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The Iranian Journal of International and Comparative Law (IJICL) is a bi-annual, open access, English language and double-blind peer-reviewed law journal. IJICL explores all issues at the forefront of *international and comparative law*, including International Law of Armed Conflicts, International Human Rights Law, International Criminal Law and criminology, International Economic Law, International Trade Law, international Treaty Law, Law of International Organizations, International Intellectual Property Law, International Dispute Resolutions, International Law of the Sea, International Aerospace Law, International Energy Law, International Environmental Law, International Labor Law, The law of state responsibility, Private International Law, Philosophy of International Law, Islamic International Law, and Comparative Studies of Legal Issues in Different Legal systems. The journal also intends to cover diverse Iranian legal issues with international aspects, ranging from the laws, regulations and legal procedures with international dimensions, to judicial rulings of the Islamic Republic of Iran; and to critique the works of international law authors in all issues of the journal. Although Iran-related topics are a priority, the journal welcomes any articles on a variety of topics in international law or comparative law from around the world.

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Letter to the Editor

The *Iranian Journal of International and Comparative Law (IJICL)* is committed to fostering scholarly dialogue on the most pressing issues in international and comparative law. In this spirit, we are pleased to feature an insightful exchange between Professor Abdulmalik M. Altamimi of Alfaisal University, Kingdom of Saudi Arabia, and Professor Mostafa Fazaeli, Editor-in-Chief of the *IJICL*. This correspondence addresses the role of cultural and civilizational perspectives in shaping international law, a topic of profound relevance to our journal's mission.

We extend our gratitude to Professor Altamimi for his thoughtful critique and to Professor Fazaeli for his considered response. Such exchanges exemplify the kind of rigorous and respectful discourse that enriches the field of international law. We encourage our readers to engage with these ideas and contribute to this vital conversation.

Below, we present the correspondence in its entirety.

Letter from Professor Abdulmalik M. Altamimi

Dear Editors of the IJICL,

Thank you for sharing two copies of your new journal on international and comparative law. I read the announcement with great interest, particularly the emphasis on the role of international legal language in fostering interaction, empathy, and integration among societies. Undoubtedly, this goal can be advanced by highlighting the civilizational legal contributions of Iranian history as part of Islamic civilization.

However, I wish to express a concern regarding the journal's first two stated goals: (1) reflecting the Iranian perspective of international law, and (2) reconsidering the Iranian-Islamic legal culture's role in the evolution of international law. While these objectives are commendable, they risk being perceived as reflecting local politics or religious interpretations, which may conflict with the universal and secular nature of international law. In my review of Khalid Bahsir's book on *Islamic International Law* (attached with full footnotes), I argued that the language of international law today is—and should remain—apolitical and secular. Promoting these features is essential to maintaining its universal applicability.

I recognize that, as a journal based in the Middle East, these goals may serve an affiliation purpose, such as securing institutional approval. Nevertheless, it is crucial to remain mindful of the broader purpose of international law, as articulated in Mary O'Connell's *The Power and Purpose of International Law*, a work inspired by her mentor, Professor Louis Henkin. Western scholars, whether traditional or contemporary, religious or secular, are not immune to bias. Examples include their often-flawed analyses of the 2003 Iraq invasion, the Palestine-Israel conflict, and the global arms trade. For Eastern scholars to gain acceptance and support within the international research community, it is imperative to articulate their views in a manner that aligns with the apolitical and secular framework of international law. In this regard, the works of scholars such as Christopher Weeramantry and Onuma Yasuaki—particularly his *International Law in a Transcivilizational World*, which draws on Edward Said's *Orientalism*—offer valuable guidance.

Thank you once again for sharing your work and for your contributions to the field.
Sincerely yours,

Abdulmalik M. Altamimi
Professor of Law, Alfaisal University
Kingdom of Saudi Arabia

Response from Professor Mostafa Fazaeli, Editor-in-Chief

Dear Professor Altamimi,
Thank you for your thoughtful letter and for engaging with the mission and vision of the *IJICL*. I apologize for the delay in my response and appreciate your patience.

I wholeheartedly agree that the language of international law must remain free from bias toward any particular culture or civilization. However, it is equally important to recognize that this universal language—often described as secular and apolitical—is itself the product of a confluence of diverse cultural and civilizational traditions. While some may argue that international law remains predominantly influenced by Western paradigms, its evolution toward true universality requires the inclusion of perspectives from all significant legal traditions.

The inclusion of representatives from various civilizations and geographical regions in international legal and judicial bodies underscores the fact that the intellectual frameworks of international lawyers are inevitably shaped by their cultural and civilizational backgrounds. These frameworks, in turn, influence their interpretation and application of international legal principles. By publishing a journal dedicated to international and comparative law, we aim to provide a platform for these diverse voices to contribute to the development of a more inclusive and universal legal language.

When we speak of "reflecting the Iranian perspective of international law," we do not seek to advance a parochial or exclusionary vision. Similarly, "reconsidering the Iranian-Islamic legal culture's role in the evolution of international law" is not an attempt to introduce an Islamic international law. Rather, these goals are intended to explore the interplay between

these perspectives and the broader framework of international law, enriching our understanding of its historical and cultural dimensions.

Your observations are invaluable, and I deeply appreciate your constructive critique. I hope we will have the privilege of publishing your work in the *IJICL* in the future. Let me reaffirm that while the *IJICL* is committed to scientific impartiality, it will never remain indifferent to the pursuit of justice and equity.

Sincerely yours,
Mostafa Fazaeli
Editor-in-Chief, *Iranian Journal of International and Comparative Law (IJICL)*

Closing Note from the Editor-in-Chief

We are profoundly grateful to Professor Altamimi for initiating this dialogue and for his incisive critique. Exchanges such as this are essential to the intellectual vitality of our journal and the field of international law as a whole. They remind us of the importance of balancing cultural and civilizational perspectives with the universal aspirations of international law.

We invite our readers to reflect on these ideas and to contribute their own perspectives to this ongoing and similar conversations. The *IJICL* remains committed to providing a platform for rigorous, inclusive, and transformative discourse on international and comparative law.

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The Palestinian People's Right to Armed Resistance from the Perspective of International Law

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ABSTRACT

The occupation of the Palestinian Territory for over seven decades encompasses historical, political, and legal dimensions, intertwined with issues of peace and security. At its core, this conflict arises from the denial of a nation's right to self-determination and the establishment of an independent state. This article not only recounts pertinent events but also analyzes the central issue of self-determination. By affirming this right, the article explores the right to resist and combat the occupying forces, examining the interplay between self-determination and the right to resistance. Additionally, it addresses the obligations of other states concerning the occupied nation and the occupying power, adhering closely to international legal standards and citing relevant sources. The recent tragic events and the dire circumstances faced by the people of Gaza, including the loss of nearly 40,000 innocent lives, underscore the significance of this research. It is evident that violations of the Palestinian people's right to self-determination are the primary causes of this prolonged crisis. The struggle and resistance of the Palestinian people, including armed resistance, are framed as the only viable solution. Both self-determination and the right to resist, including armed struggle, possess international legal legitimacy. Other states are obligated to support the Palestinian people and must refrain from legitimizing the occupation or facilitating its continuation. The support of the Islamic Republic of Iran for the Palestinian cause can be understood within this context of international law.

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Introduction

On October 7, 2023, the military wing of the Islamic Resistance Movement (Hamas) conducted a surprise operation in the Gaza Envelope, resulting in the capture of numerous Israelis and the death of several individuals during the conflict. This operation was met with widespread condemnation from Western nations and media, while public opinion in Arab and Islamic countries, as well as significant portions of the global community, regarded it more favorably. Initially, some sympathy towards the Israeli side emerged in media coverage and governmental positions due to civilian casualties. However, the subsequent severe military response from the Israeli regime against civilian infrastructure and residents of Gaza engendered a broader wave of sympathy and support for the Palestinian cause, particularly among civil society and media groups in Israel's traditional supporter regions, such as Western Europe and North America.

As of December 2024, the death toll in Gaza has tragically reached approximately 46,000, predominantly comprised of women and children.[1] Thousands more have been injured, displaced, and rendered homeless, facing severe shortages of food and medical supplies.[2] The scale of bombings and targeted killings of Palestinians in Gaza has prompted the South African government to invoke Israel's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. On December 29, 2023, South Africa initiated proceedings against Israel before the International Court of Justice (ICJ), alleging violations of the Genocide Convention concerning Palestinians in the Gaza Strip,[3] and sought provisional measures to address the situation.

This article aims to address several critical questions: Do the Palestinian movements, particularly Hamas, possess the right to armed resistance and military action against the Israeli regime as the occupying power? What is the legal framework governing this right under International Humanitarian Law? What obligations do other states have toward the Palestinian people and their liberation movements? Furthermore, what responsibilities do these states bear

1 Israel-Gaza war in maps and charts: Live tracker, retrieved from https://www.aljazeera.com/news/longform/2023/10/9/israel-hamas-war-in-maps-and-charts-live-tracker, last accessed on December 28, 2024.

2 Imminent famine in northern Gaza is 'entirely man-made disaster, retrieved from https://news.un.org/en/story/2024/03/1147656, last accessed on May 22, 2024; see also Israel's war on Gaza live: 'Catastrophe, nightmare – all these and worse, available at https://www.aljazeera.com/news/liveblog/2024/5/21/israels-war-on-gaza-live-40-of-gaza-population-displaced-in-two-weeks, last accessed on May 22, 2024.

3 Reports of the International Court of Justice, Retrieved from https://www.icj-cij.org/sites/default/files/case-related/192/192app-01-00-en.pdf#page=72., last accessed on December 28, 2024.

regarding the mass killing of Palestinian civilians, the destruction of homes, hospitals, and infrastructure in Gaza, and the repression of UNRWA[1] personnel under international law?

1. The Palestinian People's Right to Armed Resistance in Light of the Right to Self-Determination

For over seventy years, the Palestinian people have been denied their fundamental right to self-determination and the establishment of an independent state. In contrast, during the 1960s and 1970s, following the establishment of the United Nations, numerous states in Africa, Asia, and other regions liberated themselves from colonial rule or foreign occupation, thereby forming independent political systems. The Palestinian nation, however, remains deprived of its inherent rights, enduring the consequences of occupation, which has resulted in millions of displaced individuals, widespread casualties, and significant loss of homes and agricultural lands.

The right to self-determination is a recognized and valid principle under international law. This right is enshrined in Articles 1 and 55 of the United Nations Charter, as well as in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Additionally, several United Nations General Assembly resolutions affirm the principle of self-determination for peoples, notably Resolution 2526 (1970).

In its 1974 definition of aggression, the UNGA clarified in Article 7 of Resolution 3314 that anti-colonial struggles should not be classified as acts of aggression. This resolution explicitly states that "nothing in this Definition" shall "in any way prejudice the right to self-determination, freedom, and independence, as derived from the Charter, of peoples forcibly deprived of that right." The resolution further references the 1970 Declaration on Friendly Relations, emphasizing the rights of peoples under colonial and racist regimes to struggle for their liberation and to seek support in accordance with the principles of the Charter.[2]

The General Assembly has consistently recognized the rights of the Palestinian people through various resolutions, including 2535 (1969), 2672 (1970), 2792 (1971), and 2963 (1972). In Resolution 3337 (1974), the Assembly granted observer status to the Palestine Liberation Organization (PLO). The subsequent recognition of Palestine as a non-member observer state in 2012, and the recent resolution passed on May 10, 2024, affirming full membership for Palestine in the United Nations, exemplify ongoing efforts to recognize Palestinian statehood. However, the United States has impeded these developments through vetoes and opposition in the Security Council, countering the prevailing global consensus.

The discourse surrounding the right to self-determination extends beyond the General Assembly's resolutions; it is a fundamental principle of contemporary international law.[3] Scholars contend that the principle of self-determination is both a customary and conventional rule of international law, with Professor Antonio Cassese asserting that it constitutes a general

1 United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)

2 Quigley, *The Case for Palestine: An International Law Perspective* (2005) 194.

3 Case Concerning East Timor, Reports 1995, at 102 (Para. 29).

principle of law.[1] This perspective grants additional weight to the principle, acknowledging its inherent validity beyond governmental will.

While the principle of self-determination implies independence from foreign control, its application to internal self-determination—particularly concerning separatist groups—remains contentious. Cassese delineates the principle's firm establishment in international law across three contexts:[2]

1. As a measure against colonialism,
2. As a deterrent to military occupation,
3. As a means for all racial groups to attain governmental participation.

In these contexts, the right to self-determination encompasses specific rights and obligations:

A. A. The right to self-determination is a collective right that applies universally to all states, with every member of the international community bearing responsibility for its protection, reflecting its *erga omnes* characteristic.
B. B. The rights and obligations related to the conduct of belligerents during wartime apply equally to these peoples, ensuring adherence to protective rules and duties in times of conflict.
C. C. Liberation movements, representing these peoples, possess both the right and obligation to honor treaty obligations.[3]

However, distinctions exist among groups entitled to self-determination. For racial groups, this right pertains to participation in governance and the enjoyment of legal entitlements. In contrast, self-determination in the context of military occupation and colonialism pertains to liberation from foreign domination and the establishment of an independent political system.

Article 1, Paragraph 4 of the First Additional Protocol of 1977 to the Geneva Conventions of 1949 recognizes that armed conflicts involving peoples struggling against colonial domination and alien occupation, as well as against racist regimes, constitute international conflicts.

The final resolution adopted by the UNGA prior to the commencement of the Steering Committee for Human Rights (CDDH) was Resolution 3103 (XXVIII), dated 12 December 1973, entitled "Basic Principles of the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes." As articulated in the commentary of the International Committee of the Red Cross concerning the First Additional Protocol of 1977, the principles delineated in the operative paragraphs of Resolution 3103 are intended to be "without prejudice to their elaboration in future within the framework of the development of international law applicable to the protection of human rights in armed conflicts." These principles may be summarized as follows:

1. The struggle of peoples against colonial and alien domination, as well as against racist regimes, for the realization of their right to self-determination is legitimate.

1 Cassese, *International Law* (2005) 140.
2 Ibid, 141.
3 Ibid.

2. Attempts to suppress such struggles violate the Charter of the United Nations and relevant human rights declarations, posing a threat to international peace and security.
3. Armed conflicts arising from these struggles are categorized as international armed conflicts under the Geneva Conventions.
4. Combatants engaged in such struggles should be afforded prisoner-of-war status under the Third Geneva Convention.
5. Violations of this status result in full accountability for the perpetrators.[1]

Thus, liberation movements acting under this framework are protected by the First Additional Protocol and the Geneva Conventions, which delineate their rights and obligations. For instance, combatants in these movements are protected under the Third Geneva Convention, while civilians in occupied territories are safeguarded by the Fourth Geneva Convention. Importantly, as these conflicts are international in nature, support from other states for liberation movements does not constitute interference. However, these states are obliged to adhere to humanitarian law standards concerning civilians and civilian infrastructure.

Although armed resistance is not explicitly mentioned in these international documents, the recognition of such struggles as international conflicts, coupled with the imperative to respect humanitarian law, implies that armed resistance is permissible for these movements, particularly when the occupying power suppresses the right to self-determination. When self-determination is denied, the affected population bears the brunt of the injustice. The practice of the Security Council suggests that, when all other avenues fail, a people denied self-determination may resort to forceful measures to reclaim their independence. The Palestinian National Covenant characterizes the use of force aimed at achieving self-determination as an act of self-defense, asserting that "the liberation of Palestine from an international viewpoint is a defensive act necessitated by the demands of self-defense." In a case before the International Court of Justice regarding Namibia, Judge Fouad Ammoun echoed this sentiment, stating that a people possess the right to armed resistance to attain self-determination. He asserted that "the legitimacy of the peoples' resistance cannot be disputed," as it is rooted in the inherent right of self-defense, which is affirmed by Article 51 of the United Nations Charter.[2]

The Palestinian liberation movements are recognized as parties to an international conflict and are thus protected under humanitarian law based on their right to resist the occupying regime. If we take Security Council Resolution 242 as our criterion, we can designate the territories captured by Israel in 1967—including the Gaza Strip, the West Bank, and East Jerusalem—as occupied. Consequently, the struggle of the Palestinian people and their armed movements, in accordance with the aforementioned international documents and other sources of international law, constitutes legitimate and lawful resistance.

While some may argue that the Palestine Liberation Organization (PLO) and the Palestinian Authority represent the Palestinian nation due to their recognition by regional and international organizations, this viewpoint raises questions regarding the legitimacy of Hamas

1 Customary International Humanitarian Law, Retrieved from https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article1/commentary/1987?activeTab=undefined, last accessed on December 28, 2024.
2 Quigley, Op. Cit. (2005) 191

as a representative entity. The failure of negotiated solutions and the ongoing occupation of Palestinian territories, despite agreements made by these organizations with the occupying power, casts doubt on their exclusive representation. Movements like Hamas, which represent a significant segment of the Palestinian population, gained further legitimacy through their electoral victory in the 2006 Palestinian National Assembly elections and the subsequent appointment of Ismail Haniyeh as Prime Minister by the Palestinian Authority.

In addition to popular support within Palestine, various Islamic and Arab nations have bolstered Hamas's regional and global standing. As Professor Cassese has noted, while the recognition of liberation movements by international organizations is significant, it does not solely legitimize these movements.[1] This principle is particularly relevant to Hamas, which, despite the lack of formal recognition by some international entities, remains a negotiating party backed by a substantial portion of the Palestinian populace and key governments in the Middle East.

2. The Right to Self-Determination of the Palestinian People in the Advisory Opinions of the International Court of Justice

In the preceding sections, we have analyzed the right of armed resistance for the Palestinian people against the occupying power, rooted in their right to self-determination. This right is fundamental to the Palestinian cause and underpins all other rights. The position of the ICJ regarding the Palestinian people's right to self-determination is crucial for understanding their right to resistance.

2.1. Advisory Opinion of the International Court of Justice, July 19, 2024[2]

The ICJ delivered its Advisory Opinion concerning the legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory, including East Jerusalem. On December 30, 2022, the UN General Assembly adopted Resolution A/RES/77/247, invoking Article 65 of the Court's Statute and requesting an advisory opinion on two questions:

1. What are the legal consequences arising from Israel's ongoing violation of the Palestinian people's right to self-determination, its prolonged occupation, settlement, and annexation of Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character, and status of Jerusalem, as well as its discriminatory legislation and measures?
2. How do these policies and practices affect the legal status of the occupation, and what legal consequences arise for all states and the United Nations?[3]

In its advisory opinion, the Court concluded that:

- Israel's continued presence in the Occupied Palestinian Territory is unlawful.

1 Cassese, *Le Droit International dans un–Monde Divisé* (translated by Kalantarian Morteza (1992) 127 (in Persian).

2 Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem Advisory Opinion of 19 July 2024, retrieved from https://www.icj-cij.org/index.php/decisions.

3 International Court of Justice, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion, 19 July 2024) https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-pre-01-00-en.pdf, accessed 28 December 2024, 7.

- Israel is obligated to end its unlawful presence in the Occupied Palestinian Territory as swiftly as possible.[1]

The Court thoroughly examined the occupation of Palestinian lands and Israel's continuation of this situation, reaching clear conclusions about the necessity of ending the occupation, the obligations of the occupying power, and the rights of the Palestinian people. The Court emphasized that the ongoing occupation and Israel's actions in the occupied territories violate the Palestinian people's right to self-determination. It outlined the elements of this right as follows:

1. The right to territorial integrity is recognized as a vital component of customary international law, corollary to the right to self-determination (Para 237).
2. The right to self-determination protects populations against acts aimed at dispersing them and undermining their integrity (Para 239).
3. The right to exercise permanent sovereignty over natural resources is a principle of customary international law (Para 240).
4. A key element of the right to self-determination is the right of people to freely determine their political status and to pursue economic, social, and cultural development (Para 241).

The Court asserted that Israel's occupation policies exacerbate violations of the right to self-determination (Para 243). In addressing the legal status of the occupation, the Court deemed it illegal and noted that the prohibition against land acquisition by force violates the Palestinian people's right to determine their identity (Para 261).

A pertinent question arises regarding the relationship between Israel's continued presence in the occupied territories and its agreements with the Palestinian side, such as the Oslo Accords. The Court clarified that security considerations do not justify land annexation or the establishment of a permanent occupation (Para 263).[2]

2.2. Advisory Opinion on the Barrier Wall, 2004[3]

In its 2004 advisory opinion on the barrier wall in the Palestinian territories, the Court connected the issue of the occupation with the right to self-determination, concluding that Israel's construction of the wall contributed to the departure of Palestinian populations from certain areas, thereby threatening the demographic composition of the Occupied Palestinian Territory. This construction severely impeded the Palestinian people's exercise of their right to self-determination.

The Court characterized Israeli settlements established in the territories occupied since 1967, including East Jerusalem, as illegal under international law and a significant obstacle to achieving a two-state solution and a just, lasting peace. It invoked several international resolutions to condemn Israel's practices of territorial annexation,[4] including Resolution 242,

1 Ibid.
2 Ibid, section E. Question of self-determination, Paras. 230-243, pp. 65-68.
3 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136, available at https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf-, last accessed December 28, 2024.
4 Aasi, *Yuridika* (2022) 548

which stresses the inadmissibility of acquiring territory by war and calls for the withdrawal of Israeli armed forces from occupied territories.[1]

Through these advisory opinions, the ICJ has reinforced the Palestinian people's right to self-determination, asserting that the territories occupied since 1967 are reserved for the exercise of this right.[2]

3. Occupation of Palestinian Land: International Approach and Rival Theory

The prevailing theory and dominant approach at the international level, as reflected in resolutions, procedures of international institutions, and the stances of various governments, assert that the Gaza Strip, the West Bank, and East Jerusalem are occupied territories. These areas were captured by Israel during the 1967 war, and Security Council Resolution 242, issued in the same year, classifies these lands as occupied. This position continues to be upheld in United Nations documents and the positions of governments.

This approach is grounded in the "two-state solution" as outlined in UNGA Resolution 181. The Oslo Accords and subsequent agreements aimed at resolving the Palestinian issue have also been based on this framework. However, the failure of Israel and international powers to fulfill their obligations concerning the establishment of a Palestinian state in the 1967 territories has highlighted the deficiencies of this approach.

In contrast, a significant portion of the Palestinian population and some Islamic states, including the Islamic Republic of Iran, contend that all Palestinian lands, including those captured in 1948, remain occupied. This perspective argues that the partition of Palestinian land under Resolution 181 lacks legitimacy, as neither the committee establishing the resolution nor the UNGA possessed the authority to divide Palestinian territory without consulting its inhabitants. The right to self-determination and independence for the Palestinian people should have been paramount.

Thus, while this research is structured around the dominant international approach that views only the lands occupied in 1967 as occupied territories, there is a competing perspective that considers the entirety of Palestinian land, including territories occupied in 1948, as under occupation. This viewpoint is respected and upheld by a significant segment of the Palestinian populace.

4. The Two-State Solution and the Palestinian People's Right to Self-Determination

A critical question arises: why has the United Nations failed to determine a viable solution for the Palestinian people to exercise their right to self-determination? Although a framework was established through Resolution 181, the major flaws inherent in this solution rendered it ineffective for the Palestinian people. This resolution proposed the division of Palestine into separate Jewish

1 International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (19 July 2004) ICJ Reports 2004, 34, para. 75.
2 Aasi, Op. Cit. (2022) 549.

and Arab states, allocating 56 percent of the territory to the Jewish state, which predominantly comprised recent immigrants rather than the native Palestinian population.

Numerous member states expressed opposition to Resolution 181, cautioning that such division would incite enduring conflict. However, the backing of international powers, particularly Britain, facilitated the advancement of this plan alongside the efforts of Jewish organizations. Legally, Article 22 of the former Covenant of the League of Nations affirmed that the Palestinian people met the criteria for independence and should be progressively granted this right, akin to Jordan, Syria, and Iraq. Yet, the General Assembly, lacking the authority to partition territory, overlooked this legal right amidst protests from several member states.

The international response to these events has often been to plant the seeds of division and hostility in the region. Despite the initial resistance from the Palestinian and Arab populations, the establishment of the Zionist state in 1948 occurred with significant global support. The legitimacy of the partition proposed in Resolution 181 continues to be contested, as the actions and policies of the occupying regime have severely obstructed the establishment of a Palestinian state within the two-state framework.

Since the 1990s, Palestinian and Arab leaders have engaged in negotiations, accepting the two-state solution framework. This included the "permanent status negotiations" initiated in 1993, which aimed to culminate in an independent Palestinian state. However, a decade later, no final peace agreement had been reached. In 2003, a coalition of international entities proposed a performance-based Roadmap intended to facilitate the emergence of a Palestinian state, yet a genuine resolution to the Palestinian issue remains elusive.[1]

The historical context of Palestinian leaders who accepted negotiations under the two-state framework is both compelling and instructive. Yasser Arafat, former leader of the Palestine Liberation Organization, faced significant pressures from Israel and the United States, ultimately being isolated in his leadership role. His death remains shrouded in controversy, with theories of poisoning emerging amidst allegations of Israeli involvement.[2] Arafat's steadfastness against external pressures regarding critical issues like the status of Jerusalem, the right of return for Palestinian refugees and support for the intifada exemplifies the challenges faced by leadership committed to the Palestinian cause.

Another significant barrier to the two-state solution has been the expansion of Jewish settlements in Palestinian territories, which reoccupy lands and obstruct Palestinian access to their cities and villages. Security Council Resolution 2334 (2016) reaffirmed that the construction and expansion of Jewish settlements threaten the viability of the two-state solution and violate international law.[3]

Furthermore, the continued occupation of Palestinian lands contradicts Security Council Resolution 242, which calls for Israel's withdrawal from territories occupied in 1967. The establishment of settlements not only contravenes this resolution but also breaches the obligations

1 Browlie, *Principles of Public International Law* (2021) 389-390.

2 Euronews, 'European Human Rights Court Rejects Attempt to Reopen Investigation into Yasser Arafat's Death' (1 July 2021) https://parsi.euronews.com/2021/07/01/european-human-rights-court-rejects-attempt-to-reopen-investigation-yasser-arafat-death, accessed December 28, 2024.

3 UN Security Council, *Resolution 2334* (23 December 2016) S/RES/2334.

outlined in Article 49 of the Fourth Geneva Convention, which prohibits the transferring of an occupying power's civilian population into occupied territory.

Israel's violations of international law extend beyond settlement construction; the erection of a barrier wall has further segregated Palestinian areas, severely restricting access and contravening prior agreements with the Palestinian side. The ICJ issued an advisory opinion in 2004, declaring that the barrier wall undermines the Palestinian right to self-determination, recognized in various international frameworks.[1] The Court noted that Israel's actions, including the establishment of illegal settlements and security zones, constitute grave breaches of international law and severely impede the realization of Palestinian self-determination.[2]

Based on these considerations, it can be asserted that the two-state solution and the realization of the Palestinian people's aspirations have largely failed. In recent years, with the normalization of relations between certain Arab governments and the backing of the former U.S. administration, Israeli leaders have effectively abandoned the two-state framework, advocating instead for a singular Jewish state encompassing all Palestinian territories. Additionally, the opposition of the United States to Palestinian membership in the United Nations further complicates the viability of the two-state solution. Consequently, the only recourse left for the Palestinian people appears to be resistance and armed struggle in pursuit of their right to self-determination.

As previously noted, resistance, including armed struggle, is recognized as a legitimate course of action under international law. This path is deemed reasonable by the Palestinian nation, especially in light of how other nations have successfully achieved independence with significant international support, particularly from the United States. For instance, the cases of South Sudan and East Timor illustrate the granting of independence to peoples through resolutions adopted by the UN Security Council, aimed at protecting victims of egregious human rights violations and the systematic denial of their self-determination rights.

The inhabitants of East Timor and South Sudan ultimately attained statehood after secession from Indonesia and Sudan, respectively, facilitated by a series of Security Council resolutions since the late 1990s. This same rationale should equally apply to the Palestinians.[3] As noted by Edward Said, a prominent Palestinian intellectual and activist, the Palestinian people strive to preserve their collective identity and national concept, a goal that remains unfulfilled. He articulates, “We are in a unique position of being a people whose enemies assert that we do not exist. Thus, for us, the concept of 'rights' signifies the right to exist as a people, as a collective entity, rather than merely as a collection of refugees or stateless individuals.”[4]

1 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion, 9 July 2004) ICJ Reports 2004, 183.
2 Aral, *Oslo “Peace Process” as a Rebuttal of Palestinian Self-Determination* (2009) 21.
3 Ibid, 23.
4 Shalbak, *Human Rights in Palestine: From Self-Determination to Governance* (2023) 3.

5. States' Obligations Concerning the Rights of the Palestinian People

States' obligations can be analyzed from two perspectives: First, in terms of the nature of these commitments—what are the rights of the Palestinian people living under foreign occupation, and what is the significance and character of these commitments in international law? Second, the types of these obligations should be clarified, specifying which actions, whether negative or positive, are necessary for their implementation.

5.1. The Nature of States' Obligations Towards the Rights of the Palestinian People

If independence is the decisive criterion for statehood, self-determination is a principle that pertains to the right to exist as a state. A pivotal development was the reference to "the principle of equal rights and self-determination of peoples" in Articles 1(2) and 55 of the UN Charter. While some perceived these references as merely aspirational, the practices of UN organs have strongly reinforced this principle, particularly through the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960 and reiterated in numerous subsequent resolutions.

Means of achieving self-determination include the formation of a new state through secession, association in a federal state, or autonomy within a unitary state.[1] The most vital right of the Palestinian people in the occupied territories is their right to self-determination, which has been violated by Zionist occupation for over 70 years, effectively obstructing all avenues for its realization. The occupying regime, by perpetuating the occupation and constructing Jewish settlements in the West Bank and around Jerusalem, and by failing to adhere to any agreements with the Palestinians, has rendered a negotiated solution and compromise to end the occupation unattainable.

Moreover, the obstruction of recognition and membership of the Palestinian state in international organizations—supported by the United States—alongside violations of the rights of residents in the occupied territories as outlined in the Fourth Geneva Convention and other international instruments, further complicates this landscape. The obligations of governments in response to these violations of humanitarian law are not merely typical obligations; they carry significant weight. The ICJ has emphasized the erga omnes obligations arising from the right to self-determination in its advisory opinion regarding the barrier wall.[2]

Erga omnes obligations are characterized by their applicability to the international community, creating both rights and duties for all states to demand compliance with these obligations. Some scholars regard the right to self-determination for peoples under colonial rule and foreign occupation as a peremptory norm (jus cogens). This perspective is grounded in the notion that the right to self-determination is widely accepted, either due to its intrinsic nature or

1 Brownlie and Crawford, *Principles of Public International Law* (2021) 390-391.

2 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion, 9 July 2004) ICJ Reports 2004, paras 88, 155.

its significance for human rights, as it is considered a prerequisite for the effective realization of human rights.[1, 2]

In 2006, the International Law Commission recognized the right to self-determination among its authoritative list of jus cogens norms.[3] This recognition is particularly significant given the high academic and moral standing of the Commission's members within international law. Therefore, it appears that the right to self-determination, especially for peoples under foreign rule, exemplifies a jus cogens norm.[4]

In addition to the right to self-determination, which serves as the foundation for all the rights of the Palestinian people, there exists a broad spectrum of human and humanitarian rights enshrined in international documents, to which member states are obligated to adhere. A considerable portion of these obligations regarding humanitarian rights, particularly for individuals under foreign occupation, possesses a customary nature, thus qualifying as customary international law.[5]

Notably, a comprehensive study conducted under the auspices of the International Committee of the Red Cross by leading experts in humanitarian law, published in 2005, reinforces these principles. This collection, titled "Customary Rules of Humanitarian Law,"[6] demonstrates that the occupation of Palestine and the conduct of the occupying regime towards its residents adhere to customary norms, obligating all states, not merely those party to international humanitarian law.

5.2. Types of States' Obligations Towards the Rights of the Palestinian People

According to Articles 40, 41, 42, and 48 of the International Law Commission's 2001 draft on the international responsibility of states, all states are bound to:

1. Cooperate through legal means to end gross violations of obligations.
2. Refrain from recognizing the situation resulting from breaches of obligations.
3. Avoid assisting or supporting the occupying power in maintaining an illegal status quo.
4. In this context, the obligations of states regarding the rights of the Palestinian people in their struggle against occupation can be delineated in two general terms:

A) States' Negative Obligations Concerning the Occupation of Palestinian Territories

Under principles and rules of international law, particularly Article 41 of the state responsibility framework, states should neither recognize nor assist in establishing an illegal situation, especially if such a situation arises from violations of jus cogens norms. Additionally, Article 16 of the draft

1 Espérell (1978) para. 75.

2 Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development* (2006) 637-638.

3 United Nations, *Report of the International Law Commission on the Work of Its Fifty-Eighth Session* (A/CN.4/L.702, 18 July 2006) 833.

4 Habibzadeh, *The Resistance of the Palestinian People to the Right to Self-Determination and Obligations of the International Community Against It* (2015) 846.

5 For information on customary rules regarding the rights of people in occupied territories, you can refer to the Customary International Humanitarian Law document published by the International Committee of the Red Cross (ICRC). This document outlines various rules that govern the treatment of individuals in occupied territories, emphasizing protections under international humanitarian law.
The document could be accessed at https//:www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf.

6 Henckaerts and Alvermann, *Customary International Humanitarian Law (Vol 1)* (2005).

articles on state responsibility asserts that "assisting another state in an international wrongful act is itself wrongful."

In light of the violations of international law and the establishment of an illegal situation in the occupied Palestinian territories by Israel, UN member states have repeatedly affirmed these obligations in their resolutions, urging states to refrain from facilitating the continuation of these circumstances.[1] For instance, in 1980, the Security Council called upon all countries to "refrain from providing aid to Israel, particularly in relation to settlements in the occupied territories."[2]

The General Assembly has consistently reiterated its positions by issuing numerous resolutions annually. For instance, in 1980, it urged countries "not to recognize any changes in the occupied territories by Israel and to refrain from actions that may enable Israel to further its colonial policies and annex land, including the refusal to provide aid."[3] This request has also been extended to the United Nations judicial body, the International Court of Justice. In its advisory opinion concerning Israel's barrier wall in the Palestinian territories, the Court interpreted Article 1 of the Geneva Conventions as imposing an obligation on all countries not to recognize the illegal situation created by the construction of the wall and not to assist in maintaining the conditions resulting from it.[4]

Although the construction of Jewish settlements and the barrier wall contravenes the agreements between the Palestinian Authority and Israel, it raises the question of whether the local authority, as a representative of Palestine, can legitimately agree to terms under duress from the occupying regime. Should it forfeit Palestinian lands or accept arrangements that violate the rights of the residents of the occupied territories? Article 47 of the Fourth Geneva Convention stipulates that the rights of residents in occupied territories shall not be undermined by any agreement or arrangement between the occupying power and the local authorities. This provision aims to prevent local authorities from making concessions detrimental to the inhabitants under pressure from the occupying power, thereby preserving their legal status. Consequently, such agreements are deemed invalid.[5]

Despite the issuance of these resolutions and international documents, none have effectively countered Israel's persistent defiance of international law, a situation largely attributable to the unwavering support of the United States for the occupying regime.

B) States' Positive Obligations to Support the Resistance of the Palestinian People

States have obligations toward the Palestinian people's right to self-determination and their resistance against the occupying power. They are also committed to providing assistance and cooperation in this regard. In its 1970 resolution, the UNGA acknowledged the legitimacy of support for nations resisting foreign occupation, asserting that these nations have the right to "receive any material and spiritual assistance."[6] During Namibia's struggle for independence,

1 Habibzadeh, Op. Cit. (2015) 847.
2 UN Security Council, S/465,1 March,1980
3 UN General Assembly, *Resolution 35/1227* (A/RES/35/1227, 1980).
4 International Court of Justice, *Reports 2004* para. 159.
5 Gasser, *Protection of the Civilian Population' in D Fleck (ed), The Handbook of Humanitarian Law in Armed Conflicts* (translated by Hajar Siyahrostami) (2008) 335-336.
6 UN General Assembly, *Resolution 2649* (A/RES/2649, 1970).

various countries provided material aid, and the United Nations financially supported the SWAPO liberation movement,[1] while Angola permitted SWAPO to use its territory as an operational base without opposition from other states.[2]

There is, however, a divergence of opinion regarding the legality of third countries' assistance to liberation movements against foreign domination.[3] Some Western scholars argue that the absence of consensus among General Assembly members regarding this issue undermines the legality of such assistance.[4] This argument is contestable, as universal consensus on many rules of international law is not a prerequisite. Moreover, the aforementioned resolution was not adopted by consensus but rather by a majority vote.[5]

Liberation movements are entitled to request and receive assistance from other countries in their pursuit of self-determination against foreign domination, as outlined in General Assembly Resolution 2625.[6] Notably, the International Court of Justice, in the case of Nicaragua v. United States, recognized the principles articulated in Resolution 2625 as customary international law.[7] Given the status of customary international law and the imperative for compliance, the opposing views of some Western scholars contradict the validity of Resolution 2625 and its endorsement of material and spiritual support for liberation movements.

The content of Article 1, Paragraph 4 of the 1977 Additional Protocol to the Geneva Conventions reinforces this interpretation. This provision classifies struggles against colonial rule and foreign occupation as international conflicts, thus negating the obligation of non-intervention concerning liberation movements. Consequently, third-party governments are permitted to assist these movements.

Furthermore, Article 96, Paragraph 3 of the same protocol stipulates that an authority representing a people engaged in armed conflict with a High Contracting Party may unilaterally declare its intention to apply the Conventions and the Protocol to that conflict. Upon receipt of such a declaration by the depositary, the following effects ensue:

(a) The Conventions and the Protocol come into force for the said authority as a Party to the conflict with immediate effect.

(b) The authority assumes the same rights and obligations as those of a High Contracting Party to the Conventions and the Protocol.

(c) The Conventions and the Protocol are equally binding upon all Parties to the conflict.

In contrast, assistance and intervention by third governments in internal and non-international disputes are prohibited under the principle of non-intervention. Within this framework, the UNGA has, in several resolutions, called upon member states not to withhold their material and spiritual support for the Palestinian liberation movement.[8]

1 *The South West Africa People's Organization*
2 Quigley, *The Case for Palestine: An International Law Perspective* (2005) 309
3 Malcom Shaw, *International Law* (2008) 1037-1038.
4 Thurer and Burri, 2008: para. 15
5 Habibzadeh, Op. Cit. (2015) 848.
6 UN General Assembly, *Resolution 2625 (XXV)* (A/RES/2625 (XXV), 1970) para. 5, principle 5.
7 International Court of Justice, *Nicaragua Case* (1986) para. 202.
8 UN General Assembly, *Resolution 2708* (A/RES/2708, 1970).; UN General Assembly, *Resolution 2787* (A/RES/2787, 1971).

6. The Performance of Palestinian Liberation Movements and Wartime Rules

As discussed in previous sections of this research, liberation movements derive their right to armed resistance against occupying powers from international law. The legitimacy of their struggle against colonial or oppressive regimes, including apartheid systems, is well-established. However, when these movements are recognized and supported under the law of armed conflict—such that their struggle is classified as an international conflict—they are also required to adhere to the obligations imposed by humanitarian law during periods of occupation. This includes responsibilities concerning civilians, the wounded, and prisoners of war.

Furthermore, these movements must distinguish themselves from terrorist organizations, as their objectives and motivations are fundamentally different. For instance, groups such as Hamas and Islamic Jihad have not been officially classified as terrorist organizations by an international body like the United Nations Security Council. However, governments that support the Israeli occupation, notably the United States and various European nations, have unilaterally designated these groups as terrorist entities. Such actions do not contribute to resolving the Palestinian issue; rather, they overlook the historical context, wherein much of the violence in the Middle East is rooted in the ongoing occupation of Palestine and the denial of the Palestinian people's right to statehood under international law.

Conclusion

The Palestinian issue remains a regional and global crisis that has persisted for over seven decades, with the Palestinian people suffering the consequences of being deprived of their natural and legal right to self-determination. As outlined in this research, the right to self-determination is a central tenet and recognized principle in international law, as evidenced by numerous United Nations General Assembly resolutions and international legal frameworks. The International Court of Justice, as the judicial organ of the United Nations, has consistently addressed this principle in various cases. Notably, in its advisory opinion regarding the barrier wall, the Court affirmed and emphasized the Palestinian people's right to self-determination.

The advisory opinion issued on July 19, 2024, serves as a significant exposition of the right to self-determination for the Palestinian people, delineating its boundaries and implications amidst the ongoing conflict in Gaza. The Court explicitly states that Israel's policies of occupation contravene the Palestinians' right to self-determination and that the prolongation of these policies exacerbates violations of this right. The scope of this right extends to populations under colonial rule, foreign occupation, and those living under apartheid conditions; these groups are entitled to resist through various means, including armed struggle.

Other states have corresponding obligations towards these populations, which are inferred from the general principles of state responsibility articulated in the International Law Commission's 2001 framework. According to these principles, states are obligated to support liberation movements positively while refraining from legitimizing conditions of occupation, colonialism, and apartheid. Moreover, UNGA resolutions have consistently called upon member

states to assist and protect populations under occupation, with specific references to the plight of the Palestinian people.

Despite these resolutions, the actions of the Israeli occupying regime continue to disregard international law and norms, including recent decisions by the ICJ regarding the critical humanitarian situation in Gaza. For nearly eight months, the Palestinian population in the Gaza Strip has faced relentless bombardment, siege, and famine, resulting in the deaths of approximately 46,000 individuals, predominantly women and children. This situation has illuminated the reality that the Palestinian people have no recourse but to resist and engage in armed struggle—a struggle that is grounded in international law and represents a natural, human, moral, and legitimate right.

The position and actions of the Islamic Republic of Iran regarding the Palestinian issue and Gaza can be analyzed within this framework. Iran's support for the Palestinian struggle is consistent with international law and reflects its legal and humanitarian obligations. Article 154 of the Constitution of the Islamic Republic of Iran explicitly states that the country shall "fully refrain from interference in the internal affairs of other nations" while supporting the rightful struggle of the oppressed against oppressive forces globally. A comprehensive analysis of Iran's behavior and its implications would require further research beyond the scope of this article.

References

Books and Articles

Berdal A, 'Oslo 'Peace Process' as a Rebuttal of Palestinian Self-Determination' (2018) 10 (1) *Middle Eastern Studies* 8-26

Brownlie I, *Principles of Public International Law* (9th edn, Oxford University Press 2021)

Cassese A, *International Law* (2nd edn, Oxford University Press 2005)

Cassese A, *Le Droit International dans un Monde Divisé* (1986, translated by Morteza Calantarian, International Legal Services Office of IRI 1992) p 127 (in Persian

Habibzadeh T, 'The Resistance of the Palestinian People to the Right to Self-Determination and Obligations of the International Community Against It' (2015) *Public Law Studies Quarterly* 64(6) [In Persian]

Ihab S, 'Human Rights in Palestine: From Self-Determination to Governance' (2023) 29 *Australian Journal of Human Rights*

Joni A, 'Israeli Territorial Annexation in Occupied Palestinian Territory: The Ambivalence of International Law' (2022) 37(3) *Yuridika*

Quigley J, *The Case for Palestine: An International Law Perspective* (Duke University Press 2005)

Shaw M, *International Law* (6th edn, Cambridge University Press 2008)

Reports and Documents

Gasser HP, 'Protection of the Civilian Population' in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (2008) 335-336 (translated by Hajar Siyahrostami)

Hannikainen K, *Peremptory Norms (Jus Cogens) in International Law: Historical Development* (1988)

Hennikainen JM and Alvermann C, *Customary International Humanitarian Law* (Vol. 1, Cambridge University Press 2005)

Cases and Legal Opinions

Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) [2023] available at: https://www.icj-cij.org/sites/default/files/case-related/192/192app-01-00-en.pdf#page=72

Case Concerning East Timor (Portugal v Australia) [1995] available at: https://icj-cij.org/sites/default/files/case-related/84/084-19950630-JUD-01-00-EN.pdf

Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024 available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-pre-01-00-en.pdf

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1971) available at: https://www.icj-cij.org/sites/default/files/case-related/53/11473.pdf

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] available at: https://www.icj-cij.org/sites/default/files/case-related/131/131-20040630-PRE-01-00-EN.pdf

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1986] available at: https://www.icj-cij.org/sites/default/files/case-related/70/9973.pdf

United Nations Security Council Resolutions

UN Security Council Res 2334 (2016)

UN Security Council Res 465 (1 March 1980)

United Nations Documents

UN Doc A/CN.4/L.702 (18 July 2006) *Imminent Famine in Northern Gaza is 'Entirely Man-Made Disaster'* available at: https://news.un.org/en/story/2024/03/1147656

UNGA Res 2625 (XXV) (1970) *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* available at: https://treaties.un.org/doc/source/docs/A_RES_2625-Eng.pdf

UNGA Res 2649 (November 1970) *Right to Self-Determination*

UNGA Res 2708 (1970)

UNGA Res 2708 (XXV) (1970) *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*

UNGA Res 2787 (1971)

UNGA Res 3103 (XXVIII) (1973) *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Régimes*

UNGA Res 35/1227 (1980)

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The Concept of State in Exercising the Jurisdiction of the International Criminal Court: The Palestine Situation

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ABSTRACT

The International Criminal Court (ICC, the Court) enables States to pursue the ideal of international criminal justice without imposing formal conditions. Since only States can become members of the Court, a fundamental question arises: is statehood necessary for the Court to exercise its jurisdiction according to the provisions of public international law? This paper hypothesizes that the primary criterion for the Court is its objectives and the existence of conditions for exercising territorial jurisdiction, even in the absence of clearly defined borders. Employing a descriptive-analytical research method, this study draws upon legal doctrine, international documents, and general legal principles. It examines two perspectives within public international law and international criminal law to critically analyze the decision of Pre-Trial Chamber I regarding Palestine. The findings suggest that in exercising its jurisdiction, the Court operates independently of the rigid criteria traditionally associated with the concept of statehood in public international law.

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Introduction

The establishment of the International Criminal Court (ICC, the Court) marks a significant turning point in international relations and developments. The pursuit of international criminal justice has long been a fundamental aspiration of humanity, defined here as the comprehensive provision of justice that ensures no offender can evade accountability under any circumstances, including diplomatic immunity. The Rome Statute of 1998 aligns with this aspiration of human society. Justice serves as a foundational principle guiding the ICC's exercise of jurisdiction.[1]

A brief examination of the ICC's Statute reveals that it embodies a synthesis of various legal concepts, including public international law, general principles of criminal law, standards for fair trials, and overarching principles of human rights and humanitarianism. Thus, contemporary interpretation and analysis of any phenomenon within the realm of international criminal law, including the ICC, necessitate a comprehensive approach. This reflects the evolution of the field compared to the traditional theory of international criminal law that prevailed during the Nuremberg trials in 1945 and continued for several decades thereafter. In that era, public international law held exclusive validity, relegating international criminal law to a subordinate status.

Recent developments, including the national criminalization of international crimes and the emphasis on fair trial standards, have propelled the evolution of international criminal law.[2] Today, international criminal law, particularly as embodied in the ICC, possesses a distinct structure. On one hand, States are recognized as members of the ICC; on the other, individuals are subject to prosecution, trial, and punishment by the Court.

The advancements made by the ICC Statute necessitate clear distinctions between international criminal law and public international law. These differences emerge in terms of definitions, subject matter, aims, and sources. The scope of international criminal law is more specialized than that of public international law. While there are overlapping sources—such as custom, treaties, judicial precedents, and general legal principles—the reliability of these

1 Kotecha, *The International Criminal Court's Selectivity and Procedural Justice* (2020) 111.

2 Momeni, *Principles of Legality of Crimes and Punishments in International Criminal Law* (2021) pp 5-13.

sources varies. The sources of these two fields differ subtly; thus, from a modern perspective, international criminal law is the result of integrating various legal disciplines, particularly public international law, international human rights, international humanitarian law (IHL), criminal law, and criminal procedure.

According to Cassese, we are now confronted with a new legal paradigm. Key issues, including the role of domestic courts in international criminal law, the attention of international courts to national judicial procedures concerning international crimes, and the necessity for international criminal cooperation, must be carefully considered. [1] Cherif Bassiouni describes the contemporary nature of international criminal law as new and hybrid, likening it to the Amazon River.[2]

Consequently, what is deemed reliable in public international law may not necessarily serve as a source for judicial decisions. For instance, bilateral and regional customs do not hold equal standing. International treaties and documents carry greater significance in international criminal law compared to public international law. Bassiouni argues that this distinction arises from the ability of these legal instruments to more accurately fulfill the principles of legality regarding crimes and punishments.[3]

It is evident that customary law, particularly in the form of international customary mandatory rules or comprehensive international customs, has the potential to criminalize actions within the realm of international criminal law.[4] In terms of the hierarchy and importance of sources, customs hold a primary position in public international law, whereas treaties occupy this position in international criminal law.[5] The prioritization of positive rules over non-codified rules in this domain stems from the influence of criminal law principles in this integrated field.[6]

Like customary law, treaties and instruments that enjoy general acceptance among governments play a decisive role in the scope of international criminal law.[7] General legal principles are also critically examined within this field, as not all examples of such principles hold the same validity. The Statute of the ICC addresses general legal principles in two key passages: 1) Principles and rules of international law, including the fundamental principles of IHL; and 2) General principles of law derived by the Court from national legal systems worldwide.[8]

Furthermore, Articles 22-33 of the Statute mandate that the Court must observe general principles of criminal law. The scope of international criminal law is more narrowly defined than that of public international law, as it deals specifically with subjects of a criminal nature. Key concepts such as international crimes, international criminal responsibility, and international offenders are central to international criminal law, whereas public international

1 Cassese, *International Criminal Law*, trans Ardeshir Amirrajmand (2017) 19-26.
2 Bassiouni, *International Criminal Law* (2008) 3-39.
3 Bassiouni, *Principles of Legality in International and Comparative Criminal Law' in International Criminal Law* (2008) 95.
4 Momeni, Op. Cit. (2021) 151-158.
5 Kriangsak, *International Criminal Law*, trans Behnam Yousefian and Mohammad Ismaili (2004) 102.
6 Faraj Al-Saddah, *Osul al-Qanun (Principles of Law)* (2001) 49.
7 Cassese, *International Criminal Law*, trans Ardeshir Amirrajmand, Hossein Piran, and Zahra Mousavi (2008) 31.
8 Articles 21-33 of the ICC Statute.

law encompasses a broader range of relations between States and international organizations, creating interconnected rules.[1]

While natural persons are fundamental subjects in international criminal law, individuals in public international law are often viewed as entities without rights.[2] Additionally, international criminal law pursues distinct objectives that set it apart from public international law. According to Bassiouni, international criminal law is a composite discipline that includes various components, each serving different purposes. These objectives include the prevention of international crimes, addressing impunity, establishing international criminal justice, and maintaining and restoring international public order.[3]

Given the significant aims outlined in the ICC Statute, traditional forms and barriers that apply to States do not impact the ICC. Consequently, the Court has the authority to prosecute, try, and punish State leaders, a capability that should be regarded as extraordinary. A careful reading of the Statute suggests that, from a philosophical standpoint, the perspective of natural law holds particular significance. Therefore, the pursuit of justice is central to the Court's goals and functions, influencing the effectiveness of its components and the judges' interpretations of various concepts.

The decision of February 5, 2021, by Pre-Trial Chamber I of the ICC[4] presents significant advancements. This decision highlights the crucial distinction between the fields of international criminal law and public international law. It posits that even if a government does not meet the requisite conditions of public international law, the ICC Statute can still recognize it as a State—an assertion that applies to Palestine.

1. The Concept of State in International Law

The State is the most significant subject of international law, primarily aimed at regulating relations between States.[5] However, there is no universally accepted definition of a State in international law. Various legal theorists have proposed differing definitions, leading to considerable debate. Traditionally, a State is defined as an entity capable of being a "player" in the international arena. According to Article 1 of the Montevideo Convention, a State as a person of international law must fulfill the following criteria: a permanent population, defined territory, a government, and the capacity to enter into relations with other States.

There are two main theories regarding the realization of statehood: the constructive theory and the declarative theory. The constructive theory emphasizes the importance of recognition, while the declarative theory asserts that recognition is not necessary. According to the declarative theory, the criteria outlined in the Montevideo Convention are sufficient for establishing statehood; thus, the mere absence of recognition should not prevent a State from exercising its legal rights if it meets these criteria.[6]

1 Bledsoe, *Culture of International Law*, trans Alireza Parsanjad (1996) 20.
2 Cassese, *International Law in an Unconditional World*, trans Morteza Kalantarian (1991) 448.
3 Bassiouni, *International Criminal Law* (2008) 3.
4 ICC-01/18-143
5 E I Daes, *Status of Individual and Contemporary International Law* (United Nations 1992) 56.
6 Delgrande, *An Examination of Palestine's Statehood Status through the Lens of the ICC Pre-Trial Chamber's Decision and Beyond* (2021) 15-17.

The 2011 report from the Permanent Committee on the Admission of New Members in the United Nations Security Council (UNSC) regarded the status of Palestine as a controversial issue, primarily due to the lack of effective control over its territory. Conversely, some argue that Palestine can exercise its territorial jurisdiction based on the Palestinian-Israeli agreements.[1] Ultimately, under Resolution 19/67 in 2012, the United Nations recognized Palestine as a non-member observer State.

Evaluating the Palestinian State requires practical considerations. Emphasizing the principle of self-determination strengthens the argument for recognizing Palestine as a State. Additionally, the concept of statehood in the Statute of the ICC should be interpreted in light of the Statute's objectives.[2]

Thus, the pursuit of justice and the fight against impunity—key purposes of the ICC—should be taken into account. This perspective supports the exercise of the ICC's jurisdiction concerning the Palestinian State.

2. Conditions of Exercising the Jurisdiction of the International Criminal Court

According to Article 12 of the Statute of the ICC, parties accept the Court's jurisdiction over the crimes outlined in Article 5. If crimes within the Court's subject matter jurisdiction are committed on the territory of a State Party or by one of its nationals, they fall under the Court's jurisdiction (Articles 12(1)(a) and (b)).

Additionally, Article 13 States that if a situation is referred by any State Party to the prosecutor, which includes a crime under the Court's jurisdiction, the Court shall exercise its jurisdiction regarding that situation.

Under paragraphs 1 and 2 of Article 12, the Palestinian State has requested the ICC to exercise its jurisdiction concerning crimes committed by Israelis on its territory. Referring to these paragraphs, the Prosecutor has recognized Palestine as a State Party of the Court, thereby granting it the right to submit a complaint to this international tribunal.[3]

The question of why the Prosecutor has not issued summonses for the principal defendants or warrants for their arrest, as stipulated in Article 53, largely hinges on political considerations and the specific situation of the Palestinian State.

The Statute of the Court clearly prioritizes justice and the prevention of heinous crimes that violate imperative international rules. In this context, the Court has opted to exercise its jurisdiction over certain international rules, such as diplomatic immunity[4] and statutes of limitations in criminal matters.[5] This approach indicates that the Court aims to fulfill the high ideal of justice and combat the impunity of perpetrators of international crimes, rather than becoming entangled in abstract procedural issues.

Consequently, the concept of "State" in the Statute should be interpreted to support the

1 Kadkhodayi and Maqami, *Consequences of constitutionalist interpretation of international law* (2017) 21.

2 Tsilonis, *The Jurisdiction of the International Criminal Court* (2019) https://doi.org/10.1007/978-3-030-21526-2 56.

3 ICC-OTP, 'Statement of ICC Prosecutor Fatou Bensouda on the Conclusion of the Pre-Trial Examination of the Situation in Palestine and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction' (20 December 2019).

4 Article 27.

5 Article 29.

prosecution of the most serious international crimes for the international community.[1] The acceptance of Palestine's membership by the Assembly of States Parties of the ICC aligns with this perspective and transcends a purely formalistic view of international issues.

Palestine became a member of the ICC on April 1, 2015, in accordance with the formalities of Article 125(3). After becoming a member, it referred the situation regarding crimes committed in the occupied territories to the Court in 2018.

Among the rights stemming from State membership in the ICC is the ability to prosecute crimes outlined in Article 5 of the Statute, committed within that State's territory or by its nationals. Therefore, under Article 12(2)(a), the ICC has jurisdiction over crimes committed by Israel in Palestinian territories, including the occupied ones. The Prosecutor recognizes the territories occupied since 1967 as part of Palestine, asserting the Court's competence to address these issues due to the Palestinian State's membership.[2]

According to Article 21(3) of the Statute, the concept of State should be interpreted and applied in accordance with internationally recognized human rights standards, emphasizing the Palestinian people's right to self-determination. Thus, the situation referred by Palestine has been accepted by the ICC, fulfilling the conditions for exercising its jurisdiction as outlined in the Statute.

3. The Impact of the Occupation on Palestine's National Sovereignty

In Resolution 2734 of 1970, titled "Resolution to Strengthen International Security," the United Nations General Assembly (UNGA) States that all governments are obligated to cooperate in accordance with the UN Charter and to refrain from legitimizing the occupation of land resulting from the threat or use of force. Countries must also accelerate the realization of the principle of self-determination and equality of rights for nations through individual and collective measures.

The UNSC's Resolution 217 (20 November 1965) urged countries not to recognize Southern Rhodesia, as its establishment violated international law and the right to self-determination. Similarly, Resolution 312 (1972) condemned the preservation of colonial rule by force as an international crime, calling on Portugal to recognize the right of its territories' peoples to self-determination. Thus, from the perspective of international law, situations resulting from criminal acts should not be recognized in favor of the perpetrators.

Resolution 662 (9 August 1990) by the UNSC rejected Iraq's declaration of annexation of Kuwait, urging the international community not to recognize it. The UNGA reiterated in Resolution 2625 (1970) that acquiring territory through force is illegal and should not be recognized. The international crimes perpetrated against the Palestinian people—such as aggression, genocide, and gross violations of human rights—are undeniable.[3]

Numerous UNSC resolutions have declared the occupation by the Zionist regime illegitimate and invalid under international law, including Resolutions 54 (1948), 234 (1951), 101 (1953),

1 Article 1.

2 International Criminal Court, *Situation in the State of Palestine*, William Schabas, Opinion in accordance with Article 103 of the Rules of Procedure and Evidence, Case No ICC-01/18 (15 March 2020) 84.

3 Imseis, *State of Exception: Critical Reflections on the Amici Curiae Observations and Other Communications of States Parties to the Rome Statute in the Palestine Situation* (2020) 909.

106 (1955), 111 (1956), 233 (1967), 702 (1969), 234 (1967), and 252 (1968). Resolutions 237, 271, and 446 have condemned repeated violations of the Geneva Conventions by the Zionist regime, including the expulsion of Palestinians, attacks on civilians, and humanitarian blockades.

The International Court of Justice (ICJ), in its advisory opinion on the construction of the separation wall, stated that such measures aimed at isolating land constitute a clear violation of customary international law and the right to prevent the appropriation of land by force. The appropriation of land through force or coercion lacks legitimacy.[1]

On February 25, 2019, the UN Human Rights Council's Commission of Inquiry published a report on crimes committed by Israel in 2018 (A/HRC/40/74). The report confirmed that Israeli armed forces targeted Palestinian civilians, including children and journalists, during protests in Gaza. From March 30 to December 31, 2018, 189 Palestinians were killed, and over 9,000 were injured.[2]

The commission noted a lack of cooperation from the Israeli regime during the investigation, which hindered the team's access. Palestinian civilians were targeted despite posing no threat to Israeli forces,[3] and the use of lethal force was deemed unnecessary and disproportionate, violating human and humanitarian rights standards.[4]

Among the deceased were 35 children, and 940 children were injured. The commission urged the UN Human Rights Council to consider these findings for potential legal action, including through the ICC.[5] It also recommended sanctions against the perpetrators of these crimes.[6]

The commission advised member countries of the Geneva Conventions and ICC members and non-members to exercise their criminal jurisdiction over the arrest of those responsible for international crimes mentioned in the report.[7]

According to international law, occupation and the use of force to seize territory do not deprive the people of that territory of their national sovereignty and right to self-determination.[8] Instead, they obligate the occupying power to respect the rights of the occupied population, particularly their right to self-determination and independence. Consequently, Israel cannot deny Palestinians their right to national sovereignty and self-determination, even as it continues to commit international crimes through occupation and aggression. Israeli actions exemplify illegitimate force; while they may create a physical reality, they lack legal legitimacy. Thus, from a legal standpoint, occupation neither confers legal sovereignty nor deprives a State of its sovereignty.

1 *Legal Consequences of the Wall in the Occupied Palestinian Territory, Advisory Opinion* (9 July 2004) para 87.
2 Ibid, 93.
3 Ibid, 95.
4 Ibid, 99, 103.
5 Ibid, 126.
6 Ibid, 127.
7 Ibid, 128.
8 Ronen, *Palestine in the ICC: Statehood and the Right to Self-Determination in the Absence of Effective Control* (2020) 909.

3.1. Reasons for the Survival of Palestinian Sovereignty and Its State

3.1.1. UNSC Resolutions

The UNSC does not recognize the Israeli settlements established in the occupied territories since June 1967, as stated in Resolution 2334 (2016). This resolution differentiates between the land of Israel and the occupied territories of Palestine.

3.1.2. European Court of Justice Ruling

In a November 2019 decision, the Court of Justice of the European Union ruled that Israel cannot label products from Israeli settlements in the occupied territories as "Israeli." Instead, products must indicate their actual place of production,[1] as these territories are not under Israeli sovereignty but merely under its occupation.

3.1.3. ICJ Opinion

In the case concerning the separation wall, the ICJ affirmed the Palestinian people's right to self-determination as an erga omnes right, meaning it is enforceable against anyone infringing it (Legal Consequences of the Wall in the Occupied Palestinian Territory, para. 87-88). According to public international law, land seizure is prohibited, and occupation does not nullify the right to self-determination, which is a mandatory rule recognized by the international community.

3.1.4. European Commission Statement

In November 2015, the European Commission issued an interpretative note at the request of 16 EU foreign ministers, stating it does not recognize Israeli sovereignty over the occupied Palestinian territories, including the Golan Heights, the Khatri border, and the Gaza Strip.[2]

3.1.5. Support for an Independent State

Numerous UNSC resolutions emphasize the necessity of establishing an independent Palestinian State.

3.1.6. Condemnation of Israeli Actions

Various UNSC resolutions classify Israel's actions in the occupied territories as violations of the Geneva Conventions, constituting international crimes (including Resolutions 242, 237, 271, and 446).

3.1.7. Principle of *Ex Injuria Jus Non Oritur*

This principle asserts that illegal acts, such as arbitrary occupation, have no legal effect. It is invoked against the denial of national sovereignty and the right to self-determination.[3] This principle was cited in Secretary of State Stimson's 1932 statement regarding Japan's conquest of Manchuria.[4] Multiple UN resolutions, including Resolution 2734 (1970), emphasize that occupation through force is legally ineffective.[5]

1 European Court of Justice, 'Document' http://curia.europa.eu/document.jsf?jsessionid= 32 & 52.
2 EUR-Lex, 'Legal Content' http://eur-lex.europa.eu/legal-content/EN/TXT/PDF.
3 Ibid, 950.
4 US Department of State, 'Milestones: The Mukden Incident' http://history.state.gov/milestones/1921-1936/mukden-incident.
5 Pierre-Meyer de Puy, *Considerations about the International Crime of the State*, trans Ali Hossein Najafi Abrandabadi (1991) 449-486.

3.1.8. Recognition of Palestinian Statehood

While the international essence of Palestine as a State may be distorted by ongoing occupation, numerous UNSC resolutions do not recognize the Israeli occupation or its legal effects, thereby preserving the legal nature of the Palestinian State.

4. Legal Identity of Palestine

The contemporary history of Palestine, particularly since the early 20th century, is closely tied to the aftermath of World War I and the disintegration of the Ottoman Empire under the Allied powers. Before World War I, Palestine was part of the Ottoman Empire, characterized by a majority Muslim population coexisting peacefully with Jewish and Christian minorities.[1]

In this context, Theodor Herzl's book, *Jewish State*, proposed the establishment of a Jewish agency. The First Zionist Congress in 1897, held in Basel, Switzerland, declared its goal to create a homeland for the Jewish people in Palestine, asserting that this would be guaranteed under international law.[2]

With the outbreak of World War I, Britain, France, and Russia fought against the Ottoman Empire. Following the Sykes-Picot Agreement (May 16, 1916), Palestine came under British control.[3] After the war, the League of Nations placed Palestine under British trusteeship, obliging the UK to administer the territory in a manner that would lay the groundwork for an independent State. However, this administration coincided with an influx of Jewish settlers.[4]

It is important to note that the system of trusteeship did not strip Palestine of its sovereignty; sovereignty over a territory under trusteeship belongs to its original inhabitants.[5] The representative system aimed to expedite the independence of these territories, as outlined in Chapter 11 of the UN Charter.

With the Jewish immigrant population rising to 32% and the purchase of Palestinian land, the UK referred the Palestine issue to the United Nations in 1946. The UNGA approved the partition resolution (GA Resolution 181) on November 29, 1947, allocating 43% of Palestinian land to a proposed Palestinian State, 56% to a Jewish State, and 1% to Jerusalem (to be overseen by the UN Trusteeship Council).

Less than six months later, on May 14, 1948, the Israeli government declared its establishment. A critical question arises: Does the UNGA resolution possess the legitimacy to assign one State's territory to another? The UNGA's powers are defined by the UN Charter, which suggests that it lacks the authority to transfer sovereignty or ownership of a nation's territory,[6] especially without a referendum involving the affected population. Consequently, the partition resolution lacks binding force and should be viewed as a recommendation rather than a legal mandate.

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1 Sepehri Ardakani, *Taking a Look at the History of Palestine* (2004) 15.
2 Sokolow, *History of Zionism*, trans Davood Heydari (1998) 386.
3 Majid Safa Taj, *Comprehensive Culture of Philosophers* (2007) 84.
4 Koechler, *The Right of the Palestinian People to Self-Determination; The Basis of Peace in the Middle East*, trans Mohammad Habibi (2000) 75.
5 *The Origins and Evolution of the Palestine Problem 1917-1988* (prepared for, and under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations 1990) 56.
6 Ibid, 78.

Moreover, acquiring land through war and aggression is devoid of legal legitimacy. The UN Charter, particularly Article 8, ensures that the rights of nations under trusteeship remain unchanged. Article 22 of the Covenant of the League of Nations stipulates that Palestine should become an independent nation after the trusteeship period. Thus, the partition resolution violated the Palestinian people's right to self-determination.

Following the partition, Zionist forces attacked Palestinian Arabs, seizing additional territory and extending control from the initially proposed 56% to 78% of Palestinian land. Various UNSC resolutions—such as 242 (1967), 338 (1973), 1397 (2002), 1515 (2003), and 1850 (2008)—emphasize the necessity of establishing two independent States: Israel and Palestine. Furthermore, UNSC Resolution 605 (1987) acknowledged the Palestinians as a distinct nation and recognized the West Bank and Gaza Strip as Palestinian territory.

The Palestinian National Council, in Algiers on November 15, 1988, declared the formation of a Palestinian State with Jerusalem as its capital. From the perspective of international law, a State must possess certain constituent elements: a permanent population, defined territory, a government, and the capacity to engage in relations with other States. Sovereignty, as an independent entity managing its own affairs, is foundational to these elements.

Considering the situation of Palestine, it can be concluded that Palestine meets these criteria as an independent country under international law. However, two important points must be noted:

1. The expulsion of people from their homeland does not negate the condition of a permanent population. This expulsion is an illegal act, constituting a crime of aggression as outlined in the ICC Statute, and thus has no legal effect.
2. The absolute certainty of State borders—meaning the absence of territorial disputes—is not a prerequisite for statehood.[1]

Additionally, the Camp David Agreement between Egypt and Israel in 1978 recognized self-government in the West Bank and Gaza Strip. UN Resolution 19/67 of 2012 acknowledged Palestine as a non-member observer State. Recently, on May 10, 2024, 143 UN member countries recognized the State of Palestine as an independent country. This resolution calls on the UNSC to favorably consider Palestine's request for observer member status among the 194 UN member States.[2]

This recognition by the United Nations and the supporting governments affirms the status of the Palestinian State. According to public international law, Palestine fulfills the necessary conditions for the ICC to exercise its jurisdiction in investigating and prosecuting crimes committed within its territory.[3]

Therefore, while the Palestinian State may not possess all the attributes and rights of a fully recognized State, it is nonetheless regarded as a State in international law.

1 Michael Akehurst, *Modern International Law*, trans. Mehrdad Sayedi (Daftare Khadamate Hoquqiye Bayn al-Melali 1998) 27.
2 United Nations, 'Document A/67/L.28' <www.un.org/ga/search/view.doc.asp?symbol=A/67/L.28>.
3 Heinsch and Pinzauti, *To Be (A State) or Not to Be?: The Relevance of the Law of Belligerent Occupation with Regard to Palestine's Statehood Before the ICC* (2020) 928.

5. The Prosecutor's View: Statement of March 3, 2021

On March 3, 2021, Ms. Bensouda, the ICC Prosecutor, stated her positive assessment of the legal conditions necessary for the ICC to exercise jurisdiction over crimes committed in the Occupied Territories.[1] She acknowledged potential challenges, such as limited resources and a heavy workload, but emphasized that these do not hinder the Court's obligations.

According to the ICC Statute, when a member State refers a situation to the prosecutor's office and there is a reasonable basis for initiating an investigation, the prosecutor is required to act. Initially, the prosecutor informs all member States that typically have jurisdiction over these crimes. The Statute mandates the prosecutor to conduct a thorough investigation to clarify the facts and evidence, determining whether individual criminal responsibility exists.

The prosecutor has conducted a pre-trial assessment of the Palestinian situation for approximately five years, engaging with various stakeholders and holding meetings with representatives from both Palestinian and Israeli authorities. A central issue remains the Court's jurisdiction over Palestine, which the prosecutor is expected to clarify. On December 20, 2019, she announced her intention to apply to the Pre-Trial Chamber for an investigation.[2]

The Court can exercise its criminal jurisdiction regarding Palestine, encompassing Gaza, the West Bank, and East Jerusalem. Border disputes do not affect the Court's jurisdiction; such matters should be resolved between Palestinian and Israeli officials, not the ICC. The extent of the Court's territorial jurisdiction is crucial to fulfilling the Statute's objectives.

Palestine is a member of the Rome Statute, thereby requiring the prosecutor to initiate an investigation into the situation. The prosecutor believes there is a reasonable basis for the Court's jurisdiction to begin an investigation. It is the Court's duty to prevent crimes specified in the Statute, irrespective of the perpetrator. The prosecutor's office intends to focus on the most prominent accused individuals and those with the greatest liability while remaining attentive to the victims impacted by the ongoing violence.

The prosecutor recognizes the concerns of member States regarding crimes that threaten global peace and security and appreciates the opportunity for cooperation with both the Palestinian State and the Israeli regime to achieve justice through national and international measures.

UNGA Resolution 19/67, adopted on December 4, 2012, affirms the Palestinian people's right to self-determination and the independence of the Palestinian State within the 1967 Occupied Territories. Additionally, the judges of the Court have determined that the 1995 Oslo Accords do not restrict Palestine's accession to the ICC. The prosecutor argues that the Oslo Accords complement the Fourth Geneva Convention and do not invalidate the rights of the Occupied Territories.

The preconditions for exercising the Court's jurisdiction have been established in accordance with various provisions of the Statute, confirming the ICC's authority regarding Palestine.[3] Following Palestine's application for membership on January 2, 2015, the prosecutor considers

1 ICC-OTP, *Statement of ICC Prosecutor* (March 2021).
2 ICC-OTP, *Statement of ICC Prosecutor* (20 December 2019).
3 Ibid.

Palestine a member of the ICC, affirming the Court's competence under Article 12, paragraph 1 of the Statute. Thus, a separate position on Palestine is unnecessary.[1]

However, an opposing viewpoint argues that Palestine lacks sovereign State status, making it ineligible for ICC membership.[2] This formalistic interpretation appears to legitimize the occupation and contradicts the ICC's goals of justice and the right to self-determination of the Palestinian people, violating fundamental principles of human rights and IHL.

Mrs. Bensouda, in her statement on March 3, 2021, emphasized three key points regarding the jurisdiction of the ICC over the situation in Palestine:

A. Palestine as a State: The prosecutor referenced Article 12, paragraphs 1 and 2 of the ICC Statute, indicating that Palestine is recognized as a State Party. Consequently, it has the right to bring a complaint to this international tribunal.

B. Investigating Crimes Regardless of Perpetrators: The prosecutor affirmed that crimes outlined in the statute must be investigated, and justice should be administered irrespective of the nationality of the perpetrators.

C. Territorial Disputes Are Not an Obstacle: The existence of territorial disputes does not prevent the recognition of a State.

