38 (1) of the ICJ Statute States that: the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: to (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
[45] Rights of Nationals of the United States in Morocco, Op cit, Communiqué no. 51/19
[46] Preliminary Observations: Refusal by the Imperial Government to Recognise the Jurisdiction of the Court, Anglo-Iranian Company versus Iran – Followed by the Judgement of 22 July 1952, Communiqué no. 51/22, and Communiqué no.52/17.
[47] See Article 2 (4) of the 1945 United Nations Charter.
[48] Article 36 paragraph 2 of the ICJ Statute writes that: The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation

implies that the disagreeing parties need to be in accord or agree to the jurisdictional capacity of the Court before the adjudication could be effective. Yet with this opportunism, States may therefore cling to biased refusals of the ICJ's intervention and impede the course of justice, therefore, a source of jurisprudential conflict-building moments.

Example case study concerning Aerial Incident of March 10th 1953 – Demonstrating State's Interest

This particular case has been used to highlight the level of injustice that the notion of sovereignty may bring within the international conception and spectrum of justice. If there is an arbitrary international Court that needs to come to the legal aid of States which have been 'pushed to a tight corner' by other ones and such aggressor States still possess the right to deny any further or foreign intervention to repair the damages they have caused, then there is no need for any international justice mechanism.[49] Within this legal milieu, there are often major and yet totally ignored prejudices inflicted upon inferior nations at the encounter to the superior ones (Explained in detail within the conceptual framework Figure 1. below). Ideally, as an example of the need to have international justice systems that should not base their adjudicative efforts on the adherence will of the concerned States, the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* made mention of the instance that contracting parties need to first of all recognize and make use of initial pacific settlement moves at regional levels.[50] Also, there is a general indication that States cannot escape the cause of international justice by refusing the jurisdiction of the International Court of Justice. The principles align that disputes relating to the legality of acts should be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties, as well as the parties warned not to aggravate or extend the disputes especially when such disputes may give rise to threats to peace, breach of the peace or act of aggression, and that will necessitate the intervention of the Security

to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

[49] See Aerial Incident of March 10 th 1953, United States of America versus Czechoslovakia, Order of 15 March 1956.

[50] See Border and Transborder Armed Actions (Nicaragua v. Honduras), I.C.J, Communiqué No. 88/25, 20 December 1988, p.7

Council.[51]

PRACTICAL APPRECIATION OF PRIVATE INTERNATIONAL LAW AND JUSTICE AS A MEDIUM OF LEGAL CONFLICTS

A real medium of pending justice and legal conflicts as presumed. It is seldom enough or satisfactory for equally distinct sovereign entities such as States to pass judgment over the protective responsibility of one another except when there is free and voluntary consent to such by the victimized entity. Even as such, the ruling could hardly be satisfactory as there will always be that doctrinal dogma instinct that loosens or tightens the grip and control of situations within the might of State sovereignty accorded by international law. The major issue with 'legal conflicts' within private international law is reflected in the assumption that courts will either apply fixed doctrinal rules or will not adequately consider the variations in policy applicable in international cases. Though there have been limited or insufficient instances in the past in which the courts and the parties were involved in private international law conflicting suits that warrant serious concern[52] in this regard, if a court is held within a dogma, justice may not be served unless the court distinguishes between interstate and international cases.[53]

Besides the national courts' dogma positions, illegality issues arising from the domain of private international law may be embedded within considerable political maneuvers which may require that justice rendering be camouflaged behind favoritism in order to keep and/or grow the friendly relationship between the concerned nations. [54]This however

[51] In a consistent issue of cases regarding Nicaragua on the Legality of the Use of Force: [(Yugoslavia v. Belgium); (Yugoslavia v. Canada); (Yugoslavia v. France); (Yugoslavia v. Germany); (Yugoslavia v. Italy); (Yugoslavia v. Netherlands); (Yugoslavia v. Portugal); (Yugoslavia v. Spain); (Yugoslavia v. United Kingdom); (Yugoslavia v. United States of America)], the Court rejects the requests for the indication of provisional measures submitted by Yugoslavia, I.C.J press release no.1999/23, of 2 June 1999, Accessible: HTTP://WWW.ICJ-CIJ.ORG

[52] Some exemplary cases include: Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir. 1956), cert. denied, 352 U. S. 872 (1956). Conversely, international concepts have also distorted interstate law. For example, the jealous sovereign doctrine of refusing to enforce foreign tax claims has no place in a federal system and little in the international. Cf. City of Detroit v. Proctor, 44 Del. 193, 61 A.2d 412 (1948); EHREZWEIG, CO=ruCT OF LAwS § 49 (1962); GooDRiCU, CoN =cT or LAWS § 66 (Scoles ed. 1964) [hereinafter cited as GOODRICH].

[53] Eugene F. Scoles, Interstate and International Distinctions in Conflict of Laws in the United States, California Law Review, Vol. 54, Issue 4 (October 1966), 1599-1623.

[54] The report on the maltreatment of Nigerian traders in Cameroun by some Cameroonian military men during their business activities is resolved during diplomatic exchanges between the two countries and justice for the

does not resolve the pending issues and may be detrimental to the notion and values of justice as edified by international norms. In order to conceptualize the worry of this literature, a diagrammatic presentation is drawn to expose the nature of pending international justices that is left at the mercy of State jurisdictions.

Figure.1 *The Conceptual Framework of the Private International Law & Justice as a medium of 'Legal Conflicts'*

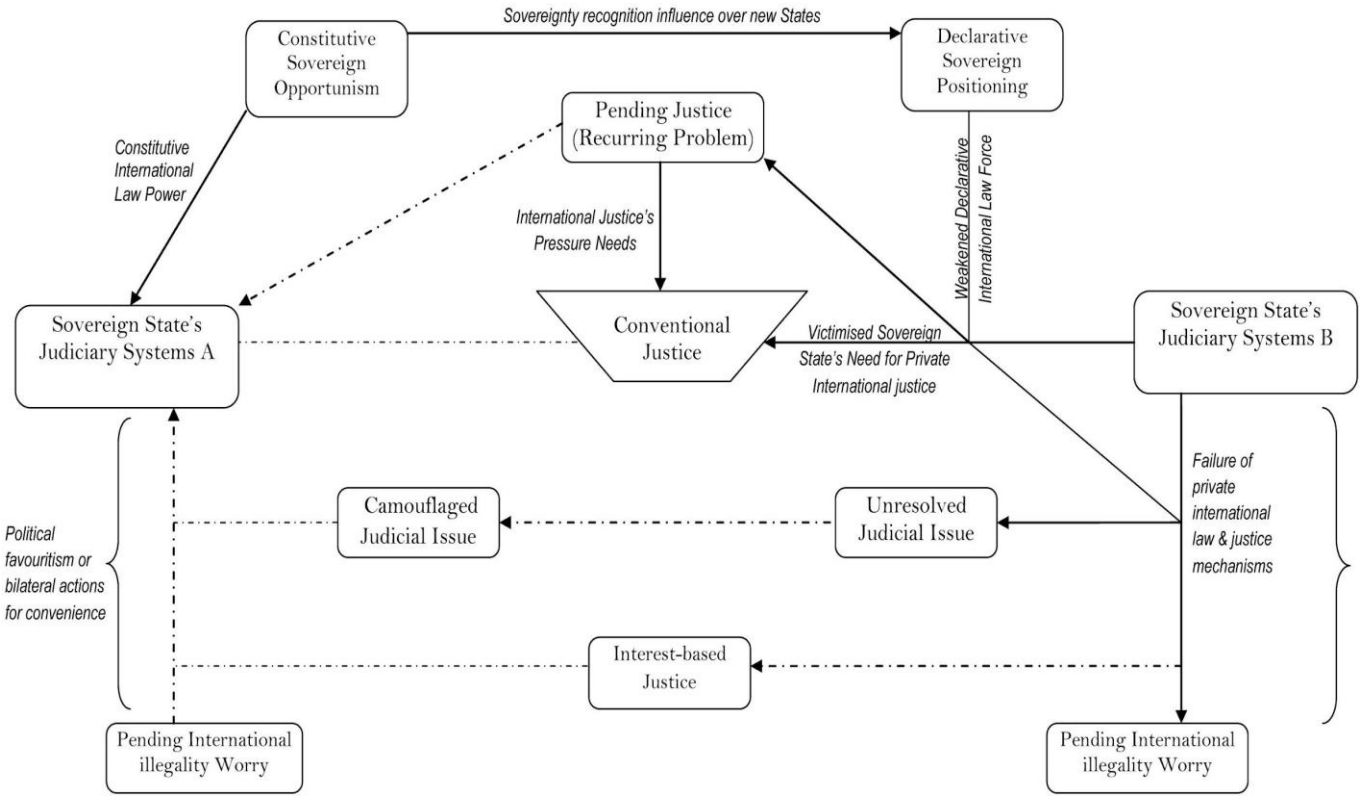

Figure.1 *The Conceptual Framework of the Private International Law & Justice as a medium of 'Legal Conflicts'*

Private International Law & Justice Rendering System – Why a Failure?

The conceptual diagram of the worry on the private international law & justice-making system depicts the roots of an already instituted international law bias on sovereign entities. From primary conventional dispositions to the present-day strategic international economic and political order grants advantages of the world's leader nations over the majority of others.

victims denied. See report at:
HTTP://ALLAFRICA.COM/STORIES/201307260764.HTML. Retrieved on the 5 th of August 2013.

1. The Worry of Sovereignty Recognition for New States

According to the constitutive theory [55] to which the Final Act of the 9th June 1815 Congress of Vienna recognized only 39 sovereign States in the European diplomatic system, the practice that marginalized the faith of future new States at the cognitive mercy of one or more of the great powers[56] was therefore established and it formed the basis of a tactical sovereignty supremacy operational plan. New States therefore became full-time subordinates or 'interest lurking' targets for the great powers until the 1933 Montenegro convention on the rights and duties of States. It is obvious that before this period, legal issues would have arisen as a result of private international law between a 'great power State' and a new State which had only been recently recognized as a sovereign entity at the mercy of such a 'great power State', cannot be talked of as having been addressed with the ethical consideration of equality, fairness, and mutuality that merits the international requirements of justice.[57]

The advent of the declarative theory as of the 1933 Montevideo convention seemed to have liberated some new States from the cognitive mercy of the great powers but, up to date, this has never really been an obvious reality because recent empirical research on the international judges' adjudicative trails, proves that their independent justice rendering mechanism has been tied to their strategic political appurtenance to different sovereign States, as well as other external audiences of estimable value (Steinberg 2004).[58] This follows recently analyzed questions by political scientists studying the content of international judicial decisions as an evident pattern of legal citation,[59] which prompts reasons why the European Court of Human Rights would choose to cite its own precedents so extensively even without any legal obligation tying it to the norm of 'stare decisis' and why the Court's tendency to cite precedents should vary widely across cases. Considering

[55] This forms the constitutive sovereign opportunism for the 'great power sovereign States, to which new States had to have their cognitive accord from before becoming recognised.
[56] Holsti, Kalevi Jaakko, Taming the Sovereigns: Institutional Change in International Politics, Cambridge University Press (1935) p. 128.
[57] A brief overview of a sovereign existential justice for States can be absorbed from: Article 2 (1) of the 1945 UN charter which declares that: The Organization is based on the principle of the sovereign equality of all its Members; and (4) 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 .
[58] Steinberg, Richard H, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints, American Journal of International Law, Volume 98, Issue 2, (April 2004), 247 *supra* note 149.
[59] Voeten, Erik, Borrowing and Nonborrowing Among International Courts, The Journal of Legal Studies, Vol. 39, No. 2 (June 2010) 547.

earlier judicial empirical explanations, findings upon the international judges and their justice-rendering stances have proven that, they make their decisions, not actually 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. These doctrinal influences, I suppose, should be basically rooted in the 1815 Vienna convention that maintains the 'super sovereignty' superiority of a few 'Great Power States'.

2. The Worry behind the Weakened Declarative International Law Force

The declarative theory that arose as a result of the December 22, 1933 Montevideo convention, has also not been without severe criticisms. From 9 June 1815, the Vienna Convention regime of sovereignty granted sovereign recognition rights to the 'great powers' and the 1933 Montevideo convention, the subordinate dogma of the new States, had been recognized during that period to foster the new States' allegiance to their 'sovereignty godfathers' and as such weaken any further empowerment measures at a later date. Also, though over 19 States were born signatories to the latter convention, there were a number of reservations made by the powers that delimited the legitimacy and legal force of the convention. For example, in the colonial era, in most cases, the only avenue open for self-determination for colonial or national ethnic minority populations was to achieve an international legal personality as a nation-state (Pahuja 2005). [60]Since a majority of the delegations at the International Conference of American States represented some independent States that had emerged from former colonies and to which their independence had been opposed by the European colonial empires, a consensus was drawn up amongst themselves that made it easier for them to gain limited sovereignty with international recognition and as such tendering to the position that 'independence' and 'sovereignty' are not mentioned in article 1 of the convention.[61] It is thus induced that, though the option of declarative sovereignty had granted the opportunity for other States to become recognized sovereign entities within the international community, there were still reservations of some of the 'great powers States' to which sovereignty became an option that is granted with limitations (or inequality precepts) meanwhile article 2 (1)

[60] Pahuja, Sundhya, The Postcoloniality of International Law, Harvard International Law Journal, Volume 46, Number 2, (Summer 2005), pp 5. available online at: www.harvardilj.org/attach.php?id=42.
[61] Kreijen, Gerard, State Failure, Sovereignty and Effectiveness, Legal Lessons from the Decolonization of Sub-Saharan Africa, Published by Martinus Nijhoff, (2004), pp 110, ISBN 90-04-13965-6.

of the UN charter duly stipulates that all States should be of equal status by every perspective. The weakened sovereign positions of most States therefore imply that there can never really be any true justice-rendering option between States with unequal sovereign powers.

3. Failure of Private International Law & Justice Mechanisms

As per the conceptual diagram (Figure 1.), when there is a tort or a criminal issue arising from the legal jurisdiction of private international law between two Sovereign States (A and B) where A is a great power State and B is a new State, the likely tendency that the quality of international justice as ascribed in article 2 (1&4) of the UN Charter will seldom be consumed is very high. As earlier explained concerning the superior and subordinate sovereign positions between States, a 'godfather–godson' relationship between both sovereign entities will apply, and to which, the latter will most likely succumb to the adjudication of the former even if the former is at the position of illegality.

In order to get an extensive grab of this proposition, we could examine the modern eventualities of neo-colonialism. A priori, the advent of independence in the late 1950s and early 1960s had a foremost companionship of severe violence and struggle for the political dominance of the Western imperial powers over their African colonies. These quests for dominance were manifested through several institutionalized processes. For example, in the case of French Cameroon, NGYAH writes that: (NGYAH 2015).

> *In fact, the main authors for independence were not involved..., meanwhile, UPC (the major nationalist party) was passively active in exile, and Ahidjo whom I would consider a treacherous ally with de Gaulle was able to manipulate the calls for a national conference on the faith of the post-colonial Cameroun by using the insurgency as a pretext to declare a state of emergency and take full executive powers for himself and as such obtaining independence in January 1961 without any general consensus—leading to the promulgation*

of a constitution modeled by his French allies.[62]

Still, in several other tactical ways to maintain parental political control (neo-colonial influence at the encounter of or over the new post-colonial sovereign States) the imperial powers had devised several other tactical and at times forceful means. The imposition of imperial colonial administrative policies and laws such as the *indigénat* law into the new independent nations; [63] 'the advent of the French administrator de Gaulle's return to power in 1958 in relation to the consequent rapid changes across French colonial Africa was one of the French imperial's assimilative moves towards their colonies;[64] the French imperial administration forcefully replaced local administrators such as Mbida who proved unable to keep his coalition together with the French assimilation complicity with agreeing others such as Ahidjo, who maintained close relations with the French authorities.[65] Ahidjo finally manipulated the country's independence without passing any national electoral test to the promulgation of a constitution, modelled on that of the emergent French Fifth Republic.[66] Also, the 1865 decree had been modified by the 1870 Crémieux decrees, which granted French nationality to Jews living in one of the three Algerian departments, and in 1881, the *Code de l'Indigénat* made the discrimination official by creating specific penalties for indigenes and organizing the seizure or appropriation of their lands, especially when the indigenous Algerian Moslems were in objection towards their generous granting of citizenship.[67]

The presented stances of legal system imposition upon other sovereign nations were as such to build the already existent colonial cultural and socio-political dominance over the virtually independent nations with ends to have these subordinate nations as loyal hosts

[62] NGYAH, K., Probable Hurdles in the Cameroon 2035 Dream. Amazon. Lulu – MAHSRA Publications (2015) pp 38-39. Link: https://www.amazon.com/gp/product/1329737628/.
[63] Victor T. Le Vine, The Cameroons from Mandate to Independence, Berkeley and Los Angeles: University of California Press, (1964), Chap IV.; Richard Joseph. Le movement nationaliste au Cameroun: les origines sociales de l'UPC (1946-1958) (Paris, 1986, first published in 1977 as The Radical Nationalist Movement in Cameroon, but no longer in print in English), 43-56.; Mbembe, Achille. La naissance du maquis dans le Sud-Cameroun, 1920-1960, Paris, Karthala, (1996), Chap I and IV.
[64] NGYAH, K. (2015) op cit.
[65] Victor 1964, op cit, Chap VII.
[66] International Crisis Group, Cameroon: Fragile State? Crisis Group Africa Report N°160, 25 May 2010, 5.
[67] le code de l'indigénat dans l'Algérie coloniale, Human Rights League (LDH), March 6, 2005 – URL accessed on January 17, 2007 (French). Available online at: http://www.ldh-toulon.net/spip.php?article527. Accessed on the 4 th of June 2013.

to their selfish interests. The infiltration of the 'great power' sovereign politico-legal system within the post-independent States (and worse still neo colonies) had to a very large extent, completely undermined the legislative force of the original customary norms within the former. Cameroon's legal system is an example that only recognizes its own customary laws when such does not conflict with the borrowed Common and Civil Law systems acquired from its former colonial imperial governments (England and France).

In perspective, the impacts of neo-colonialism make it very difficult for the domestic justice of victimized States to measure up with their former 'great power' administrator States. Without a due conventional justice system (an independent international justice mechanism that correlates jurisdictional instances and power with such as those of public international law (ICJ, ICC etc.) for issues arising from the private international law domain, there will always be pending and unresolved judicial issues that remain as pending international illegality worries to the conventional international justice expectations.

4. Victimised Sovereign State's Need for Private International Justice

The consideration of this need within the conceptual framework depicts the instance in which the inferior sovereign States remain ignorant about or are unwilling or reluctant to go for their due declarative rights as equalitarian sovereign entities with the superior sovereign States. The instance strives to indicate the need for the subordinate sovereign States to seek conventional and independent justice rendering systems that would void them of the influence of the 'great power' States. For the realization of this instance to be made possible, it would be necessary for the concerned justice States involved in a private international law issue to understand that their own already existent thoughts and justice-seeking quest are corrupt by influences (material such as in foreign aid; political such as the copied system of governance; and legislative/judicial such as in its adoptive and/or forcefully imposed form of legislation since the colonial era), that has blurred its understanding and objectivist scope of justice.

5. The Constitutive International Law Power

This aspect of the conceptual framework is applied to portray the onset patrimonial relationship of the sovereignty's obtaining lineage. This also helps to bring to light that, the 'fathers' of sovereignty were the 39 great power States to the 9th June 1815 Vienna Convention and as such had been the legitimate holders of the sovereign existence of States and were to recognized or grant such privileges to the new States, only as privileged 'sons' – 'the son remains subordinate to the father'. So, despite the advent of the 1933 Montevideo Convention that had graduated the 'sons to adulthood', the 'parental prerogatives' and/or sovereignty 'birthrights' still held strong upon the imperial West that are still holding on to their 'sovereign supremacy' positions. Some analytical examples can be obtained by examining the independence struggles; and the representative delegations of some independent States that had emerged from former colonies at the International Conference of American States who had agreed to a limited sovereignty option.[68] Thus, without a due independent international judiciary that can legitimately legislate over matters of private international law, the 'conflict of laws' issues would always be at the judicial detriment of the inferior or the subordinate's legal stand. This is the phase that majorly explains why there have hardly ever been any major ('world- shaking') litigation reports upon judicial hurdles on a very complex judicial field such as that of private international law. The major obstacle, I presume, comes from the fact that, even when the 'subordinate' sovereign nations are denied due justice in a 'conflict of laws' matter, they usually assume it as being convenient and usual for the 'quasi- dictatorial' approach and scope *mutatis mutandis* bestowed upon the superior judiciary understanding of the 'super-sovereign' nations or, great powers.

6. Political Favoritism or Bilateral Actions for Convenience

This conceptual framework also presents the phases where pending judicial issues of international law are camouflaged and a seemingly 'interest-based' justice is achieved within issues arising from the domain of private international law. This phase is characterized by a lot of compromising situations in which 'justice' as understood by international law is completely undermined and the political or economic interests of the sovereign States facing the 'conflict of laws' issues held at priority stakes. Meanwhile, the citizens of the sovereign States may be suffering from severe injustices to which they ought

[68] Kreijen 2004 op cit

to have received due protective coverage under the international law practices of their sovereign States, the general political and economic interest of the victimized States may usually undermine such citizenry privileges. Interest-based justices are without the factual consideration of the illegal action in question and rarely ever a tangible solution to a problem but masks to cover severity and intensity, which may in one way or the other, arise again in the future. This phase of the conceptual framework is also characterized by high-level corrupt practices which are usually undermined or considered as the conventional realities of 'positive solutions'. The Western support for the investitures of particular leadership personalities within some countries and the huge humanitarian aid and development funds granted to such countries under the leadership of their preferred personalities are sure means to ensure camouflaged judicial issues and interest-based justices between both States. Usually, the international judicial rights and sovereign privileges to accede such rights are bought over with philanthropy that most often tail to open and lawless exploitation opportunities and avenues within the victimized States.

7. International Justice's Pressure Needs

When major issues arising from the international private law domain are periodically compromised through interest-based justice solutions or camouflaged judicial proceedings, the obligation of the international community is put into question. Should such manoeuvres be tolerated even though they run from the jurisdictions of mutually understanding sovereign States? There is a big worry with regard to pending problems and/or unresolved illegality issues arising from the private international law domain because the justice mechanism within this legal sphere does not know sovereign representative personalities. It rather understands the totality or particularity of common citizens who deserve to be served according to the due norms, equality, and fairness of true justice. Camouflaged judicial issues are enhanced by the leaders of the sovereign States who are neither perpetual nor consistent; as such in the event of an unexpected change in the status quo, the situation may lead to an abrupt degeneration of the masked systematic well-being between both States which could lead to vengeful habits upon foreign citizens within a victimized State. In extreme cases, the victimized States may cause a war. By considering a particular example of an African State that had lived in a seemingly camouflaged political and economic situation, in his research paper 'The *Virtual Spectrum of Tyranny and Peace'* (NGYAH 2014) writes that:

From a globalization perspective the recognition of the sovereignty of the Zairian State was central to Mobutu's political strategy, especially as this allowed him to attract diplomatic support and foreign aid. [69] *Stressing that political practices clash with economic efficiency*[70] *therefore shares the opinion that the exercise of political power in Zaire owes more to informal political networks based upon economic control, rather than formal notions of proper state behavior.* [71]

However, his greed for wealth was going to bring the virtual peace and stability world he had created to 'dust'. Meanwhile in the Great Lakes region in the east of the country organized massive rebel movements in his country, Mobutu couldn't fathom why all his neighboring countries seemed to hate him so much, until he remembered that Zaire was harboring anti-government factions from virtually every country on Earth. He then remembered about how much money doing that was making him and, satisfied, went back to doing absolutely nothing about the situation.[72]

The example of Mobutu serves to prove that, when issues of the nature of private international law are not appropriately given due international justice attention, the risk of war is very high. Mobutu was illegally harboring anti-government factions under the sovereign privileges of his State and must have been playing the interest-based diplomatic justice rendering game with the leaders of the countries involved or receiving financial rewards for such treacherous crimes against other sovereign States.