6. Legal Foundations of the Pre-Trial Chamber's Decision

The legal basis for the Pre-Trial Chamber's decision (ICC-01/18, Decision on Jurisdiction in Palestine, February 5, 2021) regarding Palestine's referral includes several key factors:

- Invocation of the ICC Statute's provisions.
- Recognition of Palestine's membership in the ICC.
- Affirmation of Palestine's right to self-determination and independence.
- Distinction between the ICC's functions and certain criteria of public international law.

The Pre-Trial Chamber stated that the decisive criterion is the provisions of the Statute, as outlined in Article 21, paragraph 1. There is no need to consider secondary sources, including principles of public international law.[3]

According to Article 12, paragraph 2(a), the ICC's territorial jurisdiction over Palestine is established based on where the crime occurred.[4] Article 125, paragraph 3, specifies that the Statute is open for accession by all States, and this accession is significant regardless of international challenges.

The term "State" in the Statute is interpreted in its ordinary sense, not strictly as defined in public international law.[5] Article 126, paragraph 2, states that the Statute becomes enforceable for a new member from the first day of the month following the sixtieth day after the deposit of accession instruments.[6]

1 Mariniello and Meloni, *Foreword: Litigating Palestine before the International Criminal Court* (2020) 882.
2 Ibid, 6.
3 Ibid, 87.
4 Ibid, 90-91.
5 Ibid, 89, 95.
6 Ibid, 89.

The UNGA's Resolution 19/67 (2012) recognizes the Palestinian people's right to self-determination and independence. Consequently, Palestine can join treaties open to all governments, including the Rome Statute.[1]

Disputes among members of an international treaty, according to Article 77 of the Vienna Convention on the Law of Treaties, should be settled by the Assembly of States Parties. If unresolved, they may be addressed by international judicial authorities like the ICJ.

In Article 119(2) of the ICC Statute, the Assembly of States Parties determines the mechanism for resolving member disputes. Since disputes regarding Palestine's accession have not been addressed by the Assembly, it cannot be claimed that Palestine lacks the right to membership.[2]

Palestine formally joined the ICC on January 2, 2015, and became a member State on April 1, 2015, making it the 123rd member.[3] Most member States, except Canada, have not opposed Palestine's membership.[4] However, Australia, Austria, Brazil, the Czech Republic, Germany, Hungary, and Uganda expressed concerns about the ICC's jurisdiction over Palestine, arguing that Palestine is not a State and that Israel is not a member.

Despite these objections, Palestine's active participation in the ICC confirms its membership.[5] Palestine was officially listed as a member State during the 14th session of the Assembly of States Parties.

At the 16th session of the Assembly of States Parties, the venues for the 17th to 19th sessions were determined, and Japan and Palestine were elected as members of the Asia-Pacific group.[6] During this session, Palestine proposed a discussion on the crime of aggression and raised other issues for consideration in the 17th session. This right to request discussions is reserved exclusively for member States.[7]

Palestine has paid its membership fee, which has been accepted by the Court since its accession to the ICC.[8] The Palestinian government's cooperation in approving resolutions from the Assembly of States Parties further supports its membership.

Regardless of Palestine's status under public international law, its accession to the ICC Statute followed the proper procedures.[9] According to the Pre-Trial Chamber, Palestine fully complied with the conditions outlined in Article 125 of the Statute. The Chamber emphasized that it would be inconsistent to allow Palestine to become a member while denying it the legal benefits of that membership.[10]

The Statute's primary goal, as stated in Article 1, is to combat the most egregious international crimes that concern the global community, regardless of the perpetrator's nationality or

1 Ibid, 98-99.
2 Ibid, 95, 99.
3 Ibid, 97, 98,100.
4 Ibid, 101.
5 Ibid, 908-909; McIntyre, *The ICC, Self-Created Challenges and Missed Opportunities to Legitimize Authority Over Non-States Parties* (2021) 540.
6 ICC-01/18, Pre-Trial Chamber I, *Decision on the Jurisdiction in Palestine* (5 February 2021) para. 100.
7 Ibid, 100.
8 Ibid.
9 Ibid.
10 Ibid, 102.

immunity. Consequently, the Court's territorial jurisdiction is defined to establish individual criminal responsibility and achieve justice.[1]

A teleological interpretation of the Statute requires a comprehensive consideration of its provisions to avoid undermining any part of it. Thus, it is not necessary for a crime to occur entirely within a State's territory according to public international law.[2] Instead, the focus should be on the purpose of the Statute, which centers on individual criminal responsibility rather than State actions.

The Court does not claim competence over complex governmental issues in international law. To fulfill its objectives and conduct trials, it is unnecessary to identify the specific government involved.[3] Therefore, the concept of the State is less significant than the crimes and the individuals who commit them. This distinction is a key difference between public international law and international criminal law.

The essential issue is whether a crime defined in the Statute, which violates international public order, occurred within a member State's territory. This determination is crucial for establishing individual criminal responsibility and enables the prosecutor to initiate an investigation.[4]

To avoid misunderstandings, the Pre-Trial Chamber clarifies that its findings do not pertain to issues of international law arising from events in Palestine that fall outside the Court's jurisdiction. The Chamber does not prejudge matters of public international law regarding Palestine's status, nor does it seek to rule on territorial jurisdiction or international border disputes.[5]

In conclusion, the Pre-Trial Chamber asserts that Palestine's accession to the ICC followed the procedures defined in the Statute.

In addition, the Assembly of States Parties has accepted Palestine as a member during its meetings. As a result of this accession, Palestine can utilize the legal effects of the statute as a member State. Furthermore, Palestine's membership is not subject to the disputes outlined in Article 119, paragraph 2. Therefore, Palestine is recognized as a member of the ICC and, consequently, as a State.

For the purposes of Article 12(2)(a) of the statute, Palestine's accession resolves any questions regarding its status.[6] It can be asserted that all crimes under the jurisdiction of the ICC—including genocide, war crimes, crimes against humanity, and crimes of aggression—have been repeatedly committed against the Palestinian people by the Zionist regime. The extensive killing of Palestinians over many years, the occupation of their land through force and threats, and the expulsion of people from their homeland are well-documented globally.

The crimes committed by the Zionist regime against Palestinian civilians during peaceful

1 Ibid, 104,106.
2 Ibid, 106.
3 Ibid, 93, 104.
4 Ibid, 108.
5 Ibid, 113
6 Ibid, 112.

demonstrations in Gaza in 2018, as well as numerous violations since October 7, 2023, continue in Gaza and recently in the West Bank.[1]

The Court is composed of the following organs: (a) The Presidency; (b) An Appeals Division, a Trial Division, and a Pre-Trial Division; (c) The Office of the Prosecutor; (d) The Registry. According to Article 15 of the statute, the prosecutor can initiate an investigation based on information regarding crimes within the Court's jurisdiction. If the prosecutor concludes that there is a reasonable basis for an investigation, they must obtain permission from the Pre-Trial Chamber. Additionally, Article 14 of the ICC statute allows any member State to refer a situation involving one or more crimes within the Court's jurisdiction to the prosecutor.

Following Palestine's membership in the ICC in 2015 and its complaint against Israel regarding the 2018 crimes in Gaza, the Prosecutor announced on March 3, 2021, that Palestine is a member State of the ICC and has the authority to refer the situation to the Court. Consequently, it is now the responsibility of the ICC prosecutor to undertake the necessary measures for investigation and prosecution, in accordance with the statute, so that criminal proceedings can commence.

Conclusion

Based on the analysis of the concept of statehood in the Statute of the International Criminal Court (ICC) and the first Pre-Trial Chamber's decision on February 5, 2021, the following points can be concluded:

1. From the perspective of international law, the establishment of the occupying Israeli regime does not negate the legal existence of Palestine.
2. The principles concerning the illegitimacy of occupation and the non-transfer of ownership of occupied territories indicate that the occupation of Palestinian territories since 1967 does not eliminate Palestine's legal status. The International Court of Justice reaffirmed this in its decision, stating that the territory of Palestine corresponds to the borders established before the 1967 occupation, confirming the undeniable existence of a Palestinian State.
3. There is no doubt about the existence of the Palestinian State; even in uncertain circumstances, its existence must be acknowledged.
4. While the State of Israel was established in 1948, the United Nations did not vote to dissolve the sovereignty of Palestine. Instead, it divided the land, raising questions about the legitimacy of this division rather than the legitimacy of the pre-existing Palestinian State.
5. Multiple resolutions, including UNGA Resolution 19/67 (2012), have implicitly recognized the Palestinian State.
6. According to the ICC Statute, illegal occupation constitutes a crime of aggression. International crimes cannot confer legal legitimacy upon perpetrators, nor can occupation extinguish the legitimate existence of a State. Thus, the Palestinian State retains legal

1 Human Rights Council, *Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory* (25 February 2019).

legitimacy despite the damage inflicted by Israeli occupation. This is supported by repeated condemnations of the Israeli regime by various international bodies, including multiple UNSC resolutions.

7. Although the ICC has stated it will not rule on territorial disputes or complex governmental issues, its actions in exercising jurisdiction over crimes committed in Palestinian territories effectively recognize the Palestinian State and strengthen its legal identity.
8. The ICC's engagement with the situation in Palestine not only addresses criticisms regarding its focus on African cases over the past two decades but also reinforces the Court's commitment to achieving justice at the international level. Moreover, it enhances the recognition of Palestinian sovereignty within the international community, making the acknowledgment of the Palestinian State more significant.

References

Books

Akehurst, Michael, *A Modern Introduction to International Law* (Routledge 1989).

Bassiouni, M Cherif, *International Criminal Law* (Vol 1, 3rd edn, Martius Nijhoff Publishers 2008).

Bassiouni, M Cherif, *Principles of Legality in International and Comparative Criminal Law* in *International Criminal Law* (Vol 1, 3rd edn, Martius Nijhoff Publishers 2008).

Bledsoe, Robert L and Boleslaw A Boczek, *International Law Dictionary* (ABC-Clio Inc 1987).

Cassese, Antonio, *International Criminal Law* (Oxford University Press 2008).

Cassese, Antonio, *International Law in an Unconditional World* (Oxford University Press 1989).

Crawford, James, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006).

Daes, E I, *Status of the Individual in Contemporary International Law* (United Nations 1992).

Kittichaisaree, Kriangsak, *International Criminal Law* (Oxford University Press 2001).

Momeni, Mahdi, *International Criminal Law* (Payam Noor University Press 1400). [In Persian]

Momeni, Mahdi, *Principles of Legality of Crimes and Punishments in International Criminal Law* (Mizan Publishing 2013). [In Persian]

Sepehri Ardakani, Ali, *Seiri dar tarikhe felestin: Taking a Look at the History of Palestine* (Mirathe Mandegar Publishing 2004). [In Persian]

Sokolow, Nahum, *History of Zionism* (Adamant Media Corporation 2001).

Taj, Majid Safa, *Farhange Jame`e Felestin: Comprehensive Encyclopedia of Palestine* (Safir Ardehal Publishing 2007, Vol II). [In Persian]

The Origins and Evolution of the Palestine Problem 1917-1988 (prepared for and under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, United Nations 1990).

Tsilonis, Victor, *The Jurisdiction of the International Criminal Court* (Springer Nature Switzerland AG 2019) https://doi.org/10.1007/978-3-030-21526-2.

Articles

Delgrande, Joe, 'An Examination of Palestine's Statehood Status through the Lens of the ICC Pre-Trial Chamber's Decision and Beyond' (2021) *Journal of International Law and Politics* October.

Heinsch, Robert and Pinzauti, Giulia, 'To Be (A State) or Not to Be?: The Relevance of the Law of Belligerent Occupation with Regard to Palestine's Statehood Before the ICC' (2020) 18 *Oxford Journal of International Criminal Justice* 927.

Imseis, Ardi, 'State of Exception: Critical Reflections on the Amici Curiae Observations and Other Communications of States Parties to the Rome Statute in the Palestine Situation' (2020) 18 *Oxford Journal of International Criminal Justice* 905.

Kadkhodayi, Abbasali and Maqami, Amir, 'Consequences of Constitutionalist Reading of International Law' (2017) 48 *Journal of International Law* 38. [In Persian]

Koechler, Hans, 'The Right of the Palestinian People to Self-Determination; The Basis of Peace in the Middle East' (translated by Mohammad Habibi) (2000) *Quarterly Journal of Palestinian Studies* Summer No 4, 75.

Kotecha, Birju, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) 18 *Oxford Journal of International Criminal Justice* 107.

Mariniello, Triestino and Meloni, Chantal, 'Foreword: Litigating Palestine Before the International Criminal Court' (2020) 18 *Oxford Journal of International Criminal Justice* 881.

McIntyre, Gabrielle, 'The ICC, Self-Created Challenges and Missed Opportunities to Legitimize Authority Over Non-States Parties' (2021) 19 *Journal of International Criminal Justice* 511.

Ronen, Yael, 'Palestine in the ICC: Statehood and the Right to Self-Determination in the Absence of Effective Control' (2020) 18 *Oxford Journal of International Criminal Justice* 947.

Documents

ICC-01/18-143, Pre-Trial Chamber I, 'Decision on the Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine' (5 February 2021).

ICC-OTP, 'Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Pre-Trial Examination of the Situation in Palestine and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction' (20 December 2019).

ICC-OTP, 'Statement of ICC Prosecutor, Fatou Bensouda, on the Situation in Palestine: Summary of Pre-Trial Examination Findings' (3 March 2021).

International Criminal Court, 'Referral by the State of Palestine Pursuant to Article 13(a) and 14 of the Statute' (15 May 2018).

International Criminal Court, 'Situation in the State of Palestine: Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine' (No ICC-01/18, 22 January 2020).

International Criminal Court, 'Situation in the State of Palestine: William Schabas, Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence' (Case No ICC-01/18, 15 March 2020).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) (9 July 2004).

Montevideo Convention on the Rights and Duties of States (26 December 1933).

Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory (25 February 2019, A/HRC/40/74).

Rome Statute of the International Criminal Court (17 July 1998).

United Nations General Assembly, *Resolution 181 II (1947), Report of the Ad Hoc Committee on the Palestinian Question* (29 November 1947).

United Nations General Assembly, *Resolution 2625 (1970), Declaration on Principles of International Law Concerning Friendly Relations* (XXV).

United Nations General Assembly, *Resolution 2734 (1970), Declaration on the Strengthening of International Security* (16 December 1970).

United Nations Security Council, *Resolution 101 (1953), S/3139/Rev.2* (24 November 1953).

United Nations Security Council, *Resolution 106 (1955), S/3378* (29 March 1955).

United Nations Security Council, *Resolution 111 (1956), S/3538* (19 January 1956).

United Nations Security Council, *Resolution 217 (1965), S/RES/217* (20 November 1965).

United Nations Security Council, *Resolution 233 (1967), S/RES/233* (6 June 1967).

United Nations Security Council, *Resolution 2334 (2016), S/RES/2334* (23 December 2016).

United Nations Security Council, *Resolution 237 (1967), S/RES/237* (14 June 1967).

United Nations Security Council, *Resolution 242 (1967), S/RES/242* (22 November 1967).

United Nations Security Council, *Resolution 252 (1968), S/RES/252* (21 May 1968).

United Nations Security Council, *Resolution 270 (1969), S/RES/270* (26 August 1969).

United Nations Security Council, *Resolution 271 (1969), S/RES/271* (15 September 1969).

United Nations Security Council, *Resolution 311 (1972), S/RES/311* (4 February 1972).

United Nations Security Council, *Resolution 446 (1979), S/RES/446* (22 March 1979).

United Nations Security Council, *Resolution 54 (1948), S/902* (15 July 1948).

United Nations Security Council, *Resolution 662 (1990), S/RES/662* (9 August 1990).

Websites

Curia.europa.eu, http://curia.europa.eu/juris/document/document.jsf?jsessionid=pp:32&52.

EUR-Lex, http://eur-lex.europa.eu/legal-content/en/txt/.

International Criminal Court, https://asp.icc-cpi.int.

U.S. Department of State, http://history.state.gov/milestones/1921-1939/mukden-incident.

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Ukraine Situation from the Perspective of International Criminal Law: ICC and Beyond

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ABSTRACT

The ever-evolving landscape of International Criminal Law (ICL), as a field that connects different branches and levels of law, requires meticulous deliberation. Establishing international justice is a crucial step in ensuring that all perpetrators are held accountable. The International Criminal Court (ICC/the Court) has issued two arrest warrants against the President and Commissioner for Children's Rights of the Russian Federation, on March 17, 2023, for their involvement in forced population transfer which is an international crime under the Rome Statute. This research article seeks to explore the Ukraine situation from the perspective of ICL and examine the arrest warrants issued by the ICC against Russian authorities. Additionally, it briefly addresses the Ukraine's lawfare against Russia at the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR). While the issuance of the arrest warrants is in itself a positive step toward the fortification of international criminal justice, the implementation of these warrants specifically regarding the President of the Russian Federation seems to be very problematic. Nevertheless, in spite of the challenges faced by the ICC in this situation, issuance of the arrest warrants reveals a significant reality: international criminal justice does not exempt even the president of a permanent member of the UN Security Council. Furthermore, the legal actions taken by Ukraine against Russia at both the ICJ and ECtHR are legally positive steps towards halting aggression and restoring international peace and security through international law. However, these actions face challenges such as time constraints and compliance.

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Introduction

In earlier times and in smaller societies, the absence of judicial bodies resulted in the consolidation of power within monarchs, who simultaneously served as both lawmakers and interpreters of the law. However, as populations expanded and human societies evolved, these legislative authorities realized the necessity of delegating the responsibility of legal interpretation in order to sustain societal progress.[1] Over time, alongside the growth and progress of human societies and fundamental human developments, judicial settlement methods have expanded beyond domestic realms to regional and global arenas. This process has also influenced the domestic courts of neighboring states and communities.

Since 2006, over twenty-five international courts have been operational, possessing a statute that recognizes their competences, and having appointed judges ready to receive legal complaints. Some of these courts, in addition to inter-state disputes, have considered complaints between citizens of countries or international organizations to be heard. It is said that international courts have issued over twenty-seven thousand enforceable sentences and judgments, some of which we are familiar with.[2] These prominent examples often shape our understanding of international courts. When an international court assumes jurisdiction over an international dispute, in fact, it is officially authorized to monitor a state's compliance with international law and the actions of state, public bodies and, in some cases, individuals to ascertain their conformity with the requirements of international law. In this way, the court's role is to first determine the legality or illegality of a state's conduct, and in the second place, to establish liability for compensating the victims and the costs related to the illegal actions.

On February 24, 2022, Russia launched an invasion of Ukraine resulting in an ongoing armed conflict. Since then, this conflict has been and is discussed from different branches of

1. Karen J Alter, 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review' in Jeffrey L Dunoff, Mark A Pollack, Interdisciplinary Perspectives on International Law and International Relations: The State of the Art (2013) first edition CUP 362.

2. Raffaela Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2019) Vol 30 No. 4 European Journal of International Law 1129-1152.

public international law including international law on use of force,[1] international humanitarian law,[2] international human rights law[3] etc. In this vein, international criminal law has garnered significant attention as a discipline with potential relevance to the Ukrainian situation. International criminal law is a legal system designed to prosecute individuals responsible for committing international crimes. General categories of international crimes include aggression, genocide, war crimes, and crimes against humanity. The main objectives of international criminal law are to maintain international order, peace, and security, to hold international criminals accountable, to provide reparation and alleviate the suffering of victims of international crimes, and to prevent the occurrence of such crimes in the international community.[4]

Given the significance and relevance of international criminal law in the situation of Ukraine, particularly in light of the two arrest warrants made by Pre-Trial Chamber II of the International Criminal Court (ICC, the Court) on March 17, 2023, against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, it becomes imperative to analyze the ICC's jurisdiction and explore alternative avenues for ensuring accountability for international crimes committed in this conflict. Accordingly, this article aims to examine the Ukraine situation through the lens of international criminal law. In doing so, Section 1 will discuss the mechanisms by which the ICC may gain jurisdiction over a situation. Thereafter, Section 2 will examine the arrest warrant issued against Vladimir Putin, evaluating its merits and shortcomings. Finally, Section 3 will provide a brief overview of Ukraine's legal actions at the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR).

1. Mechanisms by Which the ICC May Acquire Jurisdiction Over a Situation

The twentieth century can be regarded as one of the bloodiest periods of human history. The occurrence of two world wars and many inter and intrastate conflicts which led to flagrant violations and abuses of human rights across the globe confirms this claim.[5] However, it is one side of the coin. This century witnessed the beginning of a new chapter in the history of international law in terms of the efforts made to legalize international relations.[6] A significant milestone was the establishment of a permanent international court to deal with international crimes committed by individuals. This culminated in the adoption of Rome Statute, the founding treaty of the ICC on July 17, 1998. The Statute entered into force on July 1, 2002, thereby, rendering the Court operational.[7] Although the idea to create a court to prosecute persons responsible for the worst

1. In this regard see James A Green, Christian Henderson, Tom Ruys, 'Russia's Attack on Ukraine and the Jus ad Bellum' (2022) Vol 9 Issue 1 Journal on the Use of Force and International Law 4-30.
2. See Patrycja Grzebyk, 'Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law' (2022) Vol XLI Polish Yearbook of International Law 145-162.
3. See Sattar Azizi, Mousa Karami, 'Applicability of Remedial Secession Theory on the Recognition of Ukraine's Donetsk and Luhansk Oblasts' Independence' (2023) Vol 39 Issue 68 International Law Review 141-172.
4. Abolfath Khaleghi, General International Criminal Law (Majd Publication 2015) 27-35.
5. Daniel D Ntanda Nsereko, 'Triggering the Jurisdiction of the International Criminal Court' (2004) Vol 4 African Human Rights Journal 256-257.
6. Parviz Zol'ein, The Foundations of Public International Law (sixth edition, Ministry of Foreign Affairs 2009) 304. [In Persian]
7. Iraj Rezaie Nezhad, The Jurisdiction of International Criminal Court (Majd Publication 2014) 25. [In Persian]
According to the ICC Homepage, 123 countries are States Parties to the Rome Statute of the Court. See https://asp.icc-cpi.int/states-parties (last access on May 6, 2023).

crimes of mankind was not a new one,[1] the establishment of ICC has been characterized as both "a revolution in international law and in the conduct of international relations" and an achievement of the global civil society. [2]

One of the significant issues regarding ICC is its jurisdiction. Generally speaking, jurisdiction refers to the Court's authority to enforce the law[3] and is aimed at identifying the "scope of the Court's authority".[4] The constituent treaty of the ICC, the Rome Statute, stipulates the situations in which the Court can exercise its jurisdiction. These are enumerated in Article 13 of the Statute, and the ICC may exercise jurisdiction through the referral of a State Party to the ICC Statute, referral by the UN Security Council and the initiation of an investigation at the behest of the Prosecutor. Moreover, regarding a State which is not a Party to the Statute, Article 12(3) states that the Court may exercise its jurisdiction if that State issues a declaration accepting the jurisdiction of the ICC retroactively. In such a case, the acceptance of jurisdiction extends to all crimes within the purview of the Court. It should be noted that, although the preconditions for the exercise of jurisdiction can be realized through a declaration under Article 12(3) of the Statute, this does not make the accepting State a Party to the ICC Statute nor does it make the referral of the situation as provided for in Article 13. [5]Neither Russia nor Ukraine have ratified the Rome Statute. Article 12(3) as regards the issuance of a declaration accepting the jurisdiction of the ICC by a non-Party is applicable in the Ukraine situation. It was following the submission of two declarations by Ukraine that the ICC finally gained jurisdiction over the situation in the country. Based on the ICC website, Ukraine has exercised its prerogatives twice, accepting the Court's jurisdiction over alleged crimes within the Court's purview and occurring on Ukrainian territory. The first declaration[6] was lodged by the Government of Ukraine on April 9, 2014, accepting ICC jurisdiction for alleged crimes committed on Ukrainian territory between November 21, 2013, and February 22, 2014. The second declaration, made on September 8, 2015,[7] extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from February 20, 2014, onwards. On February 28, 2022, the ICC Prosecutor announced he would seek authorization to open an investigation into the Situation in Ukraine, on the basis of the Office's earlier conclusions of its preliminary examination,[8] and encompassing any new alleged crimes falling within the Court's jurisdiction.[9]

1. Sarah Babaian, The International Criminal Court – An International Criminal World Court? (Springer International Publishing AG 2018) 191.
2. See Marlies Glasius, The International Criminal Court: A Global Civil Society Achievement (Routledge 2007) xiii-xiv.
3. Robert Cryer and others, An Introduction to International Criminal Law and Procedure (third edition, CUP 2014) 49.
4. William A Schabas, An Introduction to the International Criminal Court (fourth edition, CUP 2011) 25.
5. Sajjad Abbasi, 'The Decision of the International Criminal Court in the Palestine Situation: A Beginning in the Prevention of Impunity for Israeli Crimes' (2023) Vol 4 Iranian Review for UN Studies 23-25.
6. See https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf (last access on August 18, 2023).
For an in-depth analysis of the legal problems associated with this declaration see Iryna Marchuk, 'Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond' (2016) 49 Vanderbilt Journal of Transnational Law 323, 341-360.
7. See https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine (last access on August 18, 2023).
For a detailed analysis of this second declaration see Marchuk (no 13) 360-368.
8. See https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine (last access on August 18, 2023).
9. https://www.icc-cpi.int/situations/ukraine (last access on August 18, 2023).

It was pursuant to the second voluntary declaration made by the Ukrainian government that the Pre-Trial Chamber II of the ICC issued two arrest warrants on March 17, 2023, against *Vladimir Vladimirovich Putin* and *Maria Alekseyevna Lvova-Belova*. The subsequent section discusses the arrest warrant on Putin, including its strengths and weaknesses.

2. Arrest Warrant against Vladimir Putin: Strengths and Weaknesses

As King puts it, the effective function of the ICC's regime of arrest and surrender is a crucial factor in its success. [1] Issuance of arrest warrants against those responsible for international crimes is stipulated in the ICC's Statute. In accordance with Article 58(1) of the Statute: "1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances". [2] This legal framework was applicable in the Ukraine situation where the Pre-Trial Chamber issued two arrest warrants against the Russian authorities.

According to ICC website, on March 17, 2023, Pre-Trial Chamber II of the ICC issued arrest warrants for two individuals in relation to the situation in Ukraine: *Vladimir Vladimirovich Putin* and *Maria Alekseyevna Lvova-Belova*. Putin is allegedly responsible for the war crime of unlawful deportation of population (children) and unlawful transfer of population (children) from the occupied areas of Ukraine to the Russian Federation, as stipulated under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute. These crimes have allegedly been committed in Ukrainian occupied territory at least from February 24, 2022. Similarly, *Lvova-Belova*, is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute) which were allegedly committed in Ukrainian occupied territory at least from February 24, 2022.[3] Forced population transfer is a crime under the Rome Statute. Following the four visits by *Karim Khan* over the past year, it was decided that there exist "reasonable grounds to believe that Mr. Putin bears individual criminal responsibility" for the children abductions. The number of children taken from Ukraine by Russian forces remains uncertain to date. The Office of the Prosecutor detected the deportation of hundreds of children many of whom are being adopted by Russian individuals. Issuing a decree to speed up the granting of Russian nationality to these children, Putin made it easier to adopt them. According to the Office of the Prosecutor, these

1. Hugh King, 'Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute' (2006) 4 New Zealand Journal of Public and International Law 269.
2. Rome Statute of the International Criminal Court (last amended 2010) (adopted July 17, 1998, entered into force July 1, 2002) (Rome Statute) art. 58(1).
3. See https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (last access on May 5, 2023)

acts, *inter alia*, implies the intention to permanently remove these children from Ukraine. The ICC prosecutor emphasized in a statement, "We must ensure that those responsible for alleged crimes are held accountable and that children are returned to their families and communities... We cannot allow children to be treated as if they were the spoils of war" the ICC prosecutor said in a statement.[1] It is worth mentioning that it was on March 4, 2009, when the ICC issued the precedent-setting case of arrest warrant against a sitting head of State- Omar Al Bashir- allegedly on the grounds of war crimes and crimes against humanity.[2] Although the issuance of arrest warrant against Putin holds significant importance in terms of the realization of international criminal justice, particularly against the head of state of a permanent member of the UN Security Council, the enforcement of such warrant faces several obstacles. It should be noted that all States Parties to the Rome Statute are obligated to surrender *Maria Alekseyevna Lvova-Belova* to the ICC if she is found within their territory. Furthermore, non-States Parties to the Statute may cooperate with the Court in this regard. Nevertheless, the case is not this simple for President Putin. In addition to political barriers, the ICC faces several legal challenges in enforcing the arrest warrant against him. These challenges and barriers are dealt with in the following paragraphs. In such a situation, the prosecutor can file new charges against *Putin*, thereby expanding the scope of sentences.

One of the tensions between the interests of humanity and demands of state sovereignty is reflected in the discussion of the immunity enjoyed by state officials.[3] The principle of absolute personal immunity for a sitting head of State form other States' criminal jurisdiction is widely entrenched in the contemporary international law.[4] However, The State Parties to the ICC's Statute (as of currently, August 18, 2023, 123 States), have accepted to waive the immunity of their high ranking authorities including the heads of State. This approach signifies a remarkable shift as it stands contrary to treaty and customary international law or domestic laws on immunities resulting from official capacity.[5] However, as mentioned above, the Russian Federation is not a State Party to the Statute and, as a consequence, its high ranking officials, including the head of state enjoy immunity from arrest or surrender to the ICC.

According to the principle of privity of treaties under international law enshrined in Article 34 of the 1969 Vienna Convention on Law of Treaties,[6] "a treaty applies only between the Parties to it…". Furthermore, no obligation or right is created for a third state without its consent under such a treaty. Therefore, the ICC lacks the authority to compel States not Parties to its Statute to arrest and surrender their own officials or officials of other States. This is expressly specified in Article 98(1) of the Statute, which states "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its

1. See ICC, Statement by Prosecutor Karim A. A. Khan KC on the issue of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova, www.icc-cpi.int, 17 March 2023. (last access on August 18, 2023)
2. Seyed Ghasem Zamani, 'International Criminal Court and the Issue of Arrest Warrant against Omar Al Bashir' (2009) Vol 7 Issue 14 Legal Researches 13-14. [In Persian]
3. Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) Vol 98 No. 3 The American Journal of International Law 407.
4. Antonio Cassese, International Law (OUP 2005) 117-118; Jan Klabbers, International Law (CUP 2013) 102.
5. Mohammadali Chapari, Majid Shayganfard, 'Criminal Responsibility in International Crimes and Its Contrast with the Discourse of Immunity' (2017) Vol 10 International Legal Researches 77-78. [In Persian]
6. Vienna Convention on the Law of Treaties (adopted May 23, 1969, entered into force January 27, 1980) UNTS, Vol. 1155, 331.

obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

Consequently, if the head of State A against whom an arrest warrant has been issued travels to State B which is a Party to the Statute, two different situations as to the implementation of such an arrest warrant arise: 1) if the head of State A is the national of a State Party to the Statute, it appears that State B has the authority to arrest and surrender the individual to the ICC. This is due to the fact that the consent of State A to waive the immunity of the head of State has already been obtained through Article 27 of the Statute. Therefore, surrendering the head of State A does not mean to neglect the immunity of this official before State B; and 2) if the head of State B is not the national of a State Party to the Statute, the State B lacks the authority to surrender the individual to the ICC, unless the consent of State A to waive the immunity of its head of State is obtained in advance.[1] So, even States Parties to the Statute have no authority to surrender Putin to the ICC in case of his presence in their territory.[2]

A comparison can be drawn between the arrest warrant issued against Omar Al Bashir of Sudan on March 4, 2009, with that of Putin of Russia on March 17, 2023, in terms of the immunity of heads of States not Parties to the Statute. However, the two cases are different in this regard. The proceedings against Omar Al Bashir were instigated by the UN Security Council. On March 31, 2005, through Resolution 1593 (para. 1), the Council determined that the Darfur crisis poses a continuous threat to international peace and security and, as a result, decided to "to refer the situation in Darfur since July 1, 2002, to the Prosecutor of the ICC". The referral of the situation in Darfur to the ICC marked the first exercise of the power of referral by the Council.[3]

The referral empowered the ICC to investigate crimes committed by Al Bashir and prosecute him pursuant to Article 13(b) of Statute in spite of the fact that Sudan was not a State Party to the Statute. Since the Council acted under Chapter VII of the UN Charter, it had the power to disregard the immunity of the head of a non-State Party to the Statute. Although the UNSC Resolution 1593 on the basis of which the ICC issued the arrest warrant against Al Bashir did not explicitly waive his immunities, it implicitly did so by adopting the relevant provisions, particularly Article 27, on immunities when availing itself of the option offered by Article 13(b) of the Statute.[4] Undoubtedly, the successful prosecution or trial of Putin by the ICC will be a highly challenging process, and in the absence of cooperation from Russia in this regard, he may never stand trial before the Court due to his personal immunity on the one side and non-cooperation of Russia and other non-States Parties on the other side.[5] Put simply, there are two viable avenues for enforcing this arrest warrant: 1) consent of the Russian Federation to waive Putin's immunity, or 2) termination of Putin's presidential term.

1 . UNSC Resolution 1593 (2005) S/RES/1593 (2005), para. 1.

2. Julie M Martin, 'The International Criminal Court: Defining Complementarity and Diving Implications for the United States' (2006) Vol 4 Loyola University Chicago International Law Review 109.

3. Ibid.

4. Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) Vol 7 Journal of International Criminal Justice 340-341.

5. Aghen Hanson Ekori, Paul S Masumbe, 'Putin on Trial: Reality of Heads of State Immunity before International Criminal Courts' (2022) Vol 2 Polit Journal: Scientific Journal of Politics 34.

3. Ukraine Lawfare against Russia at Other Fora: ICJ and ECtHR

The invasion of Ukraine by the Russian Federation on February 24, 2022, provided the factual background for two disputes between the two States which the Ukrainian government brought before the ICJ and ECtHR. Taking into account the conflicts caused by the collapse of the former Yugoslavia and the resulting crimes, Russia's aggressive war and war crimes in Ukraine have led to one of the most severe human rights crisis in Europe since World War II.[1] In particular, the unprecedented number of declarations of intervention under Article 63 of the ICJ's Statute [33 declarations as of May 5, 2023; the last one is the Liechtenstein's on December 15, 2022][2] has made this case an extraordinary one in the history of the ICJ and Permanent Court of International Justice (PCIJ).[3] In fact, lawfare, the purposeful use of law as a weapon of war, has undeniably been a part of the Russia-Ukraine situation since 2014 by both sides. Russia has justified its military attack on Ukrainian territory under the guise of domestic and international law, whereas Ukraine has launched a lawfare project including lawsuits under both public and private international law.[4] In the subsequent paragraphs, we briefly look at Ukraine's legal actions against Russia before the ICJ and the ECtHR.

Following the military attack launched by Russia on Ukraine on February 24, 2022, Ukraine brought a case before the ICJ the day after invasion, filing an Application with the Court, requesting to institute proceedings against the Russian Federation in a dispute concerning the interpretation, application or fulfilment of the Convention on the Prevention and Punishment of the Crime of Genocide.[5] In the Request, Ukraine sought "provisional measures to protect its rights not to be subject to a false claim of genocide, and not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention".[6] Russia, on the other hand, accused Ukraine of committing genocide against millions of ethnically Russian people in the Donbas region and justified its military intervention as an act of collective self-defense to save these individuals based on two separate treaties of friendship and mutual assistance with self-proclaimed states of Donetsk, and Luhansk and their request for military assistance.[7]

It is noteworthy that the ICJ issued an Order on March 16, 2022, concerning the Request submitted by Ukraine. This Order clearly showed that the accusation and claim made by Russia against Ukraine on committing genocide against ethnically Russian people in Donetsk and Luhansk had been unfounded. The Judges of the ICJ stated that,

> *"at the present stage of the proceedings, it suffices to observe that the Court is not in*

1. Amnesty International UK, 'Foreign Secretary: Help Deliver Justice for Ukraine' available online at: www.amnesty.org.uk/actions/deliver-justice-ukraine (last access on August 18, 2023).
2. See https://www.icj-cij.org/case/182/intervention.
3. Beatrice I Bonafe, 'The Collective Dimension of Bilateral Litigation: The Ukraine v Russia Case before the ICJ' (2022) Questions of International Law 27.
4. Jill I Goldenziel, 'An Alternative to Zombieing: Lawfare between Russia and Ukraine and the Future of International Law' (2023) Vol 108 Cornell Law Review Online1.
5. Request for the Indication of Provisional Measures (Ukraine v Russia) (February 25, 2022), para. 1. Available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-WRI-01-00-EN.pdf (last access August 18, 2023)
6. Ibid, para. 12.
7. Terry D Gill, 'The Jus ad Bellum and Russia's "Special Military Operation" in Ukraine' (2022) Vol 25 Journal of International Peacekeeping 122.

possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention [on the Prevention and Punishment of the Crime of Genocide], in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide… Under these circumstances, the Court considers that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine".[1]

According to this Order, it is established that neither Ukraine has committed genocide in the Donbas region nor Russia had the authority to use force to stop such a genocide, even if one were to consider it to be committed by the Ukrainian armed forces. However, the complexity of the procedural process in view of Russia's initial objections makes the Court to address the controversial question of whether the intervention of a third party at the jurisdictional stage is legal. It should be noted that the collective intervention by third States may also prolong the case, because if Russia objects to these declarations of third-party intervention, the Court will have to hear it before deciding on the admissibility of the third-party intervention.[2]

The other forum at which Ukraine has proceeded its lawfare project is ECtHR- also known as the Strasburg Court. Since 2014, Ukraine has brought about ten inter-state cases, accusing Russia of severe human rights violations. In a somewhat unexpected step, on July 22, 2021, the Russian Federation, under Article 33 of the European Convention on Human Rights (ECHR), filed a case against Ukraine as its first interstate case submitted by Moscow before ECtHR.[3] Filing this application by the Russian Federation can be interpreted as the continuance of a chain of events against Ukraine which finally led to the full-scale invasion of February 24, 2022. Four days after the invasion, Kiev filed another case against Russia in Strasburg on grounds of "massive human rights violations being committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine".[4]

Ukraine requested the ECtHR to take interim measures under Rule 39 of the Rules of Court.[5] ECtHR has clarified that substantive interim measures of protection may only be granted when there is an "imminent risk" of "irreparable damage" to the rights and freedoms allegedly violated. The Court has also embraced a narrow approach to the concept of "irreparability" that mainly revolves around the potential harm to the life and physical integrity of the individuals concerned. Substantive interim relief is therefore granted by the Court only in cases of alleged violations of the right to life under Article 2 of the ECHR, the prohibition of torture and inhuman or degrading treatment under Article 3 of the ECHR, and exceptionally of the right to respect for private and family life under Article 8 of the ECHR.[6] In this regard, according to the press

1. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Order) [2022] General List No. 182, paras. 59-60.
2. See paragraph 2 of article 84 of the Rules of Court.
3. Milena Ingelevič-Citak, 'Russia Against Ukraine Before the European Court of Human Rights. The Empire Strikes Back? ' (2022) Vol 51 Polish Political Science Yearbook8 ,7 .
4. See http://tinyurl.com/26ojmoe3 (last access on February 2, 2024)
5. For full text of these Rules see https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf
6. Quoted from Andrea Saccucci, ' Interim Measures at the European Court of Human Rights: Current Practice and Future

release issued by the Registrar of the Court on March 1, 2022, the ECtHR decided to indicate to the Government of Russia to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals. The ECtHR also… and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops.[1] Subsequently, Russia was expelled from Council of Europe by the decision of Committee of Ministers on March 16, 2022.[2]

The lawsuits against Russia by Ukraine at both the ICJ and the ECtHR are legally positive steps to stop a war of aggression and restore the international peace and security through international law. However, they are faced with challenges such as time constraints and compliance.[3] To conclude, the Ukraine's lawfare project, launched specifically after the invasion by the Russian Federation, through the ICC, ICJ and ECtHR seems to be an effective and appropriate means for employing international law to fight against the violations committed by Russia and its officials. However, it should be accepted and considered that international law and its mechanisms are not yet effective in solving the problems that are essentially political.

We maintain that among the avenues that the international community has not taken is the formation of a special international tribunal to deal with alleged crimes committed during a certain period of armed conflicts in the territory of Ukraine by the authority of the UN Security Council. But the bitter truth of the veto power consistently shows itself in this field. On August 24, 2022, Russian Ambassador *Vassily Nebenzia* cast the only negative vote on a procedural matter that would have allowed Ukrainian President *Volodymyr Zelensky* to speak with the Security Council via telephone conference. So, the general pattern of voting in the Council in 2022 has reflected the geopolitical differences caused by Russia's war against Ukraine, which will certainly not be without influence in this case as well.[4] Therefore, in a situation where one of the permanent members of the Security Council is accused, it is obvious that the resolution will be vetoed by the accused party. As a result, the ICC is incapable of dealing with the crimes of these members in the issues referred to it. This is a fundamental problem that challenges the executive process of the Court.

Perhaps one solution is for the UN General Assembly to make tough and serious decisions in such cases. However, in terms of the framework and provisions of the Charter, the General Assembly lacks sufficient powers to take action (for example, removing the membership of a permanent member of the Security Council). Despite this, since the United Nations and the Charter derive their legitimacy from the collective will of the member States, it seems that if an overwhelming majority of the member States made such a decision, it could somehow be

Challenges' in Fulvio M Palombino, Reoberto Virzo and Giovanni Zarra (eds) Provisional Measures Issued by International Courts and Tribunals (Springer 2021) 218.

1. See https://hudoc.echr.coe.int/eng-press?i=003-7272764-9905947 (last access August 18, 2023)

2. See https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe (last access on August 18, 2023)

3. Julia Crawford, 'Ukraine vs Russia: What the European Court of Human Rights Can (and Can't) Do' (April, 7 2022), available at: https://www.justiceinfo.net/en/90187-ukraine-russia-european-court-of-human-rights-can-do.html (last access on May 5, 2023)

4. Adrian Steube, 'Voting Wrap-Up of the UN Security Council in 2022: Bitterness Mixed with Agreements' , January 9, 2023, available at: https://www.passblue.com/2023/01/09/voting-wrap-up-of-the-un-security-council-in-2022-bitterness-mixed-with-agreements/ (last access on May 5, 2023).

considered a revision of the Charter and considered to have legal validity. In such a situation, the goal is neither to draw moral equations nor to justify Russia's actions against Ukraine. The international community must condemn Russia's actions as a violation of international law in no vague terms and take practical and effective steps to prevent the recurrence of such acts that gravely endanger international peace and security.

Conclusion

The invasion of Ukraine by the Russian Federation on February 24, 2022, which led to an ongoing conflict, opened a new chapter in international relations and international law. This conflict can be analyzed from different perspectives and branches of public international law. This paper addressed the most important aspects of the Ukraine situation from the perspective of international criminal law. In doing so, first and foremost, it dealt with the mechanisms through which the ICC may gain jurisdiction over a situation. Next, it explored the arrest warrant against *Vladimir Putin* and the strengths and weaknesses of such warrants were explored. Lastly, it briefly examined the other cases pursued by Ukraine at the ICJ and the ECtHR and other viable alternatives. The findings of this essay demonstrate that, relying on the possibilities and facilities provided by international law, Ukraine has started a lawfare against the Russian Federation which has ended in a legal battlefield along with the armed conflict between two belligerents.

To elaborate, neither Russia nor Ukraine are Parties to the Rome Statute.[1] However, Ukraine lodged two ad hoc declarations according to Article 12(3) of the Statute, thereby providing the Court with the jurisdiction over the situation in Ukraine. It was pursuant to the second voluntary declaration made by the government of Ukraine on September 8, 2015, as well as the referral of the situation by 43 State Parties, which the Prosecutor of the Court started its investigations on March 2, 2022, focusing on alleged crimes committed in Ukraine since November 21, 2013. Ultimately, these investigations resulted in the issuance of two arrest warrants against Putin and Lvova-Belova.

Although the issuance of these two arrest warrants in the context of the Ukraine situation is in itself a positive step toward the consolidation of international criminal justice and can be considered a warning for the big fish as the mandate of international criminal law, the implementation of such arrest warrants specifically regarding the President of the Russian Federation seems to be seriously problematic. Given that Russia is not a State Party to the Rome Statute and considering the personal immunity enjoyed by Vladimir Putin as the head of a State, the State Parties to the ICC's Statute cannot arrest and surrender Putin to the Court. There are two possibilities to enforce this arrest warrant: 1) consent of the Russian Federation to waive the immunity of Putin; 2) termination of Putin's presidential term. However, in spite of challenges faced by the ICC in this situation, issuance of the arrest warrant unveils a significant reality that international criminal justice does not exempt even the president of a permanent member of the UN Security Council. Furthermore, although lawsuits against Russia by Ukraine at both the ICJ and the ECtHR are legally positive steps to stop a war of aggression and restore the

1 After the acceptance of the article, Ukraine deposited its instrument of ratification of the Rome Statute on 25 October 2024.

international peace and security through international law, they face several challenges such as time constraints and compliance issues. However, the ICC cannot succeed alone. It needs more support, including, but not limited to, additional financial support. The ICC has 40 inspectors in Ukraine, but its budget has not increased proportionately.

How should one contemplate the future of the world order and international organizations after the Russian war in Ukraine? Since Moscow has blocked or ignored all calls from the United Nations and other international organizations to stop hostilities, the war revealed the limitations of multilateral security institutions both at the global level and at the level of the European continent. Looking at the current crisis created by Russia, it is not possible to find an opportunity for the trust-building process with Moscow that was carried out in the 1970s. However, it may be feasible to create the desired structural changes that are needed at the time of opening the window of understanding with Russia at the global level. It is possible that this window will not appear soon. Therefore, experts in both European and global security architecture should spend time during the current crisis to outline measures that can be implemented through the current international and organizational order under different political scenarios.

References

Books

Babaian S, *The International Criminal Court – An International Criminal World Court?* (Springer International Publishing AG 2018).

Cassese A, *International Law* (OUP 2005).

Cryer R, Robinson D, Vasiliev S, *An Introduction to International Criminal Law and Procedure*(3rd edn, CUP 2014).

Glasius M, *The International Criminal Court: A Global Civil Society Achievement* (Routledge 2007).

Klabbers J, *International Law* (CUP 2013).

Rezaie Nezhad I, *The Jurisdiction of International Criminal Court* (Majd Publication 2014) [In Persian].

Schabas W A, *An Introduction to the International Criminal Court* (4th edn, CUP 2011).

Zol'ein P, *The Foundations of Public International Law* (6th edn, Ministry of Foreign Affairs 2009) [In Persian].

Articles

Akande D, 'International Law Immunities and the International Criminal Court' (2004) 98 *The American Journal of International Law* 407.

Akande D, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333.

Azizi S, Karami M, 'Applicability of Remedial Secession Theory on the Recognition of Ukraine's Donetsk and Luhansk Oblasts' Independence' (2023) 39 *International Law Review* 141 [In Persian].

Bonafe B I, 'The Collective Dimension of Bilateral Litigation: The Ukraine v Russia Case before the ICJ' (2022) 26 *Questions of International Law* 27.

Ekori A H, Masumbe P S, 'Putin on Trial: Reality of Heads of State Immunity before International Criminal Courts' (2022) 2 *Polit Journal: Scientific Journal of Politics* 29.

Gill T D, 'The Jus ad Bellum and Russia's "Special Military Operation" in Ukraine' (2022) 25 *Journal of International Peacekeeping* 121.

Goldenziel J I, 'An Alternative to Zombieing: Lawfare between Russia and Ukraine and the Future of International Law' (2023) 108 *Cornell Law Review Online* 1.

Green J A, Henderson C, Ruys T, 'Russia's Attack on Ukraine and the Jus ad Bellum' (2022) 9 *Journal on the Use of Force and International Law* 4.

Grzebyk P, 'Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law' (2022) XLI *Polish Yearbook of International Law* 145.

King H, 'Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute' (2006) 4 *New Zealand Journal of Public and International Law* 269.

Kunz R, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2019) 30 *European Journal of International Law* 1129.

Martin J M, 'The International Criminal Court: Defining Complementarity and Diving Implications for the United States' (2006) 4 *Loyola University Chicago International Law Review* 107.

Ntanda Nsereko D D, 'Triggering the Jurisdiction of the International Criminal Court' (2004) 4 *African Human Rights Journal* 256.

Zamani S G, 'International Criminal Court and the Issue of Arrest Warrant against Omar Al Bashir' (2009) 7 *Legal Researches* 13 [In Persian].

Abbasi S, 'The Decision of the International Criminal Court in the Palestine Situation: A Beginning in the Prevention of Impunity for Israeli Crimes' (2023) 4 *Iranian Review for UN Studies* 23.

Chapari M, Shayganfard M, 'Criminal Responsibility in International Crimes and Its Contrast with the Discourse of Immunity' (2017) 10 *International Legal Researches* 59 [In Persian].

Book Chapters

Alter K J, 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review' in J L Dunoff and M A Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (1st edn, CUP 2013).

Saccucci A, 'Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges' in F M Palombino, R Virzo and G Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (Springer 2021).

International Instruments

Rome Statute of the International Criminal Court (last amended 2010) (adopted 17 July 1998, entered into force 1 July 2002) ISBN No. 92-9227-227-6.

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS, vol. 1155.

UNSC Resolution 1593 (2005) S/RES/1593 (2005).

Cases

ICJ, 'Request for the Indication of Provisional Measures (Ukraine v Russia)' (25 February 2022); available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-WRI-01-00-EN.pdf (last accessed 18 August 2023).

ICJ, 'Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening) – Intervention' (21 July 2022); available at: https://www.icj-cij.org/case/182/intervention (last accessed 18 August 2023).

Online Sources

Amnesty International UK, 'Foreign Secretary: Help Deliver Justice for Ukraine', available at: <www.amnesty.org.uk/actions/deliver-justice-ukraine> (last accessed 18 August 2023).

Council of Europe, 'The Russian Federation is excluded from the Council of Europe' (2022); available at: https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe (last accessed 18 August 2023).

Crawford J, 'Ukraine vs Russia: What the European Court of Human Rights Can (and Can't) Do' (7 April 2022), available at: https://www.justiceinfo.net/en/90187-ukraine-russia-european-court-of-human-rights-can-do.html (last accessed 5 May 2023).

ECHR, 'The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory' (2022); available at: https://hudoc.echr.coe.int/eng-press?i=003-7272764-9905947 (last accessed 18 August 2023).

Embassy of Ukraine, Declaration of acceptance of the jurisdiction of the International Criminal Court, available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf (last accessed 18 August 2023).

ICC, 'Jurisdiction in the general situation- Situation referred to the ICC by 43 States Parties' (2022); available at: https://www.icc-cpi.int/situations/ukraine (last accessed 18 August 2023).

ICC, 'Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova' (17 March 2023); available at: <www.icc-cpi.int> (last accessed 18 August 2023).

ICC, 'Statement of ICC President Judge Piotr Hofmański, Public Affairs Unit, International Criminal Court' (17 March 2023); available at: <www.icc-cpi.int> (last accessed 18 August 2023).

ICC, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine' (11 December 2020); available at: https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine (last accessed 18 August 2023).

ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (17 March 2023); available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (last accessed 19 August 2023).

ICJ (International Court of Justice), 'Rules of Court' (adopted 14 April 1978 and entered into force 1 July 1978).

Minister for Foreign Affairs of Ukraine, 'Declaration of acceptance of the jurisdiction of the International Criminal Court' (8 September 2015); available at: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine (last accessed 18 August 2023).

Steube A, 'Voting Wrap-Up of the UN Security Council in 2022: Bitterness Mixed with Agreements' (9 January 2023), available at: https://www.passblue.com/2023/01/09/voting-wrap-up-of-the-un-security-council-in-2022-bitterness-mixed-with-agreements/ (last accessed 5 May 2023).

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The Feasibility of Addressing the Financing of Terrorist Crimes in the Realm of Cryptocurrencies: The Experiences of Iran and Other Countries

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ABSTRACT

Cryptocurrencies, despite their ambiguous nature, represent one of the most significant new phenomena in the global economy. Since the introduction of the first cryptocurrency, Bitcoin, in 2009, terrorist groups have increasingly utilized these currencies to finance their activities. Consequently, states, organizations, and financial institutions have been compelled to adopt effective anti-terrorist financing strategies in response to this development. This research examines a range of issues related to cryptocurrencies, their utilization in terrorist financing, and the associated benefits and risks. Within the context of Iran's regulatory framework, existing policies and measures to combat the financing of terrorist crimes through cryptocurrencies have led to challenges characterized by conflicting and fragmented approaches to the regulation of cryptocurrency exchanges and mining, both theoretically and practically, which include the illegitimacy of exchange activities. Internally, the Central Bank has issued directives aimed at clarifying this phenomenon and has sought demands from higher authorities, particularly the Islamic Council. In contrast, other countries, such as China, have adopted a dual policy, prohibiting the use of cryptocurrencies in monetary and banking contexts. Notably, nations like Canada and the United States have established specific legal regulations and policies governing Bitcoin usage, while Japan has developed regulations for virtual currency exchange service providers, including mechanisms for identifying violators through guaranteed criminal enforcement.

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Introduction

Terrorist crimes, as a global phenomenon, have raised significant concerns for states as well as regional and international organizations, particularly as terrorist groups employ diverse methods to operate and finance their activities. In response to technological advancements, these groups have refined their operational techniques, especially in terms of financing.[1]

Cryptocurrencies and digital assets are increasingly scrutinized, not only by law enforcement and regulatory authorities but also by public opinion. While digital assets provide numerous benefits and opportunities for legitimate financial transactions, their emergence has simultaneously created new pathways for illicit activities.[2]

Cryptocurrencies[3] fall under the broader category of virtual currencies. The term "virtual currencies," when used independently, refers to any currency that exists solely in electronic form, lacking any official physical representation.[4] A virtual currency is defined as a digital representation of value that can be traded electronically and functions as a medium of exchange, a unit of account, or a store of value. However, it does not possess the legal status of traditional currency in any country; such operations can only occur with societal consent among users of virtual money.[5]

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1 Dyntu & Dykyj, *Cryptocurrency as an Instrument of Terrorist Financing* (2021) 92-9; Terrorist groups have swiftly adopted cryptocurrencies to raise funds more efficiently than ever before. They have demonstrated the ability to collect substantial crypto donations in short periods, significantly reducing the time required for fundraising compared to traditional methods. While current cryptocurrencies may not entirely meet the specific requirements of terrorist groups, they can still be used for certain financial activities. However, the emergence of a widely adopted cryptocurrency that offers improved anonymity, security, and minimal regulation could increase its utility for terrorist organizations. Effective regulation, oversight, and international cooperation between law enforcement and intelligence agencies are crucial in preventing terrorists from exploiting cryptocurrencies to fund their operations.

2 Reuters, 'FTX Founder Sam Bankman-Fried Thought Rules Did Not Apply to Him, Prosecutor Says' (2 November 2023) https://www.reuters.com/legal/ftx-founder-sam-bankman-fried-thought-rules-did-not-apply-him-prosecutor-says-2023-11-02/.

3 It was first launched in late 2009, when a person or a group of persons known by the pseudonym "Satoshi Nakamoto," created a digital currency called "Bitcoin" The word "Bitcoin" is composed of two English words: "bit", which means information unit, and "coin", which means currency.6 Accordingly, the term "Bitcoin" refers to a currency taking the form of an "electronic information unit" that is issued and traded without oversight by any centralized authority or institutions. This coin preceded other types of cryptocurrencies, such as Ethereum, Tether, Solana, Zilliqa, and Dash,etc. Additionally, there are thousands of different cryptocurrencies.

4 Maddi, Ghaemi-Khargh, and Shafi'i, *Legal Jurisprudence Inquiry on the Issue of Legalization of Encrypted Currencies* (1400) 105/307-306.

5 Financial Action Task Force, 'Virtual Currencies – Key Definitions and Potential AML/CFT Risks' <http://www.fatf-gafi.

Cryptocurrencies have ushered in a transformative era within the financial landscape, enabling innovative opportunities while also presenting unique challenges. Amid these advancements, a troubling trend has emerged: the exploitation of cryptocurrencies by terrorist organizations to finance their illicit activities. The decentralized and anonymous nature of these digital assets provides fertile ground for covert fund transfers across borders, circumventing traditional regulatory frameworks and surveillance mechanisms. [1] Consequently, investigating and prosecuting cases of cryptocurrency-based terrorist financing has become a complex undertaking, necessitating novel approaches within the realm of international criminal law.[2]

The rapid convergence of virtual currencies and assets with the mainstream financial system has blurred the distinctions between physical and virtual assets/currencies. This merging has resulted in a marked increase in instances of money laundering, transnational organized crime, and terrorism financing facilitated by illicit cryptocurrencies, thereby raising concerns regarding the effectiveness of regulatory measures governing the "virtual currency/asset" domain. Furthermore, limited expertise in technology-based law enforcement and a growing sense of impunity exacerbate the challenges faced by criminal justice administration.[3]

The United States defines virtual currencies as "a digital representation of value that functions as an intermediary of exchange, measure of value, or store of value."[4] Similarly, the Central Bank of the European Union characterizes virtual currencies as "a digital representation of value that is not issued by a central bank or public institution and is not necessarily based on a credit currency; it is utilized by natural or legal persons as a means of exchange and can be transmitted, stored, or exchanged electronically."[5]

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org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potentialaml-cft-risks.pdf>

1 Since the emergence of Bitcoin in 2009, cryptocurrencies have garnered significant attention as a form of internet-native money, promising to create financial systems that are more free, fair, and transparent. However, the use of cryptocurrencies by terrorist organizations has emerged as a pressing concern for regulators and policymakers globally. While visionaries see potential for positive change, terrorist groups have also recognized the opportunities offered by cryptocurrencies in their fundraising and financing operations, prompting the need for tighter oversight of these digital currencies that operate outside the control of any government.

2 Prosecuting terrorist financing poses significant challenges within the international criminal law framework, particularly under the jurisdiction of the International Criminal Court (ICC). The absence of a universally accepted definition of terrorism hampers the identification and prosecution of individuals involved in financing terrorist activities. Additionally, proving the specific intent and connection between the accused and the financed terrorist acts presents evidentiary difficulties. The ICC's limited resources and focus on other core crimes further constrain its capacity to effectively investigate and prosecute complex cases of terrorist financing. To overcome these challenges, exploring the concept of universal jurisdiction emerges as a potential solution. Embracing universal jurisdiction would allow states to collectively address the issue of prosecuting terrorist financing, regardless of an international consensus on the definition of terrorism. By adopting this approach, states can exercise their authority to investigate and prosecute cases with transnational dimensions, enhancing flexibility and responsiveness in combating these crimes. Furthermore, to address the gaps in the existing legal framework, alternatives for prosecuting terrorist financing under the ICC should be considered. This may involve amending the Rome Statute to include a provision explicitly addressing the crime of terrorist financing or interpreting existing crimes under the ICC's jurisdiction to encompass acts of terrorist financing (Kenny, 2019: 134-136).

3 Varun, *Prospects and Models of Combating Cryptocurrency Crimes' eucrim* (14 March 2024) https://eucrim.eu/articles/prospects-and-models-of-combating-cryptocurrency-crimes/.

4 Rajabi, *Virtual Currency: Legislation in Different Countries and Proposals for Iran* (2017) 3

5 European Central Bank, 'Opinion on Virtual Currencies' (2014) European Banking Authority 4. Europe has 31% of total cryptocurrency holders, followed by Asia and Oceania 28,7%, North and South America 28,3%, and finally Africa with the Middle East at 10,7%. These rates may go up and down from time to time; as per the most updated report for 2023, cryptocurrency adoption rates increased in certain region and declined in others; However, countries differ in their recognition of digital currencies. Some countries, including China, oppose them. While others have officially adopted them and even enacted specific laws to regulate cryptocurrencies, such as Ukraine, where the president of Ukraine legalized cryptocurrencies in March 2022, which helped strengthen the Ukrainian military supplies. Meanwhile, many other countries are still cautious about cryptocurrencies. The International Monetary Fund (IMF) warned against the total-legalization of cryptocurrencies, given their risks for financial stability; not only so, the IMF also urged El Salvador to ditch Bitcoin's legal tender status; Sénat No 820, Session Extraordinaire de 2021-2022, Proposition de Résolution : tendant à la création d'une commission d'enquête sur les crypto-actifs, présentée par Nathalie GOULET, p 6 -7. The top five countries in terms cryptocurrency holders in 2023 are: India, Nigeria, Vietnam, the United States, and Ukraine; Chainalysis Report, The 2023 Global Crypto Adoption Index: Central & Southern Asia Are Leading the Way in Grassroots Crypto Adoption, September 12, 2023.

In Iran, the central bank, as a specialized institution, classifies cryptocurrency as a type of financial asset. In Japan, the monetary law defines money as coins or paper currency issued by the Bank of Japan, with the authority for issuance and circulation granted to the government. However, since virtual currencies are issued by private entities, they do not conform to the definition established by Japanese currency law.[1] Consequently, the ambiguities surrounding the legal definitions of virtual currencies in Iran[2] and other jurisdictions can lead to criminal activities in the context of cryptocurrencies. It is imperative to adopt legislative measures that provide a precise definition of virtual currencies and address the criminalization of related offenses.

This research employs a comparative approach, utilizing descriptive and analytical methods to explore the feasibility of addressing the financing of terrorist crimes in the context of cryptocurrencies. The primary question guiding this inquiry is whether existing laws and regulations allow for the effective combat of terrorism financing within the realm of cryptocurrencies. The forthcoming sections will examine the regulatory frameworks of Iran and other countries, including China, Canada, the United States, and Japan, focusing on their respective approaches and policies regarding cryptocurrencies and the financing of terrorist crimes. Ultimately, this study aims to ascertain the possibility of effectively countering the financing of terrorist activities through cryptocurrencies in Iran and other nations within this ecosystem.

For the purposes of this study, methodologies employed include scientific abstraction, synthesis, observation, generalization, and the induction of literature and legal documents to elucidate the characteristics of Bitcoin, as well as strategies for promoting and preventing its use in financing terrorism.

1. Intrastate and International Legal Challenges

While traditional currencies, such as coins or banknotes, are issued by official financial authorities or institutions that regulate their circulation at both domestic and international levels, electronic cryptocurrencies operate outside such regulation and control. This lack of oversight pertains to their issuance, movement, and the identities of cryptocurrency users, a situation attributed to the encryption and anonymity that characterize this form of currency. The term "encryption" refers to the use of specific characters, digits, and codes that preserve message anonymity; thus, cryptocurrencies can be understood as concealed electronic representations of value, derived from the concept of “cryptography.”[3] Some researchers argue that the term “Crypto” has its origins in ancient Greek, specifically from "Kruptosgraphein": “Kruptos” meaning hidden, and “graphene” meaning writing. Therefore, virtual cryptocurrencies are not coins or banknotes; rather, they

1 Ishikawa, *Designing Virtual Currency Regulation in Japan: Lessons from the Mt Gox Case* (2017) 126.

2 Iran's legislature has yet to take meaningful action to regulate virtual currencies. The central bank has issued only brief and conflicting guidelines, leading to societal confusion and hindering the population's ability to benefit from cryptocurrencies. This lack of clear legislation and ongoing oversight has also contributed to an environment conducive to the spread of related crimes.

3 Cryptocurrencies have emerged as a novel method for criminals to finance a wide range of illicit activities, including terrorist fundraising beyond national boundaries. Evidence indicates that certain terrorist organizations are utilizing cryptocurrencies as a means to raise funds.

serve as digital money functioning similarly to traditional currencies for payment and exchange purposes, and they provide access to various services.

To comprehend the nature and functions of these currencies, one researcher has offered the following definition: they are virtual currencies detached from the socio-institutional environment, reliant on encryption (hidden writing: cryptography), and operate in a decentralized manner.[1, 2]

The exchange, extraction, and utilization of cryptocurrencies, like any other tool, can facilitate legitimate uses as well as criminal activities, thereby becoming a subject of criminological research. Notably, cryptocurrencies have been exploited to facilitate criminal activities that transcend domestic borders.

The advancements in this area, particularly concerning illegal actions, may exacerbate the threats associated with virtual currencies. Key factors contributing to this situation include: the high level of privacy and anonymity provided by virtual currencies; the widespread adoption by terrorists of encryption technology, social media, and other online platforms; the connections between terrorist actors and other criminal enterprises; and the rapid pace of innovation and adoption of virtual currencies.[3]

This article examines the feasibility of addressing and punishing criminals to ensure financial security and protect individuals' capital, utilizing both domestic and international laws. It appears that the absence of legislative policies and the lack of recognition of cryptocurrencies within domestic and international legal frameworks create a conducive environment for crimes against public safety, including the financing of terrorism and fraud. Consequently, the criminal justice system's capacity to prevent and address such crimes faces significant challenges and obstacles.[4]

In addition to the range of crimes that can be perpetrated domestically and internationally using cryptocurrencies, many cryptocurrencies are created without adequate financial and informational backing, and their trading on domestic and international exchanges is increasing daily.[5] Moreover, some of the largest historical frauds on an international scale have occurred within this space.[6]

However, effective criminal prevention measures can be implemented through the establishment of criminal and legislative policies that address the challenges posed by virtual currency technologies under domestic and international law. Given the dynamic nature of cyberspace, its political and security sensitivities, and the technical complexities involved, regulation in this area necessitates heightened attention. The criminal capacities of this domain have become a priority

1 Paul Pons, *Les Cryptomonnaies Impasse ou Révolution?* (2019) 71.

2 Of course, the features and technical criteria that can be raised regarding crypto currencies are as follows: 1. Cryptocurrencies set an example of rapid qualitative development, and constitute a significant shift in dealing with currencies as a medium of payment and exchange. 2. Compared to other currencies, cryptocurrencies are distinguished by a greater degree of secrecy and security in trading and exchange processes. 3. Cryptocurrencies are not subject to oversight by any centralized authority or institutions; therefore, they are not taxable, which makes them more attractive both to individuals and corporates. 4. The strength and risk of cryptocurrencies, as encrypted electronic information unit, lies in the fact that it would be almost impossible to remove or alter their encrypted information on the web, or prevent its circulation.

3 Keatinge, Carlisle, Keen, *Virtual Currencies and Terrorist Financing: Assessing the Risks and Evaluating Responses* (2018) 9.

4 It should be noted that "cryptocurrency-powered cybercrime has attracted some actors who intend to cause widespread disruption and need financing; "For example, North Korea is increasingly looking to cybercrime to raise funds in its efforts to escape impunity." (Collins, 2017: 54)

5 Stroukal and Nedvedova, 2016: 45

6 See: Marjan Sheikhi, 'The Biggest Cryptocurrency Scams in History' *Zoomit* (2 June 2021) https://www.zoomit.ir/economics/371412-biggest-cryptocurrency-scams.

for various criminal policy systems. Consequently, policymakers are developing legislative criminal policies to regulate the multifaceted aspects of delinquency, including technological offenses. This dimension of criminal policy plays a strategic role in formulating preventative and countermeasure programs against criminal phenomena, as it entails planning, modeling, and presenting actionable strategies for criminal justice system stakeholders.[1]

The challenges facing the criminal justice system in addressing and penalizing criminal actions related to cryptocurrencies, including the financing of terrorism, underscore the necessity for comprehensive legislative measures and broad criminalization. Thus, a comparative analysis of the challenges faced by Iran's criminal justice system in prosecuting virtual currency-related crimes, alongside an examination of the operational frameworks in countries such as Japan and the United States, will further illuminate these challenges. Key issues include ambiguities in the legal status and scope of criminal activities, the difficulty of adhering to existing laws, the need for cooperation with foreign nations and international institutions for information exchange regarding virtual currencies, the establishment of memoranda of understanding between private and public sectors, and the training of judges and judicial officers in this evolving field.[2]

2. Approaches and Policies

Some countries have enacted strict laws to ban Bitcoin, consequently limiting its use by consumers and merchants. This approach has been notably adopted by China, which views virtual currencies as unnecessary. China has implemented stringent regulations prohibiting Bitcoin as a currency or financial system. Specifically, "China[3] has prohibited the collection of financial aid through organized Internet crimes for all natural and private persons while banning the activity of cryptocurrency exchanges and blocking their use."[4,5]

In contrast, the United States and Canada have established specific regulations and legislative policies regarding Bitcoin. These countries have identified laws related to money laundering and reporting obligations to the Financial Crimes Enforcement Network (FinCEN) in the U.S. and the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) for users of virtual currencies. They have adapted existing laws to encompass Bitcoin. "America[6] and Canada,[7] through various laws and new regulations, have implemented controls on exchange systems (such as virtual currency exchanges) and businesses that buy, sell, or accept Bitcoin as a means of transaction."[8] These measures aim to mitigate illegal activities through virtual

1 Shamlou and Khalilipachi, *Criminal Risk-Based Policymaking Against Virtual Currency Technology* (2019) 247/103.
2 Nabavi and Saber, *Comparative Study of the Challenges of Iran's Criminal Justice System in the Proceedings of Crimes Related to Virtual Currencies* (1399) 179/1.
3 See: L. Rosini, 'Author Archive' *Virtual Currency Report* https://www.virtualcurrencyreport.com/author/lrosini/.
4 Suberg, *Bank Complete: China Blocks Foreign Crypto Exchanges to Counter Financial Risks* (2018) 12.
5 Bitcoin has a number of features that have attracted the attention of criminals as a way to evade responsibility for a crime.
6 The Financial Crimes Enforcement Network has the mission of protecting the financial system from illegal use and combating money laundering and promoting national security through the collection, analysis and dissemination of financial information and the strategic use of financial authorities. This network fulfills its mission by receiving and maintaining financial transaction data. The analysis and dissemination of that data is done for the purposes of law enforcement and establishing global cooperation with peer organizations of other countries and international institutions.
7 The Financial Crimes Enforcement Network has the mission of protecting the financial system from illegal use and combating money laundering and promoting national security through the collection, analysis and dissemination of financial information and the strategic use of financial authorities. This network fulfills its mission by receiving and maintaining financial transaction data. The analysis and dissemination of that data is done for the purposes of law enforcement and establishing global cooperation with peer organizations of other countries and international institutions.
8 Marini, *Regulation and Innovation: Public Authorities and the Development of Virtual Currencies* (2014) 21.

currencies, including money laundering. "Thus, the two countries exhibit differing perspectives on the use of virtual currencies in both legal and illegal contexts."[1,2]

Japan has also developed regulations for virtual currency exchange service providers. Under these rules, activities involving the buying and selling of virtual currencies, converting them into other virtual currencies, and managing users' virtual currencies require a license. Violations can lead to imprisonment, monetary fines, or cancellation and suspension of exchange activities.[3] However, none of these countries have officially recognized Bitcoin and other cryptocurrencies as legal tender.

"The regulation and implementation of laws regarding virtual currencies are promising, given their potential for illegal use and unique features such as anonymity and decentralization. Nevertheless, regulatory bodies in countries like the United States and Canada must ensure that the benefits of Bitcoin for merchants and users are not undermined by excessive regulation."[4]

3. The Legal and Technical Framework of Confrontation

The rise of cryptocurrencies has presented significant challenges for regulatory bodies, particularly as instances of their use for illegal purposes have emerged. To effectively address terrorist financing in the context of cryptocurrencies, it is essential to identify concrete examples.[5]

In Iran, anti-money laundering laws prohibit any criminal actions aimed at financing terrorist activities.[6] Terrorist groups are increasingly employing new tools and methods to secure their financial resources, with the Internet being one of the primary means at their disposal.[7] The cross-border nature and anonymity of virtual currencies, coupled with the lack of oversight over their transactions, facilitate the financing of terrorist organizations.[8]

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1 Grinberg, *Bitcoin: An Innovative Alternative Digital Currency* (2011) 63.