Notably within the conceptual phase of the international justice's pressure needs on the conventional international justice system, is the fact that the pending international illegality conflicts that arise from the private international law domain and are either temporarily compromised through interest-based justice or maneuverer as camouflaged judicial issues would always remain as pending justice worries and recurring problems needing the

[69] Robert Jackson, Quasi-states: Sovereignty, International Relations and the Third World, New York: Cambridge University, (1984), pp 141-232.
[70] Willame, Jean-Claude, Governance et Pouvoir: Essai sur trois trajectoires africaines, Paris:L'Harmattan, (1994) pp 46-91; Callaghy, State-Society, 3-137
[71] NGYAH, K., "TYRANNY AND PEACE: The Virtual Spectrum". Amazon, Lulu - MAHSRA. Publications (2014) pp 64-65, 88-
[72] Sourced: 1997: End of Mobutu's reign. Available on line at: HTTP://UNCYCLOPEDIA.WIKIA.COM/WIKI/MOBUTU_Sese_Seko. accessed on the 10th of May 2013

legitimate adjudication of the international justice mechanisms. This is so because the international legality framework is the parental grantor of the State's sovereign privileges and judicial instances and as such can only be the sole arbitral instance for conflicting matters within the domain. According to the diagram (fig.1), the pending justice is sorted from the victimized or subordinate sovereign States and then directed at the conventional justice system (a supposed international justice system for the illegality issues arising from the domain of private international law) as the utmost legitimate adjudicator meanwhile also sending the recurring problems signals to the superior or 'great power' or most advantageous sovereign States as warnings for probable repercussive eventualities.

CONCLUSION

The problem question within the conceptual analysis of this article was to find out whether it is appropriate for the international justice mechanism to lean behind States' opportunistic judicial setups in order to gain solutions within the private international law domain, knowing that it has empowered such entity States that it is depending on 'to do or not to do' (discretionary measures for sovereign States). The conceptual phases highlighted and described through several theoretical and practical examples have

determined that this is not a commendable consideration. In every phase of the conceptual diagram, it is observed that there is a consistent pending worry because of the inaction of the conventional justice that is required of the international legal sphere. The presented problems are 'looked-over, camouflaged, or swallowed' without any appropriate solution. This places a persistent pending legality worry in the international legal sphere because, 'indigestion' always occurs.

The true solution to a problem is only obtainable at the roots of the problem. Sovereign entities cannot be left on their own to resolve a dispute between them when they are of equal powers and stands; rather they need a sovereign of their sovereignties to arbitrate over their problem. However, if they are not of equal power and stands, a solution is gotten

easily but most usually at the detriment of the weaker sovereign entity. This detrimental position entails that there is a pending justice within the faith of the conventional or ethical international justice rendering mechanism. ‘Justice is denied when it is overlooked’ and when justice is denied the probability of conflicts are high. The conceptual diagram therefore has demonstrated that it is dangerous for the international legal sphere to depend upon the opportunist sovereign judicial dispositions of States but rather it needs to adjudge over issues pertaining to its legislative jurisdiction between the independent and sovereign States.

More succinctly, there is no ‘justice achieved’ when a more privileged or higher qualified person has to face a less privileged or lesser qualified person in the context of human equality, as stipulate with the Universal Declaration of Human Rights. Since States are represented by human persons, the phenomenal discuss is likewise.

At last, the literary deduction is that the dependency of the international justice system within aspects that concern the private international law domain on the judiciary opportunities of sovereign States indicate neglect on the part of the international justice system.

KURDISH CRY FOR HELP: DEMYSTIFYING SEPARATIST MOVEMENTS AND THEIR CONSEQUENCES

-Mohammad Anas and Pooja Nayak[1]

ABSTRACT

The Kurdish people, a prominent Muslim ethnic group, face significant challenges due to political and cultural repression in the countries where they live. Despite sharing a distinct racial and cultural identity and being among the earliest inhabitants of the Mesopotamian plains and highlands, they have not yet established a sovereign nation-state. This is a common theme among many separatist movements around the world, with around 20 existing today, most of them in Asia and Europe, and seven or more of them being violent and reflecting racial or religious divisions. Understanding the complexities of separatism and the various tactics employed by these groups is essential to comprehend the Kurdish issue and its future. By identifying and understanding the underlying causes that contribute to the escalation of separatist movements into violent conflict, both separatist organizations and central governments can develop effective strategies to mitigate the worst consequences of separatism and prevent armed conflict. This Paper aims to shed light on why separatist movements turn violent, what are their types, and how the Kurdish issue is not getting international attention. through interview and comparative studies, this paper highlights the Kurd issue at hand explaining the legislation governing the same.

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KURDISH ORIGIN

Hûrmuzan riman, atiran kûjandû *wîşan şardiwe gewreî gewrekan* *Zor kar ereb kirine xapûr* *ginaiy pale îy heta şarezûr Jin* *û kenikiyan we dîl beşîna* *merd aza tilî we rûy hwêna* *Rewişt zerdeştire manû bî kes* *bezeîka nîka hûrmuz we hûiç kes.*	*The temples were destroyed, the fires turned off (killed)* *the greatest of the greats hid themselves* *The cruel Arabs destroyed* *The villages of poor people up to Sharezur* *They enslaved girls and women* *brave men dived into their blood* *The path of Zoroastrianism remained alone* *Ahuramazda showed pity on no one.*

The preceding excerpt is from a 7th-century Gorani Kurdish poem discovered on deerskin that describes the Islamic conquest of Kurdistan. [2] There are numerous legends about the Kurds' origins, including one from the 10th century by Al-Masudi, who asserts that they are the offspring of King Solomon's concubines, fathered by the demon Jasad. The Kurds are descended from the Djinn tribe of the mountains, who married these women.[3]

The Kurds are primarily a Muslim ethnic group, encompassing around 30 million people and proceeding to make up the fourth-largest ethnic group in the Middle East. Though the Kurds are one of the earliest inhabitants of the Mesopotamian plains and highlands, they have not established a permanent nation-state despite residing in what is now present-day northwestern Iran, northeastern Syria, southeastern Turkey, southwestern Armenia, and

[2] Chaliand, Gérard, *A People Without a Country: The Kurds and Kurdistan*. Zed Books, 248.
[3]James, Boris *"Arab Ethnonyms ('Ajam, 'Arab, Badū and Turk): The Kurdish Case as a Paradigm for Thinking about Differences in the Middle Ages".* Iranian Studies. (September 2014). 47 (5): 685.

northern Iraq[4]. Despite linguistic differences, Kurds share a distinct racial and cultural identity, and while they adhere to various religious and spiritual beliefs, Sunni Muslims form the majority of the group.

The Kurdish population is a complex and diverse ethnic group with ancestral roots in a variety of regions. The Kurdish ethnic identity is composed of many primitive ethnicities that have been incorporated into modern cultures, including those of Iran, Azerbaijan, Turkey, and Arabia. Consequently, Kurdish culture shares many resemblances with the cultures of this region, which has helped to foster an altogether different level of cultural equality and acceptance. While politics can be a point of contention among Kurds, it is a language that most significantly divides them today. Kurdish is essentially an Indo-Iranian language that bears a striking resonance to Persian, which is spoken in neighboring Iran, and Baluchi, spoken in southwestern Pakistan. Nevertheless, Kurdish is in every aspect, a distinct language as compared to either Arabic or Turkish dialects.

KURDISH HISTORY

The Kurds are one of the largest ethnic groups without a nation-state of its own, and with a population of around 30 million[5]. The area of the Middle East has, in the past, experienced decades of political turbulence that forced the division of their traditional homeland. The maltreatment that the Kurds are subjected to, traces back many centuries. Kurds were the targets of deportation and relocation, as retribution for their uprising against the Safavid dynasty, as early as the 16th century. More recently, from World War I, until its overthrow in 1979, the Pahlavi dynasty persecuted the Kurds, and in the late

[4] Hassanpour, Amir. "A Stateless Nation's Quest for Sovereignty in the Sky". Concordia University (7 November 1995). Archived from THE ORIGINAL on 20 August 2007. Retrieved 3 August 2015. Paper presented at the Freie Universitat Berlin.

[5] Blakemore, E. *Who are the Kurds?*, *Culture*. National Geographic. (2021) HTTPS://WWW.NATIONALGEOGRAPHIC.COM/CULTURE/ARTICLE/WHO-ARE-KURDSC

1980s and early 1990s, Saddam Hussein's ill-famed and outrageous al-Anfal campaign took away the lives of thousands of Kurds.[6]

Turkey (Bakur or Northern Kurdistan)

Turkey is the residence of the largest portion of the Kurdish population, with estimates ranging from 10 to 20 million individuals.[7] The concept of a Turkish Kurdistan can be traced back to the 16th century Ottoman Empire, during the continuation of which, many Kurdish principalities came under Ottoman control[8]. With the decline of Ottoman power in the early 19th century, the uncertainty of Kurdish autonomy became a pressing issue. However, the splitting up of the Ottoman Empire and the formation of new "influence zones" by the French and British led to the fragmentation of the Kurdish populace across several new states. In the 20th century, the forceful emptying of villages and fast-paced urbanization, impoverished the traditionally nomadic Kurdish livestock farmers, resulting in generations of inhumane treatment by the Turkish authorities. Kurdish uprisings in the 1920s and 1930s led to the resettlement of many Kurds, bans on the usage of Kurdish names and attires, severe limitations on the use of the Kurdish language, and even the denial of the existence of Kurdish ethnic identity, with Kurds being addressed as "Mountain Turks."[9] Tensions between the Turkish state and the country's Kurdish population persist to this day, and in 2020, UN investigators reported that the Syrian National Army which was backed by Turkey, had performed war crimes in northern Syria, including torture, arbitrary detention, murder and it had coerced Kurdish residents to escape from their residences.[10]

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[6] *Explore the Kurdish diaspora map and history The Kurdish Project*. (2015) HTTPS://THEKURDISHPROJECT.ORG/KURDISTAN-MAP/KURDISH-DIASPORA/

[7] Kurds in Turkey Religion and Public Life at Harvard Divinity School. https://rpl.hds.harvard.edu/faq/kurds-turkey

[8] *Explore Turkish Kurdistan The Kurdish Project*. (2019) HTTPS://THEKURDISHPROJECT.ORG/KURDISTAN- MAP/TURKISH-KURDISTAN/

[9] *Who are the Kurds? BBC News*. BBC. (2019) HTTPS://WWW.BBC.COM/NEWS/WORLD-MIDDLE-EAST-29702440

[10] *Un rights chief calls for Turkey to probe violations in Northern Syria | UN news* (no date) *United Nations*. United Nations, HTTPS://NEWS.UN.ORG/EN/STORY/2020/09/1072752.

Iraq

Iraqi Kurdistan is the only established autonomous Kurdish region in the Middle East, with its origins tracing back to ancient times when various Kurdish tribes and compact empires thrived in the region. After the Arab Muslims conquered them in the 7th century, the Kurdish homeland fell under Ottoman rule and was later divided by the Sykes-Picot agreement, which left many Kurds seeking refuge in northern Iraqi towns and cities. Despite differences in tribes, the Kurds in the region have been seeking sovereignty, which has led to countless revolutions against the British after World War I ad the First Iraqi-Kurdish War in the 1960s. In 1970, an autonomy agreement was signed which paved the way for an autonomous Iraqi Kurdistan, but the agreement collapsed by 1974 and the condition of the region was again transformed into violence. During the 1990s, the Iraqi government pulled back its armed forces from the region but continued to tyrannize the Kurds, including the harshly condemned use of chemical weapons on Kurdish civilians and combatants. After the fall of the Ba'athist government in 2003, the region began to be governed independently by the Kurdistan Regional Government (KRG).

Iran (Rojhelat or Eastern Kurdistan)

The Kurdish region of Iran is situated in the western part of Iranian territory and includes parts of the provinces of West Azerbaijan, Kordestan, and Kermanshah, and they share borders with Kurdish regions in Iraq and Turkey. Kurds have lived in Iran's northwestern region for generations, with a wide range of tribal and cultural groups representing the region. The language spoken by the Kurds, or the Kurdish language is thought to have evolved from Persian languages in the early centuries AD. The first Kurdish clans emerged in the 10th and 12th centuries AD, resulting in the formation of a premature Kurdish state that strongly resembles modern-day "Kurdistan." However, by the mid-1500s, the rise of

the Safavid and Ottoman empires had shifted and disempowered the early Kurdish polities. Kurdish nationalism and political activism began to arise in the region in the early twentieth century, and a Kurdish state was temporarily founded in Mahabad with help from the Soviet Union following WWII. However, as the Soviets left Iran, the Kurdish Republic of Mahabad dissolved. The Pahlavi dynasty's tenure in Iran was especially harsh on Kurds, and Kurdish activists were vocal proponents of government change during the 1979 revolution. Following the revolution, however, the new Islamic leadership led by Ayatollah Khomeini saw the Kurds as foreigners and a possible threat to the new country. As Khomeini sought to establish authority in the Kurdish provinces, an armed confrontation erupted between the new government and the Kurds. The relations between the Kurds of western Iran and the Iranian administration remain contentious to this day. Anti- government uprisings in Sanandaj recently, in October and November 2022, and Iranian security officials reacted with disproportionate and fatal force, in contravention of international human rights legislation.[11] Although the rallies were mostly nonviolent, with some protestors hurling rocks and items at security officers, the use of disproportionate force was not justified.

Syria (Rojava or Western Kurdistan)

The Kurdish territory of northeastern Syria, popularly known as Rojava, is a place of residence for Syria's biggest ethnic minority, which is mostly of Kurdish heritage. However, the Syrian government, which has likewise rejected Kurdish requests for autonomy, has deprived many Kurds of their citizenship and left them stateless. The territory is divided into three cantons, Afrin, Kobane, and Cizre, which are battling the Islamic State with both local and international allies.[12] The Democratic Union Party

[11] *Iran protests: Sanandaj becomes latest killing zone amid worsening state violence* (2022) Center for Human Rights in Iran. HTTPS://IRANHUMANRIGHTS.ORG/2022/10/IRAN-PROTESTS-SANANDAJ-BECOMES-LATEST-KILLING-ZONE-AMID-WORSENING-STATE-VIOLENCE/

[12] *Learn about rojava The Kurdish Project*. (2015) HTTPS://THEKURDISHPROJECT.ORG/HISTORY-AND-CULTURE/KURDISH-DEMOCRACY/ROJAVA-DEMOCRACY/

(PYD), associated with the Kurdistan Workers' Party (PKK) in Turkey, is Syria's foremost Kurdish political party, combating both the Syrian government and the Islamic State. The People's Protection Units (YPG) and the Women's Protection Units (YPJ), which comprise an all-female special unit dedicated to combating household abuse and rape, are part of the PYD's military wing.[13] The Kurdish National Council (KNC), a coalition of about 15 Kurdish political groups, is Syria's second-largest Kurdish political party and it advocates for Kurdish autonomy. However, it has periodically disagreed with the PYD on how to attain this objective. President Bashar al-Assad has dismissed suggestions of federalism and Kurdish autonomy, pledging to reclaim all Syrian land through diplomacy or armed action. The situation in the region remains violent and complex, with continued fighting and political uncertainty.

KURDISH ISSUES

Significant challenges such as political and cultural repression have been faced by the Kurdish people in the countries of their residence. The Kurdish people have been the victim of human rights abuse, and discrimination in sectors such as employment, housing, and education because of the military approach. It also caused the loss of thousands of lives. They are also forbidden from political participation and face cultural repression. Extensive campaigns were started in countries such as Turkey, Iran, Iraq, and Syria to assimilate the Kurds by force Kurds had to change their names to local ethnic names for enrolment of their children in schools or to get employed. Also, the Kurdish language wasn't allowed in public. Kurdish music, clothing, books, etc were considered illegal and their possession would get people imprisoned The Kurds in Iraq have achieved autonomy while the systematic cultural repression of Kurds in Iran and Turkey has been relaxed in recent times. The repression is still condemned by the Kurds.

[13] *YPJ: Kurdish Women's Protection Units* (2016) *The Kurdish Project*. HTTPS://THEKURDISHPROJECT.ORG/HISTORY-AND-CULTURE/KURDISH-WOMEN/YPJ/

Kajal Ahmad (born 1967) is a contemporary Kurdish poet whose work describes the pervasive terror experienced by Kurds in the context of dictatorship. She suggests that terror is a learned behavior, taking time to teach and painful to learn. In her writing, she explores how the mirror of society shattered under the regime, reflecting inverted values where those with small hearts were made tall by the system, while those who offered acceptance were pushed low. This taught fear to those who weren't persecuted and amplified the fear of those who were already persecuted. Ahmad's writing highlights how the lessons of terror continue beyond the reign of the teacher, persisting in the memories and lived experiences of those who endured it.

MIRROR

(Translation Darya Ali and Alana Marie Levinson - LaBrosse)

The vague mirror of my time
broke because
it made what was small big
and what was big and small.
Dictators and monsters filled its face.
Even now as I breathe
its shards pierce the walls of my heart
and instead of sweat,
I leak glass[14].

The Constitution of 1982 which is the Constitution of the Republic of Türkiye, is considered by the Kurds as divisive and undemocratic because the constitution emphasizes

[14] *Four poems by Kajal Ahmad, translated from the Kurdish* (no date) *Poetry Society of America*. HTTPS://POETRYSOCIETY.ORG/POEMS-ESSAYS/FOUR-POEMS-BY-KAJAL-AHMAD-TRANSLATED-FROM-THE-KURDISH

characterizing citizens as members of the "Turkish nation." The preamble of the constitution focuses on the concept of nationalism and also affirms the "eternal existence of the Turkish nation and motherland" and the "indivisible unity of the Turkish state." The document focuses on the significance of "Turkish historical and moral values" and affirms that sovereignty is "vested fully and unconditionally in the Turkish nation." These references to "Atatürkist nationalism," a "Turkish existence," and the history of Turkishness give the constitution an exclusive ethnic character that presupposes only one form of nationalist sentiment and ideology.[15] Article 66 of the constitution declares that anyone who is a citizen of Turkey is a "Turk," which fails to recognize citizenship as a right and equates it with ethnic identity. This lack of acknowledgment of cultural rights is particularly salient in the Kurdish community, as it pertains to education, the preservation of Kurdish traditions, and the use, study, and future development of the Kurdish language. Article 42 explicitly prohibits the teaching of any language other than Turkish as a mother tongue to Turkish citizens, and the constitution also grants the government the power to determine the foreign languages to be taught in schools. Additionally, political parties cannot be formed on an ethnic basis, and only Turkish is allowed to be used in political activities, including political campaigns, under Article 81 of the Political Party Law.[16]

As a result, speaking Kurdish to a Kurdish-speaking audience during a political campaign is forbidden. Underdeveloped Kurdish-populated areas are often seen as the least suitable locations for government workers to serve, resulting in bad relations between people and centrally appointed officials, which are exacerbated by linguistic issues. The Kurdish people are adamant that democracy is a necessary component for achieving self- governance, autonomy, and sovereignty. Despite several setbacks and betrayals over the twentieth century, the Kurdish battle for democracy has lately regained momentum, instilling renewed optimism in their possibilities of obtaining democracy. The Kurds contend that they should have a bigger voice in creating their future by asserting their right.

[15] *Constitution of the Republic of Turkey - ANAYASA* HTTPS://WWW.ANAYASA.GOV.TR/MEDIA/7258/ANAYASA_ENG.PDF

[16] *Turkey 1982 (rev. 2017) constitution Constitute*. HTTPS://WWW.CONSTITUTEPROJECT.ORG/CONSTITUTION/TURKEY_2017?LANG=EN

to self-determination and advocating for regional autonomy within a federalized framework. This will allow for power distribution and Kurdish involvement in government decisions that directly impact their way of life.

In furtherance of our goal to receive first-hand information about the lives of Kurds, and to satisfy our quest for deeper knowledge, Mr. Dalen Barzan, a young Kurd, who possesses immense socio-political awareness, answered the questions posed to him by us, through an online, structured interview. Mr. Barzan has stated that despite suffering from inconveniences in the past, the Kurds proudly live their lives, and like people from every other nation. They have their own lives and carry immense respect and reverence for their culture. The young man proceeded to state that the Kurdish parties have been at odds with each other and the neighboring countries have been taking undue advantage of the same. But he also believes that eventually, the Kurds possess the right to their own, independent state. On being asked about his perspective of Kurdish history, he further stated that the adjoining countries have turned a blind eye to the fact that the Kurdish nation, like every other nation, is God's creation. He also went on to state that history testifies that Kurds have been living in these regions since the times when Prophet Noah's ark landed on Mount Judi in North Kurdistan. The young man reiterated that the Kurds possess a rich culture and a set of historical traditions, which teaches them to honor their guests. He stated that many Kurds have resorted to Islam because of their compatibility with the respectful religion, and he affirms that Kurds are the best warriors, further giving an example of Salahuddin Ayyubi. He asserts that the Kurds prefer to govern themselves. On being asked about the common goal of Kurds, Mr. Barzan communicated that, despite the language and attire of the Kurdish population varying from place to place, the unified ambition of Kurds is to become an independent state. To achieve this goal, he enunciates that the Kurds need to set aside their problems and unite.

KURDISH RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW

The concept that considers self-determination as a right is a subject of great debate in the realm of international law. Notably, legal scholar Martti Koskenniemi posits that this concept can be categorized into two distinct forms: one that is laudable, appealing to democratic sensibilities, and another that is less desirable, often associated with tendencies towards nationalism and isolationism.

After the creation of the United nation which was followed after World War II the concept of right to self-determination was established as a fundamental principle. Article 1 (2) of the UN Charter specifically highlights the importance of respecting the principle of equal rights and self-determination of people to foster friendly relations among nations.[17] Human rights laws and treaties also recognize and protect the right to self-determination as an inherent and legal right. These laws and treaties safeguard the essential social, economic, and political rights of individuals, as well as of minority and non-autonomous groups. For example, the International Covenants on Human Rights 1966 assert that all people have the right to self-determination, which grants them the freedom to determine their political status and pursue their economic, social, and cultural development according to their own free will.[18]

The People of Southern Kurdistan follow self-determination as share the same language, they follow a common religion and the people of Kurdistan belong to a similar ethnicity and culture, satisfying the objective criteria. They also have a strong subjective desire for self-determination, as demonstrated by their refusal to be part of Iraq and their identification solely as Kurds. Furthermore, they freely express their culture and identity, displaying their flag and national anthem, while the Iraqi flag is rarely shown in the Kurdish region.

[17] *Chapter I: Purposes and principles (articles 1-2) United Nations*. United Nations. HTTPS://WWW.UN.ORG/EN/ABOUT-US/UN-CHARTER/CHAPTER-1

[18] International bill of human rights OHCHR. HTTPS://WWW.OHCHR.ORG/EN/WHAT-ARE-HUMAN-RIGHTS/INTERNATIONAL-BILL-HUMAN-RIGHTS

The Kurds in Iraq have been striving for an autonomous land since the Treaty of Lausanne failed to recognize Kurdish as an independent state. Despite the principle of territorial integrity of states, the right to self-determination remains a fundamental norm of international law. The Montevideo Convention of 1933 gives a legal definition of a state under international law, requiring a state to possess a permanent population, a defined territory, a government, and the capacity to enter into relations with other states (Convention on Rights and Duties of States Art 1, 1933).[19] Thus, the Kurds in Iraq, who have a common language, religion, ethnicity, and culture, meet the objective criterion for self-determination, and their desire for autonomy is consistent with this fundamental right.

The Montevideo Convention's criteria for statehood have been completely satisfied by the Kurds of Iraq. First off, according to KRG officials, they have a "permanent population" of about 5.2 million people, which has lately risen to over 8 million as a result of the recapture of Kurdish-disputed cities during battles with ISIS. Secondly, Articles 4, 113, and 137 of the Iraqi Constitution recognize the Kurdistan part of the country as a "defined territory." Thirdly, the Kurdistan Regional Government serves as the "government" for the Kurds in Iraq (KRG). The fact that they already have diplomatic ties to other nations proves that they can enter into contact with the other states."

The Montevideo Convention states that a necessary prerequisite for statehood is the existence of an "effective government" that performs governmental activities on a certain territory. This criterion has been met by the Kurdistan region of Iraq, which has its government known as the KRG. The KRG asserts control over the Kurdistan area and has proven capable of governing both internally and externally. As a result, the Kurdistan region duly complies with the third requirement of the Montevideo Convention, which is the presence of a functional authority over its area.

[19] H2O Montevideo Convention of 1933 & UN Articles on Responsibility of States (2001). HTTPS://H2O.LAW.HARVARD.EDU/TEXT_BLOCKS/28904

The Kurdistan Regional Government (KRG) performs efficient governmental duties in the Kurdistan area as a democratic republic with a parliamentary system akin to that of the United Kingdom. It determines tax rates, maintains security, and manages water and oil resources. It manages the Peshmerga region's security forces and regulates the oil and water resources. The Iraqi Constitution recognizes its legitimacy and gives the KRG autonomous jurisdiction over the territory (Const. of Iraq Articles 4, 113, 137).[20] In a general election, the Kurdistan National Assembly, the region's democratically elected legislature, is chosen for a four-year term by secret vote (Const. of the KRG Art. 40, 42).[21] Additionally, the KRG established a Department of Foreign Relations in 2006, led by a ministerial rank individual, to manage international affairs on the region's behalf.

INTERNATIONAL STANCE

The UN security council in 2017 stated that a vote on independence by the Kurdistan region could prove unsettling which further fueled global restrain on the said vote.

In the year of 2019, an armed military campaign was initiated in the northeastern part of Syria by Ankara. This was mainly aimed at Kurdish fighters who were perceived as terrorists. But in the eyes of many countries of the West, the same fighters were perceived as important resources for the fight against the Islamic State terrorist group. this difference of opinion gave rise to an intricate situation at the global level.

There were significant contemplations done on Turkey's actions by the United Nations security council. On one hand, the Turkish had stated that their actions were a thorough

[20] Iraq 2005 Constitution Constitute. HTTPS://WWW.CONSTITUTEPROJECT.ORG/CONSTITUTION/IRAQ_2005?LANG=EN
[21] Kurdistan: Constitution of the iraqi kurdistan region UNPO. HTTPS://UNPO.ORG/ARTICLE/538

and careful anti-terror step to curb the influence of terror groups, the Kurdish fighters voiced out their concern to the world and asked for international assistance on the same to help stop genocide.

The council stated that in their opinion, the armed actions by the Turkish would have severe negative consequences on the already occurring humanitarian situation. It advised Turkey to withdraw from the assault and further engage in peaceful and diplomatic channels instead.

Concerning the Indian side, there are cultural links between the Kurds and Indians, interestingly Hindi and Kurdish also possess some similar words. Kurdish students also travel to India to pursue they're under graduation and masters. 500 such students were admitted to various Indian parts. India also opened its Consulate in Erbil. this was done alongside 20 other states. India's exchanges and ties with the Kurdistan Regional Government (KRG) and the Iraqi Central Authority is generally in a perfectly balanced way. As India is the country called as the biggest democracy with its demographics showing a blend of countless variations and combinations, the Kurds should take inspiration from India. India can be a shining example to inspire an integrative model of growth. If not done so, Iraq can get into serious trouble with the looming threat of societal and cultural threat of breaking up society as a whole.

INTRODUCTION TO THE SEPARATISM MOVEMENT

Separatist movements have existed throughout history. There are currently around 20 separatist movements existing, mostly in Asia and Europe. Seven or more of them are violent and reflect racial or religious divisions with the mother country. To comprehend the Kurdish issue and its future, it is important to first understand what separatism is before delving into the study of this separatist movem

Separatism is the idea that, in response to a long history of repression, exclusion, persecution, and discrimination, differences in race, ethnicity, culture, religion, politics, and language can be used as justification for a group to sever its political and legal ties with others. Usually, the goal is to re-establish sovereign control over a particular territory. Rebellions and revolutions are frequently sparked by the intense feelings of rage, humiliation, and hurt that go along with separatist claims. Separatists' primary goal is to put a social barrier and a physical barrier between themselves and the people, state, or territory they object to.

Nearly as long as there have been nation-states, there have been separatist movements. The French Revolution questioned long-held notions of state authority, including divine right. Instead, support for self-determination grew. The desire for national self-governance significantly increased following the 1919 Treaty of Versailles and again after the Cold War was over. The spectrum of separatist movements is very wide, ranging from relatively peaceful movements, like those seen in Scotland and Quebec, to movements that are significantly more aggressive, like those in Chechnya and Eritrea.

Any effort to strengthen a group's independence, in our opinion, qualifies as a form of separatism. Such autonomy may take a variety of forms, from explicitly wishing to secede to giving more power to a regional administration over education. Regarding the international legal framework that decides when a higher level of autonomy is appropriate, there is still some ambiguity. The case rests on three major principles: minority rights, indigenous rights, and the right to self-determination.[22] These rights are very difficult to define in reality and legislation, despite the United Nations Charter including self- determination as a fundamental human right.[23]

Secession and autonomy claims are inextricably linked to nationalism. Both the nationalism of the region seeking autonomy and the nation it wants to break away from is

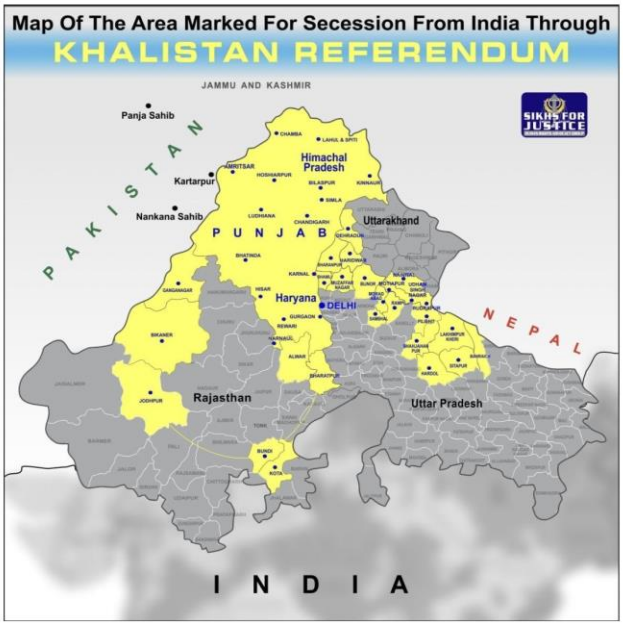
[22] Ghai, Yash. *"Ethnicity and Autonomy: A Framework for Analysis,"* in Yash Ghai (ed.) Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States (Cambridge: Cambridge University Press, 2000), 3.
[23] Hechter, M. *Containing nationalism*. Oxford: Oxford University Press. (2010)

important. Nationality is also hard to define specifically because of the ebb and flow of ethnicity, which is "explicable on a variety of social and economic factors.'[24] For example, religion is losing salience in some places while gaining it in others in terms of defining ethnicity. One catalyst for ethnic consciousness that occurs often is "oppression by the state or"[25] the majority community. Stalin was infamous for using this method when he was trying to create a common Soviet nationality.

The examples of different separatist movements that have been discussed highlight the intricacy of the issue and the various tactics employed by these groups. Some separatist groups may use violence and terrorism, while others may opt for nonviolent means to achieve their goals. However, many governments are faced with the difficult task of managing separatist movements and preventing armed conflict. To develop more effective strategies for resolving conflicts, it may be possible to identify and understand the underlying causes that contribute to the escalation of separatist movements into violent conflict. This knowledge can help both separatist organizations and central governments to mitigate the worst consequences of separatism and reduce the likelihood of casualties and fatalities. Therefore, governments need to approach the issue of separatism with nuance and understanding, acknowledging the potential for violence and working to prevent or manage it through targeted dialogue, financial incentives, and social reforms. By promoting peaceful coexistence and respecting the diverse identities and aspirations of all groups within a given society, we can hope to address the challenges posed by separatism and create a more stable and peaceful future.

[24] Hechter, M. *Containing nationalism.* Oxford: Oxford University Press. (2010)
[25] Ghai, Yash. *"Ethnicity and Autonomy: A Framework for Analysis,"* in Yash Ghai (ed.) Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States (Cambridge: Cambridge University Press, 2000).

A. Land of the Pure: The Khalistan Movement in India



An organisation Sikhs for Justice released a new map of India showing not just Punjab but Haryana, Himachal Pradesh and several districts of Rajasthan and Uttar Pradesh as part of Khalistan. PHOTO: TWITTER/@SikhPA

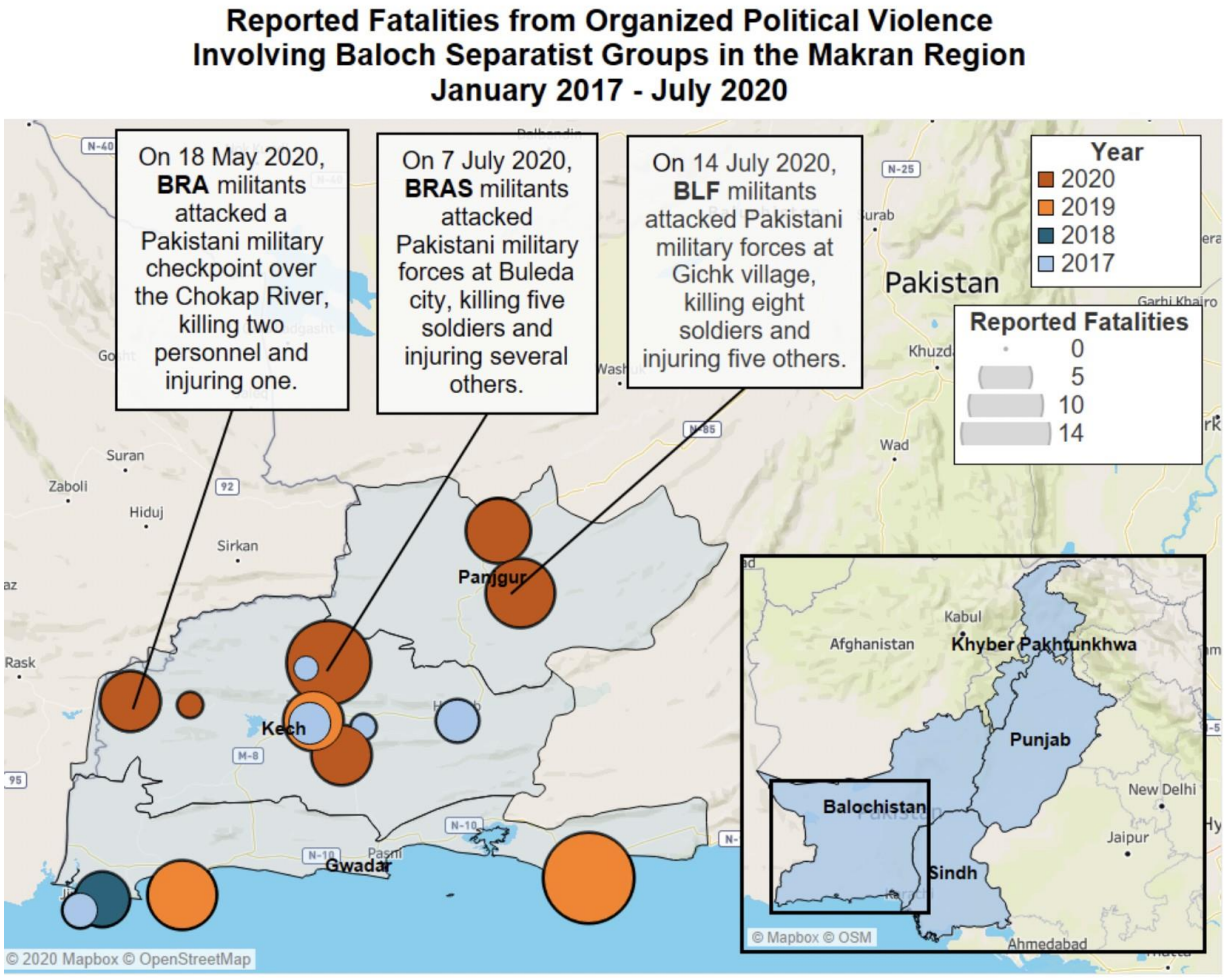
Khalistan, popularly referred to as the "Land of the Khalsa," is a proposed independent state located in the northern region of India, specifically in Punjab. The primary purpose of this proposal is to provide the Sikh community, a religious minority in India with a significant diaspora of approximately 30 million people globally, with a distinct homeland. With approximately 5th place globally, Sikhism is one of the most significant religions worldwide. The quest for a distinct Sikh state, encompassing regions where Sikhs form the majority, has been ongoing since the end of the British Raj, parallel to the demand for a separate Muslim state (Pakistan).

Growing discontent among Indian Sikhs was evident in the years leading up to the new millennium. Violent incidents resulted from the Indian Army's Operation Blue Star attack on Sri Harmandir Sahib, the most revered site in Sikhism. These tragic occurrences included the assassination of Prime Minister Indira Gandhi and the downing of Air India Flight 182, which is still the deadliest aviation attack in history before 9/11. Additionally, it sparked anti-Sikh riots in India the following year that claimed many innocent lives, a

tragedy that we should all work to avoid happening again.

The ongoing conflict related to Khalistan is a sensitive matter that can be likened to the situation in Kashmir. The Indian government has been involved in prolonged conflicts with Kashmiri separatists and Pakistan, and the use of force has not been limited to militants alone, but also civilians. However, the situation is complex, and the Indian government is in a precarious position as it deals with challenges to its authority on the subcontinent and power struggles with China. It is unlikely for India to concede a significant part of its northern provinces to separatists due to these challenges, which would have severe implications for the country's political stability, territorial integrity, and national security.

Taking into consideration the complexities of the Kashmir conflict, it is evident that India is unlikely to concede to calls for Punjab's independence in the foreseeable future. Such a move would give rise to issues similar to those faced in Kashmir, leading to the weakening of India to the advantage of its rival neighbor. Furthermore, the secession of a region motivated by religious differences would have adverse effects on relations between the different ethnic groups in the nation. India's commitment to secularism would be called into question, and it would send the wrong message to other significant religious groups in India, notably Muslims, Christians, and others, regarding their safety and security. Thus, while the Khalistan movement may have strong arguments regarding the safety of Sikhs within India, it is unlikely to succeed shortly. India is closely monitoring the activities of Sikhs for Justice, a US-based organization supporting the secession of Punjab from India for the creation of Khalistan, as seen in their recent release of a new map.



The situation in Balochistan, Pakistan's largest province but least populated, is a delicate and concerning matter. The Baloch nationalist movement has been suppressed by Pakistani security forces since 2005, resulting in sectarian and ethnic violence within the province. Despite repressive measures, the separatist spirit remains prevalent, and the violence continues. This has weakened the social structures within Balochistan, leaving a power vacuum that could result in an explosive situation that borders Afghanistan's most vulnerable provinces. A political resolution is the most viable solution to the ongoing chaos in Balochistan.

Baloch nationalist parties were primarily concerned with enhancing political autonomy

and socioeconomic rights within the confines of their constitution before the state's intervention to maintain control. However, the actions of the state have caused some nationalist groups to become more radicalized and escalate their struggle for independence. Although government bodies like the Supreme Court have brought attention to the violence and human rights abuses in Balochistan, these efforts have been hampered by the security forces' disregard for the law. Due to this, more Pakistanis now see the security forces as a source of instability than separatist movements.

Balochistan is transforming as it slowly devolves into anarchy. The ongoing economic and social inequalities between the provinces, which have been exacerbated by military repression and pervasive human rights violations, are to blame for the persistence of Baloch nationalism. Baloch nationalism, which had its roots in tribal structures initially, has since spread from rural to urban centers. Balochistan's social and institutional structures are being destroyed as a result of the government's neglect of the province's economy. Only the most extreme factions are left as a result. As the future of this unstable region continues to be in doubt, the Baloch insurgency is a concerning issue in Pakistani society.

In conclusion, the events of 1971 demonstrate the failure of the two-nation theory, and the need for a more robust foundation for nation-building than just a shared religion. The ruthless suppression of sub-nationalism and a strong sense of identity has also been shown to be ineffective. Additionally, in the broader context of Pakistan's foreign policy, the country's relationship with China and the changing global political landscape could have repercussions for Pakistan's continued oppression of Balochistan. If history is any guide, the ruling elite in Islamabad is likely to face similar consequences if it continues to oppress Balochistan and prioritize its relationship with China over its people. The lessons of the past must be heeded if a more stable and prosperous future is to be secured for Pakistan and its people.

The conflict in Chechnya, which erupted into a secessionist war in 1994, has its roots in a complex web of factors. The conflict led to the deaths of tens of thousands of Russians and Chechens and resulted in a long-standing political connection between the two regions. While some attribute the conflict to oil economics, which played a significant role in the region's development, the situation is far more complicated than a simple economic explanation. Specific individuals, including Russian President Boris Yeltsin and Chechen leader Dzhokhar Dudaev, also played a role in escalating tensions between the two regions. However, the underlying causes of the conflict are likely more nuanced, with factors such as historical grievances, cultural differences, and ethnic tensions all contributing to the long-standing animosity between the two regions. As with many conflicts, the roots ofthe Chechen conflict are multifaceted and require a deep understanding of the history and context to fully grasp. Moreover, the high level of Islamic radicalization in the region is believed to have been triggered by the First War, and a significant militant group is pushing for the creation of an Islamist state. Anzor Maskhadov's announcement that the secessionist movement is still active indicates that the Chechen's aspirations for independence remain,

as they join other nations in resisting Moscow's control. The creation of a "Chechen Liberation Army" suggests that a new underground movement is being activated in the region.[26]

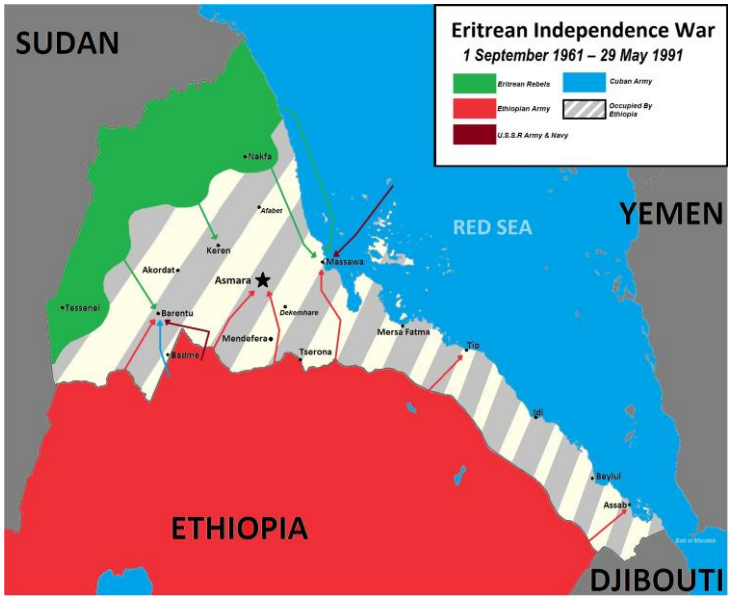
According to Khusein Dzhambetov, the commander of the sabotage reconnaissance group of the Ichkerian battalion fighting on the side of Ukraine, the world may have overlooked the atrocities committed during the Chechen wars, possibly due to Russia's control of significant fossil resources. He further added that every Chechen who has come to fight in Ukraine is motivated to win this conflict, as they have personally experienced the loss of family and friends due to Russia's actions. These fighters are determined individuals who remain steadfast in their efforts to oppose their long-time adversary.[27]

In summary, the southernmost region of Russia is home to the predominantly Muslim region of Chechnya. In 1922, it briefly declared independence; however, following the fall of the Soviet Union, it did so once more. But Russia opposed the breakup and fought Chechnya in two wars, one in 1994 and the second in 1999. Both significant destruction and fatalities were caused by the conflict. Chechnya eventually became an independent republic within the Russian Federation in 2003 after a vote.

[26]Rfe/rl (2022) Сторонники Ичкерии заявили о подготовке подпольного сопротивления в Чечне, RFE/RL. Кавказ.Реалии. HTTPS://WWW.KAVKAZR.COM/A/STORONNIKI-NEPRIZNANNOY-ICHKERII-ZAYAVILI- O-PODGOTOVKE-PODPOLJNOGO-SOPROTIVLENIYA-V-CHECHNE/31954994.HTML

[27] Mikhalchenko, L. Chechen separatist fighters defend Ukraine against 'common enemy' Russia, RadioFreeEurope/RadioLiberty. Radio Free Europe / Radio Liberty (2022). HTTPS://WWW.RFERL.ORG/A/UKRAINE-CHECHENS-COMMON-ENEMY-RUSSIA/32136592.HTML

The aberration of Eritrean secession



Eritrea, a country with a violent secessionist movement, has had a tumultuous post-World War II era. The thirty-year civil war between Ethiopia and Eritrea, like the conflict in Chechnya, is characterized by a strong central state. International organizations and military assistance from the United States and the Soviet Union may have also played a role in the protracted war. Eritrea gained independence with high hopes and the establishment of a new constitution. However, conflict with Ethiopia over the border led to militarization and detention of political leaders. As a result, Eritrea experienced political isolation, economic collapse, and international sanctions, scoring poorly on democracy, human rights, religious freedom, and free press when compared to other countries.

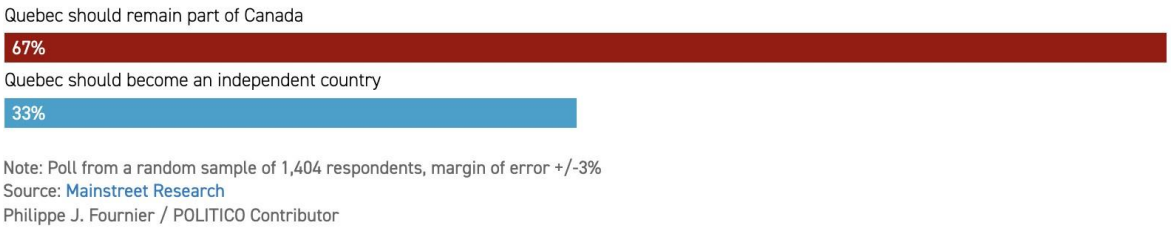
For over three decades, Eritrea has been led by President Isaias Afewerki, who played a significant role in the country's independence movement and is the sole leader of its political party. However, despite the country's independence, Eritrea has not held national elections, and the constitution remains unimplemented. In addition to these political challenges, Eritrea has faced external tensions, including border disputes with Ethiopia and Djibouti in 1998 and 2008, respectively. While these tensions have somewhat subsided

since the signing of the 2018 peace agreement, Eritrea's role in regional conflicts remains a concern. In November 2020, Eritrean forces entered northern Ethiopia to support the Ethiopian government's military campaign against regional authorities in Tigray, further complicating the country's geopolitical landscape. Despite these challenges, Eritrea has made strides in other areas, such as improving its education system and expanding its mining sector. However, the country still faces significant obstacles on its path to stability and prosperity.

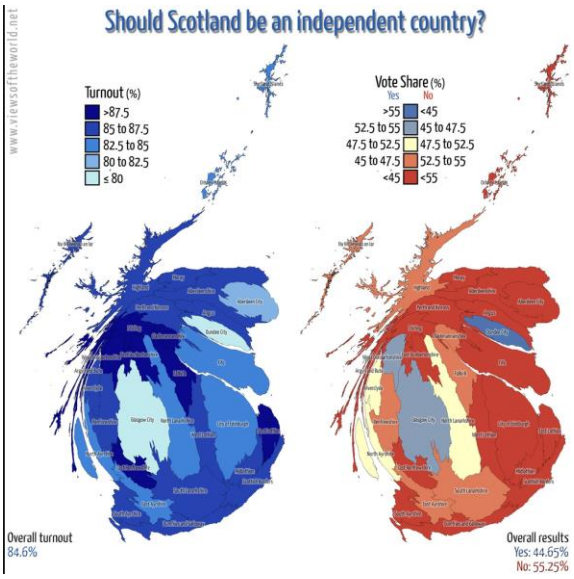
Quebec sovereignty movement: abandonment of Quebec by France

The Quebec separatist movement initially seems to have traits in common with violent nationalist movements. Catholic and Francophone, the majority of Quebecers have historically been shut out of English-speaking business and political elites. However, the movement has largely been nonviolent save for one terrorist attack in 1970. The Parti Quebecois was established in the 1970s, and its main platform is the secession of Quebec from Canada. The first referendum on Quebec independence was held after the party came to power in the province in 1976. The separatist movement has had a significant negative impact on Canada's federal government, which was forced to make concessions to all provinces in addition to Quebec.

When a referendum on Quebec's independence was narrowly lost by a margin of less than one percent in 1995, Canada was put in a risky position. Two options were presented to the electorate in a more recent plebiscite held under the supervision of the François Legault administration: either Quebec should assert its sovereignty and become an independent country, or it should continue to be a province of Canada. Surprisingly, a resounding 67% of respondents said they wanted Quebec to remain a part of the Canadian Federation. Only 33% of those polled expressed support for Quebec's potential for independence.