2 On March 4, 2024, the Executive Office of the Counter-Terrorism Committee (CTED) of the United Nations Security Council hosted an important discussion on the latest trends and changes in the use of various types of virtual assets by ISIS-affiliated terrorist groups, al-Qaeda and their supporters, including for fundraising campaigns. The session provided member states with practical insight into how virtual assets are being used for terrorist financing purposes and how related technologies, including blockchain analytics, can help identify and suppress such abuses. Amidst ongoing work on drafting non-binding guidelines on measures to prevent and counter terrorist use of new payment technologies and fundraising methods based on the Delhi Declaration of the Counter-Terrorism Committee, this meeting It provided member states with practical insights on how to use virtual assets. for the purposes of terrorist financing, and how related technologies, including blockchain analytics, can help identify and suppress such abuses. Despite these trends, which indicate the increasing misuse of virtual assets by terrorist groups and their supporters, the majority of funds used for terrorist financing purposes are still collected and moved through cash, remittance services, and traditional financial institutions. Experts emphasized that digital currency transactions are traceable and immutable, meaning that blockchain intelligence can identify, track and trace the flow of funds transferred through such transactions in ways that are not possible with cash and other methods; https://www.un.org/securitycouncil/ctc/news/cted-hosts-insight-briefing-%E2%80%9Clatest-trends-use-cryptocurrency-terrorist-groups-and-their

3 Ishikawa, Op. Cit. (2017) 129.

4 Ly, *Coining Bitcoin's Legal Bits: Examining the Regulatory Framework for Bitcoin and Virtual Currencies* (2014) 608.

5 In October 2022, the UN Counter-Terrorism Committee Executive Directorate estimated that crypto was used to finance as many as twenty per cent of all terrorist attacks, up from approximately five per cent a few years ago; https://www.ifcreview.com/articles/2024/january/tackling-the-role-of-crypto-in-terrorist-financing/

6 "There are many terrorist groups that use cryptocurrencies for their massive fund-raising investments, such as ISIS, Mujahideen Council, Al-Qaeda, etc. "Due to external pressures such as loss of territory and limited financial regulation, diverse terrorist groups are building their financial portfolios through the dark web and cryptocurrencies to survive." (Zahirah and Ridwan, *The Utilization of Cryptocurrencies by the Terrorist Group as an Alternative Way of Hawala for Illicit Purposes* (2019) 10)

7 Entenmann and Van Den Berg, *Terrorist Financing and Virtual Currencies: Different Sides of the Same Bitcoin?* (2018).

8 A report by the Regional Office of the United Nations Office on Drugs and Crime for Southeast Asia and Oceania released on January 15, 2024 indicated that casinos are the main drivers of money laundering, underground banking and cyber fraud in East and Southeast Asia. Is. In fact, analysis by the United Nations Office on Drugs and Crime estimates that as of early 2022, more than 340 land-based casinos, both licensed and unlicensed, were operating in Southeast Asia, most of them in Online, they started live streaming and betting services. However, the formal online gambling market is expected to grow to more than $205 billion by 2030, with the Asia Pacific region expected to account for the largest share of market growth between 2022 and 2026, with a projected 37%. This study describes several policy developments and enforcement actions implemented by governments in the region to address the illicit casino-based capital flows, corruption, and money laundering that have partially fueled these trends;https://www.unodc.org/roseap/en/2024/casinos-casinos-cryptocurrency-underground-banking/story.html

As noted by Siahbidi-Kermanshahi and Tahal-Muayed (2016),[1] "If the fight against crimes in the context of cryptocurrencies develops to such an extent that the perpetrators are deprived of the possibility of laundering the proceeds of illegal acts, the commission of the crime will be practically useless." In essence, if criminals are unable to integrate illegal income into the legal financial system for legitimate or illegitimate purposes, such as financing terrorism, the incentive to commit these crimes diminishes.[2,3]

To understand how virtual currencies can be a primary means of financing terrorist crimes, two key aspects must be continuously examined. First, it is crucial to investigate how financial technologies, similar to virtual currencies, have successfully prevented illegal financial activities and, specifically, the financing of terrorism. Second, understanding the reasons behind the attraction of criminal groups to virtual currencies will help determine whether terrorists will continue to use them as other criminals do.

Adopting new strategies to better identify and disrupt terrorist financing through virtual currencies in the current digital financial landscape is imperative. Policy leaders must consider several fundamental principles that, if embraced, will significantly enhance the capacity to counter the terrorist use of virtual currencies. Governments should adopt three core principles at the highest levels and communicate these clearly to the private sector:

a. Prioritizing the financing of terrorist activities and other financial crimes, particularly via new virtual currencies;
b. Creating a policy and regulatory environment that fosters innovation;
c. Developing new strategies and legal tools for improved coordination, especially between public and private sectors.[4,5]

The use of virtual currencies in the United States has been reported as a method to evade government taxes by converting income into virtual currency and transferring it to foreign accounts. Concerns regarding the use of virtual currencies for financing terrorist activities, human trafficking, and sexual exploitation remain significant for governments and international institutions, especially in the United States and Canada.[6]

Global interest in combating the financing of terrorism surged after the events of September

1 Siahbidi-Kermanshahi and Tahal-Muayed, *Economic Criminal Law of Money Laundering* (2016).

2 "Given the key role of funding in supporting terrorist acts, counterterrorism efforts, particularly the financial sub-category of counterterrorism, often focus on tracking the flow of money through bank accounts and preventing financial transactions that may be used to support attacks. "However, the success of counterterrorism financial strategies in reducing terrorists' access to fiat currencies has raised concerns that terrorist groups may increasingly use digital cryptocurrencies such as Bitcoin to support their activities." (Dion-Schwarz, Manheim, B. Johnston, 2019: 3)

3 Goldman et al., *Terrorist Use of Virtual Currencies; Containing the Potential Threat* (2017).

4 Ibid, 33.

5 In the context of the Terrorist Financing Convention, the financing of terrorist crimes is explicitly considered a crime. The elements agreed upon in various definitions of terrorism include the use of unlawful violence or the threat thereof, terrorizing individuals, and surprising a target by harming, killing, or destroying it, whether it is a civilian or military target. As for the definition of the crime of terrorism financing, the Arab Convention on Combating Money-Laundering and the Financing of Terrorism stipulates that the following are criminalized acts of terrorism financing: 1. The provision of funds under any name in the knowledge that they will be used to finance terrorism; 2. The acquisition or collection of funds by any means with the intention that they should be used to finance terrorism; 3. The possession or holding of funds, or managing the investment thereof, in the knowledge that they are to be used to finance terrorism.15 Some have defined the crime of terrorism financing as "collecting, providing, or transferring funds by any means, directly or indirectly, in the knowledge that they are to be used, in full or in part, to finance terrorism according to the definitions of terrorism contained in the Arab convention."(Bahamaoui, *Mechanisms for Drying up Sources of Funding for Terrorist Groups* (2017) 71)

6 Kethineni and Dodge, *Use of Bitcoin in Darknet Markets: Examining Facilitative Factors on Bitcoin-Related Crimes* (2017) 90.

11, 2001, as the increasing activity of terrorist groups raised international concerns about their funding sources. The emergence of cryptocurrencies in 2009 introduced new challenges in the fight against terrorism financing, as these digital currencies operate through decentralized, encrypted protocols that allow for anonymity.

Addressing the financing of terrorism through cryptocurrencies involves several key aspects, notably legislative and procedural or technical measures. Given that cryptocurrencies lack a formal legal framework and central mechanisms for tracking transactions, countries and organizations have been compelled to enact legislation to mitigate the risks associated with their use in money laundering and terrorism financing.

The International Convention for the Suppression of the Financing of Terrorism highlights these challenges, noting that existing multilateral legal instruments do not explicitly address terrorism financing. The convention emphasizes the urgent need for enhanced international cooperation to devise effective measures for preventing and prosecuting terrorist financing.[1] Each State Party is mandated to take appropriate steps to identify, detect, freeze, or seize funds used for terrorist activities, including proceeds from such offenses, for potential forfeiture to compensate victims.[2]

The United Nations resolution on combating the financing of terrorism, adopted in 2001, further underscores the commitment to address all forms of terrorism financing. This resolution, issued under Chapter VII of the UN Charter following the September 11 attacks, emphasizes the need for international collaboration, particularly in Articles 1, 2, and 3. Organizations like the Financial Action Task Force (FATF), also known by the abbreviation GAFI "Le Groupe d'action financière",[3] play a crucial role in monitoring and preventing money laundering and terrorism financing, including through cryptocurrencies. Additionally, firms such as Chainalysis provide blockchain analysis to aid these efforts.[4]

National and international authorities are intensifying efforts to trace cryptocurrencies used for financing terrorism and to identify involved parties. Combating terrorism requires a holistic approach that extends beyond financial suppression to address the multifaceted dimensions of the phenomenon, including ideological, religious, economic, social, and political factors. A comprehensive strategy should include:

1. Reforming sources of terrorist ideology, such as educational institutions and associations.
2. Developing communities and regions that are breeding grounds for terrorism.
3. Cutting off funding sources.
4. Addressing political conditions and differences that foster extremism.
5. Utilizing force to confront armed terrorists.

In Iran, unauthorized electricity use for cryptocurrency mining has led to significant issues, prompting police seizures of Bitcoin mining farms. The unauthorized use of electricity, often

1 International Convention for the Suppression of the Financing of Terrorism, 1999.
2 Ibid., Article 8.
3 'Accueil' *Groupe d'action financière (GAFI)* https://www.fatf-gafi.org/fr/home.html.
4 For more information, visit https://www.chainalysis.com

linked to industrial operations, is criminalized under laws governing resource theft, ensuring stringent penalties.[1]

Strengthening international collaboration is essential for effectively addressing the challenges posed by cryptocurrencies in financing terrorism. Establishing robust asset confiscation and recovery systems at both national and international levels can act as a deterrent against organized crime and protect the integrity of financial markets. Additionally, capacity building for law enforcement is critical, necessitating specialized units equipped to investigate virtual currency-related crimes. Public awareness campaigns about the risks associated with cryptocurrencies can empower individuals to make informed decisions and contribute to crime prevention. [2]

Legislative efforts to combat terrorism financing, particularly concerning cryptocurrencies, align with relevant multilateral conventions and UN resolutions. Early initiatives to address cryptocurrencies' involvement in financing terrorism are also evident. Developed countries, such as the United States and those in Europe, have more resources and capabilities to combat this issue effectively, benefiting from centralized technology and advanced intelligence mechanisms.

Conclusion

The rise of cryptocurrencies has created new opportunities for terrorist organizations to exploit digital assets for financing their activities. The unique nature of cryptocurrencies, characterized by confidentiality and anonymity, poses significant challenges in combating terrorism financing. The complexity and global reach of these encrypted currencies complicate crime detection and enforcement efforts, particularly in Iran and other countries. Non-criminal prevention measures, such as technological and situational interventions, may offer greater efficiency and effectiveness than traditional criminal responses. This underscores the need for legislative policies that respect the principle of legality in defining crimes and punishments.

The challenges and opportunities presented by cryptocurrencies transcend national borders, reflecting the broader implications of globalization and technological advancement. Transnational crimes, including money laundering and terrorism financing, require countries to respond under their national laws, which often lack the necessary scope to address these cross-border issues. Thus, an international collaborative approach is essential for effectively combating transnational crimes.

In Iran, it is crucial to adopt robust legislative and criminalization policies to address these challenges. Establishing a clear legal framework for the use and exchange of cryptocurrencies is vital for combating internet fraud, money laundering, and terrorism financing. This framework will enhance the capabilities of law enforcement agencies to detect and pursue crimes within both domestic and international jurisdictions.

A comparative study of the legislative policies in developed countries reveals that risk-oriented approaches to anti-money laundering, in line with the requirements of the Financial Action Task Force (FATF), are essential. These approaches include monitoring, licensing,

1 Nabavi and Saber, Op. Cit. (1399) 1/189.

2 Varun VM, 'Prospects and Models of Combating Cryptocurrency Crimes: The India-EU Dialogue as a Perspective?' *eucrim* (2024) https://doi.org/10.30709/eucrim-2023-032.

record-keeping, and international cooperation to mitigate the criminal risks associated with virtual currencies. Iranian lawmakers should draw on the experiences and policies of leading countries, such as Canada, the United States, Japan, and China, while adapting these strategies to fit domestic legal principles.

While these countries have recognized the need to regulate cryptocurrency exchanges and mining, they have yet to establish comprehensive legislative frameworks that provide the necessary criminalization and enforcement measures. Addressing these gaps is critical to effectively countering the misuse of cryptocurrencies in financing terrorism and other illegal activities.

References

Books

Siahbidi Kermanshahi S and Tarhimmoyed AA, *Economic Criminal Law of Money Laundering* (1st edn, Mizan 2017) [In Persian].

Abbasi A, *Economic Criminal Law of Money Laundering; Combating Money Laundering in International Documents and Iran's Legal System* (1st edn, Mizan 2016) [In Persian].

Dion-Schwarz C, Manheim D and Johnston P B, *Terrorist Use of Cryptocurrencies: Technical and Organizational Barriers and Future Threats* (RAND Corporation 2019).

Goldman Z K et al., *Terrorist Use of Virtual Currencies; Containing the Potential Threat* (Energy, Economics & Security 2017).

Keatinge T, Carlisle D and Keen F, *Virtual Currencies and Terrorist Financing: Assessing the Risks and Evaluating Responses* (European Union 2018) https://www.europarl.europa.eu/RegData/etudes/STUD/2018604970//IPOL_STU(2018)604970_EN.pdf.

Articles

Bahamaoui C, 'Mechanisms for Drying up Sources of Funding for Terrorist Groups' (2017) *Afak Ilmia Journal* 13: 5874-.

Shamlou B and Khalili Pachi A, 'Criminal Risk-Based Policymaking Against Virtual Currency Technology' (2019) *Majlis and Strategy* 27(103): 247278-. [In Persian]

Madadi M, Qaemi-Khargh M and Shafi'i Q, 'Legal Jurisprudence Inquiry on the Issue of Legalization of Encrypted Currencies' (2021) *Majlis and Strategy* 28(105): 334303-. [In Persian]

Nabavi M and Saber M, 'Comparative Study of the Challenges of Iran's Criminal Justice System in the Proceedings of Crimes Related to Virtual Currencies' (2019) *Comparative Law Research* 24(1): 183209-. [In Persian]

Bollen RA, 'The Legal Status of Online Currencies – Are Bitcoins the Future?' (2016) *Melbourne Business School, Financial Institutions, Regulation & Corporate Governance (FIRCG) Conference*.

Dyntu V and Dykyj O, 'Cryptocurrency as an Instrument of Terrorist Financing' (2021) *Baltic Journal of Economic Studies* 7(5): 89121-.

Grinberg R, 'Bitcoin: An Innovative Alternative Digital Currency' (2011) *Hastings Science and Technology Law Journal* 4.

Kenny C, 'Prosecuting Crimes of International Concern: Islamic State at the ICC?' (2019) *Utrecht Journal of International and European Law* 33(84): 120–145.

Kien-Meng Ly M, 'Coining Bitcoin's Legal Bits: Examining the Regulatory Framework for Bitcoin and Virtual Currencies' (2014) *Harvard Journal of Law and Technology* 27(2).

Irwin AS M and Milad G, 'The Use of Crypto-Currencies in Funding Violent Jihad' (2016) *Journal of Money Laundering Control* 19(4).

Silalahi Nuth M, 'Taking Advantage of New Technologies: For and Against Crime' (2008) *Computer Law & Security Review* 24(5).

Ishikawa M, 'Designing Virtual Currency Regulation in Japan: Lessons from the Mt Gox Case' (2017) *Journal of Financial Regulation* 3(1).

Kethineni S, Cao Y and Dodge C, 'Use of Bitcoin in Darknet Markets: Examining Facilitative Factors on Bitcoin-Related Crimes' (2017) *American Journal of Criminal Justice* 43(2).

Zahirah R and Ridwan M, 'The Utilization of Cryptocurrencies by the Terrorist Group as an Alternative Way of Hawala for Illicit Purposes' (2019) *Journal Kelompok Studi Mahasiswa Pengkaji Masalah Internasional (KSMPMI)* 2.

Reports and Strategic Documents

Rajabi A, 'Virtual Currency: Legislation in Different Countries and Proposals for Iran' (2017) *Strategic Report, Vice President of Infrastructure Research and Production Affairs Office, Communication Studies and New Technologies Research Center of the Islamic Council*: 1-24. [In Persian]

Doyle C, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*(Congressional Research Service 2017).

Marini P, 'Regulation and Innovation: Public Authorities and the Development of Virtual Currencies' (2014) *Senate, Commission Des Finances* http://www.senat.fr/rap/r-syn-en.pdf.

Online Articles and Blogs

Collins K, 'The Hackers Behind WannaCry Ransomware Attack Have Finally Cashed Out' *Quartz* (3 August 2017) https://qz.com/1045270/wannacry-update-the-hackers-behind-ransomware-attack-finally-cashed-out-about-140000-in-

bitcoin/.

Entenmann E and Van Den Berg W, 'Terrorist Financing and Virtual Currencies: Different Sides of the Same Bitcoin?' (1 November 2018) *International Centre for Counter-Terrorism – The Hague (ICCT)* https://icct.nl/publication/terrorist-financing-and-virtual-currencies-different-sides-of-the-same-bitcoin/#_ftnref3.

Suberg W, 'Bank Complete: China Blocks Foreign Crypto Exchanges to Counter Financial Risks' *Cointelegraph: The Future of Money* (5 February 2018) https://cointelegraph.com/news/ban-complete-china-blocks-foreign-crypto-exchanges-to-counter-financial-risks.

Sparshott J, 'Regulator on Bitcoin: Same Rules Apply' *The Wall Street Journalhttp://online.wsj.com/news/articles/SB*.

Conference Papers and Presentations

PONS JP, 'Les Cryptomonnaies Impasse ou Révolution?' (2019) *Thème de Recherché presented at the Université du Temps Libre du Bas Languedoc-UTL 34*, p 71.

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Security Council Involvement in Mitigating Adverse Impacts of Climate Change

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ABSTRACT

The impacts of climate change pose a potential threat to peace as defined in the United Nations Charter. Currently, there are few concrete examples of violent conflicts directly induced by climate change, and our understanding of future projections remains limited. Many researchers contend that it is not climate change itself that precipitates conflict, but rather issues such as poor governance of water resources that serve as the primary drivers. This paper examines the competency of the United Nations Security Council (UNSC) in addressing the effects of climate change to either mitigate the sources or enhance the sinks of greenhouse gases. Various recommendations have been proposed for the UNSC in its dealings with the adverse impacts of climate change. These include refraining from involvement, adopting coercive measures, resorting to military force, ending impunity for environmental crimes, requesting advisory opinions from the International Court of Justice (ICJ), imposing sanctions, opting for non-response, and utilizing legislative competencies or authorizing measures. However, given the existence of multilateral climate treaties and other relevant forums, immediate action by the UNSC may be unnecessary. Additionally, the withdrawal of certain Permanent Members from the Paris Agreement complicates the Council's ability to advocate for compulsory actions in support of climate initiatives.

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Introduction

Recent climate changes are affecting physical and biological systems across all continents and most oceans, with particular emphasis on regional temperature increases. The impacts of these climatic changes on human systems are becoming increasingly evident. Global assessments indicate that anthropogenic warming over the past three decades has likely influenced various physical and biological systems. Climate change significantly impacts snow, ice, and frozen ground, and emerging evidence reveals alterations in hydrological systems, water resources, coastal zones, and oceans. Consequently, climate change has become a serious global threat that necessitates an urgent collective response. The ramifications of environmental degradation and the consequences of environmental change are increasingly linked to non-traditional notions of security.

Viewing the environment as a threat to individual, national, or global security has introduced a new agenda within security studies. The expanding scope of international security now encompasses environmental degradation, global warming, and climate change. The environment, as a strategic resource, holds significant importance for nation-states that derive power from natural resources such as water, oil, gas, and various minerals.

The increasing state control over the environment and natural resources often results in negative spillover effects, including environmental degradation and associated catastrophes. These catastrophes manifest as uncontrolled migration, high population growth, and human casualties, which have become pressing security concerns for the affected states. Continuous environmental calamities can stifle a nation's economic growth, disrupt social cohesion, and destabilize political structures. Environmental change diminishes economic opportunities by causing demographic displacement both within states and across international borders.

It is argued that environmental challenges are unlikely to be the primary causes of major disputes between states. According to Dupont, environmental issues interact with more direct causes of conflict, complicating or prolonging existing disputes.[1] Climate change impacts international security primarily by affecting the survival and well-being of populations through rising sea levels, extreme weather events, and the spread of diseases. The principal challenge

1 Buhaug, *Climate-Driven Risks to Peace over the 21st Century* (2023) 39.

lies in effectively managing the effects of climate change as a "threat multiplier," necessitating adequate preparation and adaptation. Adaptation presents significant challenges and will require innovative thinking regarding future threats and responses.[1]

The United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol provide a foundation for international cooperation, complemented by various partnerships and approaches. Countries facing diverse circumstances adopt different strategies to contribute to climate change mitigation. However, it is crucial to establish a shared international vision of long-term goals and to develop frameworks that enable each country to fulfill its responsibilities toward these common objectives.

The Report of the Secretary-General's High-level Panel on Threats, Challenges, and Change (December 2, 2004) highlighted the expansion of the concept of "security," identifying new tasks for the United Nations system in the 21st century. These threats transcend national boundaries and necessitate global, regional, and national responses. No state, regardless of its power, can achieve invulnerability against contemporary threats solely through its own efforts. Moreover, it cannot be assumed that every state will consistently meet its responsibility to protect its own citizens without jeopardizing neighboring states. The High-level Panel identified six clusters of threats, including economic and social threats (such as poverty, infectious diseases, and environmental degradation), inter-state and internal conflict, weapons of mass destruction, terrorism, and transnational organized crime. Notably, environmental degradation was recognized among the threats requiring preventive action from the United Nations.

Climate change is likely to undermine states' abilities to provide opportunities and services that sustain livelihoods and promote peace. In certain contexts, the direct and indirect impacts of climate change on human security and state stability may escalate the risk of violent conflict. It is clear that climate change poses risks to human security, primarily through its potentially adverse effects on well-being. However, further research is essential to better understand how climate change may undermine human security, particularly because our current understanding of vulnerability is insufficient for developing effective adaptation strategies. The perceived or actual insecurity stemming from various factors, including livelihood contraction, is often a catalyst for violent conflicts, suggesting that human insecurity exacerbated by climate change may lead to more conventional security issues.[2]

This paper will examine whether climate change falls within the appropriate scope of the United Nations Security Council's interests, what actions the Security Council should undertake, and whether its leadership could enhance the effectiveness of climate change regimes by mitigating international security threats.

1. Climate Change's Securitization Process within the United Nations Organization

Climate change emerged as a security concern from the environmental movement of the 1960s, a period marked by heightened public, scientific, and political awareness of environmental issues,

1 Cassotta et al., *Climate Change and Human Security in a Regulatory Multilevel and Multidisciplinary Dimension: The Case of the Arctic Environmental Ocean* (2016) 71-91.

2 Barnett & Adger, *Climate Change, Human Security and Violent Conflict* (2007) 639.

facilitated by government and non-governmental organizations, public campaigns, and legislative efforts. As a security issue, climate change was initially addressed in various United Nations reports. Starting in the 1970s, both the United Nations and the international scientific community began exploring the nexus between climate change and security.[1] Although not a primary focus, climate change was indirectly addressed at significant international conferences, including the United Nations Conference on the Human Environment (1972), a series of World Climate Conferences (1979, 1990, and 2009), the Villach meetings of expert scientists (1985 and 1987), and the Brundtland Commission (1987), which introduced the term "security of environment." Political leaders from both sides of the Cold War expressed concern in international forums, notably Mikhail Gorbachev, who remarked, "The relationship between man and the environment has become menacing... the threat from the sky is no longer missiles but global warming."

In 1985, the World Resources Institute[2] warned that the impact of greenhouse warming could be catastrophic. This concern was echoed at the 1987 World Conference on the Changing Atmosphere: Implications for Global Security, which identified climate change as a major international security threat, describing it as an "unintended, uncontrolled, globally pervasive experiment whose ultimate consequences could be second only to a global nuclear war."

The establishment of the Intergovernmental Panel on Climate Change (IPCC) in 1988 and the UNFCCC in 1992 marked a significant turning point in international political momentum. The end of the Cold War also transformed how security issues, including climate change, were perceived and addressed by scholars, policymakers, and the foreign policy establishment. The state, once the sole referent object in security discourse, was joined by concepts of "human security" and "environmental security."

As part of this evolving security paradigm, scholars began to investigate the connections between resource scarcity, population growth, environmental degradation, and acute conflict. Notable empirical studies throughout the 1990s, particularly from the Toronto Group and the Environmental and Conflicts Project, contributed significantly to this discourse, along with programs such as the International Human Dimensions Programme on Global Environmental Change and the Global Environmental Change and Human Security initiative.

The Toronto Group, led by Thomas Homer-Dixon, is often credited with influencing environmental security studies, albeit with critiques suggesting it marginalized the issue of climate change by downplaying the links between localized impacts and global dynamics. Consequently, climate change was often dismissed as a "low priority issue" during the 1990s.[3]

The Toronto Group acknowledged that environmental scarcity "rarely contributes directly to interstate conflict." However, its findings indicated that environmental scarcity could lead to negative consequences such as impoverishment, population displacement, and state weakening, which in turn foster instability. Under certain conditions, these factors could catalyze collective

1 Dietz, *Earth Day: 50 Years of Continuity and Change in Environmentalism* (2020) 306.

2 The World Resources Institute is an independent non-profit organization with a mission to protect the Earth and improve people's lives. It catalyses permanent change through partnerships that implement innovative, incentive-based solutions founded upon hard, objective data. Its commitment to exploring private sector-led development is part of a long tradition of success in harnessing the power of markets to ensure real, not cosmetic, change. It has a staff of over 200 scientists, economists, policy experts, business analysts, statistical analysts, mapmakers and communicators.

3 Thomas, *The Securitization of Climate Change: Australian and United States' Military Responses* (2017) 1.

violent action. The Environment and Conflicts Project identified three main types of armed conflict arising from environmental scarcity: simple-scarcity conflicts, group-identity conflicts, and insurgencies linked to the relative deprivation of lower-status groups. Additionally, it outlined seven stereotypical environmental conflicts, including ethno-political conflicts, center-periphery conflicts, and international water disputes.[1]

In 1992, the notion of utilizing the UNSC to address environmental threats gained traction, culminating in the Council's resolution A/47/253, which explicitly recognized ecological instability as a threat to peace and security.

Despite terrorism and the Iraq War dominating international politics in the early 2000s, climate change regained prominence between 2007 and 2010, fueled by the release of the IPCC's Fourth Assessment Report and the anticipation of a global agreement leading up to the Copenhagen Conference. During this period, climate change increasingly began to be framed as an urgent and existential security threat requiring immediate action.

Recent emphases by successive Secretaries-General on environmental security threats, coupled with the Security Council's significant discussions on climate change in 2007 and a recent General Assembly draft resolution inviting further consideration of the matter, have elevated the topic from speculative academic discourse to a central issue on the international agenda. The time is thus ripe for further investigation.[2]

In practice, securitization has been primarily employed as a strategy to mobilize the international community toward achieving a conclusive agreement on emission reductions, particularly during the Copenhagen Conference, and as a fresh approach to addressing the security implications of climate change comprehensively.

2. 2. United Nations Security Council High-Level Debate on Climate Change

The UNSC first focused explicitly on climate change on April 17, 2007, during a ministerial-level open debate on the relationship between energy and security, convened by the United Kingdom. This session included a briefing by then Secretary-General Ban Ki-moon.[3] Since then, the Security Council has held four debates on climate security, aiming to foster international consensus and add momentum to global efforts addressing climate change.[4]

Sharp divisions emerged during these debates. The representative of the United Kingdom asserted that “an unstable climate will exacerbate some of the core drivers of conflict, such as migratory pressures and competition for resources.” This perspective was echoed by several other members, who linked climate change to the Council’s responsibility for conflict prevention. However, Council members China, Russia, and South Africa questioned the compatibility of climate change with the Council’s mandate under the United Nations Charter. China emphasized that while “climate change may have certain security implications…generally speaking it is in essence an issue of sustainable development.” Both the Non-Aligned Movement and the

1 Hagmann, *Confronting the Concept of Environmentally Induced Conflict* (2005) 6.
2 Conway, *The UNSC and Climate Change: Challenges and Opportunities* (2010) 375.
3 United Nations Security Council, *S/PV.5663* (Resumption I) (2007).
4 Liu & Xu, *Climate Security Debates in the UN Security Council and Potential Climate Security Risks* (2023) 1.

Group of 77+China expressed concerns about potential encroachments on the responsibilities of the General Assembly and the Economic and Social Council. Statements from the broader membership reflected these divisions among Council members.

The Council revisited climate change on July 20, 2011, during an open debate initiated by Germany, featuring briefings by Secretary-General Ban and the Executive Director of the United Nations Environment Programme.[1] Once again, differences emerged regarding whether the Council was the appropriate forum for discussing climate change. While several countries supported the Council's engagement with the issue, China and Russia, along with the G77 countries, Non-Aligned Movement countries, and India, reiterated their concerns about encroachment upon the prerogatives of other UN entities deemed more suitable for addressing climate change. China, as both a Permanent Member of the Security Council and the world's largest greenhouse gas emitter, faced increasing pressure regarding mitigation and financial support.

Notably, during both the 2007 and 2011 debates, the perspective of small island developing states in the Pacific was significant. While most of these nations are G77 members, they did not share the same level of concern regarding encroachment as other G77 members. Representatives from these countries emphasized that rising sea levels induced by climate change pose existential threats to their nations. For instance, President Marcus Stephen of Nauru expressed concern that "we are more concerned about the physical encroachment of the rising seas on our island nations." He proposed that the Council appoint a Special Representative on climate and security and conduct an assessment of the United Nations system's capacity to respond to such impacts, ensuring that vulnerable countries receive adequate support. However, the Council has not pursued either of these measures.[2]

The divisions among Council members were evident during Germany's efforts to negotiate a presidential statement prior to the July 2011 debate. Negotiations continued throughout the meeting, with the outcome uncertain for much of the discussion. Early in the meeting, U.S. Ambassador Susan Rice criticized the Council's inability to reach consensus on even a simple draft presidential statement acknowledging that climate change has the potential to impact peace and security, despite clear evidence to the contrary. She described the failure to reach agreement as "pathetic, short-sighted and…a dereliction of duty".[3]

Ultimately, agreement was reached by the end of the proceedings.[4] The statement reaffirmed that the UNFCCC "is the key instrument for addressing climate change," while expressing concern that the potential adverse effects of climate change could aggravate existing threats to international peace and security. It also emphasized the importance of including conflict analysis and contextual information on the possible security implications of climate change in the Secretary-General's reports, particularly when these issues drive conflict, challenge the implementation of Council mandates, or threaten the consolidation of peace.

The contentious nature of the July 2011 debate and negotiations served as a lesson for those

1 United Nations Security Council, *S/PV.6587* (Resumption I) (2011).
2 United Nations Security Council Report, 2017
3 United Nations Security Council, *Security Council Report* (31 July 2017).
4 United Nations Security Council, *S/PRST/2011/15* (2011).

wishing to address climate change within the Council. This session marked the last formal meeting specifically focused on climate change. Since then, the Council has often opted to hold briefings or debates on broader non-traditional threats to peace and security, including climate change. For instance, on November 23, 2011, Portugal convened a high-level briefing on various interconnected issues termed "New challenges to international peace and security and conflict prevention," which included HIV/AIDS, climate change, and transnational organized crime.[1] Similarly, on July 30, 2015, New Zealand held an open debate on "peace and security challenges facing small island developing states," addressing climate change alongside transnational organized crime, drug and human trafficking, and piracy.[2] On November 22, 2016, Senegal chaired an open debate on "water, peace, and security,"[3] which explored the relationship between climate change and water scarcity, transboundary water management, and the adverse impacts of conflict on access to clean water.

Additionally, Council members have addressed climate change through Arria-formula meetings. On February 15, 2013, the UK and Pakistan co-hosted a meeting on the "security dimensions of climate change," which included participation from civil society and member states outside the Council. Notably, Secretary-General Ban Ki-moon, who championed climate change efforts during his two terms, was one of the briefers, a rare occurrence for a Secretary-General in this format. Similarly, Spain and Malaysia co-hosted an Arria-formula meeting on June 30, 2015, focusing on climate change as a threat multiplier for global security. Most recently, an Arria-formula meeting organized by Ukraine on "Security Implications of Climate Change: Sea Level Rise," with cooperation from Germany, was held on April 10, 2017.

The future of the Council's engagement with climate change remains uncertain. Political divisions persist and are exacerbated by the current U.S. administration's decision to withdraw from the Paris Agreement on climate change. However, there are signs of a growing willingness within the Council to recognize the security implications of climate change. For instance, resolution 2349 on the Lake Chad Basin, adopted shortly after the Council's visiting mission to the region in early March, included a paragraph acknowledging the negative impacts of climate change, among other factors, on regional stability. The U.S. expressed discomfort with this paragraph but ultimately accepted it with some modifications.[4]

Currently, there are no concrete examples of violent conflicts directly induced by climate change, and our understanding of future implications remains limited. Many researchers argue that it is not climate change itself that is the primary driver of conflict; rather, issues such as poor governance of water resources play a more significant role.[5]

3. The United Nations Security Council as a Competent Body on Climate Change

It is challenging to envision a scenario where the use of force authorized by the UNSC would be the most effective response to climate change. One significant concern regarding collective security

1 United Nations Security Council, *S/PV.6668* (2012).
2 United Nations Security Council, *S/PV.7499* (2016).
3 United Nations Security Council, *S/PV.7818* (2017).
4 United Nations Security Council Report, 2017
5 Schoch, *Rethinking Climate Change as a Security Threat* (2011) 1.

approaches to environmental threats is the potential for misuse. States may exploit environmental issues as a pretext for interventions driven by other motives. For instance, a state might invoke self-defense against environmental harm as justification for military action. Although the legal landscape may evolve to eventually consider environmental threats within the scope of self-defense, currently, the risks of misuse outweigh any potential benefits.

Under Article 2(4) of the United Nations Charter, the UNSC prohibits the use of force without addressing the underlying causes, including climate change. The UNSC has expanded its range of Chapter VII actions in the post-Cold War era, addressing security threats that transcend specific times and geographies. Resolutions 1373 on terrorism and 1540 on weapons of mass destruction exemplify this trend, as they identify threats and mandate that all states take specific actions. These resolutions are often termed 'legislative' or 'quasi-legislative,' a characterization that has sparked controversy.

Critics express concern that the UNSC may overextend its legislative role, thereby disrupting the balance of power between the UNSC and the UNGA and undermining the principles of sovereign equality and consent in international law. Some argue that the Council acts ultra vires when passing legislative resolutions. However, the UNSC could potentially emerge as a leading body in addressing climate change and energy issues. Despite its lack of expertise in environmental matters, it could collaborate with relevant bodies to establish standards and create an Environment Security Committee to monitor compliance.[1]

The UNSC's authority to take coercive, binding action to maintain or restore international peace and security against threats—whether military or non-military—is defined in Chapter VII of the UN Charter. Such action hinges upon a determination of a "threat to the peace, breach of the peace, or act of aggression," as specified in Article 39. Historically, the UNSC has identified a 'threat to the peace' more frequently than a breach of the peace, showing reluctance to label situations as acts of aggression. The term 'threat to the peace' encompasses a broad range of issues, including internal conflicts and terrorism.[2]

The determination of whether an environmental threat constitutes a threat to peace is ultimately at the discretion of the UNSC, which has approached this issue with caution.[3] While some argue that if the Council recognizes climate change as a threat under Article 39, it may take any measures it deems necessary, the Council must operate within the confines of the law. It is essential that any action align with the express or implied powers granted by the Charter.

Chapter VII delineates the primary powers available to the Council, which include determining the existence of threats to peace, providing for "provisional measures," deciding on non-military measures for Member States, and authorizing armed actions when necessary. Although these provisions grant the Council broad authority, this power is limited to what is explicitly granted.

Additionally, the Council's powers are constrained by other provisions of the Charter. Notably, Chapter VII powers must be exercised solely for the purpose of maintaining or restoring international peace and security. No action can be taken until a threat to peace, breach

1 Scott, *Climate Change and Peak Oil as Threats to International Peace and Security: Is it Time for the Security Council to Legislate?* (2008) 14.
2 Voigt, *Security in a "Warming World": Competences of the UN Security Council for Preventing Dangerous Climate Change* (2009) 289-312.
3 Ibid.

of the peace, or act of aggression has been established. Furthermore, decisions of the Council are binding only when made "in accordance with the ... Charter." While the implications of this provision are debated, it is clear that decisions significantly altering the delineation of functions within the UN or claiming mandatory powers in areas where the Charter grants the Council only recommendatory powers would not be valid.

In delegating its powers, the Council must also respect the doctrine of *delegatus non potest delegare*.[1] Beyond legal limitations, the Council's effectiveness is constrained by realpolitik, particularly the lack of legitimacy that can hinder implementation of its resolutions. The relationship between legitimacy and the effectiveness of international law is crucial, as Security Council resolutions ultimately rely on state compliance for their impact.

Several factors complicate the request for the Security Council to address climate change's security aspects. The power dynamics within the Council are significant, as the P5—China, Russia, the United States, the United Kingdom, and France—are among the largest greenhouse gas emitters. In contrast, poorer nations that suffer the most from climate change impacts have limited influence on Council decisions. Additionally, attributing responsibility for climate change is challenging, as it is a global, anthropogenic issue rather than a specific act like war crimes.

One potential avenue for the Council's involvement is linking its actions to compliance mechanisms established by the (post-)Kyoto framework, allowing for appropriate responses to non-compliance.[2] However, even informing the Council about climate change's relevance to peacekeeping and fragile states has proven difficult. Compromises have led to calls for the Secretary-General to report on climate-conflict links,[3] but the Council's generally reactive nature hampers proactive engagement.

Conflict prevention is integral to the mandate of the UNSC, and the substantial financial burden of peacekeeping operations provides a compelling incentive for preventive measures. However, in the context of interstate preventive diplomacy, particularly concerning shared river basins, the Office of the Secretary-General has historically proven to be a more effective instrument than the Council itself. Furthermore, the Council has exhibited a consistent reluctance to undertake preventive actions in intrastate conflicts. Initiatives commencing in 2016 aimed at implementing a 'horizon scan' briefing from the Secretariat—focused on instability and emerging conflicts—have underscored the significant hesitance of numerous member states to be categorized as 'fragile' within the Council's agenda.[4]

A third issue pertains to the complex challenge of managing the political division of labor in relation to the UNFCCC. Advocates for Council action on climate matters have leveraged past discussions to catalyze stagnant climate diplomacy, while critics have cautioned against encroaching upon or disrupting the established framework of global climate negotiations. Although initial optimism surrounding the Paris Agreement mitigated some polarization, this optimism was undermined by the withdrawal of the Trump Administration from the accord.

1 The maxim, a delegate cannot delegate, means that no sovereign or government, as the representative of a people has the power to delegate the appointment of its diplomatic envoys to a foreign sovereign.

2 Webersik, *Climate Change and Security: A Gathering Storm of Global Challenges* (2010) 1.

3 Conca et al., *Climate Change and the UN Security Council: Bully Pulpit or Bull in a China Shop?* (2017).

4 Ibid.

The more profound concern lies in the Paris process's seemingly tepid engagement with critical issues that resonate within the Council, thereby potentially obstructing its mandate without effectively addressing these challenges. Regarding the imminent threat of sea-level rise and the existential dangers to small island nations, the Paris Agreement's provisions on loss and damage explicitly facilitate the consideration of several pertinent issues, including early warning systems, emergency preparedness, slow-onset events, risk management, and the resilience of communities, livelihoods, and ecosystems.[1] This dynamic may restrict the political space available to the Council concerning small-island statelessness, particularly given the inadequacy of the UNFCCC process in addressing issues of liability and compensation.

A similar trend of diminishing political momentum through inadequate responses may be emerging concerning climate-induced displacement. The UNFCCC's 21st Conference of the Parties authorized a task force to develop recommendations addressing this issue, with a preliminary report scheduled for 2018.[2]

In considering how climate change can facilitate the transformation of the Council into a more effective body for sustainable security, a preliminary step would involve enhancing the Secretary-General's reporting function, as agreed during the 2011 discussions. The most valuable insights for the Council are likely to stem from regional-scale, medium-term assessments, rather than localized crisis briefings or long-range climate scenarios. Engaging with these spatial and temporal dimensions is likely to yield forward-looking initiatives, garnering support from those member states that are most directly affected or vulnerable, as exemplified by the Integrated Strategy for the Sahel. This strategy emphasizes the importance of building long-term resilience as one of its three foundational pillars, alongside inclusive governance and the management of cross-border threats. A UNSC briefing in this context, focusing on the interconnections among climate trends, migration, and conflict within the region, was positively received due to its specificity and the support it garnered from member states.[3]

A subsequent step would involve challenging countries aspiring to a seat on the Council to articulate a specific vision for advancing the Council's agenda on climate issues. Several candidates for elected seats have addressed this topic in recent campaigns; however, it is equally relevant for nations seeking permanent seats on an expanded, reformed Council—specifically Japan, Germany, Brazil, and India. It remains critical to ascertain how these nations perceive the climate issue in relation to the Council's mandate, particularly regarding preventive diplomacy, disaster vulnerability, and displacement.[4]

Finally, despite the current political complexities, a symbolic gesture from the P5 would acknowledge the multifaceted roles of member states across the UN system. If executed appropriately, this could legitimize a proactive (yet judicious) role for the Council as part of a comprehensive system-wide response. During the 2011 debate, Nigeria highlighted the dual role of the P5, stating that "Seated around the table are those who could encourage developed countries to implement their commitments to reducing emissions and to support developing

1 Article 8.4.
2 Conca et al., Op. Cit. (2017).
3 Ibid.
4 Ibid.

countries with the requisite technological and financial assistance to effectively address climate change."[1]

4. Possible United Nations Security Council Responses in the Context of Climate Change

Mainstream global climate change efforts are currently focused on achieving significant breakthroughs, such as those sought in the 2015 Paris Agreement. Scholarly discussions about the potential for a UNSC role typically concentrate on specific actions, like sanctions or the use of force.[2]

4.1. Complexity of Climate-Related Crises

Crises exacerbated by climate change may not be immediately recognizable, nor is the causal relationship always clear—especially when the UNSC needs to make timely decisions. This lack of clarity can lead many to view the UNSC's potential role in addressing climate change as more theoretical than practical. Additionally, the Council must decide whether to focus on mitigation (reducing greenhouse gas emissions) or adaptation (adjusting to climate impacts).[3]

4.2. Key Variables in UNSC Responses

Several key variables influence how the UNSC might respond to climate change:

1. **Mitigation vs. Adaptation**: The Council could choose to address either mitigation or adaptation measures.
2. **Existing Tools vs. New Approaches**: The UNSC can adapt its existing tools or develop new mechanisms for addressing climate issues.
3. **Recommendatory vs. Compulsory Powers**: The Council's response could utilize its recommendatory powers or its more binding, compulsory powers.
4. **Nature of Threat**: The UNSC has broadened its understanding of what constitutes a "threat to the peace," allowing for a wider scope of action.

These variables generate a multitude of potential UNSC responses, leading to various interpretations of the Council's role in climate change. To clarify these possibilities, we can categorize them into four broad responses.[4]

4.2.1. Rejection of Involvement

One potential response is for the UNSC to explicitly reject any involvement with climate change, claiming it is unrelated to security or that the Council is not the appropriate institution for addressing the issue.[5]

4.2.2. Coercive Measures

At the opposite end of the spectrum, the UNSC could opt to use its Chapter VII powers, positioning itself as a key global governance body for climate change. Given that climate change threatens

1 Ibid.
2 Scott, *Implications of Climate Change for the UN Security Council: Mapping the Range of Potential Policy Responses* (2015) 91.
3 Intergovernmental Panel on Climate Change, 2015
4 Scott, Op. Cit. (2015) 97.
5 Ibid, 103.

humanity's future, it could be argued that it falls within the UNSC's purview. This perspective aligns with the principle of collective security—if one nation is threatened, all nations must cooperate to ensure collective security.[1]

4.2.3. Military Force

Chapter VII decisions often involve the authorization of military force, which raises complex questions. While some argue that extreme security threats warrant extreme measures, others contend that "there are no military solutions to environmental insecurity." Military intervention may lead to loss of life and further environmental harm, making it an inappropriate response to the multifaceted challenges posed by climate change.[2]

4.2.4. Ending Impunity for Environmental Crimes

Since the end of the Cold War, the UNSC has established international judicial institutions aimed at combatting impunity and addressing threats to peace and security. Advocates have proposed recognizing a crime of "ecocide," applicable to large-scale environmental destruction, even during peacetime. While the UNSC cannot create international law directly, it could support initiatives to amend existing treaties, such as the Rome Statute of the International Criminal Court, to include ecocide.[3]

4.2.5. Condemnations

One potential coercive measure for the UNSC is to issue condemnations regarding certain states' conducts or inactions related to climate change mitigation. While these condemnations may lack the enforceability of sanctions, they can effectively raise awareness of climate-related threats within the international community. For instance, the Council could condemn "the massive pollution of the atmosphere" and explicitly link it to threats to peace and security. Such actions may increase state accountability regarding climate change and deter harmful conducts. By framing climate change as a security issue, the Council could pave the way for more constructive state actions to address these challenges, amplifying the urgency and importance of collective responses.[4]

4.2.6. Request to the International Court of Justice

Another option, which has not been extensively explored in legal literature, is for the UNSC to seek an advisory opinion from the ICJ on questions of international law. Possible inquiries could involve the legal consequences for states failing to comply with obligations under the UNFCCC or the Kyoto Protocol. An advisory opinion on non-compliance and the potential for countermeasures might deter states from neglecting their responsibilities. The Council could also ask about the legality of significant atmospheric pollution or the liability for damages caused by destabilizing the global climate system. Such requests would align with previous inquiries by the United Nations General Assembly and the World Health Organization regarding nuclear weapons, thereby highlighting the legal and moral imperatives of addressing climate change.[5]

4.2.7. Sanctions

Sanctions represent another viable option available to the UNSC under Article 41 of the Charter. Various commentators have highlighted the potential of sanctions in the context of climate

1 Ibid, 109.
2 Ibid, 113.
3 Ibid, 118.
4 Voigt, Op. Cit. (2009).
5 Ibid.

change. If a state fails to act, the Council could impose import or export bans on companies that engage in environmentally harmful practices, such as extensive deforestation or maintaining an excessive carbon footprint.[1]

4.2.8. Non-Response

A "non-response" occurs when the UNSC does not explicitly address climate change but indirectly engages with its effects. In this scenario, the Council may not recognize that underlying issues stem from climate change; instead, it might respond to crises labeled as "civil war," "desertification," "increasing migration flows," or "natural disasters." This reactive approach is characterized by adaptation rather than proactive mitigation, limiting the Council's ability to lead on climate change issues. This is arguably the most minimal form of involvement at present.[2]

4.2.9. Measured Response

In this final category, the UNSC acknowledges in a resolution that climate change poses risks to international peace and security and takes deliberate actions to address these consequences. By recognizing climate change as a security threat, the Council can frame it as an issue that may exacerbate conflict and hinder the stabilization of societies post-conflict. This acknowledgment highlights climate change's potential to bring about environmental changes, including extreme weather events, that threaten human security and, consequently, international security.[3]

Even though the Council's current responses may primarily fall within the "non-response" category, this approach might yield certain benefits. The term "climate change" often polarizes opinions and evokes strong emotions, complicating discussions about responsibility. However, this passive stance risks missing opportunities for proactive measures aimed at both ambitious mitigation targets and significant adaptation challenges. During the 2011 debate, states expressed a desire for the Council to monitor and anticipate threats. If the Secretary-General were to consider climate-related factors in country or thematic reports, it could enhance awareness and reduce resistance to a more active Council role in climate-related matters, potentially leading to the inclusion of relevant contextual information in Council resolutions.[4]

5. United Nations Security Council Competences in Preventing Climate Change

Chapter VII of the UNSC Charter allows for measures to prevent dangerous climate change. According to Article 39, actions taken by the Council in response to a "threat to the peace, breach of the peace, or act of aggression" must aim "to maintain or restore international peace and security." The term "maintain" emphasizes that the Council can take preventive actions without waiting for peace to be disturbed. However, the more challenging question is what effective actions the UNSC could undertake to address climate change.

5.1. Legislative Competences

Since the end of the Cold War, the Council has utilized its Chapter VII authority to pass "legislative" resolutions requiring all states to take actions against common threats, such as terrorism and the proliferation of nuclear weapons. Similarly, the Council could theoretically mandate that states

1 Scott, Op. Cit. (2015) 121.
2 Ibid, 123.
3 Ibid, 125.
4 Ibid, 128.

legislate to significantly reduce their carbon footprints and work towards decarbonizing the global economy.[1] This could create obligations for all states concerning climate change, which could overlap with their existing commitments under the UNFCCC and the Kyoto Protocol.[2]

While anti-terrorism measures address vital national security concerns, climate change regulation directly impacts states' core economic and development priorities. Emission reduction necessitates extensive regulation across nearly all sectors of the economy, making cooperation with various stakeholders essential. Therefore, adequate legitimacy will be crucial for any UNSC legislation on climate change.

Resolution 1540 was largely accepted due to an urgent need to address gaps in international regulation of weapons of mass destruction; similarly, the challenges facing the UNFCCC could create opportunities for Council engagement.

Theoretically, the UNSC could declare climate change as outside its mandate. However, it is likely that the Council would still be compelled to address issues such as mass migration, civil conflict, or health crises that climate change has exacerbated, even if those crises do not initially appear to be "climate change situations."[3]

In response to concerns about states using the Council's counter-terrorism resolutions to justify questionable laws under international human rights law, both the Council and the General Assembly have recently reaffirmed that all actions taken under these resolutions must comply with international law. This suggests that even if the Council interprets its resolutions authoritatively after the fact, it emphasizes the need for adherence to obligations under international law.

International courts decisions further support this conclusion. The European Court of Human Rights has consistently held that contracting states must uphold Convention rights when implementing decisions from international organizations. Notably, the EU Court of First Instance has ruled that actions taken to implement UNSC resolutions that allow for discretion in their application do not benefit from the primacy outlined in Articles 25 and 103 of the Charter, particularly distinguishing cases involving legislative resolutions, such as Resolution 1373.

Regulating greenhouse gas emissions affects multiple areas of domestic policy, many of which are also subject to international obligations. While later treaties generally override earlier conflicting treaties between the same parties, it is rare for climate change commitments to directly conflict with other international obligations. Instead of requiring specific actions, these commitments typically establish broad goals to be achieved through each party's chosen means. In the absence of direct conflict, these broad commitments must be implemented in harmony with other international obligations.

5.2. Authorizing Measures

Authorizing measures that are inconsistent with a particular treaty effectively amends that treaty, at least temporarily, which can destabilize the rule of law. To mitigate this risk, the Council might prefer to avoid actions that could jeopardize what it considers vital for climate change mitigation.

1 In The Case of Resolution 1373 (2001), The Council Effectively Made Obligatory Certain Of The Substantive Obligations Of The 1999 Terrorist Financing Convention. In The Event Of Any Conflict Between Obligations Under The Charter And Those Assumed By A State Under The United Nations Framework Convention on Climate Change Regime, Those Created By The Council Would Prevail.

2 Scott, Op. Cit. (2015) 136.

3 Ibid, 139.

5.3. Multilateral Climate Treaties and Effective Action

Climate change is a global phenomenon that necessitates a collective response through global partnerships. Effective solutions must be underpinned by a consensus for action.[1] However, both the UNFCCC and the Kyoto Protocol have shortcomings in establishing mechanisms that compel states to significantly reduce their greenhouse gas emissions. While the Framework Convention does not quantify emission reductions, the Kyoto Protocol sets specific targets for the gases listed in its Annex A.

The extent, sources, and consequences of global warming are subjects of ongoing debate, and the potential security implications are often speculative. Even if the predicted impacts outlined in the IPCC report materialize, they are not immediate security threats. Numerous initiatives, forums, and organizations are already dedicated to studying and evaluating the consequences of global warming, focusing on clarifying the science and weighing the costs of action against the risks of inaction. A debate in the UNSC is unlikely to advance these ongoing efforts.[2]

The UNSC currently faces a backlog of immediate threats to international peace and security that remain unresolved. Focusing on speculative threats that may arise decades in the future undermines the seriousness of the Council and distracts from pressing crises. While global warming is indeed an important environmental concern, its classification as a security crisis is not universally supported by evidence.

Scientific uncertainties abound, particularly regarding alarming predictions used to justify the Security Council's involvement in an issue better suited to the United Nations Environment Programme and other relevant bodies. For example, the Copenhagen Consensus Conferences in 2004 and 2006 prioritized global problems and concluded that health, water, education, and hunger should take precedence over financial instability and climate change.[3]

Moreover, an additional global forum to debate global warming is unnecessary and counterproductive. Numerous organizations, including national environmental ministries and NGOs, are already devoted to researching climate change. Within the United Nations, bodies like the United Nations Environment Programme and the World Meteorological Organization allocate significant resources to address these issues. Existing treaties, such as the Kyoto Protocol, have been in force since 2005, and other initiatives like the Asia-Pacific Partnership on Clean Development and Climate are also in place.[4]

High-level multilateral institutions, such as the IPCC, established in 1988, work collaboratively to assess climate science and present findings to world leaders every five to seven years. Given these existing efforts, it is difficult to see how further debate in the Security Council would contribute meaningfully to the discourse on climate change. The Council lacks the specialized expertise of established forums and dissenting scientific groups, making its involvement seem redundant.[5]

Additionally, the Security Council has struggled to address transnational terrorism

1 Voigt, Op. Cit. (2009)
2 Schaeffer and Lieberman, *Discussing Global Warming in the Security Council: Premature and a Distraction from More Pressing Crises* (2007).
3 Ibid.
4 Ibid.
5 Ibid.

effectively, failing to condemn state sponsors despite evidence of their involvement with terrorist groups. The recent frequency and scale of UN deployments have strained member states' willingness to contribute personnel to peace operations, leading to challenges within the Department of Peacekeeping Operations. This situation has resulted in mismanagement, misconduct, poor planning, and other issues, yet the Council has largely remained silent on how these weaknesses affect its decisions.

The UNSC has a pressing agenda filled with immediate threats that warrant deliberation and action. Focusing on the speculative threats posed by climate change detracts from these critical issues and undermines the Council's credibility, reducing it to a platform for political theater.[1] While enforcement actions related to human rights and humanitarian relief are essential, they serve as a useful analogy for considering how the Security Council might engage with environmental catastrophes as well.

The analogy between the UNSC's exercise of humanitarian intervention under Chapter VII and environmental concerns is complicated by the lack of clear international recognition of a right to a safe and healthful environment. This absence is particularly troubling because, regardless of the Council's authority under Chapter VII, its activities are confined by the stated purposes of the United Nations in Article 1, which explicitly mentions human rights alongside the maintenance of international peace and security. Without a threat to military peace or the recognition of ecological security, the legitimacy of any Security Council measures to protect the environment on humanitarian grounds is weakened.

Economic sanctions aimed at human rights violations often end up harming those they intend to protect, while leaving the underlying power structures unchanged. However, economic activities that exploit natural resources can be more easily quantified in economic terms, making it simpler to tailor sanctions to deter or punish excessive environmental exploitation. While some environmental issues may implicate vital security concerns—such as hazardous nuclear reactors—many fall outside these more urgent parameters.

It has been suggested that the UNSC could establish subsidiary organs under Chapter VII to address specific issues like global warming. However, this approach is more effective for norm-creating and adjudicatory functions than for responding to emergencies. In cases of environmental disasters, where affected states request assistance, the language of Chapter VI ("any dispute, or any situation which might lead to international friction or give rise to a dispute") is broader and more anticipatory than the "threat to the peace" under Chapter VII. The Council has established procedures for emergency sessions and could quickly recommend emergency assistance to member states or act as a clearinghouse for such aid.[2]

Environmental security threats that resemble a "crisis" are more aligned with the Council's traditional role than issues with less widespread impact.[3] The term "climate change" and its framing as a "security" threat are often unacceptable to many developing countries, which seek to achieve living standards comparable to those in advanced nations. For these countries, issues like poverty, resource scarcity, and competition for energy are expected to lead to conflicts,

1 Ibid.

2 Malone, *Green Helmets: A Conceptual Framework for Security Council Authority in Environmental Emergencies* (1995) 17.

3 Scott, Op. Cit. (2008) 21.

with equitable resource distribution proposed as a solution. Adherence to principles such as common but differentiated responsibility, the "Agenda 21," and the UNFCCC is seen as key to addressing climate challenges.

Moreover, why does the Security Council only discuss the security implications of climate change, rather than broader environmental changes? Phenomena such as cyclones, subsidence, and tsunamis cannot solely be linked to climate change; they reflect changes in the environment as a whole. Classifying climate change as a "threat multiplier" rather than a direct cause of conflict might be a more accurate approach, as evidenced by the multifactorial nature of crises like the one in Darfur.

Similarly, the connection drawn between the Arab Spring and climate change—rooted in food price spikes from droughts—must be understood within the larger context of public discontent towards existing regimes in countries like Libya, Egypt, and Tunisia. Attempts to label climate change as a "developing country syndrome" dilute the global nature of the issue. For example, migration from Bangladesh and the Maldives to India is often viewed as a security threat, while similar migration from South Pacific islands to Australia and New Zealand is not classified in the same way.

In the 1990s, the United Nations began to pay greater attention to "human security," addressing individual rights, including access to food, water, healthcare, and shelter. The Security Council has faced criticism for facilitating wars and imposing sanctions unjustly, suggesting that now might be the right time to shift focus from the Council to alternative forums for discussing environmental change and brainstorming solutions. 'Transnational' bodies that include both state and non-state actors could foster greater consensus than an 'international' organ like the Security Council, which is often dominated by the parochial interests of states.[1]

In the past, world leaders urgently committed to addressing significant challenges to human life and dignity, which have claimed millions of lives, particularly in Africa. UNSC Resolution 1308 (2000), adopted on July 17, 2000, was the first resolution to address a global public health threat to international peace and security. Recognizing the AIDS epidemic's exacerbation by violence and instability, the resolution stressed that, if unchecked, the epidemic could pose risks to stability and security.[2]

Conclusion

The relationships between the environment and human security are both close and complex. The threats to human security are far more numerous and diverse than those to state security. Even emerging threats like transnational crime or infectious diseases are viewed differently through a human security lens. This perspective shifts the focus from traditional macro-economic growth to the opportunities and capabilities of individuals, thereby redefining conventional state security.

The adoption of the Paris Agreement in December 2015 at the 21st Conference of the Parties to the UNFCCC represented a pivotal moment in multilateral diplomacy. Countries committed to enhancing their nationally determined contributions to climate action on a five-year cycle,

1 Jayaram, *Six Reasons Why the United Nations Security Council Should Not Discuss Climate Change* (2013).
2 UNAIDS, *The Responsibility of the UNSC in the Maintenance of International Peace and Security: HIV/AIDS and International Peacekeeping Operations*(2011).

aiming to phase out greenhouse gas emissions to net zero by the latter half of the 21st century. The Agreement also initiated a rebalancing of climate risk management across its entire spectrum.

General Assembly Resolution 10830 (2009) encouraged relevant United Nations organs to intensify efforts in addressing climate change and its potential security implications. There remains no consensus on whether the UNSC should be proactive regarding climate change or what its contributions to global efforts might entail. However, the Council's legal authority to override contradictory obligations of member states and its multimodal methods of operation render its role significant.

If the Security Council does not consciously engage with climate change, it is likely to respond implicitly to its security consequences. Thus, it is timely to explore the range of actions legally available to the Council as a precursor to assessing what would be politically feasible and practically useful. While some extreme responses, including the use of force, are politically unviable, concerns about potential misuse of mandates by the P5 create resistance to the Council's involvement. Addressing these concerns could enhance the legitimacy of the Council's proactive measures.

The Council could build on its established precedents and adopt a measured response to the security risks associated with climate change. Recognizing the close link between effective climate change adaptation and development suggests that the Security Council has the potential to positively contribute to global climate governance, utilizing existing tools and developing new ones in the future.

However, withdrawals from international agreements can undermine global climate governance and disrupt cooperative efforts. Such withdrawals affect the universality of the Paris Agreement and highlight the challenges of integrating environmental variables into conflict assessment tools. The decision-making process within the Security Council, requiring an affirmative vote from nine members including the P5, poses significant obstacles. Creating political consensus is crucial, especially given the urgency of the task.

While raising climate change as an issue in the Council could precede a decision or resolution, it remains uncertain whether global warming will soon pose a direct threat to international peace and security. The science and predictions surrounding climate change are still subject to considerable uncertainty, and proposed solutions may present their own challenges. Until these uncertainties are resolved, the Security Council's resources and attention are better directed toward pressing crises rather than speculative threats.

References

Books

Thomas MD, *The Securitization of Climate Change: Australian and United States' Military Responses (2003-2013)* (Vol. 10, Springer 2017).

Webersik C, *Climate Change and Security: A Gathering Storm of Global Challenges* (ABC-CLIO 2010).

Jayaram D and Sethi G, 'Geopolitics of Climate Change and Water Security in South Asia: Conflict and Cooperation' in N Khare (ed),*Science, Policies and Conflicts of Climate Change*(Springer, Cham 2022)https://doi.org/10.1007/978-3-031-16254-1_4.

Liu C and Xu H, 'Climate Security Debates in the UN Security Council and Potential Climate Security Risks' in G Zhuang, Q Chao, G Hu and J Pan (eds), *Annual Report on Actions to Address Climate Change (2019)* (Springer, Singapore 2023) https://doi.org/10.1007/978-981-19-7738-1_8.

Cassotta S, Hossain K, Ren J and Goodsite ME, 'Climate Change and Human Security in a Regulatory Multilevel and Multidisciplinary Dimension: The Case of the Arctic Environmental Ocean' in *Climate Change Adaptation, Resilience and Hazards* (Springer, Cham 2016) 7191-.

Articles

Barnett J and Adger WN, 'Climate Change, Human Security and Violent Conflict' (2007) 26 *Political Geography* 639.

Biswas NR, 'Is the Environment a Security Threat? Environmental Security Beyond Securitization' (2011) 20 *International Affairs Review* 1.

Conca K, Thwaites J and Lee G, 'Climate Change and the UN Security Council: Bully Pulpit or Bull in a China Shop?' (2017) 17 *Global Environmental Politics* 1.

Conway D, 'The UNSC and Climate Change: Challenges and Opportunities' (2010) 1 *Climate Law*375.

Dietz T, 'Earth Day: 50 Years of Continuity and Change in Environmentalism' (2020) 2 *One Earth* 4.

Hagmann T, 'Confronting the Concept of Environmentally Induced Conflict' (2005) 6 *Peace, Conflict and Development* 1.

Halvard Buhaug et al, 'Climate-Driven Risks to Peace over the 21st Century' (2023) 39 *Climate Risk Management*.

Khagram S, Clark W and Raad DF, 'From the Environment and Human Security to Sustainable Security and Development' (2003) 4 *Journal of Human Development* 289.

Malone LA, 'Green Helmets: A Conceptual Framework for Security Council Authority in Environmental Emergencies' (1995) 17 *Michigan Journal of International Law* 515.

Satyendra Singh, 'Environmental Security in South Asia: An Analysis of Bangladesh' (2015) 19 *World Affairs: The Journal of International Issues* 2.

Schaeffer BD and Lieberman B, 'Discussing Global Warming in the Security Council: Premature and a Distraction from More Pressing Crises' (2007) *Heritage Foundation WebMemo* 1425.

Scott SV, 'Climate Change and Peak Oil as Threats to International Peace and Security: Is it Time for the Security Council to Legislate?' (2008) 9 *Melbourne Journal of International Law* 495.

Scott SV, 'Implications of Climate Change for the UN Security Council: Mapping the Range of Potential Policy Responses' (2015) 91 *International Affairs* 1317.

Voigt C, 'Security in a "Warming World": Competences of the UN Security Council for Preventing Dangerous Climate Change' in *Security: A Multidisciplinary Normative Approach* (Brill 2009) 289312-.

Zhang HB, Dai HC, Lai HX and Wang WT, 'US Withdrawal from the Paris Agreement: Reasons, Impacts, and China's Response' (2017) 8 *Advances in Climate Change Research* 220.

Ekhator E and Okumagba E, 'Climate Change, Multinationals and Human Rights in Nigeria: A Case for Climate Justice' (January 9, 2023) forthcoming in Kim Bouwer et al (eds), *In Pursuit of Climate Justice in Africa* (Bristol University Press 2023) https://ssrn.com/abstract=4320843.

Reports and Policy Papers

Brauch HG, 'Threats, Challenges, Vulnerabilities and Risks in Environmental and Human Security' (2005) *UNU-EHS*.

Change C, 'International Security, Paper from the High Representative and the European Commission to the European Council S113/08' (2008) *European Commission* 14.

HM Treasury, 'Stern Review on the Economics of Climate Change' (2006) http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm.

Security Council Report, 'The UNSC and Climate Change - An Ambivalent Relationship: Thematic Issues, In Hindsight' (2017) http://www.securitycouncilreport.org/monthly-forecast/2017-08/the_security_council_and_climate_change_an_ambivalent_relationship.php.

Schoch C, 'Rethinking Climate Change as a Security Threat' (*International Institute for Environment and Development* 2011) http://www.iied.org/pubs/display.php.

UNAIDS and DPKO, 'The Responsibility of the UNSC in the Maintenance of International Peace and Security: HIV/AIDS and International Peacekeeping Operations' (2011) http://www.unaids.org/sites/default/files/sub_landing/files/20110512_UNITED_NATIONS_SECURITY_COUNCIL_UNAIDS_DPKO_NonPaper.pdf.

Online Articles and Blogs

Jayaram D, 'Six Reasons Why the United Nations Security Council Should Not Discuss Climate Change' (*E-International Relations* 2013) http://www.e-ir.info/2013/04/26/six-reasons-why-the-un-security-council-should-not-discuss-climate-change/.

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Renewable Energy Investment Incentives: The Approach of International Investment Agreements

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ABSTRACT

Today the world is tackling climate change and simultaneously needs to overcome growing energy security challenges. The transition to renewable energy is known as the key strategy for reducing carbon emissions and ensuring energy security. However, not all countries access the required finance and technologies to successfully and sustainably deploy renewable energy projects. Therefore, they seek to attract foreign investment and technology. A growing number of governments are adopting incentives to compete in this field and create a more favorable investment atmosphere. The granting of investment incentives lies within the realm of national legislation which is susceptible to revocation by the host States. This exposes foreign investors to several risks as no State is bound by its unilateral commitments and the change or withdrawal of pro-foreign investment policies by the host States is a mere exercise of their sovereignty. As International Investment Agreements (IIAs) were primarily drafted to promote and protect cross-border investments against unfair and discriminatory treatments, it is interesting to know their current approach to investment incentives and assess its implications for renewable energy investments. Adopting a qualitative approach, this research aims to clarify this issue by defining investment incentives and shedding new light on the relevant clauses in IIAs that can better contribute to the protection of renewable energy investors' interests. Findings suggest that harmonizing investment incentives by including them in IIAs has not been on the agenda so far and IIAs seldom contain renewable energy-related incentive provisions. Therefore, this research points out the relevant provisions that can better accommodate the renewable energy investment needs.

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Introduction

The rationales behind governments' support for the transition to renewable energy are multifold. Renewable energy generates no emissions, lowers the country's carbon footprint, and provides a cheaper form of electricity that never runs out. In addition, diversifying the energy sources away from conventional sources helps overcome energy security challenges.[1] However, the non-affordability of renewable energy projects is considered to be the most challenging issue for governments and investors.[2] There is a risk that investors may become reluctant to invest at the scale necessary to fully utilize renewable energy sources if policy actions in favor of such projects are lagging or non-existent.[3] Therefore a growing number of States are adopting several incentives under various circumstances to attract renewable energy investments and increase the production of energy from renewable sources.

Investment incentives may be defined as 'measurable economic advantages that governments provide to specific enterprises or groups of enterprises, with the goal of steering investment into favored sectors or regions or of influencing the character of such investments'.[4] These incentives may generally be categorized into four types: fiscal incentives, financial incentives, regulatory incentives, and technical and business support incentives.[5]

Generally, the granting of investment incentives lies within the realm of national legislation, and therefore governments are adopting specific laws, directives, or ordinances to this end.[6]

1. Hossein Karami Lakeh, 'What Are the Advantages and Disadvantages of Renewable Energy?' (20 May 2022) <https://www.greenmatch.co.uk/blog/2021/09/advantages-and-disadvantages-of-renewable-energy> accessed 25 June 2023. Union of Concerned Scientists, 'Benefits of Renewable Energy Use' (20 December 2017) <https://www.ucsusa.org/resources/benefits-renewable-energy-use> accessed 20 June 2023.
2. S U Zakaria and others, 'Public Awareness Analysis on Renewable Energy in Malaysia' (2019) 268 IOP Conf. Series: Earth and Environmental Science 1, 6-8. International Energy Agency, Perspectives for the Energy Transition – Investment Needs for a Low Carbon Energy System (IEA/IRENA 2017), 8.
3. Pierpaolo Grippa, Jochen Schmittmann and Felix Suntheim, 'Climate Change and Financial Risk: Central banks and financial regulators are starting to factor in climate change' (2019) 56(4) Finance and Development 26, 29.
4. Sebastian James, Tax and Non-Tax Incentives and Investments: Evidence and Policy Implications (World Bank Group 2014) 6.
5. Lise Johnson, Perrine Toledano, Investment Incentives: A Survey of Policies and Approaches for Sustainable Investment (Columbia Center on Sustainable Investment 2022) III.
6. Martin Dietrich Brauch, 'Reforming International Investment Law for Climate Change Goals' in Michael Mehling and Harro van Asselt (eds), Research Handbook on Climate Finance and Investment Law (Edward Elgar Publishing forthcoming 2023) pts 3.2-3.

National legislation can reduce various political and economic risks associated with renewable energy projects, including the lack of information on renewable energy options, high transaction costs, limited access to technology, inadequate infrastructure, unfavorable power pricing rules, lack of access to credit, government monopolies, uncertainty in national policies, and insurance gaps.[1] Unsurprisingly, no State is bound by its unilateral commitments as the unilateral changes of pro-foreign investment laws and reduction or withdrawal of incentives by the host State are merely the exercise of sovereignty.[2] This concern is unlikely to be alleviated unless there are treaty obligations that require the States to honor commitments made as to the treatment of foreign investments.[3] Thus, where a contract or municipal laws and regulations mandate fundamental commitments in favor of foreign investment and its economic value, such negative changes are elevated to a breach of treaty commitments.[4] The normal effect of such clauses in International Investment Agreements (IIAs) could be to transform what might be seen as an obligation under domestic law, into a justiciable obligation under international law, bring greater protection to investors, and ensure that State contracts and other obligations of the host State are no more governed exclusively by domestic law which are susceptible to revocation by governments.[5]

Although both IIAs and investment incentives are used by governments to attract investments and promote outward investments, harmonizing investment incentives by including them in IIAs has not been on the agenda so far. This is particularly because incorporating investment incentives into IIAs would not be without costs to the parties. In fact, the attitude of States toward including investment incentives in their IIAs largely depends on whether they adopt a *laissez-faire* approach to foreign investment.[6] However, most governments prefer to retain the power to create and/or modify investment schemes as needed based on their changing public policy needs.[7] Most notably, developing countries might face capacity constraints in implementing these policies and as a result, incorporating convenient incentive provisions into IIAs does not guarantee more foreign investments.[8] Therefore, IIAs seldom contain binding incentive measures, and they may simply include incentive provisions of general application in soft law language. It is important to note that while it is rare to find IIA provisions addressing the substantive details of investment contracts which often contain different incentive obligations,

1. Bradford S Gentry, Jennifer J Ronk, 'International Investment Agreements and Investments in Renewable Energy' in Leslie Parker and others (eds), From Barriers to Opportunities: Renewable Energy Issues in Law and Policy (Forestry & Environmental Studies Publications Series 2007) 58-59.
2. Diego Zannoni, 'The Legitimate Expectation of Regulatory Stability under the Energy Charter Treaty' (2020) 33(2) Leiden Journal of International Law 451, 457-58. See also Orsat Miljenić, 'Energy Charter Treaty – Standards of Investment Protection' (2018) 24(83) Croatian International Relations Review 52, 73.
3. M Sornarajah, The International Law on Foreign Investment (Cambridge University Press 2021) 40-46.
4. Matthias Herdegen, Principles of International Economic Law (Oxford University Press 2016) 432-88. Zannoni (no 8), 457-58. Miljenić (no 8), 73.
5. Thomas W Walde, 'The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases' (2005) 6(2) Journal of World Investment & Trade 183, 202-207. See generally, Michael Bennon and Francis Fukuyama, 'The obsolescing bargain crosses the Belt and Road Initiative: renegotiations on BRI projects' (2022) 38(2) Oxford Review of Economic Policy 278. Today many arbitration proceedings on foreign investment projects are ongoing for different reasons. For instance when the Government of Sri Lanka suspended its support for the Colombo Port City project. The Chinese States-owned Enterprise which was the concessionaire for that project threatened to resort to arbitration to recover damages of around $143m for delays on the project and this led the Government of Sri Lanka to settle the dispute in 2016: at 283-90.
6. UNCTAD, Investment Promotion Provisions in International Investment Agreements (United Nations Publication 2008) 9.
7. Brauch (no 6), pts 3.2–3.
8. UNCTAD (no 12), XII.

reforming or revoking national policies or derogations from contractual provisions may lead to breaches of investment protection provisions and the objectives of the applicable IIAs.[1] So far at least 80 publicly-known Investor-State Dispute Settlement (ISDS) cases related to breaches of renewable energy investment policies have been brought against a number of States resulting in awards worth millions of dollars.[2]

International investment law has generally received little attention from sector-specific analyses compared to other sub-systems of international law such as international trade law.[3] Much of the existing literature highlights the positive effects of investment incentives on the promotion of foreign investments in the renewable energy sector. For instance, *Zhao et al.* have analyzed the role of China's incentive policies for renewable energy power generation,[4] and similarly, *Alves* and his colleagues have conducted a panel analysis of international renewable energy incentive policies in developed and developing countries between 2005 and 2015.[5]

Another notable example is the recent book by *Raikar* and *Adamson,* titled 'Renewable Energy Finance: Theory and Practice'. In this work, the authors have carried out in-depth analyses of the prevailing fiscal and financial policies to support renewable energies.[6] However, the ways in which renewable energy incentives have been typically approached in the literature are limited by geographical boundaries and/or national legislation points of view.[7] Besides, most of the studies have focused on certain categories of incentives. As a result, the comprehensive approach to the legal status and nature of investment incentives, the way they are incorporated into IIAs, and their relationship with renewable energy investments are often overlooked.