Scotland: The secessionist movement seeking independence from the United Kingdom



A convincing example of how a highly unitary government can work with a country seeking more autonomy is the Scottish independence movement. In contrast to the Irish Republican Army, which has pursued self-rule through violent means, Scotland has successfully established its first Parliament in more than three centuries by using political parties, campaigns, and referenda. Compared to other separatist movements, the Scottish movement has some advantages, such as low Gaelic language usage and religious resemblance to the United Kingdom. Furthermore, unlike places like Chechnya and Eritrea, Scotland has not experienced the kind of extreme poverty that can breed fanaticism and extremism. However, the rise of the Scottish independence movement has also been significantly influenced by changes in the population.

The 2020 public opinion poll revealed that there is a significant generational divide among Scots when it comes to the issue of independence. Specifically, more than 70% of those aged 16 to 34 support Scottish independence.[28] This suggests that younger Scots are more likely to be motivated by a desire for greater political control and self-determination. Moreover, the UK Supreme Court's decision to temporarily block the path to independence has likely further strengthened the resolve of the Scottish National Party (SNP) and the Scottish Parliament to achieve their goals.[29] This decision has been met with disappointment and frustration by many Scottish citizens who feel that their voices and aspirations are not being heard or respected by the UK government. In response, the SNP has pledged to continue pursuing the cause of independence through legal means, including a potential referendum in the future.

Overall, the generational divide and the Scottish Parliament's continued commitment to achieving independence suggest that this issue will remain at the forefront of Scottish politics for the foreseeable future. The debate will likely continue to be shaped by a range of factors, including economic considerations, cultural identity, and historical grievances, and the outcome will depend on a complex interplay of political, social, and economic factors.

CAUSES OF SEPARATIST VIOLENCE

It is a common misconception that separatist movements only use violent or nonviolent means of protest. According to Cunningham (2013), this kind of binary thinking can obscure how violent and nonviolent methods may reinforce one another. This is because

[28] Walker, B. *More than two-thirds of young Scots now back independence*, New Statesman. (2020) HTTPS://WWW.NEWSTATESMAN.COM/POLITICS/2020/09/MORE-THAN-TWO-THIRDS-OF-YOUNG-SCOTS-NOW-BACK-INDEPENDENCE .

[29] 5435 In re Scottish Independence Referendum Bill, [2022] 1 W.L.R. 5435, HTTPS://WWW.SUPREMECOURT.UK/CASES/DOCS/UKSC-2022-0098-JUDGMENT.PDF

many movements employ a variety of tactics.[30] Dunning (2011) used Hindu nationalists as an example to demonstrate how institutional and violent forms of politics could be combined for political gain.[31] It is crucial to understand that secessionist movements have a variety of tactical options at their disposal, including institutional politics, the use of violent force, and nonviolent protests. Of the 136 movements analyzed, Griffiths and Wasser (2019) determined that 28 of them utilized a combination of institutional, nonviolent, and violent forms of civil resistance.[32]

Political scientists have proffered a gamut of hypotheses to elucidate why political movements resort to violence, irrespective of their perception of violent and nonviolent approaches as dichotomous or complementary. During the Cold War, scholars posited that economic inequality was the underlying reason for all civil wars, regardless of whether they were separatist or otherwise.[33] Subsequently, novel theories that centered on culture and contended that states with ethnic diversity were susceptible to outbreaks of separatist or nationalist violence gained currency, particularly after events such as the Yugoslav Wars in the immediate post-Cold War period.[34]

Samuel Huntington sparked controversy by asserting that Islam as a religion triggered violent conflict owing to "demographic and cultural features," including the high incidence of young men who are susceptible to radicalization and recruitment into rebel armies[35]. The media often cites "ancient hatreds" as a catch-all explanation for civil strife, particularly in the Yugoslav wars. Other cultural accounts exist.[36] Recent scholarship has challenged these cultural explanations, positing that structural factors have a greater impact

[30] Cunningham, K. G. *Understanding strategic choice: The determinants of civil war and nonviolent campaign in self-determination disputes.* Journal of Peace Research, 50(3), 291–304. (2013). HTTPS://DOI.ORG/10.1177/0022343313475467
[31] Dunning, T. *Fighting and Voting: Violent Conflict and Electoral Politics*. Journal of Conflict Resolution, 55(3), 327–339 (2011).. HTTPS://DOI.ORG/10.1177/0022002711400861
[32] Griffiths, R. D., & Wasser, L. M.. *Does Violent Secessionism Work?* Journal of Conflict Resolution, 63(5), 1310–1336 (2019). HTTPS://DOI.ORG/10.1177/0022002718783032
[33] Fearon, J.D. And Laitin, D.D. Ethnicity, Insurgency, and Civil War. *American Political Science Review*, 97(1), 75-90. (2003).
[34] *ibid*
[35] *ibid*
[36] Majstorovic, *Ancient Hatreds or Elite Manipulation? Memory and Politics in the Former Yugoslavia.* World Affairs, 159(4), 170-182. (1997).

on determining whether political movements resort to violence. Structural factors refer to the conditions surrounding separatist movements that tend to increase or decrease the perceived likelihood, cost, or profitability of specific political strategies. Scholars, known as "structuralists," generally agree that the more an institutional channel is ineffective or a movement is obstructed from achieving its objectives through institutional means, the more likely it is to turn to violence.[37]

According to structuralists, weak, unstable states with "kin" bordering another state are especially prone to violence[38]. Cunningham (2013), unlike Fearon and Laitin (2003), does not consider larger populations to be a risk factor. Another factor is geography, with easy- to-hide terrain and oil and diamond deposits, both of which increase the likelihood of political violence, as the former makes it easier to evade military detection and the latter facilitates the maintenance of an insurgency even with a "small enclave".[39] Laitin also questioned Huntington's claim that there is a causal link between Islam and civil war, citing the influence of oil.[40]

The characteristics of the movement, as well as those of the state, have a significant impact on whether it resorts to violence. Cunningham finds that independence struggles are more likely than other conflicts to escalate into violence, contradicting Fearon and Laitin's 2003 findings that there is no link between nationalist sentiment and the likelihood of civil war. States treat secessionists harshly in comparison to anti-regime and anti-occupation movements, which is understandable given that independence directly threatens the state's integrity.[41] This is especially true if a region is more integrated before seceding; movements in dual-states such as Czechoslovakia make people less concerned that the state will fall apart completely if one region gains independence.[42]

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[37] Cunningham, K. G. *Understanding strategic choice: The determinants of civil war and nonviolent campaign in self-determination disputes*. Journal of Peace Research, 50(3), 291–304. (2013). HTTPS://DOI.ORG/10.1177/0022343313475467

[38] *ibid*

[39] Fearon, J.D. And Laitin, D.D. Ethnicity, Insurgency, and Civil War. *American Political Science Review*, 97(1), 75-90. (2003).

[40] *ibid*

[41] Griffiths, R. D., & Wasser, L. M. *Does Violent Secessionism Work?* Journal of Conflict Resolution, 63(5), 1310–1336. (2019). HTTPS://DOI.ORG/10.1177/0022002718783032

[42] *ibid*

This final result highlights a point of nuance in the structuralist position: they do not suggest a one-to-one correlation between the likelihood of a movement attempting a civil war and the ability to win one. Even though a dispersed movement would probably struggle more than a united front to win a civil war, they are still more likely to try because they find it even more difficult to achieve their objectives through institutional means. Similar to this, Dunning (2011) notes a debate among structuralist scholars about which situation is more likely to lead to the use of violence: one in which the majority and minority groups have nearly equal numbers or one in which there is a significant disparity.[43] Different academics have sided with either side because numbers help a movement succeed in both elections and war.

CLASSIFICATION OF SEPARATISM

Separatism can be caused by a variety of factors, including cultural, religious, economic, ideological, ethnic, or civilizational differences. Separatist activity can range from active support for secession to moderate calls for autonomy, as well as passive dissatisfaction without demands. Separatist movements can also be classified as open or closed, depending on whether they are openly expressed or suppressed by the government.

Separatist movements can go through different stages of development, with some of the most extreme ones resulting in grave human rights violations. The first stage may involve imposing a specific identity on an ethnic group, such as requiring them to adopt a national language or cultural practices that do not reflect their own. The second stage may involve forbidding the use of a group's language, culture, or history, which can cause the loss of cultural heritage and identity. The third stage may involve criminalizing separatist activities, which can result in imprisonment or persecution of the group's leaders or

[43] Dunning, T. *Fighting and Voting: Violent Conflict and Electoral Politics*. Journal of Conflict Resolution, 55(3), 327–339(2011). HTTPS://DOI.ORG/10.1177/0022002711400861

members. The fourth stage may involve the forced assimilation of the ethnic group into the titular group, which can lead to the loss of unique cultural practices and traditions. Finally, in the most extreme cases, separatism can result in genocide, which is the deliberate killing of members of an ethnic group with the intent to destroy the group as a whole. It is important to recognize and address separatism before it reaches these extreme stages and to find peaceful and equitable solutions to the grievances of marginalized communities.

Separatism is perceived as an internally generated phenomenon that can be triggered by a variety of domestic factors. However, it is critical to recognize the impact of external factors, especially when neighboring states or "great powers" seek to capitalize on a country's destabilization or collapse to increase their regional influence or territorial expansion. External factors have a significant impact on a nation's internal development, and conflicts may arise as a result, influenced by the unique features of the geopolitical and geosocial system and its dynamics. Regardless of the type of territorial organization a state adopts, ethnic or separatist tensions can arise within its borders, resulting in some cases from natural development and in others from state-sponsored intervention eager to exacerbate such conflicts.

Ideological foundations underpinned the USSR and USA's relations with one another during the cold war. The latter imposed particular ideological frameworks, which led to movements for national liberation, perceived as beneficial to the USSR, and conversely, ideologically divergent movements were stigmatized as separatists. Today, globalization has rendered the idea of sovereignty conditional, prompting politicians to advocate forthe right of people to self-determination, including the secession of regions from failing states, a position supported by the USA and Russia.[44] Notably, the two powers only endorse separatist movements that serve their interests, while they reject others as violating the principle of sovereignty.[45] As V.A. Tishkov points out, had separatism not been employed as a tool for interstate competition and geopolitical engineering, it would not have assumed

[44] Баранов А.,Сепаратизм у сучасному світі: політикотериторіальний аспект, Человек. Сообщество. Управление., 3, 107–123, (2006)
[45]Electronic theses & dissertations center Ohio LINK Electronic Theses & Dissertations (ETD) Center. HTTPS://ETD.OHIOLINK.EDU/

global proportions.[46] While the external factors that drive separatism are more evident in developing countries and post-Soviet states, internal factors may also drive separatist movements, such as in the case of Catalonia in Europe.

External factors that threaten the stability of a region can be addressed using both soft and hard methods. While peaceful solutions are always preferable, more forceful action may be required at times. Military invasion is one such hard approach, which can involve providing military aid to the region, deploying peacekeeping forces to resolve the conflict while taking into account the interests of both the rebellious region and the government, and carrying out humanitarian intervention, which may require participating in hostilities alongside the rebellious region. However, military intervention should only be considered as a last resort, after all diplomatic and peaceful options have been exhausted. Furthermore, the decision to intervene should be carefully considered, with a clear understanding of the potential consequences and impact on the region and its people.

Soft support can be divided into two categories, soft active and soft passive, each with its components. Soft passive support refers to the mere presence of a neighboring country with an ethnically similar population and a desire to unite the people. On the other hand, soft active support involves actions taken to support a particular side in a conflict. Examples of soft active support include financial assistance, such as funding the conflict or supporting NGOs, technical assistance such as providing lethal weapons, and humanitarian support such as establishing relationships with morally upstanding individuals in the fields of culture, education, and science, funding educational programs, scientific projects, and internships. Additionally, support of the rebel region or authorities in international organizations such as the UN and OSCE, and the construction of religious structures can also be considered soft active support. Conversely, demonization of the rebellious region or the authorities of the state can also be considered soft active support, as it can create an environment where violence is more likely to occur. It's important to note that soft support, like hard methods, should be used cautiously and with a clear understanding of the potential consequences.

[46] Тишков В., , Сепаратизм как новая геополитика, (2005) HTTP://WWW.VALERYTISHKOV.RU/CNTNT/PUBLIKACII3/LEKCII2/ LEKCII/N66_SEPARAT.HTML

CONCLUSION

Separatist violence is a complex and multifaceted issue that requires in-depth analysis and understanding. While various theories attempt to explain the causes of separatist violence, the structuralist explanation, which emphasizes rigorous observation, appears to offer more comprehensive insights compared to culturalist explanations. Nevertheless, the root causes of separatist violence and civil unrest are still under debate in political science, and each case may have unique characteristics that require specific solutions. It is important to note that separatist movements often stem from ethnic tensions and can escalate into civil wars, genocide, and the need for humanitarian assistance. As such, powerful international actors may exploit these conflicts to establish direct rule over a region or nation to address geopolitical issues. Given the complexity of this issue, it is critical to approach it with nuance and sensitivity. While there may be no one-size-fits-all solution to separatist violence, a deeper understanding of the underlying causes can lead to more effective strategies for conflict resolution and prevention."

The separatist impulse poses a significant challenge to nation-states, particularly to democratic nation-states with diverse populations. At the heart of the challenge is the need to establish social and cultural institutions that allow for the free and open interaction of different groups, regardless of their race, ethnicity, religion, or language. This challenge is particularly acute in diverse societies, where competing cultural and social demands can result in the fragmentation of the political landscape.

Democratic societies are faced with the challenge of balancing the desire for social cohesion with the need to recognize and accommodate the diversity of their populations. This balance is particularly challenging in societies where cultural and religious identities

are strongly held and where different groups have competing claims to resources, status, and power. The effectiveness of democratic institutions in these situations is put to the test by their ability to accommodate natural and orderly interactions between different groups and cultures.

Even in societies where there is a core culture that is widely accepted, various forms of separatism can arise. For example, in some communities, Amish culture, ultra-Orthodox Jews, and Muslims may choose to create their social institutions and organizations to preserve their way of life. Such groups may view separatism as a means of protecting their cultural and religious identity and may even seek to establish autonomous regions within the larger political structure.

In conclusion, the challenge of separatism is not easily solved, particularly in diverse democratic societies. A delicate balance must be struck between the need for social cohesion and the recognition of the diversity of cultural and social identities. Effective solutions must account for the complex interplay of social, cultural, economic, and political factors that drive separatist impulses and seek to create institutions and organizations that can accommodate and manage these tensions. While some minority groups may seek separatism as a means of preserving their cultural and religious identity, other forms of separatism may be imposed from without or within the group. It is crucial to differentiate between cultural decisions made by groups and the various homelands or ghettos built for them by dominant groups. In any case, the challenge of separatism must be addressed through a nuanced and thoughtful approach. Effective solutions must account for the unique characteristics of each case and the complex interplay of social, cultural, economic, and political factors that drive separatist impulses. Ultimately, it is only by fostering open and constructive dialogue and working to build inclusive and accommodating social and cultural institutions that we can hope to manage the challenge of separatism in a way that promotes social cohesion and respect for diversity.

AN ANALYSIS OF THE RIPARIAN RIGHTS OF STATES AND THE ENVIRONMENTAL REPERCUSSIONS OF THE CONSTRUCTION OF THE YARLUNG TSANGPO DAM IN TIBET

- ***Shambhavi Sharma & Akshay Krishna***[1]

ABSTRACT

The Brahmaputra River commonly known as Yarlung Tspango in Tibet is one of the largest rivers globally and has immense cultural, social, and economic relevance in the countries through which it flows. China has long been vocal about its plan to construct a dam on this river. However, as the Tibet Plateau is an extremely eco-fragile zone, any construction over the river will have grave environmental repercussions and might cause irreparable damage to the ecosystem. Further, the river plays a pivotal role in the regional economy. In addition to being a major source of water for both India and Tibet, the river has immense socio-cultural and religious significance attached to it in both countries. This paper analyses the socio-cultural and economic significance of the river in the region and scrutinizes the effect that the construction of this dam will have on the ecology and the society of Tibet and North East India.

The Yarlung Tspango Dam would further strengthen China's geo-political presence in the region and the absence of any formal treaty over the distribution and co-operation of the river water further complicates the situation. This paper examines the future of Indo- China relationship in light of the construction of this dam. Lastly, the article proposes certain mitigation strategies and emphasizes the need for an international treaty between the countries to preserve the ecosystem and secure Indian interests.

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THE SOCIO-RELIGIOUS AND ECONOMIC SIGNIFICANCE OF THE YARLUNG TSANGPO RIVER IN TIBET AND NORTH EAST INDIA

Tsangpo is a Tibetan word used to denote river. In the Tibetan Plateau, Yarlung Tsangpo is simply known as Tsangpo, which denotes the socio-cultural importance of the river in the region. In India, the river is popularly known as the Brahmaputra. The name finds its mention in ancient Indian texts like the Kalika Puran. The Yarlung Tsangpo River acts as the source of one of the most important river systems in Asia. "The river is about 1,800 miles (2,900 km) long and is commonly known as the Everest of Rivers."[2]

The river originates near Mount Kailash and has one of the highest average elevations. The Yarlung Tsangpo flows through a rift created by the impact of the collision of the Eurasian plates before entering the Indian Territory. "At one point in the river's course, it plunges some 8.858 feet (2,700 meters) through the Yarlung Tsangpo Grand Canyon, forming an enormous gorge more than twice the depth of the Grand Canyon in the United States."[3] Due to its highly dramatic course, the river is one of the major sources of hydroelectricity in Tibet and India. As India is on the verge of facing a severe energy crisis, this river has become even more important for the country due to its massive hydroelectricity potential. Agriculture, fishing, and tourism are the main industries that support the entire economy of North East India. Tourism is an important industry in Tibet as well. The river plays a central role in attracting tourists to the region as the banks of the river are home to more than thirty tourist hot spots in the region. Various waterfalls and rapids created by the river along its course are major attractions for tourists. Tourists often hike along the course of the river trying to discover the origin of the countless serene waterfalls made by the river.

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[2] *Yarlung Tsangpo: The Everest of Rivers* NASA, (2001), HTTPS://EARTHOBSERVATORY.NASA.GOV/IMAGES/80558/YARLUNG-TSANGPO-THE-EVEREST-OF-RIVERS

[3] Christopher McFadden, *China's New Dam Project Could Dwarf the Three Gorges Dam* INTERESTING ENGINEERING *(2021),* HTTPS://INTERESTINGENGINEERING.COM/INNOVATION/CHINAS-NEW-DAM-PROJECT-COULD-DWARF-THE-THREE-GORGES-DAM

Majuli Islands of Assam, which are situated upon the Brahmaputra River is a tourist favorite. Revenue generated by tourism on the Islands contributes greatly towards the economy of Assam. Further, the various river cruises organized along the river are largely viewed as adventurous and exciting by tourists. Fishing along the river is not only a major source of livelihood for the local population but various fishing schools and tour organizers, who teach the basics of fishing to eager tourists, both domestic and foreign, during the summer months.

About 61 percent of the total population of Assam is engaged in agricultural activities.[4] The river also functions as a convenient and cheap way of transportation across borders. Entrepreneurs having operations across the countries often prefer to transfer raw materials and ready-made goods through the river due to the cost-effectiveness of this mode of transportation.

The river plays a central role in the social life of Tibetans. Tibetans view the river as a manifestation of the Goddess on Earth. The river is especially sacred in Tibetan Buddhism. Locals often gather around the river to celebrate important social events in Tibet as well as North East India. Locals must take a dip in the river during Karma Dunba or the Tibetan bathing festival. A myriad of social folklore is attached to the river. Cultural and artistic work surrounding the river is extremely popular amongst the local Tibetan and North East Indian populations.

Lastly, Tibet has one of the richest alpine floras in the world. Further, the state invests heavily in ecological conservation, which is extremely important for maintaining the ecological balance in South West China. The river is extremely important to maintain this environmental balance in the region and to ensure that the alpine vegetation of the region remains in an optimum condition.

[4] Dr. Purusottam Nayak, *The Brahmaputra and the socio-economic life of people of Assam*, SSRN Electronic Journal [Preprint], HTTPS://DOI.ORG/10.2139/SSRN.2790210.

CHINESE MOTIVATIONS BEHIND THE CONSTRUCTION OF THE YARLUNG TSANGPO DAM

Due to the highly extraordinary course taken by the river, Yarlung Tsangpo has vast potential for generating hydroelectricity. As early as November 2020, the Chinese announced their plan of constructing a dam over the river. Upon its completion, the Yarlung Tsangpo Dam would be the biggest in the world, even bigger than the mighty Three Gorges Dam.

The Yarlung Tsangpo dam would be highly profitable to China upon completion. China committed on the global stage to reduce its emissions and achieve carbon neutrality by the year 2060. As the proposed dam is estimated to generate thrice the amount of electricity produced by the Three Gorges Dam, the timely completion of this dam becomes instrumental for the country to achieve its carbon neutrality goals due to the potential of electricity production it has.

Further, the Yarlung Tsangpo Dam will establish China as a major electricity producer in South Asia. This dam would ensure that the country becomes both a major producer as well as supplier of hydroelectricity internationally. China would be in an advantageous position when global energy trade is concerned. It must be noted that the cost of building the dam is fairly low when compared to the amount of profit this dam will be able to generate in the future. As the Tibetan Plateau is sparsely populated, relocation costs accompanying the construction of this dam are also extremely less.

Not only will the dam provide China with economic benefits, but its construction would also strengthen the country's geo-political presence. It must be noted that Indo-China ties have been quite turbulent in the past. The Indo-Sino War of 1962, differences of opinion regarding the autonomy of Tibet, and recent border clashes are some of the contentions

present between the two countries. Many disagreements persist amongst the countries regarding certain border lines which demarcate India and China. The Yarlung Tsangpo dam will provide China with an edge concerning the relationship between the two countries. In the opinion of the authors, the construction of this dam will adversely affect the relationship shared by the two countries.

THE EFFECT OF THE CONSTRUCTION OF YARLUNG TSANGPO ON THE ENVIRONMENT

The Unique Geography of Tibet

Being almost the same size as Germany and France combined, the Tibetan Plateau occupies almost one-eighth of China. The region is distinguished from the via its altitude and relative remoteness thereby earning it the nickname of Third Pole. The region is as diverse as it is unique. In addition to being home to some of the highest mountain ranges, the region also contains deep marshes and vast banana and tea plantations. The Ecology of the Tibet Autonomous Region can be broadly classified into four categories namely the glacial ecosystem, shrub ecosystem, Lake Ecosystem, and forest ecosystem.[5]

The Tibet Autonomous Region is the largest glaciated area in the middle and low altitudes of the Earth containing both dry as well as wet glaciers. Not only does the region contain frozen soil year-round, but also has a layer of permafrost that is almost 120 meters thick.[6] Due to the intense glaciation, the Tibet Autonomous Region contains a plethora of cirques, glacial valleys, and moraines. In addition to that, numerous gorges and canyons are present in Tibet. The geo-tectonic structure of Tibet is extremely unstable and the region is prone to landslides and earthquakes.

[5] Yeung, Y.-man and Shen, J. *Developing China's West: A Critical Path to Balanced National Development.* Shatin, N.T, Hong Kong: Chinese University Press. (2004)
[6] Yang, Q. and Zheng, D. *Tibetan Geography*, Beijing: China Intercontinental Press. (2004)

In addition to being heavily glaciated, the Tibet Autonomous Region also contains vast areas of shrubs and alpine forests. Major Asian Rivers originate from Tibet, only to flow through the entire South East Asia before reaching the ocean. The exploitation of natural resources in the region is minimal and in many areas of the Tibet Autonomous Region, the resources are still unexplored.

Due to the extremely fragile ecosystem of the region, any development project must be carefully designed and executed. Improper execution of development projects may have disastrous and irreversible consequences.

Tectonic Characteristics of North East India

The Indian state of Arunachal Pradesh and the areas adjoining it are recognized as one of the most seismically active zones globally. In Northeast India, three major plates interact along two convergent boundaries: the Himalayas and the Indo–Burma Ranges, which meet at the Assam Syntaxis.[7] Two major tectonic convergence zones occur in the Himalayan region. It has been stated on multiple occasions that the North East Indian region is one of the most tectonically complex zones. Any construction in the area or areas adjoining it must be carried out with utmost caution as a minor tectonic upset has the potential of being transformed into a major earthquake affecting the entire region.

Geological Impact of Construction of the Three Gorges Dam- A Parallel

The idea of the Three Gorges Dam was hailed as remarkable at the time of its conception

[7] Jacques Angelier, Saurabh Baruah, *Seismotectonics in Northeast India: A Stress Analysis of Focal Mechanism Solutions of Earthquakes and its Kinematic Implications*, Geophysical Journal International, Volume 178, Issue 1, 303–326, (July 2009)HTTPS://DOI.ORG/10.1111/J.1365-246X.2009.04107.X

just like how the idea of the Yarlung Tsangpo is being celebrated now. The Three Gorges Dam was also constructed on an eco-fragile area just like the Yarlung Tsangpo Dam. The dam was constructed to minimize floods and to generate hydroelectricity for domestic supply. However, the Three Gorges Dam has adversely affected the ecology of the region and the damage caused by the dam far outweighs the benefits.

The Donting Lake which is the largest water body and connects the dam to the Yangtze River after it leaves the dam and hosts about 48 percent of the total snail habitation of China.[8] The dam has interfered with the distribution of snails in Donting Lake and has led to the reduction of its population in the region thereby negatively affecting the aquatic food chain and causing an increase in the deadly disease of schistosomiasis in the region. Other waterborne diseases have also increased after the completion of the dam.

The flow of the Yangtze River has been slowed tremendously after the completion of the dam and this has resulted in the pollutants staying longer on the surface of the water as opposed to being flushed into the sea before the dam was constructed. Further, the dam resulted in submerging of cities around the river which also submerged the various toxins and pollutants present in the city. The dam also caused the inundation of historical villages, ruining the cultural fabric of the region.

While landslides increased in the downstream regions, instances of flooding of important historical and cultural regions situated in the upstream region were also reported shortly after the completion of the dam. Landslides and rockslides triggered after the construction of the dam have proved to be harmful to human life in addition to the environment. In 2003, 700 million cubic feet (20 million cubic meters) of rock slid into the Qing Gan River just a couple of miles from where it flows into the Yangtze.

[8] Li, F. et al. "*Impact of the Three Gorges Project on ecological environment changes and snail distribution in Dongting Lake area*," PLOS Neglected Tropical Diseases, 11(7). (2017) HTTPS://DOI.ORG/10.1371/JOURNAL.PNTD.0005661.

The rockslide spawned 65-foot (20-meter) waves that killed 14 people.[9]

The alteration of water flow patterns caused by the dam has caused an increase in the temperature of the adjoining regions. Many parallels can be drawn between the Three Gorges Dam and the proposed Yarlung Tsangpo Dam. It is probable for the Yarlung Tsangpo Dam to bear consequences that are similar to the impact of the Three Gorges Dam after its completion.

Geological Consequences Accompanying the Construction of Yarlung Tsangpo Dam

Even though the dam has been hailed as an engineering and construction marvel, the dam is bound to have a disastrous impact on the Tibetan and North East Indian Environment. The Constant construction of dams is likely to trigger the submerging of land and forests underwater, causing great loss of human life and animal biodiversity. As the dam will be constructed in an unpredictable seismic area, it might trigger earthquakes and landslides. In addition to this, maintaining the dam will be extremely difficult to maintain due to the extreme land sliding and bedrock exhumation.

The dam will greatly impact the environment of downstream countries and deprive countries like India and Bangladesh of the sediment flux carried by the Yarlung River thus affecting the soil quality of states like Arunachal Pradesh and Assam. Not only would this affect the agriculture of the region, but also negatively impact the livelihood of the people. The construction of the dam will interfere with the natural hydrological cycle of the river which is likely to cause severe water shortages in the Indian state of Arunachal Pradesh and Assam. It must be noted that the Mekong Dams constructed by China had an adverse impact on India and caused a draught-like situation in certain areas. The dam might further

[9] Watson, S. *Why could China's Three Gorges Dam cause an environmental disaster*? HowStuffWorks Science. HowStuffWorks. (2020) HTTPS://SCIENCE.HOWSTUFFWORKS.COM/ENVIRONMENTAL/GREEN-SCIENCE/THREE-GORGES-DAM-DISASTER1.HTML

trigger earthquakes and landslides in the extremely unstable northeastern region. The dam will adversely affect the environment and economic development of the North East Indian region and steps must be taken to mitigate the effects of this construction.

The North Eastern region of India is not only an ecologically sensitive zone but is also an important region in the Indo-Myanmar biodiversity hotspot. It must be noted that the Indo-Myanmar biodiversity hotspot is among the 25 global biodiversity hotspots recognized currently.[10] The region also houses a major indigenous population in the country. It, therefore, becomes even more important to conserve the North East Indian region. In addition to being susceptible to earthquakes, the region's geography is dominated by the extremely fickle Brahmaputra making the area prone to frequent flooding and soil erosion. It must be noted that flooding and soil erosion not only greatly harms human life and agriculture, but also affects the developmental strategies planned by the Government.

It must be noted that the Brahmaputra basin covers an area of 5,80,000 sq km, out of which 293,000 sq km is in China, 240,000 sq km in India and Bhutan, and 47,000 sq km in Bangladesh.[11] The Brahmaputra River is extremely unstable and it abruptly changes its course several times due to the amount of silt carried by it causing the areas through which it flows to face severe consequences.

Though the region has great potential for harnessing hydroelectricity, it must be ensured that the mega dams built in the region do not adversely affect the ecology of the North East and do not hamper the social and economic aspirations of North East Indian people. It must be ensured by the Government that proper Environmental Impact Assessments must be carried out in the North East Indian region as well as the Yaalung Tsangpo Dam would affect the economy and ecology of North East. Indigenous culture and aspirations must be accounted for while conducting the assessment and China must be mandated to take into consideration the results of the report while constructing the dam. Effective compensation

[10] Lalremruata, C. *Mega dams in North East India*, Academia.edu. (2014) HTTPS://WWW.ACADEMIA.EDU/7305835/MEGA_DAMS_IN_NORTH_EAST_INDIA

[11] Bhattacharyya, R. *New strategy to tackle floods and erosion in India's disaster prone northeast*. The Diplomat. (2019) HTTPS://THEDIPLOMAT.COM/2019/12/NEW-STRATEGY-TO-TACKLE-FLOODS-AND-EROSION-IN-INDIAS-DISASTER-PRONE-NORTHEAST/

packages must be awarded to locals who will have to be rehabilitated due to the construction of the dam. Also, China must be made to pay for the rehabilitation. Sustainable building practices must be awarded and at no point of time during the construction should the course of the river be altered. Attempts must be made to ensure that no unprecedented flooding of the region takes place. Lastly, it must be ensured that progressive guidelines are laid down and followed during and after the construction of the dam to ensure minimal environmental damage.

The authors would also like to express that the Chinese authorities have already built multiple damns along the Yarlung Tsangpo River in Medong County. However, these dams are not nearly as potent as the recent dam that is being built. We must understand that this dam, when completed, according to reports from Chinese authorities, will generate about 60 gigawatts of power[12]. China has stated, on multiple occasions, that this dam is one of their greatest commitments to carbon neutrality by 2060 as this dam would generate three times the energy of the Three gorges dam. This is of particular concern to India as China sits Upstream with regard to the flow of the Yarlung Tsangpo. This means that China would be able to harvest the resources of the Yarlung Tsangpo while negating the economic and security needs of India. India is a largely agrarian economy and the northeast is heavily reliant on agriculture to ensure their sustenance. However, the construction of this dam, according to experts, would direct the deposition of silt on the Chinese side of the LAC. This would lead to devastating consequences, especially for the northeast as this silt, when deposited on the Chinese side, would lead to a lack of soil fertility in India and therefore, a decrease in crop yields across the northeast. In addition to this, the rivers also carry various sediments that naturally yield to an increase in the water commons of the society, and without these water commons, the region would be devoid of both agriculture and fishing, which again, would have a devastating impact on the economy of India.

[12] Rahman, M.Z. "Geopolitics of Sino-Indian transboundary water management in the Yarlung Tsangpo and the Brahmaputra," *Mondes en développement*, n° 177(1), 63–77, (2017), HTTPS://DOI.ORG/10.3917/MED.177.0063.

THE WEAPONIZATION OF WATER BY CHINA

China is largely deemed to be an "Upstream" superpower and this can have disastrous consequences for the world and downstream economies. More than 40 major transboundary rivers that flow to 16 other nations originate in China and it has been successful in leveraging this point without question[13]. The question that arises now is whether the same fate has befallen India and this is something that the authors would like to elaborate upon shortly. For now, the authors would like to mention that China was one of the three countries that voted against the UN convention of the law of the Non- Navigational Uses of International watercourses. This convention sought to strike a balance between the interests and downstream nations and the Chinese rejected the same as they would have been held at a disadvantage if they had acquiesced to these demands. China does have multiple bilateral agreements with multiple countries but it seems to have not had such an agreement with India on the sharing of water between the two countries. Selina Ho, a renowned professor at the National University of Singapore specifically states that this is due to the reason that China sees India as a regional power as India is set to significantly grow in the coming decades, something that China has tried to curtail. China's belligerence, when in stark competition with India's tenacity could result in "water wars" that would not be in India's favor.

China sees India's significant rise as a threat to its dominance in Asia. Multiple reports have already suggested that multiple manufacturing projects that would go to China, by default, are now pouring into India as the West stares down an aggressive China. The belligerence encountered by most nations via an aggressive China is to some extent limited by Geography but the same cannot be said for India. India already controls Arunachal Pradesh, a state that China sees as its own. The Chinese even went as far as to name villages and refer to the state as "South Tibet"[14], something that is contrary to the Indian claims of sovereignty. If we look at the map of India, there is a narrow strip of land that connects India to its eight northeastern states. This strip of land is often called the Chicken's neck.

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[13] Baruah, S. *Upstream superpowers*. The Indian Express, (2014), HTTPS://INDIANEXPRESS.COM/ARTICLE/OPINION/COLUMNS/UPSTREAM-SUPERPOWERS/

[14] *China says Arunachal Pradesh is part of it "since Ancient Times"* THE ECONOMIC TIMES. (2021), HTTPS://ECONOMICTIMES.INDIATIMES.COM/NEWS/INDIA/CHINA-SAYS-ARUNACHAL-PRADESH-PART-OF-IT-SINCE-ANCIENT-TIMES/ARTICLESHOW/88618947.CMS?FROM=MDR

This piece of land, if lost, would mean the separation of India from its northeastern states and this would also ensure that China lays claim to Arunachal Pradesh.

While this may seem farfetched, we must understand that China already has border disputes with 18 nations at the moment and has even forced countries in the past to cede land under "historical claims"[15]. If the effect of the dam would increase water scarcity, India, as a result of the fact that China has not signed the aforementioned treaty, has nowhere to go to enforce its claim. The sharing of water is a mere principle of customary international law unless applied via a treaty. It has no binding action upon the states concerned and this is something that must be noted. If not a military incursion, China could cut off a large part of the water supply of the Yarlung Tsangpo and this could adversely impact India. In addition to this, China has already been reluctant to acknowledge the impacts of these dams and share meteorological data with India in multiple instances. Take for instance the Dokhlam standoff. China refused to share meteorological data with India after the standoff and this led to a tremendous flood and loss of life in India[16]. While India is intending to build a dam to mitigate the effects of the same, in the opinion of the author, this dam warfare will have a catastrophic impact on the lives of the people and environment and the people at large. As a result of this, the authors believe that this strategy must not be followed and a treaty must be signed between the two nations to ensure that the sharing of the Yarlung Tsangpo is done equitably. The author presumes that China is weaponizing water to push its claims in Arunachal Pradesh and bleed India through its salami-slicing strategy. To this, the authors would only like to further reiterate that an internationally binding convention between the two nations is the only way to address the same and when such a treaty is signed, it would protect the interests of both China and India.

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[15] Tripathi, S. *List of territorial disputes involving China*. JAGRANJOSH.COM, (2022) HTTPS://WWW.JAGRANJOSH.COM/GENERAL-KNOWLEDGE/LIST-OF-TERRITORIAL-DISPUTES-INVOLVING-CHINA-1659614606-1#:~:TEXT=CHINA%20HAS%20A%20DISAGREEMENT%20WITH,OF%20THE%20LINE%20OF%20CONTR
OL.&TEXT=THE%20ISSUE%20BETWEEN%20CHINA%20AND%20INDONESIA%20IS%20ANOTHER
%20SOUTH%20CHINA%20SEA%20DISPUTE..

[16] Keerthana, R. *Why is China's new dam a concern for India?* THE HINDU. (2021) HTTPS://WWW.THEHINDU.COM/CHILDREN/WHY-IS-CHINAS-NEW-DAM-A-CONCERN-FOR-INDIA/ARTICLE61734775.ECE

AN INDO-SINO WATER-SHARING AGREEMENT FOR THE RIVER OF YARLUNG TSANGPO, COULD IT BECOME A REALITY?

In the recent decade, there has been an increased realization of the scarcity of water that strikes the nations of the earth. According to multiple estimates, India is bound to be a water-scarce country by the year 2030 and this is further supplemented by the dependence of the Northeast on the Yarlung Tsangpo river. China sits atop the Tibetan plateau and has complete control of the waters originating from it. China stands at the precipice of the great bend region of the river and it is the concern of the downstream states, particularly India, that such water flow could be diverted if China wished to do so. The essence of the Brahmaputra can be best understood through the words of the legendary Assamese singer and composer, Bhupen Hazarika. In his works, he has talked of the flow of the Brahmaputra and the dependence of the state of Assam upon this river. The report of the Development, Concepts, and Doctrine Centre's (DCDC) Global Strategic Trends Program 2007-2036, (Ministry of Defense, 2007, 27) even discusses the possibility of China rerouting the flow of the Brahmaputra and causing great harm to both India and Bangladesh. There have been several disputes concerning China and India, particularly about the water sharing between these two countries. To illustrate this point, we can simply look back at the 2000 incident wherein the Indian officials, with scientific data, claimed that China had breached temporary lakes created by the landslides without providing a sufficient explanation to the Indian side, thereby resulting in flash floods. China actively denied any knowledge or wrongdoing on its part and the international community stood silently, despite the huge loss of life and property.

India has voiced its concerns regarding the diversion of the flow of the Brahmaputra River before the Chinese side on multiple occasions. In 2003, the then-prime minister, Atal Bihari Vajpayee, traveled to Beijing to take up the matter on a diplomatic level. The Chinese conveniently denied every allegation that was made by the Indian side and despite India's protest, they began to work on the dam that would be built on the Yarlung Tsangpo.

In light of these facts, the authors feel like a treaty between the two nations seems highly unlikely, given the global posturing of the two regional powers as rivals.

CHINA'S CONTENTIONS

China has stated on multiple occasions that it is ready to listen to India's concerns and also take note of any dangers that may be caused by its hydroelectric power projects across the Yarlung Tsangpo. However, something that must be noted is that China has also laid down terms to sit at the negotiating table with India. As per multiple reports, these terms include an unequivocal "order" from China to India. This "order" mandated that the Chinese would not interfere in the flow of the Brahmaputra River and would accept India's contentions to the same. However, in exchange for the same, China wishes that India should not construct any dam in the so-called "disputed" state of Arunachal Pradesh and must use the water released by China solely for irrigation and not hydroelectric power generation[17]. This has understandably upset India as this not only sends a clear message of defiance to India, concerning the legitimacy of its sovereignty over Arunachal Pradesh but also mandates that India acquiesce to China's claims of baseless dominance over this issue, something that India's side is weary of doing.

INDIA'S CONTENTIONS

As China has complete control of the Tibetan Plateau and the rivers that originate from it, India stands downstream and is weary of Chinese designs upon the river. The visit by Manmohan Singh in 2013 did little to dissuade the Chinese from constructing this project

[17] Rampini, C. "Hydropower and Sino-Indian hydropolitics along the yarlung-tsangpo-brahmaputra," The Political Economy of Hydropower in Southwest China and Beyond, 235–254, (2021) , HTTPS://DOI.ORG/10.1007/978-3-030-59361-2_12.

and this is extremely unfortunate for India[18] The contentions put forth by India are a result of the disadvantageous position that India finds itself in. India has stated on multiple occasions that it just wants to come to an understanding concerning the sharing of the water of the Brahmaputra. However, China has set its terms and this has gotten in the way of proper negotiations between the Indian and Chinese sides as mentioned above. With India's plans to construct a dam in the northeast with an output of 10 gigawatts, it is safe to say that China has got the message that India is not willing to back down. In light of this, the author would suggest that the two neighbors cease their hostilities immediately and talk as equals about the sharing of the Yarlung Tsangpo River.

THE AUTHOR'S SOLUTION TO THE PROBLEM

In the view of the author, the belligerence of China can be seen time and again with regard to the sharing of rivers. Take for instance the Mekong water-sharing dispute. China, in stark similarity to this situation, takes complete advantage of the fact that it lies upstream of the Mekong River and has constructed hydroelectric projects and dams that could divert or even stop the flow of the Mekong River into Myanmar, Laos, Cambodia, etc. This does present quite the opportunity to India and as per the act east policy, India could co-opt these nations into its struggle with China and the sharing of the Brahmaputra. This would ensure the collective bargaining power of these nations and force China into acceding to the requirements of these nations or at least sign a treaty with these nations collectively. An example of such a treaty can be seen in the Se San protection network (SPN) wherein the Cambodian communities on the Se San River had convinced the Vietnamese government to consider their plight before going ahead with the construction of a dam on the aforementioned river as per their terms. Cambodia made Vietnam consider the rights of the nations downstream and this halted the designs that the Vietnamese had upon the

[18] *Manmohan Singh concludes China visit having signed Border Pact,* THE ECONOMIC TIMES, (2013). HTTPS://ECONOMICTIMES.INDIATIMES.COM/NEWS/POLITICS-AND-NATION/MANMOHAN-SINGH-CONCLUDES-CHINA-VISIT-HAVING-SIGNED-BORDER-PACT/ARTICLESHOW/24650392.CMS .

dam on the Se San River. Such dialogue could also be initiated between the downstream countries and China to ensure that China could never stop the flow of the rivers concerned or do what they would please to them. this comprehensive treaty could protect the rights of both parties and must be agreed upon to ensure peace amongst the countries concerned. In addition to this, the author would also like to suggest the inclusion of international arbitration clauses when a dispute arises and the wording of this convention to be as precise as the Indus Water treaty between India and Pakistan. In the Indus water treaty, India could not stray above a certain limit when it came to the utilization of the water from the Indus River and its tributaries for hydroelectric purposes. the treaty offers a certain notice period to be given to the opposing state to reply to any contention and prohibits any misuse of Upstream status. Such a treaty would serve the aforementioned nations well and would also ensure that these nations are not subjected to flash floods and other natural disasters. However, convincing these nations to side with China and join India in lobbying against China seems to be a difficult affair, but it is not completely out of the possibility of success. To make China accede to the same, India must be willing to sacrifice some of its hydroelectric potential and we believe that this is a fair trade to ensure continuous water flow. However, given how China just brushed aside the ruling of the ICJ in the South China Sea dispute, it is only natural for China to violate any treaty that could be entered into by the two sides and India must be ready for the same.

CONCLUSION

After much deliberation upon this topic, the authors would like to conclude by stating that the Indian contentions to the dams being constructed along the Yarlung Tsangpo are based on fact and not fiction as the Chinese would have us believe. In light of this, China must behave like a responsible partner to India and enter into a comprehensive agreement with India to ensure that the water of the Yarlung Tsangpo will neither be diverted nor used for

the artificial creation of flash floods. The authors believe that diplomacy is the only way out of this situation and to have an aggressive India and China posturing at the border would benefit no one. India and China have a lot to gain from trade and the exchange of cultures and peoples. It would not be right to squander the same on a dispute concerning a river that serves as a lifeline to many in India. In light of this, the authors would like to state that it is in the interests of both India and China to stop this conflict and for China to release the water as per a comprehensive water treaty agreed upon by both neighbors as water is a collective treasure of mankind and to have one nation benefit from the suffering of another can only be termed as cruelty, to say the least. India must set an example by ensuring that it too does not violate any water-sharing agreements or understandings with other downstream nations such as Bangladesh as this will not only provide a sense of security to China but would also encourage them to do the same as their soft power requirements. In light of this, water amongst these nations must flow freely and the clear stream of reason, as Rabindranath Tagore said, must find its way into co-operation and not into the dreary desert sand of endless posturing.

FEASIBILITY OF A GLOBAL WEALTH TAX IN AN INTERNATIONAL TAX REGIME

-Chetan R[1]

ABSTRACT

There has been an alarming increase in the wealth gap between the rich and the poor throughout the world. This has only been exacerbated after the pandemic due to which not only individuals but also states have been bearing the burden of wealth inequality and subsequent loss of taxes due to capital flight to tax havens. Although any such international step for regulating global wealth can be challenged, there exist considerable convincing grounds through economic, political, and social perspectives, to justify the requirement of such an international system. Further, one of the biggest objections to such a concept is the challenge it poses to the sovereignty of the States. The traditional notions of sovereignty, such as Westphalian sovereignty, maybe going against this global wealth tax system. However, with the newer understanding of sovereignty in the light of globalization and increased international cooperation, responsibility-based sovereignty would actually be promoted due to such a system. The resulting global wealth tax needs to be modeled such that it is based on the already existent Customary International Law ("CIL") in international tax law. This model should also keep in mind the concerns and representations of third-world countries to include their perspectives on vouching for tax havens. A compromise on both sides leading to a staggered global wealth tax system, with such TWAIL countries having a lower wealth tax rate than other developed/developing countries would be the most effective system with all concerns being considered and at the same time, the present problems of wealth inequality being addressed.

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INTRODUCTION

In the aftermath of World War II, increased globalization has resulted in an exponential rise of international trade, investment, and exchange[2]. The decrease in the cost of international business, the increase in the number of international transactions, easier trade in capital goods, and accessibility to easy credit, caused the signing of numerous agreements[3], including agreements like the General Agreement on Tariffs and Trade ("GATT"), which worked to regulate international trade. These set up beneficial practices like dispute resolution mechanisms under the aegis of the World Trade Organization ("WTO"). [4]

This growth of international trade and subsequent developments in technology around the world has enabled not only states but also non-state actors, such as companies and individuals to engage in trading and business on a global scale. [5]

This led to freer movement of goods, services, labor, capital, etc., across the globe. [6] The scope of the paper shall be confined to the regulation of the movement of capital belonging to non-state actors through the lens of an emerging international tax law.

Different countries had their own policies and laws governing the movement and subsequent taxation of capital and wealth. These include countries, such as Spain, Norway, Switzerland, etc., which taxed the wealth accumulated by their citizens[7], while most others, such as India, France, Cana, etc., imposed no tax on wealth accumulation[8]. However, the latter still imposes a tax on income generated from the said wealth. There are also countries, such as Luxembourg, Bermuda, Netherlands, etc., which do not impose any tax on even the income generated from wealth.

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[2]Andrew P. Morriss & Lotta Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition*, 4 Column. J. Tax. L. 1 (2012).
[3] Girjesh Shukla, *Regulating Tax Havens: An Imperative Under International Law*, 2 SML. L. Rev. 135 (2019).
[4] Richard J. Vann, *International Aspects of Income Tax*, in VICTOR THURONYI (EDS), TAX LAW DESIGN AND DRAFTING (Vol 2, International Monetary Fund: 1998).
[5] Stephen G. Brooks & William C. Wohlforth, *Power, Globalization, and the End of the Cold War: Reevaluating a Landmark Case for Ideas*, 25(3) Int'l Security 5 (2000).
[6] Gautam Sen, *Developing States and the End of the Cold War: Liberalization, Globalization, and Their Consequences*, in LOUISE FAWCETT, & YEZID SAYIGH (EDS), THE THIRD WORLD BEYOND THE COLD WAR: CONTINUITY AND CHANGE (Oxford University Press, 2000).
[7] Prabhu Balakrishnan, *List of Countries with Wealth Tax*, BEST CITIZENSHIP (Dec. 11, 2020) HTTPS://BEST-CITIZENSHIPS.COM/2020/12/11/LIST-OF-COUNTRIES-WITH-WEALTH-TAX/.
[8] Sarah Perret, *Why were most wealth taxes abandoned and is this time different?*, 42(3) Fiscal Studies 539 (2021).
[9] *The most popular tax havens worldwide*, WORLD DATA, https://www.worlddata.info/tax-havens.php.

Thus, this combination of open international trade and different tax policy options being available across the world promotes non-state actors to evade their respective state's rules and laws. In this way, they can act in furtherance of their private interests while disregarding the state.[10] This paper seeks to answer this undesirable situation by building on Thomas Piketty's suggestion of a global wealth tax, through the perspective of international tax law. Hence, this paper will not be entirely venturing into arguments or discussions concerning income tax.