Against this background, this article aims to draw the attention of researchers to the potential role of IIAs in promoting renewable energy investments by better utilizing incentive provisions. Organized into four parts, the article first describes fiscal incentives and their potential impact on promoting renewable energy investments and the relevant IIAs provisions. The second part discusses the financial incentives and the way in which IIAs approach them. The third part explores the nature and impact of regulatory incentives on promoting foreign investments in the renewable energy sector.

Finally, technical and business support incentives are examined in light of recent developments in treaty law. Eventually, the article concludes that fiscal incentives are still the most frequently used investment incentives, and with the introduction of Feed-in Tariffs (FITs), financial incentives are particularly gaining momentum in the renewables energy sector. Nevertheless, IIAs seldom articulate clear incentives that target renewable energy, and investments in this sector may benefit from the same incentive provisions as other types of foreign

1. UNCTAD, State Contracts: Series on Issues in International Investment Agreements (United Nations Publication 2004) 12.
2. Gentry and Ronk (no 7), 69-71. Ladan Mehranvar and Sunayana Sasmal, The Role of Investment Treaties and Investor-State Dispute Settlement in Renewable Energy Investments (Columbia Center on Sustainable Investment (CCSI) 2022) 10.
3. Jan Peter Sasse, An Economic Analysis of Bilateral Investment Treaties (The Netherlands: Gabler Verlag, 2011).
4. Zhen-Yu Zhao, Yu-Long Chen and Rui-Dong Chang, 'How to stimulate renewable energy power generation effectively? - China's incentive approaches and lessons' (2016) 92 Renewable Energy 147, 151.
5. Elia Elisa Cia Alves and others, 'From a Breeze to the Four Winds: A Panel Analysis of the International Diffusion of Renewable Energy Incentive Policies (2005–2015)' (2019) 125 Energy Policy 317.
6. Santosh Raikar, Seabron Adamson, Renewable Energy Finance: Theory and Practice (London: Academic Press 2019).
7. See eg, Mustafa Ozcan, 'Assessment of Renewable Energy Incentive System from Investors' Perspective' (2014) 71 Renewable Energy 425. In this work, the author has surveyed the efficacy of renewable energy incentives and other support mechanisms only in Turkey.

investments in general. However, IIAs should incorporate investment incentive provisions as they can help protect and promote foreign investments in renewable energy. These provisions bring more clarity and predictability to the investment environment as they serve as a signal that the host State has laws and policies in place to promote foreign investments and help prevent the abuse of incentive measures.

1. The Potential Contribution of Fiscal Incentives to Renewable Energy Investments

Fiscal Incentives, also referred to as tax incentives, are among the incentives stemming from governmental policies and may have various forms, and often implicate tax-based measures, such as the reduction or periodic freeze of tax payments.[1] Generally, tax incentives may be in the form of a tax credit, tax abatement, or tax exemption.[2]

Today, many countries are introducing new fiscal incentives for priority sectors (for example through the establishment of Special Economic Zones (SEZs)). For instance, Angola has recently adopted its Free Zones Act which focuses on developing the agricultural and industrial sectors, labor-intensive industries, and high-tech industries, and offers a range of tax incentives to companies established in the free zones. Similarly, Botswana has announced that investors' income from SEZ-licensed projects is to be taxed at a special rate of 5% for the first 10 years, and 10% thereafter.[3] China has also offered tax holidays for 'new technology enterprises' which operate in SEZs.[4] Clearly, fiscal incentives remain the most frequently used investment incentives on the part of host developing countries that lack the competitive financial capacity to provide upfront subsidies for inward investments.[5]

As the UN Environment Emissions Gap Report (2018) has confirmed the possible key role of fiscal policies 'in creating strong incentives for low-carbon investments and reducing GHG emissions', so far various countries have adopted fiscal incentives for the renewables sector.[6] Thus, fiscal incentives have become the prevailing incentive for the promotion of renewable energies.[7] These incentives are designed to help the investors with the costs and risks of renewable energy projects as they can mitigate the costs of installation and production, and potentially increase the earnings from the generated renewable energy. These incentives can also offset market failures that favor fossil fuels over renewable energy.[8]

Although there are controversies about the real impact of fiscal incentives on renewable

1. Nicole Tryndina and others, 'Renewable energy incentives on the road to sustainable development during climate change: A review' (2022) 10 Frontiers in Environmental Science 1, 2.
2. The University of Calgary, 'Fiscal incentives' (Energy Education) <https://energyeducation.ca/encyclopedia/Fiscal_incentive#cite_note-IPCC_SRREN-2> accessed 10 May 2023.
3. UNCTAD, World Investment Report 2022: International Tax Reforms and Sustainable Investment (United Nations Publication 2022) 61.
4. OECD, Overcoming Barriers to International Investment in Clean Energy, Green Finance and Investment (OECD Publishing 2015) 92.
5. UNCTAD, Incentives: Series on Issues in International Investment Agreements (United Nations Publication 2004) 5.
6. UNEP, The Emissions Gap Report 2018 (United Nations Environment Programme 2018) XXI. Yose Rizal Damuri and Raymond Atje, Investment Incentives for Renewable Energy: Case study of Indonesia (The International Institute for Sustainable Development 2013) 15.
7. Tryndina and others (no 22), 1. OECD (no 25), 90.
8. Dan Arvizu and others, 'Technical Summary' in Ottmar Edenhofer and others (eds), Renewable Energy Sources and Climate Change Mitigation: Special Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2012) 151-52.

energy development, some studies suggest that such incentives are effective if they are correctly targeted to favor the taxpayers over the entities that are producing energy from fossil fuels, and therefore government policies and investment contracts must be thoroughly drafted and executed.[1] A notable example is the incentive policy system for renewable energy power generation in China. The Government of China has developed renewable energy production by providing tax incentives for solar, hydro, wind, and geothermal power projects. These preferential tax schemes cover Value-Added Tax (VAT), income tax, and import duties. The government's preferential tax policies for renewable energy production have considerably reduced the tax burden on renewable energy investors compared to the standard VAT rate of 17% and the income tax rate of 25%. Similarly, the import duty of renewable energy equipment has a considerable impact on the investors' profit as lower import duties help foreign investors to safely import the equipment they require.[2] As surveys confirm, the aforesaid measures have particularly reduced the costs of wind power installed capacity, facilitated the regional presence of wind power manufacturing, and promoted foreign investments in this sector.[3]

It is important to mention that some States have also adopted restrictive tax policies as a tool to speed up renewable energy projects. For instance, the German government has established an ecological tax reform that imposes a tax on the consumption of power produced by non-renewable sources. Similarly, Denmark has introduced a CO2 emission tax on the consumption of fossil fuels, while providing various tax supports for the use of renewables.[4] Following such incentives, the per-unit cost of electricity from renewable sources drops, and the renewable energy sector can have a level playing field to compete with conventional energies.[5] Therefore fiscal incentives are deemed to be more efficient in the renewable energy sector than in other energy sectors.[6] Hopefully, these schemes are likely to have sweeping impacts beyond Europe and pave the way for other governments to follow suit and contribute to the renewable energy transition.

However, so far IIAs have rarely included fiscal incentives, in part due to the fact that such programs might be expensive and many developing countries may find difficulties in implementing them, and partly because of the existence of Double Taxation Treaties (DTTs).[7] On the other hand, most IIAs that stipulate fiscal incentives provide them in a general manner and without adequate clarification of the conditions and the extent to which such measures should be granted.[8] For instance, the Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) has not only asked the parties to cooperate and adopt collective policy measures 'to achieve a harmonized monetary and fiscal system in the Common Market' but also invites them to 'remove administrative, fiscal and legal restrictions to intra-Common

1. Tryndina and others (no 22), 3.
2. Zhao, Chen and Chang (no 18) 151.
3. Qiang Wang, 'Effective Policies for Renewable Energy - The Example of China's Wind Power - Lessons for China's Photovoltaic Power' (2010) 14(2) Renewable and Sustainable Energy Reviews 702, 702-710.
4. Zhao, Chen and Chang (no 18), 151.
5. Sikandar Abdul Qadir and others, 'Incentives and strategies for financing the renewable energy transition: A review' (2021) 7 Energy Reports 3590, 3598.
6. Tryndina and others (no 22), 3.
7. UNCTAD (no 24), 87. UNCTAD (no 12), XII.
8. UNCTAD (no 12), 35-36.

Market investment'.[1] Another example is the China – Kuwait BIT which proposes 'tax relief' as a possible incentive to promote investment flows.[2]

Although some agreements such as the Trade and Cooperation Agreement between the EU and the UK provide detailed provisions on taxation,[3] many agreements exclude or carve-out taxation matters totally or partly from their scope of protection.[4] For instance, the Japan-Georgia BIT clearly excludes taxation measures from the scope of National Treatment (NT) and the Most Favored Nation Treatment (MFN).[5] The Brazil-India BIT goes even further as it has generally carved out such measures from the jurisdiction of the agreement in toto.[6]

Generally, IIAs that do not exclude taxation from their scope provide important signaling assistance for prospective foreign investors in various sectors including renewables.[7] This is due to the fact that these instruments may have different implications for the host State's general and specific tax-related measures. As NT and MFN provisions are designed to prevent de facto and de jure discriminatory treatment preferential tax policies exclusively in favor of national or foreign investors from third States could be seen as a breach of NT or MFN under the applicable IIAs.[8] Similarly, Fair and Equitable Treatment (FET) clauses that are drafted in an open-ended way leave the tribunals with a broad margin of interpretation and might lead to their interpretation of taxation measures as a breach of the investors' legitimate expectations of regulatory stability.[9] As clearly stated by the tribunal in *Electrabel v Hungary,*

> *[The] obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment.*[10]

1. Treaty Establishing the Common Market for Eastern and Southern Africa (opened for signature 5 November 1993, entered into force 8 December 1994) ('COMESA') arts 76, 159.
2. Agreement between China and Kuwait for the Promotion and Protection of Investments (signed 23 November 1985, entered into force 24 December 1986) art 2.
3. Trade and Cooperation Agreement between the EU and the UK (opened for signature 30 December 2020, entered into force 1 May 2021).
4. Ohene-Manu Kenneth and Fernández Antuña Antolín, 'Taxation Exclusions' (Jus Mundi, 6 September 2022) <https://jusmundi.com/en/document/publication/en-taxation-exclusions#> accessed 20 January 2023. See eg Agreement between Oman and Hungary for the Promotion and Reciprocal Protection of Investments (signed 2 February 2022, entered into force 24 October 2022). This agreement does not regulate tax policies whatsoever. See also The Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) ('ECT') 2080 UNTS 100 art 21.
5. Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment (signed 29 January 2021, entered into force 23 July 2021) ('Japan-Georgia BIT') art 19.2.
6. Investment Cooperation and Facilitation Treaty between Brazil and India (signed 25 January 2020, not yet in force) ('Brazil – India BIT') art 3.6(b). See also Model Text for the Indian Bilateral Investment Treaty (2015) art 2.4(ii).
7. Energy Charter Secretariat, Special Paper Series: Handbook on General Provisions Applicable to Investment Agreements in the Energy Sector (ECS 2017). Antony Crockett, 'Stabilisation Clauses and Sustainable Development: Drafting for the Future' in Chester Brown and Kate Miles (eds), Evolution in Investment Treaty Law and Arbitration (Cambridge University Press 2011) 519-521.
8. UNCTAD (no 24), 87-90.
9. Igor V Timofeyev and others, 'Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty' in J W Rowley, Doak Bishop and Gordon E Kaiser (eds), The Guide to Energy Arbitrations (Law Business Research 2020), 45-70.
10. Electrabel S.A. v The Republic of Hungary (Decision on Jurisdiction, Applicable Law and Liability) (ICSID Case No. ARB/07/19, 30 November 2012) para 7.74. See also Noble Ventures, Inc. v Romania (Award) (ICSID, Case No ARB/01/11, 12 October 2005).

Moreover, non-restricted Full Protection and Security (FPS) clauses can directly protect foreign investors based on the concepts of stability of tax framework and investment environment; particularly because a growing number of tribunals are extending the scope of FPS to legal and economic stability.[1] In a similar way, the obligations against expropriation can safeguard foreign investments against tax measures that substantially deprive the investors of their investments. And the same goes for other IIAs' clauses such as transfer of funds obligations, umbrella clauses, and ISDS provisions.[2] Particularly, ISDS mechanisms enable foreign investors to directly hold the host States accountable for legislative interferences and negative taxation practices. ISDSs are the preferable means of ensuring that the covered investments are not dramatically affected by subsequent legal and/or political measures.[3] As rightly stated by the tribunal in *Quasar de Valores v Russia,*

> *The notion that states have a considerable margin of discretion in enacting and enforcing tax laws should not lead to any confused idea that they have a discretion as to whether or not to comply with an international treaty […] It is no answer for a state to say that its courts have used the word 'taxation' - any more than the word 'bankruptcy' - in describing judgments by which they affect the dispossession of foreign investors. If that were enough, investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation. When agreeing to the jurisdiction of international tribunals, states perforce accept that those jurisdictions will exercise their judgment, and not be stumped by the use of labels.*[4]

Thus, ISDS provisions provide foreign investors with a great deal of protection against all possible host States' arbitrary/discriminatory taxation measures. To date, about 95% of IIAs contain ISDS provisions, and so far in at least 165 cases, foreign investors, including those in the renewable energy sector, have challenged the host States' tax-related measures based on the applicable IIAs.[5] The most notable examples are the investment disputes against the Government of Spain inter alia arising out of a series of policy reforms affecting the renewables energy investors, and imposing a 7% tax on power generators' revenues.[6] However, a brief

1. UNCTAD (no 24), 89. Sornarajah (no 9) 459-460. See eg Siemens AG v The Argentine Republic, (Award) (ICSID Case No ARB/02/8, 17 January 2007) para 303. Azurix Corp v The Argentine Republic (Award) (ICSID Case No ARB/01/12, 14 July 2006) para 408. Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania (Award) (ICSID Case No. ARB/05/22, 24 July 2008) pp. 715-29. National Grid Public Limited Company v The Argentine Republic (Award) (UNCITRAL Case No. 1:09-cv-00248-RBW, 3 November 2008) pp 181-9.
2. UNCTAD (no 24), 88-90.
3. Energy Charter Secretariat (no 44). Crockett (no 44), 519-521.
4. Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation (Award) (SCC Case No. 24/2007, 20 July 2012) para 179.
5. UNCTAD (no 24), 87-90. See eg Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India (Final Award) (PCA Case No. 2016-07, 21 December 2020) para 2032. Charanne B.V. and Construction Investments S.A.R.L. v Spain (Final Award) (SCC Case No. 062/2012, 21 January 2016). Hulley Enterprises Ltd. v Russian Federation (Final Award) (PCA Case No. 2005-03/AA226, 18 July 2014).
6. See eg Yukos Universal Limited (Isle of Man) v The Russian Federation (Final Award) (PCA, Case No 2005-4/AA 227, 18 July 2014) para. 1430. Filipe Vaz Pinto and Joana Granadeiro, 'Round-up of Arbitrations in the Renewable Energy Sector: Lessons for Portugal' (2019) 6(2) e-Pública 73, 73-113. Investment Policy Hub, 'Investment Dispute Settlement Navigator' <https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search> accessed 20 May 2023.

review of the arbitral awards suggests that the tribunals have often dismissed the investors' tax claims and ruled in their favor based on the host States' revocation of financial incentives.[1] In other words, fiscal incentives are most effective when combined with financial incentives.[2]

2. Financial Incentives and the Renewable Energy Sector

Although developing countries are more frequently using fiscal incentives, it appears that financial incentives are playing a greater role in developed countries.[3] However recent research suggests that investment incentives are of little use if there is less public awareness.[4] Therefore, there is still a need for developing specific investment incentives literature and the notion of financial incentives is no exception. In much the same way that energy markets have just recently become more familiar with terms like volatility, uncertainty, complexity, and ambiguity, much work remains to be done to define the exact domain of financial incentives in the renewable energy sector.[5]

Generally, financial incentives refer to the availability of funds based on performance.[6] They may include subsidies, preferential loans, loan guarantees, export credits, government equity participation, and preferential insurance schemes.[7] For instance, FITs which are sometimes classified as subsidies, are known as the principal driving force in the worldwide development of Solar Photovoltaic, and, so far more than 110 governments have adopted such measures.[8]

It is important to mention that home countries and international institutions may similarly offer financial incentives to encourage outward investments or support renewable energy investments in a particular destination. For instance, the Japan Bank for International Cooperation provides overseas investment loans to Japanese investors and/or their overseas affiliates inter alia for various infrastructure projects in other countries.[9] Another notable example is the credit facilities provided by various international institutions, such as the European Investment Bank, World Bank, and development agencies of different countries to promote investments in Turkey's renewable energy projects.[10] However, such offers are mostly carried out by utilizing

1. See eg SolEs Badajoz GmbH v Kingdom of Spain (Award) (ICSID Case No. ARB/15/38, 31 July 2019). Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain (ICSID Case No. ARB/13/36, 23 December 2013). RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain (ICSID Case No. ARB/13/30, 23 November 2013). Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v Kingdom of Spain (ICSID Case No. ARB/13/31, 29 October 2013).
2. Arvizu and others (no 29), 151-52.
3. Johnson, Toledano (no 5), 25.
4. Boban Melović, Dragana Ćirović, 'Analysis of Financial Incentives as an Instrument of Renewable Energy Sources Management in Montenegro', E3S Web of Conferences 157, No. 04001, (2020): pp. 1-6. See generally Rafael Leal-Arcas, 'The Multilateralization of International Investment Law' (2009) 35(1) North Carolina JILCR 33 at 70.
5. Abdul Qadir and others (no 34), 3598.
6. OECD, Governing Regional Development Policy: The Use of Performance Indicators (OECD Publishing 2009), 41.
7. Anastasios Gourgourinis, 'Domestic Investment Incentives in International Trade Law' (2023) 22(1) World Trade Review 35, 38.
8. REN21, 'Renewables 2017 Global Status Report' (REN21 Secretariat, 2017) <https://www.ren21.net/wp-content/uploads/2019/05/GSR2017_Full-Report_English.pdf> accessed 20 June 2023. Jennifer Runyon, 'IEA: Feed-in Tariff Not a Subsidy, But Tax Credits Are' (Renewable Energy World, 11 January 2013) <https://www.renewableenergyworld.com/solar/iea-feed-in-tariff-not-asubsidy-but-tax-credits-are/> accessed 24 May 2022. Marie Wilke, Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review (International Centre for Trade and Sustainable Development 2011), 11.
9. Japan Bank for International Cooperation, 'Overseas Investment Loans' (JBIC) <https://www.jbic.go.jp/en/support-menu/investment.html> accessed 20 March 2023.
10. Mustafa Ozcan, 'Assessment of Renewable Energy Incentive System from Investors' Perspective' (2014) 71 Renewable Energy 425, 427.

national and/or institutional initiatives and IIAs do not necessarily play a determined role in this context. On the other hand, to help implement the agreed objectives, some IIAs offer financial assistance to a party on either a unilateral or reciprocal basis.[1] Despite all these the term 'financial incentive' often connotes the incentives provided for foreign investors and/or their investments by the host State and in its territory.

Financial incentives may partly fall under the purview of 'financial contributions' mentioned in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM) which refers to the transfer of economic resources (i.e., money, goods, or services) delegated with such a function.[2] It appears that the SCM is among the few multilateral treaties with universal application that has tried to define and regulate financial incentives, as it was adopted due to the insufficient treatment of subsidies and countervailing measures in the General Agreement on Tariffs and Trade (GATT). [3]

Financial incentives have double importance in the renewable energy sector, which is why some scholars simply divide renewable energy investment incentives into two broad categories, namely financial and regulatory incentives.[4] Since the early 1980s, financial incentives have been the most common form of renewable energy investment incentives and were particularly effective with regard to wind power projects in Denmark and Germany.[5] Still, different types of renewable energies are often deemed capital-intensive, meaning that a considerable portion of the investors' costs is incurred prior to the operation of these projects. And even for successful investments, their costs are only recouped in the long term. As a result, these projects cannot compete with conventional energy projects without substantial financial incentives.[6] Therefore, financial incentives are still provided as supplementary support schemes for the promotion of renewable energies.[7]

Financial incentives in the renewable energy sector are often targeted at the provision of project finance which is especially crucial to developing big and/or modern renewable energy projects (e.g., hydropower and geothermal power plants) that need huge financial resources and expose investors to greater risks.[8] As opposed to tax incentives which are often administered by a single national authority, financial incentives may take various forms with different policy objectives and are intermittently granted by several private bodies and government entities at national, subnational, and local levels. These challenging features of financial incentives

1. Eg., Enhanced Partnership and Cooperation Agreement between the European Union and the Republic of Kazakhstan (opened for signature 21 December 2015, entered into force 1 March 2020) ('EU-Kazakhstan EPCA') art 261. Free Trade Agreement between Egypt and the EFTA States (opened for signature 27 April 2007, entered into force 1 September 2008) art 34.
2. Agreement on Subsidies and Countervailing Measures (entered into force 1 January 1995) 1869 UNTS 14 ('SCM') art 1.1.
3. Gourgourinis (no 60), 40-42. Zaker Ahmad, 'Conflicts of the SCM Agreement with LDCs Interests over Renewable Energy Incentives: Proposals for Reform' (2015) 50(2) Foreign Trade Review 118, 126.
4. Tryndina and others (no 22), 3.
5. Reinhard Haas and others, 'A Historical Review of Promotion Strategies for Electricity from Renewable Energy Sources in EU Countries' (2011) 15(2) Renewable and Sustainable Energy Reviews 1003, 1013-1026.
6. IRENA (no 2), 8. Jean-François Gagné, Energy Technology Perspectives: Harnessing Electricity's Potential (IEA Publications 2014), 14. See also SolEs Badajoz GmbH v Kingdom of Spain (Award) (ICSID Case No. ARB/15/38, 31 July 2019) para 415.
7. Bernardo Sarti, 'Policies for the Deployment of Renewable Energies: An Overview' (2018) 62 Social Impact Research Experience (SIRE) 1, 1-24.
8. Damuri, Atje (no 27), 14.

increase the likelihood of their abuse and they may be granted in a discretionary manner and possibly based on political criteria rather than economic justifications.[1] As a result, the cost-benefit analysis (*ex-ante*) of renewable projects can also be a challenging task for prospective investors.[2]

Moreover, renewable energy investors have a strong interest in the stability of the investment environment, the continuity of incentive schemes, and protection against adverse measures and policy changes during the payback period.[3] This calls on host States to observe the stability of financial incentives. As rightly claimed by the European Parliament, the Member States should ensure that 'the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support'.[4] Nonetheless, renewable energy projects usually have a term beyond that of one or two governments, and due to various economic and/or political reasons, host States may have to scale back or revoke the existing financial incentives before the completion of the payback period.[5] The revocation of these incentive schemes, if not discriminatory against foreign investments, can be seen as a serious distortion of economic equilibrium.[6]

Therefore, host States should not be able to revoke these incentive schemes without generating liability.[7] So far, the revocation of financial renewable energy incentives has been the subject of several ISDS cases. For instance, the Czech Republic, Italy, and Spain adopted financial incentives to increase renewable energy production. They however later discontinued or canceled these programs for economic reasons. This policy change adversely impacted foreign investors and resulted in dozens of investor-state cases which are known as the 'European Renewable Energy Cases'.[8] In these cases, the tribunals have awarded damages in favor of the claimants, partly thanks to the broad investment protections of the Energy Charter Treaty (ECT). [9]

1. James (no 4).
2. Johnson, Toledano (no 5), 74-75. Christian Bellak and Markus Leibrecht, 'The Use of Investment Incentives: The Cases of R&D-Related Incentives and International Investment Agreements' in Ana Teresa Tavares-Lehmann and others (eds), Rethinking Investment Incentives: Trends and Policy Options (Columbia University Press 2016), 65.
3. Nadejda Komendantova, Thomas Schinkoa, and Anthony Patt, 'De-risking Policies as a Substantial Determinant of Climate Change Mitigation Costs in Developing Countries: Case study of the Middle East and North African Region' (2019) 127(c) Energy Policy 404, 404-411. See also Timofeyev and others (no 46), 45-70.
4. European Parliament, Directive EU2018/2001 of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources (recast), [2018] OJ L328/82, 11/12/2018 art 6(1).
5. Johnson and Toledano (no 5), 102. Energy Charter Secretariat (no 44), 34.
6. Thomas Dromgool, Daniel Y Enguix, 'The Fair and Equitable Treatment Standard and Revocation of Feed in Tariffs-Foreign Renewable Energy Investments in Crisis-Struck Spain' in Volker Mauerhofer (ed), Legal Aspects of Sustainable Development (Springer 2016) 414.
7. Jack Biggs, 'The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases' (2021) 36(1) ICSID Review 99, 99-100.
8. Ibid, 99. See eg., Antaris Solar GmbH and Dr Michael Gode v Czech Republic (PCA, Case No. 2014-01, 8 May 2013). BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain (ICSID Case No. ARB/15/16, 16 April 2015). ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic (ICSID Case No. ARB/16/5, 8 March 2016).
9. Eg., AES Solar and others (PV Investors) v The Kingdom of Spain (Final Award) (PCA Case No. 2012-14, 28 February 2020) para 909. Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain (Award) (ICSID Case No. ARB/13/36, 4 May 2017) para 486. Infrastructure Services Luxembourg S.à.rl and Energia Termosolar BV v Kingdom of Spain (Award) (ICSID Case No. ARB/13/31, 15 June 2018) para 748. InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain (Award) (ICSID Case No. ARB/14/12, 2 August 2019). Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain (Award) (ICSID Case No. ARB/14/1, 16 May 2018) para 697.

IIAs can contribute to the alleviation of concerns around host States' financial incentive practices. Therefore, some IIAs oblige the parties to 'create and maintain favorable conditions for the investors' or cooperate in this regard.[1] Some have taken steps to regulate the margin of discretion of national decision-makers in relation to the application of financial incentives.[2] For instance, the EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (EPCA) has generally drawn the party's attention to the need to omit 'anti-competitive business practices and state interventions, including subsidies [that] have the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation'.[3] Moreover, the agreement states in clear language:

> *2. Each Party shall ensure transparency in the area of subsidies. To that end, each Party shall report every two years from the date of application of this Title to the other Party on the legal basis, including the policy objective or the purpose of the subsidy, the duration or any other time limits, the form and, where possible, the amount or the budget and the recipient of the subsidy granted by its government or a public body. Such report is deemed to have been provided if the relevant information is made available on a publicly accessible website or through the WTO notification mechanism.*
>
> *3. If a Party considers that a subsidy granted by the other Party is negatively affecting the first Party's interests, the first Party may request consultations on the matter. The requested Party shall accord due consideration to such a request. The consultations should, in particular, aim at specifying the policy objective of the subsidy, whether the subsidy has an incentive effect and is proportionate, and any measures taken to limit the potential distortive effect on trade and investment of the requesting Party.*[4]

Such provisions can promote foreign investments as they keep foreign investors informed about the new subsidies and their purposes, and help monitor such measures as an essential step to prevent the abuse of financial incentives.[5] Importantly financial incentives are subject to the standards of treatment under the applicable IIAs. For instance, the changes made to the financial incentives may inter alia amount to a breach of FET as an act against the investor's legitimate expectations, and detrimental to 'a stable business environment'.[6] However, some

1. See eg, Agreement for the Promotion and Protection of Investment between Japan and Kenya, No. 55787 (signed 28 August 2016, entered into force 14 September 2017) ('Japan-Kenya BIT') art 5(3). See also Political, Free Trade and Strategic Partnership Agreement between the UK and Ukraine (signed 8 October 2020, entered into force 1 January 2021) arts 73 and 323.
2. See eg, Interim Agreement Establishing an Economic Partnership Agreement between the United Kingdom and the Republic of Cameroon (signed 9 March 2021, entered into force 19 July 2021) ('Cameroon - UK EPA'). This agreement urges the parties not to 'introduce new export subsidies or increase any existing subsidy of this nature on agricultural products destined for the territory of the other Party... [except] increases due to variations in the world prices of the products in question': art 24(1).
3. EU-Kazakhstan EPCA, art 156.
4. Ibid, art 159(2) and (3). See also CETA, art 7.3.
5. Leonardo Borlini, Stefano Silingardi, 'The Foundations of International Economic Order in the Age of State Capitalism' in Panagiotis Delimatsis, Georgios Dimitropoulos and Anastasios Gourgourinis (eds), State Capitalism and International Investment Law (Hart Publishing 2023), 17-41. See generally Christopher Frey, 'Tackling Climate Change Through the Elimination of Trade barriers for Low-Carbon Goods: Multilateral, Plurilateral and Regional Approaches' in Volker Mauerhofer (ed), Legal Aspects of Sustainable Development: Horizontal and Sectorial Policy Issues (Springer 2016), 456-57. Joseph L. Staats and Glen Biglaiser, 'The Effects of Judicial Strength and Rule of Law on Portfolio Investment in the Developing World' (2011) 92(3) Social Science Quarterly 609, 613.
6. Johnson, Toledano (no 5), 102. See eg., Saluka Investments BV v Czech Republic (Partial Award) (PCA, Case No. 2001-04,

IIAs have, for instance, excluded various financial incentives from the scope of their NT and/or MFN provisions.[1] Similarly, by using negative lists, some recent IIAs have exempted certain local governments from the scope of NT, particularly with respect to financial incentives for renewable energy projects.[2] It is crystal clear that foreign investors (and producers) would enjoy greater protection against the possible host States' discriminatory and arbitrary incentive practices in the absence of such exclusions.[3]

IIAs may also encourage or provide different financial incentives. For instance, the Cameroon-UK Economic Partnership Agreement (EPA) invites the parties to observe financial and technical cooperation through 'multilateral organizations and international financial institutions [that] may provide long-term financial resources, including risk capital, to assist in promoting growth in the private sector and help to mobilize domestic and foreign capital for this purpose'.[4] This agreement further elaborates on the particular kinds of cooperation including:

> *[G]rants for financial and technical assistance to support policy reforms, human resource development, institutional capacity building or other forms of institutional support related to a specific investment, measures to increase the competitiveness of enterprises and to strengthen the capacities of the private financial and non-financial intermediaries, investment facilitation and promotion and competitiveness enhancement activities.*[5]

To further encourage the establishment of foreign investments, some IIAs have long advocated for the granting of financial and other incentives at the early stages of investment projects. A notable example is the Investment Agreement among the Member States of the Organisation of Islamic Cooperation which stipulates that:

> *The contracting parties will endeavour to offer various incentives and facilities for attracting capital and encouraging its investment in their territories such as commercial, customs, financial, tax and currency incentives, especially during the early years of the investment projects, in accordance with the laws, regulations and priorities of the host state.*[6]

Although such clauses are usually drafted in soft law, they generally have the potential to favor foreign investments, including those in the renewable energy sectors, as they unequivocally indicate the original intention of parties to provide financial incentives for the

17 March 2006) para 303. Occidental Exploration and Production Company v Republic of Ecuador (I) (Award) (LCIA Case No UN3467, 1 July 2004) para 183.

1. Eg., NAFTA, art 1108(7). USMCA, art 14.12(5). See also ECOWAS Common Investment Code (opened for signature 22 December 2019, entered into force 22 December 2019) art 7.6 and 20.1. See also CETA, art 8.15(5).

2. CETA, Reservation I-PT-94.

3. Gourgourinis (no 60), 38. Timothy Meyer, 'Free Trade, Fair Trade, and Selective Enforcement' (2018) 118 Columbia Law Review 491, 512. See eg., WTO, Canada-Certain Measures Affecting the Renewable Energy Generation Sector- Report of the Appellate Body, WT/DS412/AB/R (6 May 2013). WTO, Canada-Measures Relating to the Feed-in Tariff Program- Report of the Appellate Body, WT/DS426/AB/R (6 May 2013).

4. Cameroon - UK EPA, art 8.

5. Ibid, art 10.1(a).

6. Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (adopted 5 June 1981, entered into force 23 September 1986) art 4.

covered investments and thereby give rise to a sort of legitimate expectations on the part of the foreign investors and tribunals regarding the host State's incentive policy practices. [1]

3. Regulatory Incentives

Many governments have adopted special investment and renewable energy-related laws. However, several regulatory issues remain, including instability, lack of comprehensive laws, inadequate regulatory frameworks for ancillary services and grid access, and the lack of transparency and predictability of incentives.[2] A notorious example of such hurdles in renewable energy investments is the bureaucratic procedures that expose foreign investors to challenging processes of obtaining government approval for their projects. A process that is not always based on merits and qualifications. Thus, in many cases, this results in a loss of confidence among prospective investors.[3]

In an attempt to alleviate these concerns, States bundle various regulatory incentives such as enhanced physical infrastructure, streamlined administrative services, advantages relating to foreign exchange, and other preferable legal and regulatory requirements with financial and fiscal incentives.[4] In this sense, regulatory incentives are adopted to achieve a variety of objectives including risk reductions, reliability, meeting technical, financial, and consumer service requirements, disaster responses, and enabling safe and reliable interconnections with electric systems, inter alia through the establishment of SEZs.[5] In this way, host States may 'offer or provide derogations from generally applicable laws or regulations' and exempt foreign investors from having to comply with the normally applicable regulations, providing them with favorable rights and conditions to facilitate and attract more foreign investments.[6]

Against this background, it is important to know that IIAs are themselves considered a particular type of regulatory incentive as they influence investors' decisions by offering substantive and procedural protections.[7] Besides, IIAs may prescribe certain incentives, or regulate the use of such supports. For instance, as mentioned above, they may require tax stabilization, or an even broader set of laws affecting the projects, and/or to provide compensation for undue changes in these laws.[8]

4. Technical and Business Support Incentives

recent research studies suggest that investment incentives may be of little use when there is a lack of awareness.[9] Therefore, some advisory services are designed to ease entry or support the establishment and operations of investors/investments and ensure their ability to successfully

1. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31.
2. Rahmatallah Poudineh, Anupama Sen and Bassam Fattouh, 'Advancing renewable energy in resource-rich economies of the MENA' (2018) 123 Renewable Energy 135, 145.
3. Abdul Qadir and others (no 34), 3598.
4. Gourgourinis (no 60), 39-42.
5. Ronald L. Lehr, 'Public Policy Perspective: Regulatory Incentives to Support Grid Modernization' in Lisa Schwartz (ed), Regulatory Incentives and Disincentives for Utility Investments in Grid Modernization: Future Electric Utility Regulation/ Report No. 8 (Berkeley Lab 2017), 78.
6. Johnson, Toledano (no 5), 6-7.
7. Bellak, Leibrecht (no 73), 63-64.
8. Johnson, Toledano (no 5), 45-107. See eg., Japan-Kenya BIT, art 5(3). See also Political, Free Trade and Strategic Partnership Agreement between the UK and Ukraine, arts 73 and 323.
9. Melović, Ćirović (no 57), 1-6. Leal-Arcas (no 57), 70.

manage and overcome the potential costs and risks that they may have encountered without such services.[1] These incentives may be categorized as 'investment facilitation' rather than 'investment promotion', because they may start from the pre-establishment phase and help investors with the establishment, operation, and maintenance of their investments.[2]

Notwithstanding the evident overlapping features between other investment incentives and technical and business incentives, the latter is often concerned with information asymmetries and possible administrative delays. The purposes of such incentives are inter alia to ease access to assets and provide the required infrastructure and resources, technical and consumer services, aftercare and disaster responses, etc.[3]

IIAs may provide for various technical and advisory support incentives and relevant frameworks, facilitating foreign investments in the renewable energy sector. For instance, they may provide contact points that let investors have direct access to the decision-making process through special advisory bodies or other official consultation procedures.[4] These 'contact' or 'inquiry' points are conceived as support incentives because they are devised to clarify the government rules and procedures, enable investors to engage in public consultations and receive timely and reliable information about laws and regulations and thereby reduce the costs and facilitate their investments and create an attractive investment climate for power projects.

Furthermore, foreign investors can overcome their possible disadvantages, such as language barriers or limited knowledge of local institutions by using such arrangements.[5]

Conclusion

This article provides insights into the legal relationship between International Investment Agreements (IIAs) and renewable energy incentives. It is important to note that the primary objective of this research was not to establish a mono-causal link between the provisions of IIAs and the promotion of renewable energy investments. Instead, the aim was to single out the relevant provisions and describe potential changes that may be made to further facilitate renewable energy investments and potentially secure the interests of the investors. Therefore, this research followed a deductive logic.

As observed, fiscal incentives are still the most frequently used investment incentives, and through the introduction of Feed-in Tariffs (FITs), financial incentives are particularly gaining momentum in the renewables sector. However, IIAs seldom articulate clear renewable energy targeted incentives and the investments in this sector may benefit from incentive provisions as other types of foreign investments in general. On the other hand, most IIAs provide for such incentives without adequate clarification of the conditions and the extent to which such measures must be carried out. Some have excluded several incentives from the scope of their NT and/or MFN while others have exempted certain local governments from providing NT for

1. Johnson, Toledano (no 5), 7-8
2. Shunta Yamaguchi, Rob Dellink, Greening Regional Trade Agreements on Investment (OECD Publications 2020), 50.
3. Johnson, Toledano (no 5), 7-8. Lehr (no 97), 78.
4. Eg., ECT, art 20.3.
5. OECD, Public Sector Transparency and the International Investor (OECD Publications 2003), 9-10. Anton Eberhard and others, Directions in Development, Energy and Mining: Independent Power Projects in Sub-Saharan Africa - Lessons from Five Key Countries (World Bank Group 2016), 47-97.

renewable energy incentives in particular. Foreign investors would enjoy greater protection against the possible host States' discriminatory practices in the absence of such exclusions.

The European renewable energy cases have proved the significance of investment protections under the applicable IIAs for the benefit of foreign investments and the relevance of these protections for protecting renewable energy investments against possible discriminatory or arbitrary incentive policy practices by host States. Given the increase in renewable energy incentive policies implemented by governments and the growing number of renewable energy projects around the world, it is no surprise if one claims that investment incentive provisions of IIAs can similarly contribute to the protection of foreign renewable energy investments in the future. This is particularly because such provisions bring more clarity and predictability to the investment environment, signaling that the host State has laws and policies in place to promote foreign investments. Furthermore, they can secure the interests of foreign investors in case of disputes, because in accordance with the principle of *effet utile,* the tribunals interpret the applicable agreements according to the ordinary meaning of the terms and should not overlook a text that clearly illustrates the original intention of the drafting parties regarding the provision and/or stability of incentive measures.

Therefore, similar to the international trade law system that has long endeavored to regulate various aspects of financial incentives and has adhered to the principles of liberalization, including the elimination or restriction of tariffs and non-tariff barriers to trade, international investment law and its agreements need to adopt a broader approach to investment promotion in general and incentive policies in particular. Indeed, the purpose of IIAs is to encourage flows of investment between the parties, and given the increased economic and environmental interests in renewables, modern IIAs need to incorporate regulatory incentives to facilitate renewable energy investments, helping renewables gain a level playing field on the market. It is promising to see that some recent agreements (e.g., Cameroon-UK EPA) are venturing into investment incentive regulation and have taken steps to limit the sphere of discretion of national decision-makers in applying these measures. A notable example is the EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (EPCA) which has drawn the party's attention to the need to prevent anti-competitive business practices, interventions, and subsidies that could distort investment and trade liberalization. Such provisions can promote foreign investments in general and renewable energy investments in particular, and help prevent the abuse of incentive measures. For now, it remains to be seen how new IIAs will follow suit.

References

Books

Arvizu D et al., 'Technical Summary' in O Edenhofer and others (eds), *Renewable Energy Sources and Climate Change Mitigation: Special Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2012).

Bellak C and Leibrecht M, 'The Use of Investment Incentives: The Cases of R&D-Related Incentives and International Investment Agreements' in A T Tavares-Lehmann and others (eds), *Rethinking Investment Incentives: Trends and Policy Options* (Columbia University Press 2016).

Borlini L and Silingardi S, 'The Foundations of International Economic Order in the Age of State Capitalism' in P Delimatsis, G Dimitropoulos and A Gourgourinis (eds), *State Capitalism and International Investment Law* (Hart Publishing 2023).

Brauch MD, 'Reforming International Investment Law for Climate Change Goals' in M Mehling and H Asselt (eds), *Research Handbook on Climate Finance and Investment Law* (Edward Elgar Publishing forthcoming 2023).

Crockett A, 'Stabilisation Clauses and Sustainable Development: Drafting for the Future' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011).

Dromgool T and Enguix DY, 'The Fair and Equitable Treatment Standard and Revocation of Feed-in Tariffs: Foreign Renewable Energy Investments in Crisis-Struck Spain' in Volker Mauerhofer (ed), *Legal Aspects of Sustainable Development* (Springer 2016).

Frey C, 'Tackling Climate Change Through the Elimination of Trade Barriers for Low-Carbon Goods: Multilateral, Plurilateral and Regional Approaches' in V Mauerhofer (ed), *Legal Aspects of Sustainable Development: Horizontal and Sectorial Policy Issues* (Springer 2016).

Gagné J, *Energy Technology Perspectives: Harnessing Electricity's Potential* (IEA Publications 2014).

Gentry BS and Ronk J, 'International Investment Agreements and Investments in Renewable Energy' in Leslie Parker and others (eds), *From Barriers to Opportunities: Renewable Energy Issues in Law and Policy* (Forestry & Environmental Studies Publications Series 2007).

Herdegen M, *Principles of International Economic Law* (Oxford University Press 2016).

Lehr RL, 'Public Policy Perspective: Regulatory Incentives to Support Grid Modernization' in Lisa Schwartz (ed), *Regulatory Incentives and Disincentives for Utility Investments in Grid Modernization: Future Electric Utility Regulation/Report No. 8* (Berkeley Lab 2017).

Raikar S and Adamson S, *Renewable Energy Finance: Theory and Practice* (Academic Press 2019).

Sasse JP, *An Economic Analysis of Bilateral Investment Treaties* (Gabler Verlag 2011).

Sornarajah M, *The International Law on Foreign Investment* (Cambridge University Press 2021).

Timofeyev IV and others, 'Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty' in J W Rowley, D Bishop and G E Kaiser (eds), *The Guide to Energy Arbitrations* (Law Business Research 2020).

Articles

Abdul Qadir S and others, 'Incentives and Strategies for Financing the Renewable Energy Transition: A Review' (2021) 7 *Energy Reports* 3590.

Ahmad Z, 'Conflicts of the SCM Agreement with LDCs Interests over Renewable Energy Incentives: Proposals for Reform' (2015) 50(2) *Foreign Trade Review* 118.

Alves EC and others, 'From a Breeze to the Four Winds: A Panel Analysis of the International Diffusion of Renewable Energy Incentive Policies (2005–2015)' (2019) 125 *Energy Policy* 317.

Bennon M and Fukuyama F, 'The Obsolescing Bargain Crosses the Belt and Road Initiative: Renegotiations on BRI Projects' (2022) 32(2) *Oxford Review of Economic Policy* 278.

Biggs J, 'The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases' (2021) 36(1) *ICSID Review* 99.

Gourgourinis A, 'Domestic Investment Incentives in International Trade Law' (2023) 22(1) *World Trade Review* 35.

Grippa P, Schmittmann J and Suntheim F, 'Climate Change and Financial Risk: Central Banks and Financial Regulators Are Starting to Factor in Climate Change' (2019) 56(4) *Finance and Development* 26.

Haas R and others, 'A Historical Review of Promotion Strategies for Electricity from Renewable Energy Sources in EU Countries' (2011) 15(2) *Renewable and Sustainable Energy Reviews* 1003.

Komendantova N, Schinkoa T and Patt A, 'De-risking Policies as a Substantial Determinant of Climate Change Mitigation Costs in Developing Countries: Case Study of the Middle East and North African Region' (2019) 127(c) *Energy Policy* 404.

Leal-Arcas R, 'The Multilateralization of International Investment Law' (2009) 35(1) *North Carolina JILCR* 33.

Melović B and Ćirović D, 'Analysis of Financial Incentives as an Instrument of Renewable Energy Sources Management in Montenegro' (2020) 157(04001) *E3S Web of Conferences* 1.

Meyer T, 'Free Trade, Fair Trade, and Selective Enforcement' (2018) 118 *Columbia Law Review* 491.

Miljenić O, 'Energy Charter Treaty – Standards of Investment Protection' (2018) 24(83) *Croatian International Relations Review* 52.

Ozcan M, 'Assessment of Renewable Energy Incentive System from Investors' Perspective' (2014) 71 *Renewable Energy* 425.

Pinto FV and Granadeiro J, 'Round-up of Arbitrations in the Renewable Energy Sector: Lessons for Portugal' (2019) 6(2) *e-Pública* 73.

Poudineh R, Sen A and Fattouh B, 'Advancing Renewable Energy in Resource-Rich Economies of the MENA' (2018) 123 *Renewable Energy* 135.

Sarti B, 'Policies for the Deployment of Renewable Energies: An Overview' (2018) 62 *Social Impact Research Experience (SIRE)* 1.

Staats JL and Biglaiser G, 'The Effects of Judicial Strength and Rule of Law on Portfolio Investment in the Developing World' (2011) 92(3) *Social Science Quarterly* 609.

Tryndina N and others, 'Renewable Energy Incentives on the Road to Sustainable Development During Climate Change: A Review' (2022) 10 *Frontiers in Environmental Science* 1.

Walde TW, 'The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases' (2005) 6(2) *Journal of World Investment & Trade* 183.

Wang Q, 'Effective Policies for Renewable Energy - The Example of China's Wind Power - Lessons for China's Photovoltaic Power' (2010) 14(2) *Renewable and Sustainable Energy Reviews* 702.

Zakaria SU et al., 'Public Awareness Analysis on Renewable Energy in Malaysia' (2019) 268 *IOP Conf. Series: Earth and Environmental Science* 1.

Zannoni D, 'The Legitimate Expectation of Regulatory Stability under the Energy Charter Treaty' (2020) 33(2) *Leiden Journal of International Law* 451.

Zhao Z, Chen Y and Chang R, 'How to Stimulate Renewable Energy Power Generation Effectively? - China's Incentive Approaches and Lessons' (2016) 92 *Renewable Energy* 147.

Treaties and Agreements

Agreement between China and Kuwait for the Promotion and Protection of Investments(signed 23 November 1985, entered into force 24 December 1986).

Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment (signed 29 January 2021, entered into force 23 July 2021) ('Japan-Georgia BIT').

Agreement for the Promotion and Protection of Investment between Japan and Kenya, No. 55787 (signed 28 August 2016, entered into force 14 September 2017) ('Japan-Kenya BIT').

Agreement Oman and Hungary for the Promotion and Reciprocal Protection of Investments(signed 2 February 2022, entered into force 24 October 2022).

Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (adopted 5 June 1981, entered into force 23 September 1986).

Agreement on Subsidies and Countervailing Measures (entered into force 1 January 1995) 1869 UNTS 14 ('SCM').

ECOWAS Common Investment Code (opened for signature 22 December 2019, entered into force 22 December 2019).

Enhanced Partnership and Cooperation Agreement between the European Union and the Republic of Kazakhstan (opened for signature 21 December 2015, entered into force 1 March 2020) ('EU-Kazakhstan EPCA').

European Parliament, Directive EU2018/2001 of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources (recast), [2018] OJ L328/82, 11/12/2018.

Free Trade Agreement between the Arab Republic of Egypt and the EFTA States (opened for signature 27 April 2007, entered into force 1 September 2008).

Interim Agreement Establishing an Economic Partnership Agreement between the United Kingdom and the Republic of Cameroon (signed 9 March 2021, entered into force 19 July 2021) ('Cameroon - UK EPA').

Investment Cooperation and Facilitation Treaty between Brazil and India (signed 25 January 2020, not yet in force) ('Brazil-India BIT').

Model Text for the Indian Bilateral Investment Treaty (2015).

Political, Free Trade and Strategic Partnership Agreement between the UK and Ukraine(signed 8 October 2020, entered into

force 1 January 2021).

The Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) ('ECT') 2080 UNTS 100.

Trade and Cooperation Agreement between the EU and the UK (opened for signature 30 December 2020, entered into force 1 May 2021).

Treaty Establishing the Common Market for Eastern and Southern Africa (opened for signature 5 November 1993, entered into force 8 December 1994) ('COMESA').

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Cases

AES Solar and others (PV Investors) v The Kingdom of Spain (Final Award) (PCA Case No. 2012-14, 28 February 2020).

Antaris Solar GmbH and Dr Michael Gode v Czech Republic (PCA, Case No. 2014-01, 8 May 2013).

Azurix Corp v The Argentine Republic (Award) (ICSID Case No ARB/01/12, 14 July 2006).

BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain(ICSID Case No. ARB/15/16, 16 April 2015).

Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania (Award) (ICSID Case No. ARB/05/22, 24 July 2008).

Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India (Final Award) (PCA Case No. 2016-07, 21 December 2020).

Charanne B.V. and Construction Investments S.A.R.L. v Spain (Final Award) (SCC Case No. 062/2012, 21 January 2016).

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain (Award) (ICSID Case No. ARB/13/36, 4 May 2017).

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain (ICSID Case No. ARB/13/36, 23 December 2013).

Electrabel S.A. v The Republic of Hungary (Decision on Jurisdiction, Applicable Law and Liability) (ICSID Case No. ARB/07/19, 30 November 2012).

ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic (ICSID Case No. ARB/16/5, 8 March 2016).

Hulley Enterprises Ltd. v Russian Federation (Final Award) (PCA Case No. 2005-03/AA226, 18 July 2014).

InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain (Award) (ICSID Case No. ARB/14/12, 2 August 2019).

Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v Kingdom of Spain(ICSID Case No. ARB/13/31, 29 October 2013).

Infrastructure Services Luxembourg S.à.rl and Energia Termosolar BV v Kingdom of Spain(Award) (ICSID Case No. ARB/13/31, 15 June 2018).

Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain (Award) (ICSID Case No. ARB/14/1, 16 May 2018).

National Grid Public Limited Company v The Argentine Republic (Award) (UNCITRAL Case No. 1:09-cv-00248-RBW, 3 November 2008).

Noble Ventures, Inc. v Romania (Award) (ICSID, Case No ARB/01/11, 12 October 2005).

Occidental Exploration and Production Company v Republic of Ecuador (I) (Award) (LCIA Case No UN3467, 1 July 2004).

Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation (Award) (SCC Case No. 24/2007, 20 July 2012).

RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain (ICSID Case No. ARB/13/30, 23 November 2013).

Saluka Investments BV v Czech Republic (Partial Award) (PCA, Case No. 2001-04, 17 March 2006).

Siemens AG v The Argentine Republic (Award) (ICSID Case No ARB/02/8, 17 January 2007).

SolEs Badajoz GmbH v Kingdom of Spain (Award) (ICSID Case No. ARB/15/38, 31 July 2019).

Yukos Universal Limited (Isle of Man) v The Russian Federation (Final Award) (PCA, Case No 2005-4/AA 227, 18 July 2014).

Reports

Damuri YR and Atje R, *Investment Incentives for Renewable Energy: Case Study of Indonesia* (The International Institute for Sustainable Development 2013).

Eberhard A and others, *Directions in Development, Energy and Mining: Independent Power Projects in Sub-Saharan Africa - Lessons from Five Key Countries* (World Bank Group 2016).

Energy Charter Secretariat, *Special Paper Series: Handbook on General Provisions Applicable to Investment Agreements in the Energy Sector* (ECS 2017).

International Energy Agency, *Perspectives for the Energy Transition – Investment Needs for a Low Carbon Energy System* (IEA/IRENA 2017).

James S, *Tax and Non-Tax Incentives and Investments: Evidence and Policy Implications* (World Bank Group 2014).

Johnson L and Toledano P, *Investment Incentives: A Survey of Policies and Approaches for Sustainable Investment* (Columbia Center on Sustainable Investment 2022).

OECD, *Governing Regional Development Policy: The Use of Performance Indicators* (OECD Publishing 2009).

OECD, *Overcoming Barriers to International Investment in Clean Energy, Green Finance and Investment* (OECD Publishing 2015).

OECD, *Public Sector Transparency and the International Investor* (OECD Publications 2003).

REN21, 'Renewables 2017 Global Status Report' (REN21 Secretariat, 2017) https://www.ren21.net/wp-content/uploads/2019/05/GSR2017_Full-Report_English.pdf accessed 20 June 2023.

UNCTAD, *Incentives: Series on Issues in International Investment Agreements* (United Nations Publication 2004).

UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (United Nations Publication 2008).

UNCTAD, *State Contracts: Series on Issues in International Investment Agreements* (United Nations Publication 2004).

UNCTAD, *World Investment Report 2022: International Tax Reforms and Sustainable Investment*(United Nations Publication 2022).

UNEP, *The Emissions Gap Report 2018* (United Nations Environment Programme 2018).

Wilke M, *Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review*(International Centre for Trade and Sustainable Development 2011).

WTO, *Canada-Certain Measures Affecting the Renewable Energy Generation Sector- Report of the Appellate Body*, WT/DS412/AB/R (6 May 2013).

WTO, *Canada-Measures Relating to the Feed-in Tariff Program- Report of the Appellate Body*, WT/DS426/AB/R (6 May 2013).

Yamaguchi S and Dellink R, *Greening Regional Trade Agreements on Investment* (OECD Publications 2020).

Online Sources

International Trademark Association, 'IP in Outer Space: The Next Frontier' https://www.inta.org/perspectives/features/ip-in-outer-space-the-next-frontier accessed 22 July 2023.

Investment Policy Hub, 'Investment Dispute Settlement Navigator' https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search accessed 20 May 2023.

Japan Bank for International Cooperation, 'Overseas Investment Loans' (JBIC) https://www.jbic.go.jp/en/support-menu/investment.html accessed 20 March 2023.

Kenneth O and Antolín FA, 'Taxation Exclusions' (Jus Mundi, 6 September 2022) https://jusmundi.com/en/document/publication/en-taxation-exclusions# accessed 20 January 2023.

Lakeh HK, 'What Are the Advantages and Disadvantages of Renewable Energy?' (20 May 2022) https://www.greenmatch.co.uk/blog/2021/09/advantages-and-disadvantages-of-renewable-energyaccessed 25 June 2023.

Runyon J, 'IEA: Feed-in Tariff Not a Subsidy, But Tax Credits Are' (Renewable Energy World, 11 January 2013) https://www.renewableenergyworld.com/solar/iea-feed-in-tariff-not-a-subsidy-but-tax-credits-are/ accessed 24 May 2023.

The University of Calgary, 'Fiscal Incentives' (Energy Education) https://energyeducation.ca/encyclopedia/Fiscal_incentive#cite_note-IPCC_SRREN-2 accessed 10 May 2023.

Union of Concerned Scientists, 'Benefits of Renewable Energy Use' (20 December 2017) https://www.ucsusa.org/resources/benefits-renewable-energy-use accessed 20 June 2023.

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Food Safety in International Law: A Step in Preventing the Occurrence of Communicable Diseases

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ABSTRACT

The outbreak of Covid-19 in 2019 raised significant concerns about the transmission of the virus, especially regarding zoonotic diseases. As the third common virus transmitted between humans and animals after SARS and MERS, the perception of Covid-19 as a foodborne illness intensified discussions surrounding food safety and security. This article aims to explore the commitment of states to ensure safe food supply chains. Food safety practices are essential for preventing disease, and the right to food is enshrined in various human rights documents. Although food supply has not been the subject of a specific legal framework, international organizations and conferences have recognized the necessity of regulating food production and distribution methods to ensure that populations have access to adequate and nutritious food, thereby promoting overall health and well-being.

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Introduction

Access to healthy and nutritious food is essential for human energy and overall health. However, one of the pressing security challenges faced globally, not just in developing countries, is the provision of sufficient and healthy food. Ensuring food security is thus recognized as a fundamental necessity of human life. According to United Nations data from 2002, approximately a quarter of the population in developing countries faces serious food and water shortages.[1] Furthermore, the World Health Organization (WHO) reports that over a third of the global population suffers from health issues related to contaminated food and water,[2] with chemical contamination on the rise.

The adverse health effects of poor nutrition have led to an increase in dangerous diseases with potentially fatal consequences. Alarmingly, more than 100 million children die each year due to the consumption of contaminated water.[3] Projections indicate that at least 150 million people may face hunger in the future due to sudden spikes in food prices, potentially leading to significant social unrest worldwide.[4]

The United Nations defines food security as the access of all individuals to sufficient food at all times for a healthy life.[5] This definition encompasses three core elements: food availability, access, and stability. Presently, challenges such as escalating hunger, dietary imbalances, environmental degradation, and resource depletion have elevated food security to one of the most critical issues facing human societies. Food security is not only a key condition for human security but also a pillar of economic development.[6]

It is crucial to recognize that food security extends beyond mere availability; the consumption of contaminated or unhealthy food poses a greater risk to human health than a lack of access to food. This concern becomes particularly pertinent in the context of the globalization of food trade, which can enhance access to food but also create conditions conducive to widespread

1 Gorbachev, *Solving Global Water Crisis: Moral Imperative, Access to Water Human Right* (2005) ENV/DEV/847 https://www.un.org/press/en/2005/envdev847.doc.htm accessed 28 April 2022.

2 World Health Organization, '1 in 3 People Globally Do Not Have Access to Safe Drinking Water – UNICEF, WHO' (18 June 2019) https://www.who.int/news/item/18-06-2019-1-in-3-people-globally-do-not-have-access-to-safe-drinking-water-unicef-who accessed 28 April 2022.

3 Djukic, Moracanin, et al, *Food Safety and Food Sanitation* (2015) 26.

4 Ibid.

5 International Food Policy Research Institute, 'Food Security' https://www.ifpri.org/topic/food-security accessed 24 August 2020.

6 Qalamkari, *Definitions and the New Concept of Nutrition and Food Security* (2015) 1.

outbreaks of foodborne diseases.[1] Factors such as societal industrialization, urbanization, and shifts in food consumption patterns further jeopardize food safety. In developed countries, as much as 50% of the food budget may be allocated to food prepared outside the home,[2] which often lacks the requisite quality standards.

Food safety is thus a fundamental public health issue for all nations. Foodborne illnesses, which can arise from various microbial pathogens, biotoxins, or chemical contaminants, represent a significant threat to the health of millions and are closely related to the broader issue of food security. Numerous countries have experienced outbreaks of serious foodborne illnesses, with the potential for such outbreaks to occur anywhere in the world.

The emergence of Covid-19, which spread globally from China in December 2019, raised hypotheses regarding its transmission through animals and food,[3] thereby highlighting the connection between food safety and the prevention of infectious diseases. This leads to the central question of this research: How can international law ensure food safety and thereby prevent the occurrence of foodborne infectious diseases? To address this question, the research will first examine the threats to food security posed by infectious diseases, alongside the commitment to the right to food—particularly in relation to climate change. The role of international organizations will also be considered. Methodologically, this research adopts a doctrinal approach, analyzing existing legal frameworks related to food safety.

1. Communicable Diseases Are a Threat to Food Security

To identify the factors threatening food security and to determine the role of infectious diseases among them, it is essential to understand the concept of food security, which differs from mere food production. While food production—regardless of its geographic location—is a crucial element of food availability, it alone does not guarantee food security.[4]

In 1994, the United Nations Development Program's Human Development Report described human security as encompassing various dimensions, one of which is food security.[5] This concept is closely linked to legal frameworks within the field of development.[6] International organizations such as the Food and Agriculture Organization (FAO) and the World Bank have offered differing definitions of food security. The FAO defines it as "ensuring the physical and economic access of all people to basic foods at all times."[7] The World Bank, on the other hand, defines food security as "the access of all people at all times to sufficient food to lead a healthy and active life."[8] The World Food Summit in 1996 provided a more comprehensive definition: "Food security exists when all people have physical and economic access to sufficient, healthy, and nutritious food at all times, enabling them to meet their nutritional needs and dietary preferences for an active and healthy life."

1 Elmi, *Food Safety* (2008) 144.
2 Ibid, 143
3 Ibid, 146
4 United States Department of Agriculture, *Climate Change, Global Food Security, and the U.S. Food System* (December 2015) p 17.
5 United Nations Development Programme, *Human Development Report 1994* (Oxford and New York: Oxford University Press).
6 Drèze and Sen, *Hunger and Public Action* (1989) 1.
7 Food and Agriculture Organization, *World Food Security: A Reappraisal of the Concepts and Approaches* (Director General's Report, Rome 1983).
8 World Bank, *Poverty and Hunger: Issues and Options for Food Security in Developing Countries* (Washington DC 1986).

According to the FAO, food security is established when all people have consistent access to safe and nutritious food that meets their dietary requirements and preferences.[1] This includes:

- Availability: A sufficient quantity of food of suitable quality.
- Accessibility: Regular access for individuals to appropriate and nutritious food sources.
- Nutritional Well-being: Proper diet, clean water, hygiene, and health care are necessary to ensure that all biological needs are met.

Communities, families, or individuals should always have access to food, and sudden shocks or emergencies should not disrupt this access.[2]

Based on the aforementioned concepts, food contamination with various pathogens poses a significant threat to food security. Such contamination can lead to the global spread of infectious diseases, further complicating efforts to ensure the safety and availability of food.

1.1. The Role of Food Safety in Preventing Food-Borne Diseases and Achieving Food Security

Ensuring food quality is a critical aspect of food security. Food quality is intrinsically linked to food safety, which encompasses the methods of preparing, using, and storing food to prevent food-borne diseases. Food safety is a fundamental feature of food security, varying in nature, intensity, and extent depending on the circumstances, whether normal, emergency, or disaster scenarios. For instance, during floods or storms, surface waters contaminated with sewage can lead to food contamination and threaten food safety.

The terms "food safety" and "food quality" can sometimes be confusing. Food safety refers to managing all hazards—both chronic and acute—that may harm consumers, while food quality encompasses the characteristics that influence a product's value to consumers.[3] Both food security and safety are public health issues that play a significant role in improving societal health conditions.[4]

Historically, unsafe food has posed significant health problems. Despite global efforts to enhance food safety, the incidence of food-borne diseases remains a substantial issue in both developed and developing countries. According to the WHO, unsafe food contributes to approximately 2 million deaths worldwide each year. Addressing food safety is essential to solving these problems. The FAO emphasizes that nutrition is a fundamental right, vital for health and well-being, as it protects the public from disease.[5] Health is a prerequisite for individuals to pursue their rights effectively.[6]

Food-borne diseases pose a serious threat to human health. They not only impact individual health and well-being but also have economic repercussions for nations, placing a heavy burden on health systems and reducing productivity. Urbanization, changing food habits, and climate

1 United Nations, 'Food' https://www.un.org/en/sections/issues-depth/food/index.html accessed 24 August 2020.
2 Bora, Ceccacci, et al, *Food Security and Conflict* (2011) 2.
3 WHO, FAO, *Assuring Food Safety and Quality: Guidelines for Strengthening National Food Control Systems* (Joint FAO/WHO Publication 2016) http://www.fao.org/3/a-y8705e.pdf.
4 Rideout, *Food Safety, Food Security and the Public Health Inspector* (2014) 1.
5 Damayanti and Wahyati, *Food Safety in the Protection of the Right to Health* (2019) 2.
6 Ibid.

change further complicate food safety. Virtually all food items can become contaminated, posing dangers to consumers if proper production, processing, and usage principles are not adhered to.[1]

In response to public health concerns and the economic losses caused by food-borne diseases, there have been global efforts by food suppliers, industries, and governments to ensure food quality and safety.[2] However, food-borne diseases continue to be a significant public health challenge for various reasons.[3] According to the WHO, 600 million people—approximately 1 in 10—fall ill each year due to contaminated food, resulting in 420,000 deaths annually.[4]

Recent years have seen increased attention to zoonotic diseases, which are often transmitted through food. As more people venture into unfamiliar ecological areas, their exposure to animals and the infections they transmit increases. Additionally, modern travel has facilitated the spread of diseases that were once geographically confined, as seen with the outbreak of acute respiratory syndrome (SARS). The migration and trade of animals pose similar threats, evidenced by the emergence of Nile fever in the United States—previously unseen in the Western Hemisphere.[5]

The coronavirus, first identified in 1960, illustrates the transmission of human infections from animals. Reports indicate that Covid-19 initially spread through a seafood wholesale market, highlighting the importance of food safety measures.[6] SARS-CoV-2, the virus responsible for Covid-19, is the seventh known coronavirus infecting humans and the third that is zoonotic, following SARS and MERS. Bats, particularly Chinese horseshoe bats, serve as reservoirs for many coronaviruses.[7] Although bats are not commonly sold in markets, they are sometimes caught and sold directly to restaurants for food preparation.[8]

Therefore, enhancing food control and health activities in live animal food markets is crucial to protecting public health from similar zoonotic diseases.[9] Addressing food safety comprehensively is essential to prevent the occurrence of food-borne diseases and ensure food security.

1.2. The Imperative of Food Safety in Global Health and Security

The increasing prevalence of food-borne diseases and the risk of contamination throughout the global food supply chain underscore the need for competent authorities to adopt a preventive approach to protect public health. This involves implementing measures that are proportionate to the risks associated with food insecurity. Effective food safety systems prioritize proactive responses to potential problems rather than merely identifying them after they arise.[10]

One of the eight Millennium Development Goals established by the United Nations, as

1 WHO, *The Burden of Foodborne Diseases in the WHO European Region* (2017) 2.
2 Manuela Camino Feltes et al, *Food Quality, Food-Borne Diseases, and Food Safety in the Brazilian Food Industry* (2017) 13–27.
3 Ibid.
4 Kearney, *Introduction to Foodborne Illness Outbreak Investigations* (2018) 320.
5 PAHO, *Zoonoses and Communicable Diseases Common to Man and Animals* (2003) viii.
6 Travel Medicine and Infectious Disease. COVID-19: Zoonotic aspects. 24 February 2020. P 2. https://doi.org/10.1016/j.tmaid.2020.101607
7 Mackenzie and Smith, *COVID-19: A Novel Zoonotic Disease Caused by a Coronavirus from China: What We Know and What We Don't* (2020) 5.
8 WHO, *Novel Coronavirus (2019-nCoV): Situation Report – 22* (2020) 2.
9 Ibid.
10 Faour-Klingbeil and Todd, *Prevention and Control of Foodborne Diseases in Middle-East North African Countries: Review of National Control Systems* (2019) 2 <www.mdpi.com/journal/ijerph>.

discussed at the Millennium Forum in 2000, focused on eradicating extreme poverty and hunger. Countries committed to halving the number of individuals suffering from poverty and hunger by 2015.[1] The absence of food safety can disrupt children's learning and hinder adults' productivity, thereby complicating human development. Consequently, the 2030 Sustainable Development Agenda emphasizes the provision of safe food as essential for promoting health and eliminating hunger.[2]

Food security cannot exist without food safety. In a world where the food supply chain has become increasingly complex, any adverse incident related to food safety can have far-reaching negative impacts on public health, trade, and the economy. Unsafe foods, which may contain harmful bacteria, viruses, parasites, or chemicals, are responsible for over 200 diseases, ranging from diarrhea to cancer. Furthermore, the effects of climate change on food safety necessitate urgent attention to global food production and supply systems that impact consumers, industries, and the planet.[3]

A wide range of stakeholders—governments, regional economic bodies, UN agencies, development organizations, trade associations, consumer and producer groups, academic institutions, and private sector entities—must collaborate on issues affecting food security at global, regional, and local levels. Effective cooperation is vital for combating food-borne disease outbreaks, requiring alignment across governmental sectors and international borders. The longstanding partnership between the FAO and the WHOexemplifies this collaborative effort, addressing a wide array of issues to enhance global food safety and protect consumer health.[4]

Different countries face varying risks and challenges related to food safety, influenced by their consumption patterns, production processes, and trade practices. Ensuring food safety is crucial for achieving diverse development outcomes, and decisions in this area often occur where the interests of different sectors intersect.[5] Recognizing the significance of food safety and food security in fostering international peace and security, the global community has sought to develop legal frameworks to support these objectives.

1.3. The Role of International Law in Providing Food Safety to Prevent the Spread of Infectious Diseases

Communicable diseases pose significant transnational and often global challenges that exceed the capacities of individual countries' governments, necessitating multilateral and global approaches. These diseases pose serious threats to fundamental human rights, including the right to life and the right to health. Given that food safety is a critical preventive measure against the spread of these diseases, the prevailing human rights approach in international law can establish a foundation for states' obligations to ensure food safety.[6]

1 Gualtieri, *Right to Food, Food Security and Food Aid under International Law, or the Limits of a Right-based Approach* (2013) 20 http://thefutureoffoodjournal.com/index.php/FOFJ/article/view/207/159.

2 'The 2030 Agenda and the Sustainable Development Goals' https://repositorio.cepal.org/bitstream/handle/11362/40156/25/S1801140_en.pdf accessed 12 April 2023.

3 WHO & FAO, *Food Safety, Everyone's Business: World Food Safety Day* (2019).

4 Ibid.

5 FAO. *Food Safety Risk Management: Evidence-Informed Policies and Decisions, Considering Multiple Factors* (2017).

6 Patterson, Buse, Magnusson, and Toebes, *Legal and Human Rights-Based Approaches to Healthy Diets and Sustainable Food Systems*

Moreover, the fundamental aim of international law is to maintain international peace and security. Today, this goal extends beyond the mere absence of war; it encompasses any factor that disrupts human welfare and a decent life.[1] This perspective leads to the conclusion that theories of global governance, which emphasize the interconnected roles of various actors—including states, individuals, international organizations, and non-governmental organizations—view international law as a mechanism for creating and implementing a coordinated legal framework to address global threats.

As a significant topic within international law, food safety has given rise to various branches and multilateral regimes, including the International Health Regulations from the World Health Organization, the TRIPS Agreement from the World Trade Organization, and the standards set by the Codex Alimentarius Commission under the FAO.[2]

Food undergoes numerous processes before reaching consumers, making it essential for an effective food control system to incorporate stringent enforcement of mandatory requirements alongside education, community development programs, and the promotion of voluntary cooperation.[3] The development of harmonized laws and regulations related to food safety, along with their effective implementation, forms a foundational element of a modern food control system.

This section of the article aims to analyze international legal frameworks related to food safety, focusing on how these rules can minimize the spread of foodborne infectious diseases globally.

2. The Commitment to Provide the Right to Food

The right to adequate food is not merely a charitable act; it is a fundamental right of every individual—woman, man, and child—that must be fulfilled by both governments and non-state actors. Agenda 21 for Sustainable Development recognizes the need for new measures to eradicate poverty, end hunger,[4] and eliminate all forms of malnutrition.[5]

The Universal Declaration of Human Rights (UDHR), the cornerstone of human rights documentation, does not differentiate between civil, cultural, economic, political, and social rights, placing them all on equal footing, including the right to food.[6, 7] Since the 1980s, the standing of economic, social, and cultural rights has progressively improved within international law and public acceptance, with the right to food taking a prominent role.[8]

In 1983, the United Nations Economic and Social Council (ECOSOC) prepared a report

(2020) 1.; The Commission on Global Governance, *Our Global Neighbourhood*, Chapter Three—Promoting Security (1995) http://www.gdrc.org/u-gov/global-neighbourhood/chap3.htm accessed July 20, 2024.

1 Commission on Human Security, *Human Security Now* (2003) 4 https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C6907C1256D19006A9353-chs-security-may03.pdf accessed July 20, 2024.

2 Aginam, *International Law and Communicable Diseases* (2002) 2-3 https://www.researchgate.net/publication/10913225, accessed July 20, 2024.

3 WHO and FAO, *Assuring Food Safety and Quality: Guidelines for Strengthening National Food Control Systems* (Joint FAO/WHO Publication) 3.

4 The 2030 Agenda and the Sustainable Development Goals. Goals 1-2.

5 FAO, *The Right to Food* (2020) http://www.fao.org/right-to-food/background/en/.

6 Universal Declaration of Human Rights. 10 December 1948. Article 25. https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf

7 Künnemann and Epal-Ratjen, *The Right to Food: A Resource Manual for NGOs. DFID* (2004) 34.

8 Ibid.

highlighting the right to food as a human right,[1] marking the first comprehensive examination of this issue within the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This report introduced the framework of triple obligations for governments regarding the right to food: respect, protection, and realization.[2]

That same year, the International Law Association[3] established the Right to Food Committee, and the Netherlands Institute for Human Rights organized an international conference on this topic. In 1987, the United Nations Commission on Human Rights endorsed the ECOSOC report on the right to food. Additionally, in 1986, a group of international legal experts at Maastricht University formulated the Limburg Principles on the Implementation of Economic, Social, and Cultural Rights, which provided essential guidance for interpreting these rights.

The 1980s marked a pivotal period for economic, social, and cultural rights, producing significant reports and studies, with the right to food considered a key milestone.[4] Importantly, the right to food is comprehensive; it encompasses not only minimum caloric and nutritional requirements but also all elements necessary for an individual to lead a healthy and active life.[5]

To realize the right to food, several indicators have been identified, including nutrition, food safety, consumer protection, and access to food.[6] The Committee on Economic, Social and Cultural Rights emphasizes that proper nutrition is linked to health, which hinges on ensuring that food is prepared using appropriate ingredients and processes.[7] Article 12 of the ICESCR promotes the health of individuals and extends to other determinants of health, such as food, nutrition, housing, and access to clean water and sanitation.[8]

The right to food is explicitly recognized in Article 25 of the UDHR[9] and Article 11 of the ICESCR[10]. Additionally, the International Covenant on Civil and Political Rights (ICCPR)[11] contains provisions that emphasize the right to food indirectly. Article 6 recognizes the right to life, while Article 7 prohibits torture and inhumane treatment. Article 10(1) affirms the humane treatment of detained persons, and Article 26 establishes the right to non-discrimination, implicitly supporting access to healthy and sufficient food.

Two crucial articles in the Convention on the Elimination of All Forms of Discrimination against Women protect the right to food specifically. Article 12 safeguards the rights of mothers and infants to adequate food, whereas Article 14 protects women in rural areas from

1 Asbjørn Eide, (born 11 February 1933) is a Norwegian human rights scholar with base in Law and Social Science Research. He was married October 10, 1959, to Professor of nutritional physiology Wenche Barth Eide (b. 1935), and the father of former Norwegian Minister of Defence (2011–12) and Minister of Foreign Affairs (2012-13) Espen Barth Eide. Wikipedia.

2 For more info, see: Henry Shue. Basic Rights: Subsistence, Affluence and U.S. Foreign Policy, 2nd ed., (Princeton, NJ: Princeton University Press, 1996) pp ix+236. Cambridge University Press: 20 December 2016. https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/abs/henry-shue-basic-rights-subsistence-affluence-and-us-foreign-policy-2nd-ed-princeton-nj-princeton-university-press-1996-pp-ix236/43F9D53C9D4977D3865AE805BF5E5B8C . 29 April 2022.

3 The International Law Association (ILA) was founded in Brussels in 1873 and is a body for the study, clarification and development of public and private international law and the furtherance of international understanding and respect for international law

4 Künnemann and Epal-Ratjen, Op. Cit. (2004) 35.

5 UNHR. *The Right to Adequate Food. Fact Sheet No. 34*. P 2.

6 "Report on indicators for promoting and monitoring the implementation of human rights" (HRI/MC/2008/3).

7 Damayanti and Wahyati, Op. Cit. (2019) 4.

8 Ibid.

9 Universal Declaration of Human Rights.

10 International Covenant on Economic, Social and Cultural Rights. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

11 International Covenant on Civil and Political Rights. 16 Dec 1966. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

discrimination in accessing productive resources, including land and social security programs.[1] Furthermore, the Convention on the Rights of the Child emphasizes the right to food to combat malnutrition, explicitly mentioning this right in Articles 24 and 27. Article 24 guarantees the right to health, including the provision of sufficient and nutritious food and safe water, while Article 27 recognizes the right to an adequate standard of living.[2]

The European Convention on Human Rights and Fundamental Freedoms, established by the Council of Europe in 1950, also addresses the right to food indirectly through its provisions. The European Court of Human Rights, founded in 1959, interprets this Convention and adjudicates on the legality of government actions based on its principles.[3] Similarly, Article 25 of the American Convention on Human Rights grants every person the right to seek judicial recourse for violations of constitutional rights recognized by their nation or the Convention itself.[4]

In Africa, the protocol of the African Charter on Human and People's Rights established a court with jurisdiction over human rights violations based on the Charter or other ratified human rights instruments.[5] Additionally, Article 54(1) of the First Additional Protocol of the Geneva Conventions (1977) states that "starvation of civilians as a method of warfare is prohibited."[6] Article 14 of the Second Additional Protocol reinforces this by prohibiting starvation of civilians during armed conflict.[7]

General Comment No. 12 from the Committee on Economic, Social, and Cultural Rights emphasizes that the right to adequate food is intrinsically linked to human dignity and essential for realizing other human rights outlined in international law.[8] The primary responsibility for protecting and promoting these rights lies with governments, which must respect people's access to food and protect this right from violations by third parties. Moreover, governments are tasked with actively enhancing access to resources and tools that guarantee livelihoods, including food security.

In summary, international human rights law establishes a comprehensive framework for the right to food, obligating states to respect, protect, and fulfill this fundamental right for all individuals.[9]

3. A Commitment to Confront Climate Change and Its Harmful Effects

Climate change poses both direct and indirect risks to food safety throughout various stages of the food chain. To address these challenges, governments must prepare for the impacts of climate change. Some developed countries have initiated programs to identify food safety risks associated with climate change, while the FAO plays a crucial role in assisting developing nations in

1 Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979.
2 Convention on the Rights of the Child. https://www.unicef.org/child-rights-convention/convention-text
3 Kent, *Freedom from Want. The Human Right to Adequate Food* (2005) 33.
4 American Convention on Human Rights. San José, Costa Rica, on 22 November 1969.
5 For more info, see: The Practical Guide to Humanitarian Law. The African Commission and African Court for Human Rights. https://guide-humanitarian-law.org/content/article/3/the-african-commission-and-african-court-for-human-rights/ 21 April 2023.
6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977.
7 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977.
8 CESCR General Comment No. 12: The Right to Adequate Food (Art. 11). Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999 (Contained in Document E/C.12/1999/5)
9 UNHR. The Right to Adequate Food. Fact Sheet No. 34. April 2010. P 18.

assessing changes in food security conditions and fostering international cooperation to enhance understanding of climate change's effects on food security.[1]

The ramifications of climate change on food production, safety, and security are significant. It is essential to recognize that the risks associated with global climate change are disproportionately distributed. While most activities contributing to climate change originate in developed countries, it is developing and underdeveloped nations that bear the brunt of its harmful effects on health and public health.[2]

Climate change can affect food safety and security in various ways. Rising temperatures, altered rainfall patterns, and extreme weather events have all impacted agricultural productivity, the geographic spread of waterborne diseases, and trade dynamics.[3] Climate change directly influences food production efficiency and indirectly affects the quality and availability of water, pollination, and pest dynamics.[4] Additionally, increased carbon dioxide emissions can degrade food quality.[5]

Global warming results in shifts in weather patterns, including temperature variations and changes in wind and water distribution. These alterations affect broader ecosystems and disrupt sustainable biodiversity across regions, significantly impacting food availability, accessibility, sufficiency, and sustainability.[6] Projections indicate that by 2050, nearly 25 million children may suffer from malnutrition. A 2017 WHO report underscores the connection between unsafe food and malnutrition, stating that "unsafe food creates a vicious cycle of diarrhea and malnutrition," particularly threatening vulnerable populations. [7] Future climate change effects may exacerbate resource scarcity, displacing rural communities and diminishing access to food, energy, and water, while increasing disease prevalence.[8]

During a virtual UN conference on climate change in June 2021, experts sought strategies for sustainable land and water management amidst growing insecurity linked to climate change. According to the Intergovernmental Panel on Climate Change's 2019 Special Report on Climate and Land Change, food supply stability is anticipated to decline, severely impacting the most vulnerable populations. However, proactive climate action can enhance agricultural sustainability and yield socio-economic benefits that contribute to poverty eradication and bolster resilient livelihoods for at-risk groups.

The implementation of sustainable agricultural practices is central to achieving food security in the context of climate change. Since 2018, countries, experts, and stakeholders have convened to explore opportunities across six agreed agricultural technical areas, encompassing soil health, nutrient management, effective livestock systems, and adaptation strategies to climate change impacts.[9]

At the United Nations Climate Change Conference in Sharm el-Sheikh, Egypt, in December 2022, discussions focused on agriculture and food security, urging governments to implement

1 FAO. CLIMATE CHANGE: IMPLICATIONS FOR FOOD SAFETY. P 6.
2 Ibid.
3 USDA. P 18.
4 USDA. P 21.
5 Mbow and Rosenzweig, *Food Security. Final Government Distribution* (n.d.) 22.
6 Caesens and Padilla Rodríguez, *Climate Change and the Right to Food* (2009) 28-29.
7 WHO, *Food Safety Climate Change and the Role of WHO. Department Of Food Safety and Zoonoses* (2018) 6.
8 Challinor and Neil Adger, *International dimensions. UK Climate Change Risk Assessment* (2017) 45.
9 United Nations Climate Change. Protecting the Climate and Achieving Food Security. 16 June 2021 https://unfccc.int/news/protecting-the-climate-and-achieving-food-security 8 July 2023.

effective measures to reduce greenhouse gas emissions in alignment with climate goals. This included a new four-year plan for agriculture and food security and an initiative aimed at increasing funding for agricultural system transformations by 2030.[1]

An important aspect of this discourse is the issue of compatibility. The UNFCCC acknowledges the vulnerability of developing countries to climate change and calls for targeted efforts to mitigate its consequences, particularly in nations lacking the necessary resources. Early ratification years largely overlooked compliance;[2] however, countries are now encouraged to devise adaptation solutions and take action to address both current and future climate impacts. Adaptation is vital for the long-term global response to climate change, safeguarding people, livelihoods, and ecosystems.[3] Ongoing efforts in this area are being conducted under the auspices of convention institutions.[4]

3.1. The Commitment to Ensure Food Safety in Documents Issued by International Organizations

Food safety is a critical global concern, as the consumption of unsafe or contaminated food can lead to severe health issues. International standards organizations play a vital role in establishing guidelines, regulations, and best practices to ensure the safety and quality of food products. These organizations collaborate to develop a coordinated approach to food safety, facilitating international trade and protecting public health.

3.1.1. United Nations

The roles of the two main bodies of this organization, namely the Security Council and the General Assembly, will be assessed below.

3.1.1.1. Security Council

The UN Security Council has increasingly recognized the links between health crises and international security. Following the Ebola outbreak in several African countries, Resolution 2177/2014 marked the first instance in which the Security Council classified a global public health crisis as a "threat to international peace and security," proposing a set of measures to address it.[5]

In 2018, the Security Council adopted Resolution 2417,[6] a significant step toward establishing an international policy and legal framework to combat conflict-related food insecurity. This resolution was supported by Rome-based agencies, partners, and governments, reflecting a commitment to addressing hunger in crisis situations. Since its adoption, stronger language regarding hunger has been incorporated into subsequent resolutions by member states, such as UNESC Resolution 11/2018.

The new peacekeeping framework emphasizes prevention as a central issue, as approved

1 United Nations Climate Change. Governments Step Up Action on Agriculture and Food Security at COP27. 5 Dec 2022. https://unfccc.int/news/governments-step-up-action-on-agriculture-and-food-security-at-cop27 8 July 2023.

2 UN Climate Change. What is the United Nations Framework Convention on Climate Change? https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change 9 July 2023.

3 UN Climate Change. https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/introduction9 July 9, 2023.

4 UN Climate Change. What is the United Nations Framework Convention on Climate Change?

5 Resolution 2177 (2014) / adopted by the Security Council at its 7268th meeting, on 18 September 2014. https://digitallibrary.un.org/record/779813?ln=en . 22 August 2023.

6 For more info, see: UN. Adopting Resolution 2417 (2018), Security Council Strongly Condemns Starving of Civilians, Unlawfully Denying Humanitarian Access as Warfare Tactics. https://press.un.org/en/2018/sc13354.doc.htm.

through resolutions by both the General Assembly and the Security Council. This framework recognizes the need for a better connection between the UN's three pillars: peace and security, development, and human rights.

In April 2020, on the second anniversary of Resolution 2417, the President of the UN Security Council (Dominican Republic) highlighted the importance of applying the World Food Health Committee's framework for action in protracted crises. This reflects a growing focus on the humanitarian-development-peace nexus, also known as the "triple nexus."

The concept of the triple nexus emphasizes the interconnections between humanitarian efforts, development initiatives, and peacebuilding activities. It advocates for a more coherent approach to addressing people's needs, reducing vulnerabilities, and moving toward sustainable peace. Consequently, the application of the Committee on World Food Security (CFS) Framework for Action (FFA) principles continues to evolve within this triple nexus framework.[1]

3.1.1.2. General Assembly

In response to rising global food prices, the UN General Assembly adopted a resolution urging the international community to urgently support countries affected by the food security crisis through coordinated action. The document,[2] titled "Global Food Insecurity," was approved without a veto,[3] highlighting the urgency of addressing this issue.

General Assembly Resolution 31/121, passed in December 1976, called on the World Food Committee to promptly implement resolutions adopted by the World Food Conference, including the World Declaration on the Eradication of Malnutrition. This declaration emphasized the need to address the deprivation of access to food and medicine.[4]

Resolution 3362,[5] approved in September 1975, identified the rapid increase of food production in developing countries as essential for solving global food problems. It advocated for urgent changes in food production patterns and trade policies to significantly enhance agricultural productivity and export income in these nations.[6]

The first World Food Conference, convened under General Assembly Resolution 3180[7] in December 1973, led to the adoption of the Universal Declaration on the Eradication of Hunger and Malnutrition on November 16, 1974. General Assembly Resolution 3348,[8] approved shortly thereafter, further reinforced commitments to addressing food security, agricultural development, and trade in agricultural products.[9] It stressed that food issues must be addressed in the preparation and implementation of national economic and social development plans, with an emphasis on humanitarian considerations.[10]

1 CFS. Forty-seventh Session "Making a Difference in Food Security and Nutrition". CFS 2021/47/Inf.17. 8-11 February 2021. P6. https://www.fao.org/3/ne740en/ne740en.pdf 15 January 2023.

2 Document A/76/L.55.

3 UN. General Assembly Adopts Resolution Addressing Global Food Crisis. 23 MAY 2022. https://press.un.org/en/2022/ga12421.doc.htm 12 April 2023.

4 Rome Statute of the International Criminal Court.

5 S-VII.

6 United Nations. A/RES/S-7/3362.

7 Ibid, XXVIII.

8 Ibid, XXIX

9 For more info, see: Report of the World Food Conference. Rome, 5-16 Nov 1974.

10 UN. Universal Declaration on the Eradication of Hunger and Malnutrition. the World Food Conference convened under General Assembly resolution 3180 (XXVIII) of 17 December 1973; and endorsed by General Assembly resolution 3348 (XXIX) of 17 December 1974.

At the next World Food Conference in 1996, the Rome Declaration on World Food Security and the World Food Summit Plan of Action established multiple pathways toward achieving food security at individual, household, national, regional, and global levels.[1] The 2002 World Food Summit revisited the lack of progress made since 1996, with the final declaration reaffirming the Right to Food.[2] In 2009, countries unanimously pledged to expedite efforts to eliminate hunger.[3]

The most recent summit in 2021 aimed to transform the global approach to food production and consumption as a critical step towards achieving the 17 Sustainable Development Goals.[4] However, by 2022, the focus shifted to adapting food systems to combat climate change, recognizing that food security is at a critical juncture. The combined effects of the pandemic, climate crisis, high energy and fertilizer prices, and ongoing conflicts, including Russia's invasion of Ukraine, have disrupted production and supply chains, exacerbating global food insecurity, particularly for vulnerable populations.[5]

Agenda 21, adopted at the UN Conference on Environment and Development (Earth Conference) in 1992, serves as a comprehensive action plan at global, national, and regional levels, addressing the impact of human activities on the environment. Chapter 26 promotes the recognition and empowerment of indigenous peoples and their communities in development processes.[6] While it does not explicitly mention the right to food, Agenda 21 emphasizes protecting and strengthening indigenous peoples' access to resources, which is fundamental for ensuring their food security.[7]

3.1.2. Food and Agricultural Organization (FAO)

Historically, the importance of food safety has been recognized since ancient times. However, the development of safety rules and hygiene principles gained prominence when food production shifted from home kitchens to manufacturers and factories, leading to a greater focus on trade.[8] As a result, ensuring the safety and quality of the food supply has traditionally been the responsibility of governments through the formulation of regulations and inspections.[9]

With the expansion of the food industry in the 1950s and 1960s, particularly in North America and Western Europe, the challenges of distributing products over long distances and preserving them for extended periods made food safety an increasingly critical concern. During this time, the responsibility for monitoring food safety remained with governments,[10] while

1 For more info, see: World Food Summit, Rome. 13-17 Nov 1996.
2 For more info, see: World Rome. 10-13 June 2002Food Summit.
3 For more info, see: World Food Summit on Food Security, Rome, 16-18 November 2009
4 For more info, see: UN Food System Summit. 23 Sep 2021.
5 For more info, see: World Food Summit 5 May 2022.
6 United Nations Conference on Environment and Development, *Agenda 21* (3-14 June 1992) https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf accessed 29 May 2023.
7 Lidija Knuth. The right to adequate food and indigenous peoples. How can the right to food benefit indigenous peoples? FAO. Rome, 2009. P 26. https://www.fao.org/3/ap552e/ap552e.pdf P27 January 2023.
8 Food Safety Magazine. An Historical Food Safety Approach for the World We Want. February 4, 2020. https://www.food-safety.com/articles/6448-an-historical-food-safety-approach-for-the-world-we-want 29 December 2022
9 Dharni and Sharma, *Food Safety Standards, Trade and WTO* (2008) 12.
10 FAO/WTO. *Trade and Food Standards*. (n.d.) 3-5.

internationally, food hygiene standards were compiled and formalized using statistical methods. Organizations such as the FAO and WHO played pivotal roles in this shift in approach.[1]

To address growing concerns about food safety, the Codex Alimentarius Commission was established to develop and publish food standards and a "Food Code" aimed at safeguarding public health and ensuring fair practices in food trade. Founded in 1963 as part of a joint program by the FAO and WHO, the Codex Alimentarius encompasses a set of internationally harmonized standards, policies, and guidelines. For over five decades, it has served as a reference text vital for food safety and quality.[2]

The period of peace and stability following World War II led to increased agricultural production, particularly surplus grains in Western countries, which fueled the growth of international food trade. To facilitate this trade, food items required standardization. The first FAO regional conference in Europe endorsed the idea of an international agreement on minimum food standards, which ultimately led to the establishment of the Codex Commission three years later,[3] formalized by resolutions from the FAO in 1961 and the WHO in 1963.[4]

The primary objectives of the Codex are to protect consumer health and promote fair practices in the food trade through the codification, harmonization, and publication of food standards and related texts.[5] Codex standards are recognized in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures as an international reference point for food safety.

The Codex Commission currently comprises 188 member states, one member organization (the European Union), and over 230 observers, including intergovernmental organizations, non-governmental organizations, and UN agencies. The legitimacy and universality of Codex standards depend on the effective participation of all its members, ensuring a collaborative approach to global food safety.[6]

FAO is a specialized agency of the United Nations dedicated to improving global nutrition and living standards. Its core mission involves ensuring productivity in the production and distribution of food and agricultural products, promoting sustainable management of natural resources, and enhancing the livelihoods of rural populations. Through these efforts, FAO aims to contribute to the global economy and help eradicate hunger.

According to Article 1 of the FAO Constitution,[7] the organization has broad authority encompassing nutrition, food, and agriculture.[8] FAO is actively engaged in crisis management at both institutional and operational levels. A key tool in this regard is the Food Chain Crisis

1 Ramsingh, *The emergence of international food safety standards and guidelines: Understanding the current landscape through a historical approach. Perspectives in Public Health* (2014) 208. http://rsh.sagepub.com/content/134/4/206 29 December 2022.

2 FAO/WTO. Op. Cit. (n.d.) 3-5.

3 Dharni and Sharma, Op. Cit. (2008) 12

4 FAO/WHO, *FAO/WHO Framework for the Provision of Scientific Advice on Food Safety and Nutrition* (2007) 9. https://www.fao.org/3/a1296e/a1296e.pdf 3 January 2023

5 Vapnek and Spreij, *Perspectives and Guidelines on Food Legislation, with a new Model Food Law* (2005) 5. https://www.fao.org/3/a0274e/a0274e.pdf January 28, 2023.

6 FAO. Food Safety and Quality. Codex Alimentarius. https://www.fao.org/food-safety/food-control-systems/policy-and-legal-frameworks/codex-alimentarius/en/ 27 January 2023

7 For more info, see: https://www.jus.uio.no/english/services/library/treaties/14/14-01/food-organization.xml 25 January 2023

8 OECD. The Case of the Food and Agriculture Organization of the United Nations (FAO). International Regulatory Co-operation and International Organisations. 2016. P 14. https://www.oecd.org/gov/regulatory-policy/FAO_Full-Report.pdf 10 January 2023

Management Framework, which supports countries in managing threats to the human food chain from production to consumption. This framework consists of three interrelated units:

1. Information and Coordination Unit
2. Emergency Prevention Unit
3. Rapid Response Unit[1]

FAO also plays a critical role in the development of international standards for food safety and quality, collaborating with the International Plant Protection Convention and the Codex Alimentarius. It provides scientific advice to support the establishment of food standards and enhances the capacity of developing countries to participate effectively in these standard-setting processes.[2]

In line with its commitment to global food security, Article 5, Paragraph 6[3] of the FAO Constitution[4] led to the establishment of the Committee on World Food Security. Proposed by the FAO Council, this committee serves as a permanent body to address world food security issues.[5] Its secretariat includes three UN agencies based in Rome: the FAO, the International Fund for Agricultural Development (IFAD), and the World Food Programme (WFP).

In 2015, the Committee on World Food Security approved a framework for action on food security and nutrition in protracted crises, featuring 11 complementary principles aimed at addressing long-term crisis situations.[6] This framework seeks to promote food security and nutrition for individuals affected by or exposed to prolonged tensions.[7]

FAO's Legal Office, part of the Office of the Secretary-General, provides technical assistance to member countries for developing, formulating, and revising food-related legal and regulatory frameworks. FAO emphasizes the importance of establishing predictable, fair, and appropriate rules to encourage investment, facilitate market operations, and define responsible behavior. The Legal Office focuses on five main areas related to food control, safety, and trade:

1. Participation in international initiatives and drafting legal documents at regional and international levels.
2. Providing legal advisory services to member states through technical assistance projects funded by FAO and other donors.
3. Collaborating with the Economic and Social Department to develop international guidelines to realize the right to food.
4. Conducting research on legal developments concerning food safety.
5. Collecting and disseminating legal information related to food issues.

Through these initiatives, FAO plays a pivotal role in advancing food safety, security, and sustainable agricultural practices globally.[8]

1 Ibid, 41.
2 Ibid, 62.
3 V-6.
4 For more info, see: https://www.jus.uio.no/english/services/library/treaties/14/14-01/food-organization.xml 25 January 2023
5 https://www.fao.org/3/x5589E/x5589e0c.htm 13 January 2023
6 For more info, see: COMMITTEE ON WORLD FOOD SECURITY.P 2. 8-11 February 2021. https://www.fao.org/3/ne740en/ne740en.pdf
7 CFS. Forty-seventh Session "Making a Difference in Food Security and Nutrition". CFS 2021/47/Inf.17. 8-11 February 2021. P 3.
8 Vapnek and Spreij, Op. Cit. (2005) 53.

3.1.3. World Trade Organization (WTO)

The Codex standards are recognized within the framework of the World Trade Organization (WTO). The General Agreement on Tariffs and Trade (GATT), ratified in 1948 by 23 UN member states, focused on economic cooperation and tariff reduction, particularly concerning international food trade tariffs for agricultural products.[1] While these treaties primarily address economic issues, they also include protocols related to food safety, health, and animal and plant health, though they provide limited detail on genetically modified and new foods.

At the WTO level, agreements have been established to ensure that regulations regarding food safety, as well as animal and plant health, do not create unfair competitive conditions for potential importing countries.[2] Article 20 of the GATT[3] allows governments to take trade actions to protect human, animal, or plant life or health, provided these actions are not discriminatory or used as covert protection for domestic production.[4]

The WTO Agreement on Agriculture acknowledges the need to consider food security in the commitments made by member countries under the Committee on Agriculture and during ongoing negotiations. At the 12th Ministerial Conference in June 2022,[5] WTO members reached two significant outcomes regarding trade and food security as part of the "Geneva Package." The ministers agreed to exempt food prepared for humanitarian purposes by the WFP from export restrictions. Additionally, they adopted a Ministerial Declaration on the Emergency Response to Food Insecurity, marking the first such declaration by trade ministers at the WTO.[6]

1. The Agreement on the Application of Sanitary and Phytosanitary Measures specifies rules for countries wishing to restrict trade to ensure food safety and protect human life from zoonotic diseases (those transmitted from animals to humans). This agreement serves two primary purposes:
2. It recognizes the sovereign right of members to determine their appropriate level of health protection.
3. It ensures that sanitary or phytosanitary requirements do not constitute unnecessary, arbitrary, scientifically unjustified, or disguised restrictions on international trade.

To achieve these objectives, the agreement encourages members to utilize international standards, guidelines, and recommendations when available.[7] It officially recognizes the food safety standards, guidelines, and recommendations developed by the FAO, WHO, and Codex Alimentarius. This recognition of Codex standards simplifies compliance, eliminating the need for each country to conduct individual risk assessments.[8]

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1 Povea Garcerant, *International Food Law and Regulation: A Review* (2017). https://www.researchgate.net/publication/317098565 2 January 2023.

2 Campden BRI (Chipping Campden) Ltd. Comparing international approaches to food safety regulation of GM and Novel Foods. Food Standards Agency. 20 April 2021. P 179.

3 WTO. The General Agreement on Tariffs and Trade (GATT 1947). https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm

4 Dharni and Sharma, Op. Cit. (2008) 8.

5 MC12.

6 WTO. *Food Security* (2023), https://www.wto.org/english/tratop_e/agric_e/food_security_e.htm.

7 WTO/WHO. *WTO Agreements and Public Health. A Joint Study by the WHO and the WTO Secretariates* (2022) 35-36. https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf 16 January 2023.

8 Ibid, 65.

3.1.4. World Health Organization (WHO)

The WHO plays a crucial role in food safety by protecting consumers from food hazards. Article 2(f)[1] of the WHO's statute mandates the development, establishment, and promotion of international food standards. The organization asserts that access to sufficient, nutritious, and safe food is a fundamental human right essential for achieving the highest possible level of health.

WHO has a long-standing history of providing health risk assessment advice to the Codex Alimentarius Commission and its member states. To facilitate this, WHO collaborates with the FAO through several joint committees, including:

- **Joint Committee on Food Additives:**[2] Established in 1956, this committee evaluates the safety of food additives and is jointly managed by FAO and WHO.[3]
- **Joint FAO/WHO Meeting on Pesticide Residues:**[4] Meeting annually since 1963, this committee provides scientific assessments[5] and recommendations[6] regarding pesticide residues in food.
- **Joint FAO/WHO Expert Meeting on Pesticide Specifications:**[7] Established in 2001, this body develops globally applicable pesticide specifications through a formal evaluation process.[8]
- **Joint FAO/WHO Committee of Nutrition Experts:**[9] Formed in 1952, this committee addresses nutrition-related issues.[10]
- **Joint FAO/WHO Expert Meeting on Microbiological Risk Assessment:**[11] Initiated in 2000, this meeting responds to requests from the Codex Commission and member states for risk-based scientific advice on microbiological food safety.[12]

Additionally, the International Organization for Standardization (ISO) has developed international standards related to food safety,[13] specifically through ISO Technical Committee 34, which focuses on food products.

The International Network of Food Safety Authorities (INFOSAN) is a voluntary global network of national authorities that plays a vital role in food safety, coordinated by the Joint FAO/WHO Secretariat. Founded in 2004,[14] this network helps member states manage food safety risks and respond to food safety incidents and emergencies.[15] It promotes collaboration

1 Constitution of the World Health Organization https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf.
2 The Joint FAO/WHO Expert Committee on Food Additives (JECFA).
3 FAO. Chemical risks and JECFA. https://www.fao.org/food/food-safety-quality/scientific-advice/jecfa/en/ 12 April 13, 2023.
4 The Joint Meeting on Pesticide Residues (JMPR).
5 WHO. Joint FAO/WHO Meeting on Pesticide Residues (JMPR). https://www.who.int/groups/joint-fao-who-meeting-on-pesticide-residues-(jmpr)/about April 13, 2023.
6 WHO. Food Safety. Report by Director- General. EXECUTIVE BOARD 105th Session Provisional agenda item 3.1. EB105/10 2 December 1999. Pp 3-4 https://apps.who.int/gb/ebwha/pdf_files/EB105/ee10.pdf 13 January 2023.
7 The "Joint Meeting on Pesticide Specifications" (JMPS).
8 FAO/WHO. FAO/WHO Framework for the Provision of Scientific Advice on Food Safety and Nutrition. Rome 2007. P 15. https://www.fao.org/3/a1296e/a1296e.pdf 13 April 2023.
9 Joint. FAO/WHO Committee on Nutrition (JECN).
10 FAO/WHO. FAO/WHO. P 15.
11 The Joint FAO/WHO Expert Meetings on Microbiological Risk Assessment (JEMRA).
12 FAO. Microbiological risks and JEMRA. https://www.fao.org/food/food-safety-quality/scientific-advice/jemra/en/ 13 April 2023.
13 International Organization for Standardization, *ISO/TC 207/SC 1—Environmental management* https://www.iso.org/committee/47858.html accessed 13 April 2023.
14 FAO. *Food Safety and Quality*. https://www.fao.org/food-safety/emergencies/infosan/en/ 13 April 2023.
15 Food Safety and Zoonoses (FOS).

and joint efforts among countries to tackle challenges posed by globalization and increased trade in food and agriculture.[1,2]

The **World Organization for Animal Health** (OIE) is another key player, responsible for improving global animal health and issuing international standards for veterinary products.[3] Together, FAO, WHO, and OIE provide a One Health approach to address shared diseases affecting humans and animals.[4]

In May 2000, the 53rd World Health Assembly unanimously adopted Resolution WHA-53.15 on food safety, affirming it as a fundamental public health priority. This resolution committed WHO and its member countries to undertake multi-sectoral and multidisciplinary actions to promote food safety at all levels. It called for the expansion of WHO's responsibilities in food safety, effective use of limited resources, and the development of guidelines to improve global food safety.[5] Additionally, WHO has formulated a global strategy for food security based on recommendations from its Technical Advisory Group.[6]

Conclusion

Food safety encompasses the management of all risks—both chronic and acute—that may harm consumers, and it is integral to food security as a dimension of human security. The emergence of epidemic diseases, such as COVID-19, which studies suggest may be linked to contaminated food, underscores the critical importance of ensuring food safety.

While food safety has not been explicitly addressed in an independent legal document, various rules in international law imply governments' commitment to providing safe and healthy food. The right to healthy food is particularly significant in this context, recognized as a fundamental human right. Moreover, resolutions from the Security Council have linked epidemic diseases—often stemming from unsafe food—to issues of international peace and security.

The efforts of international organizations such as the FAO, WHO, and WTO demonstrate the global commitment to managing food safety. Additionally, the rapid pace of climate change poses significant challenges to the availability of sufficient and nutritious food worldwide. Therefore, governments have an obligation to implement measures that adapt to climate change and enhance the resilience of the food sector, as outlined in relevant climate change documents.

In conclusion, while international law does not exhibit a legal gap in the realm of food safety, there is a strong case for compiling a comprehensive document detailing governments' obligations to ensure food security and, by extension, food safety. This would further solidify the international community's commitment to safeguarding public health and promoting sustainable food systems.

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1 International Food Safety Authorities Network (INFOSAN).

2 WHO. *Food Safety*. https://www.who.int/westernpacific/about/how-we-work/programmes/food-safety 13 April 2023.

3 European Medicine Agency. World Organisation for Animal Health (OIE). https://www.ema.europa.eu/en/partners-networks/international-activities/multilateral-organisations-initiatives/world-organisation-animal-health-oie 13 April 2023.

4 WHO. WHO, FAO, and OIE call for stronger coordination in mitigating health threats. https://www.who.int/europe/news/item/23-04-2021-who-fao-and-oie-call-for-stronger-coordination-in-mitigating-health-threats 13 April 2023.

5 WHO. WHO Global Strategy for Food Safety : Safer Food for Better Health. 2002. P 14. https://apps.who.int/iris/bitstream/handle/10665/42559/9241545747.pdf 13 January 2023.

6 WHO. Draft WHO Global Strategy for Food Safety 2022-2030. Towards Stronger Food Safety Systems and Global Coorporation. 21 April 2022. P 8.

References

Books

Cheikh Mbow and Cynthia Rosenzweig, 'Food Security' in *Final Government Distribution*.

Elisabeth Caesens and Maritere Padilla Rodríguez, *Climate Change and the Right to Food* (Vol 8, Publication Series on Ecology, 2009).

George Kent, *Freedom from Want: The Human Right to Adequate Food* (Georgetown University Press 2005).

Jean Drèze and Amartya Sen, *Hunger and Public Action* (Clarendon Press 1989).

Jessica Vapnek and Melvin Spreij, *Perspectives and Guidelines on Food Legislation, with a New Model Food Law* (FAO, Rome 2005) https://www.fao.org/3/a0274e/a0274e.pdf.

Khushdeep Dharni and Sonika Sharma, *Food Safety Standards, Trade and WTO* (2008).

Lidija Knuth, *The Right to Adequate Food and Indigenous Peoples: How Can the Right to Food Benefit Indigenous Peoples?* (FAO, Rome 2009) https://www.fao.org/3/ap552e/ap552e.pdf.

Articles

Brigit Ramsingh, 'The Emergence of International Food Safety Standards and Guidelines: Understanding the Current Landscape Through a Historical Approach' (2014) 134(4) *Perspectives in Public Health*.

Dima Faour-Klingbeil and Ewen CD Todd, 'Prevention and Control of Foodborne Diseases in Middle-East North African Countries: Review of National Control Systems' (2019) *International Journal of Environmental Research and Public Health* https://www.mdpi.com/journal/ijerph accessed 17 September 2024.

Donato Gualtieri, 'Right to Food, Food Security and Food Aid Under International Law, or the Limits of a Right-Based Approach' (2013) 1(2) *Future of Food: Journal on Food, Agriculture and Society*http://thefutureoffoodjournal.com/index.php/FOFJ/article/view/207/159 accessed 12 April 2023.

Dragutin Djukic, Slavica Veskovic Moracanin, et al, 'Food Safety and Food Sanitation' (UDC 614.31) *Journal of Hygienic Engineering and Design*.

FN Damayanti and E Wahyati, 'Food Safety in the Protection of the Right to Health' (2019) *Earth and Environmental Science* 292.

Gregory D. Kearney, 'Introduction to Foodborne Illness Outbreak Investigations' (11 October 2018) *Environmental Public Health*.

Ismael Povea Garcerant, 'International Food Law and Regulation: A Review' (24 May 2017) https://www.researchgate.net/publication/317098565.

John S. Mackenzie and David W. Smith, 'COVID-19: A Novel Zoonotic Disease Caused by a Coronavirus from China: What We Know and What We Don't' (2020) *Microbiology Australia*.

Maria Manuela Camino Feltes, Adriana Pavesi Arisseto-Bragotto, et al, 'Food Quality, Food-Borne Diseases, and Food Safety in the Brazilian Food Industry' (2017) *Food Quality and Safety*, vol 1, no 1.

Mohamed Elmi, 'Food Safety' (2008) 14 *Eastern Mediterranean Health Journal* (Special Issue).

Obijiofor Aginam, 'International Law and Communicable Diseases' (February 2002) https://www.researchgate.net/publication/10913225. [In Persian]

Rolf Künnemann and Sandra Epal-Ratjen, *The Right to Food: A Resource Manual for NGOs* (DFID, 2004).

Saswati Bora, Iride Ceccacci, et al, *Food Security and Conflict* (World Development Report 2011, Agriculture and Rural Development Department, World Bank, 22 October 2010).

Treaties and Conventions

American Convention on Human Rights (adopted 22 November 1969, San José, Costa Rica).

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, New York).

Convention on the Rights of the Child https://www.unicef.org/child-rights-convention/convention-text accessed 17 September 2024.

International Covenant on Civil and Political Rights (16 December 1966) https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights accessed 17 September 2024.

International Covenant on Economic, Social and Cultural Rights (17 September 2024) https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, Geneva).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-Interna-

tional Armed Conflicts (Protocol II) (adopted 8 June 1977, Geneva).

Rome Statute of the International Criminal Court.

The General Agreement on Tariffs and Trade (GATT 1947) (17 September 2024) https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm.

Universal Declaration of Human Rights (adopted 10 December 1948) https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf.

Universal Declaration on the Eradication of Hunger and Malnutrition (World Food Conference, General Assembly resolution 3180 (XXVIII), 17 December 1973; endorsed by General Assembly resolution 3348 (XXIX), 17 December 1974).

Reports and Documents

CESCR, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' (12 May 1999) E/C.12/1999/5.

CFS, *Making a Difference in Food Security and Nutrition* (47th Session, 811- February 2021) CFS 202147//Inf.17 https://www.fao.org/3/ne740en/ne740en.pdf accessed 17 September 2024.

Commission on Human Security, *Human Security Now* (2003) https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C6907C1256D19006A9353-chs-security-may03.pdf accessed 15 December 2024.

FAO, *Climate Change: Implications for Food Safety*.

FAO, *Food Safety Risk Management: Evidence-Informed Policies and Decisions, Considering Multiple Factors* (Rome 2017).

FAO, *The Right to Food* http://www.fao.org/right-to-food/background/en/ accessed 4 July 2020.

FAO, *World Food Security: A Reappraisal of the Concepts and Approaches* (Director General's Report, Rome 1983).

FAO/WHO, *FAO/WHO Framework for the Provision of Scientific Advice on Food Safety and Nutrition*(Rome 2007) https://www.fao.org/3/a1296e/a1296e.pdf accessed 17 September 2024.

FAO/WHO, *Assuring Food Safety and Quality: Guidelines for Strengthening National Food Control Systems* (17 September 2024) http://www.fao.org/3/a-y8705e.pdf.

OECD, *The Case of the Food and Agriculture Organization of the United Nations (FAO): International Regulatory Co-Operation and International Organisations* (2016) https://www.oecd.org/gov/regulatory-policy/FAO_Full-Report.pdf.

PAHO, *Zoonoses and Communicable Diseases Common to Man and Animals* (Vol III, 3rd edn, 2003).

Report on Indicators for Promoting and Monitoring the Implementation of Human Rights(HRI/MC/2008/3).

The 2030 Agenda and the Sustainable Development Goals (17 September 2024) https://repositorio.cepal.org/bitstream/handle/1136225/40156//S1801140_en.pdf.

The Commission on Global Governance, *Our Global Neighbourhood, Chapter Three—Promoting Security* (1995) http://www.gdrc.org/u-gov/global-neighbourhood/chap3.htm.

UNDP, *Human Development Report 1994* (Oxford and New York: Oxford University Press, 1994).

UNHR, *The Right to Adequate Food: Fact Sheet No 34* (April 2010).

United Nations, A/RES/S-7/3362.

USDA, *Climate Change, Global Food Security, and the US Food System* (December 2015).

WHO, *Draft WHO Global Strategy for Food Safety 2022-2030: Towards Stronger Food Safety Systems and Global Cooperation* (21 April 2022).

WHO, *Food Safety: Report by the Director-General* (Executive Board 105th Session, Provisional Agenda Item 3.1, EB105,10/ 2 December 1999) https://apps.who.int/gb/ebwha/pdf_files/EB105/ee10.pdf.

WHO, *Novel Coronavirus (2019-nCoV): Situation Report – 22* (11 February 2020).

WHO, *The Burden of Foodborne Diseases in the WHO European Region* (2017).

WHO, *WHO Global Strategy for Food Safety: Safer Food for Better Health* (2002) https://apps.who.int/iris/bitstream/handle/106659241545747/42559/.pdf.

WHO/FAO, *Sustainable Developments Goals: Food Safety, Everyone's Business* (World Food Safety Day, 7 June 2019).

WHO/FAO/OIE, 'WHO, FAO, and OIE Call for Stronger Coordination in Mitigating Health Threats' (23 April 2021) https://www.who.int/europe/news/item/23-04-2021-who-fao-and-oie-call-for-stronger-coordination-in-mitigating-health-threats.

World Bank, *Poverty and Hunger: Issues and Options for Food Security in Developing Countries*(Washington DC 1986).

WTO/WHO, *WTO Agreements and Public Health: A Joint Study by the WHO and the WTO Secretariates* (17 September 2024) https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf.

Online Sources

'1 in 3 People Globally Do Not Have Access to Safe Drinking Water – UNICEF, WHO' (18 June 2019) https://www.who.

int/news/item/18-06-2019-1-in-3-people-globally-do-not-have-access-to-safe-drinking-water-unicef-who accessed 17 September 2024.

'An Historical Food Safety Approach for the World We Want' (Food Safety Magazine, 4 February 2020) https://www.food-safety.com/articles/6448-an-historical-food-safety-approach-for-the-world-we-want accessed 17 September 2024.

'COVID-19: Zoonotic Aspects' (Travel Medicine and Infectious Disease, 24 February 2020) https://doi.org/10.1016/j.tmaid.2020.101607 accessed 17 September 2024.

'General Assembly Adopts Resolution Addressing Global Food Crisis' (23 May 2022) https://press.un.org/en/2022/ga12421.doc.htm accessed 17 September 2024.

'Governments Step Up Action on Agriculture and Food Security at COP27' (5 December 2022) https://unfccc.int/news/governments-step-up-action-on-agriculture-and-food-security-at-cop27 accessed 17 September 2024.

'Protecting the Climate and Achieving Food Security' (16 June 2021) https://unfccc.int/news/protecting-the-climate-and-achieving-food-security accessed 17 September 2024.

'Resolution 2177 (2014) Adopted by the Security Council at Its 7268th Meeting, on 18 September 2014' https://digitallibrary.un.org/record/779813?ln=en accessed 17 September 2024.

'Solving Global Water Crisis "Moral Imperative," Access to Water Human Right, Mikhail Gorbachev Tells Sustainable Development Commission' (21 April 2005) ENV/DEV/847 https://www.un.org/press/en/2005/envdev847.doc.htm accessed 28 April 2022.

'UN Climate Change' https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/introduction accessed 9 July 2023.

'What Is the United Nations Framework Convention on Climate Change?'https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change accessed 17 September 2024.

Campden BRI (Chipping Campden) Ltd, *Comparing International Approaches to Food Safety Regulation of GM and Novel Foods* (20 April 2021, Food Standards Agency).

Constitution of the World Health Organizationhttps://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf accessed 17 September 2024.

European Medicine Agency, *World Organisation for Animal Health (OIE)*https://www.ema.europa.eu/en/partners-networks/international-activities/multilateral-organisations-initiatives/world-organisation-animal-health-oie accessed 17 September 2024.

FAO, 'Chemical Risks and JECFA' https://www.fao.org/food/food-safety-quality/scientific-advice/jecfa/en/ accessed 17 September 2024.

FAO, 'Food Safety and Quality: Codex Alimentarius' https://www.fao.org/food-safety/food-control-systems/policy-and-legal-frameworks/codex-alimentarius/en/ accessed 17 September 2024.

Hamidreza Qalamkari, 'Definitions and the New Concept of Nutrition and Food Security' *Tejarat Bertar Monthly* http://drghalamkari.ir/component/k2/item/73 accessed 17 September 2024. [In Persian]

IFPRI, 'Food Security' (24 August 2020) https://www.ifpri.org/topic/food-security accessed 17 September 2024.

Karen Rideout, 'Food Safety, Food Security and the Public Health Inspector' (CIPHI National Conference, Canada, 15 July 2014).

UN, 'Food' (24 August 2020) https://www.un.org/en/sections/issues-depth/food/index.html.

WTO, 'Food Security' (17 September 2024) https://www.wto.org/english/tratop_e/agric_e/food_security_e.htm.

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Nationality and Citizenship in the Laws of Nigeria: Acquisition and Loss of Nigerian Citizenship with a Comparative Analysis of the Laws of Other Nations

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ABSTRACT

In the international arena, it is uncommon to find a nation with a comprehensive nationality law and citizenship policy, as complexities arise frequently across various contexts. This article seeks to explore some of these challenges, which are not confined to individual nations but are indeed global in nature. By examining the laws and policies regarding the acquisition and loss of citizenship in six randomly selected countries, this study aims to deepen the understanding of citizenship from domestic and international perspectives, clarifying states' positions on these pertinent issues. Through its analysis, the article highlights significant nuances within a broad legal framework that influences individuals' rights and obligations, irrespective of their nationality. It aspires to contribute to the ongoing discourse surrounding citizenship laws by thoroughly investigating these topics. The article is structured into sections, detailing the system of nationality law in Nigeria, along with a discussion of the relevant provisions in the selected nations. It addresses the matter of dual citizenship before examining laws concerning the loss of citizenship in other countries. Additionally, it considers the issue of statelessness in Nigeria and the measures taken to combat it. The article concludes with robust recommendations for nations to better uphold their citizens' inherent rightsl.

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Introduction

Nigeria is one of the few countries in the world that establishes an explicitly ethnic basis for its citizenship law.[1] These unique citizenship laws strongly emphasize belonging to a Nigerian Indigenous community as the primary determinant of citizenship status. Governed by the Nigerian Constitution and the Nigerian Citizenship Act, these laws outline the conditions and circumstances surrounding the acquisition and loss of citizenship. While the Constitution provides fundamental provisions on citizenship and nationality, the Citizenship Act delves into detailed regulations regarding the modes of acquiring and losing Nigerian citizenship. Chapter IV of the Constitution specifically addresses the various ways individuals can become Nigerian citizens, including by birth, registration, or naturalization, as well as the rights, privileges, and responsibilities associated with Nigerian citizenship. In contrast, the Citizenship Act offers comprehensive guidelines on citizenship status for individuals born in Nigeria, born outside Nigeria to Nigerian parents, or those seeking naturalization after residing in Nigeria for a specified period. Both legal frameworks address matters such as citizens' rights and duties, dual citizenship, and the processes involved in acquiring or losing Nigerian citizenship.

1. The Nigerian Nationality System

The current Nigerian nationality system is a unique blend of *jus sanguinis* and *jus soli* principles, differing from its previous approach to nationality before British colonization.[2] This system allows individuals to acquire citizenship through descent or birth within the country. This approach sets Nigeria apart from other nations while sharing similarities with certain aspects of global citizenship laws. We will compare Nigeria's nationality laws with those of other countries, focusing on key areas such as jus sanguinis, jus soli, dual nationality, naturalization, loss of citizenship, and statelessness, to understand how Nigeria's approach aligns with international norms.

Like many countries, Nigeria grants nationality based on descent, meaning that a child born

1 Browen Manby and Momoh Solomon, *Report on Citizenship Law: Nigeria* (European University Institute, Italy, July 2020) 1.

2 For a detailed history of citizenship law in Nigeria during the colonial period and the transition to independence, see Laurie Fransman, Adrian Berry, and Alison Harvey, *Fransman's British Nationality Law* (3rd edn, Bloomsbury Professional 2011).

to Nigerian parents is recognized as a citizen, regardless of the place of birth. This aligns with the laws of countries like Iran,[1] Germany,[2] Greece,[3] and Italy,[4] where citizenship is primarily inherited from parents. Additionally, Nigeria practices jus soli under specific circumstances, similar to Canada,[5] granting citizenship to individuals born on Nigerian soil, subject to certain exceptions and conditions.

While a country like Germany strictly adheres to the jus sanguinis principle, Nigeria integrates elements of both jus sanguinis and jus soli, with birth within the territory playing a role in acquiring citizenship. In contrast to Nigeria's stance on dual nationality, countries like Canada explicitly permit and even encourage dual citizenship with specific restrictions, while others, like Iran, do not support it.

The process for foreign nationals to acquire citizenship through naturalization also varies across countries. Nigeria outlines specific residency requirements and conditions that differ from those of countries like the United States or Canada, and it has links with countries like Iraq, Japan, and Greece.

Procedures for the loss of citizenship differ among nations, with Nigeria having provisions for loss of citizenship under certain circumstances. While fraud may not be grounds for deprivation of citizenship in countries like France, it is significant in Nigeria. Notably, Nigeria has a lower incidence of statelessness compared to countries like Iraq and Syria, due to its efforts to assist individuals in acquiring Nigerian citizenship and actively engage in initiatives aimed at eliminating statelessness. As a signatory to various conventions, Nigeria plays a role in addressing statelessness within its borders, which we will explore further.

2. Outline of Other Countries' Provisions on Acquisition of Citizenship

Iran, Iraq, Canada, Greece, Germany, and Italy each have unique approaches to citizenship acquisition that reflect their historical, cultural, and social contexts, yet there are commonalities among them. In this section, we will examine the citizenship acquisition provisions in these countries to identify common and recurring issues.

Iran emphasizes inclusivity by considering every resident a citizen, fostering a sense of community. An individual's foreign nationality is recognized if their nationality documents are not challenged by the Iranian government,[6] as stated in a sub-paragraph of Article 976 of the Civil Code. Several Iranian legal scholars argue that this provision implies the application of the pure jus soli principle.[7] However, such an interpretation is misleading, as it would render the rest of the nationality articles, particularly Articles 979, 980, and 983, meaningless. Reading this sub-paragraph in conjunction with other relevant articles indicates that it serves as a legal presumption, confirming the usual existing link between nationality and residency. In other

1 Civil Code of the Islamic Republic of Iran, 23 May 1928, Art. 976(2).
2 German Nationality Act 2021, s. 3(1).
3 Greek Citizenship Code, ch. A, De jure, art. 1.
4 Italian Citizenship Law No. 91/92, Art. 1.
5 Canada Citizenship Act RSC 1985, s. 3(1).
6 Civil Code of the Islamic Republic of Iran, 23 May 1928, s. 976(1).
7 Seyed Nasrolah Ebrahimi, *International Private Law* (Semat Publication, Tehran 2004) 110.

words, while drafting the nationality law, it was deemed appropriate to consider all individuals residing in the country as Iranians unless proven otherwise.[1] However, this presumption should only apply in exceptional cases today, as invoking this paragraph could lead to everyone being entitled to nationality by mere residence in the country. The country's modes of citizenship acquisition, including naturalization, foundling status, and registration, provide various pathways for individuals to become citizens, accommodating different circumstances.

In contrast, Iraq's focus on birthright citizenship and limited exceptions highlights a more rigid approach to citizenship acquisition. By requiring a connection to at least one Iraqi parent, the country aims to preserve its national identity and cultural heritage. Iraq's Nationality Law is based on the jus sanguinis doctrine, with nationality passed from parent to child. However, a child born in Iraq does not automatically acquire Iraqi nationality. There is also no provision for acquiring nationality through birth in the territory for a child who would otherwise be stateless (e.g., born to stateless parents or to parents who cannot confer nationality). Thus, the European Network on Statelessness and the Institute on Statelessness and Inclusion note that "statelessness is an intergenerational issue in Iraq."[2] Iraq's Nationality Law clearly outlines the conditions for acquiring Iraqi nationality. Article 3 states that a child born inside or outside of Iraq to an Iraqi father or mother, or a child found in Iraq with unknown parentage, shall be considered to have been born therein unless proven otherwise.[3]

Canada's approach to citizenship acquisition is characterized by flexibility, with both natural-born and naturalization pathways allowing a diverse range of individuals to become citizens.[4] This flexibility was particularly notable when Chrétien's government made several administrative changes to the naturalization process in the 1990s.[5] As Richet (2007) indicates, the necessity of an interview with a citizenship judge was called into question due to costs and delays in processing requests. In 1995, the Liberals introduced a standard 20-question multiple-choice citizenship test, along with a revised guidebook, *A Look at Canada*. To be invited to take the test, candidates had to be permanent residents who had lived in Canada for at least three years. They were required to study the citizenship guide, pass the test (correctly answering 12 of 20 questions), and swear allegiance to Canada and the Queen during a citizenship ceremony. Certain questions about voting rights and eligibility for public office had to be answered correctly (Citizenship and Immigration Canada, 2010b). Only individuals ages 17 to 59 were required to take the test. Those who did not pass were interviewed by a citizenship judge, who would then decide on the candidate's suitability for Canadian citizenship (Chapnick, 2011). With a pass rate of over 90 percent, the Canadian citizenship test was primarily symbolic. Requirements such as language proficiency and knowledge of Canada promote social cohesion and integration of new citizens. The country's merit-based criteria for naturalization align with its values of diversity and inclusion.[6]

1 Mahmood Saljouqi, *The Rules of International Private Law* (Vol. 4, Mizan, Tehran 2006) 86.
2 Stateless Journeys, *Statelessness in Iraq* (Country Position Paper, November 2019).
3 Iraqi Nationality Law [Iraq], s. 4, Law 26 of 2006, 7 March 2006.
4 Margaret Young, *Canadian Citizenship Act and Current Issues* (Law and Government Division, 1998).
5 To fully understand the historical background of citizenship and its provisions in Canada, see Elke Winter, *Report on Citizenship Law: Canada, Historical Background* (European University Institute, Florence 2015) 3-9.
6 Ibid, 9.

As for Greece, until 2010, Greek citizenship law provided five ways to acquire Greek citizenship (Greek Citizenship Code, Chapter A): *by birth* from Greek parents (Article 1, paragraph 1), or by birth on Greek soil if the child has no right to acquire any other foreign citizenship or their citizenship is unknown at the time of birth (Article 1, paragraph 2); *by recognition* of fatherhood, if the child is a minor at the time of recognition (Article 2); *by adoption* (Article 3); *by enlistment in the armed forces*[1] (Article 4); and by *naturalization* (Article 5).

The legislative reform of 2010 brought significant changes to the acquisition of citizenship by birth and naturalization. While it left untouched the provisions regulating the other three methods of acquiring citizenship—recognition, adoption, and enlistment in the armed forces—it introduced a new pathway for citizenship acquisition *by declaration*. The second paragraph of Article 1 states that "*Greek Citizenship is acquired upon the birth of a child in Greece if: a) one of the parents of the child was born in Greece and has been permanently domiciled in the country since his or her birth...*" This new provision represents a major innovation in Greek citizenship law by establishing the principle of double jus soli, which provides for the automatic acquisition of citizenship by foreign citizens belonging to the so-called "third generation." As noted in the preamble: "Given the fact that these persons have strong links to our country and that their parents were born in Greece and have integrated into Greek society, there is no doubt that they too will integrate."

The rule of automatic citizenship acquisition for the "third generation" has faced criticism as "illiberal" from conservative (Nea Dimokratia) and far-right (LA.O.S.) members of parliament, arguing that it grants Greek citizenship against an individual's will: *malgré lui*.[2] The acquisition of Greek citizenship "*by declaration and application*" is the most significant innovation introduced by the new law. Greek citizenship is granted to the children of immigrants born in Greece—provided that both parents have lawfully and permanently resided in Greece for at least five continuous years (Article 1A, paragraph 1). A child born before the completion of this five-year lawful and permanent residence acquires citizenship through their parents' declaration only after the fifth year. Parents must submit the declaration within three years of their child's birth. If no declaration is submitted within these three years, the right to submit a declaration expires. If the child wishes to acquire citizenship afterward, they may do so using other relevant provisions.[3]

Germany's adherence to jus sanguinis prioritizes ancestral ties in citizenship acquisition. Until January 1, 2000, one of the predominant features of German nationality law and practice—although not explicitly stated in the 1913 law—was that the acquisition of German nationality through naturalization was an exception rather than the norm. One of the main innovations of the 1999/2000 reform was the introduction of the ius soli principle in paragraph 4 of the law.

1 With special reference to foreign nationals of Greek origin that have been admitted to military academies or enlisted in the armed forces as volunteers.

2 The interest of these two parties in the free development of children's personalities would be genuine only if their cautiousness towards the acquisition of citizenship by immigrants' grandchildren also applies to the case of Greek citizens' grandchildren or children who acquire Greek citizenship or are given their names without being asked. With that in mind, it becomes evident that citizenship by birth does inescapably involve a certain element of constraint. But this constraint is rather unimportant given the fact that the person concerned is a minor. The same rationale applies when it comes to names.

3 For a further detailed explanation of the acquisition of Greek citizenship, see Dimitris Christopoulos, *Country Report: Greece* (European University Institute, Florence 2013).

Children of foreign parents acquire German citizenship on the condition that one parent has had lawful habitual residence in Germany for eight years and possesses a secure residence permit. Since January 2004, the threshold for acquisition by ius soli has been raised to require a settlement permit or, in the case of EU citizens, the right to free movement. Since the settlement permit necessitates a higher level of German language proficiency than the unlimited residence permit, which had been sufficient for naturalization before 2004, *ius soli* acquisition now requires a high degree of integration on the part of the foreign parent.

Another significant feature has been the facilitation of naturalization. A foreigner is now entitled to naturalization after a habitual lawful residence of eight years, reduced from the previous fifteen years. Additionally, naturalization is contingent upon several requirements, including a declaration of loyalty to the free and democratic constitutional order, possession of a regular residence permit or freedom of movement as an EU citizen, or an equally privileged right under the EEA Agreement. The foreigner must also demonstrate the ability to sustain themselves without recourse to social welfare or similar benefits (such as unemployment assistance), maintain a clean criminal record, and renounce or lose their previous nationality. The country faces challenges in balancing the preservation of German identity with the integration of diverse populations. Germany's citizenship laws are influenced by historical factors and ongoing efforts to address nationality and identity issues.[1]

In Italy, as in all modern legal systems, the primary mode of citizenship acquisition is through maternal or paternal *ius sanguinis*. Indeed, *ius sanguinis* is the cornerstone of the 1992 Citizenship Act,[2] which remains the main piece of legislation on the subject. Italian citizens at birth include those born to an Italian citizen or those born in Italy to unknown or stateless parents.

A distinctive feature of Italian legislation is that it imposes no limits on the transfer of citizenship by descent, even for individuals who migrated in the distant past. To maintain Italian citizenship, the 1992 Act does not require residence in the country for the descendants of Italians unless they have lost and not reacquired Italian citizenship for any reason. The number of 'latent Italians' who have sought recognition of their citizenship by applying for Italian passports abroad is substantial. According to data from the Ministry of Foreign Affairs, from 1998 to 2011, nearly 1 million passports were issued to Italians residing abroad (Tintori, 2012). This situation arises from the fact that individuals who have retained their status as Italian citizens applied for its recognition and obtained it. This development is also a result of the 1992 Act and its official acceptance of dual nationality; acquiring another nationality does not entail the loss of Italian citizenship.

3. Acquisition of Nigerian Citizenship (Current Citizenship Regime)

The citizenship provisions of the 1979 Constitution were largely repeated in the 1999 Constitution, which is still in force today. The Citizenship Acts of 1960 and 1961, repealed in 1974, have never been replaced, and the only law governing citizenship is the 1999 Constitution.[3] There are three

1 For a further detailed explanation of the acquisition of German citizenship, see Anuscheh Farahat and Kay Hailbronner, *Report on Citizenship Law: Germany* (European University Institute, Italy 2020).

2 Act No. 91 of 5 February 1992.

3 Manby and Solomon, Op. Cit. (2020) 1.

ways of acquiring Nigerian citizenship as outlined in the Constitution: by Birth, by Registration, and by Naturalization.

3.1. Birthright Citizenship

As stipulated in Section 25, [1] "The following persons are citizens of Nigeria by birth—namely:

a) every person born in Nigeria before the date of independence, either of whose parents or any of whose grandparents belong or belonged to a community Indigenous to Nigeria; provided that a person shall not become a citizen of Nigeria under this section if neither his parents nor his grandparents were born in Nigeria.
b) every person born in Nigeria after the date of independence, either of whose parents or any of whose grandparents is a citizen of Nigeria; and
c) every person born outside Nigeria, either of whose parents is a citizen of Nigeria."

From this section, it follows that a person is a Nigerian citizen by birth if: (i) both parents are Nigerians, (ii) either parent is Nigerian, or (iii) any grandparent is Nigerian. This was affirmed in the case of *Shugaba v. Minister of Internal Affairs*,[2] where Adefila J. held that the deportation of the applicant was unconstitutional. Once a person proves Nigerian citizenship under the Constitution, they cannot be deported from Nigeria.

3.2. Registration

Registration methods include the marriage and non-marriage form.

3.2.1. Marriage

Nigeria's rules on acquisition through marriage discriminate based on the sex of the spouse. Section 26 of the Constitution allows a woman married to a Nigerian man to acquire citizenship by registration, but not a man married to a Nigerian woman.[3] Although this process is easier than naturalization, the acquisition of citizenship by a woman based on marriage is discretionary. The applicant must satisfy the president of her good character, show the intention to remain domiciled in Nigeria, and take the oath of allegiance.[4] A foreign husband of a Nigerian woman can only acquire citizenship through naturalization under the same terms as any other foreigner.

3.2.2. Born Abroad with a Nigerian Grandparent

Section 26 also allows for individuals born outside Nigeria, with at least one grandparent who is a Nigerian citizen, to acquire citizenship by registration. This provision opens the possibility of citizenship acquisition through a grandparent for those born outside Nigeria, whereas a grandchild of a Nigerian citizen born in the territory automatically acquires citizenship at birth (Section 25(1)(b)). The conditions for this registration are the same as those for the wife of a Nigerian citizen: good character, intention to be domiciled in Nigeria, and oath of allegiance.

3.3. Naturalization

Nigeria's laws and practices regarding the acquisition of citizenship through naturalization based on long residence are quite restrictive. In addition to requiring a residence period of 15 years,

1 Constitution of the Federal Republic of Nigeria (CFRN), 1999, Cap. C23; Laws of the Federation of Nigeria (LFN), 2004, S. 25.
2 *Shugaba v. Minister of Internal Affairs* (1981) INCLR 459.; *Ahmed v. Minister of Internal Affairs* (2002) 15 NWLR Pt 790, 239 CA.
3 CFRN (1999) S. 26(2)(a).
4 Ibid, S. 26(1).

which is lengthy by international standards, the other conditions are also challenging to fulfill. Section 27(2) of the Constitution states that:

"No person shall be qualified to apply for the grant of a certificate of naturalization unless he satisfies the President that—

(a) He is a person of full age and capacity;
(b) He is a person of good character;
(c) He has shown a clear intention to be domiciled in Nigeria;
(d) He is deemed acceptable to the local community where he resides, and has assimilated into the lifestyle of Nigerians in that part of the Federation;
(e) He has made or is capable of making useful contributions to Nigeria's advancement, progress, and well-being;
(f) He has taken the Oath of Allegiance prescribed in the Seventh Schedule to this Constitution; and
(g) He has, immediately preceding the date of his application, either—

i. resided in Nigeria for a continuous period of fifteen years, or
ii. resided in Nigeria continuously for twelve months, and during the preceding twenty years has resided in Nigeria for periods totaling not less than fifteen years."

An application for naturalization is submitted to the Ministry of the Interior, and the dossier is reviewed by various state agencies, including the State Security Service, the Immigration Service, the police, the governor of the state, the local government area chair, and others. Ultimately, the dossier is passed to the Federal Executive Council[1] for review and recommendation, with the final decision made by the president. Naturalization is not automatic for minor children of successful applicants, and a separate application must be made upon reaching majority.[2]

3.4. The Issue of Dual Citizenship in Nigerian Law

In Nigeria, citizenship legislation explicitly opposes dual nationality; thus, acquiring a foreign nationality results in the automatic loss of Nigerian citizenship. Under the 1979 Constitution, any Nigerian citizen who acquired the citizenship of another country automatically forfeited their Nigerian citizenship unless they were a citizen by birth and renounced their other citizenship by the age of twenty-one or within one year of the 1979 Constitution coming into force.[3]

However, Section 28[4] states that a person will renounce their Nigerian citizenship if they acquire or retain the citizenship of a country other than Nigeria, of which they are not a citizen by birth. Consequently, a Nigerian citizen by birth can obtain the citizenship of another nation without losing their Nigerian citizenship. Thus, the 1999 Constitution implies that dual citizenship may be permitted.

1 The Federal Executive Council, also known as cabinet members, is a branch of the Executive arm of Government, comprising the President, the Vice-President, the Secretary of the Government of the Federation, the Head of Service, and the Ministers. The Council members advise the Presidency and decide the executive level. See the *Nigeria Government Website* accessed 14 May 2020 https://nigeria.gov.ng/members-of-the-federal-executive-council/.

2 Confirmed by Nigerian National Immigration Service, Abuja, July 2014; see Bronwen Manby, 'Migration, Nationality and Statelessness in West Africa' (UNHCR and IOM, 2015) 39-40.

3 K.M. Mowoe, *Constitutional Law in Nigeria* (Malthouse Press Limited, Lagos 2008) 263.

4 CFRN, 1999, Cap. C23 LFN 2004.

In the case of *Willie Ogbeide v. Arigbe Osula*,[1] one issue before the court was whether a citizen of Nigeria by birth would lose their citizenship upon acquiring the citizenship of another country. Justice Adeniyi noted:

> *"A citizen of this country by birth never loses his citizenship even when he holds dual citizenship of another country and cannot be disqualified from contesting election into the House of Representatives solely for holding such dual citizenship. The lower tribunal, therefore, misled itself in that regard, and the answer to issue No. 4 is that Section 66(1) does not prohibit Nigerian citizens by birth from holding the citizenship of another country and contesting election for a seat in the National Assembly."*

Thus, the Constitution, and consequently Nigerian law, does not permit dual citizenship for foreigners who are not citizens of another country by birth. Any registration or naturalization of a foreign citizen is subject to the effective renunciation of citizenship or nationality of another country within twelve months of registration or naturalization.[2] According to Malemi, the Nigerian Constitution allows a foreigner who is a citizen of another nation by birth to also be a citizen of Nigeria by registration or naturalization. Therefore, Nigerian law does not authorize dual citizenship for foreigners who are not naturalized citizens of another nation.

4. Outline of other Countries' Provisions on Loss of Citizenship

In other countries, the methods by which citizens lose their citizenship vary significantly:

4.1. Citizenship Laws in the Islamic Republic of Iran

In the Islamic Republic of Iran, the renunciation of nationality is subject to several conditions.[3] Although the age of majority in Iran is under 18,[4] the minimum age for renunciation of citizenship is set at 25. Under Article 13 of the Citizenship Act of 1929, the legal age for renouncing Iranian citizenship was 18,[5] but this was deemed insufficient by the new legislature,[6] influenced partly by military service requirements.[7]

The second requirement for a renunciation application is the permission of the Council of Ministers, which is the sole authorized body for this matter. No other authority can interfere with its decisions. However, the 1967 Cabinet Resolution allows the Ministry of Foreign Affairs to review documents and decide on applications.[8] This decision is discretionary, meaning the authorized body can reject an application.[9]

The third requirement is that applicants must have performed or completed military service,

1 *Willie Ogbeide v. ArigbeOsula* (2004) 12 NWLR Pt 886, 138, per Adeniji J.C.A (pp 50-51) paragraphs a-d.
2 Ibid, S. 28(2).
3 Civil Code of the Islamic Republic of Iran, 23 May 1928, Art. 988.
4 Behshid Arefnia, *International Private Law*, 5th ed (Aqiq Publication, Tehran 1995) 110.
5 Mohamad Nasiri, *International Private Law*, 1st ed (Agah Publication, Tehran 1993) 76.
6 Behshid Arfania, *International Private Law*, 5th. Ed, (Tehran: *Aqiq* publication, 1995), page 110.
7 Mahmoud Saljooghi, *The Rules of International Private Law*, 1st ed (Mizan Publication, Tehran 2001) 95.
8 Arefnia, Op. Cit., (1995) 110.
9 Seyed Mohsen Sheykholeslami, *International Private Law*, 1st ed (2004) 64.

as stipulated in Paragraph 4 of Article 988 of the Civil Code. Women and holders of exemption cards are exempt from this condition.[1]

Additionally, a person applying for renunciation of citizenship must relinquish all rights to immovable property in Iran or any rights they may inherit from an Iranian national within one year of renunciation. This requirement is particularly interesting, as it mandates that individuals renouncing Iranian nationality surrender rights even to assets legally permitted for foreign ownership. It has been argued that a person uninterested in their homeland is more foreign to a country than a foreigner.[2]

4.2. Citizenship Laws in Iraq

In Iraq, according to Article 11,[3] an Iraqi national who voluntarily acquires a foreign nationality loses their Iraqi nationality. However, if they return to Iraq legally and reside there for one year, they can apply to restore their Iraqi nationality.

Under Article 12,[4] if an alien woman marries an Iraqi national, she acquires Iraqi nationality upon ministerial approval. She can renounce this nationality within three years of her husband's death, divorce, or separation. If the foreign woman is not of Arab nationality, she can only acquire her Iraqi husband's nationality after three years of marriage and residing in Iraq during that time.

If an Iraqi woman marries a foreigner who later acquires a foreign nationality, she loses her Iraqi nationality if she voluntarily acquires her husband's nationality. However, she can restore her Iraqi nationality if her husband dies, they divorce, or the marriage dissolves. A foreign woman married to an Iraqi national can only acquire Iraqi nationality through her husband.

Article 13[5] states that if an alien acquires Iraqi nationality, their children also become Iraqi nationals. However, if an Iraqi national loses their nationality, their children under the age of majority will also lose it but can apply to restore it within a year of reaching majority while residing in Iraq. Children of Iraqi nationals who lost their nationality under specific laws are not eligible for this provision.

Article 18[6] allows the Minister to withdraw Iraqi nationality from an alien who has acquired it if they return to their original nationality while abroad. Article 19[7] permits withdrawal if the person engages in actions deemed dangerous to the state's security. Article 20[8] outlines cases where the Minister may withdraw Iraqi nationality from an Iraqi national, including joining foreign military service without permission, working for a foreign government or organization, or joining a group abroad aimed at undermining the state's social and economic system. Finally, Article 21[9] stipulates that an Iraqi who loses their nationality remains subject to duties and obligations incurred before losing it.

1 Javad Ameri, *International Private Law*, 2nd ed (Agah Publication, Tehran 1983) 63.
2 Sheykholeslami, Op. Cit., (2004) 63.
3 Law No. (46) of 1963 - Iraqi Nationality, S. 11.
4 Ibid, S. 12.
5 Ibid, S. 13(2).
6 Ibid, S. 18.
7 Ibid, S. 19.
8 Ibid, S. 20.
9 Ibid, S. 21.

4.3. Citizenship Laws in Canada

In Canada, the current Citizenship Act contains provisions similar to those originally proposed in Bill C-425. The fast-tracking of citizenship acquisition for members of the Canadian Armed Forces has received little public scrutiny.[1] However, the revocation of Canadian citizenship is a highly contentious issue. Specifically, the Minister's office can now revoke the citizenship of dual citizens engaged in actions contrary to Canada's national interests (e.g., high treason, terrorism, espionage) or if they are charged outside Canada with an offense that would be considered serious if committed within Canada.

This provision disproportionately targets dual citizens, including those born on Canadian soil, and poses a threat of banishment and exile. This distinction suggests that trying someone for treason implies, "You have turned your back on your country," while revoking citizenship suggests, "This is not your country."[2] While single-citizenship Canadians could only be tried for the former, dual-citizenship Canadians face the latter threat, highlighting the contested belonging of dual citizens.

According to Macklin (2014: 1), this creates "an unconstitutional regime that violates multiple sections of the Canadian Charter of Rights and Freedoms." The Canadian Bar Association (CBA) notes that the current legislation creates four classes of citizens:

1. **Canadian-born citizens without another nationality**: These 'true' citizens have secure status, with no proposed mechanism for revoking their citizenship, even for serious crimes.
2. **Naturalized citizens without another nationality**: These citizens risk losing their citizenship only if it was obtained through misrepresentation.
3. **Canadian-born citizens with another nationality**: Apart from misrepresentation, they are subject to the full range of revocation provisions.
4. **Naturalized citizens with another nationality**: These 'third-class' citizens face the full range of retrospective revocation provisions. (Canadian Bar Association, 2014: 19).