To that effect, this paper is divided into three sections. *Firstly*, this paper will highlight the need for a global wealth tax from economic, political, and social perspectives. *Secondly*, this paper will address the main theoretical concern opposing such a global tax regime, which is the question of the sovereignty of the state. *Thirdly*, this paper proposes the formulation of a global wealth tax by positing the same in customary international tax law and considering the Third World Approaches to International Law ("TWAIL") perspective.

NEED FOR A GLOBAL TAX

Wealth taxes have been among one of the oldest fiscal instruments ~~to exist~~ in the world. Yet, this instrument has been neglected and discarded in many states around the world.[11] This section seeks to argue in Favor of wealth tax, by justifying the same through economics, political and social perspectives.

Economic Justification

The economic justification for wealth tax can be found in the works of John Maynard Keynes and Thomas Piketty.

[10] Miroslaw Przygoda, *Tax Havens as an Inseparable Element of Regional and Global*, 2(2) International Journal of Operations Management 34 (2022).

[11] RICHARD M. BIRD, TAX POLICY AND ECONOMIC DEVELOPMENT (The Johns Hopkins University Press, 1992) 130.

When people save and invest in wealth (like real estate, gold, paintings, etc.), there will be less money for them to consume, leading to a lack of demand. [12]

If there is no demand in the market, then the supply will also tank because demand stimulates supply. As a result of this, there will be lesser investment into production, a reduction in employment, lesser income is generated, and society (consisting mainly of the working class) will become poorer. [13] The rich will still have this money (which they would have otherwise invested into production) and will use it to buy more wealth, but this will not set up industries and create employment.

This creates a negative feedback loop whereby due to this investment into wealth, there will again be lesser demand and then lesser supply, and so on. When this is seen in the backdrop of Piketty's work, the rate of return on the wealth/capital will be higher than the rate of economic growth ($r > g$), which just makes the rich grow even richer and their wealth grow manifold while depriving the remaining majority of the society of economic growth, thus, in stabilizing the economy. [14]

This shows how the hoarding of capital causes a vicious cycle that goes on to destroy the economic growth of a country. One effective way of countering this phenomenon would be through imposing a wealth tax on all forms of wealth and capital with no exceptions. This tax should have high thresholds to target those living in the top 1% or even the top 0.1%, giving only incentives to investment in those capitals which lead to more production and employment than a prescribed limit.

[12] James Ahiakpor, *A Paradox of Thrift or Keynes's Misrepresentation of Saving in the Classical Theory of Growth?*, 62 Southern Econ. J. 16 (1995).

[13] James Ahiakpor, *Why Economists Need to Speak the Language of the Marketplace*, FEE (Dec. 01, 1995), HTTPS://FEE.ORG/ARTICLES/WHY-ECONOMISTS-NEED-TO-SPEAK-THE-LANGUAGE-OF-THE-MARKETPLACE/#:~:TEXT=THROUGH%20THIS%20REASONING%2C%20KEYNES%20BELIEVES,AS%20IF%20IT%20WERE%20VALID.

[14] THOMAS PIKETTY, CAPITAL IN THE 21ST CENTURY (Harvard University Press, 2017).

This form of incentive would also address the concerns that critiques of wealth tax have with respect to underinvestment and capital formation.[15] Thus, capital investment and wealth growth in all forms are not being targeted in such a regime. It will only be those forms of wealth that do not generate the required limit of production and employment that will be taxed. In this way, a portion of the capital that the rich are hoarding in non-productive wealth would have to be paid off as taxes to the state in a non-compromising way.

This achieves two goals. First, the wealth inequality between the top 1% or 0.1% and the remaining will reduce counteracting Keynes' paradox of poverty in the midst of plenty principle because people will be less incentivized to save, out of the fear of paying more wealth taxes, and would instead spend their money or invest it in employment and production generating capital. Second, the state also receives a substantial sum of money (depending on the tax rates, which should tend to be on the higher side). It can then use this money to finance public spending to increase employment, production, and economic growth.

Political Justification

The political justification for wealth tax can be found in the works of Katherina Pistor and the concept of legal coding[16]. Wealth generation and storage have always been legal constructs. For any corporate/individual to generate wealth, have a right over it, and store it in any form, they require legal institutions and frameworks to have enabled them in this process right from the beginning[17].

[15] Kristoffer Berg & Shafik Hebous, *Does a Wealth Tax Improve Equality of Opportunity? Evidence from Norway*, (IMF Working Paper) WP/21/85.

[16] KATHERINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (Princeton University Press, 2019).

[17] *Katharina Pistor Cracks the Legal Code of Wealth and Inequality*, COLUMBIA LAW (June. 10, 2019) https://www.law.columbia.edu/news/archive/katharina-pistor-cracks-legal-code-wealth-and-inequality.

This particularly becomes important in the current day and age where wealth is not just limited to land and gold but extends to financial instruments, intellectual property rights, cryptocurrency, etc.

Such legal institutions and various other public goods and services are provided by the state, which is what enables corporates/individuals to amass their wealth. Paying for this bundle of non- excludable and non-rivalrous goods and services provided by the state forms a key justification for such a wealth tax[18]. However, with globalization and free movement of capital/wealth around the world, states themselves have become players in the market of taxation and compete with each other on the kinds and amount of public goods and services being offered, with tax becoming the currency for this competition[19]. This creates a prisoner's dilemma situation in the international forum where individual states make decisions that result in a less-than-optimal outcome for all thestates[20].

This, coupled with regimes in certain countries, enables corporates/individuals to unbundle the public goods and services, which means, they could selectively consume and selectively pay for them through taxation[21]. Due to the lack of any form of a global wealth tax, corporates/individuals are able to store their wealth in countries where there is little to no wealth tax (popularly known as "tax havens"), while still continuing to enjoy the public goods of countries where they have their business activity, citizenship, education, etc. This process is termed "capital flight" [22].

This fragmentation enables such corporates/individuals to tailor the basket of public goods in any way they want from different jurisdictions, as per their preferences[23]. Through this, they aim for

[18] Tsilly Dagan, *Klaus Vogel Lecture 2021: Unbundled Tax Sovereignty – Refining the Challenges*, 76(7) Bulletin for Int'l Taxation 318 (2022).
[19] *Id*.
[20] R. O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984) pp. 85–110
[21] Dmytro Sokolovskyi, *Is Race to the bottom is modelled as Prisoner's dilemma?* (MPRA Paper No. 99404, April 07, 2020).
[22] Léonce Ndikumana, *Capital Flight and Tax Havens: Impact on Investment and Growth in Africa*, 22 Revue d'économie du développement 99 (2014).
[23] Dagan *supra* note 19.

achieving the best tax offer, without paying the due to the states where they have consumed such public goods for the growth of their wealth[24]. For example, India lost nearly Rs. 75,000 crores in taxes in the past year due to corporates utilizing this fragmentation and tax havens[25]. The effect of this fragmentation and unbundling even on the social contract is enormous as corporates/individuals will be acting as per their own preferences with no regard to the moral and political rules of the state, thereby creating a form of state of nature on the international forum[26].

Social Justification

Due to the reasons mentioned above, practices of fragmentations and tax havens may appear to be beneficial for business, however, they have a detrimental impact on society and people. Firstly, such practices entirely go against the principle of progressive wealth taxation. This is one of the main tools for wealth redistribution wherein the state imposes increasing levels of taxes on corporates/individuals having more wealth[27]. This policy action ensures that inequalities in the society are minimized and human rights are promoted through increased government spending on development and reducing the wealth gap[28]. Such policies become particularly important in the post-pandemic world where nearly 500 new billionaires came up[29], with the poor falling even lower in the economic scale. Poverty and hunger, which remain one of the largest human rights concerns across the world, are exacerbated by this growing inequality in wealth[30].

[24] Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64(5) J. Political Econ. 416 (1956).
[25] *India's losing Rs 75,000 crore in taxes every year due to tax abuse by MNCs, individual evasion*, THE ECONOMIC TIMES (Nov. 21, 2020), https://economictimes.indiatimes.com/news/economy/finance/indias-losing-10-3-billion-in-taxes-per- year-due-to-tax-abuse-by-mncs-individual-evasion/articleshow/79326660.cms?from=mdr.
[26] Allison Christians, *Sovereignty, Taxation and Social Contract*, 18 Minn. J. Int'l L. 99 (2009).
[27] A. Pfingsten, *Progressive Taxation and Redistributive Taxation: Different Labels for the Same Product?*, 5(2) Social Choice and Welfare 235 (1988).
[28] Shukla *supra* note 3.
[29] Chase Peterson-Withorn, *Nearly 500 People Became Billionaires During The Pandemic Year*, FORBES (Apr. 06, 2021), HTTPS://WWW.FORBES.COM/SITES/CHASEWITHORN/2021/04/06/NEARLY-500-PEOPLE-HAVE-BECOME-BILLIONAIRES-DURING-THE- PANDEMIC-YEAR/?SH=5E87C07B25C0.
[30] *Inequality and poverty: the hidden costs of tax dodging*, OXFAM INTERNATIONAL, HTTPS://WWW.OXFAM.ORG/EN/INEQUALITY-AND-POVERTY-HIDDEN-COSTS-TAX-DODGING.

Secondly, the concentration of wealth in the hands of a few members would also lead to them acquiring bargaining power and sway within the political working of the country[31]. Such power may result in policies and government actions being taken to cater to the interest of this minority thereby jeopardizing the majority, most of whom would lie on the middle or lower economic sections of the society. This would also erode the democratic nature of the majority of the states[32].

Thirdly, the large amount of wealth being lost to tax havens, greatly affects low-income countries much more than high-income countries[33]. And the countries operating as tax havens are not always third-world countries with no other sources of income. 78% of the world's annual tax losses can be attributed to Organization for Economic Cooperation and Development ("OECD") countries, with the UK being one of the major contributors[34]. The absence of these funds causes states to compromise on providing essential goods and services such as water, sanitation, finance infrastructure, medical services, etc., and even fail to meet concerns about global warming and the environment[35]. Thus, meeting human rights obligations by different states would be impaired due to the lack of sufficient funds.

QUESTIONING TAX SOVEREIGNTY OF STATES

This section aims to address the main concern for any such global tax imposition, which is its impact on the sovereignty of the states. Originally, there have been two forms of sovereignty propounded in literature.

They are the Westphalian sovereignty and Domestic sovereignty[36]. The former has been understood, in international law and political science, to mean states have equal status on the global forum, with every state having the right to non-interference in its internal affairs.

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[31] R. Harrison Wagner, *Economic Interdependence, Bargaining Power, and Political Influence*, 42(3) Int'l Organization 461 (1988).

[32] Rebecca S. Rudnick & Richard K. Gordon, *Taxation of Wealth,* in VICTOR THURONYI (EDS), TAX LAW DESIGN AND DRAFTING (Vol 1, International Monetary Fund: 1996).

[33] *Id*.

[34] Mark Bou Mansour, *Losses to OECD tax havens could vaccinate global population three times over, study reveals*, TAX JUSTICE NETWORK (Nov. 16, 2021), HTTPS://TAXJUSTICE.NET/2021/11/16/LOSSES-TO-OECD-TAX-HAVENS-COULD-VACCINATE- GLOBAL-POPULATION-THREE-TIMES-OVER-STUDY-REVEALS/.

[35] Magdalena Sepúlveda, *Tax justice—a crucial tool to advance human rights*, SOCIAL EUROPE (Dec 10, 2021) https://socialeurope.eu/tax-justice-a-crucial-tool-to-advance-human-rights.

[36] Laurens van Apeldoorn, *International Taxation and the Erosion of Sovereignty*, in THOMAS RIXEN & PETER DIETSCH, GLOBAL TAX GOVERNANCE. WHAT'S WRONG WITH IT AND HOW TO FIX IT (ECPR Press, 2016).

Thereby, it imposes a corresponding duty on other states for the said non-interference[37].

The latter has been understood to mean the state is the supreme authority within its territory, so it concerns only the internal actors[38]. The concept of a global wealth tax, would *prima facie*, go against both these forms of sovereignty, as there would be interference in the internal affairs of the state along with internal actors also not being able to discharge their obligation to the supreme authority. However, in the current day and age, with the aforementioned globalization and its subsequent effects on trade and business across the world, these classical ideas of sovereignty no longer remain entirely true[39]. A new form of sovereignty not limited to superiority and non-interference has been emerging throughout the world.

Not only literature, but also states themselves, have accepted this new form of sovereignty, which is not always based on the duty of non-interference, but in reality, it is actually based on responsibilities to assist other states to ensure they fulfill their duties of protection of human rights of their subjects[40]. This new form of understanding sovereignty goes above and beyond the Westphalian idea of non-interference. The common goals and interests that different states have in the current globalized environment require this form of international interdependent cooperation[41]. Moreover, even under the Universal Declaration of Human Rights, 1948, states are envisaged to provide human rights to all their subjects without any discrimination[42].

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[37] *Peace of Westphalia*, BRITANNICA (Oct. 17, 2022), HTTPS://WWW.BRITANNICA.COM/EVENT/PEACE-OF-WESTPHALIA.

[38] Peter Dietsch, *Tax competition and its effects on domestic and global justice*, in AYELET BANAI & MIRIAM RONZONI (EDS), SOCIAL JUSTICE, GLOBAL DYNAMICS: THEORETICAL AND EMPIRICAL PERSPECTIVES (Routledge, 2011).

[39] Peter Dietsch, *Rethinking sovereignty in international fiscal policy*, 37(5) Rev. Int'l Studies 2107 (2011).

[40] Ezgi Arik, *Philosophical Re-Thinking of International Tax Law: An Analysis of Harmful Tax Competition*, 10(19) Cambio. Rivista Sulle Trasformazioni Sociali 73 (2020).

[41] Koesrianti Koesrianti, *International Cooperation Among States in Globalized Era: The Decline of State Sovereignty*, 3(3) Indonesia L. Rev. 267 (2013).

[42] The Universal Declaration of Human Rights, Article 2.

In this new conception, states sacrifice these classical forms of sovereignty to a certain extent to ensure all the cooperating states benefit and are successful in providing their subjects with better public goods and services and hence, safeguard their human rights[43]. This is seen in the form of thousands of treaties being signed by states. This new form of sovereignty, as understood as responsibilities, forms the basis for imposing any such global wealth tax regime[43]. In such a case, the constraints on the state's power for designing any form of a tax policy, would not be constraints on its sovereignty, but would be "constraints of sovereignty"[45].

Consequent to this understanding, different national tax practices can, in fact, be viewed as eroding the sovereignty of nation-states[46]. These practices include tax competition (a race to the bottom in providing the least amount of domestic tax to invite foreign investment), tax havens (states not imposing taxes on certain forms of investments), etc. These state practices, coupled with non-state accumulation of wealth lead to an increasing inequality around the world, not only between people but also between states. This causes states to fail in the discharge of their obligations to their subjects as their supreme authority due to the distributive injustice prevalent within the state and around the world[47]. Therefore, any form of a global wealth tax regime would be in line, and would actually promote the sovereignty of states around the world.

MODELLING A GLOBAL WEALTH TAX REGIME

This section aims to model a global wealth tax regime in the backdrop of international law, by first, posting the same in customary international law ("CIL"), and secondly, providing the regime a TWAIL perspective to ensure better inclusion and representation.

[43] J.H. Bello, *National Sovereignty and Transnational Problem Solving*, 18(3) Cardozo L. Rev. 1027 (1996).
[44] Dietsch *supra* note 39.
[45] Dietsch *supra* note 39.
[46] Arik *supra* note 40.
[47] Arik *supra* note 39.

There is an extraordinary convergence in the current and previous domestic wealth tax laws and policies of numerous countries around the world[48]. However, as of now, the international tax regime mainly rests on bilateral tax treaties signed between countries. Treaties of multilateral nature are exceedingly rare, with the OECD model being one of the very few, but this too doesn't squarely deal with a global wealth tax[49]. Due to this, a global wealth tax regime has to be found in both bilateral tax treaties and CIL in international taxation.

CIL is the law that arises on the international forum due to a consistent and general practice followed by states as a result of their sense of legal obligation, which is widely accepted[50]. So, a practice can qualify as CIL if it has two components, firstly, the objective components of the actual state practice, and secondly, the subjective element of *opinio juris*[51]. The first component can be seen in the 3,000+ bilateral tax treaties present in the world, among which almost 80% are nearly identical to each other, along with numerous continuing and previously failed attempts at implementing a wealth tax within their domestic tax system.

This shows a consistent state practice. The second component can be seen in the states wanting to get into these treaties to properly implement their tax system and not lose out revenue, which is a major driving factor for any state. The states have also attributed the failure of their wealth tax systems to it being too expensive and inefficient in its implementation,[52] and have not questioned their ideals behind wealth taxation. Therefore, there are *opinio juris* on the part of the states for wanting such a system, albeit in a more feasible and efficient manner.

[48] H. David Rosenbloom, *International Tax Arbitrage and the "International Tax System"*, 53 Tax L. Rev. 137 (2000).
[49] REUVEN S. AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW (Cambridge University Press, 2007).
[50] Reuven S. Avi-Yonah, *Does customary international tax law exist?*, in YARIV BRAUNER (EDS), RESEARCH HANDBOOK ON INTERNATIONAL TAXATION (Edward Elgar Publishing Ltd., 2020).
[51] Dirk Broekhuijsen & Irma Mosquera Valderrama, *Revisiting the Case of Customary International Tax Law*, 23 Int'l Community L. Rev. 79 (2021).
[52] Perret *supra* note 7.

The three prominent coordinating rules of CIL in international taxation law are (1) the Permanent Establishment ("PE") Threshold, (2) the Arm's Length ("AL") Standard, and (3) the Non-Discrimination Principle[53]. The PE Threshold states that a source country would not tax a foreign business unless this foreign corporation has a permanent establishment in the source state. This has previously been understood to mean a physical presence[54], but with increasing digital financial instruments, even "substantial digital presence" is being considered to be acceptable. The AL Standard states that in allocating the tax benefits between the source country and foreign country, the proper standard would be to treat the parties as if they were dealing with one another at arm's length.[55]

Hence, in view of these substantiations, CIL existent in international taxation law and can form the basis for any global wealth tax regime which may be designed. Similar claims have already been raised by parties in cases such as the *Vodafone International Holdings BV. v. Union of India*,[56] where it was argued that CIL would govern this case involving international tax law.

TWAIL Approach to Global Tax

In designing a global wealth tax, mistakes committed by the OECD in their BEPS Action Plan needs to be avoided. There should not be an assumption that all forms of capital tax havens are harmful without understanding the reasons for opting for such a wealth tax system.[57] Moreover, there should not be an assumption that all states stand at an equal position, i.e., the position of developed Western countries.[58] The TWAIL countries, and their past experiences of colonization, exploitation, oppression, etc. have to be recognized and taken due notice in any deliberations for

[53] Reuven S. Avi-Yonah, *International Tax Law as International Law*, 57 Tax L. Rev. 483 (2004).
[54] *Commissioner of Internal Rev. v. Piedras Negras Broadcasting Co*., 127 F.2d 260 (5th Cir., 1942).
[55] Yonah *supra* note 53.
[56] [2012] 341 ITR 1.
[57] Terry Dwyer, *'Harmful' tax competition and the future of offshore financial centres, such as Vanuatu*, 15(1) Pacific Econ. Bulletin 48 (2000).
[58] Sissie Fung, *The Questionable Legitimacy of the OECD/G20 BEPS Project*, 10(2) Erasmus L. Rev. 76 (2017).

a global wealth taxes.[59] There needs to be a differentiation made while designing any such global policy without lumping all the states together. Furthermore, these TWAIL countries have to be given negotiating power without facing any coercive strategies on the part of Western states. They should not be subject to a "civilizing mission" where such unilateral taxes are imposed.[60] There should rather be a "Common but Differentiated Approach" to the designing of such a law wherein the broader aim of the global tax system should be to further the justifications, while different countries depending on their economic, political, and social needs, should adopt different approaches which cater to the said needs.

So, instead of there being just a staggering wealth tax depending on the corporate/individual's ability to pay, or a flat wealth tax, there needs to be differentiated wealth tax at least on two levels, along with having little to no exemptions. Some TWAIL countries are only getting investment and capital because of imposing little to no wealth tax on the capital being invested in their countries.[61] So, an ideal design of a global wealth tax, keeping in mind the TWAIL perspective, would be to have a staggered form of a global wealth tax, whereupon an agreement between all consenting states, super developed and developed countries along with certain developing countries could set- up a singular global wealth tax system. Countries that are under-developed and primarily rely on such investment through their status as tax havens can impose a lower percentage of wealth tax. Due to their attempts at fulfilling their obligations of development towards their citizens, concerns of TWAIL countries have to be considered,[62] despite a large amount of Western literature calling these tax havens as being harmful to the entire world.[63]

This reduction in wealth tax should be such that it doesn't greatly affect the corporates/individuals who are looking to shift their capital, but at the same time, it brings some transparent regulation, less loss of revenue and a uniformity in at least the imposition of wealth

[59] Jalia Kangave, *'Taxing' TWAIL: A Preliminary Inquiry into TWAIL's Application to the Taxation of Foreign Direct Investment*, 10 Int'l Comm L Rev 389 (2008).
[60] Makau Mutua & Antony Anghie, *What Is TWAIL?*, 94 Proceedings of the Annual Meeting (American Society of International Law) 31 (2000).
[61] Kangave *supra* note 59.
[62] Abosede Abidemi Oladiji, *Global Tax Regulation and Developing Countries*, (Faculty of Law, University of Manitoba), HTTPS://MSPACE.LIB.UMANITOBA.CA/XMLUI/BITSTREAM/HANDLE/1993/33592/OLADIJI%20ABOSEDE.PDF?SEQUENCE=1&ISALLO WED=Y.
[63] Álvaro De la Vía, *A Critical Third World Approach (TWAIL) To CFC Rules*, *LINKEDIN* (Aug. 27, 2020), https://www.linkedin.com/pulse/critical-third-world-approach-twail-cfc-rules-%C3%A1lvaro-de-la-v%C3%ADa/.

tax throughout all these countries. Sharing of information to remove information asymmetry would be of prime importance in such a scenario, as even though corporates/individuals may look to shift their capital to countries offering low wealth tax rates, there will be no great loss of revenue and complete opacity for the involved states, as it is right now.

This approach, instead of the altogether abolishing of tax havens would be a much more plausible and agreeable solution. Any such treaty formed for imposing a global wealth tax will have to be enforced in good faith as per the VCLT.[64] Thus, such a model would incorporate not only the aims of developed/developing states to reduce capital flight, and wealth inequality, prevent the loss of wealth tax revenue and ensure better protection of the human rights of its subjects but also the aims of under-developed states which look for foreign investments through such offerings of slightly low wealth taxes as compared to the rest. This would greatly address the current prisoner's dilemma situation which is existing in the international wealth tax scenario.

CONCLUSION

There has been an alarming increase in the wealth gap between the rich and the poor throughout the world. This has only been exacerbated after the pandemic due to which not only individuals but also states have been bearing the burden of wealth inequality and subsequent loss of taxes due to capital flight to tax havens.

[64] Brian J. Arnold, *An Introduction to Tax Treaties*, UNITED NATIONS, HTTPS://WWW.UN.ORG/DEVELOPMENT/DESA/FINANCING/DOCUMENT/INTRODUCTION-TAX-TREATIES-BRIAN-ARNOLD.

Further, one of the biggest objections to such a concept is the challenge it poses to the sovereignty of the states. While the traditional notions of sovereignty may be going against this global wealth tax system, the newer understanding of sovereignty in the light of globalization and increased international cooperation, the responsibility-based sovereignty would actually be promoted due to such a system. And the resulting global wealth tax needs to be modeled such that it is based on the already existent CIL in international tax law.

It should also keep in mind the concerns and representations of the TWAIL countries to include their perspectives on vouching for tax havens. A compromise on both sides leading to a staggered global wealth tax system, with such TWAIL countries having a lower wealth tax rate than other developed/developing countries would be the most effective system with all concerns being considered and at the same time, the present problems of wealth inequality being addressed.

NATIONAL SECURITY: AN EVALUATION FROM THE PRISM OF RUSSIA- MEASURES CONCERNING TARIFF IN TRANSIT CASE

- ***Saniya Khanna***[1]

ABSTRACT

Geopolitics has always had an impact on international relations and politics and the case of 2019, Russia- measures concerning tariff in transit, an example of the same, dwells on the relation of trade with national interest and sovereignty and becomes of immense importance today. As in the contemporary times, the ongoing Russia-Ukraine armed conflict by virtue of the above-mentioned Panel report of 2019 gives a clean chit to the Federation to cause economic hardships to the Ukrainian economy by imposing "security interests" restrictions which can cause a spillover-domino effect for many other nation states as well thereby frustrating the very intent of the regime. The case note of the panel report seeks to evaluate how the panel report acts to circumscribe the realist intent of 'national interest' in the political actions of nation-states by applying the objective analysis to 'security interest' in light of Article XXI of the General Agreement on Trade and Tariff.