At a symbolic level, the provision questions the authenticity and loyalty of all dual nationals. It does not only target individuals; depending on the citizenship laws of a person's country of ancestry, entire ethnic or national communities may be subjected to these provisions, resulting in differential treatment based on ethnicity or national origin, which the CBA deemed unconstitutional (2014: 19).

In public discourse, the citizenship revocation provision is often associated with 'radicals,' 'terrorists,' and 'jihadists,' particularly those identified as dual Canadians of Muslim, Arab, or Middle Eastern origin (Winter and Presivic, 2015).

The constitutionality of the new provision has been challenged in court. In June 2014,

1 Only very few individuals would be eligible. One must be a Canadian citizen to join the armed forces, although permanent residents can become reservists. However, permanent residents can join the regular forces in exceptional circumstances when the military has a need for their skills and the position cannot be filled by a Canadian citizen (Gloria Elayadathusseril. (2011). *A career with the Canadian Forces*. Canadian Immigrant. Retrievable from http://canadianimmigrant.ca/featured/a-career-with-the-canadian-forces) A laid-off British fighter pilot might immigrate to Canada and have his citizenship application fast-tracked as his/her qualification would be greatly sought after by the Canadian Armed Forces.

2 Elke Winter, *Report on Citizenship Law: Canada* (European University Institute, December 2015) 28.

lawyer Rocco Galati sued the federal government over the citizenship revocation provision of Bill C-24, focusing on its impact on Canadian-born citizens.[1] On January 22, 2015, federal court judge Donald J. Rennie rejected Galati's challenge, ruling that citizenship is not an inalienable right.[2] Galati has appealed this decision.[3]

In August 2014, the Canadian Association of Refugee Lawyers and the British Columbia Civil Liberties Association launched a constitutional challenge, arguing that the Act creates second-class citizenship. Despite these challenges, the law took effect on May 29, 2015, allowing the government to revoke the citizenship of dual citizens engaged in actions contrary to Canada's national interests. Hiva Alizadeh, a dual citizen of Canada and Iran serving a prison sentence for terrorist offenses, became the first individual threatened with revocation of Canadian citizenship under this law (Bell, 2015; White, 2015). As of the latest updates, Saad Khalid, imprisoned for his involvement in the Toronto 18 plot, is still contesting the revocation of his citizenship. Although the incoming Trudeau administration promised to repeal the law, it may be too late for those who have already lost their Canadian citizenship, such as Toronto leader Zakaria Amar.

4.4. Citizenship Laws in Greece

In Greece, the legal framework outlines specific circumstances under which an individual may lose their Greek citizenship. **Article 16**[4] addresses situations where acquiring foreign citizenship or holding a position in a foreign state's public sector can lead to the loss of Greek citizenship. This provision reflects the principle of loyalty to the Greek state and aims to prevent potential conflicts of interest.

Article 17[5] focuses on cases where Greek citizenship can be revoked if an individual's actions are deemed to be against the interests of Greece while they are in a foreign country. This provision underscores the importance of upholding Greece's reputation and safeguarding its national interests, even when individuals are abroad.

Article 18[6] provides a mechanism for individuals to voluntarily renounce their Greek citizenship through a written declaration submitted to the Greek Consul abroad. This option allows individuals to make a conscious decision to relinquish their citizenship for personal or practical reasons, emphasizing individual autonomy in matters of nationality.

Regarding children of foreign nationals who acquired Greek citizenship before reaching adulthood, **Article 19**[7] allows them to renounce their citizenship within a specified timeframe by submitting a declaration to the relevant authorities. This provision recognizes the unique circumstances of individuals who may have acquired citizenship involuntarily due to their parents' status, providing them with a pathway to make their own choices regarding nationality.

In cases where a Greek citizen is adopted by a foreign national before reaching adulthood,

1 See *Galati v Canada (Minister of Citizenship & Immigration)*, Legal Challenge T-1474-14 (2014).
2 See *Galati v Canada (Governor General)*, Court Decision 2015 FC 91 (2015).
3 See *Rocco Galati et al v His Excellency the Right Honourable Governor General*, Appeal Court File No A-52-15 (2015).
4 *Greek Citizenship Code*, Chapter B, Art 16.
5 Ibid, art. 17.
6 Ibid, art. 18.
7 Ibid, art. 19.

Article 20[1] permits them to renounce their Greek citizenship if they assume the adoptee's citizenship with the Minister of the Interior's approval. This provision acknowledges the complexities that may arise from international adoptions and ensures that individuals have a clear process for managing their citizenship status in such situations.

Finally, **Article 21**[2] addresses scenarios where a foreign national acquired Greek citizenship through marriage and wishes to renounce it while maintaining their original citizenship. By declaring their intention to the appropriate authorities, individuals can navigate the implications of their marital status on their citizenship rights, highlighting the intersection of personal relationships and legal status in matters of nationality.

4.5. Citizenship Laws in Germany

In Germany, the latest amendment to the nationality law has enhanced the acceptance of dual nationality.[3] However, elements exist that seek to limit the effects of dual nationality in the long run. The 2000 reform abolished the national clause (*Inlandsklausel*), meaning that since January 1, 2000, acquiring a foreign nationality based on an application leads to the automatic loss of German nationality, even if the individual retains domicile in Germany.

Further, the automatic loss of German nationality also occurs from voluntary entry into a foreign army without permission from the German Ministry of Defence if the individual possesses the nationality of that foreign state in addition to German nationality. The modes of losing German nationality were largely unchanged by the 1999/2000 reform; loss can occur through a request for release from citizenship when applying for a foreign nationality, voluntary renunciation by a dual national, or through adoption by a foreign national, if the foreign nationality is thereby acquired.

The 2009 reform introduced qualifications regarding withdrawal and loss of nationality, particularly affecting children. According to Section 17 of the Nationality Act, children may only lose their German nationality up to the age of five. The amendment also clarified that naturalization may only be withdrawn based on illegal acquisition, such as deceit or corruption, and only five years after completing the naturalization procedure. Despite these reforms, the general modes of losing German nationality have largely remained unchanged.

4.6. Citizenship Laws in Italy

In Italy, the legal framework governing citizenship reflects a comprehensive approach to the loss of citizenship.[4] Article 11 stipulates that an Italian citizen who holds or acquires foreign citizenship retains their Italian citizenship but has the option to renounce the foreign citizenship while residing abroad. This underscores the recognition of dual citizenship and individual choice regarding citizenship status.

Article 12[5] outlines that an Italian citizen will lose their citizenship if they accept public employment or military service from a foreign state and fail to comply with a request from the

1 Ibid, art. 20.
2 Ibid, art. 21.
3 For clarity, see Farahat and Hailbronner, Op. Cit., (2020) 17-22.
4 *Italian Citizenship Code*, Law No 91/92 (1992) arts. 11 and 12.
5 Ibid, art. 12(2).

Italian Government to renounce such roles within a specified period. This provision reflects the state's interest in maintaining loyalty and preventing conflicts of interest.

Furthermore, during a war with a foreign state, an Italian citizen who accepts public employment or fails to renounce such roles will lose their citizenship upon the cessation of war. The Italian nationality system emphasizes the balance between individual rights and state interests regarding citizenship.

Now, let's examine the provisions in Nigeria regarding the loss of citizenship:

5. Loss of Citizenship in Nigeria

The Nigerian nationality legislation outlines two ways in which a citizen can lose their citizenship: voluntary and involuntary. Let's explore each of these in more detail.

5.1. Renunciation of Citizenship in Nigeria

Renunciation,[1] as a voluntary mode of losing Nigerian citizenship, is provided in the Citizenship Act as follows: Any person of full age and capacity[2] who is a citizen of Nigeria and is also a citizen of another country[3] may renounce their Nigerian citizenship through a declaration made in the prescribed manner.[4] Such a declaration is ineffective unless registered. The President must register this declaration, and upon registration, the declarant ceases to be a citizen of Nigeria.[5] However, the President has the discretion to withhold registration of a declaration made during a war in which Nigeria is engaged or if it is deemed contrary to public policy.[6]

In Nigerian law, marriage does not affect citizenship or nationality. Therefore, a married woman is competent to make a declaration of renunciation and is regarded as of full age[7] for this purpose. Additionally, the renunciation of citizenship does not absolve an individual from liability for any offenses committed before the registration of their declaration.[8]

5.2. Deprivation of Citizenship

The involuntary mode of losing citizenship, known as deprivation, is at the discretion of the President, who may by order deprive a person of their citizenship.[9] Notably, there is an absence of a quasi-judicial inquiry in cases of intended withdrawal of citizenship. The citizenship of the wife or children of a person against whom an order for deprivation has been made remains unaffected. The President lacks the power to deprive a wife or child of citizenship solely because the husband or father has been deprived.

The deprivation of citizenship does not affect an individual's liability for offenses committed before the order of deprivation.

5.2.1. Grounds for Deprivation

The Nigerian Citizenship Act provides several grounds for deprivation of citizenship applicable to different categories of citizens, aligning with the legislation's aim to minimize dual citizenship.

1 CFRN, 1999, Cap. C. 23; LFN, 2004, S. 29.
2 For definition see, *Nigerian Citizenship Act 1960*, s 2(3) and (4).
3 For definition see, ibid s. 2(1).
4 No form has yet been prescribed.
5 *Nigerian Citizenship Act* as amended s 7(1).
6 Ibid, proviso.
7 *Nigerian Citizenship Act 1960*, s 7(2).
8 *Nigerian Citizenship Act 1960*, s 11.
9 CFRN, 1999, Cap. C23; LFN, 2004, s.30.

Two grounds for deprivation are specified in Section 8(1) of the Act of 1960:

1. Deprivation applies to any citizen other than one who is a citizen by birth in Nigeria. This exclusion also applies to citizens by registration under Section 8(1) of the Constitution or Section 3a(1) of the Act, raising questions about the legislative intent regarding citizens by registration.[1]
2. The grounds apply to citizens by registration, descent, and naturalization, specifically targeting those who, while being citizens of Nigeria and of full age and capacity, have:
    - Acquired the nationality of a foreign country by any voluntary act other than marriage.
    - Voluntarily claimed rights in a foreign country that are exclusive to its citizens.

Before the President makes a deprivation order, they must be satisfied that the acts have been committed and that it is not conducive to the public good for the individual to continue as a citizen of Nigeria. The acts must have occurred while the person was a Nigerian citizen, and the individual must have been of full age and capacity at that time. Notably, minors and persons of unsound mind cannot be deprived of citizenship under these grounds. Additionally, a married woman is regarded as a *feme sole* for these provisions, and the acquisition of foreign nationality solely due to marriage is expressly excluded.

Both grounds for deprivation stress that the acts leading to loss of citizenship must be voluntary, falling within the sphere of free choice. The extent of influence that removes an act from this sphere can vary based on the nature of the act. It is not necessary for the individual to fully understand the legal consequences of their actions.[2]

5.3. Other Grounds for Deprivation of Citizenship

5.3.1. Section 8 (2) of the Citizenship Act

An additional ground for deprivation is outlined in Section 8 (2) of the Act of 1960. This section applies to any citizen of Nigeria of full age and capacity who, upon ceasing to be a citizen of Nigeria, will become a citizen of another Commonwealth country, the Republic of Ireland, or a foreign country. In this case, the President has the authority to require the individual to renounce their other nationality. If they fail to do so within a specified timeframe, the Minister may issue an order depriving them of their Nigerian citizenship. Upon the issuance of this order, the individual ceases to be a citizen of Nigeria.

This provision primarily aims to reduce the incidence of dual or multiple citizenships, aligning with the broader intent of Nigerian citizenship legislation. Although Section 13 of the Constitution addresses similar concerns, it specifically applies only to individuals who acquired Nigerian citizenship before turning twenty-one.

Notably, this provision includes citizens by birth who also possess the citizenship or nationality of another country. The legislative framework expressly excludes citizens by birth

1 See *Nigerian Citizenship Act 1960*, as amended, s 3(c) which refers to such citizen as one "who by reason of his birth in Nigeria... become a citizen of Nigeria by registration".

2 For more explanations these grounds of deprivation, see: A V J Nylander, *Nationality, Citizenship and Domicile in The Laws of Nigeria* (ProQuest LLC 2018) 205-225.

from deprivation provisions. It could be argued that Parliament intended to amend Section 16(b) of the Constitution to expand its legislative powers, but courts may be reluctant to accept this view, especially since it contradicts Section 18 of the Act, which states that the Act's provisions must align with the Constitution. That Parliament has no intention of increasing its legislative power is shown by the fact that the Republican Constitution, which came into force after the enactment of the Act of 1960, provided for the legislative power of deprivation of citizenship in the same way as did the Federal Constitution, 1960.[1] It is submitted that Parliament did not intend to enlarge its legislative powers of deprivation to include citizens by birth, and section 6 (2) of the act is to be read as excluding such citizens.

5.3.2. Presidential Powers of Deprivation

The President's powers regarding deprivation differ based on the category of citizenship—registration or naturalization.[2] A citizen by registration may only lose their citizenship due to misconduct in obtaining registration, while a citizen by naturalization may face broader grounds for deprivation.[3]

Before issuing an order of deprivation, the President must determine that it is not conducive to the public good for the individual to retain Nigerian citizenship.

- **For Citizens by Registration:** A citizen may be deprived if the President finds that their registration was obtained through fraud, false representation, or concealment of important facts.[4]
- **For Citizens by Naturalization:** A broader range of grounds applies, including if the individual:
  - Demonstrates disloyalty or disaffection towards the Government of Nigeria.
  - Engages in unlawful trade or communication with an enemy during wartime.
  - Is sentenced to imprisonment for twelve months or more within seven years of naturalization.[5]
  - Resides abroad continuously[6] for seven years without registering at a Nigerian consulate[7] or notifying the Minister of their intent to retain Nigerian citizenship.[8]

6. The Issue of Statelessness in Nigeria

In Nigeria, the citizenship legislation[9] contemplates the condition of statelessness and assimilates stateless individuals to aliens. The Nigerian Citizenship Regulations of 1961[10] allow stateless persons to apply for naturalization.[11] However, there are no specific provisions in Nigerian

1 See *Federal Constitution*, s 15(b); *Republican Constitution*, s 16(b).
2 *Nigerian Citizenship Act 1960*, s 9(1).
3 Ibid, s 9(5).
4 Ibid, s 9(2).
5 Ibid, s 9(3).
6 For definition, see *Nigerian Citizenship Act 1960*, s 2(1).
7 Not yet prescribed
8 *Nigerian Citizenship Act 1960*, s 9(4).
9 For a detailed explanation of the topic, see A V J Nylander, *Nationality, Citizenship, and Domicile in The Laws of Nigeria* (ProQuest LLC 2018) 234.
10 L N 11 of 1961, Second Schedule Form A.
11 *Nigerian Citizenship Act 1960*, s 6.

citizenship law aimed at reducing or eliminating statelessness. The law does, however, consider the possibility of statelessness in the context of renouncing Nigerian citizenship, allowing only those who are also citizens of another country to renounce their Nigerian citizenship.[1]

While Nigeria does not have specific laws addressing statelessness, the issue is covered under various international conventions to which Nigeria is a party. Notably, Nigeria is a signatory to the 1954 Convention relating to the Status of Stateless Persons[2] and the 1961 Convention on the Reduction of Statelessness,[3] which provide principles for preventing and reducing statelessness. However, Nigeria has not yet acceded to the 1951[4] Refugee Convention, which also addresses issues related to statelessness.

6.1. The Citizenship of Those Affected by the ICJ Judgment on the Nigeria-Cameroon Border

During the colonial era, the establishment of a precise boundary between the British Colony and Protectorate of Nigeria and the Northern and Southern Cameroons, which were mandated to Britain by the League of Nations in 1919, was not deemed essential. This was largely because the mandated territories were administered from Nigeria.[5] The resource-rich Bakassi Peninsula, located at the southern edge of the border between Nigeria and Cameroon and extending into the Gulf of Guinea, continued to be governed by Nigeria post-independence and is listed among the 774 local government areas in the 1999 Constitution. Cameroon contested this claim to ownership, leading to escalating military confrontations between the two nations. Additionally, Cameroon asserted that Nigerian settlers had encroached upon its territory along the northern segment of the border.

In 1994, Cameroon brought the border disputes before the International Court of Justice (ICJ). In its final judgment rendered in 2002, the ICJ awarded sovereignty over the Bakassi Peninsula to Cameroon and also transferred additional territories near Lake Chad.[6] Notably, the court refrained from addressing the nationality of individuals residing in the transferred regions, although international law generally presumes that nationality is linked to habitual residence unless expressly stipulated otherwise.[7]

Initially, Nigeria rejected the Efik people from the historical Calabar Kingdom—the agreement stipulated that Cameroon would uphold the fundamental rights and freedoms of Nigerian nationals. It also assured that these individuals would not be forcibly displaced from their homes nor compelled to change their nationality.[8] The formal transfer of the territory to

1 Ibid, s 7 as amended; see supra note p 106.

2 Convention relating to the Status of Stateless Persons, New York, 28 September 1954 (acceded by Nigeria on 20 September 2011).

3 Convention on the Reduction of Statelessness, New York, 30 August 1961 (acceded by Nigeria on 20 September 2011).

4 Convention and Protocol Relating to the Status of Refugees, Geneva, 28 July 1951.

5 This section draws on Manby, *Citizenship in Africa*, chapter 8.3.

6 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, ICJ Judgement of 10 October 2002, available at http://www.icj-cij.org/en/case/94. For a detailed history of the dispute, the court case, and its aftermath, see H V Lukong, *The Cameroon-Nigeria Border Dispute: Management and Resolution, 1981-2011* (Langaa Research & Publishing Common Initiative Group 2011).

7 ILC, *Draft Articles on Nationality of Natural Persons about the Succession of States*, art 5.

8 Greentree Agreement, art 3(2): 'Cameroon shall: a) Not force Nigerian nationals living in the Bakassi Peninsula to leave the zone or to change their nationality…'.

Cameroon occurred on August 14, 2008, although a Nigerian presence persisted during a five-year transitional period.

It appears that the understanding was that, following this transitional phase, residents of the transferred territories could acquire Cameroonian nationality and identity documents, while retaining the option to remain Nigerian with resident alien status in Cameroon or to relocate back to Nigeria.[1] Nonetheless, the legal framework governing these potential outcomes remained ambiguous. On the Nigerian side, no constitutional amendments were proposed akin to those enacted for the Northern Cameroons after post-independence referendums, which would have clarified the nationality status of individuals who relocated to Nigeria from the territories that were subsequently recognized as part of Cameroon. Furthermore, no actions were taken to ensure continued recognition of Nigerian citizenship for those whose residences now lay within Cameroon.

The government of Cross River State in Nigeria attempted to establish a new local government area for the displaced Bakassi residents, despite lacking constitutional authority to do so, and provided or facilitated some humanitarian assistance.[2] However, former Bakassi residents were denied the right to vote in various elections, as their registered locations no longer existed, leading to litigation by the Independent National Electoral Commission on this matter.[3] In February 2014, Nigerian Attorney General and Minister of Justice, Mr. Mohammed Adoke, remarked at the opening of the 32nd Session of the Mixed Commission that those affected by the judgment who wished to retain Nigerian citizenship should "apply for Nigerian citizenship," suggesting a need for naturalization rather than acknowledgment of their original nationality by birth.[4] Since that time, the status of the Bakassi people remains unresolved, leaving them in a state of "near statelessness."

Those Bakassi residents who now inhabit the Cameroonian side of the border reportedly face taxation and are treated as foreigners by Cameroonian authorities. Lacking Cameroonian national identity documents, they encounter significant challenges regarding freedom of movement.[5]

6.2. Action Against Statelessness in Nigeria

Nigeria is a party to nearly all relevant international conventions and African instruments concerning the right to nationality. In 2011, it acceded to the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness,[6] becoming

1 'Bakassi - more than one place, more than one problem', IRIN, 13 November 2007; *Le temps des réalisations: Bulletin mensuel bilingue d'informations* N° 14, Special Edition on Bakassi, Government of Cameroon, August/September 2013.

2 The National Commission for Refugees, Migrants, and Internally Displaced Persons was reported by the Cross River State government to have distributed relief supplies to more than 1,500 households in two local government areas in the state: 'Bakassi, Akpabuyo Refugees Get Relief from Refugees Commission', Cross River State government, 29 July 2013.

3 Chidi Anselm Odinkalu, 'Stateless in Bakassi: How a Changed Border Left Inhabitants Adrift', Open Society Foundations, 2 April 2012, available at https://www.opensocietyfoundations.org/voices/stateless-bakassi-how-changed-border-left-inhabitants-adrift; Jude Okwe, 'INEC - Bakassi May Not Participate in 2015 Elections', *This Day* (Abuja), 4 April 2014.

4 Dele Ogbodo, 'Greentree Agreement: FG Advises Bakassi Indigenes to Apply for Nigerian Citizenship', *This Day*, 3 February 2014.

5 Hindatu Maigari Yerima and Ranjit Singh, 'The Bakassi Dispute: People's Dynamics and the Rise of Militancy', *Journal of Humanities and Social Science* (IOSR-JHSS) Vol 22, Issue 1, Ver 6 (Jan 2017) 67-70, at 69.

6 Ratification status for UN human rights treaties http://indicators.ohchr.org/; for the Statelessness Conventions https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en; and for the African Union https://au.int/en/treaties.

the first state in the West African sub-region to do so.[1] However, Nigeria has yet to domesticate these conventions to give them legal force within the country.[2]

At the regional level, Nigeria participated in the Economic Community of West African States (ECOWAS) adoption of the Abidjan Declaration on the Eradication of Statelessness, committing to prevent and reduce statelessness by reforming constitutional, legislative, and institutional regimes related to nationality. In 2017, ECOWAS ministers meeting in Banjul adopted a Regional Plan of Action to Eradicate Statelessness in West Africa. This plan states that:

"ECOWAS, in collaboration with UNHCR and the competent institutions of the African Union, will assist Member States by adopting common standards that will guide the reform of nationality legislation, including the removal of discriminatory provisions in the transmission of nationality and the inclusion of safeguards against statelessness to ensure that every child acquires nationality at birth."[3]

The Plan of Action also emphasizes the urgent need for concrete information about the sources of statelessness, obstacles to acquiring nationality, and identification of at-risk groups.[4]

At the national level, the Nigerian government, with support from UNHCR and other stakeholders, drafted a National Plan of Action to end statelessness in 2016, which was updated in 2018. As of now,[5] this Plan of Action awaits approval from the Federal Executive Council to become an official government policy.

During the UNHCR High-Level Segment on Statelessness held in Geneva in October 2019, Nigeria pledged to develop a determination procedure to identify stateless persons, grant protection status, and facilitate appropriate solutions.[6]

Concluding Remarks

This document provides a comprehensive overview of the nationality systems concerning the acquisition and loss of citizenship in various nations, including Nigeria. It offers insights into each country's approach to dual citizenship and statelessness. Our objective is to highlight that nationality and citizenship laws, whether in Nigeria, Iran, Canada, Germany, or any other selected country, inherently possess flaws.

As demonstrated, further investigation into the nationality and citizenship regulations of these nations may reveal various strengths and weaknesses, some more pronounced than others. While challenges surrounding international private law are evolving, many countries' nationality and citizenship laws have remained stagnant for years or even decades. In some cases, these laws may not exist or may be outdated. It is difficult to comprehend how such legal

1 UNHCR, *Acceding to the UN Statelessness Conventions. Ending Statelessness within 10 Years - Good Practices Paper Action 9* (2018) 8.

2 Nigeria is a dualist State; as such, foreign treaties or international laws must first be received through an Act of the National Assembly before they are binding in Nigeria.

3 *Banjul Plan of Action of the Economic Community of West African States (ECOWAS) on the Eradication of Statelessness 2017 – 2024* (9 May 2017) Preamble, Strategic Objective 1.3.

4 Ibid, Strategic Objective 2.

5 Manby and Momoh, Op. Cit., (2020).

6 See UNHCR, *Results of the High-Level Segment on Statelessness* (14 May 2020) https://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness/.

issues persist in matters of international private law today, especially considering the significant progress humanity continues to achieve.

The focus of our discussion is on these vulnerabilities, how they manifest, and how scholars from each nation can be encouraged to explore effective solutions for modernizing their citizenship laws to align with current standards. We believe the most effective approach involves identifying and exchanging the laws of different nations, creating a unique synthesis of each nation's practices where applicable.

Recommendations

The responsibility lies with legal scholars, states, and international organizations to leverage the benefits of global progress. Without addressing nationality and citizenship issues—particularly the lack of dedicated acts for citizenship and statelessness—nations will continue to face constitutional challenges. Any nation whose constitutional laws fail to safeguard its citizens will experience limited progress or even stagnation.

There is a wealth of topics for analysis in this area that demand further research and scholarly articles. It would be beneficial for writers to embrace these issues and produce more comparative works on nationality and citizenship.

References

Books

Ameri J, *International Private Law* (2nd edn, Agah Publication, Tehran 1983). [In Persian]

Arefnia B, *International Private Law* (5th edn, Aqiq Publication, Tehran 1995). [In Persian]

Ebrahimi SN, *International Private Law* (SAMT Publication, Tehran 2004). [In Persian]

Fransman L, Berry A, and Harvey A, *Fransman's British Nationality Law* (3rd edn, Bloomsbury Professional 2011).

Nasiri M, *International Private Law* (1st edn, Agah Publication, Tehran 1993). [In Persian]

Saljooghi M, *The Rules of International Private Law* (1st edn, Mizan Publication, Tehran 2001). [In Persian]

Saljooghi M, *The Rules of International Private Law* (Vol 4, Mizan 2006). [In Persian]

Sheykholeslami SM, *International Private Law* (1st edn, 2004) 64. [In Persian]

Articles

'Bakassi - More than One Place, More than One Problem' (IRIN, 13 November 2007).

'Greentree Agreement: Article 3(2)' https://www.example.com/greentree-agreement.

Anselm Odinkalu C, 'Stateless in Bakassi: How a Changed Border Left Inhabitants Adrift' (Open Society Foundations, 2 April 2012) https://www.opensocietyfoundations.org/voices/stateless-bakassi-how-changed-border-left-inhabitants-adrift.

Maigari Yerima H and Singh R, 'The Bakassi Dispute: People's Dynamics and the Rise of Militancy' (2017) *Journal of Humanities and Social Science* Vol. 22, Issue 1, Ver. 6, 67-70, at 69.

Odinkalu CA, 'Stateless in Bakassi: How a Changed Border Left Inhabitants Adrift' (Open Society Foundations, 2 April 2012) https://www.opensocietyfoundations.org/voices/stateless-bakassi-how-changed-border-left-inhabitants-adrift.

United Nations High Commissioner for Refugees, *Results of the High-Level Segment on Statelessness* https://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness/.

Reports

Browen Manby and Momoh Solomon, *Report on Citizenship Law: Nigeria* (European University Institute, Italy, July 2020) 1.

Elke Winter, *Report on Citizenship Law: Canada* (European University Institute, Florence, December 2015) 28.

Legislations

Canada Citizenship Act RSC 1985.

Civil Code of the Islamic Republic of Iran, 23 May 1928.

Constitution of the Federal Republic of Nigeria 1999.

German Nationality Act 2021.

Greek Citizenship Code, ch. A, De jure.

Iraqi Nationality Law [Iraq], s. 4, Law 26 of 2006, 7 March 2006.

Italian Citizenship Law No. 91/92.

Law No. (46) of 1963 - Iraqi Nationality.

Laws of the Federation of Nigeria 2004.

Nigerian Citizenship Act 1960.

Court Decisions

Ahmed v Minister of Internal Affairs (2002) 15 NWLR Pt 790 239 (CA).

Galati v Canada (Governor General), Court Decision 2015 FC 91 (2015).

Galati v Canada (Minister of Citizenship & Immigration), Legal Challenge T-1474-14 (2014).

Shugaba v Minister of Internal Affairs (1981) INCLR 459.

Willie Ogbeide v Arigbe Osula (2004) 12 NWLR Pt 886 138, per Adeniji JCA (pp 50-51, para. a-d).

Conventions

Convention Relating to the Status of Stateless Persons, New York, 28 September 1954 (acceded by Nigeria 20 September 2011).

Convention on the Reduction of Statelessness, New York, 30 August 1961 (acceded by Nigeria 20 September 2011).

Convention and Protocol Relating to the Status of Refugees, Geneva, 28 July 1951.

Documents

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), ICJ Judgment of 10 October 2002, available at http://www.icj-cij.org/en/case/94.

International Law Commission, *Draft Articles on Nationality of Natural Persons about the Succession of States*, 1999.

Banjul Plan of Action of the Economic Community of West African States (ECOWAS) on the Eradication of Statelessness 2017 – 2024 (9 May 2017), Preamble, and Strategic Objective 1.3.

Greentree Agreement, 2006. https://www.example.com/greentree-agreement.

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A Comparative Analysis of the Position of Equality in Labor Rights and Wages in International Documents and Applicable Laws of Iran and Canada

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ABSTRACT

Worker wages represent a critical dimension of labor rights, encompassing all forms of remuneration arising from employment contracts. Given the inherent power imbalance between employers and employees, there exists an ongoing concern that employers, driven by the desire to minimize operational costs, may offer unjust wages to workers. Consequently, various frameworks are employed across societies to establish minimum wage standards. Social security stands as a fundamental indicator of the welfare levels of workers and vulnerable populations, providing a vital criterion for evaluating public satisfaction with governance. This research employs library resources, alongside descriptive-analytical and comparative approaches, to examine the relevant laws and documents within the national legal frameworks of Iran and Canada, as well as pertinent international instruments. The findings, based on the study's hypotheses, suggest that the systems governing equality in rights within Iran and Canada, as well as in international documents, emphasize the right to receive insurance benefits and secure employment as foundational elements of equality rights. Furthermore, the domains of relief and support serve to enhance these foundational structures.

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Introduction

International organizations involved in labor matters draw from fundamental principles articulated in international public documents, emphasizing the principle of equality across various texts. This principle is now recognized as a critical foundation for ensuring equal rights and benefits for women and the workforce within social security systems. Approaches advocating for equal treatment have been adopted at international, regional, and national levels, as envisioned by policymakers across different countries.[1] Within this context, the impact of gender on the enjoyment of equality rights has garnered significant attention from researchers, given its contentious nature as a crucial facet of the principle of equality.[2] At the international legal level, equality is acknowledged as a fundamental principle in social security, governing non-discrimination based on gender, race, and other factors among beneficiaries of social security benefits.[3]

In Iran's domestic legal framework, the Constitution, as the highest law, underscores this principle in Article 20. Additionally, Section "k" of Article 1 of the Comprehensive Welfare and Social Security System Structure Law identifies the reduction of inequality as a primary objective of the national social security system. This article aims to analyze international documents and corresponding regulations while reviewing the laws within the domestic legal systems of Iran and Canada. It seeks to answer the question of how Iran's social insurance regulations have established gender equality in enjoying equal rights, in compatibility with international standards and the Canadian framework. To achieve this goal, we will first explore the position of this principle in the international system, followed by an examination of the domestic laws of Iran and Canada to identify legal gaps in this area.

Contemporary societies differ significantly from those of previous eras. Economic systems are in constant flux, and their future remains uncertain. Alongside the wealth and prosperity enjoyed by a small segment of the global population, general poverty and unemployment are on the rise worldwide. The powerful continue to seek new avenues for amassing national wealth, while the working class, low-income individuals, and other vulnerable segments of

1 Brooks, 1990, *Vol. 3: 120.*

2 Badeeni, 2008, *Vol. 4: 43*.

3 Shahbazi Nia, *The Right to Social Security: The Features, Content and Principles* (2007) 90.

society lack the resources and power necessary to defend their rights. In the current landscape, reliance solely on individual and voluntary social security measures is insufficient.[1] The Islamic Republic of Iran has made significant strides toward alleviating poverty and supporting the needy since its establishment; however, the persistent reality of poverty remains evident in society. The gap between the affluent and the impoverished is widening, and unemployment rates are increasing.[2] This article will examine the strengths and weaknesses of workers' rights and wages as articulated in international documents, comparing the frameworks of Iran and Canada using a descriptive-analytical and comparative method.

In recent years, considerable efforts have been made by practitioners to organize equality in rights and wages, as well as to expand the coverage and inclusivity of related services. It is anticipated that the full implementation of social security laws will further advance the justice-oriented goals of the Islamic system. Consequently, various opinions exist regarding the basis for providing equal benefits to women. The fundamental challenge in this area arises primarily from differing perspectives on equality or distinctions between genders. The approach based on formal equality emphasizes the necessity of enacting laws that ensure equal rights for women and men in accessing these benefits, as well as granting full citizenship rights to women.

Dr. Irvan Masoud Asl, in his book "Social Welfare System Worldwide," briefly mentions recent social welfare activities but does not address Canada specifically.

Mohammad Ghasemi's thesis, supervised by Dr. Saeed Sadeghi Boroujerdi, titled "Evaluation of the Quality of Services Provided by the Social Security Organization from the Perspective of Customers and Employees," conducted at the Science and Research Branch of Sanandaj University in 2004, solely evaluates the Social Security Organization from the viewpoints of customers and employees without broader comparisons.

Yaser Mohabbati's thesis, supervised by Seyyed Mostafa Mohammad Moshkouh, titled "A Comparative Study of the Structure of the Comprehensive Welfare and Social Security System in Iran and Selected Countries," conducted at Imam Sadegh University in 2008, focuses on examining the comprehensive welfare and social security systems in Iran and selected countries.

However, none of these works comprehensively address a meticulous comparison of equality rights, benefits, and wages for workers within the relevant laws of Iran and Canada, as well as international documents, as presented in this research. Therefore, this study, beyond serving as a resource for other researchers, aims to provide necessary solutions and recommendations to enhance the utilization, expansion, and quality of equality rights and wage services in Iran. The implementation of these recommendations can yield effective and beneficial outcomes.

This study aims to (1) examine and compare the equality rights systems in Iran and Canada, as well as relevant international documents, focusing on the nature and methods of service provision; (2) identify the strengths and weaknesses of the equality rights systems in the countries under discussion and propose an appropriate model to enhance the efficiency of the social security system in Iran; and (3) clarify and describe the current challenges within the equality rights system in Iran and underscore the necessity for reform based on best practices

1 Pateman & Shanley, *Feminist Interpretations and Political Theory* (1991) 39.
2 E'tesadpour & Rajabi Rad, *Social Security in Iran* (1997) 124.

from leading countries. in so doing, the study specifically addresses the following research questions:

1. What criteria underpin the equality rights system in international documents and the relevant laws of Iran and Canada?
2. What differences and similarities exist in the equality rights systems of the aforementioned countries?

1. Terminologies

The following terms are operationally defined as follows in the current study.

1.1. Wage

"Wage" represents a critical element in the relationship between workers and employers. This economic relationship is actualized through the remuneration provided for labor performed. Consequently, an individual engaging in voluntary activities is not classified as a worker, and likewise, an individual benefiting from unpaid labor is not deemed an employer. Article 2 of the Labor Law of 1369 delineates the distinction between a worker and a non-worker based on the receipt of consideration, which includes wages, salaries, shares, profits, and other benefits, as requested by the employer. Furthermore, Article 3 of the same law stipulates: "The employer is a natural or legal person for whom the worker performs duties at the employer's request, receiving payment in exchange for the consideration provided..."[1]

1.2. Equal Rights and Wages

The term "discrimination" linguistically refers to "the granting of equality or preference to one or some individuals over others, without valid justification."[2] In contrast, "equality" denotes "the state of being alike, similarity, leveling, or mutual equivalence."[3] In legal terminology, discrimination can be defined as "the legal superiority of certain individuals without justifiable preference, exemplified by the granting of rights and privileges to one party over another in the absence of any relevant superiority between them."

At the international level, four conventions have articulated definitions of discrimination, including: the first paragraph of Article 1 of the International Labour Organization (ILO) Convention No. 111, the first paragraph of Article 1 of the UNESCO Convention on the Elimination of Discrimination in Education (1960), the first paragraph of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), and Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979). These sources provide the following definitions within the context of discrimination:

- "Any difference, deprivation, or preference based on race, skin color, gender, religion, political belief, or national or social background that exists in employment

1 Vatankhah, *The Impact of International Labor Organization Resolutions on Labor Rights in Iran* (2010) *107.*
2 Moein, *Persian Encyclopedia* (1981) 1024.
3 Dehkhoda, *Dehkhoda Dictionary* (1994) 109.

and occupation and undermines or inhibits equality of treatment and opportunity for workers."[1]

- "Discrimination encompasses any specific distinction, deprivation, limitation, or preference based on race, color, sex, language, religion, political belief, or any other belief, nationality, social status, economic conditions, or production, which results in the elimination of equal treatment towards individuals in accessing education or distorts such access."[2]

2. Equality System in Iran

The equality rights systems of Iran and Canada, along with international documents, recognize entitlement to insurance benefits and employment as the foundational infrastructure of the social security system. Notably, there are distinctions in the types of coverage, services offered, presentation methods, and deductions applied within the social security frameworks of Iran and Canada.

2.1. Equal Wages in the Iranian Constitution

The legal framework for the protection of wages in Iranian law is primarily grounded in the Constitution and the Labor Law. Articles 9 and 14 of the third principle of the Iranian Constitution assert: "The elimination of unjust discrimination and the creation of fair opportunities for all in both material and spiritual domains," as well as "Securing comprehensive rights for all individuals, regardless of gender, and establishing equitable judicial security for everyone" are fundamental objectives of the government.[3] Chapter 3 of the Constitution, titled "People's Rights," begins with Article 19, which emphasizes the principle of non-discrimination, stating: "The people of Iran, irrespective of their tribe or ethnic group, possess equal rights, and distinctions based on color, race, language, and similar factors shall not confer any privilege." Article 20 explicitly prohibits gender discrimination: "All individuals, regardless of gender, are entitled to legal protection and enjoy all human, political, economic, social, and cultural rights in accordance with Islamic standards." This principle unequivocally affirms gender non-discrimination across all spheres. Furthermore, Article 28 mandates that: "... The government is obliged to create equal employment opportunities for all individuals, considering society's need for various occupations."[4]

2.2. Governing Principles of the Equal Rights System in the Iranian Labor Law

Article 37 of the Labor Law stipulates: "Wages must be paid regularly during non-holiday periods and working hours in the national currency or by mutual agreement through a bank-guaranteed check." Additionally, Article 38 asserts: "Equal work performed under equal conditions in a workshop shall be compensated with equal wages for both women and men. Discrimination in wage determination based on age, gender, race, nationality, and political or religious beliefs is

1 First paragraph of Article 1 of ILO Convention No. 111.
2 First paragraph of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965.
3 Naeimi, Ghasemi, Rezvani Monfared, *Social Security Law in the Current System* (2010) 87.
4 Ghorbanian et al., *Review of Women's Rights* (2006) 276.

strictly prohibited." Article 41 further mandates that: "The Supreme Labor Council is responsible for determining the minimum wage for workers across various regions and industries."[1]

3. Equality System in Canada

Canada, recognized globally for its advanced welfare and healthcare systems, has an aging population characterized by low infant mortality rates and high-quality rights and remuneration services.[2]

3.1. Principles Governing the Social Security System in Canada

To ensure citizen satisfaction and the provision of desirable services, Canada has developed specific standards and criteria that govern the delivery of welfare services. The most significant principles are outlined below.

3.2. Principle of Insurance Coverage Based on Residence and Nationality

This principle asserts that welfare and social security services in Canada encompass all individuals within society. Citizenship and nationality ensure that all residents, regardless of employment status or insurance premium payments, have access to support services. Consequently, individuals are not deprived of these services due to unemployment or the absence of an employer-employee relationship. Additionally, non-native residents and foreign workers residing in Canada are eligible for social security services, ensuring that their non-native status does not hinder access.

3.3. Equality and Equivalence Principle in Insurance Coverage

Under this principle, services are provided to all individuals without discrimination. This ensures that all individuals are treated equally within the insurance system, enjoying equitable services. There is no differentiation in the type or amount of service received; rather, diversity in service provision is inclusive of all individuals. Consequently, the system maintains consistency and adherence to service delivery standards.

4. Equal Wages in International Documents

The adoption of policies to support workers' wages has been a persistent focus in international forums. Article 23 of the Universal Declaration of Human Rights states: "Everyone has the right to equal pay for equal work without discrimination. Everyone who works is entitled to just and favorable remuneration, ensuring a life of dignity for themselves and their families, supplemented by other means of social protection if necessary." The declaration's Article 2 emphasizes: "... Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, including race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. No distinction shall be made based on the political, jurisdictional, or international status of the country or territory to which a person belongs, regardless of whether it is independent, under trusteeship, non-self-governing, or subject to any limitation of sovereignty."[3]

To achieve equality in remuneration for work of equal value, it is essential that women's working

1 Sahab, *Reference for Dealing with the Records of Insured Workers* (2007) 62.
2 Bazargan et al., *Research Methods in Behavioral Sciences* (1997) 54.
3 Iraqi, *Labor Law* (2011) 49.

conditions are not inferior to those of men and that they receive equal pay for equal work.[1] Adequate benefits for women and their families must be considered in accordance with applicable regulations. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the United Nations General Assembly on December 21, 1965, and ratified by the Iranian government in 1968, prohibits racial discrimination in all its forms. Member states are committed to ensuring every individual's right to equality before the law, particularly regarding the right to work, free choice of employment, fair and satisfactory working conditions, protection against unemployment, equal pay for equal work, and fair remuneration without discrimination based on race, color, nationality, or ethnic origin.[2]

The International Labour Organization's Convention No. 95 on the Protection of Wages, adopted in 1949 and ratified by Iran in 1975, defines wages comprehensively and outlines the extent of their protection through various articles. While the convention encompasses all wage earners, each country's competent authorities may exempt certain groups of workers whose terms and conditions of service do not proportionately align with the convention's stipulations. This exemption may apply to manual laborers or domestic workers.

The primary objective of this convention is to ensure the protection of workers' income. It provides a broad definition of wages, stipulating that wages must be paid in national currency and cannot be substituted with promissory notes or transfers. Payment of wages is permissible only through checks.[3]

From this convention's perspective, "remuneration" encompasses not only the minimum wage but also all other benefits, whether direct or indirect, in cash or kind, provided by the employer in relation to employment. The convention introduces the concept of "equal remuneration for work of equal value," which is broader than "equal work." This concept emphasizes that even if two jobs are not identical, they may still be considered of equal value based on tangible evaluations and should be compensated accordingly. Ultimately, the purpose of "equal remuneration for work of equal value" is to ensure that factors such as gender, age, and religious beliefs do not influence wage determination, thereby guaranteeing that remuneration is based on the nature of the work.[4]

5. Adaptation and Comparison

This section offers a detailed analysis of how these two countries manage wage equality and social welfare, reflecting their unique policies and priorities.

5.1. Comparison of the Wage Equality System in Iran and Canada

Wage equality and compensation in Iran and Canada are comparable regarding the receipt of insurance benefits, contingent upon a history of paying insurance fees and employment. However, the provision of benefits, allowances, healthcare services, and measures addressing unemployment or income reduction differ significantly in their execution. Both countries exhibit initiatives aimed

1 Keyhanloo, *Principles of International Human Rights Law* (2009) 77.
2 Vatankhah, Op. Cit. (2010) 197.
3 Iraqi & Ranjbaran, *Transformation of International Labor Law* (2011) 308-309.
4 Moeini Rad & Heidari, *The Overall Framework of the Role of the Ministry of Welfare and Social Security in the Country's Economic Transformation Plan* (2010) 52.

at enhancing service levels in insurance and support systems, yet their approaches reflect varying degrees of commitment and effectiveness in delivering wages and compensation.[1]

In both nations, the prerequisite for accessing insurance, welfare, wages, and social security services is a documented history of paying insurance and employment fees; however, the conditions and methods differ. In Iran, a worker must have contributed to insurance for 30 years and be at least 60 years old to qualify for retirement and receive a pension. While this framework is subject to flexibility based on specific circumstances, such adjustments vary by gender and occupation type.[2]

Research indicates that Canada's insurance service system also relies on a history of insurance fee payments and qualifying years, but the criteria and standards diverge from those in Iran. To receive universal or insurance-based pensions, Canadian citizens must be at least 65 years old, while spouses may qualify for benefits if they are between 60 and 64. Additionally, to qualify for universal pensions, applicants must have a minimum of 10 years of permanent residence in Canada; those residing outside the country must have 20 years of residence. Notably, individuals seeking this pension are not required to have a history of insurance payments.

In Canada, insured workers must have a 30-year history of paying insurance fees to qualify for continuous pension benefits, with specific exemptions for individuals unable to work due to accidents, illnesses, or caregiving responsibilities. Surviving spouses of deceased insured individuals must meet an age requirement of at least 35 years, although this is waived if the deceased has disabled children. Furthermore, the age limit for dependent children is set at 18, with no restrictions on parents' insurance payment history regarding supplementary pensions.[3]

While some countries link the right to receive pensions with wage equality, differences exist in the number of years and payment amounts within the insurance systems of Iran and Canada. Research and reviews of international documents reveal that workers must be 65 years old and have a 30-year history of insurance payments for full pension benefits. In addition to the primary pension, which serves as the main retirement benefit, guaranteed pensions (under the new system) and retirement pensions (under the old system) are also available, with age and historical payment conditions varying accordingly.

5.2. Types of Services Available and the Amount and Method of Salary Deductions in Iran and Canada

The nature and coverage of labor rights and wages in Iran and Canada exhibit significant distinctions, reflecting the varying effectiveness of their respective insurance systems. In Iran, the process of receiving insurance benefits and the associated benefits for employees is governed by specific laws and regulations. A standard deduction of 30% from an individual's salary and benefits is allocated to the Social Security Organization. Of this, 23% is borne by the employer, including 3% for services that, if paid by unemployed workers, qualify them for statutory unemployment benefits. The remaining 7% is contributed by the insured worker. For certain professions, such as lawyers and government employees, the applicable rate is 27%, though these individuals are

1 Kolehr & Mehr, *Social Security in Canada* (1994) 52.

2 Pour Reza, *Evolution and Development of the Healthcare and Insurance System in Canada* (2008) 43.

3 Panahi, *Functions of Social Security* (2007) *61*.

not entitled to unemployment benefits. For self-employed individuals, deductions can range from 12% to 18%, varying based on the type of services received. In contract agreements, deductions may be 15% or 7%, depending on whether the contract is labor-based or material-based.[1]

In contrast, Canada's insurance system features a lower insurance rate of 6.3%, evenly split between the employer and the insured, and deducted from the salary.[2] Certain provinces, such as Ontario, Alberta, and British Columbia, have implemented measures to secure financial resources for their insurance systems, requiring insured individuals to contribute to the costs. In Quebec, the employer's contribution is set at 3% of the monthly salary, while in other regions, the employer's share is determined by local unions.

Internationally, the approach to salary deductions and insurance benefits varies significantly. In some countries, a single insured individual contributes only 7% of their assessable income to retirement insurance, with no requirement for survivors' benefits. Self-employed individuals may pay 7% for retirement insurance, plus an additional 21.10% for retirement and 7.1% for survivors' benefits, totaling nearly 18%. In cases of employer-insured individuals, the employer covers 21.10% for retirement and 7.1% for survivors' benefits, amounting to approximately 12%. Additionally, in government jobs, the government assumes full responsibility for guaranteed pension costs and provides income-based insurance benefits for central government employees.[3]

5.3. Conditions of Pension Payment and Service Provision in Iran and Canada

While both Iran and Canada offer various pensions and additional services, these provisions differ significantly in terms of eligibility criteria, benefit amounts, and duration. The complementary activities and measures associated with these payments are contingent upon specific conditions that must be met by the insured. The commitments and responsibilities of social security organizations in both countries should align with the standards established by the ILO and the International Social Security Association (ISSA). The primary obligations of these organizations encompass pensions for insured individuals and their survivors, along with support in cases of unemployment, illness, pregnancy, and related ancillary services.[4]

5.4. Alignment of Services Provided in Pregnancy, Treatment, and Health in Iran and Canada

Insured individuals expect comprehensive support from the social security system during health-related events. Services encompass preventive measures to avert disease and treatment options aimed at recovery and health maintenance. For pregnant individuals, while the arrival of a child is a joyous occasion, it can also present challenges. The need for assistance during pregnancy and recovery from illnesses is paramount. Thus, both government officials and citizens prioritize preparedness for health crises, ensuring that measures are in place to address accidents and illnesses. Beyond surgical interventions and prescribed medications, the provision of auxiliary

1 Ghasemi, *Evaluation of the Quality of Services of the Social Security Organization from the Perspective of Customers and Employees* (2009) 55.
2 Zare, *Development of Insurance and Poverty Reduction in the Islamic Republic of Iran* (2002) 212.
3 Fakhim Alizadeh & Hassanzadeh, *Solutions for Expanding Insurance Coverage in the Social Security Organization of Iran* (2011) 86.
4 Mohabbati, *Comparative Study of the Structure of the Comprehensive System and Welfare of Social Security in Iran and Selected Countries* (2008) 63.

services, such as prosthetics, is also crucial for maintaining the insured's health and well-being. These services, while prevalent in both countries, may vary in quantity and quality.[1]

5.4.1. Benefits and Allowances during Pregnancy

In Iran, maternity benefits are available to insured women who have paid at least 60 days of insurance premiums within the year preceding their pregnancy. These benefits, calculated based on the average salary, are provided for a duration of 90 days. Notably, maternity leave was previously set at six months but was extended to nine months following approval from the Islamic Consultative Assembly in 2013, becoming effective in 2021. Additionally, mothers are entitled to one hour of breastfeeding leave per day for one year after returning to work.

In Canada, various programs support pregnant women and their families. The Canadian Welfare and Health Organization addresses material needs related to childbirth through universal insurance and pension schemes. Pregnant women who become unemployed or must work part-time to care for their children are exempt from insurance premium payments until their child reaches seven years old. This framework ensures that their rights are preserved within the supportive plans established by the government. Furthermore, Canada offers free medical care for pregnant women through these assistance programs.[2]

5.4.2. Medical and Health Services

In Iran, approximately 7% of the insured's salary is allocated to healthcare services. The Social Security Organization administers these services in two ways. First, insured individuals receive direct services after submitting their salary statements, which allows them to access free medical care at Social Security healthcare centers and hospitals. Self-employed individuals, however, contribute 25% of the deductible costs. In the second method, medical services are procured from private and government healthcare institutions, requiring insured individuals to pay 30% of the costs at non-governmental centers.[3]

In Canada, healthcare services are delivered through two mandatory insurance schemes: the Mandatory Insurance Plan and the Universal Insurance Plan. The National Welfare and Health Organization manages healthcare programs at both national and provincial levels, providing a range of services, including maternity care, surgery, pharmaceuticals, and laboratory tests. While the federal government plays a role in managing healthcare insurance programs, the primary responsibility for health services lies with provincial and territorial governments.[4]

6. Differences and Disparities in the Social Security Systems of Iran and Canada

A thorough examination of the social security systems in Iran and Canada reveals a significant disparity, with more differences than similarities between the two. Canada is recognized as an advanced nation in providing welfare and social security services, operating within a robust social welfare framework. Conversely, Iran's social welfare system is considered mediocre to low,

1 Moeini Rad & Heidari, Op. Cit. (2010) 35.
2 Masoud Asl, *Social Welfare System in the World* (2009) 12.
3 Ghasemi, Op. Cit. (2009) 19.
4 Naeimi et al., Op. Cit. (2010) 51.

lacking the comprehensiveness found in more developed countries. This comparison highlights several weaknesses in Iran's social security system, while Canada's framework demonstrates greater effectiveness in addressing diverse needs. Key disparities include:

1. **Dispersion of Services**: In Iran, the types of services offered within the insurance, support, and relief sectors are fragmented. The insurance coverage does not extend to all individuals or societal groups, leading to significant gaps in service delivery. In contrast, Canada provides a more cohesive and comprehensive social welfare system.
2. **Healthcare Access and Quality**: In Iran, despite a 7% per capita subsidy for medical treatment, the healthcare services available are inadequate, resulting in dissatisfaction among beneficiaries. Issues such as the reluctance of specialized physicians and advanced hospitals to accept social security booklets, a lack of national medical centers, and insufficient access to necessary services are prevalent. Additionally, dental services and certain urgent cosmetic surgeries are not covered. In Canada, such services are often provided free or at reduced costs under insurance tariffs.
3. **Insurance Premiums**: The premium payment structure in Iran, with rates of 30% and 27%, is comparatively high. Canada offers various exemptions and government support, with maximum rates typically around 17% for extraordinary circumstances, making the Iranian system more expensive for its users.
4. **Basis of Coverage**: In Iran, social security services are primarily linked to premium payments and employment status. In contrast, Canada's system provides coverage based on citizenship and residency, ensuring broader access.
5. **Caregiving Services**: Iran’s social security system lacks support services for individuals requiring constant care, while Canada has established provisions for such needs within its insurance framework.
6. **Unemployment Support**: Iran does not adequately support job seekers facing unemployment, whereas Canada offers unemployment insurance services, providing essential financial assistance during job searches.
7. **Healthcare Cost Assistance**: There is a notable absence of healthcare cost assistance, preventive education, and post-birth services for children in Iran, while Canada provides comprehensive support until children reach the ages of 18 or 20.
8. **Exemptions from Insurance Payments**: In Iran, specific vulnerable groups, such as disabled individuals, female heads of households, pregnant women, and caregivers, are not exempt from insurance payments. In Canada, these groups receive such exemptions, facilitating access to necessary services.
9. **Cash Assistance and Benefits**: Canada allocates cash assistance and birth benefits to children, extending support until they reach ages 18 or 20. Conversely, Iran's social security system lacks similar provisions.

Given these disparities, it is evident that Iran’s social security system requires significant reforms to enhance efficiency and accessibility. A comprehensive review of the social security systems in both countries underscores the necessity for a more unified and easily accessible

framework in Iran. The fragmentation of services across various regions complicates access for beneficiaries, while Canada's cohesive system allows for effective resource allocation and planning.

Despite substantial funding directed towards welfare and social security in Iran, the system fails to achieve its intended goals, leading to dissatisfaction among beneficiaries. Individuals participating in the insurance system expect better services, and the current shortcomings may contribute to their discontent. Addressing these issues is crucial for improving the overall effectiveness and satisfaction within Iran's social security framework.

Conclusion

The examination of equality in numerous international documents and conventions underscores that "equality in enjoying equal benefits and rights" is a fundamental aspect of "equality between women and men in equal working conditions." This principle has received significant attention from the ILO, the foremost international body in this domain, which emphasizes it in various treaties and recommendations. The review of relevant benefits highlights ongoing efforts toward achieving equal rights and wages for workers.

In both Iran and Canada, the central government plays a pivotal role in delivering welfare and social security services. Financial support for the unemployed, patients, and those in need is a primary responsibility of these systems. Both countries have implemented measures to establish minimal welfare conditions for individuals and families lacking adequate income. These measures encompass pension payments, legal and incidental support, continuous assistance for the unemployed, unemployment benefits, maternity benefits, and healthcare services.

Ensuring adequate financial resources and covering the costs of provided services are vital principles governing the social security systems in both nations. However, notable shortcomings exist in Iran's system, such as the absence of support for job seekers without suitable employment and the lack of unemployment insurance services, in contrast to Canada's provision for such individuals. Furthermore, Iran does not exempt specific vulnerable groups—such as people with disabilities, female heads of households, pregnant women, and caregivers—from insurance premiums, while Canada does.

These deficiencies in Iran's social security framework highlight critical areas for reform. Addressing these issues is essential for enhancing the effectiveness and accessibility of the social security system, thereby ensuring that it meets the needs of its beneficiaries. Immediate reforms to relevant laws are necessary to align Iran's social security system with international standards and to better support its citizens.

References

Books

Araghi E and Ranjbarian A, *International Labor Law Transformation* (2006) Tehran Institute of Labor and Social Security. [In Persian]

Araghi E, *An Introduction to Social Security Law* (2007) Publications of Higher Social Security Research Institute. [In Persian]

Bazargan et al., *Research Methods in Behavioral Sciences* (1998) Agah Publishing. [In Persian]

Brocas A M, Cailloux A M, and Oget V, *Women and Social Security: Progress Towards Equality of Treatment* (1990) International Labour Organization.

Dehkhoda A A, *Dehkhoda Dictionary Vol 4* (1st edn, Tehran University 1994) Tehran. [In Persian]

E'tesadpour N and Rajabi Rad F, *Social Security in Iran* (1997) Zahel. [In Persian]

Ghorbanian et al., *Review of Women's Rights Vol 2* (1st edn, Rouznov 2006) Tehran. [In Persian]

Iraqi E and Ranjbarian A, *Transformation of International Labor Law* (2011) Labor and Social Security Institute, 1st edn, Tehran. [In Persian]

Iraqi E, *Labor Law Vol 1* (12th edn, SAMT 2011) Tehran. [In Persian]

Keyhanloo F, *Principles of International Human Rights Law* (1st edn, Tehran University 2009) Tehran. [In Persian]

Kolehr Z and Mehr K, *Social Security in Canada* (1994) Institute for Advanced Studies in Social Security.

Masoud Asl I, *Social Welfare System in the World* (2009) Parliamentary Research Center, Islamic Consultative Assembly. [In Persian]

Moein M, *Persian Encyclopedia Vol 1* (4th edn, Amir Kabir 1981) Tehran. [In Persian]

Naeimi O, Ghasemi M and Rezavani Monfared A, *Social Security Law in the Current System*(2010) Legal and Parliamentary Affairs Office of the Legal Department of the Parliament of Social Security, Jangal Publications, 1st edn, Tehran. [In Persian]

Panahi B, *Functions of Social Security* (2007) Institute for Social Security Research, Tehran. [In Persian]

Pateman C and Shanley M L, *Feminist Interpretations and Political Theory* (1991) Penn State Press.

Pour Reza A, *Evolution and Development of the Healthcare and Insurance System in Canada*(2008) Institute for Social Security Research. [In Persian]

Vatankhah H, *The Impact of International Labor Organization Resolutions on Labor Rights in Iran*(2010) Samar, 1st edn, Tehran. [In Persian]

Zahedi Asl M, *Foundations of Social Welfare* (2002) Allameh Tabatabai University Publication, Tehran. [In Persian]

Zare H, *Development of Insurance and Poverty Reduction in the Islamic Republic of Iran* (2002) Insurance and Treatment Deputy of the General Directorate of Studies and Research. [In Persian]

Articles

Araghi E and Qassemi M, 'Legal Review of Subordinate Insureds Social Security Benefits' (2011) *Legal Information Quarterly* 27, 946-. [In Persian]

Araghi E, 'The Effect of International Social Security Measures on Domestic Law' (2007) *Social Security Quarterly* 30, 1338-. [In Persian]

Badini H, 'A Critical Look at Iran's Social Security Legal System' (2008) *Law Journal of the Faculty of Law and Political Science* 38(4), 5588-. [In Persian]

Badini H, 'Social Security Law in the Legal System' (2007) *Social Security Quarterly* 9(30), 123150-. [In Persian]

Brocas A M, 'Equal Treatment of Men and Women in Social Security: An Overview' (1998) 41(3) *International Social Security Review* 231249-.

Fakhim Alizadeh S and Hassanzadeh A, 'Solutions for Expanding Insurance Coverage in the Social Security Organization of Iran' (2011) *Social Security Journal* No 31 and 32. [In Persian]

Guerrina R, 'Equality, Difference and Motherhood: The Case for a Feminist Analysis of Equal Rights and Maternity Legislation' (2010) 10(1) *Journal of Gender Studies* 3342-.

Moini Rad R and Heidari A, 'The Overall Framework of the Role of the Ministry of Welfare and Social Security in the Country's Economic Transformation Plan' (2010) *Sixth International Conference on Social Security Research*. [In Persian]

Sahab T, 'Reference for Dealing with the Records of Insured Workers' (2007) *Journal of Internal Laws and Regulations of Social Security* Issue 2.

Shahbazi Nia M, 'The Right to Social Security: The Features, Content and Principles' (2007) *Social Security Quarterly* 9(30), 3964-. [In Persian]

Laws, Regulations, and Agreements

Agreement No. 100 of the International Labor Organization on Equal Remuneration for Work of Equal Value (adopted 1951).

Agreement No. 111 of the International Labor Organization concerning Discrimination in Respect of Employment and Occupation (adopted 1958).

Agreement No. 95 of the International Labor Organization on the Protection of Wages (adopted 1949).

Charter of the Social Security Fund (approved by the Cabinet 2010).

Constitution of the Islamic Republic of Iran.

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 1965).

International Covenant on Economic, Social and Cultural Rights (adopted 1966).

International Labour Organization (ILO), *102nd International Labour Conference. Full Text of the Conclusions of the Committee on the Applications of Standards, Part 12, Iran, Islamic Republic, Convention 111. Discrimination* (2013).

Labor Law of Iran (ratified 1990).

Social Security Law of Iran (ratified 1975).

Theses and Dissertations

Ghasemi M, 'Evaluation of the Quality of Services of the Social Security Organization from the Perspective of Customers and Employees' (2009) Sanandaj Branch, Islamic Azad University. [In Persian]

Mohabbati Y, 'Comparative Study of the Structure of the Comprehensive System and Welfare of Social Security in Iran and Selected Countries' (2008) Imam Sadiq University. [In Persian]

Websites

International Labor Organization (ILO), *Gender Equality and Decent Work: Selected ILO Convention and Recommendation that Promote Gender Equality* (2012) Geneva, Bureau for Gender Equality and International Labor Standards Department.

International Labor Organization (ILO), *Women's Empowerment: 90 Years of ILO Action* (2008) Geneva, Gender Equality at the Heart of Decent Work.

International Social Security Association (ISSA), *MEGATRENDS AND SOCIAL SECURITY: Family and Gender* (2017) Geneva.

Official website of the International Social Security Association: https://ww1.issa.int.

Official website of the Social Security Organization: https://www.tamin.ir.

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Floor Crossing in the Constitution of the People's Republic of Bangladesh: A Comparative Legal Perspective

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ABSTRACT

Whether floor crossing is democratic or undemocratic under Article 70 of the Bangladeshi Constitution is a significant question. The major goal of this rule is to prevent Members of Parliament (MPs) from voting against their party, lest their seats in Parliament be vacated. However, this article's violation of the Members of Parliament's (MPs') right to free speech is a major matter for worry, as it violates their fundamental rights. The primary purpose of this study is to examine the existing floor crossing law to determine whether or not it constitutes a breach of fundamental rights as embodied in the Bangladeshi Constitution, and to identify the gaps prevalent in the provision regulating floor crossing. This paper employs the doctrinal research methodology, utilizing journal articles, textbooks, academic databases, and online resources. In this study, we've attempted to introduce the provisions of floor crossing and describe it with historical context, Article 70 of the Constitution of the People's Republic of Bangladesh, and provisions in other nations such as the United States, the United Kingdom, and India. We have reviewed the rationale for barring floor crossing and why this provision will not be altered. We have also reviewed a recent incidence involving floor crossing and a case study that constructively critiques the regulation. We have determined that floor crossing is abandoning one's party in Parliament to vote for the opposing party during the bill's voting or passage, and we have provided recommendations to fix this issue and make the provision of floor crossing acceptable for the benefit of our people.

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Introduction

Floor Crossing typically entails voting against the party from which the member was nominated. It also bans members of parliament from selecting their vote during the voting period. Not only is it illegal for a member to cross the floor, but the law also states that he will lose his membership if he is absent during a vote when a bill is passed, or if he does not vote. Floor crossing stripped Members of Parliament of the right to 'freedom of speech,' because under this law, they cannot vote independently against their party line to maintain their membership.

Floor crossing is a prevalent concern in all democratic nations. Democracy is the most prevalent form of government in the modern world. It indicates that the government is managed by the people of the country and that the people elect their representatives through a voting process. Representatives hail from a single or multiple political party. However, majority-affiliated party representatives from the government and parliament become the sources of all authority, and the government is responsible and accountable to parliament for its acts. However, in 1972, our constitutional drafters added Article 70, which prohibits floor crossing in Bangladesh. Although the rule was initially enacted owing to the instability of the newly formed nation, it is today a violation of human rights[1].

Floor crossing and defections have had implications for governance, political stability, and democratic processes in Bangladesh. Critics argue that frequent floor crossing undermines democratic norms, weakens party structures, and reduces accountability to voters. Proponents of anti-defection laws argue that such measures are necessary to prevent opportunistic behavior and ensure the stability of the parliamentary system.

Article 70 of the Bangladeshi constitution restricts the freedom of members of parliament. Members of Parliament cannot vote against their party in any circumstance, even a vote of no confidence[2]. Even if he leaves the party, he will not be a member of the legislature. However, a member of Parliament should be allowed to vote and express his opinion on any matter before the chamber. Consequently, these regulatory measures must be entirely removed.

1 Karim, Sheikh Mohammad Towhidul. "Is Anti-Floor Crossing Law in Bangladesh Contrary to the Spirit of the Constitution of Bangladesh? An Inquiry." *Kathmandu Sch. L. Rev.* 4 (2014): 123.

2 Hossain, Md Mohaimen. "Critical Evaluation of the Article 70 of the Constitution of Bangladesh and its Contravention with the Constitution." PhD diss., East West University, 2023.

1. Definition of Floor Crossing

Floor crossing is a prevalent issue in all democratic nations. Political defection, often known as 'floor crossing' or 'side switching', is the act of resigning from one's political party or leaving one political party to join another. Article 70 stipulates that a Member of Parliament's seat is vacated if he resigns from the party that nominated him for election or votes against that party in Parliament.

The definition of floor crossing is when a Member of Parliament leaves his or her political party to join another or run as an independent. The word was first used to describe the process by which members of the British House of Commons crossed the floor to join the group of individuals (members of a different political party) sat at the opposite end of the chamber.

When a member of parliament votes against his or her party during the voting period or to approve a bill, this is referred to as floor crossing. Therefore, "crossing the floor" refers to voting against one's party in the parliament or resigning from one's party to join another. Lastly, we can say that if a Member of Parliament votes against his party in Parliament or resigns from his party, his seat will be considered vacant; this is known as floor crossing.

2. History of Floor Crossing in Bangladesh

Floor crossing in Bangladesh refers to the act of members of parliament (MPs) or elected representatives switching their political party affiliation or allegiances after being elected to office. The history of floor crossing in Bangladesh is intertwined with the country's political developments, transitions, and legal frameworks. Below is an overview of the history of floor crossing in Bangladesh:

- Early Years (1970s-1980s): Bangladesh gained independence in 1971, and parliamentary democracy was established. In the early years, floor crossing was not uncommon, and MPs frequently changed party affiliations based on political expediency, ideological shifts, or personal interests. There were instances of MPs crossing the floor to join or support different political alliances or governments[1].
- Constitutional Amendment and Anti-Defection Laws (1980s-1990s): In 1979, the Constitution of Bangladesh was amended to introduce provisions related to defection and floor crossing. The Anti-Defection Act was enacted in 1986 to discourage MPs from switching parties and to maintain political stability. The Act prohibited MPs from crossing the floor without resigning from their seats and seeking re-election under their new party affiliation. Despite the legal framework, instances of floor crossing continued to occur, albeit with legal and political consequences for the defectors.
- Political Turmoil and Party Alliances (1990s-2000s): Bangladesh witnessed periods of political turmoil, including frequent changes of government, alliances, and political confrontations. Floor crossing became a strategic tool for political parties to gain or maintain power, leading to allegations of opportunism and lack of ideological commitment among some MPs. The Anti-Defection Act was amended and strengthened

1 Rahman, Ziaur. "Democracy: Freedom of Speech and Floor-crossing interface." *Northern University Journal of Law* 1 (2010): 2438-.

in response to political developments and challenges to uphold the integrity of the parliamentary system[1].

- Contemporary Developments (2010s-Present): In recent years, floor crossing has remained a topic of debate and controversy in Bangladeshi politics. The legal and political landscape regarding defection and floor crossing continues to evolve, with occasional debates on the effectiveness and enforcement of anti-defection laws. Political parties and coalitions have implemented internal mechanisms to deter floor crossing and maintain party discipline among their members.

Overall, the history of floor crossing in Bangladesh reflects the complexities of the country's political landscape, including power struggles, ideological shifts, and the interplay between legal regulations and political practices. The ongoing debate surrounding floor crossing underscores the challenges and considerations in balancing political freedom with the need for stable and accountable governance.

3. Provision of Floor Crossing in Bangladesh

Article 70 of the Bangladesh constitution states "A person elected as a member of parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he –

a. Resigns from that party;
b. Votes in parliament against that party;

but shall not thereby be disqualified for subsequent election as a member of parliament" Under the Constitution of 1972, there were primarily two conditions prohibiting floor crossing. We are aware that the purpose of Article 70 was to prevent members of parliament from crossing the floor. This clause was influenced by the anarchy of the past and the dysfunctional circumstances caused by the parties. These are the two prerequisites:

i. If a member leaves his party; or
ii. ii. If he votes against his party during parliamentary votes.

The fourth amendment of 1975 added two additional qualifications by introducing an explanation of the phrase "votes against his party in Parliament." They are:

i. if a member is present in parliament but does not vote; and
ii. if a member does not attend the direction of his party and is absent from any parliamentary session.

Again, the 12th Amendment of 1991 included two additional criteria. The following are:

i. Article 70 has rendered the formation of a group within the parliamentary party of a political party virtually impossible;
ii. It is a violation of Article 70 if an elected independent member joins another political party.

1 Ibid.

After the 12th Amendment, Article 70 permits the removal of a member of parliament for six reasons. Thankfully, the 15th Amendment has reinstated the original Constitutional provisions on Article 70, although the culture surrounding this alteration has yet to flourish. These reforms were established to reserve legislative authority for the executive branch. Thus, we stated that Amendments can be used to implement dictatorship[1]. There is no possibility of democracy here. Whatever the executive will determine will be final. Other party members are unable to protest. As our country's executive is the prime minister, he or she is not required to account to the legislature and can do anything he or she pleases.

4. Floor Crossing in Other Countries

Floor crossing is also observed in certain other jurisdictions, which will be examined in the subsequent discussion.

4.1. India

Floor crossing in India refers to the act of Members of Parliament (MPs) or Members of Legislative Assembly (MLAs) changing their party affiliations after being elected to office. The history of floor crossing in India is intertwined with the country's political developments, electoral dynamics, and legal frameworks. Before India gained independence in 1947, floor crossing was not uncommon in the legislative bodies of British India. Political alliances and affiliations often shifted based on regional, ideological, and personal considerations. In the early years after independence, floor crossing occurred sporadically but did not attract significant attention or legal regulation. Political parties were evolving, and coalition politics was prevalent, leading to occasional instances of MPs or MLAs changing parties.[2]

The 1980s and 1990s witnessed a surge in floor crossing and political defections across India, particularly at the national level. Several high-profile defections and changes in party allegiances occurred, impacting government stability and political equations. In response to the growing concerns about political instability due to floor crossing, the Tenth Schedule of the Indian Constitution, also known as the Anti-Defection Law, was introduced in 1985. The Anti-Defection Law aimed to curb defections by disqualifying MPs or MLAs who voluntarily gave up their party membership or violated party whips during votes. The Anti-Defection Law significantly reduced the frequency of floor crossing and defections in Indian politics. MPs or MLAs who switch parties are subject to disqualification unless they meet specific criteria outlined in the Tenth Schedule.[3]

Over the years, the Anti-Defection Law has faced legal challenges and interpretations, particularly regarding the scope of disqualification and exceptions for mergers or splits within parties. The law has been upheld by the judiciary as a crucial mechanism for preserving party discipline and ensuring the stability of governments. While the Anti-Defection Law has been

1 Bari, M. Ehteshamul, and Pritam Dey. "The anti-defection provision contained in the constitution of Bangladesh, 1972, and its adverse impact on parliamentary democracy: A case for reform." *Wisconsin International Law Journal* 37, no. 3 (2020): 487.
2 Janda, Kenneth. "Laws against party switching, defecting, or floor-crossing in national parliaments." In *World congress of the international Political Science association, Santiago, Chile*, pp. 12-16. sn, 2009.
3 Bari, M. Ehteshamul, and Pritam Dey. "The Anti-Defection Provision Contained in the Constitution of Bangladesh, 1972, and Its Adverse Impact on Parliamentary Democracy: A Case for Reform." *Wis. Int'l LJ* 37 (2019): 469.

effective in curbing large-scale defections, occasional instances of floor crossing still occur, often leading to political controversies and debates. The law continues to play a significant role in shaping party politics, coalition formations, and government stability in India.

Overall, the introduction of the Anti-Defection Law marked a significant shift in addressing floor crossing and defections in Indian politics, leading to greater party discipline and stability in legislative bodies. However, the occasional instances of defections highlight ongoing challenges and debates regarding the balance between party loyalty and individual conscience in representative democracy.

4.2. The United Kingdom

In the United Kingdom, floor crossing refers to the act of Members of Parliament (MPs) or Members of the House of Lords changing their party affiliations or sitting as independents after being elected. The history of floor crossing in the UK has evolved, influenced by political developments, party dynamics, and legislative frameworks. Throughout British parliamentary history, there have been instances of MPs crossing the floor or changing party allegiances for various reasons, including ideological differences, personal beliefs, and political expediency.[1]

Before the 20th century, floor crossing was relatively common in the British Parliament, reflecting the fluidity of party politics and the absence of strict party discipline. MPs often switched parties based on changing political circumstances, government policies, or disagreements with party leadership. The 20th century saw the emergence of stronger party discipline and whip systems within major political parties in the UK. Party leaders exerted greater control over their MPs, reducing the frequency of floor crossing and defections.

Despite increased party discipline, there have been notable instances of floor crossing in modern UK politics. For example, in 1974, several Labor MPs crossed the floor to join the Conservative Party, leading to shifts in parliamentary balance and government stability. The UK does not have specific anti-defection laws comparable to those in some other countries, such as India. MPs in the UK Parliament have the freedom to change party affiliations or sit as independents without facing immediate legal consequences[2].

Floor crossing can have implications for government stability, parliamentary majorities, and political dynamics in the UK. It can influence coalition formations, parliamentary votes, and the balance of power within the House of Commons or House of Lords. Floor crossing occasionally sparks public debate and discussion about political integrity, representation, and the role of MPs in representing their constituents' interests versus party mandates. In recent decades, instances of floor crossing in the UK have been relatively rare compared to earlier periods. MPs who choose to cross the floor often do so based on significant policy disagreements, shifts in party ideologies, or personal convictions. Overall, while floor crossing has been a historical feature of British parliamentary politics, the prevalence and impact of such actions have diminished over time due to increased party discipline, changing political norms, and a lack of formal anti-defection laws in the UK.

1 Malebeswa, Tendekani E. "Floor Crossing and Elective Office: Freedom of Choice or Betrayal of Trust?-The Case of Botswana." *U. Botswana LJ* 28 (2020): 81.
2 Horn, Geoff. "Crossing the floor: Reg Prentice and the crisis of British social democracy." *Crossing the floor* (2016): 1256-.

4.3. The United States of America

In the United States, floor crossing, or the act of elected officials changing their party affiliations, is less common compared to parliamentary systems found in other countries. However, there have been notable instances of floor crossing in U.S. politics, especially at the congressional level. Throughout U.S. history, there have been instances of elected officials changing their party affiliations for various reasons, including ideological shifts, policy disagreements, and political considerations. The U.S. political system is characterized by strong party affiliations and party discipline, which often discourages floor crossing. Elected officials typically align with either the Democratic Party or the Republican Party and tend to adhere to party platforms and agendas.[1]

While floor crossing is less common in the U.S., there have been notable instances of elected officials changing parties or becoming independents. For example, in recent years, some members of Congress have switched parties or become independents due to policy disagreements, leadership changes, or electoral considerations. Floor crossing can have implications for legislative dynamics, committee assignments, and the balance of power in Congress.[2] It can influence the majority party's control over legislative agendas, committee chairs, and procedural outcomes.

Floor crossing may also be influenced by electoral considerations, such as changes in constituency demographics, political realignment, or electoral prospects for reelection. The U.S. Constitution does not explicitly address floor crossing or impose restrictions on elected officials changing parties. Elected officials have the freedom to change party affiliations or become independents without facing legal consequences. Floor crossing occasionally sparks public debate and discussion about political integrity, representation, and accountability. Critics may view floor crossing as opportunistic or driven by personal ambitions, while proponents argue that elected officials have the right to follow their convictions and represent their constituents' interests.[3]

In recent years, there have been a few instances of floor crossing in Congress, although they are relatively rare compared to other political phenomena, such as party realignment or ideological shifts within parties. Overall, while floor crossing is less common in the United States due to strong party affiliations and party discipline, it remains a part of U.S. political dynamics, especially in contexts where policy disagreements or political considerations lead elected officials to reassess their party affiliations or become independents.

5. Reasons Behind Prohibiting Floor Crossing in Bangladesh

The Floor crossing law is necessary for maintaining party discipline in the country, but it also impedes the development of parliamentary government and undermines the rule of law; yet, it will not be repealed. Our constitution had seventeen changes, but neither the government nor political parties moved to revise or repeal this provision. They did not obtain the necessary two-thirds majority vote to alter or eliminate this statute. In 2008, the Bangladesh Awami League took power

1 Smiles, Joseph. "Floor-crossing: a controversial democratic process." *Journal for Contemporary History* 32, no. 1 (2007): 130148-.

2 Joubert, Leonardus Kolbe. "The Mandate of Political Representatives with Special Reference to Floor Crossing: A Legal Historical Study." PhD diss., University of South Africa, 2006.

3 Rahman, Ziaur. "Democracy: Freedom of Speech and Floor-crossing interface." *Northern University Journal of Law* 1 (2010): 2438-.

with more than two-thirds of the seats. However, they never acted to delete or alter this provision.[1]

Floor crossing was included in Article 70 for the sole purpose of maintaining the government's stability and effective operation. Honorable speaker Barrister Jamiruddin Sarker stated to the eight defendants of Article 70 of the Bangladeshi constitution, which bars floor crossing by members of parliament, that "it will assist strengthen and stabilize parliamentary democracy in the country". Some constitutional scholars claim that Article 70 of the Constitution "was crafted with great deliberation to guarantee stability and strengthen parliamentary democracy".

The purpose of the article is to ensure the stability and continuity of administration, as well as the discipline of political party members, to eradicate corruption and instability from national politics. In addition, politicians are pleased with this provision since it allows them to implement an authoritarian system in which no party or individual can be opposed.

Another rationale for this rule is that "it ensures solidarity among the members of a single party, yet there are major difficulties such as parliamentary contradictions, a lack of responsibility, and the expansion of dictatorship". Contradictions in the system or constitution impede the application of the rule of law. The primary issue, however, is that corruption can occur sporadically as a result of this, which is Bangladesh's primary systemic problem. To achieve stability and continuity of government, at least for the team that is elected, is another motive[2]. Article 70 of the United States Constitution guarantees a robust, stable, and functioning parliamentary democracy. While there are arguments both for and against the prohibition of floor crossing, these reasons reflect the underlying objectives of ensuring stable governance, preserving party discipline, protecting electoral mandates, and promoting accountability and public trust in Bangladesh's political system.

5.1. Recent Incidents of Floor Crossing in Bangladesh

Kazi Sirajul Islam, who was elected MP from the Faridpur-1 constituency on an Awami League (AL) ticket in the 2001 general election, defected to the ruling party Bangladesh Nationalist Party (BNP) on June 4, 2001. He went to the Prime Minister's office, presented Khaleda Zia with a bouquet, pledged fealty to her leadership, and declared his intention to join the BNP. Premier Khaleda Zia applauded Kazi Sirajul Islam's decision to join the BNP. Kazi Sirajul Islam initiated the first-floor crossing of the Eighth Parliament.

In July 2009, Awami League general secretary Abdul Jalil again spoke out against this party's activities. As a result, he was forced to confront a massive scandal, and he ultimately resigned from the party. "I am resigning today from my position as general secretary of the Bangladesh Awami League," Jalil declared in a brief press release from his Gulshan home, adding, "I have no other choice". In June 2012, Tanjim Ahmad Sohel Taj, the son of the nation's first prime minister Tajuddin Ahmad, resigned from his position as a lawmaker and announced that he would no longer be actively participating in politics. He had been elected to this parliament, but his views differed from those of his colleagues, and he lacked the courage to improve his political region. A particular example of Sultan Mansur's parliamentary membership aids in

1 Alam, Md Asraeul. "Anti-Defection Law And Its Impact Over Constitutionalism In Bangladesh: An Analytical Study." *Available at SSRN 4708257* (2024).

2 Hossain, Kamal. "The Making of the Bangladesh Constitution." In *The Emergence of Bangladesh: Interdisciplinary Perspectives*, pp. 57-65. Singapore: Springer Nature Singapore, 2022.

comprehension: Mr. Sultan Mansur, the elected representative from the Moulvibazar-2 seat under the banner of Gono-forum. In March 2019, he finally took his oath as a member of parliament. On the same day, hours after taking the oath, he was dismissed from the party because he had broken the party's resolve not to join parliament. Referring to Article 70 of the constitution, Attorney General Advocate Mahbubey Alam told the media that Sultan Mansur's parliamentary membership will stand because he neither resigned from the party nor voted against it. Furthermore, he is the only Gono-Forum lawmaker who has taken the parliamentary oath.

Professor Dr. Ridwanul Hoque of Dhaka University disagrees and believes that Mr. Mansur's seat in parliament has become vacant following Article 70. Constitutional law expert Mahmudul Islam asserts that a violation of any party directive will not inevitably result in the vacating of a seat. Therefore, under the current circumstances, Sultan Mansur will not lose his membership in the assembly. Article 66(4) of the constitution stipulates that, if a dispute arises regarding whether a member of parliament has, after his election, become subject to any form of disqualification listed in Article 66(2), or whether he should vacate his seat under Article 70, the dispute shall be referred to the "Election Commission" for adjudication, and the commission's decision shall be final.[1]

In December 2021, a faction of the Jatiya Party (JP) led by GM Quader, brother of late President HM Ershad, announced their decision to join the ruling Awami League-led Grand Alliance. This move was seen as a significant development in Bangladeshi politics, as it reshaped political alliances and strengthened the ruling coalition. In October 2021, Kazi Firoz Rashid, a prominent MP and former leader of Jatiya Party (Ershad), announced his departure from the party. Rashid cited differences in ideology and organizational matters as reasons for leaving the party, signaling a shift in political alignments.

The Bangladesh Nationalist Party (BNP) has experienced internal divisions and defections in recent years, with several MPs and leaders either leaving the party or being expelled. These defections have influenced political dynamics and coalition formations, contributing to a fluid political landscape. In June 2021, a faction of the Jatiya Samajtantrik Dal (JSD) led by ASM Abdur Rab announced their decision to join the Awami League-led Grand Alliance. This move was seen as a strategic realignment within the opposition and ruling coalitions, impacting parliamentary dynamics[2].

Apart from national politics, defections, and floor crossing have also been observed in local government bodies, including municipalities and city corporations. These local-level defections can influence governance at the grassroots level and impact political alignments in different regions. It is important to recognize that political developments in Bangladesh are fluid, and alliances can shift based on evolving circumstances, ideological considerations, and strategic calculations. The incidents mentioned above are indicative of the dynamic nature of Bangladeshi politics and the role of floor crossing in shaping political outcomes.

1 Al Faruque, Abdullah. "Role of Parliament in Ensuring Democratic Accountability in Bangladesh: Setting the Agenda for a Strengthened Parliamentary System." In *The Constitutional Law of Bangladesh: Progression and Transformation at its 50th Anniversary*, pp. 121-137. Singapore: Springer Nature Singapore, 2023.

2 Hossain, Md Mohaimen. "Critical Evaluation of the Article 70 of the Constitution of Bangladesh and its Contravention with the Constitution." PhD diss., East West University, 2023.

5.2. Effects of Article 70 in Bangladesh

The effects of Article 70 of the Bangladeshi Constitution are as follows:

5.2.1. Article 70 is inconsistent with the basic rights of members of parliament

Article 70 of the Constitution of Bangladesh is inconsistent with the fundamental rights of members of parliament, including personal liberty, freedom of association, freedom of thought and conscience, and freedom of expression. Political defection is a democratic right associated with individual liberty and freedom of expression. The right of a member to vote against a party's choice, to be absent from the chamber to protest an undemocratic party decision, or to abstain from voting is tied to his or her liberty. A lawmaker who is directly elected by the people is always expected to act democratically. The mandate of the people is for him to speak out against undemocratic decisions, not to follow an undemocratic party line.

Article 70, however, prohibits members of the ruling party from exercising their rights even when the government passes an undemocratic law; as a result, this rule violates human rights and is used to persecute innocent persons. Some constitutional experts and members of civil society contend that Article 70 of our constitution "contradicts the fundamental rights enumerated in part (iii) of the constitution, consequently restricting the rights of the MPs in terms of freedom of thought and expression".

Thus, we might conclude that this law is detrimental to the state. It prohibits MPs from freely expressing their opinions in the House of Representatives and from speaking freely in party meetings. Moreover, because no member of Congress may speak out against his party's choice, their fundamental rights are readily violated.

5.2.2. Conflict among members of parliament

Article 70 prohibits members of parliament from voting against undemocratic party decisions. In other words, it prohibits MPs from protesting or having differing ideas on party choices. Consequently, the majority of members of parliament do not talk openly or express their opinions during party meetings or seminars. This indicates the primary aim of democracy has not been achieved. Article 70 was deemed dictatorial by numerous members of the 5th and 7th Congresses. The question then comes as to why they are not attempting to alter or eliminate the law. The expertise of these legislators is also an issue, as they are unaware of Article 70's comprehensive application. Thus, the attitude of the legislators is somewhat paradoxical.

5.2.3. Lack of responsibility and scope of dictatorship

The principle of parliamentary democracy is that the executive is directly accountable to the legislative branch. Parliamentary government must count the pulse of the majority of legislators at every step, as it may be defeated at any time on the floor. Responsibility of government consists of two types: individual responsibility of ministers and collective responsibility of the cabinet. However, the Constitution of Bangladesh makes no provision for individual responsibility and collective responsibility to the effect of Article 55, but the provision for collective responsibility has been rendered ineffective by Article 70, as the cabinet is always confident that it will not be deposed by a motion of non-citizens. Therefore, it is simpler for the Prime Minister to be authoritarian. No member of Congress is permitted to speak against the party line, preventing the

development of democracy. This law allows the Prime Minister, in his capacity as head of state, to practice dictatorship. Article 70 has thereby transformed a responsible government into an elected dictatorship.

5.2.4. Article 70 is a great hindrance to the ensuring rule of law in the country

Rule of law should create a situation where there will be a chance of discussion over a bill. The members or MPs should have their right to argue or debate on a proposed issue or over a proposed bill but in Article 70 no dissenting opinion can be made by the members of the rolling party and as a result every bill, however undemocratic it may be gets quickly passed on approved. Bangladesh has been victimized due to this law, not once but multiple times. Dr. Badruddoza Chowdhury, a former member of the Bangladesh Nationalist Party and the president of the People's Republic of Bangladesh at the time, had minor disagreements with the ruling party in August 2003. And he was forced to resign without ceremony (Hossain, 2018).

When a bill is introduced in the parliament, there is an opportunity to discuss it; this discussion should be conducted by both parties so as not to undermine democracy. This discussion, however, is impeded by Article 70, which prohibits any member of Parliament from speaking out against a party decision. This is why the rule of law is being disregarded and why it is detrimental to democracy. Therefore, Article 70 has transformed the rule of law into the rule of the party.

6. Findings

From the preceding discussion, we have learned a great deal about the significance of this study. The following text discusses these results:

1. Regarding floor crossing, we've discovered that it entails abandoning one's own party in Parliament to vote for the opposing party during voting or bill passage. In addition to floor crossing, a member of parliament will lose his seat if he is absent from the chamber during a vote or the passage of a measure.
2. We have also discovered that under a democratic state, MPs represent the general populace in Parliament and the government is governed by the people. A floor crossing statute prevents members of Congress from criticizing their own party, even if it goes against the will of the people.
3. This floor crossing law under Article 70 was added to the Bangladeshi constitution in 1972 in an effort to settle the volatile situation, but it today violates all human rights.
4. 4) The concept of a floor crossing law originated in the British House of Commons. No member of parliament is permitted to cross the floor and vote for the opposing party; if he does so, his position in parliament will be vacated.
5. Additionally, we discuss the history of floor crossings. MPs used to cross the floor from one party to another for personal reasons, which is a major hindrance for the government; therefore, the administration is compelled to make this decision in order to maintain normal flow between the parties.
6. From the preceding discussion, we have also learned about the floor crossing provision of the Constitution of Bangladesh, which states that no mem-

ber of parliament can be absent during the voting or passage of a bill in parliament, nor can he vote against his own party, lest he lose his seat in parliament.

7. We've discovered that Article 70 of the Bangladeshi Constitution has been modified by the 4th and 12th amendments. Through the 15th Amendment, the original provision was later reinstated.
8. We have also discovered that floor crossing or anti-defection law has been enacted in India by their 52nd constitutional amendment. The British House of Commons created the law governing floor crossing. In the United Kingdom and the United States, there are many examples of floor crossings.
9. We are also aware that regardless of whose government is in power, this clause cannot be altered. Because this clause ensures the government's stability. There is no reason to replace it, according to some Constitutional scholars, because it maintains the stability and strength of parliamentary democracy.
10. This clause of the Bangladeshi Constitution directly violates the Constitution since it denies the MPs their basic rights. Personal liberty, Freedom of Association, Freedom of Thought and Conscience, and Freedom of Speech, these rights are fundamental to a citizen as enshrined in the constitution, but MPs cannot exercise these rights, they cannot give their opinion freely, and they cannot express their opinion in opposition to their party. Therefore, we can conclude that this provision infringes the fundamental rights of legislators and is therefore fully incompatible with the Constitution.
11. This provision perpetuates the government's dictatorship. Because it ensures the stability of the government, no government will ever alter this provision. This restriction hinders democracy because representatives cannot vote against their party. There are numerous opportunities for the government to exercise its dictatorship. Although Article 70 was inserted to the Constitution to preserve a dynamic situation, to maintain discipline among members of Congress, and to eliminate political corruption, the article also serves to maintain MP discipline and prevent political corruption. In the end, though, it ensures a dictatorship, which poses a direct threat to a country's democracy.
12. This clause is a direct impediment to the rule of law in a country. As a result, if a measure is offered in the parliament, a member of parliament cannot express his opinion against the will of his party, even though it is their right to fight about the bill, whether it is right or wrong. However, due of this rule, members of Congress cannot vote out of fear that their seats may be abandoned. Due to these hurdles, the rule of law is impeded.

7. Recommendations

As a result of the preceding discussion on floor crossing in light of our constitution, the following actions are suggested:

a. Regardless of the reason for not changing or repealing the Anti-floor Crossing law, I

believe that a stable and effective government system is always more important than the floor crossing system, even if it is undemocratic.

b. In Bangladesh, corruption, self-interest, greed, and a desire for power have been and continue to be the norm among political figures, as demonstrated in the past and present. Therefore, it would be impractical for Bangladesh to simply eliminate this law.
c. If this law were repealed, it would create another impossible scenario, and the government could collapse, as it did between 1954 until 1958. Therefore, the avoidance of floor crossing is necessary for the government's stability.
d. The prevention of floor crossing and defection is only necessary for the government's stability. Through a vote of confidence or non-confidence, the government's stability is examined. The applicability of the anti-defection law, Article 70, must therefore be limited to a vote on a motion of non-confidence or confidence. A typical or general bill is not always related to the government's stability.
e. If the anti-defection rule is applied just to motions of no-confidence or confidence, members of parliament will be allowed to reject undemocratic legislation, be it a spending bill or an ordinance approval. As a result, the spirit of responsible parliamentary administration and rule of law will not be hindered to the same extent.
f. Article 70 should grant MPs the right to vote on money bills and budget passes, as these have nothing to do with the government's stability and will not impede the government's functioning.
g. This law restricts legislators from voting freely, which is detrimental to democracy. To remedy this issue, it is necessary to empower MPs to independently cast their regular votes (votes other than votes of no confidence or confidence). This provision should be preserved exclusively in the event of a vote of no confidence or confidence, so that the government can function effectively.
h. If democracy is to thrive in a country, this provision must be amended, and MPs must be able to freely voice their opinions and exercise their fundamental rights. Only thus can democracy be enhanced and government tyranny be prevented, both of which are essential for a country's democracy.

Therefore, even if this section is amended, the legislature will not be fully effective. Nonetheless, it will aid us in establishing a stable political system and implementing the rule of law and democracy, which are crucial for achieving a responsible government. Therefore, if this law is altered, the government will not fall and the rule of law will still be maintained. And members of Congress have the opportunity to voice their opinions in the House of Representatives, which is also essential for Parliamentary democracy.

Conclusion

After the preceding discussion, it is quite evident that Article 70 of the Bangladeshi constitution's provision for floor crossing is detrimental to our democracy. If we examine the history of floor crossing, it was introduced at a period when the country's position was uncertain and it was

vital to pass any law in the legislature, even if it was for the people's benefit. However, after 50 years of independence as a developed and democratic nation, we should change Article 70 of the Bangladesh Constitution following the above recommendations. As we profess to be a democratic nation, we should quickly introduce an amendment to ensure democracy in our legislature. The provision of floor crossing should be limited to motions of no-confidence or confidence, and removed from all other parliamentary votes.

We desire a competent government and responsible representatives in Congress. Members of Congress are permitted to vote honestly, even if it goes against their party. This law must be removed, but because our political leaders are crooked, this cannot be accomplished easily. As I suggested in the recommendation section, it can be modified slightly so that we can experience some democracy. We believe that, as a result of this shift, we will have a responsible government and responsible legislators, and will be able to implement the rule of law. Consequently, we will have a significantly more accountable legislature.

References

Books

Horn G, *Crossing the Floor: Reg Prentice and the Crisis of British Social Democracy* (2016) 1256-.

Al Faruque A, 'Role of Parliament in Ensuring Democratic Accountability in Bangladesh: Setting the Agenda for a Strengthened Parliamentary System' in *The Constitutional Law of Bangladesh: Progression and Transformation at its 50th Anniversary* (Springer Nature Singapore 2023) 121137-.

Hossain K, 'The Making of the Bangladesh Constitution' in *The Emergence of Bangladesh: Interdisciplinary Perspectives* (Springer Nature Singapore 2022) 5765-.

Articles

Bari ME and Dey P, 'The Anti-Defection Provision Contained in the Constitution of Bangladesh, 1972, and Its Adverse Impact on Parliamentary Democracy: A Case for Reform' (2020) 37(3) *Wisconsin International Law Journal* 487.

Janda K, 'Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments' in *World Congress of the International Political Science Association* (Santiago, Chile 2009) 1216-.

Karim SMT, 'Is Anti-Floor Crossing Law in Bangladesh Contrary to the Spirit of the Constitution of Bangladesh? An Inquiry' (2014) 4 *Kathmandu School of Law Review* 123.

Malebeswa TE, 'Floor Crossing and Elective Office: Freedom of Choice or Betrayal of Trust?—The Case of Botswana' (2020) 28 *University of Botswana Law Journal* 81.

Rahman Z, 'Democracy: Freedom of Speech and Floor-Crossing Interface' (2010) 1 *Northern University Journal of Law* 2438-.

Smiles J, 'Floor-Crossing: A Controversial Democratic Process' (2007) 32(1) *Journal for Contemporary History* 130148-.

Theses and Dissertations

Hossain MM, 'Critical Evaluation of the Article 70 of the Constitution of Bangladesh and Its Contravention with the Constitution' (PhD Dissertation, East West University 2023).

Joubert LK, 'The Mandate of Political Representatives with Special Reference to Floor Crossing: A Legal Historical Study' (PhD Dissertation, University of South Africa 2006).

Online Sources

Alam MA, 'Anti-Defection Law and Its Impact Over Constitutionalism in Bangladesh: An Analytical Study' (2024) SSRN 4708257 https://ssrn.com/abstract=4708257 accessed September 20, 2024.

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Issues and Challenges Concerning Copyright Law in Relation to the Outer Space

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"The imagination is an innate gift, but it needs refinement and cultivation; this is what the humanities provide."

Martha Nussbaum

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ABSTRACT

The 21st century is commonly referred to as the century of technological upgradation and digitalisation. A large section of the developmental activities that are taking place in our daily lives are due to the invention and exploration based activities that are being conducted by researchers, scientists and scholars from different nations. One of the most significant activities that have helped in shaping the country's future is the ability to forecast weather conditions, disaster situations, natural calamities and atmospheric health of a country and also of the world at large. This becomes possible because of the imagery and the information which are generated with the help of the satellites. Furthermore different categories of satellite also help in broadcasting such information and sending information to the masses through various modes of communication including the television and the wireless network mediums. The term invention is heavily dependent and interconnected with a particular discipline of law- the intellectual property right. The information which is generated by the satellites is considered as important creations. The main question that arises in this sector is whether such information is subject to protection under any scheme and specifically copyright regime of the intellectual property right domain. This paper focuses on the intersection between the copyright regime and the creations in relation to the outer space and what are the possible areas which are required to be focused on in order to establish a sound system of protection for such creations.

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Introduction

The Earth that we dwell on is a part of the vast expanse of space which is often referred to as the outer space. The concept of outer space has not yet been given a fixed form of definition; however several scientists have approached several mechanisms in order to define the concept of Outer Space and what constitutes it. The term outer space has been interpreted by the existence of an imaginary line called the Von Karman line which lies a hundred kilometres above the earth's surface. The interpretation which is often followed is that any property which lies beyond this imaginary line is considered to be a property of the outer space. The existence of this imaginary line helps in segregating the space which belongs to various jurisdictions of and within the Earth's area from the extent of the Outer Space. The 21st century is often recognized as the century of mass digitalization and technological up-gradation. In order to materialize this facility and feature, it becomes extremely important to explore various aspects of Earth as well as that of the outer space so as to increase connectivity at various levels.[1]

The research and development based activities have increased specifically during the 21st century. The multidisciplinary approaches in such research and development have enabled the residents of this planet to understand and acknowledge how various disciplines of study can be made to interpret with one another in order to provide the technological applications with sufficient flexibility and suavity.[2] While dealing with multi-disciplinary approaches, two of the most prominent fields that are being researched upon continuously and extensively include the Intellectual Property Rights regime and the Outer Space. The history that follows these two respective fields reveal that their existence came at different time periods but currently they are being researched upon simultaneously in order to recognize the possible existence of an intersection between them and explore this intersection in a much more stable manner.[3] While, deciphering the timeline of intersection that exists between these two separate fields, a certain point becomes indispensable in the discussion.

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1 European Union's Database directive 96/9/EC of 1996

2 Retrieved from https://www.aspistrategist.org.au, last accessed on July 16, 2023.

3 Retrieved from https://iprlawindia.org/wp-content, last accessed on July 20, 2023.

The objective to understand the timeline of evolution becomes important in order to recognize the fact that there are several areas which are still being worked upon in order to understand the possible intersection that exists. The concept of Intellectual Property Right (IPR) came to be recognized much later in comparison to the concept of Outer Space. However the law in relation to IPR became recognized much earlier in contrast to the law that safeguards and protects the Outer Space. The first official recognition to the intellectual property right regime was given in the form of the Paris Convention in the year 1883.[1] Following the Paris Convention, a worldwide recognition and acclamation was given to this domain by means of bringing the Berne Convention into existence in 1886.

By the 20th century, most of the conventions in relation to the IPR and a global recognition of the same had already come into existence. In fact following these conventions, numerous domestic legislations had already started being inculcated into the system as a result of which such legislations could be made much more sharp-edged and refined. There were extensive research based activities which were being constantly conducted in IPR especially during the latter part of the 19th century. On the contrary, the recognition of outer space was an act which was already given shape and form to during the 12th century. Several scientists devoted their time in an activity which was referred to as stargazing which involved an observation conducted in relation to the celestial bodies in order to understand their position, their activity and their basic features. However this activity was purely scientific and no scope of establishing its connection with law could be traced.[2]

It was during the Second World War that missiles {referred to as Vengeance weapons (termed as V2 missiles)} were launched by the German army (from 1942-1945). As an aftermath of the same there were several casualties. This made the countries in power realize how outer space can be used for multifarious purposes and how they can serve as the future of the upcoming generation.[3] The very initial phase that followed this realization was clouded by the stakeholders of power trying to manipulate their ways in order to encroach a larger portion of the Outer Space.[4] The United Nations which was formed as an aftermath of the Second World War had given rise to the United Nations Office of Outer Space Affairs[5] (UNOOSA) which became one of the significant bodies in deciding affairs in relation to the outer space.

The United Nations Office for Outer Space Affairs (UNOOSA) works to help all countries, especially developing countries, access and leverage the benefits of space to accelerate sustainable development. Work toward this goal is achieved through a variety of activities that cover all aspects related to space, from space law to space applications.[6] It was assisted by the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) in framing of legislations and rules that would help in maintaining sufficient law and order in relation to the Outer Space. As a consequence of the Second World War the, Soviet Union and the United States of America divided the world into two orders and they were consistently trying

1 Retrieved from http://stage.tksc.jaxa.jp/spacelaw, last accessed on July 20, 2023.
2 Retrieved from www.nasa.gov, last accessed on July 17, 2023.
3 Retrieved from https://www.legalservicesindia.com, last accessed on July 17, 2023.
4 Retrieved from http://digitalcommons.unl.edu, last accessed on July 18, 2023.
5 Retrieved from https://www.unoosa.org/, last accessed on July 31, 2023.
6 Retrieved from https://www.unoosa.org/oosa/en/aboutus/roles-responsibilities.html, last accessed on July 20, 2023.

to dominate the remaining countries not only on the earth as well as in the Outer Space. As a result of this tumultuous affair, it was soon realized by the remaining nations under the United Nations that unless a social and legal order is being brought which was ratified and backed by the world at large, either of these countries or both of them would soon become the *dominus* (master) of the Outer Space.[1]

Thereafter the committee decided among its members and brought forth five treaties which have been ratified by most of the nation states and serve as the torch-bearers in determining the activities in relation to the Outer Space. This often brings one of the most important issues into light - whether the outer space can be treated as a separate domain. In order to restrict and restrain the activities conducted in the outer space the committee decided that there must be the presence of a factor which will treat the outer space in the same manner as the high seas are treated and there must be a jurisdictional approach brought within the bounds of this particular domain. The Outer Space Treaty recognizes the outer space as a separate domain by bringing the extra-territorial approach within its forte. This enables any and every nation state to be recognized once they send their entity into the outer space and the recognition is given on the basis of few determining criteria which are once again a part of the five treaties.[2]

The Liability Convention and the Registration Convention when read together, gives an insight into the fact that any space ship which is sent to the outer space will have jurisdiction over the activities which are conducted within such spaceship and the jurisdiction will be in relation to the nation state who is responsible in launching the concerned spaceship into the Outer Space. This has materialized effectively into determining the jurisdictional approach. Another important factor that has helped in deciphering the fact that no nation state can ever become the sole master of the outer space is the principle of common Heritage of mankind.[3] This principle has been effectively mentioned under the outer space treaty and it provides that while every nation state has freedom of access and freedom of using the space resources for exploration based activities, there can be no appropriation of the property that is a constituent of the Outer Space. This principal can be commonly equated with the principle of Res Communis- meaning property belongs to the community at large and it further ensures that no individual claims ownership over any of such outer space related property.[4]

The fact that the principle of Common Heritage of Mankind in relation to the outer space is strictly against appropriation has been firmly established under the Outer Space Treaty. Since the last three decades the field of inter-disciplinary study has made great progress especially in relation to the domains concerning Trademarks and Patents.[5] One of the most important exploration based activity in relation to the outer space is establishing its linkage with the IPR regime. In fact, the trademark related activities that are currently being determined in relation to the outer space has increased manifold, however the concerns in relation to the copyright legislation have a lot more scope of being worked upon.[6] As a result of the difference in their

1 Retrieved from https://www.ifrc.org, last accessed on July 19, 2023.
2 Retrieved from http://www.newworldencyclopedia.org, last accessed on July 12, 2023.
3 Retrieved from https://www.wipo.int/export/sites, last accessed on July 20, 2023.
4 Retrieved from http://articles.adsabs.harvard.edu, last accessed on July 20, 2023.
5 Akaanksha Mishra, 'The Indian Journal of Intellectual Property Law' (2014–2015) 7 85.
6 See Indian Journal of Air and space Law (IJASL), Vol III, 20-60

timeline of evolution, the intersection between these two domains had not been effectively identified. As a result of this, even in the 21st century there are still numerous areas lying on their interface that have not yet been recognized and a legal regime recognizing this intersection becomes indispensable.[1]

1. Principles Concerning IPR (With Reference to Copyright) and Outer Space: Establishing a Balance

One of the most important ventures that follow the identification of the linkage between these two regimes is determining whether they are contradicting at any point especially in relation to the principles that have helped in their respective evolution. While doing so it has been found out that on numerous occasions the principle that underlies the IPR regime is mainly revolving around the principle of exclusive right. The reference of the same has been found in the Two Treatise Theory of John Locke's Labour Theory.[2]He states that any property that belongs to the public and the community at large can also eventually become an individual's property. A certain property on which labour has been invested and appropriation has been conducted by an individual will lead to the end product being a commodity over which the individual will have an exclusive right. Therefore the term appropriation becomes an important aspect under the IPR regime. The Outer Space Treaty on the other hand clearly prohibits any appropriation related activity taking place in the Outer Space. This leads to a significant collision of the principles and raises the question as to whether any IPR based activity that takes place in relation with the outer space, appropriates any property that belongs to the outer space.[3] For determining this, the constituents need to be interpreted.

1.1. What Is Meant by Property of Outer Space?

The outer space domain initiates from a distance of 100 km above the Earth's surface. Anything that lies beyond and imaginary line termed as the Von Karman line is considered to be a property of the Outer Space. While determining what are the properties present in the outer space over which a claim of ownership cannot be exercised, Article 2 of the Outer Space Treaty provides that it constitutes Moon and other celestial bodies thereby stating the fact that any celestial body present in the outer space will be termed as a property of the outer space. The European Space Agency while determining the constituents of outer space has stated that asteroids and meteors will also be considered as celestial objects and they are properties of the outer space. However a satellite which has been sent by the Earth to the outer space will not be referred to as a body of the outer space because there is an exception in such cases where the doctrine of extra territorial jurisdiction applies to the respective satellite which has been sent by a particular nation state. Therefore the principle of Common Heritage of Mankind will be applicable to anything and everything that is present in the outer space except any commodity which is being sent by the Earth to the Outer Space.[4]

1 WIPO, 'Symposium on Broadcasting, New Communication Technologies on IPR' (1998).
2 Retrieved from http://www.esa.int/esapub/bulletin, last accessed on July 28, 2023.
3 Retrieved from https://www.inta.org/perspectives/features/ip-in-outer-space-the-next-frontier, last accessed on July 22, 2023.
4 Article VII of Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967

There lies a certain exception to this aspect. It has been stated by a resolution by the International Institute of Space Law (IISL) that any asteroid or meteor that lands on the earth from the outer space no longer remains a property of the outer space and becomes a property of the nation state wherein it has landed.[1]This allows the concerned nation state to conduct any research-based activity on the meteor without having to compromise the anti-prohibition principle.[2]However at the same time it also raises a particular question as to whether the body which is being sent from the Earth to the outer space for conducting exploration and research defies the prohibition principle and appropriates any of the outer space resources. In order to determine the same it becomes significant to understand and interpret the term appropriation and how the body specifically the satellites which are being sent from the Earth to the outer space functions.[3]

1.2. What Is Meant by Appropriation?

The term appropriation has not been defined particularly and specifically. Neither is there a universally accepted definition in this respect. There have however been numerous instances where the term appropriation and the interpretation of this concept have been dealt with under various regimes involving property law and the outer space. Oxford Dictionary has conceptualized this term as an incident wherein a certain individual uses and takes over the property of another individual without the consent and knowledge of the latter. Therefore in relation to space law, appropriation can be enabled only with the consent of the owner of the property since ownership has been given to the public at Large in other words it cannot be appropriated without the consent from the entire world population which is practically not possible thereby making it a domain which cannot be appropriated.[4]

Another reference can be drawn in order to understand the term appropriation. Arthur Goldberg who was the permanent representative to the United Nations Office of Outer Space Affairs of the United States had chalked down the concept of appropriation in his paper which is submitted under the International Astronautical Congress in June 1966. Before the Outer Space Treaty came into existence, numerous interpretations of the terms which were to be included under various provisions of the treaty was being discussed in order to decipher[5] their meanings in relation to the concerned treaty. In the papers submitted before the International Astronautical Congress, the term appropriation has been interpreted in three manners that includes setting apart any constituent of a particular material from its original content, or using a matter or commodity in a manner that would amount to consumption of the commodity or using a Celestial body in a manner that would result in disruption of motion of the commodity or body.[6]

These definitions have been identified as official interpretations of the terms and concepts

1 Retrieved from http://www.unoosa.org/documents, last accessed on July 22, 2023.

2 See C. Garmon, 'Intellectual Property Rights: Protecting the Creation of New Knowledge across Cultural Boundaries' (2002) 45 *American Behavioural Scientist* 1145.

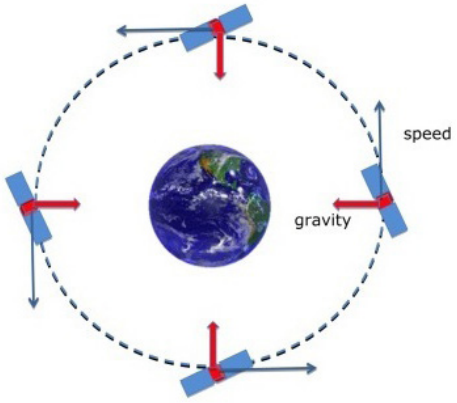
3 Retrieved from http://www.cops.usdoj.gov/mime/open.pdf?Item=1729, last accessed on July 22, 2023.

4 Retrieved from http://www.arl.org/scomm/copyright/copyright.html, last accessed on July 22, 2023.

5 See Barbara Luxenberg and Gerald J. Mossinghoff, 'Intellectual Property and Space Activities' (1985) 13 *Journal of Space Law* 8.

6 Hanneke Van Traa-Engelman, 'The Commercial Exploitation of Outer Space: Issues of Intellectual Property Rights and Liability' (1991) 4 *Leiden Journal of International Law* 303.

which have been laid down under the outer space treaty. This decision was agreed to in the United Nations Celestial Bodies Convention.[1] Articles 38 of the International Court Of Justice Statute while determining what all constitutes international law has laid down that conventions are also considered to be an international law does the terms which have been given an official recognition by the United Nations celestial bodies convention are also to be considered as a part of universally accepted international law.



2

1.3. Functioning of an Artificial Celestial Body: Appropriation or Mere Use?

In order to decipher whether a satellite which is being sent from the Earth to the outer space is committing itself to any activity that is resulting in appropriation, it becomes indispensable to understand the technicalities of how a satellite functions. A satellite is released with the help of a rocket from a particular Space Station. It leaves its designated space station with a particular velocity which is generated with the help of the chemical reactions taking place at the rear end of the rocket. The operational activity of the satellite once it reaches the outer space is controlled to a larger extent by mechanisms which are pre-designed and partly by the space station which has launched the same. Thereafter the satellite locates itself on a targeted orbit and starts moving along the particular orbit.[3]

In case the satellite uses the energy or any other property which is a constituent of that particular orbit, the activity will be categorized under an appropriation based activity.[4] However what happens is that the satellite is balanced by two forces acting on it in a centrifugal and centripetal manner please stop these forces are the velocity which it has gathered from the rocket launcher and the gravitational force which acts towards the Earth. Both these forces act in a perpendicular manner thereby allowing and enabling the satellite to move along its orbit. Therefore it can be concluded from the above mentioned principles and their subsequent derivations that a satellite while helping in collecting information (that will later on be subject to copyright protection) moves with the help of a balancing mechanism and is in no way appropriating any property of the outer space. This further assists in concluding that although the principle of appropriation has been strictly prohibited under the principle of Common

1 Retrieved from http://www.unoosa.org, last accessed on July 22, 2023.
2 Retrieved from https://www.sciencelearn.org.nz/resources/268-gravity-and-satellite-motion, last accessed on July 16, 2023.
3 Retrieved from http://web.mit.edu, last accessed on July 17, 2023.
4 See Alexander N. Sack, "The Doctrine of Quasi-Territoriality of Vessels and the Admiralty Jurisdiction over Crimes Committed on Board National Vessels in Foreign Ports" 12 N.Y.U. L. Q. Rev. 628 (1935)

Heritage of Mankind, the activity which the satellite undertakes is use and exploration devoid of appropriation and therefore the Intellectual Property Rights mechanism which is applicable in the outer space is not contradicting with the principal which has helped in shaping the outer space domain.[1]

2. Copyrightability of Information Generated by Remote Sensing Satellite

The remote sensing satellite occupies an immensely significant role under the copyright regime. There are various activities which are performed with the help of the remote sensing satellite which in turn amounts to being extensively used by various departments, researchers and different organizations thereby making it important to highlight the boundary of copyright protection laws which may be applicable to the information generated with the help of such satellites. Before identifying the type of works which are generated with the help of these categories of satellites, it becomes indispensable to highlight how these satellites function so as to understand and emphasize how the work is actually being generated with the help of these satellites.

2.1. Mechanism of Launching and Functioning of Space Ships and Carriers in the Outer Space

1. One of the most important aspects of outer space is the launching of satellites into the outer space by various National and international, private and government based Space Research Organisations. Apart from any kind of naturally occurring celestial body that rotates or revolves around a certain orbit, there are thousands of artificial bodies which move around in several directions in the space and these are referred to as satellites. Satellite in isolation cannot be launched into the space.[2]For this reason, satellites are at first launched on to space vehicles or rockets having numerous propellants. These rockets are then launched with a certain escape velocity into the outer space or on any celestial body. Following a successful launching on any intended orbit or celestial body, the satellites now examine all the kinds of existing forces, texture, pattern and activity of the Earth or other celestial bodies in the atmosphere that surround them and send information to the operating body which is generally the Space Research Organisation.[3]
2. After the satellites have been launched in the outer space, the satellites can either revolve around the earth in order to examine the prevailing conditions surrounding the earth or send such information back to the Space Research Organisation which launched it. The satellites can also revolve around some other planet to examine the conditions existing around the planet or the existence of any kind of unknown space debris, black hole or any other kind of unnamed and unknown celestial body. When a satellite is being launched in order to orbit the earth's rocket having an ordinary escape velocity is generally launch because such velocity is transferred to the satellite and the

1 Retrieved from http://www.copyright.com.au/reports%20&%20papers/CCS0202Berne.pdf, last accessed on July 19, 2023.
2 Brussels Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite, May 21, 1974.
3 Retrieved from https://opengeospatialdata.springeropen.com, last accessed on July 18, 2023.

satellite possesses the momentum and the energy that has been transferred by the satellite which has been launched. The International Space Station launched and established 20 years by the National Aeronautics and Space Administration (NASA) of USA orbits around 250 miles above the surface of the earth and the velocity with which travels is a round 27595 km/hour.[1]

3. When the discussion of satellite is broached upon, the most important and significant satellite that needs to be maintained, sent, recorded and operated from most of the space research stations is the geostationary satellites located on a Geo-synchronous orbit. A geostationary satellites is an Earth orbiting satellites but the main difference between other satellites orbiting the earth and a geostationary satellites is that it is placed at a higher altitude of around 35,000 km above the equator and such satellites are made to revolve around the earth.[2]The entire world in the 21st century is closely surrounded and assisted by numerous technological appliances and gadgets that help in understanding how the Earth is working. In today's civilization it has become indispensable for every organisation and every entity to understand and foresee[3] from[4] the present how the future may take shape. In fact, it is the same factor that regulates the density of population in a particular arena along with what are the possible economic conditions that will thrive in a particular area and every other accessory matter.[5]
4. The matters in relation to cultivation, farming activity, industrialization and commercialization of such matters are largely and heavily dependent on the weather and climatic conditions of a particular place. Apart from this there is another issue that becomes inevitable and must be addressed- the accessibility of roads for the purpose of easy communication and transportation which also plays an important role in determining the quotient of industrialisation that in turn determines whether that particular place is developing, under-developed or a developed arena. All these matters are nowadays easily determined with the help of a particular artificial celestial body or in short satellites. Apart from these two functions, there is another facility that has become very important in our daily lives. A well-built stretch of road is undoubtedly important to maintain communication but at the same time communication can also be well maintained using software platform and Social Medias. The news that we retrieve with the help of antenna and satellites which are broadcasted from all across the world help in ascertaining the on-going situation of other region and places along with other countries throughout the entire global scenario. [6]
5. For the purpose of study and limiting the scope of application of this particular paper, the researchers have divided the type of satellites used in space into two broad

1 For details, visit https://www.nasa.gov/mission_pages/station/main/index.html, last accessed July 31, 2023.

2 WIPO The WIPO Treaty on the Protection of Broadcasting Organizations: Informal Paper circulated at the SCCR meeting Geneva (3−7 November 2008)

3 Retrieved from https://www.spiedigitallibrary.org, last accessed on July 19, 2023.

4 Retrieved from https://www.semanticscholar.org/paper/Copyright-protection-of-remote-sensing-imagery-by-Barni-Bartolini/d44f73749bf3f8b96cd5c296a8661933b35b79b1, last accessed on July 19, 2023.

5 Retrieved from https://spacelaws.com, last accessed on July 18, 2023.

6 Reliance for such argument may be made on basis of several international IP legal regime viz. WIPO Convention, 1967, Berne Convention, 1886, Paris Convention for the Protection of Industrial Property, 1883, TRIPS, 1995

categories constituting of Remote sensing satellites and direct broadcasting satellites. It becomes pertinent to mention that the work[1] and the creation that is an outcome of the functioning of these satellites in the outer space becomes an important commodity of protection and their four becomes a subject matter of copyright. The satellites are placed in the Geo-synchronous orbit where-from they are operated by various[2] Space Stations in order to gather information on the occurrence of any incident or similar information that is taking place in the outer space or in order to analyse and process the information in order to understand what future weather conditions may look like.

6. From a holistic point of view, the Remote Sensing Satellites initiated the entire process of acquiring information about any phenomena or object that is placed in the outer space or can be investigated from the outer space and further analyse such information in order to provide to the public with a more refined end product. The eyesight of human beings being restricted within a biologically defined frequency, electromagnetic emissions from various matters[3] and materials present in the outer space cannot be seen without the help of specially manufactured machines. NASA has defined the term Remote Sensing Satellite as artificial satellites which sensors and detects energy which is emitted by the earth and reflected from the Earth's surface. Sensors are energy detecting machines which are fitted onto the satellites. The data is generated with the assistance of the satellites but the data produced are of various categories and can be classified as raw data, processed information and enhanced information. These data are subject to copyright protection however not all the categories of data will be protected under the intellectual property regime.[4]

2.2. Types of Information Generated

The Remote Sensing Satellites which are being used in multiple sectors and currently have a holistic and multifarious use are renowned for generating a wide variety of contents which upon examination reveal what are the specific characterizations that make up these categories of information which are generated with the help of the concerned class of satellites. The sensors which are attached to these categories of satellite record the electromagnetic radiation that it receives from numerous objects present on the earth. The frequency of these radiations varies as a result of which the radiations which are recorded also differ.[5]These signals then send the recorded radiation with the help of signals to the receiving stations which are located inside the various space stations on the earth. Scientists who receive and collect this data generally retrieve the information by means of a process called transcription.[6]

The information that is displayed on the computer system which are connected to the antennas responsible for receiving signals from the Remote Sensing Satellites are in binary

1 Retrieved from https://www.terisas.ac.in/uploads/NRG162.pdf (last accessed on 20th July, 2023)
2 See Arthur Raphael Miller and Michael H. Davis, *Intellectual Property: Patents, Trademarks, and Copyright in a Nutshell* (3rd edn, West Group 2000).
3 Retrieved from http://spacenews.com, last accessed on July 19, 2023.
4 Retrieved from http://www.wipo.int, last accessed on May 6, 2023.
5 Retrieved from http://www.esa.int, last accessed on May 6, 2023.
6 Retrieved from https://digitalcommons.unl.edu, last accessed on May 6, 2023.

digits. This in order to be made available as a piece of information is required to be transcribed from binary language to a commonly accepted language. While doing so a certain quantum of labour, skill and judgement are applied by the scholars and this is turn are invested in the process of transcription.[1]The European Space Agency and the National Aeronautics and Space Administration while determining what are the main activities which are involved in the process of transcription has stated that the scientists are responsible for mainly three categories of activities. This includes translation, spatial filtering and mosaic enhancing.

It has been held in *Mason v/s Montgomery Data, Inc.,*[2] that maps are generally not copyrighted. However if and when any creative compilation is taking place in relation to the maps such as addition of information which are unique to the creator or a certain portion of the commonly available political map is being highlighted in order to add value to the existing piece of art, the result which is generated as a result of this value addition that takes place by means of modicum of creativity and becomes a subject matter of copyright protection. Therefore the effort which the scientist puts into undergoing the process of transcription becomes important in the light of copyright legislation. The content that is generated by means of this effort is of two categories and includes imagery and information. While the former falls under the category of artistic work and are protected under the Indian as well as all other important copyright legislations across the world, the latter forms a part of literary work and are equally entitled to receive copyright protection.

The National Aeronautics and Space Administration has categorised the nature of the information that is generated using a remote sensing satellite into two categories and it consists of` raw data and analysed information. The analysed or enhanced information can further be classified into primary information and secondary information. While the primary information consists of information that is generated after a process of transcription, the secondary information includes literary work which is generated after the primary information has been analysed time and again and a process of compilation has been implemented. This category of work does not include mere compilation. The compilation involves a creative component and includes sufficient modicum of creativity for the information to be granted copyright protection under various legislations across the world. In this respect few cases that become important.[3]

In *Burrow-Giles Lithographic Company v. Sarony*[4] the question that was asked in this case is whether a photograph will constitute sufficient components to be granted copyright protection in the light of the fact that the picture that has been captured is of an incident or entity or occurrence that forms a part of the public data. While deciding this case the US Supreme Court held that photographs are subject matters of copyright protection because it involves sufficient quantum of skill, labour and sheer judgement that becomes important in determining what angle the camera has to be positioned in order to capture a picture or what will be the dimensions of a lens aperture and[5] even what are the surrounding conditions of light reflection

1 Retrieved from http://arstechnica.com, last accessed on May 6, 2023.
2 *Harris* v. *Bexar County* 765 F. Supp. 353 (S.D. Tex. 1991).
3 Retrieved form https://iprlawindia.org/wp-content/uploads/2018/01/IPR-and-Outer-Spaces-Activities-final.pdf, last accessed on July 20, 2023.
4 *United States v. McGowan* 111 U.S. 53 (1884).
5 Sharma, 'Copyright Protection over Sports Broadcasts: A Global Perspective' (Paper presented at the 60th ABU Sports Group Conference, Hong Kong, May 2017).

that are to be allowed to exist when the picture is being captured. These characteristics constitute sufficient modicum of creativity in order to grant a photograph copyright protection even under the Indian jurisprudence.

3. National and International Legislation Recognizing Copyright Protection of Satellite Imagery

The information generated with the help of the Remote Sensing satellites are of two categories and can be divided into artistic and literary work. In India while the entire scheme of protection was initially garnered with the help of the Indian Copyright Act, 1957 recently the Remote Sensing Data Policy, 2020has helped in identifying the ownership over the information or the imagery which are developed with the help of such categories of satellites. While it recognizes the ownership and clearly distinguishes between the different entities that are to be deemed as the owners, there is still a lot more scope in establishing the difference between the raw data and analysed data and detecting the thin line of difference that would make an information or imagery subject to copyright protection. In the international scenario, the International Telecom Union has helped in identifying the information as a subject matter of protection under the Intellectual Property Rights.

The World Intellectual Property Right Organisation based three conventions and the Berne Convention recognizes such categories of work as literary or artistic work. The European Union or the United States have their own set of legislation protecting such information within their territorial jurisdiction. However an international convention dedicated purely towards the protection of information or imagery generated with the help of satellite is yet to be formed in order to promote a sound and stable protection scheme that may be accepted by all the nation states across the world in order to eradicate any kind of ambiguity in the interpretation of the constituents**.**

3.1. Direct Broadcasting Satellite

The second category of satellite that occupies immense significance and is the next subject matter of discussion of the concerned paper is the functioning of direct broadcasting satellites. The definition of this category of satellites which has been laid down by the Indian Ministry of Electronics and Information Technology is that it is a type of satellite that falls under the category of Fixed Satellite Service and is responsible in availing radio-communication. It enables the transmission of signals from the ground station to the satellite positioned in the Geostationary Orbit and then receives the signals which are sent to the receiver stations via antennas. Scholar Bruce Patton has laid down a simplified understanding of how a Direct Broadcasting Satellite (DBS) operates. He has stated that there are a total of five constituents of such types of satellites:[1]

a. Ground station
b. Uplink
c. Direct Broadcasting Satellite
d. Downlink

1 Retrieved from https://encyclopedia2.thefreedictionary.com/Direct+broadcasting+satellite+systems, last accessed on July 23, 2023.

e. Broadcasted Content

When the concept of DBS is being discussed, the main question that is generated is the copyright issue pertaining to the broad-casted content. The copyright-ability of the same has been firmly established on the grounds of being an original content that is credited to the creator. The content which is generally broadcasted includes a work of the nature of sound recording or cinematography. This has been identified to be eligible for protection under copyright legislations in most of the important statutes across the world and therefore it is no longer a questionable aspect under the copyright regime.[1]The entire network that is stimulated and prepared by means of the mechanism of broadcasting involves two prominent features which are termed as the up linking and down linking of signals to and from the stations to the satellite.

With the signals being an inseparable part of the broadcasting network, one of the most prominent contributions that are enabled with the help of these signals is the entertainment industry and the communications industry that takes place with the help of the broadcasted content. Adding to this enormous industry, there is another covert feature present which may not be visible to our naked eyes. It definitely is one of the most important aspects of this entire mechanism and procedure thereby helping in enabling the generation of the signals.[2] The question that follows this is whether the discussed feature needs to be protected under any scheme of copyright legislation and whether there lies any prima facie danger that affects the existence of such features.

3.2. Decoding the Mechanism of DBS

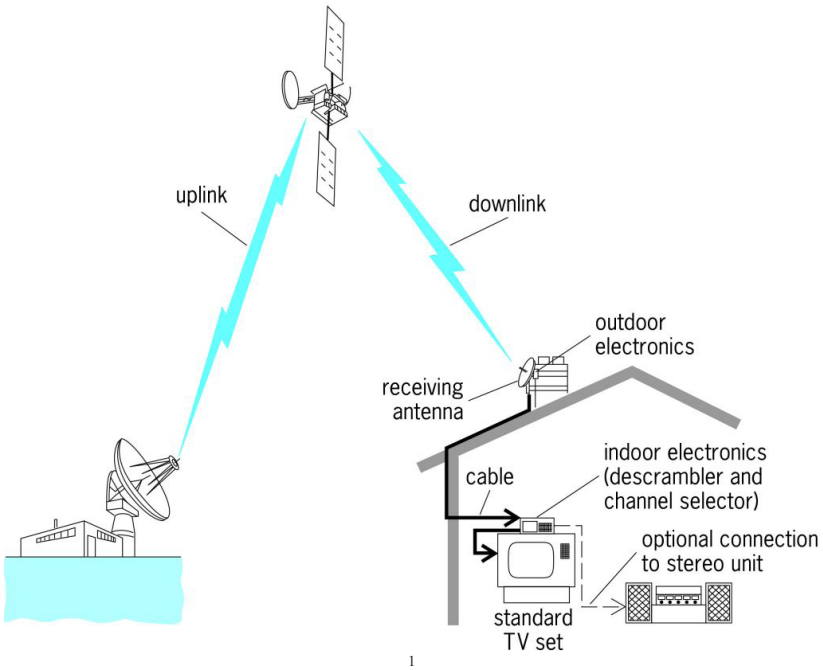
For the purpose of understanding the aspects of a direct broadcasting satellite and in order to determine the need for protecting the same, it becomes pertinent to understand and decipher in the simplest manner as to how the mechanism of this category of satellite functions.[3] The ground station comprises numerous computer systems which are attached through wireless modems to antennas which are located in various parts of a concerned region from where the ground station operates or which comes under the authority of the ground station. The antennas are connected not only to the ground station but also with the receiver station at various corners of the world all of the country which comes under the purview of a particular broadcasting system. These antennas are responsible for capturing the signals, sending the signals and receiving the signals directly or indirectly from the concerned direct broadcasting satellite.

The transmission of signals takes place in the manner of thunderstorms wherein we often find electromagnetic radiations reaching the Earth's surface. In a similar manner the signals are generated and sent with the help of antennas to the desired satellite which has an amplifier attached to it. There is a change of frequency taking place within the satellite and the signals are changed in order to be redistributed among several receiver stations with respect to the frequencies and are sent back with the help of antennas to the ground stations. The next important aspect that comes into the discussion is what helps in the generation of signals and what the need of protecting signals is. In the year 2021/2022 when the evils of the covid-19 pandemic

1 Retrieved from https://hbr.org/2021/02/the-commercial-space-age-is-here, last accessed on July 18, 2023.
2 Retrieved from https://theconversation.com, last accessed on July 18, 2023.
3 Retrieved from https://www.thebalance.com/nasa, last accessed on July 18, 2023.

was very feebly withdrawing itself and the world was still confined within the limits of their respective houses and internet services, one of the most important source of entertainment was the contents which were being broadcasted.

However with regards to the Indian perspective it was found out that India became the greatest sufferer because of illegal data interception and signal piracy- an incident that was reported by the Star India Pvt Ltd. Media house as well. The ownership over the signals can be related with the owners of media houses who are responsible in generating the broadcasted content. When a case of signal piracy occurs, the media houses are the worst sufferers followed by the artists and this results in a decreased revenue generation from a sector which otherwise is capable to generate a high quantum of revenue.



1

This brings into notice the importance and relevance of signal protection and the relevance of bringing a completely separate legislation recognizing the existence of the mechanism of direct broadcasting, each and every constituent of such a broadcasting system and giving protection to the elements along with recognizing the entity who is to be considered as the owner of such elements. The concept of signal protection traverses back to the contents or information or any category of work which helps in generation of the signals.[2]The computer system which helps in generation of these signals are to be operated by inserting a certain category of programming which are often referred to as computer programs and in specific which are referred to as source code. The question of protecting a source code comes under the copyright legislation and more specifically under the literary work of copyright. Both the Copyright Act of India and the TRIPS Agreement expresses that 'computer programs', whether in source or object code, shall be protected as literary works under the Berne Convention 1971.[3] The main issue with the source code or the object code

1 Retrieved from https://encyclopedia2.thefreedictionary.com/Direct+broadcasting+satellite+systems, last accessed on July 23 2023.

2 See Matthew Weinzierl and Mehak Sarang, 'The Commercial Space Age Is Here' https://hbr.org/2021/02/the-commercial-space-age-is-here accessed 18 July 2023.

3 Retrieved from https://www.thebalance.com/nasa, last accessed on July 18, 2023.

which is generated in relation to the production of signals is that they are being recognized under the copyright legislation and as a result of the same the lack of a protective regime enables signal piracy and various other offenses to be committed in relation to the signals.

3.3. International Instruments Recognizing DBS Under the Copyright Protection Scheme

Therefore the primary need to protect signals that are being emitted with the help of the computer generated systems should be dealt with not only under the copyright legislation but also under a separate mechanism. Such signals prove to be of utmost importance in relation to carrying information, entertainment related contents and news and communication related contents all across the world. The international instrument that has been discussed by the Brussels Convention[1] recognizes the entity of signals granting them an indirect mode of protection. However the main problem with this convention is the fact that the Brussels Convention lacks a regulatory authority or a mechanism of regulation and as a result of the same the main issue that arises is lack of a system that can grant the signals effective protection.[2]

The International Telecom Union is a conference that is held at regular intervals discussing the eminent issues in relation to telecommunication, network, signal and service providers with an objective of uniting and consolidating the existing rules and regulations especially in relation to International Communication System that takes place by means of telecommunication with the help of satellites. This conference recognized the efficiency of Direct Broadcasting Satellite and the need to protect every constituent of this satellite so as to ensure that there is no piracy related activity taking place in relation for the same. However the fact that the computer generated programs must be given a separate protection in order to facilitate a double protection mechanism for the entire scheme has not yet been recognized by the international instruments.[3]

3.4. Indian Perspective

India has undoubtedly upgraded herself in terms of satellite connectivity and the laws which are protecting the actions or the information which are generated with the help of the satellites. The main factor that is effectively lacking in this aspect is that there is the absence of a specific legislative mechanism granting protection to the individual elements of a satellite. An approach towards formation of a consolidated bill was undertaken in 2001 however it lapsed in 2004. The main objective of this bill which was termed as the Communications Convergence Bill, 2001 was the intention of consolidating the following rules and regulations and bringing them under one canopy in order to make the interpretation of the terminologies surrounding the direct broadcasting satellite easier and in order to further any protection scheme that has not been recognized in the existing legislations.

1. Indian Telegraph Act, 1885
2. Indian Wireless Telegraph Act, 1993

1 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 1974.

2 Retrieved from https://escholarship.mcgill.ca, last accessed on July 18, 2023.

3 Catherine Doldirina, "Intellectual Property Rights in the Context of Space Activities" in Frans Von der Dunk and Fabio Tronchetti (eds), *Handbook of Space Law* (Edward Elgar, UK, 2015) 958.

3. PrasharBharti Act, 1990
4. Telecom Regulatory Authority of India (TRAI) Act, 1997.
5. The Cable Television Networks (Regulation) Act, 1995
6. SATCOM Policy, 1997

The lack of recognition of the essential elements and more specifically every individual element arising out of the system that comprises the direct broadcasting network has led to numerous cases of interception which are the only illegal and this has in turn resulted in a situation where signal piracy is taking place at an enormously higher level.

Conclusion

A comprehensive analysis of the outer space affairs in relation to the intellectual property right and more specifically the copyright related issues reveal the fact that there are numerous areas which have not been discussed in details from an inter-disciplinary point of view. The term inter disciplinary has been used in order to reciprocate the interface that arises out of the common boundaries of the outer space domain on one hand and the Intellectual Property Rights regime on the other. Unless the overlapping factors that exist between these two disciplines of law are recognised, the constituents of the overlapping area will not be efficiently recognised. This can be identified in the fact that although the Remote Sensing Satellites and the Direct Broadcasting Satellites occupy an immensely important role of the daily lives of human beings, there are very few laws even in the 21st century that protect the information which is generated with the help of these satellites.

The 21st century emphasizes majorly on the creation and the rights of the creator. Unless the information from the satellites are being recognised officially to be falling under the copyright regime and a sound system of protection is being set up for the same, that chances of exploitation, interception and piracy in relation to such information become easier there by completely neglecting the right of the creators. The reciprocal protection of copyright has been recognized on an international platform by means of the Universal protection that has been granted by Berne Convention. This has helped in materializing an effective protection scheme of the works generated by any means, with the aid and assistance of any commodity from any part of the world so long as the nation state in question is a member state of the Berne Convention.[1]

The WIPO Copyright Treaty 1996 WCT) and the WIPO Performances and Phonograms Treaty 1996 (WPPT) provide a sound protection system of generalized scheme of protection for the work categorized under the copyright and related rights.[2] In the light of the intellectual property right, the object is to reward the creators and boost inventions. Therefore the requirement of framing a specific and sound system of law recognising the information generated from the satellite in the light of the intellectual property rights regime becomes indispensable in order to ensure effective protection and recognition of all the constituting elements that lie in the interface concerning the Copyright regime and the Outer Space.

1 Retrieved from https://www.wipo.int/export/sites/www/patent-law/en/developments/pdf/ip_space.pdf, last accessed on August 2, 2023.
2 Retrieved from http://docs.manupatra.in/newsline/articles/Upload/DFC0906E-2C8A-45EF-8553-8604077E1D49.pdf, last accessed on August 2, 2023.

References

Books

Doldirina C, 'Intellectual Property Rights in the Context of Space Activities' in Frans Von der Dunk and Fabio Tronchetti (eds), *Handbook of Space Law* (Edward Elgar, UK 2015) 958.

Miller AR and Davis MH, *Intellectual Property: Patents, Trademarks, and Copyright in a Nutshell*(3rd edn, West Group 2000).

Articles

Garmon C, 'Intellectual Property Rights: Protecting the Creation of New Knowledge across Cultural Boundaries' (2002) 45 *American Behavioural Scientist* 1145.

Indian Journal of Air and Space Law (IJASL), Volume III, 20–60.

Kleiman MJ, 'Patent Rights and Flags of Convenience in Outer Space' (7 February 2011).

Luxenberg B and Mossinghoff GJ, 'Intellectual Property and Space Activities' (1985) 13 *Journal of Space Law* 8.

Mishra A, 'The Indian Journal of Intellectual Property Law' (2014–2015) 7 *Indian Journal of Intellectual Property Law* 85.

Van Traa-Engelman H, 'The Commercial Exploitation of Outer Space: Issues of Intellectual Property Rights and Liability' (1991) 4 *Leiden Journal of International Law* 303.

Treaties and Legal Documents

Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 1974.

Harris v. *Bexar County* 765 F. Supp. 353 (S.D. Tex. 1991).

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art VII (1967).

United States v. *McGowan* 111 U.S. 53 (1884).

European Union Directives

European Union, Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJ L 077, 20 https://www.aspistrategist.org.au accessed 16 July 2023.

European Union, Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJ L 077, 20 https://iprlaw-india.org/wp-content accessed 20 July 2023.

Reports and Drafts

ANGELS, https://spacelaws.com accessed 18 July 2023.

Association of Research Libraries, 'Copyright' http://www.arl.org/scomm/copyright/copyright.html accessed 22 July 2023.

Australian Copyright Council, 'Berne Convention' http://www.copyright.com.au/reports%20&%20papers/CCS0202Berne.pdf accessed 19 July 2023.

Barni, M. and Bartolini, P., 'Copyright Protection of Remote Sensing Imagery' https://www.semanticscholar.org/paper/Copyright-protection-of-remote-sensing-imagery-by-Barni-Bartolini/d44f73749bf3f8b96cd5c296a8661933b35b79b1 accessed 19 July 2023.

NASA, 'International Space Station' https://www.nasa.gov/mission_pages/station/main/index.html accessed 31 July 2023.

Open Geospatial Data, Software and Standards, https://opengeospatialdata.springeropen.com accessed 18 July 2023.

SpaceNews, http://spacenews.com accessed 19 July 2023.

SPIE Digital Library, https://www.spiedigitallibrary.org accessed 19 July 2023.

The Balance, 'NASA' https://www.thebalance.com/nasa accessed 18 July 2023.

U.S. Department of Justice, 'Open Document' http://www.cops.usdoj.gov/mime/open.pdf?Item=1729 accessed 22 July 2023.

WIPO, *The WIPO Treaty on the Protection of Broadcasting Organizations: Informal Paper circulated at the SCCR meeting Geneva* (3−7 November 2008).

Organizations and Agencies

Ars Technica, http://arstechnica.com accessed 6 May 2023.

eScholarship@McGill, 'Home' https://escholarship.mcgill.ca accessed 18 July 2023.

European Space Agency, http://www.esa.int accessed 6 May 2023.

JAXA, 'Space Law' http://stage.tksc.jaxa.jp/spacelaw accessed 20 July 2023.

Legal Services India, 'Legal Services India - Free Legal Advice, Supreme Court Judgments, Lawyers & Case Laws' https://www.legalservicesindia.com accessed 17 July 2023.

NASA, 'NASA Home' https://www.nasa.gov accessed 17 July 2023.

Terrestrial Institute of Advanced Studies, 'Law and Policy for Maps and Remote Sensing' https://www.terisas.ac.in/uploads/NRG162.pdf accessed 20 July 2023.

University of Nebraska-Lincoln, 'UNL Institutional Repository' http://digitalcommons.unl.edu accessed 18 July 2023.

University of Nebraska-Lincoln, 'UNL Institutional Repository' https://digitalcommons.unl.edu accessed 6 May 2023.

UNOOSA, 'Roles and Responsibilities' https://www.unoosa.org/oosa/en/aboutus/roles-responsibilities.html accessed 20 July 2023.

UNOOSA, 'United Nations Office for Outer Space Affairs' https://www.unoosa.org/ accessed 31 July 2023.

World Intellectual Property Organization, 'Intellectual Property Issues in Space Activities' https://www.wipo.int/export/sites/www/patent-law/en/developments/pdf/ip_space.pdf accessed 2 August 2023.

World Intellectual Property Organization, http://www.wipo.int accessed 6 May 2023.

Online Resources

Astrophysics Data System, 'ADS Articles' http://articles.adsabs.harvard.edu accessed 20 July 2023.

International Trademark Association, 'IP in Outer Space: The Next Frontier' https://www.inta.org/perspectives/features/ip-in-outer-space-the-next-frontier accessed 22 July 2023.

IPR Law India, 'IPR and Outer Space Activities' https://iprlawindia.org/wp-content/uploads/2018/01/IPR-and-Outer-Spaces-Activities-final.pdf accessed 20 July 2023.

Massachusetts Institute of Technology, 'MIT Home' http://web.mit.edu accessed 17 July 2023.

Matthew Weinzierl and Mehak Sarang, 'The Commercial Space Age Is Here' https://hbr.org/2021/02/the-commercial-space-age-is-here accessed 18 July 2023.

Science Learning Hub, 'Gravity and Satellite Motion' https://www.sciencelearn.org.nz/resources/268-gravity-and-satellite-motion accessed 16 July 2023.

The Balance, 'NASA' https://www.thebalance.com/nasa accessed 18 July 2023.

The Conversation, 'Home' https://theconversation.com accessed 18 July 2023.

The Free Dictionary, 'Direct Broadcasting Satellite Systems' https://encyclopedia2.thefreedictionary.com/Direct+broadcasting+satellite+systems accessed 23 July 2023.

Conference Papers and Presentations

Sharma, 'Copyright Protection over Sports Broadcasts: A Global Perspective' (Paper presented at the 60th ABU Sports Group Conference, Hong Kong, May 2017).

Reports and Symposiums

WIPO, 'Symposium on Broadcasting, New Communication Technologies on IPR' (1998).

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Optimizing Resource Allocation within the Judiciary of the Islamic Republic of Iran: A Comparative Study

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ABSTRACT

The relationship between increased budget allocations to the judiciary and improvements in judicial behavior and performance has gained prominence in recent years. However, given the limited nature of resources, extensive funding for the justice system often comes at the expense of other societal needs. Thus, optimizing resource allocation within the judiciary is essential. This optimization requires identifying challenges specific to the judicial system of the Islamic Republic of Iran and examining the experiences of other nations. This article argues that effective governance demands budget transparency, and arbitrary resource allocation—without considering medium- and long-term planning—presents significant challenges. Despite the implementation of six medium-term plans since the Islamic Revolution in 1979, a coherent link between these plans and the budgetary process remains elusive in Iran. This disconnect can be partly attributed to the influence of bargaining dynamics on budget allocation. Additional challenges include a lack of fiscal discipline, an excessive reliance on incremental budgeting, inadequate use of an efficient accounting system, and ineffective oversight by other branches of government regarding the financial performance of the judiciary. Experiences from various countries indicate that when budgeting systems resist reform, a viable solution involves identifying and strengthening components within the existing institutional framework that enhance efficiency. Given that implementing Performance Budgeting within the judiciary may be impractical, a more effective approach may involve adhering to traditional budgeting methods. Ultimately, enhancing budget transparency and facilitating public access to budgetary information can empower citizens, promote government accountability, and yield mutual benefits.

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Introduction

There is a notable dissatisfaction among judicial authorities in the Islamic Republic of Iran concerning the inadequate budget allocation to the judiciary. Many believe that addressing the financial needs of this branch is essential for its reform.[1] Despite recent increases in the judiciary's budget, authorities assert that these funds remain insufficient for effectively fulfilling its responsibilities.

Judiciaries with limited resources often struggle to provide competitive salaries, benefits, and pensions necessary to attract and retain qualified personnel, which can exacerbate the risk of corruption. Furthermore, the relationship between the judiciary's budget and its independence becomes more pronounced when external entities supplement inadequate funding. In several countries, local governments and businesses provide judges with essential resources such as office space, educational discounts for their children, transportation, and housing. In return, these benefactors may seek favorable consideration in legal matters. When a judiciary's budget fails to meet its needs, the judiciary may generate funds to augment its resources. For example, in the United States, trial courts historically faced underfunding from state and local governments. In response to resistance against increasing direct support, many jurisdictions instituted user fees, which can lead to adverse effects.[2] Financial obligations imposed by the criminal justice system, while intended to penalize offenders and fund system operations, disproportionately impact those from lower socioeconomic backgrounds and marginalized communities, perpetuating cycles of disadvantage and criminal justice involvement.[3]

Conversely, extensive resource allocation to the justice system can deprive other sectors of society. It is crucial to critically evaluate the judiciary's budget and its utilization before endorsing requests for increased funding. Experiences from other countries indicate that issues often stem not merely from overall resource scarcity but also from inefficient allocation within

1 Qazi Khorramabadi, *The Council Management of the Judiciary Gives a Sense of Independence to the Judges* (2009) 58.; Motaman, *The Current Officials Have Deviated a Bit from the Right Path* (2004) 21.