INTRODUCTION

'*Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*.'[2]

Professor Henkin's statement indeed reflects the dynamism within international law. The obedience and disobedience of international law and obligation make international law a double-edged sword. The evolution of international law reflects that international

[1] Student at the Symbiosis Law School, Noida.
[2] Harold H. Koh, *why do nations obey International Law*, 106 YLJ 2599 (1997).

law is built on the foundational stone of 'sovereig nty.' The irony, however, is that the very foundation seeks to challenge international law through the 'will' of each nation State. While, modern international law attributes 'sovereignty' as the supreme and pivotal authority within a territorial jurisdiction[3] it constantly seeks to challenge its end i.e., securing international peace and security across the world. Securing 'security' within its territorial jurisdiction has always been a constant effort of the nation-State. Albeit a nation State's security equips the nation-State to break away from the binding international treaties.[4]

Economic sovereignty has always been a constant struggle for developing and least developing States, especially within the international trading regime.[5] The international trading regime under the aegis of the World Trade Organisation and General Agreement on Tariff and Trade seeks to promote economic development[6], multilateralism[7] and a liberalised economy.[8] However, the trading regime has to constantly pass the test of 'sovereign interests' and as envisaged within the international trade law as national security under Article XXI. The ambiguity within the language of the Article XXI of the GATT makes the Article a pandora's box. There has always been a constant struggle to harmonise the ambiguity and the intent of the drafters of the GATT regime. The case concerning Russia- measures concerning tariff in transit case is no exception to this.

Geopolitics has always had an impact on international relations and politics and the

[3] Samantha Besson, Sovereignty, Max Planck Encyclopaedia of International Law, <HTTPS://OPIL.OUPLAW.COM/DISPLAY/10.1093/LAW:EPIL/9780199231690/LAW-9780199231690-E1472>.

[4] Dominik Eisenhut, *Sovereignty, National Security and International Treaty Law: The Standard of Review of international courts and tribunals with regard to 'Security exceptions''*, 48 Bd. 4, 431-466 (2010). National interest and security interest have always allowed a nation State to claim it as an exception to the treaty (Article XXI of the GATT). See also, supra note 1.

[5] Organization for Economic Cooperation and Development, *Developing countries and development cooperation: What is at Stake?*, Organization for Economic Cooperation and Development as on April 28, 2020, <HTTPS://WWW.OECD.ORG/CORONAVIRUS/POLICY-RESPONSES/DEVELOPING-COUNTRIES-AND-DEVELOPMENT-CO-OPERATION-WHAT-IS-AT-STAKE-50E97915/ >

[6] World Trade Organization, *The General Agreement on Tariffs and Trade: What GATT is and What GATT has done' (WTO)*, World Trade Organization, <HTTPS://DOCS.WTO.ORG/GATTDOCS/Q/GG/MGT/58-44.PDF>.

[7] World Trade Organization, History *of the multilateral trading system*, World Trade Organization, <HTTPS://WWW.WTO.ORG/ENGLISH/THEWTO_E/HISTORY_E/HISTORY_E.HTM>.

[8] Trade Organization, *why is the liberalisation of services important?* World Trade Organization, <HTTPS://WWW.WTO.ORG/ENGLISH/TRATOP_E/SERV_E/GATS_FACTFICTION2_E.HTM >.

present case of 2019, Russia- measures concerning traffic in transit, an example of the same, delve into the relation of trade with national interest and sovereignty. The case note seeks to critically evaluate the case in the following parts. The first refers to the case of 2019 and is further bifurcated into two parts. While the former part discusses and presents the factual matrix of the case. The latter part delves into the ration decendi of the dispute settlement body. It highlights the rationale provided by the adjudicating body for supporting the Russian Federation over the complainant, Ukraine. The second part of the case note provides an abridged critique of the 2019 order of the adjudicating body while discussing the prospective problems associated with the outcome of the Panel report. Ultimately, the case note suggests viewing the national security exception under the regime from the prism of legitimacy and not just limiting its legality.

THE CASE OF RUSSIA 2019

Factual background

On the backdrop of the ongoing distressed relations[9] between Ukraine and Russia, Ukraine filed a request to formalize a World Trade Organization Panel (Panel) against the violations of the GATT regime of 1994(regime)[10] by the Russian Federation

[9] In the years prior to 2017, the international relations between Ukraine and Russia were deteriorating. This was primarily due to the annexation of Crimea albeit was not recognized by the UNSC in 2016 and the referendum of March 2014 due to which several complaints were being filed by both nations States across the different forums of international courts. This was further aggravated by the integration of the Eurasian Economic Union (EaEu) and Ukraine with the European Union and the EU-Ukraine agreement of 2014 which sought to bring the two nations together economically and politically. Subsequently, economic warfare strategies were being utilized by both the nation States to further their political interests such as tariffs on agricultural products and the imposition of tariffs at EaEu rates from the implementation of the EU-Ukraine agreement and the termination of the CIS-FTA in regards to Ukraine etc., which were being challenged for the violations of the GATT regime of 1994. Consultations were held in the latter half of 2016 in regards to Articles I and IV of the Understanding of Rules & Procedures Governing Settlement of Disputes (DSU) however failed.

[10] The articles that were complaint of by Ukraine against the Federation were articles V:2, V:3, V:4, X:1 AND X:2 of the GATT of 1994 and Protocol 1 of Russian Accession Protocol, Article 19(1) of the DSU. That is, the Federation being a WTO member prohibits another such member with which shares a border and prohibits the transit violates the first part of article V and the transit were undertaken not in an "emergency time" thus the prohibition from entering and exiting from the territory of a WTO member nation violates the second part of the Article 5.

(Federation). The Ukrainian contention[11] that the Federation had imposed tariff restrictions[12] on the transit of goods from Ukraine to other nations (third parties to the dispute) such as Kazakhstan and the Republic of Kyrgyz (which were via the Federation) violated the prevailing trading regime.[13] The Federation rather than arguing[14] on the violations of the regime took the plea of the exception of security interest and challenged the jurisdictional competency of the Panel under Article XXI(b)(iii) of the regime.

The Panel Report

The Panel was faced a two-pronged obstacle in the present case. First, it had to adjudicate on the question of jurisdiction posed by the Federation. The panel prima facie deliberated on the issue of the settlement body's power to adjudicate the concerned matter. Second, the Panel was tasked to interpret 'national security' as envisaged under Article XXI of the regime. The Panel sought to evaluate the self- judging character of the concerned article.

Jurisdictional Challenge

The Panel vis-à-vis its jurisdiction stated that it does possess the capacity to submit its report as Article XXI is within the regime[15]. The panel argued that that adjudicate function of the international tribunals including the Panel itself (as held by the International Court of Justice[16]) empowers the panel to deliberate and decide on all and any matter pertaining to the enforcement of its substantive jurisdiction.[17]

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[11] Ukraine contended that for goods destined to Kazakhstan the rail/road transit via the Federation was prohibited since 2016- which is cause of concern as, as per the Russian agreement, only the Belarus-Russian border could be used subject to conditions of on registration cards and identification. Second, a similar restriction was imposed with respect to transit to the Republic of Kyrgyz, Mongolia, Turkmenistan, Uzbekistan and Tajikistan. Second, certain goods i.e., as stated in Federation Resolution number 778 of the Russian Govt. and those goods wherein customs duties were levied as per the Common Customs tariff of the EaEu, the exception to which is still unclear were prohibited. Third, the goods that were listed under the above mention resolution could not be under veterinary surveillance when transiting via the Belarus-Russian border.

[12] There were primarily three such tariff restrictions imposed namely, the 2014 ban, the 2016 general transit ban and the 2016 product-specific transit restriction.

[13] *Supra* note 9.

[14] The contention of the Federation was that the complaint was not in consonance with Article 6(2) of DSU and the practice of such measures by the Federation was not proved by the Complainant nation.

[15] It was held that Article XXI of the regime was as per the Article I:1 and not II:2 of the DSU and Panel was formulated under article VII:2 of the DSU.

[16] WTO, *Russia- measures concerning traffic in transit* (29 April 2019) WT/DS512/R; *Questions of Jurisdiction and/or Admissibility, Nuclear Tests Case (*Australia v. France) [1974] ICJ Rep 259-260; *Case Concerning the Northern Cameroons* (Cameroon v. United Kingdom) (Preliminary objections) [1963] ICJ Rep 29-31.

[17] WTO, *Russia- measures concerning tariff in transit* (29 April 2019) WT/DS512/R,38**.**

INTERPRETING NATIONAL SECURITY UNDER THE REGIME

The Panel report sought to interpret the 'national security' exception within the regime so as to analyze the legality in regard to the invocation of the said article by the Federation. The Panel report held that "it considers" reflected in the language of the article in relation to a security interest under the exceptions to the regime is not based on the sole discretion of the nation State herein the Federation.[18] Consequently, the alleged 'security interest' had to satisfy the conditions laid down under clauses (i) to
(iii) of the concerned article.[19] The Panel further stated that "emergency in international relations" is circumscribed in its scope to armed conflict irrespective of it being latent in nature, heightened crises/tension, and common instability surrounding the area/region. It circumscribes the scope of 'emergency' by imposing a threshold. The threshold sough to check if the military and defense interest or the maintenance of public order and the law is hindered a situation of 'emergency' is created.[20] The Federation herein did not specify the 'emergency' to invoke the article. Rather the Federation argued on the existing distressed situation and tense relation between the nation States. The Panel took into account the UNGA Resolution. which stated that the relations between the nation-states were that of an armed conflict and thus qualified as an "emergency."

[18] In interpreting the article XXI, it held that that security interest would have to be read in light of the notion 'necessity', 'essential security interest', the sub-provisions of Article XXI(b). Henceforth, it states that while interpreting the 'emergency in international relations' an objective interpretation had to be undertaken and the sole discretion of nation state could not be relied upon. In this regard, Ukraine also argued that permitting the subjective determination of the 'emergency' would be violative of Article XXIII of the DSU that is the right to redressal. Further, the Panel noted that such subjectivity would hinder the very intent of establishing the 1994 regime if attaining subjectivity and predictability with the multilateral regime. It further drew interpretation from the Vienna Convention on the Law of Treaties, more especially, Article 31(3)(b) in regards to subsequent practice and held that it did not reflect any subsequent practice.

[19] WTO, *Russia- measures concerning tariff in transit* (29 April 2019) WT/DS512/7,41. The panel report explicitly stated that political or economic differences cannot be a ground to invoke the article. Moreover, the panel undertook this approach to signify the intent of the drafters of the article which aimed to strike a balance between the security interest and the abuse of such interest by nation-states by curtaining the article through the tests enumerated in sub-clauses (i) to (iii) of clause (b) of the article.

[20] *ibid.*

Based on the above rationale, the Panel stated that Article XXI the Panel implied two things. First, 'special interest' is specific to the time and second, that the nation State's discretion is herein limited in its scope to interpret 'special interest' by the principle of good faith. Thus, the articulation of restrictions has to have a nexus with the interest. The panel report held that the restrictions so imposed must be proportionate and proximate to the situation at hand to claim such "special interest". Thereby the measures that can be undertaken to safeguard such interest are based on the principle of good faith thus, since herein the relations were such that the nation-states were on the verge of war/armed conflict the Panel stated that the Federation was correct to impose the restrictions.[21]

AN EVALUATION

The first case of security exception within the regime has sought to effectively strike a balance between the national interest and multilateralism. In the past, the international court of Justice has had limited deliberation on the article due to the lack of an adjectival clause.[22] Prima facie, the Panels' report seeks to advocate the doctrine of competence- competence and clean hands in the trading regime while proposing the proximity test between 'emergency' and the restrictive tariffs being placed.

The report has and is often critiqued for the manner in which the Panel has adjudicated the case.[23] Firstly, as many have stated[24] that while the prevalent regime seeks to differentiate between exception and exemption. Such that exception usually, under the regime is tested via a two-pronged test i.e., violation of the primary breach and if passes the

[21] This is based on the application of the *de novo* standard of review and reasonable assessment of the standard of review by the Panel.

[22] *Case of Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (Merits) [1986] ICJ Rep 116; *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America) (Merits) [2003] ICJ Rep 183.

[23] Tania Voon, *Russia-Measures concerning traffic in transit*, 114 AJIL 1 96(2020); Victoria Lapa, The WTO Panel Report in Russia- Traffic in Transit: Cutting the Gordian Knot of the GATT Security exception?, Questions of International Law as of May 12, 2020, < HTTP://WWW.QIL-QDI.ORG/THE-WTO-PANEL-REPORT-IN-RUSSIA-TRAFFIC-IN-TRANSIT- CUTTING-THE-GORDIAN-KNOT-OF-THE-GATT-SECURITY-EXCEPTION/ >; Dylan Geraets, WTO issues ruling in Russia- Traffic in Transit: measures Justified or National security grounds are justiciable, Mayer Brown, <HTTPS://WWW.MAYERBROWN.COM/EN/PERSPECTIVES-EVENTS/PUBLICATIONS/2019/04/WTO-ISSUES- RULING-IN-RUSSIA-TRAFFIC-IN-TRANSIT-MEASURES-JUSTIFIED-ON-NATIONAL-SECURITY-GROUNDS-ARE-JUSTICIABLE > .

[24] *ibid.*

test is questioned on its justiciability.[25] The Panel herein took a different approach as it sought to answer the justification given by the Federation instead of deliberating on whether a breach was undertaken or not in reference to Article V of the regime. Secondly, the report showcases that the responsibility to adhere to the burden of proof can be overlooked by relying on Article XII of the DSU as it ruled in favor of the Federation on this premise.[26]

However, the report of the Panel has opened a pandora's box. The threshold of utilizing the exception for defense and maintenance of public order in a State paves out the path for a dangerous State practice. A dangerous state practice of potential abuse of political power and might. The implication of the Panel report can further lead to great economic distress. The utilization of the article as a defense mechanism towards the retaliatory measures may promote the economic hegemony of the mightier nations.[27]

Procedurally, the insertion of the 'plausibility test' and 'objective assessment' on the imposed restriction losses its value due to the non-binding character of the dispute settlement body. While the panel does have a persuasive value, the overriding effect of the appellate body of the dispute settlement body may nullify the efforts of balancing interest undertaken by the Panel in this case. Further, the implication of the Panel report has been seen in recent cases but it is yet to be tested by the Appellate body.[28]

[25] WTO, *Thailand- Customs and Fiscal Measures on Cigarettes from Philippines* (21 July 2016) WT/DS371/AB/R.

[26] In regards to the general exception of security interest, the burden of proof is placed on all the parties to the dispute. In the case, Ukraine had discharged the burden by showcasing the prima facie violations by the Federation in lieu of the primary rule of article V of the regime whereas the Federation rather than placing evidence in lieu of its defence under article XXI it sought to challenge the jurisdiction of the Panel. Thereby, despite the failure to adduce evidence the Panel favoured the Federation on the pretext of relying on Article XII of the DSU.

[27] For instance, between the US-China trade war, the security exception as perceived in the Panel Report can act as a defence to the retaliatory measures of the member nation.

[28] WTO, *Saudi Arabia- Protection of Intellectual property Rights* (21 April 2022) WT/DS567/R and W/DS567/R Add.1; WTO, *UAE- Goods, Services and Intellectual Property rights* (20 January 2022) WT/DS526/8, WTO, *Japan- Products and Technology* (29 July 2020) WT/DS590/4.

Further, as in contemporary times, the ongoing Russia-Ukraine armed conflict by virtue of the above-mentioned report gives a clean chit to the Federation to cause economic hardships to the Ukrainian economy by imposing "security interests" restrictions which can cause a spill over- domino effect for many other nation States as well thereby frustrating the very intent of the regime. The order of the dispute settlement body can be perceived to challenge the principle of non-intervention as ultimately the Panel report objectively tests the authority of the sovereign vis-à-vis the 'security interest' of the nation. The effect of the report may thus cause instability within the trading regime as it might promote nation-states like the United States to withdraw from the regime. Post the 9/11 attacks States have stressed on the importance of determining threats to national security and have propagated a regime of insisting upon self-defense which the Panel report seeks to hinder. Perceiving the report within the Indian-Chinese context (post the Galwan attack), the burden resting on the Indian government to substantiate the 'emergency in international relations' for imposing tariff bans on Chinese trade and apps becomes problematic. Thus, as argued by Prof. Jackson, the concerned article does cause asymmetry within the global economy as it allows for nation States to disguise restrictive trade practices and imposition of tariffs in the garb of 'security.'[29]

Economically as well, since the inception of the regime, the economic effect of the article has never been taken into consideration. Economists and opponents of liberalised trade have argued that the invocation of the national security article for non- economic benefits is required. Such proponents have proposed that nation-states are willing to trade off economic gain for security interests.[30] However, the justification towards the economic cost associated with the imposition of the national security restriction is unanswered. Thus, the actual effect and impact vis-à-vis the welfare of the people of the article is left untouched and thereby the legitimacy of the article remains unexplored.

[29] Chao Wang, Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to review and standard of review, 19 Chinese Journal of International Law 3, 695 (2019).
[30] Guzmann, A. *et.al.*, *International Trade Law* (3rd edn, Aspen Publications, Walter Kluwer 2009) 28-29, 31.

CONCLUSION

It is imperative to state, that case of 2019 has immensely contributed to the jurisprudence of Article XXI of the regime. The Panel has undertaken the herculean task of objectively assessing sovereignty. It has sought to circumscribe the realist intent of 'national interest' in the political actions of nation states by testing 'security interest' through review. The Panel has dealt with the legality of the article albeit its implication vis-à-vis the impact of such protectionist measure is unanswered. The (il)legitimacy of imposing such protectionist measures has not been evaluated. The article argues that while much has been deliberated on the legal implication of the article, the economic and legitimate threshold could be a sound ground to test the bona fide intent of the imposing nation State.

OPUZ TURKEY CASE ANALYSIS

-Rajdeep Bhattacharjee[1]

ABSTRACT

The European Court of Human Rights in the case of Opuz v Turkey 2009[2] ruled that Turkey violates its duty to protect women from domestic abuse on June 9, 2009, in a landmark judgment. The court also declared for the first time that gender-based violence constituted a form of discrimination under the European Convention. This case deals with the violation of Articles 2, 3, 6, 13, and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and it was ruled that women were not protected against domestic violence under Turkish domestic law[3]. This was the first instance in which a court acknowledged that a state's inability to act against domestic violence constituted a violation of the Convention.[4]

FACTS

In 1995, Nahide Opuz wed H.O., and the two moved to Diyarbakir, in southeast Turkey, their home[5]. Shortly after, H.O. started to regularly abuse Opuz and her family. H.O. attacked Opuz and her mother in 1995 and made death threats to both. Just one year later, Opuz was badly beaten by H.O., who also caused bleeding in her ear and eye. The district attorney in each of these cases brought charges. However, once Opuz and her mother withdrew their complaints

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[2] *Opuz v. Turkey*, Application no. 33401/02, Council of Europe: European Court of Human Rights, 9 June 2009, available at: HTTPS://WWW.REFWORLD.ORG/CASES,ECHR,4A2F84392.HTML [accessed 19 November 2022]

[3] Opuz and interights (intervening) v Turkey, merits and just satisfaction, App No 33401/02, [2009] ECHR 870, (2010) 50 ehrr 28, 27 BHRC 159, IHRL 3618 (ECHR 2009), 9th June 2009, Council of Europe; European Court of Human Rights [ECHR] Oxford Public International Law, HTTPS://OPIL.OUPLAW.COM/VIEW/10.1093/LAW:IHRL/3618ECHR09.CASE.1/LAW-IHRL-3618ECHR09 (last visited Nov 18, 2022)

[4] Carmelo Danisi, 'How Far Can The European Court Of Human Rights Go In The Fight Against Discrimination? Defining New Standards In Its Non-discrimination Jurisprudence' (2011) 9 International Journal of Constitutional Law

[5] See Opuz, *supra* note 4, p. 7-8.

out of concern for their safety, the local court dropped both charges[6]. Over the ensuing years, this cycle of violence, followed by the reluctance of local authorities to file charges against H.O. was repeatedly repeated, with the attacks getting increasingly brutal. H.O. continued attacking Opuz, her mother, and her sister in February 1998 with a knife, rendering each of them unconscious for a few days.

Despite these repeated attacks, the district attorney in the area chose not to press charges against H.O. due to a lack of supporting data.[7] A month later, Opuz and her mother were seriously hurt when H.O. crashed his car into them.[8] Opuz filed for divorce and asked the authorities to be put under protection after receiving frequent death threats from her spouse.[9] Criminal charges were brought by the district attorney, and H.O. was detained. Opuz and her mother again dropped their accusations in October 1998, this time out of concern for retaliation. Despite the nature of the alleged crimes, the local court found H.O. guilty and gave him a three-month prison term. Later, the punishment was just a fine.[10]

During a dispute in October 2001, H.O. attacked Opuz seven times with a knife. Soon after, Opuz's mother's counsel filed a petition with the district attorney's office, saying that Opuz and her mother had previously been forced to drop their accusations against H.O. due to his repeated threats of killing them.[11] H.O.'s threats persisted despite the court imposing a fine for the knife assault, and no additional charges were brought against him.[12]

When Opuz's mother attempted to relocate to a different town in March 2002, the violence reached a peak. When H.O. faced Opuz's mother, he shot her in the open in front of a witness. She expired right away.[13] H.O. was accused of murder, found guilty, and given a life sentence.[14]

Later, the local court reduced the punishment to 15 years in recognition of H.O.'s exemplary conduct during the trial. However, the local court discharged H.O. pending appeal.[15]

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[6] Id., p. 10-11, 13-19.
[7] Id., p. 20-21
[8] Id., p. 23
[9] Opuz, supra note 3, p. 25-28
[10] Id., p. 34-36
[11] Id., p. 37-39.
[12] d., p. 45-46
[13] Opuz, supra note 3, p. 54.
[14] Id., p. 55-57
[15] See Id., p. 57

Opuz filed a complaint with the European Court of Human Rights in 2002, claiming that three articles of the European Convention on Human Rights had been broken by the Turkish government. She first claimed that the killing of her mother and her suffering constituted violations of Articles 2,[16]—the right to life—and 3,[17]—the prohibition on torture and other cruel treatment.[18] Opuz claimed that the Turkish government breached the Convention by failing to protect her and her mother despite a pattern of physical abuse and threats to their life, even though none of the domestic abuse was carried out under state supervision.[19]

SUMMARY OF FACTS

- In 1995, Nahide Opuz wed H.O. and the two moved to Diyarbakir, in southeast Turkey. Soon after domestic violence commenced. Domestic violence started in the family of Opuz in addition to death threats and severe hitting. H.O. continued attacking Opuz, her mother, and her sister in February 1998 with a knife, rendering each of them unconscious for a few days.
- The District Attorney refused to press charges due to the lack of supporting evidence. H.O. hit Opuz's mother with his car and subsequently, Opuz filed for divorce, and criminal charges were pressed against H.O. by the District Attorney but in October 1998 the victims dropped their accusations in apprehension of retaliation.
- During a dispute in October 2001, H.O. attacked Opuz seven times with a knife. Soon after, Opuz's mother's counsel filed a petition with the district attorney's office, saying that Opuz and her mother had previously been forced to drop their accusations against H.O. due to his repeated threats of killing them
- When Opuz's mother attempted to relocate to a different town in March 2002, the violence reached a peak. When H.O. faced Opuz's mother, he shot her in the open in

[16] European Convention on Human Rights (1953), art. 2(1) ("Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.").
[17] European Convention on Human Rights (1953), art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").
[18] See Opuz, supra note 3, p. 154-156
[19] European Convention on Human Rights (1953), art. 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.").

front of a witness. She expired right away. H.O. was accused of murder, found guilty, and given a life sentence.

- Later, the local court reduced the punishment to 15 years in recognition of H.O.'s exemplary conduct during the trial. However, the local court discharged H.O. pending appeal.