2 Office of Democracy and Governance, *Guidance for Promoting Judicial Independence and Impartiality* (2002) 25-26.

3 Gleicher and Delong, *The Cost of Justice: The Impact of Criminal Justice Financial Obligations on Individuals and Families* (2018) 1-3.

the judiciary.[1] Therefore, advocating for increased budgetary allocations is indefensible without justifying existing expenditures. Optimizing resource allocation within the judiciary is vital, not merely to save costs but to ensure that resources are utilized effectively to serve justice.

The optimization of resource allocation within the judicial system aligns with discussions in "law and economics." While these discussions primarily center on economic issues, they provide a foundation for legal reform. In the United States, findings suggest that legislators face challenges in reducing high-cost, low-return policies and reallocating savings to programs proven to reduce crime.[2] Many states have decriminalized minor traffic offenses,[3] and Louisiana, for example, has implemented policy reforms to reduce sentences for nonviolent crimes and create early release options. These measures divert individuals convicted of less severe offenses from prison, shifting resources toward education, job skills, reentry programs, and substance abuse treatment to facilitate successful reintegration.[4]

This study examines resource allocation optimization within the judiciary of the Islamic Republic of Iran through the lens of micro-level economic analysis, influenced by the New Institutional Economics approach. This framework recognizes three levels surrounding the micro-level unit: informal institutions (norms, customs, ethics, traditions, and religion), official rules (constitutional and ordinary laws), and management institutions.[5] Neglecting to consider these levels in conjunction may hinder achieving desired outcomes.

The research aims to identify and address challenges in optimizing resources allocated to the judiciary, focusing on the interactions between the judiciary and higher-level institutions. Employing extensive literature reviews and expert interviews, the study seeks to uncover inefficiencies within the institutional framework, including formal rules, informal constraints, and management practices throughout the budget allocation process. Additionally, it addresses the challenges related to supervising budget implementation in the judiciary. The outcome of these discussions will highlight existing challenges and provide recommendations for enhancing the budgeting system.

1. The Inefficiencies of Institutional Frameworks Governing Budget Allocation in the Judiciary of the Islamic Republic of Iran

This section aims to identify the methods of cost estimation within the judiciary of the Islamic Republic of Iran, considering existing budgeting laws, informal norms, and their implementation. Additionally, it examines the inefficiencies of these cost estimation methods and their conflicts with principles of efficiency and optimality.

1.1. Failure to Implement Program Budgeting

France has made significant strides in moving away from traditional expenditure-oriented budgets by adopting a "program budgeting" system. This approach aims to enhance transparency in public

1 Office of Democracy and Governance, Op. Cit., (2002) 26.

2 Sie, *How 4 States Cut Their Criminal Justice Budgets Without Sacrificing Safety* (2022) 1.

3 Essex, *Reducing Admissions to Jail and Prisons' (National Conference of State Legislatures* (2021) 1-2.; Leachman, Chettiar and Geare, *Improving Budget Analysis of State Criminal Justice Reforms: A Strategy for Better Outcomes and Saving Money* (2012) 2-6.

4 Sie, Op. Cit., 1-2.

5 Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead* (2000) 5-8.

finances and grant departments greater autonomy and accountability for their expenditures. The new organic budget law, enacted in 2001, categorizes expenditures for the justice sector into five major programs: administration of justice (civil and criminal), prison administration, judicial protection of youth, access to law and justice (legal aid), and the management of justice policies and related institutions. Each program is associated with specific policy and performance objectives.[1]

In the Islamic Republic of Iran, the Plan and Budget Law, approved in 1972, mandates that budgets be prepared programmatically, aligning with annual plans based on medium-term strategies. However, despite the existence of six medium-term plans since the Islamic Revolution in 1979, a coherent relationship between these plans and the budget has never materialized. Consequently, the provisions of the Plan and Budget Law have not been fully realized.[2]

The Iranian judiciary has established medium-term plans, such as "the legal and judicial dimension of Iran's economic, social, and cultural development programs," "judicial development programs," and "the judicial transformation document." Nonetheless, there is a lack of effective coordination between these plans and the judiciary's budget. The legal and judicial aspects of Iran's development programs consist of general articles that do not include specific guidelines for budget allocation. To integrate program-oriented budgeting into the judiciary, it is essential to delineate specific programs and establish corresponding budgetary chapters and lines.[3]

For instance, the Fourth Program of Judicial Development outlines numerous initiatives in broad terms but lacks detailed implementation strategies. One proposed prevention strategy focuses on the re-education and retraining of offenders, yet the plans surrounding this strategy are vague, emphasizing the roles of amnesty, sentence reduction, and parole without clear guidelines for implementation. This lack of precision complicates adherence to these plans at the execution level.

Although the judicial transformation document outlines more specific responsibilities for the judiciary and suggests solutions for their execution, it still lacks clarity regarding the budgetary chapters and lines responsible for each duty. Moreover, mechanisms to monitor the alignment of the judiciary's budget with proposed plans are notably absent.

Certain procedural obstacles further hinder the alignment of the budget with plans. Previously, the General Department of Budget and Credit Allocation of the judiciary operated under the Strategic Deputy, responsible for setting plans and estimating budgets based on information from various departments. This structure facilitated program-oriented budgeting. However, recent organizational changes have placed the General Department of Budget and Credit Allocation under the Financial, Support, and Construction Deputy, severing the connection between budgeting and planning. This shift has elevated bargaining as a key factor in budget allocation.

Additionally, all funds collected by the judiciary from the public are deposited into the Treasury of the Islamic Republic of Iran. Some of these funds are refundable, as specified in Article 30 of the Public Accounts Law. Since 1999, the Treasury has deposited certain refundable

1 Webber, *Good Budgeting, Better Justice: Modern Budget Practices for the Judicial Sector* 3 *Law and Development Working Paper Series* (2009) 21-24.

2 Hassanabadi and Najjar Sarraf, *A Total Model for Performance Based Budgeting Diamond Model* (2010) 291.

3 The office of Budget and Planning, Budgeting in Iran (Problems & Challenges) (Majlis Research Center 2002) 186.

funds into centralized accounts designated for the judiciary, which cannot be withdrawn. The Chief Justice utilizes the profits from these accounts to supplement the approved budget when necessary. However, these unsupervised revenues pose challenges for implementing program budgeting due to their lack of oversight and reliance on individual discretion.[1]

Another significant impediment to implementing certain programs is the Iranian budget's reliance on oil revenues. The protracted process of oil sales often results in a portion of the appropriated funds entering the judicial system in the final months of the fiscal year. This timing leads to hasty and inefficient spending, as unused appropriations are typically canceled at year-end due to the annual nature of the appropriations.

In contrast, nearly all member countries of the Organization for Economic Co-operation and Development (OECD) allow for the transfer of unused appropriations at the end of the fiscal year under specific conditions, highlighting a potential area for reform in Iran's budgeting practices.

1.2. The Inefficiency of the Traditional Budgeting System

The UK government has adopted a performance-oriented approach to budgeting and public expenditure management, aiming to provide Parliament, the government, and the public with "world-class performance measurement and reporting systems." Similarly, the New Zealand government has developed performance budgeting concepts since significant public-sector and financial management reforms were initiated in the late 1980s.[2]

In the Islamic Republic of Iran, while the implementation of program budgeting has not been fully realized, the pursuit of performance budgeting has been on the agenda of Iran's Management and Planning Organization since 1999.[3] Performance budgeting was first introduced in the 2003 budget law for the entire country and subsequently integrated into other legislation, including the Fourth Development Plan Law.[4] However, the successful implementation of this approach requires substantial groundwork across various domains, including financial, administrative, employment, and budgeting laws. Regrettably, comprehensive action in these areas has not been taken.[5] According to the 2020 budget liquidation report, 1,052 executive organizations remain without an integrated performance budgeting system.[6]

In Iran, the primary principle guiding budget allocation to organizations, including the judiciary, is the preservation of their existence rather than the magnitude of their administrative operations. Social pressures also heavily influence budgetary direction. Consequently, there is often a failure to accurately assess the volume of administrative operations, the correlation between these operations and allocated resources, and the evaluation of management and organizational efficiency.[7] This oversight results in budgeting practices that remain entrenched in tradition.[8]

1 Momeni, *Political Economy Course of Budgeting in Turbulent Conditions* (2021) 1.
2 Webber, Op. Cit., (2009) 8, 29.
3 Hassanabadi and Najjar Sarraf, Op. Cit., (2010) 204.
4 Amirkabiri, Almasi and Mahmoudi, *Performance Budgeting: A Tool for Clarifying the Relationship between Consumed Resources and the Results Obtained in the Organization* (2014) 12, 21.
5 Rezaei, *Performance Budgeting Requirements in Iran* (2016) 55, 65.
6 The Supreme Audit Court, '2020 Budget Liquidation Report for The Entire Country' 21.
7 Mehnatfar and Jafari Samimi, *Fundamentals of Budget Planning in Iran* (2013) 217.
8 Babaei, *Government Budgeting in Iran (from theory to policy)* (2000) 2-3.

The first large-scale experience with performance budgeting occurred in the United States in 1949, following the recommendations of the Hoover Commission. This initiative emphasized total cost measurement, workload evaluation, and unit costs. However, the experiment was deemed a failure, leading to its abandonment shortly thereafter, although some lessons learned were incorporated into budget reforms in the 1990s.[1]

In Asia, experiences with program and performance budgeting in countries such as India, Malaysia, and Sri Lanka yielded uneven results, falling far short of the initial ambitions of proponents from the 1960s. Similar challenges were observed in Latin America.[2]

Within the traditional budgeting system, expenditures are categorized by organization and item (line-item budgeting), providing information on the type and nature of expenditures.[3] However, this method complicates the identification of specific goals or programs related to each expenditure and the corresponding results achieved. The focus remains primarily on financial and accounting aspects, such as receipts and payments. Consequently, Parliament's responsibility is limited to overseeing government expenditures within approved allocations, ensuring that no expenses exceed designated amounts and that each expense is allocated appropriately.[4] However, Parliament does not monitor organizational performance, efficiency, or outcomes. For instance, if one Rial is spent on purchasing goods outside established financial and accounting standards, the issue is reported to the Supreme Audit Court only if the acquired assets are deemed excessive.[5]

The traditional line-item budgeting approach serves primarily to control expenditures.[6] However, scholars have noted that when traditional budgeting is combined with an input-oriented approach in budget formulation and detailed expenditure controls, it hinders performance and program prioritization.[7] In the judiciary of the Islamic Republic of Iran, strict and detailed expenditure controls exist, yet transfers between certain appropriations approved by Parliament are permitted. Article 79 of the Act of Adjustment of a Part of Financial Regulation of the State, approved in 2001, allows for the transfer of approximately 30% of total current and construction expenditures. In some instances, salaries and wages are paid from construction funds.[8]

While increased flexibility in budgeting is desirable, granting greater authority to managers becomes problematic without corresponding accountability for outputs and without a standard for measuring their performance in achieving established plans. This lack of accountability can lead to financial corruption,[9] further undermining the integrity and efficacy of the judicial budgeting process.

1.3. The Effect of Questionable Budgeting Practices on the Inefficiency of Resource Allocation

A country's budgeting system typically employs multiple methods rather than adhering to a single approach.[10] In the traditional budgeting system of the Islamic Republic of Iran, questionable

1 Schiavo-Campo and Tommasi, *Managing Government Expenditure* (1999) 86.
2 Ibid, 87.
3 Farajvand, *The Process of Formulation to Budget Control* (2006) 159.
4 Farzib, *Governmental Budgeting in Iran* (1996) 365.
5 Farajvand, Op. Cit., (2006) 199-200.
6 Ibid, 159.
7 Schiavo-Campo and Tommasi , Op. Cit., (1999) 133, 164.
8 Ghasemi et al., *Budgeting in Iran, Budget and Budget Makers (Survey)* (2008) 33.
9 Hassanabadi and Najjar Sarraf, Op. Cit., (2010) 204.
10 Mehnatfar and Jafari Samimi, Op. Cit., (2013) 80.

practices such as "excessive bargaining" and "incremental budgeting" significantly impact the estimation of organizational costs.[1]

In preparing the judiciary's budget, financial needs are initially estimated based on information collected from various branches of the judiciary. Following this, the judiciary engages in negotiations with the Plan and Budget Organization to discuss income, expenses, and resource allocation. A mutual agreement is reached, establishing the budget framework for the judiciary, which is then incorporated into the budget bill. During these negotiations, expenditures are estimated primarily through "incremental budgeting," relying heavily on the previous year's budget. Conducting comprehensive annual evaluations of programs or implementing a "zero-based" budgeting exercise is often impractical and costly. However, depending solely on incremental budgeting limits discussions to reviewing last year's budget items and negotiating minor adjustments. This approach emphasizes inputs while neglecting results, effectiveness, efficiency, and priorities. More effective tools for controlling expenditures exist beyond incremental budgeting.[2]

While an "apolitical" budgeting process may seem ideal, the reality is that bargaining will always be part of budget preparation due to the need to balance conflicting interests. However, when bargaining becomes the dominant force in the process, it often results in inefficient resource allocation. Decisions may then be based more on the political influence of various actors rather than on factual assessments or desired outcomes. This can lead to false compromises and a lack of transparency in budget appropriations, creating opportunities for evasion and the exclusion of critical programs from the budget.[3]

The budget preparation process for the judiciary, as well as Iran's overall budget, heavily relies on political bargaining, resulting in a lack of transparency and clarity in the judiciary's budget. Analyzing the judiciary's budget lines over the past decade reveals a trend toward broader and more general allocations.

To effectively plan, evaluate performance, and optimize budget preparation, accurate accounting information and an efficient accounting system are essential. However, the aforementioned questionable budgeting practices have marginalized the role of accounting information in the budgeting process, undermining the need for appropriate accounting systems.[4]

Even after the budget bill is submitted to the Islamic Parliament of Iran, further bargaining can occur. Ideally, parliamentarians should refrain from altering budget figures established by experts. However, due to time constraints and a lack of technical expertise, most parliamentarians are ill-equipped to scrutinize the budget in detail.[5] Article 75 of the Iranian Constitution limits parliamentarians' powers to modify budget figures.[6] Their primary responsibilities include examining government plans, assessing various scenarios for achieving those plans, and evaluating resource allocation to prioritize development initiatives. Unfortunately, parliament

1 Etebarian, Emadzadeh and Rouhani, *Investigating the Role of Accounting Information in Budget and Budgeting* (2013) 13-14.
2 Schiavo-Campo and Tommasi, Op. Cit., (1999) 126.
3 Ibid, 127.
4 Etebarian, Emadzadeh, and Rouhani, Op. Cit., (2013) 1-3.
5 Ghasemi et al. Op. Cit., (2008) 69.
6 Jalali and Tangestani, *Examining Article 75 of the Constitution with an Emphasis on the Opinions of the Guardian Council Regarding the Approvals of the Islamic Parliament up to the Eighth Period* (2015) 69, 73.
7 Hosseini, Fatehizadeh and Tehrani, *Article 75 of the Constitution and Judiciary's Powers in Budgeting* (2012) 133.

often becomes embroiled in secondary budget issues, interfering with institutions' budgets and making adjustments to their funding.[1] The influence of parliamentarians on budget figures arises not only from official rules but also from unwritten constraints shaped by frequent interactions among various actors.

In this context, judicial officials engage in negotiations and consultations with parliamentarians to secure increases in the judiciary's budget. There have been instances where parliamentarians significantly raised the judiciary's budget. Over time, the judiciary's budget has gradually increased from 1% of the country's total budget to 1.93% in 2017.

Additionally, the approval of a clause in the Consolidation Commission of the Sixth Economic, Social, and Cultural Development Program mandated that the government allocate a specific percentage of the budget to the judiciary each year. Initially proposed at 3.2% of the public budget, this percentage required approval. Ultimately, in accordance with Article 119 of the Law of the Sixth Development Program, passed on April 3, 2017, the government was obligated to allocate at least 2.9% of the budget to the judiciary. However, this article has yet to be implemented. In 2021, approximately 2.13% of the public budget was allocated to the judiciary, with around 2.37% allocated in 1402.

The judiciary's budget is standardized as a percentage of the nominal Gross Domestic Product (GDP). In the Islamic Republic of Iran, from 2021 to 2022, approximately 3.8% to 4.2% of GDP was allocated to the judiciary.

Table 1 illustrates the judicial system's budget (including court budgets, prosecution services, and legal aid) as a percentage of GDP in European countries for 2020.

Table 1- Judicial System Budget of European Countries as a Percent of GDP in 2020[2]

States	As % of GDP
Albania (ALB)	0.33%
Andorra (AND)	0.44%
Armenia (ARM)	0.28%
Austria (AUT)	0.32%
Azerbaijan (AZE)	0.28%
Belgium (BEL)	0.22%
Bosnia and Herzegovina (BIH)	0.73%
Bulgaria (BGR)	0.61%
Croatia (HRV)	0.53%
Cyprus (CYP)	0.27%
Czech Republic (CZE)	0.32%
Denmark (DNK)	0.17%
Estonia (EST)	0.26%
Finland (FIN)	0.19%
France (FRA)	0.21%
Georgia (GEO)	0.23%
Germany (DEU)	0.35%
Greece (GRC)	0.29%

1 Ghasemi et al., Op. Cit., (2008) 70, 73.

2 European Judicial Systems CEPEJ Evaluation Report (2022) Evaluation Cycle. Part 1: Tables, Graphs and Analyses, Council of Europe, 20.

States	As % of GDP
Hungary (HUN)	0/40%
Iceland (ISL)	0.62%
Ireland (IRL)	NA[1]
Italy (ITA)	0.30%
Latvia (LVA)	0.37%
Lithuania (LTU)	0.27%
Luxembourg (LUX)	0.17%
Malta (MLT)	0.26%
Republic of Moldova (MDA)	0.41%
Monaco (MCO)	0.29%
Montenegro (MNE)	0.80%
Netherlands (NLD)	0.27%
North Macedonia (MKD)	0.37%
Norway (NOR)	0.13%
Poland (POL)	NA
Portugal (PRT)	NA
Romania (ROU)	0.44%
Serbia (SRB)	0.66%
Slovak Republic (SVK)	0.43%
Slovenia (SVN)	0.45%
Spain (ESP)	0.37%
Sweden (SWE)	0.27%
Switzerland (CHE)	0.29%
Turkiye (TUR)	0.21%
Ukraine (UKR)	NA
UK-England and Wales (UK:ENG&WAL)	NA
UK-Northern Ireland (UK:NIR)	0.39%
UK-Scotland (UK:SCO)	0.27%

Bosnia and Herzegovina (0.73%) and Montenegro (0.80%) have significantly higher budget percentages of GDP within European judicial systems. Although the budget allocated to the judicial system depends on many factors, the budget of Iran's Judiciary is significantly higher compared to the budget of European judicial systems.

However, judicial officials continue to consult to further increase the Judiciary's share. Clause 2 of Article 113 of the Seventh Development Plan Law mentions that the judicial branch's share of the public budget will increase by 30% in the first year of the program's implementation.

The determination of these percentages is based on factors other than accurate assessments and needs calculations. Furthermore, some researchers argue that assigning a fixed percentage of the entire budget to the judicial system may undermine transparency and efficiency in practice, as the judiciary is not obligated to justify or explain its actions or how it utilizes its allocated budget[2].

1 NA: No reliable information Available

2 Office of Democracy and Governance, Op. Cit., (2002) 26.

1.4. The Resistance of Iran's Budgeting System to Reforms

Given the complexities outlined above, understanding the budgeting realities and the implementation of budgets in practice cannot be achieved solely by studying formal rules. It is insufficient to examine formal regulations in isolation. The intricacies arise from the fact that different laws adopt varying approaches, and budgeting is implemented in diverse ways. This phenomenon is not unique to Iran; it is also evident in many developed countries. As North points out, formal rules are a significant part, but not the entirety, of the overall constraints. The decision-making process and its outcomes are shaped by a combination of informal constraints, formal rules, and management methods. Relying exclusively on formal rules would lead to an incomplete understanding of the situation. Even in societies with similar formal laws, outcomes can differ significantly due to the influence of informal constraints. Therefore, substantial changes in institutions necessitate modifications to both formal laws and informal constraints, as well as the methods of their implementation.

Unfortunately, there is a tendency to replace new formal laws with informal restrictions, often disregarding the deeply ingrained cultural heritage that underpins many informal constraints.[1] Consequently, reorganizing Iran's budgeting system cannot be achieved merely through the enactment of the Plan and Budget Act or the introduction of performance budgeting in economic, social, and cultural development programs. Without considering the informal constraints that have shaped actions over the years, inconsistencies arise between formal and informal norms, leading to a disconnect between the budgeting process and existing laws.

Transforming informal constraints can be a protracted process, often taking centuries.[2] These norms have gradually emerged from the generalization of past laws, becoming embedded in traditions, customs, principles, and behavioral norms, while demonstrating remarkable resilience.[3] Institutional changes, encompassing both formal and informal constraints,[4] occur gradually due to the enduring nature of informal constraints, which contribute to the persistence of institutions and the connection between the past, present, and future. As a result, choices made today and tomorrow are influenced by historical contexts.[5]

Analyzing Iran's income and expenditure situation prior to the Islamic Revolution and the Constitutionalism Movement reveals that authorities frequently exploited the country's financial challenges to prioritize personal interests, establishing rentier relationships. Although some attempts were made to streamline Iran's finances over time, there has consistently been strong resistance to well-considered policies. For example, Amir Kabir (1807-1852) made significant efforts to improve Iran's revenue and expenditure management before the Constitutionalism Movement, but these attempts were thwarted by opposition from the monarch's inner circle and supporters of foreign policy.

Following the Constitutionalism Movement in 1906, Iran's budget improved to some extent, with initiatives to regulate courtiers' salaries. Indeed, one of the constitutionalists' primary demands was to reform the income and expenditure situation. The push for financial

1 North, *Institutions, Institutional Change and Economic Performance* (1990) 24, 69-70, 93, 146.
2 Williamson, Op. Cit., (2000) 7.
3 North, Op. Cit. (1990) 24, 146.
4 Momenipour, *Economic Analysis of the Petroleum Ownership in the Light of Efficient Property Rights* (2015) 56.
5 North, Op. Cit., (1990) 13.

reform, which threatened the interests of courtiers, was a major factor behind the bombardment of the first parliament in 1908. A second parliament was established after the constitutionalists regained control of the capital. In 1910, Sani-al-Dawla Hedayat (1856-1911), then Minister of Finance, prepared Iran's first budget under new principles of budget formulation, but he was assassinated while presenting it to Parliament.[1] In May 1911, American financial expert William Morgan Shuster was invited to Iran to organize the country's finances. However, he was forced to leave after eight months due to political crises and an ultimatum from the Russian government,[2] leading to the dissolution of the second parliament amid budgetary sensitivities.

The financial situation improved in 1931, and by 1940, the budget underwent significant reforms, only to collapse again with the dismissal of Reza Shah in 1941. During Dr. Mohammad Mossadegh's premiership in 1950, the budget was balanced, but after the 1953 coup, rentier relationships reemerged.

Following the Islamic Revolution, calls for budgeting reforms intensified. While the country's economic situation stabilized in the early years post-revolution and during the Iran-Iraq War, rentier relationships gradually intensified in subsequent years.[3] This aligns with North's proposition that after revolutions, many characteristics and institutions of societies persist,[4] complicating the path to effective reform and resource allocation in the judiciary and beyond.

1.5. Institutional Resistance to Reform in Iran's Budgeting System

Institutions and formal laws are often not designed with social efficiency in mind. Instead, they are created to serve the interests of those wielding the bargaining power to propose new laws. As long as weak institutions benefit individuals with this bargaining power, significant institutional changes are unlikely to occur.[5] However, despite the gradual nature of such changes, it is possible to expedite the reform process by establishing socially efficient formal institutions and enhancing transparency. This is particularly feasible in societies where political entities demonstrate the will and strong motivation to implement efficient reforms.[6]

Some countries have successfully developed relatively efficient institutions when the personal objectives of those with the power to negotiate institutional changes align with socially beneficial solutions. This alignment helps explain the resistance of Iran's budgeting system to reform.

In a broader context, institutional frameworks serve as the "rules of the game," while organizations act as the players. The constraints imposed by these frameworks define the range of opportunities available and the types of organizations that can emerge. Organizations develop the skills and knowledge necessary for survival and success within competitive environments. The types of skills that yield benefits depend on the incentive structures inherent in the institutional matrix.[7] Consequently, the institutional framework shapes the knowledge required for effective operation.

1 Ebrahiminejad, *The Principle of Budget Preparation, Formulation and Control* (2008) 46.
2 Gholizadeh, *Budgeting System in Iran (Theory and Practice)* (2012) 38.
3 Ghasemi, *The Historical Locks of Iran's Budgeting System: Past, Present, and Prospects* (2021) 1.
4 North, Op. Cit., (1990) 70.
5 Ibid, 39, 115.
6 Momenipour, Op. Cit., (2015) 56.
7 North, *Institutional Change: A Framework of Analysis* (1994) 3.

Within the budgetary structure of the judiciary in the Islamic Republic of Iran, the prevailing rules involve the neglect of programmatic approaches, excessive bargaining, and a lack of transparency and financial discipline. Within such a framework, it is unrealistic to expect the judiciary to fulfill its role optimally and efficiently, as this contradicts the established rules of the game. In this institutional context, the production and dissemination of knowledge regarding budgeting and planning are regarded as unimportant, and expert opinions carry little weight in decision-making.

As a result, organizations that develop under these institutional conditions become adept at navigating rentier relationships, to the extent that the budget transforms into a superficial and non-functional facade. This detachment from effective budgeting practices further entrenches inefficiencies and undermines the potential for meaningful reform within the judiciary and broader governance structures in Iran.

2. Lack of Appropriate Mechanisms to Supervise Budget Implementation in the Judiciary of the Islamic Republic of Iran

This section explores several factors that complicate the supervision of the judiciary's budget implementation in Iran.

2.1. The Impact of the Judiciary's Maximum Institutional Independence on Non-Interaction with the Executive Branch

Before the Islamic Revolution, the judicial system in Iran was heavily dependent on the executive power. Given the historical context and the authoritarian nature of the regime, there was widespread skepticism regarding the executive's influence. Consequently, after the revolution, some members of the Assembly for the Final Review of the Constitution argued that this dependence posed risks, prompting calls for a more independent judiciary.[1]

The Constitution of the Islamic Republic of Iran established a highly independent judicial system, emphasizing a clear separation from the executive branch.[2] This shift significantly diminished the role of the Minister of Justice, who is part of the executive.[3]

Certain members of the Assembly advocated for the judiciary's budget to be prepared solely by judiciary officials, thereby insulating it from potential interference, reductions, or objections from the executive branch. While Article 144 of the draft constitution addressed the financial independence of the judiciary, it was ultimately not approved due to opposition from the majority in Parliament, who deemed it impractical.[4]

Despite this constitutional independence, the executive branch retains influence over the judiciary through its authority in drafting the annual national budget. However, to prevent executive interference in judicial performance, interactions between the President and the Chief

1 Annotated version of the deliberations of the Assembly for the Final Review of the Constitution of the Islamic Republic of Iran (1979) 1594.
2 Aghaeitouq, *Examining the Budget of the Judiciary in the Light of the Articles of the Constitution' in Judicial Research 1* (2016) 20.
3 Annotated Report of the Deliberations of the Assembly for Revising the Constitution of the Islamic Republic of Iran (1989) 322, 351, 731, 885-889.; Mehrpour, *A Concise of the Constitutional Law of the Islamic Republic of Iran* (2014) 354-355.
4 Annotated version of the deliberations of the Assembly for the Final Review of the Constitution of the Islamic Republic of Iran, Op. Cit., 1417-1419, 1594-1597.

Justice are limited.[1] Historical skepticism towards the executive has fostered efforts to minimize its role in the system of checks and balances.[2]

It is crucial to understand the nature of judicial independence in Iran. As Warren articulates, judicial independence is not absolute; it is a limited independence, characterized by freedom from improper influence rather than all influence.[3] In managing the judiciary's current affairs, there is an inherent dependence on Parliament for budget approval and on the government, as the Minister of Justice oversees this branch.[4] While maximizing independence for the judiciary may seem beneficial, it can paradoxically hinder transparency and accountability. Enhancing financial performance while minimizing undue executive interference can be achieved through increased transparency and a strengthened system of checks and balances.

Historically, judicial branches lacked the responsibilities of budget preparation and administration. Instead, executive agencies assessed the courts' financial needs, submitted these needs to the legislature, negotiated funding, and managed the allocated resources. Although this process involved consultation with judicial officials, it still allowed for the potential denial of financial support to courts or specific judges who issued decisions contrary to executive interests.[5]

In 1939, judicial branches began to develop their own budget estimates, presenting them directly to the legislature or executive for incorporation into a comprehensive government budget without alteration. The judiciary also defended its budget requests before the legislature and administered the granted funds. However, current judicial budgeting procedures still expose the judiciary to oversight and some degree of control by other branches. The executive may influence judicial funding levels through its recommendations to Congress on fiscal policy.[6]

While U.S. judges enjoy a fair measure of independence, this independence is not absolute. Studies of judicial decision-making indicate that the judiciary remains attentive to the attitudes of Congress and the President,[7] highlighting the complexities inherent in balancing judicial independence with effective budget supervision.

2.2. Challenges of Financial Supervision by the Islamic Parliament of the Islamic Republic of Iran over the Judiciary

Some members of the Assembly for Revising the Constitution of the Islamic Republic of Iran emphasized the need for accountability of the head of the judiciary. Asadollah Bayat, a member of the Assembly, articulated the concern:

> *"It is dangerous if the head of the Judiciary is not held accountable. While we respect the judicial system, we do not consider them to be immune from responsibility. Now that all responsibilities of the Judiciary are assigned to one person, we must establish a form of accountability and oversight."*[8]

1 Hashemi, *The Constitutional Law of the Islamic Republic of Iran vol 2* (2007) 307.
2 Rasekh, *Checks and Balance*, (2009) 151.
3 Warren, *The Importance of Judicial Independence and Accountability* (2003) 3.
4 Turpin, '*Pouvoir Judiciaire' in Constitution et Justice* (1995) 10.
5 Gur-Arie and Wheeler, *Judicial Independence in the United States: Current Issues and Relevant Background Information* (2001) 133, 136.
6 Ibid.
7 Cross, *Thoughts on Goldilocks and Judicial Independence* (2003) 195-196.
8 Annotated Report of the Deliberations of the Assembly for Revising the Constitution of the Islamic Republic of Iran, Op. Cit., 331.

However, to ensure judiciary independence, the Chief Justice has no obligations to other branches, aside from implementing laws and coordinating the budget.[1] According to Article 57 and Clause 6 of Article 110 of the Constitution, the Supreme Leader oversees the head of the judiciary, but a specific supervisory mechanism for this oversight has not been established. Furthermore, neither the Constitution nor other relevant statutes provide a framework for holding high-ranking judicial officials accountable.[2]

The Islamic Consultative Assembly (ICA) employs mechanisms such as "financial supervision," "questioning and impeachment," and "investigation" to oversee the financial performance of organizations.[3] However, these mechanisms encounter significant challenges when applied to the judiciary, as its leadership is not directly accountable to Parliament.[4]

The Supreme Audit Court of Iran is tasked with financial supervision on behalf of Parliament.[5] However, this institution can only oversee the implementation of the budget allocated to the judiciary. Since the Chief Justice is not held accountable, the Supreme Audit Court's ability to effectively monitor the financial affairs of the judiciary is limited.

Moreover, the inability to impeach the head and senior officials of the judiciary[6] forces parliamentarians to direct their inquiries to the Minister of Justice regarding all judiciary-related matters, as stipulated in Article 4 of the Act on the Implementation of a Part of Article 160 of the Constitution (approved in 2015). Judicial officials are required to provide the Minister with necessary information and documents to address parliamentary inquiries (Article 5 of the same law). However, a note in Article 5 allows the Chief Justice to prevent the submission of documents related to the judiciary if he deems it a violation of judicial independence or against government interests.[7] This broad provision undermines effective supervision, as it permits generalized claims about violations of judicial independence or government interests. Furthermore, the political repercussions of questioning the Minister of Justice are limited to warnings or, in extreme cases, a vote of no confidence; thus, the head and senior managers of the judiciary bear no responsibility, rendering such questioning largely ineffective.

Article 76 of the Iranian Constitution grants the Parliament the right to "investigate" "all affairs of the country." However, Note 7 of Article 212 of the Act of Internal Regulations of the Parliament (approved in 2020) restricts this authority, stating that investigations do not cover judicial cases and that permission from the Supreme Leader is required for inquiries into other matters concerning the judiciary, including financial and administrative affairs.

In 2004, an investigation into the judiciary's performance included financial inquiries. Despite the explicit authority granted to Parliament by Article 76 and the interpretive opinion of the Guardian Council, which affirmed Parliament's investigative rights, the judiciary refused to cooperate. The head of the judiciary expressed doubts about this authority and suggested that Parliament could only investigate the performance of the administrative and financial deputy of

1 Hashemi, Op. Cit. (2007) 370.
2 Mohammad Ghasem Tangestani, *Independence and Responsibility of Judiciary* (Mizan Publication 2018) 330.
3 Mohammad Hedayati Zafarghandi, 'The Role and Function of the Supreme Audit Court in Financial Supervision' (2017) 18 *International Journal of Nations Research* 45, 52-53.
4 Jalali & Tangestani, Op. Cit. (2015) 329.
5 Hashemi, Op. Cit. (2007) 205.
6 Ibid, 370.
7 Jalali & Tangestani, Op. Cit. (2015) 321.

the judiciary, excluding the judicial organization of the armed forces. Although the head of the judiciary allowed Parliament to investigate the organizational and financial performance of this branch, no satisfactory responses were provided even after several months.

In 2018, several parliamentarians requested an investigation into the funds deposited by the judiciary, the profits generated, and the areas of expenditure. Although the Economic Commission of Parliament communicated with the judiciary multiple times, it received no response. Following a change in the head of the judiciary in 2019, the Parliamentary Counselor of the Judiciary provided some explanations, but many parliamentarians remained unconvinced, and no further action was taken.

Even if an investigation uncovers violations or crimes within the judiciary, Parliament cannot take direct action. Instead, it can refer the case to appropriate authorities and notify the head of the judiciary, allowing him to take discretionary administrative measures. Additionally, the matter can be brought to the attention of the Supreme Leader.[1]

The institutional framework governing budgeting in Iran's judiciary, as previously described, presents significant challenges to supervision, often undermining it. The inefficiencies of the non-independent judicial system before the Islamic Revolution, combined with the strong emphasis on judicial independence by the Constitution's founder, reinforce this framework and enable judicial authorities to evade accountability and obstruct supervisory mechanisms. Consequently, non-transparency within the judicial system is heightened compared to other systems, creating a critical obstacle to efficient resource allocation.

In contrast, U.S. judicial branches have primary responsibility for their administration. However, the legislature retains authority over public funding for the courts, including directing expenditures within broad categories. Furthermore, the legislature often holds constitutional power to change court organization and jurisdiction, thereby creating a legislative oversight role that promotes public accountability.[2]

Conclusion

To gain a comprehensive understanding of the efficiency or inefficiency of resource allocation and management within the judiciary, it is essential to examine the institutional framework governing this branch and the challenges it faces. This framework includes formal laws, informal constraints, and managerial practices; focusing solely on formal rules would lead to an incomplete understanding.

In Iran, the predominant budgeting method introduced by the Plan and Budget Law is program budgeting. However, the implementation of budgeting practices largely adheres to traditional methods, despite proposals for operational budgeting following the Fourth Development Program. The judiciary has not successfully established medium-term programs based on accurate statistics and scientific principles. Certain procedural challenges, such as non-supervisory incomes and an overreliance on oil revenues, further complicate the development of medium-term budgeting plans. As a result, the budgeting process is often haphazard and lacks alignment with strategic priorities.

1 Ibid, 319.
2 Gur-Arie and Wheeler, Op. Cit. (2001) 144.

While traditional budgeting can offer some level of cost control, it has proven ineffective within Iran's judicial system. Fiscal discipline alone cannot sustainably address issues stemming from arbitrary resource allocation and inefficient operations. Additionally, the performance of organizations within this traditional structure is not adequately supervised or evaluated from an efficiency perspective.

The extensive use of unprincipled procedures, such as incremental budgeting and political bargaining, has compromised the integrity of the budgeting process, detaching it from reliable accounting information. It is crucial to establish a robust accounting system within the judiciary. The inclusion of bargaining in decision-making diminishes the focus on factual outcomes and program implementation, allowing political power dynamics to dictate budgetary decisions.

In summary, a thorough examination of the institutional framework governing the judiciary is necessary to assess resource allocation and management efficiency. The current reliance on traditional budgeting methods and the lack of proper accounting systems present significant challenges that must be addressed. Furthermore, the extreme interpretation of judicial independence has resulted in inadequate mechanisms for overseeing the financial performance of judicial authorities. Judicial officials often invoke judicial independence as a shield to evade accountability, undermining the effectiveness of existing regulatory mechanisms and highlighting the pressing need for greater transparency.

These challenges, which pertain to optimizing resources allocated to Iran's judiciary, shape the institutional framework governing the budgeting process. An organization operating within such a framework is inevitably influenced by its constraints and operates accordingly. As such, it is unrealistic to expect the judiciary to function optimally within this structure.

To improve this framework, all its dimensions—including legal restrictions and behavioral norms—must change. However, institutional changes are typically gradual due to the enduring nature of informal constraints. Significant changes will only occur when those with bargaining power find it advantageous to promote effective institutional frameworks. Therefore, improvements in institutional frameworks will emerge when influential individuals and entities are motivated to initiate change.

Institutional frameworks can either enhance or hinder productivity. While institutional changes create opportunities for both productive and unproductive activities, in a rentier structure like Iran's, these opportunities often facilitate activities that conflict with optimization and efficiency. This research aims to identify and strengthen aspects of the existing institutional framework that enhance efficiency rather than pursue fundamental changes.

Given the current state of Iran's budgeting system, its resistance to reform, and lessons from other countries, implementing performance budgeting in the judiciary appears impractical. Maintaining the traditional budgeting system during the reform process is more prudent. Nevertheless, in reforming the budgeting structure of the judicial system, lessons from performance budgeting can be valuable.

New budgeting methods should prioritize the judiciary's policies. Meaningful reforms require a review of financially burdensome policies that yield minimal benefits, such as those related to criminal justice. Detailed and actionable plans should then be developed based

on these new policies, paying close attention to implementation mechanisms and available financial resources. A series of plans and reforms should be forecasted and evaluated concerning economic costs and social effects. Using cost-benefit analysis, the most suitable solutions can be identified. By defining detailed plans, there is potential to improve the budget's commitment to programs and enhance the cost control system.

Additionally, Parliament should oversee the alignment of the budget with strategic plans. The budget liquidation report is crucial for shedding light on the financial performance of organizations, including the judiciary. This report can identify inefficient laws, evaluate organizational performance, and expose budgetary misuse. It must be submitted to Parliament in a timely manner and scrutinized in public sessions, ensuring that it is considered during the approval process for the judiciary's budget. This would increase the judiciary's accountability for delivering results.

It is also advisable to modify the resource distribution structure among various parts of the judicial system and determine the optimal allocation for each section. This requires establishing priorities for the judicial system and developing performance indicators to guide resource distribution. Such indicators will support rational adjustments to budget allocation and provide vital information during negotiations regarding the overall judicial budget.

Finally, it would be beneficial to establish a percentage range for the minimum and maximum budget allocations for the judiciary. This range would encourage the Plan and Budget Organization and Parliament to consider the judiciary's performance and output when reviewing and approving the annual budget.

References

Books and Articles

Aghaeitouq M, 'Examining the Budget of the Judiciary in the Light of the Articles of the Constitution' in *Judicial Research* 1 (Judiciary Press and Publishing Center 2016). [In Persian]

Amirkabiri A R, Almasi H, and Mahmoudi H, 'Performance Budgeting: A Tool for Clarifying the Relationship between Consumed Resources and the Results Obtained in the Organization' (2014) 174 *Work and Society Monthly* 12. [In Persian]

Babaei H, *Government Budgeting in Iran (from Theory to Policy)* (Commercial Print and Publications Company 2000). [In Persian]

Cross F B, 'Thoughts on Goldilocks and Judicial Independence' (2003) 64 *Ohio State Law Journal* 195.

Ebrahiminejad M, *The Principle of Budget Preparation, Formulation and Control* (Shahid Bahonar University of Kerman 2008). [In Persian]

Essex A, 'Reducing Admissions to Jail and Prisons' (National Conference of State Legislatures (NCSL) 2021).

Etebarian A, Emadzadeh M, and Rouhani A, 'Investigating the Role of Accounting Information in Budget and Budgeting' (2013) 10 *Journal of Accounting Research* 1. [In Persian]

Farajvand E, *The Process of Formulation to Budget Control* (Forouzesh Press 2006). [In Persian]

Farzib A R, *Governmental Budgeting in Iran* (Governmental Management Training Center 1996). [In Persian]

Ghasemi H R, 'The Historical Locks of Iran's Budgeting System: Past, Present, and Prospects' (2021) Institute of Religion and Economic Studies. [In Persian]

Gholizadeh R Gh, *Budgeting System in Iran (Theory and Practice)* (Chaparpub 2012). [In Persian]

Hashemi M, *The Constitutional Law of the Islamic Republic of Iran* 2 (Mizan Publication 2007). [In Persian]

Hassanabadi M, Najjar Sarraf A R, *A Total Model for Performance Based Budgeting Diamond Model* (Industrial Research & Training Center of Iran 2010). [In Persian]

Hedayati Zafarghandi M, 'The Role and Function of the Supreme Audit Court in Financial Supervision' (2017) 18 *International Journal of Nations Research* 45. [In Persian]

Hosseini M R, Fatehizadeh M, and Tehrani I, 'Article 75 of the Constitution and Judiciary's Powers in Budgeting' (2012) 70 *Scientific Quarterly Journal of Majlis & Rahbord* 133. [In Persian]

Jalali M and Tangestani M Gh, 'Examining Article 75 of the Constitution with an Emphasis on the Opinions of the Guardian Council Regarding the Approvals of the Islamic Parliament up to the Eighth Period' (2015) 10 *Quarterly Journal of Public Law Knowledge* 69. [In Persian]

Khorramabadi Q, 'The Council Management of the Judiciary Gives a Sense of Independence to the Judges' (2009) 58 *Judiciary Monthly* 54. [In Persian]

Leachman M, Chettiar I, and Geare B, 'Improving Budget Analysis of State Criminal Justice Reforms: A Strategy for Better Outcomes and Saving Money' (2012) Center on Budget and Policy Priorities, American Civil Liberties Union.

Lienert I, 'The Legal Framework for Budget Systems (An International Comparison)' (2004) 4 (3) *OECD Journal on Budgeting* (Special Issue).

Mehrpour H, *A Concise of the Constitutional Law of the Islamic Republic of Iran* (Dadgostar Publication 2014). [In Persian]

Office of Democracy and Governance, *Guidance for Promoting Judicial Independence and Impartiality* (U.S. Agency for International Development 2002).

Rezaei M, 'Performance Budgeting Requirements in Iran' (2016) 51 *Journal of Public Law Research* 55. [In Persian]

Sie J, 'How 4 States Cut Their Criminal Justice Budgets Without Sacrificing Safety' (2022) National Conference of State Legislatures.

Tangestani M Gh, *Independence and Responsibility of Judiciary* (Mizan Publication 2018). [In Persian]

The Office of Budget and Planning, *Budgeting in Iran (Problems & Challenges)* (Majlis Research Center 2002). [In Persian]

Webber D, 'Good Budgeting, Better Justice: Modern Budget Practices for the Judicial Sector' 3 *Law and Development Working Paper Series*, Legal Vice Presidency, The World Bank, USA.

Laws, Regulations, and Agreements

Annotated Report of the Deliberations of the Assembly for Revising the Constitution of the Islamic Republic of Iran (1989). [In Persian]

Annotated version of the deliberations of the Assembly for the Final Review of the Constitution of the Islamic Republic of Iran (1979). [In Persian]

Theses and Dissertations

Momenipour E, '*Economic Analysis of the Petroleum Ownership in the Light of Efficient Property Rights*' (MA Thesis, Shahid Beheshti University 2015). [In Persian]

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Scrutinizing Provisions of the Islamic Penal Code of the Islamic Republic of Iran in Combating Pirate Impunity: From Classic Piracy to Modern Piracy

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ABSTRACT

Modern piracy poses a significant challenge to global stability, jeopardizing international order and creating insecurity on the world's waterways. While reminiscent of traditional piracy, contemporary piracy manifests in distinct forms that diverge from its classical antecedent, particularly in terms of violence, the breadth of activities, methods employed, and underlying motives. Currently, the jurisdiction over these offenses rests with domestic courts. Despite the concerted efforts of the international community to prosecute perpetrators within these courts, both governments and international law have encountered considerable obstacles in achieving success. A particularly contentious issue is the jurisdictional complexities faced by governments during legal proceedings. In light of various United Nations Security Council resolutions, the concept of universal jurisdiction has evolved, albeit subject to diverse interpretations. The Islamic Republic of Iran has adopted specific procedural frameworks to address this issue. In accordance with Iranian law, both universal and territorial as well as personal jurisdictions are invoked to combat the immunity associated with modern piracy. The provisions articulated in Articles 3, 4, 7, 8, and 9 of the Islamic Penal Code unequivocally indicate that the Islamic Republic of Iran possesses substantial jurisdiction over individuals accused of modern piracy. Nevertheless, it is evident that legislative capacity remains underutilized, particularly concerning the existing gaps and deficiencies in the definitions and punitive measures related to piracy within the Islamic Penal Code. This has inadvertently resulted in piracy being perceived as a subset of other criminal offenses. Nonetheless, Iranian courts, grounded in the principles of universality, territoriality, and personal jurisdiction as delineated in the aforementioned Articles of the Islamic Penal Code, do indeed possess the requisite authority to adjudicate piracy cases.

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Introduction

Piracy has resurfaced in regions such as Somalia and the Gulf of Aden, highlighting a persistent issue that has never fully vanished from the international arena.[1] It is essential to recognize the significant distinctions between modern piracy and the definitions established by the 1958 High Seas Convention and the 1982 United Nations Convention on the Law of the Sea.

Modern piracy is characterized by illegal acts of violence occurring in areas beyond governmental jurisdiction, the types of vessels involved, and the motives behind these acts. For instance, in the Somalia and Gulf of Aden regions, piracy can sometimes occur without the use of violence, relying instead on the threat of violence, or may take place within inland waters and ports that fall under governmental jurisdiction. Furthermore, piracy manifests in various forms, including attacks on vessels from speedboats, as well as assaults on fishing and recreational boats, oil and chemical platforms, and tankers. A crucial distinction lies in the motives of the perpetrators, who may claim to act in the interest of alleviating poverty.[2]

Acts of violence occurring in areas beyond governmental jurisdictions, particularly involving vehicles that are subjected to piracy, distinguish contemporary piracy from its classical definition. Specifically, modern piracy in the regions of Somalia and the Gulf of Aden can occur without actual violence, relying instead on the threat of violence. Such acts may also take place in inland waters and ports, as well as within the jurisdictions of sovereign states. Additionally, piracy can manifest both on board vessels and via speedboats, targeting fishing and recreational boats, oil and chemical platforms, and tankers. A significant distinction lies in the motives attributed to these acts, where some claim to act in furtherance of humanitarian assistance to the impoverished.[3]

While numerous governments, in accordance with the High Seas Convention (1958) and the United Nations Convention on the Law of the Sea (1982), possess the authority to prosecute acts of piracy under principles of universal jurisdiction and common law, the practical exercise

1 John Mo, *Options to Combat Maritime Piracy in Southeast Asia Ocean Development and International Law* (2002) 83.

2 Gholamali Ghasemi and Mohammad Setayeshpur, 'International Community's Acts to Confront Modern Piracy', *Iranian Journal of International Politics* 2 (2019) 4-5.

3 Ibid.

of such jurisdiction remains limited. Concerning the Islamic Republic of Iran, as a signatory to the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), it bears responsibility to prosecute or extradite individuals accused of piracy.[1] Despite this obligation, Iranian naval forces have demonstrated reluctance to arrest suspected pirates, and due to jurisdictional limitations, Islamic Republic of Iran has been unable to prosecute those apprehended, resulting in their repatriation.[2]

Articles 3 to 9 of the Islamic Penal Code of Iran (adopted April 21, 2013) delineate four principles of jurisdiction: territorial, protective, active or passive personal jurisdiction, and universal jurisdiction. Of these, only protective jurisdiction is not applicable in the context of piracy. This study aims to examine the legislative approach of the Islamic Republic of Iran regarding the jurisdiction of its courts over piracy and to articulate existing legal frameworks aimed at combating impunity. Modern piracy represents a significant challenge to global stability, creating insecurity on international waterways and posing threats to states. It resembles traditional piracy but has evolved in form, diverging from classical definitions through variations in violence, scope, operational methods, and underlying motives. Currently, the jurisdiction over these offenses resides primarily with domestic courts. Despite concerted efforts by the international community to bring perpetrators to justice, success remains elusive within both governmental and international legal frameworks. The complex issue of jurisdiction presents considerable challenges for governments in legal proceedings. Nevertheless, following the enactment of various Security Council resolutions, universal jurisdiction has been interpreted in multiple ways. The Islamic Republic of Iran has adopted specific procedures addressing this matter, recognizing both universal and territorial jurisdiction, as well as personal jurisdiction, in its efforts to combat impunity related to modern piracy. This article explores these issues in detail.

1. Territorial Jurisdiction of Iranian Criminal Courts Against Piracy in the Islamic Penal Code of Iran

The principle of territorial jurisdiction is a foundational concept in criminal law that has been integral to the establishment of sovereign states.[3] Article 3 of the Islamic Penal Code asserts that crimes committed within Iranian territory fall under Iranian jurisdiction. Notably, international law considers ships and aircraft, including Iranian military vessels, as extensions of Iranian territory.

According to Article 101 of the United Nations Convention on the Law of the Sea, also reiterated in the Convention on the Law of the Sea, piracy is defined as a crime that can occur on the high seas or in regions not under the jurisdiction of any state. Although Islamic Republic of Iran is not a member of these conventions, had it been, the nation would have been able to prosecute pirates attacking Iranian territory based on territorial jurisdiction and piracy charges. In the absence of such legislation, Iranian courts may resort to prosecuting pirates under alternative legal frameworks, such as theft or kidnapping, which do not carry the same international crime

1 Seyyed Sajjad Kazemi, 'In Search of Jurisdiction for Prosecution of Piracy off the Coast of Somalia and the Gulf of Aden', *Journal of International Police Studies* 32 (2017) 10.

2 Ali Khaleghi and Seyyed Sajjad Kazemi, 'An Analysis of the Jurisdiction of Iranian Courts in the Case of Piracy', *Quarterly Journal of Criminal Law and Criminology Studies* 3 (2015) 89.

3 Eugene Kotorovich, 'The Piracy Analogy: Modern Universal Jurisdictions, Hollow Foundation', *Harvard International Law Journal* (2004) 71.

characteristics, including enhanced penalties. Nevertheless, Iranian courts can address certain piracy-related offenses under the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, to which Islamic Republic of Iran is a party.[1]

In accordance with international law, attacks on Iranian vessels in the high seas are viewed as incidents occurring within the jurisdiction of the country whose flag is flown.[2] Thus, the jurisdiction of Iranian courts to prosecute piracy against Iranian ships is firmly grounded in the principle of territorial jurisdiction.

2. Personal Jurisdiction of Iranian Criminal Courts Against Piracy in the Islamic Penal Code of Iran

Personal jurisdiction serves to complement the principle of territorial jurisdiction and can be categorized into two forms: the nationality principle and the passive personality principle.[3]

2.1. Active Personality Principle

Article 7 of the Islamic Penal Code states that any Iranian national who commits an offense abroad will be tried and punished under Iranian law upon their return to Islamic Republic of Iran, provided that: a) the act is criminalized under Iranian law; b) if the offense carries discretionary punishment, the accused has not been tried and acquitted, or if convicted, the sentence has not been fully enforced in the jurisdiction of the crime; and c) there are no legal grounds in Iranian law for a dismissal or cessation of prosecution.

Moreover, acquiring citizenship after the commission of a piracy offense, unlike in some countries such as France or Lebanon,[4] does not extend jurisdiction to Iranian courts. However, Iranian courts retain the authority to address piracy accusations based on personal jurisdiction pertaining to the individual's nationality at the time of the offense.

2.2. Passive Personality Principle

The passive personality principle represents a significant addition to the Islamic Penal Code. Article 8 stipulates that any non-Iranian who commits an offense against an Iranian citizen or the state, and who is subsequently found or repatriated to Islamic Republic of Iran, will be prosecuted for their actions. This principle allows Iranian courts to exercise jurisdiction over perpetrators of piracy, especially given recent incidents where Iranian warships have apprehended pirate suspects while patrolling international waters. Due to the lack of jurisdiction to prosecute, these individuals were ultimately released off the coast of Somalia.[5]

3. Universality Jurisdiction of Iranian Criminal Courts Against Piracy in the Islamic Penal Code of Iran

The principle of universal jurisdiction permits any state to prosecute individuals for crimes that have not occurred within its territory, do not involve its nationals, and do not violate its vital

1 Khaleghi and Kazemi, Op. Cit. (2015) 78, 84.

2 Mohammad Reza Ziaei Bigdeli, *Public International Law* (Ganje Danesh Publication 2004) 181.

3 Donald Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction', *American Journal of International Law* 1 (2006).

4 Javidzadeh A, *Jurisdiction of the Criminal Court in International Criminal Law*, Imam Sadeq University (1992).

5 Khaleghi and Kazemi, Op. Cit. (2015) 16.

interests.[1] This principle enables governments to exercise criminal jurisdiction over individuals who have committed offenses against international law, rendering traditional jurisdictional principles inapplicable.[2] This differs from international jurisdiction, which is granted to member states of an organization through the ratification of a statute to achieve specific organizational goals.[3]

In Iranian criminal law, universal jurisdiction is articulated in Article 9 of the Islamic Penal Code. This article states: "The perpetrator of offenses that, pursuant to special laws or treaties and international regulations, is to be tried in any country where he or she is found shall be tried and punished in accordance with the penal laws of the Islamic Republic of Iran, if found in Iran." The 1392 amendment to the Islamic Penal Code further expanded this article by including "regulations," thus incorporating customary law into the factors establishing jurisdiction for the courts of the Islamic Republic of Iran. However, two conditions must be met: first, the crime must be defined in a special law, treaty, or regulation, and second, it must be punishable under the laws of the Islamic Republic of Iran.[4]

Piracy is recognized as the foremost crime under customary international law that falls within the scope of universal jurisdiction. This customary rule gained traction with the ratification of the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea. However, since the Islamic Republic of Iran has not acceded to these conventions, if the incorporation of international custom into domestic Iranian law is not acknowledged, Iranian courts may lack jurisdiction over piracy offenses.

Conclusion

The prosecution and trial of piracy suspects present significant legal challenges in addressing the ongoing crisis of piracy in international waters. Articles 3, 4, 7, 8, and 9 of the Islamic Penal Code clearly indicate that the Islamic Republic of Iran possesses substantial jurisdiction over individuals accused of modern piracy. Multiple forms of jurisdiction—universal, territorial, and personal—may apply, affirming that Iranian courts can adjudicate piracy cases within their jurisdiction.

Nonetheless, there remain critical legislative gaps that need to be addressed, particularly concerning the definitions of piracy and its associated penalties within the Islamic Penal Code, which have led to its classification as a lesser offense. While Iranian courts may have jurisdiction based on the principles of universality, territoriality, and personal jurisdiction, the lack of membership in the 1982 Law of the Sea Convention and the necessity for criminalization under Security Council resolutions underscores the need for a specific law addressing maritime piracy.

To effectively combat piracy and ensure the jurisdiction of Iranian courts, it is imperative

1 Devika Hovell, 'The Authority of Universal Jurisdiction', *European Journal of International Law* 2 (2018); Seyyed Yaser Ziaee and Saeed Hakimiha, 'Legal Conditions of Application of Universal Jurisdiction in International Law', *Journal of Public Law Research* 53 (2017) 114-115.
2 Theodor Meron, *Humanization of International Law* (The Hague Academy of International Law, Martinus Nijhoff Publisher 2006) 118.
3 J. Ashley Roach, 'Countering Piracy off Somalia: International Law and International Institutions', *American Journal of International Law* 3 (2010) 394.
4 Hojatollah Rezaei and Mohammad Ali Mahdavi Sabet, 'Origin and Legitimacy of Exercising the Principle of Universal Jurisdiction in National Courts to Prosecute International Crimes', *Journal of Criminal Law and Criminology* 17 (2021) 33.

for the Iranian legislator to enact comprehensive legislation that addresses the gaps and shortcomings in existing maritime piracy regulations. This will facilitate the establishment of full jurisdiction for Iranian judicial authorities over piracy cases in collaboration with other nations.

References

Books

Javidzadeh A, *Jurisdiction of the Criminal Court in International Criminal Law* (1992) Piyuseha, Imam Sadeq University. [In Persian]

Meron T, *Humanization of International Law* (The Hague Academy of International Law, Martinus Nijhoff Publisher 2006).

Pourbaferani H, *International Criminal Law, Vol II* (Jangal Publishing 2009). [In Persian]

Ziaei Bigdeli MR, *Public I ternational Law* (Ganje Danesh Publication 2004). [In Persian]

Articles

Donovan D and Roberts A, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) No. 1 *American Journal of International Law*.

Ghasemi GA and Setayeshpur M, 'International Community's Acts to Confront Modern Piracy' (2019) No. 2 *Iranian Journal of International Politics*. [In Persian]

Hovell D, 'The Authority of Universal Jurisdiction' No. 2 *European Journal of International Law*.

Kazemi SS, 'In Search of Jurisdiction for Prosecution of Piracy off the Coast of Somalia and the Gulf of Aden' (2017) No. 32 *Journal of International Police Studies*. [In Persian]

Khaleghi A and Kazemi SS, 'An Analysis of the Jurisdiction of Iranian Courts in the Case of Piracy' (2015) No. 3 *Quarterly Journal of Criminal Law and Criminology Studies*. [In Persian]

Khaleghi A, 'Introduction to the Study of the Principles Governing Criminal Jurisdiction in International Criminal Law' (2002) No. 2 *Journal of Legal Research*. [In Persian]

Kotorovich E, 'The Piracy Analogy: Modern Universal Jurisdictions, Hollow Foundation' (2004) No. 1 *Harvard International Law Journal*.

Mo J, *Options to Combat Maritime Piracy in Southeast Asia Ocean Development and International Law* (2002).

Posner E and Sykes A, 'Economic Foundations of the Law of the Sea' (2010) No. 4 *American Journal of International Law*.

Rezaei H and Mahdavi Sabet M, 'Origin and Legitimacy of Exercising the Principle of Universal Jurisdiction in National Courts to Prosecute International Crimes' (2021) No. 17 *Journal of Criminal Law and Criminology*. [In Persian]

Roach J, 'Countering Piracy off Somalia: International Law and International Institutions' (2010) No. 3 *American Journal of International Law*.

Ziaee SY and Hakimiha S, 'Legal Conditions of Application of Universal Jurisdiction in International Law' (2017) No. 53 *Journal of Public Law Research*. [In Persian]

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Book Review; Prolonged Occupation and International Law: Israel and Palestine (Edited by Nada Kiswanson and Susan Power)

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ABSTRACT

This review examines "Prolonged Occupation and International Law: Israel and Palestine", a 2023 collection of essays, offering an in-depth analysis of the protracted Israeli occupation of Palestinian territory. The book is structured into two thematic sections. "Legal Frameworks and Characterizations" critically evaluates historical narratives and legal classifications, including debates on colonialism and apartheid. "Legal Responsibilities and Accountability" investigates the obligations of states, corporations, and individuals, with particular attention to the International Criminal Court's (ICC) role in addressing Israeli war crimes and crimes against humanity. The central argument of the book is about the inherent illegality of the occupation and its profound impact on Palestinian rights. By incorporating critical assessment from Michael Lynk and referencing the 2024 ICJ Advisory Opinion, this review addresses the complex legal implications of this long-lasting occupation. This book is lauded for its contribution to international legal discourse and its potential to contribute to addressing historical injustices, while acknowledging the ongoing debate regarding the occupation's legal status.

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1. Legal Frameworks and Characterizations
2. Legal Responsibilities and Accountability
3. Critical Assessment

Introduction

"Prolonged Occupation and International Law", published in late March 2023 by Brill Publishing House, is a landmark collection of essays on the Israeli regime's protracted occupation of Palestinian territory. The 16-chapter book is a treasure trove of valuable contributions from eminent scholars, professors, lawyers, practitioners, and policymakers, including former UN Special Rapporteurs. The book has received acclaim from several legal scholars, including William A. Schabas, Professor of International Law, School of Law, Middlesex University, who has offered a glowing review, stating: "Scholarly and comprehensive, this impressive collection of essays by renowned experts...offers a tour d'horizon of the fundamental legal issues raised by Israel's prolonged occupation of Palestine as well as potential remedies that can confront the illegalities."[1] The book intends to draw international attention to the extraordinary length of the occupation of the Palestinian territory by Israel, which has now lasted more than half a century. Chapters in this book cover a broad spectrum of topics related to the prolonged occupation and Israel's control, ranging from colonialism to apartheid. Authors unanimously assert the illegality of the occupation from day one, and emphasize that indefinite occupation and colonialism collide with the foundational requirement under international humanitarian law that the occupied territory be returned to the occupied population. The miscellany also underscores the critical importance of historical analysis in comprehending the root causes that have propelled Israel onto its current trajectory of apartheid, colonialism, and annexation. Unfolding the past - the book argues- is essential for addressing the intergenerational trauma and injustice inflicted upon the Palestinian people and ultimately achieving a just and durable resolution. This brief analysis will summarize the book's principal arguments and evaluate its key themes presented in two parts, followed by a critical assessment.

1 Retrieved from https://brill.com/edcollbook/title/61385?language=en, last accessed on September 20, 2024.

1. Legal Frameworks and Characterizations

The book's first part titled "Legal Frameworks and Characterizations" examines the historical narratives around the occupation of the Palestinian territory. John Quigley introduces the discussion in the first part. As mentioned in the introduction section of the book, "His chapter uncovers Israel's targeted strategy to take control over Palestine before the 1967 war erupted and Israel's orchestrated use of pre-emptive self-defense."

In Chapter 2, Vito Todeschini, however, discusses that the passage of time renders the occupation illegal. He makes a distinction between the jus ad bellum and jus in bello frameworks and concludes that "a belligerent occupation that lasts for a period of time exceeding the necessities of self-defense becomes unlawful because it breaches the principles of necessity and proportionality and, by implication, the prohibition on the use of force enshrined in the UN Charter and customary international law".

Chapter 3 is penned by Ray Murphy, Anita Ferrara, and Susan Power who question the applicability of today's international rules governing occupation to the current situation in the occupied Palestinian land, employing the "Third World Approaches to International Law" perspective. The authors argue that the traditional rules of international law were not meant to handle a situation where an occupation has persisted for such an extended period and that the way these laws are applied may be biased towards the interests of the occupying power.

Aeyal Gross is the author of Chapter 4. He argues that despite the so-called "disengagement plan",[1] Israel's occupation of Gaza persists and that the regime has rebranded its control as a "remotely controlled occupation" to disguise the ongoing nature of its dominance.

Chapter 5 moves out of the scope of international humanitarian law of occupation. In this chapter, John Reynolds views Israel's "apartheid system as a core feature of settler-colonial rule in Palestine since the Nakba and – more recently – as an increasingly central focus of international legal analysis of the Palestinian reality". Reynolds argues that in order for us to truly understand Palestinians' long ordeals, we need to acknowledge how Palestinians themselves see their situation "as one of apartheid". He also emphasizes that this apartheid is deeply connected to the history of colonialism.

In Chapter 6, Rimona Afana also addresses colonialism and its legal context. She holds that the regime uses occupation as "a tool of and smokescreen for colonialism".

Sarah Francis in Chapter 7 views Israel's judicial military system as an "annexationist tool". She expands on "Israel's use of military orders and military courts to mass-incarcerate, punish, and silence Palestinians as a means to cement its control over the occupied territory."

Chapter 8 is a posthumous publication based on the writings of late Suha Jarrar, who was a member of the Palestinian human rights community and a pioneer in the field of environmental law under occupation. "While adapting to climate change, Palestinians living in environmentally and politically vulnerable areas, simultaneously endure coercive environments created by Israel to drive Palestinian displacement and forcible transfer. Future climate change projections for the OPT

1 In 2005, Israel unilaterally dismantled 21 settlements in the Gaza Strip and four in the West Bank. Israeli settlers and military forces withdrew from the Gaza Strip, with the army repositioning along the border. This disengagement was carried out without coordination or an orderly transfer of control to the Palestinian Authority. Despite the withdrawal, the Gaza Strip is still regarded as occupied under international law.

(Occupied Palestinian Territory) entail an increase in annual temperatures and a decline in rainfall. Consequently, the urgent need for proper climate change adaptation will continue to rise," she notes.

2. Legal Responsibilities and Accountability

Part 2 of this book delves into the legal responsibilities and involvement of individuals, corporations, and Third States. John Dugard is the author of Chapter 9 which mainly focuses on peremptory norms of international law and States' responsibilities. Dugard comparatively looks into the international community's responses to apartheid South Africa and Palestine. He "asks imperative questions around States' selective approaches to breaches of peremptory norms and highlights the powers that States can harness to end unlawful behavior. He demonstrates how States, unilaterally and collectively, have failed to challenge Israel and hold it accountable for its violation of a host of peremptory norms." Dugard concludes that this failure has "weakened respect for human rights and humanitarian law", as well as "brought international law into disrepute and given rise to cynicism about the respect States have for international law".

In Chapter 10, Manuel Devers and Tom Moerenhout examine the legal obligations and roles of third states in the context of the European Union. This chapter stresses that "non-recognition and non-assistance are trade measures under EU law and makes a compelling case for why the EU must act where peremptory norms are breached, or else its Member States will violate their international law obligations. States are not the only actors relevant to Israel's occupation."

The focus of Chapters 11 through 14 is on individual criminal responsibility and the functions of the International Criminal Court (ICC). In Chapter 11, Nada Kiswanson, a Swedish lawyer specializing in international criminal and human rights law, addresses three parts. "The first part will present the developments in the Situation in Palestine at the ICC. The second part will introduce the Rome Statute's complementarity framework. It will then analyze the Israeli High Court of Justice's approach to international law and discuss the structural, substantive, and procedural characteristics of the Israeli military justice system. The third and final part will present the ICC as the only international judicial institution mandated to investigate, prosecute, and punish Israelis responsible for committing war crimes and crimes against humanity on the Palestinian territory," according to the introduction section of the book.

Shane Darcy, a senior lecturer at the Irish Centre for Human Rights in the National University of Ireland Galway, examines the individual criminal legal responsibility of private sector actors in Chapter 12, with a specific focus on their potential involvement in the mistreatment of Palestinian detainees and prisoners. He explores various modes of liability and identifies potential avenues for prosecution under international criminal law and policies.

Chapter 13 by Susan Power views the systematic economic exploitation of the Palestinian territory within the meaning of the war crime of pillaging. She contemplates on the prosecution of pillage at international trials related to World War ii and scrutinizes the potential for modern-day prosecutions under the Rome Statute.

Chapter 14, authored by Halla Shoaibi and Asem Khalil, examines the ICC's jurisdiction and sovereignty in the context of the Israeli occupation. They argue that the occupation does not diminish an occupied State's sovereignty, enabling it to grant the ICC jurisdiction over Rome

Statute crimes committed within its territory. Furthermore, they contend that the Oslo Accords do not preclude ICC jurisdiction, as these agreements conflict with Palestine's right to self-determination and its obligations under the Geneva Conventions.

Marya Farah and Maha Abdallah in Chapter 15 demonstrate how the businesses working under the auspices of Israel have exerted control over crucial Palestinian infrastructure, including water, telecommunications, and electricity systems. This control has significantly altered the Occupied Palestinian Territory, impacting its physical environment, economy, and population distribution in ways that violently contravene international law.

The last chapter is penned by Thomas Hammarberg, who is a Swedish diplomat and human rights defender. In Chapter 16, he "examines the historical context of the Palestinian conflict, recalling the ethnic cleansing of Palestinian communities during the establishment of Israel. It highlights the ongoing plight of Palestinian refugees and underscores their continued right to return," according to the introduction section of the book. The roles and responsibilities of the UN, particularly UNRWA, have been also addressed in this piece. Chapter 16 attaches importance to "understanding the historical roots of the conflict—including apartheid, colonialism, and annexation— to address the intergenerational trauma and injustice experienced by the Palestinian people."

3. Critical Assessment

"Prolonged Occupation and International Law" serves as a powerful reminder of how international law, seen by some as "ineffective", can still be a dynamic force in the pursuit of global justice. This volume of essays shows how, through creative engagement and collaborative efforts with social movements, international law can be a driving force for safeguarding human rights and addressing injustices like occupation, not only in Palestine but also everywhere across the globe.

However, Michael Lynk, former Special Rapporteur on the situation of human rights in the Palestinian territory, in a piece[1] titled "Prolonged Occupation or Illegal Occupant?" refers to the concept of prolonged occupation and its potential illegality, arguing "An unresolved question in international humanitarian law is whether an occupying power – whose authority as occupant may have initially been lawful – can cross a bright red line into illegality because it is acting contrary to the fundamental tenets of international law dealing with the laws of occupation. This question has become especially relevant in light of several prolonged occupations in the modern world, including the 50-year-old Israeli occupation of the Palestinian territory."

He further stresses that occupation is inherently temporary, and the occupying power has a fiduciary duty to act in the best interests of the occupied population.

> *"Occupation is by definition a temporary and exceptional situation where the occupying power assumes the role of a de facto administrator of the territory until conditions allow for the return of the territory to the sovereign," Lynk notes.*

He draws parallels to the Namibia Advisory Opinion, where South Africa's illegal occupation was determined based on its annexationist goals, failure to act as a trustee, and breach of fundamental obligations.

1 See https://www.ejiltalk.org/prolonged-occupation-or-illegal-occupant/, last accessed on January 13, 2025.

> *"In 1971, the International Court of Justice, in its Namibia Advisory Opinion, stated that annexation by a mandatory power is illegal, the mandatory must act as a trustee for the benefit of the peoples of the territory, it must fulfill its obligations in good faith, and the end result of the mandate must be self-determination and independence. It also held that the breach of the mandatory power's fundamental obligations under international law can render its continuing presence in the mandate territory illegal, notwithstanding that the Covenant of the League of Nations (Article 22) was silent on this issue. The ICJ found South Africa to have become an illegal mandatory as a result of its aspirations for annexation, its prolonged stay, its failure as a trustee, and its bad faith administration."*

In the conclusion part of his commentary, Lynk contends that declaring Israel an "illegal occupant" would strengthen the international community's responsibility to end the occupation and pave the way for a just and lasting resolution of the Israeli-Palestinian conflict.

Consequently, it would be a good idea to replace "illegal occupant" with "prolonged occupation" so that the international community would feel the urgency to put an end to the protracted occupation once and for all.

Another point to consider here, in light of the previous discussion, is the International Court of Justice (ICJ) 2024 Advisory Opinion[1] on the "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem".

The opinion - from paragraphs 104 to 110- addresses the issue of prolonged occupation.[2] Paragraph 109 stipulates: "The fact that an occupation is prolonged does not in itself change its legal status under international humanitarian law. Although premised on the temporary character of the occupation, the law of occupation does not set temporal limits that would, as such, alter the legal status of the occupation. Instead, the legality of the occupying Power's presence in the occupied territory must be assessed in light of other rules. In particular, occupation consists of the exercise by a State of effective control in foreign territory (see paragraphs 91-92 above). In order to be permissible, therefore, such exercise of effective control must at all times be consistent with the rules concerning the prohibition of the threat or use of force, including the prohibition of territorial acquisition resulting from the threat or use of force, as well as with the right to self-determination. Therefore, the fact that an occupation is prolonged may have a bearing on the justification under international law of the occupying Power's continued presence in the occupied territory."[3]

Therefore, the ICJ holds that, although the length of an occupation does not fundamentally change its legal status, a prolonged occupation requires justification and its permissibility depends on adherence to core international law principles, including the prohibition of force and territorial acquisition, and the right to self-determination.

1 Retrieved from https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf), last accessed on January 15, 2025.
2 Ibid, 33-34.
3 Ibid, 34.

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