ISSUES

The issues are as follows;

Ms. Opuz filed a claim at the European Court of Human Rights for a breach of:

-**Art. 2** (the right to life) as a result of her mother's death and the past and ongoing threats to her own life;

-**Art. 3** (on torture and ill-treatment); and

-**Art. 14** (non-discrimination) as a result of the failure by the State to prosecute her husband based on non-interference with family life amongst others which amounted to discrimination against her based-on gender

- Whether the applicant's husband committed torture and/or ill-treatment against the applicant
- Whether the State took sufficient action to protect the applicant

RULES

NATIONAL LAW

- Criminal Code: Art. 188
- Criminal Code: Art. 199(1)
- Criminal Code: Art. 449
- Criminal Code: Art. 456(1), (2) & (4),
- Criminal Code: Art. 457

- Criminal Code: Art. 460
- Family Protection Act: Ss. 1&2

INTERNATIONAL LAW

- European Convention on Human Rights: Art. 2 (Right to Life);
  European Convention on Human Rights: Art. 3 (Right not to be subjected to torture or cruel, inhumane, or degrading treatment);
- European Convention on Human Rights: Art. 14 (Right to non-discrimination).

ANALYSIS

This case consisted of a failed assassination attempt, death threats, harassment, and ongoing physical assault was among the alleged acts of violence against the applicant and her mother (whom he later shot and killed). The relevant state authorities were repeatedly informed of this; however, after the two women withdrew their complaints, the prosecution of H.O. was dropped. Following his release and conviction appeal, H.O. harassed the applicant again, prompting her to file a complaint with the European Court of Human Rights alleging a violation of the conventions[20].

When examining the claims, the court went beyond what precedent in cases such as Kontrová v. Slovakia[21] had established.

This is because it made preventing domestic violence against women a requirement for not violating the Convention. The Court made its decision based on the criteria established in Kontrová[22] and the Osman[23] decision. Article 2 was said to impose a constructive obligation on states to protect private life, but not in a burdensome way. Authorities have a duty to act when there is a genuine and immediate threat to life and acting could save lives. It was determined whether Turkey had fulfilled its obligation by examining the circumstances

[20] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2, 3 and 14
[21] *Kontrová v Slovakia*, App. No. 7510/04 (ECHR, 31 May 2007)
[22] *Kontrová v Slovakia*, App. No. 7510/04 (ECHR, 31 May 2007)
[23] *Osman v United Kingdom*, ECHR 1998 — VIII 3124

surrounding the Opuz case. The court then cited Amnesty International, which stated that domestic violence is still tolerated in police stations and that some officers serve as arbitrators, support the abuser, or advise the victim to drop their case, demonstrating that domestic violence is a widespread problem in Turkey[24]. Domestic violence cases, however, could not be prosecuted without a victim filing charges unless the assault caused ten days of illness and inability to work. This was deemed unjust by the court because it would prevent victims of domestic violence from filing claims.[25] In light of the applicant's history with H.O. and the fact that she had informed local authorities about the ongoing violence, the Court held that authorities should have taken "special measures commensurate with the gravity of the situation." The Court ruled that the Turkish government violated Article 2 in the case of the applicant's mother's death because the authorities failed to act despite receiving information that should have prompted them to act against H.O.

Regarding Article 3, the applicant claimed a violation occurred as a result of H.O.'s abusive behaviour and the local authorities' subsequent inaction. The Court then outlined the guidelines to be followed in Article 3 cases and determined that the woman's treatment met the seriousness threshold required to support a claim under Article 3[26]. The abuse history was mentioned, as well as "the precarious position of women in south-eastern Turkey"[27]. The Court found that Turkey violated Article 3 by failing to provide adequate protection for the applicant, even though local authorities had not interfered significantly with H.O.'s treatment, including medical examinations and the initiation of criminal proceedings.

The court was then told that Turkey had violated Article 14 by failing to adequately protect the rights of the applicant and her mother under Articles 2 and 3. Discrimination is defined in court precedents[28] as "treating differently, without objective and reasonable justification, individuals in comparable circumstances"[29]. A critical analysis of human rights norms in various

[24] 'Turkey: Women Confronting Family Violence' (*Amnesty.org*, 2004) accessed 18 November, 2022

[25] Analysis of the ECHR judgment in Opuz v Turkey Law Teacher, HTTPS://WWW.LAWTEACHER.NET/FREE-LAW-ESSAYS/HUMAN-RIGHTS/ANALYSIS-OF-THE-ECHR-JUDGMENT-IN-OPUZ-V-TURKEY-6831.PHP#_FTN10 (last visited Nov 18, 2022)

[26] Costello-Roberts v United Kingdom, App. No. 13134/87 (ECHR, 25 March 1993), 30

[27] Opuz (n 1) 160

[28] *D.H. and Others v Czech Republic*, App. No. 57325/00 (ECHR, 13 November 2007)

[29] *Opuz* (n 1) 183

jurisdictions was conducted to determine how they protect women from domestic violence, citing the Convention on the Elimination of All Forms of Discrimination Against Women, the Belém do Pará Convention, and statements by the Inter-American Commission on Human Rights and the United Nations Commission on Human Rights.[30] Based on this and the European Convention, the Court recognized that "the State's failure to protect women from domestic violence violates their right to equal protection under the law, and this failure does not have to be intentional."[31] In light of this, the Court considered whether victims of domestic violence in southeast Turkey received equal legal protection. The court discovered evidence of discrimination against women, including an Amnesty International report that included testimonies from victims of domestic violence, statistics indicating how common it is in Turkey, and proof that police failed to investigate allegations of abuse, causing significant delays in legal proceedings.[32] The Turkish government was found to have violated Article 1 of the Constitution based on the facts of the case and the general inability of local authorities to protect women from domestic violence.[33]

CONCLUSION

Given the aforementioned factors, this verdict can be seen as ground-breaking in terms of the state's obligation and international law on violence against women.[34] It acknowledged that in situations where there is substantial violence, States must act pro-actively and file criminal charges against those who commit such violence.[35] More importantly, the Court noted how inequality affects violence against women and how that interferes with the exercise of other rights. This was accomplished using non-European resources, like General Recommendation No. 19 of the CEDAW Committee[36], which focused on gender-based violence.[37] As a result, it

[30] *ibid* 193-96
[31] *ibid* 191
[32] *ibid* 192
[33] *ibid* 198-202
[34] Daniela Simona Tatu, *Violence Against Women: With An Overview Of The European Court Of Human Rights' Case Law* (Key Editore 2019), 81.
[35] Patricia Londono, 'Developing Human Rights Principles In Cases Of Gender-Based Violence: Opuz V Turkey In The European Court Of Human Rights' (2009) 9 Human Rights Law Review.
[36] Nergihan Celen, 'New New Protocol Aims To Protect Targets Of Domestic Violence' (Todays Zaman, 2009) accessed 18 November 2022
[37] Filip Dorssemont, Klaus Lörcher and Isabelle Schömann, *The European Convention On Human Rights And The Employment Relation* (Bloomsbury Publishing 2014), 373.

is hoped that the judgment "could make a difference for hundreds of thousands of women victims of domestic violence in Europe."[38]

[38] Maud de Boer-Buquicchio, 'Speech At Council Of Europe Conference Of Ministers Of Justice' (*Council of Europe*, 2019) accessed 18 November 2022.

UNDERSTANDING EXTRATERRITORIALITY OF ESPIONAGE ACT: JULIAN ASSANGE CASE NOTE

- ***Sasmit Powale*** [1]

ABSTRACT

The Espionage Act of 1917 gives power to the U.S. Federal Government to punish anyone who participates in any act such as speaking, transmitting, obtaining, or publishing any material that the U.S. Government deems to be of paramount secrecy and therefore whose unauthorized "leak", would harm the nation's interests or help a foreign enemy. Recently, the people charged under the Act are Edward Snowden, a former NSA (National Security Agency) Analyst who blew a whistle on the US Government's massive global surveillance project, and the 45th President of the United States, Donald J. Trump. However, the act took a dangerous turn in 2019 when the US Government charged Jullian Assange, the Australian editor of the internet whistleblowing website Wikileaks. Jullian Assange is neither a US citizen nor his operations are based out of US territory. Assange is an independent crowd-sourced publisher of government secrets and documents which help reveal the backchannel dealings of mega-corporations, politicians, and military operations. The leaks published by the site are used by journalists worldwide, and especially by post-colonial nations, to piece together a narrative of power that threatens to take away the fundamental rights of ordinary people. The essay takes a look at the constitutional validity and the implications of such a wide extra-territorial jurisdiction which dares to include in its ambit any person who is found accessing or in possession of any material that the U.S. government says is harmful to its interest.

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INTRODUCTION

On April 11th, 2019 Julian Paul Assange was arrested in London, United Kingdom after Ecuador, the country providing him political asylum in its embassy, revoked its permission after seven long years.[2] As Julian Assange was produced before the Westminster's magistrate's court to answer a charge of 'jumping bail'[3] The United States of America unsealed an indictment a federal grand jury for the Eastern District of Virginia had issued against Assange in 2018.

Following his arrest, on May 23rd, 2019[4], a new set of 17 new charges were brought against Assange for violating the espionage act of 1917 by his action of engaging in a wide-ranging effort to obtain and disseminate classified information about America's Iraq and Afghanistan wars.

Julian Paul Assange, an Australian citizen, is the founder and public face of "Wikileaks," a website he created with others as an "intelligence agency of the people". It has been instrumental in revealing the super-secret inner workings, corruption, and war crimes of powerful governments. These back-channel dealings that take place behind the bureaucratic curtain are also known as the 'deep state.' On April 5, 2010, Wikileaks released footage of air-to-ground attacks conducted by a team of two U.S. AH-64 Apache helicopters firing on a group of men and killing several of them. The footage also carried the audio of the pilots laughing at the casualties.[5] It was later discovered that four of the many casualties of this strike were two Reuters journalists and two children, a girl of age four and one boy of age eight.[6]

[2] Addley, Esther, "*The seven-year itch: Assange's awkward stay in the embassy*." THE GUARDIAN, 11 April 2019, HTTPS://WWW.THEGUARDIAN.COM/MEDIA/2019/APR/11/HOW-ECUADOR-LOST-PATIENCE-WITH-HOUSEGUEST-JULIAN-ASSANGE .

[3] "*Julian Assange: Wikileaks co-founder arrested in London." BBC*, 12 April 2019, HTTPS://WWW.BBC.COM/NEWS/UK-47891737. Accessed 15 November 2022.

[4] *WikiLeaks Founder Julian Assange Charged in 18-Count Superseding Indictment*. (2019, May 23). DEPARTMENT OF JUSTICE. Retrieved November 15, 2022, from HTTPS://WWW.JUSTICE.GOV/OPA/PR/WIKILEAKS-FOUNDER-JULIAN-ASSANGE-CHARGED-18-COUNT-SUPERSEDING-INDICTMENT

[5] HTTPS://WWW.THEGUARDIAN.COM/WORLD/2010/APR/05/WIKILEAKS-US-ARMY-IRAQ-ATTACK.

In April 2011 Wikileaks along with the New York Times, NPR and The Guardian and other independent organizations began publishing the Guantanamo Files. Guantanamo, or as colloquially known as Gitmo, is the U.S. military detention center at Guantanamo Bay, Cuba which was created in the wake of the 9/11 terrorist attacks to give the US unprecedented power in investigating the attack as well as avoiding future acts of terrorism on the American soil. This detention center has generated intense debate about human rights, international conventions, and justice and is dubbed as a legal blackhole for its opaqueness concerning the procedures used to bring, detain and interrogate detainees. The Gitmo files revealed nearly 100 detainees at Gitmo were diagnosed with depressive or psychotic illnesses and they tortured many foreign nationals. The documents also revealed that some of the prison's youngest detainees included 14-year-old boy Naqib Ullah who suffered from fragile mental and physical conditions.

Over the course of the next decade, Wikileaks published various classified information, emails, and diplomatic cables such as the ones exposing surveillance by the Central Investigation Agency, National Security Agency, and private corporations. Diplomatic cables from Saudi Arabia, emails from the government of Turkey and Syria as well as corruption in Turkey. The emails detailing the corruption of the Tunisian government were instrumental in the Arab Spring.[7]

The United States responded by arresting and charging Chelsea Manning, the 22-year-old American Army Intelligence analyst who leaked the Afghan and Iraq war logs, for espionage, and later Julian Assange.

The importance of the publications by Wikileaks can be gauged by going through the

[6] Alexander, David, et al. "*Leaked U.S. video shows deaths of Reuters' Iraqi staffers*." REUTERS, 5 April 2010, HTTPS://WWW.REUTERS.COM/ARTICLE/IDUSTRE6344FW20100406 .

[7] Walker, Peter, "*Amnesty International hails WikiLeaks and Guardian as Arab spring 'catalysts*.'" THE GUARDIAN, 12 May 2011, HTTPS://WWW.THEGUARDIAN.COM/WORLD/2011/MAY/13/AMNESTY-INTERNATIONAL-WIKILEAKS-ARAB-SPRING .

recognition it has received for its journalistic work. Wikileaks has been awarded The Economist's New Media Award in 2008 at the index censorship awards, and Amnesty International's UK Media Award in 2009. Julian Assange received the 2010 Sam Adams Award for integrity in Intelligence for releasing secret US Military reports on the Iraq and Afghan wars. Was named reader's choice for TIME's Person of the Year in 2010 and also has been nominated for the Nobel Peace Prize in 2021. Yochai Benkler, the Bekerman professor of entrepreneurial legal studies at Harvard law school praised Wikileaks for serving a particular journalistic function when he testified before the court in the trial of Chelsea Manning. The information published by Wikileaks is used by citizens and journalists worldwide and especially by the people of post-colonial nations to piece together a narrative of power and abuse which threatens to take away the fundamental rights of the ordinary people.

For the reasons aforementioned the arrest of Julian Assange, as a publisher of classified information, has ignited a debate over whether pursuing Assange for publishing classified information could lead to other cases against journalists who receive government secrets, publishers who publish them, and readers who obtain them when they are not citizens of the United States of America. Such a prosecution of a foreign national outside the territory of a nation under the said nation's domestic law has a chilling effect on freedom of speech, right to information, and journalism.

This essay explores the extraterritorial jurisdiction of the USA concerning the Espionage Act, its validity, counter-arguments, and its ramifications in four parts. Part I takes a look at the indictment and law. The board and tedious wording of the act offers immense insight into the minds of the lawmakers. Part II looks at the laws, logic, and philosophy of extraterritorial criminal jurisdiction and its proponents and validity concerning the impugned act. Part III makes a strong argument against such use of extraterritorial jurisdiction generally and specifically relating to the case of Julian Assange a foreign journalist. Finally, in Part IV, the essay captures the broad ramifications of such action by the United States of America on international law, journalists, and the free press

THE LAW

The Espionage Act was brought in June 1917 shortly after the United States entered World War I to prohibit interference with military operations or recruitment, prevent insubordination in the military, and prevent the support of United States enemies during wartime.

The provisions of the act which pertain to the discussion of this essay are section 1 (a) which helps identify the person fit to be prosecuted under this act, "to obtain information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or the advantage of any foreign nation…" It also provides a list of documents that are considered important for national security. Section 1 (b) criminalizes the acts of making copies, obtaining originals, or copies of the aforementioned documents which are in any way connected to national defense. Section 2 and 4 criminalizes the conspiracy of more than one person engaged in any acts of espionage as defined in the aforementioned provisions.

The act was able to successfully prosecute many including Eugene V. Debs, a four-time presidential candidate from the socialist party[8]. However, since the end of World War two and especially after the Vietnam War, the act's provisions have come under criticism especially after Daniel Ellsberg and Anthony Russo were charged with a felony under the Espionage Act for publishing classified documents which later began to be known as Pentagon Papers[9]. The Pentagon papers (officially titled Report of the Office of the Secretary of Defense Vietnam task for, exposed the secret and enlarged scope of its Vietnam war which included but was not limited to, coastal raids of North Vietnam and

[8] *'Harding Frees Debs and 23 Others Held for War Violations: Socialist Leader Among Those Pardoned by President on Eve of Christmas'*, NEW YORK TIMES, (1921) December 24 HTTPS://WWW.NYTIMES.COM/1921/12/24/ARCHIVES/HARDING-FREES-DEBS-AND-23-OTHERS-HELD- FOR-WAR-VIOLATIONS-SOCIALIST.HTML.

[9] *'The Nixon Tapes: 1971-1972'*, NATIONAL SECURITY ARCHIVE, THE GEORGE WASHINGTON UNIVERSITY, accessed on 15 February 2023, HTTP://WWW.GWU.EDU/~NSARCHIV/NSAEBB/NSAEBB48/NIXON.HTML.

lying to the public and the Congress about the objectives of war. Ellsberg and Russo passed on the report to the media and claimed defense of public interest, the United States swiftly moved into action and asked for an injunction against the press from releasing the papers. While the Supreme Court in New York Times Co. V. United States denied granting a prior injunction against the publishing of the papers, they all concurred that if the action was brought under the Espionage Act they would have ruled in favor of the government. Ellsberg and Russo were not acquitted of violating the Espionage Act. However, they were freed due to a mistrial based on irregularities in the government's case.[10]

This case invoked a discussion around the law concerning the vagueness and overbreadth of the legislation. The Act criminalizes a range of activities related to espionage and national security, including the disclosure of information that could harm U.S. national security. However, the Act does not clearly define what constitutes "national security" or what kinds of information may be considered harmful. This lack of clarity leads to the Act being applied in an overly broad or arbitrary manner[11].

But despite such criticisms, the question comes: what is the standing of an act that dares prosecute a foreign national residing outside the territory of the United States?

EXTRA TERRITORIALITY: LOGIC AND LAWS

The terms 'extraterritoriality' and 'extraterritorial jurisdiction' refer to the competence of a State to make, apply and enforce rules of conduct in respect of persons, property, or events beyond its territory. Such competence may be exercised by way of prescription, adjudication, or enforcement[12].

[10] *"New York Times Co. v. United States,"* Wikipedia contributors, Wikipedia, The Free Encyclopedia, , HTTPS://EN.WIKIPEDIA.ORG/WIKI/NEW_YORK_TIMES_CO._V._UNITED_STATES.

[11] *"Amend Espionage Act: Public-interest Defenses Must Be Allowed Whistleblowers."* PITTSBURGH POST-GAZETTE (May 23, 2019), HTTPS://WWW.POST-GAZETTE.COM/OPINION/EDITORIALS/2019/05/23/AMEND-ESPIONAGE-ACT-PUBLIC-INTEREST-DEFENSES-MUST-BE-ALLOWED-WHISTLEBLOWERS/STORIES/201905230044.

While prima facie prosecuting a foreign national under domestic laws sounds blatant violation of the territorial integrity of sovereign nations and human rights, extraterritoriality is a well-recognized principle of international law.

Under the Indian Penal Code 1860, sections 3 and 4 deal with its extraterritorial jurisdiction bringing within its ambit crimes committed on foreign soil by citizens of the nations or foreigners. Apart from the Indian Penal Code, the Information and Technology Act, of 2000, the Unlawful Activities (Prevention) Act, of 1967, the Prevention of Money Laundering Act, of 2002, the Foreign Contribution (Regulation) Act, of 2010 also make provisions for the prosecution of foreign entities. Such laws draw their strength from the concept of the protective principle.

The concept of the protective principle has its roots in the principle of jurisdiction, which is a core concept in international law. While jurisdiction refers to a state's legal authority to govern persons, events, and things within a certain geographic area, the protective principle is a concept within a jurisdiction that allows a state to exercise its legal authority over a person or entity that has committed a criminal offense outside of the state's territory but that affects the state's interests or security. The state's legal authority in this case is based on the need to protect its interests or security, rather than on the traditional idea of territoriality.

Laws such as the United Kingdom Bribery Act, 2010, and Canada Corruption of Foreign Public Official Act, 1999, also make use of this principle.

The origin of the protective principle can be traced back to ancient times; modern examples of it are to be found in the early 19th century when in 1837 the United States government seized and destroyed a British ship, the Caroline, that was being used by Canadian rebels

[12] Michael Bothe, *Extraterritoriality*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (Last updated May 2012), HTTPS://OPIL.OUPLAW.COM/VIEW/10.1093/LAW:EPIL/9780199231690/LAW-9780199231690-E1040.

to launch attacks against British forces. The British government protested the action as a violation of its sovereignty, but the United States claimed the right to use the protective principle to defend itself against attacks by Canadian rebels.[13]

The protective principle was also applied in the trial of Adolf Eichmann, a high-ranking Nazi Official who was responsible for organizing the deportation of Jews to concentration camps during World War II. He was captured from Argentina and tried in Israel (a country that did not even exist when the alleged crimes took place)[14].

The concept of protective principle has been successfully used and defended in various cases in the United States such as United States v. Yunis (D.D.C. 1991) and United States v. Alvarez-Machain (1992) in which the US Supreme Court allowed the extradition of a Mexican doctor who was accused of involvement in the kidnap and murder of a US DEA agent. The doctor was abducted by US officials from Mexico and brought to the US for trial, despite objections from Mexico that the abduction was illegal.

However, the protective principle has not yet been applied to The Espionage Act and Julian Assange's case shall be the first to experiment with it. Therefore, protective principle is a well-established tenet of international law that allows nation-states to prosecute non- citizens committing crimes outside their territorial jurisdiction which threaten the security of the nations in question. However, this principle can be subjected to tests before it is allowed to be made applicable.

[13] "*Caroline affair*," WIKIPEDIA, last modified August 10, 2021, HTTPS://EN.WIKIPEDIA.ORG/WIKI/CAROLINE_AFFAIR

[14] Treves, Vanni E., "*Jurisdictional Aspects of the Eichmann Case*" HTTPS://CORE.AC.UK/DOWNLOAD/PDF/217208455.PDF

DEFENCES AGAINST EXTRA-TERRITORIAL JURISDICTION

The extraterritorial component of the Espionage Act will have to pass the following tests to apply to Jullian Assange.

Test of Necessity

The exercise of jurisdiction under the protective principle must be necessary to protect the state's national security or interests. This means that the state must be able to demonstrate that there is no other reasonable or effective way to protect its interests. Since thestrength of the act are that it is broadly worded and doesn't define the term national interest, the possibility of leaked papers having jeopardized the many sources and operations of the United States may be sufficient to qualify for this test.[15]

Test of Proportionality[16]

The exercise of jurisdiction must be proportional to the harm or threat being addressed. This means that the state must use the minimum amount of jurisdiction necessary to achieve its objective.

Test of Non-intervention

While the Australian Government has politely asked the United States to stop pursuing Assange, the United Kingdom has failed to show a keen interest in protecting the freedoms of the accused.[17]

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[15] Von Bernstorff, J. (2018), *Necessity and Proportionality in International Law*, In THE CAMBRIDGE HANDBOOK OF THE JUST WAR (PP. 259-273), CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, HTTPS://DOI.ORG/10.1017/9781316340978.018 (last accessed on February 16, 2023)

[16] *ibid*

[17] *Australian prime minister urges US government to drop Julian Assange case*, THE GUARDIAN (Nov. 30, 2022), HTTPS://WWW.THEGUARDIAN.COM/MEDIA/2022/NOV/30/AUSTRALIAN-PRIME-MINISTER-ANTHONY-ALBANESE-US-GOVERNMENT-JULIAN-ASSANGE-WIKILEAKS

Test of Due process

The exercise of jurisdiction must comply with the principles of due process and fair trial. This means that the accused must have the right to a fair trial, with legal representation and the opportunity to present a defense.

Assange could argue that the extraterritorial application of the Espionage Act violates principles of international law, such as the principle of territoriality or the doctrine of non- intervention, but at this point, the essay can only speculate. Since the 'Journalism' or 'Public interest' defense is not applicable under this act, it was only a policy of the United States not to prosecute journalists for publishing classified information in the public interest and not a limitation of law.[18] Moreover, the U.S. Government has labeled Wikileaks at best a publisher (not a journalist) and at best a terrorist.

RAMIFICATIONS AND CONCLUSION

As Mark Zaid points out, the indictment of Julian Assange under the Espionage Act is a slippery slope[19]. Since the act does not distinguish between a spy, a journalist, and a common man, anyone in any corner of the world can be potentially hauled up for prosecution under this piece of legislation and national boundaries are not a protection. Since this law makes even the act of possessing such information critical to U.S. national defense regardless of the medium a crime, a person going on the internet and downloading a piece of information relating to the United States defense or possessing a newspaper that has published such information liable to be charged for espionage under this act.

Such a wide scope coupled with near infinite jurisdiction is a recipe for disaster of freedom

[18] Zaid Mark S., TWITTER, HTTPS://MOBILE.TWITTER.COM/MARKSZAIDESQ/STATUS/1131682904713699329

[19] *ibid*

of the press. Various news media publishers have come out in support of Assange and against his prosecution under the act for they can foresee the dangers if this trial goes through and the precedent it shall set.[20]

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