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WHAT'S IN THIS ISSUE?

HOW VIABLE IS THE OECD/G20 PROJECT ON BEPS? A STUDY ON ITS IMPACT ON INDIAN TAXATION STRUCTURE

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ABSTRACT

The international corporate arena has given birth to numerous tax-evading manoeuvres under intricate BEPS strategies aimed at circumventing levy of tax by multiple sovereign authorities, majorly through creation of sham entities for depositing of profits offshore. To combat this growing menace, the OECD and G20 nations have drafted various Action Plans (APs) under the collective reference of the "BEPS project", attempting to cover every single aspect of tax circumvention on the international sphere. The descriptive and elaborate nature of these APs assists the nations to tackle global corporations and business organisations devising ways to harness the discrepancies and inadvertent loopholes between different domestic tax policies.

Thus, the paper wishes to not only assess the goals to be achieved by the OECD/G20 BEPS project, but also examine the limitations mainly faced pertaining to its viability and legitimacy. The paper gives due recognition to the lack of proper implementation strategies and a consolidated framework for bringing all countries to the same footing, while also analysing the areas where the BEPS project simply failed to make an impact. The case of India has been additionally taken for considering the need to revamp its international policies similar to its stringent domestic taxation framework. Through this theoretical analysis of the BEPS framework and its implementation potential on both the domestic and international fronts, the paper aims to bring out the problems associated with BEPS both by its own complex structural existence, and the foundational issues attributable to any legislation or policy sought to be enacted at the international level by all countries with the same fervour and enforceability.

INTRODUCTION

Base Erosion and Profit Shifting (BEPS) refers to the mechanism of employing strategies related to comprehensive tax planning, with the foremost objective of building structures which exploit the "mismatches" and discrepancies in tax rules, through the faux "disappearance" of profits and incomes, or the shifting of such profits to "tax havens" i.e. jurisdictions with lesser or no tax on such incomes. The main issue with BEPS is that there is no patent illegality under any individual domestic tax regime, since every BEPS transaction is carefully formulated with a view not to overstep the statutory boundaries of every tax jurisdiction, while storing the incomes legally in countries with lower tax rates or more assessee-friendly taxation provisions.

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It is considered that BEPS relates mainly to instances of inconsistent domestic laws of different countries, which either creates double taxation or entitles the income to totally evade taxation. This objective of tax evasion is achieved by companies through policies and activities such as aggressive tax planning by multi-national entities (MNEs), lack of transparency as well as absence of coordination between tax jurisdictions, discrepancies amongst taxation regimes of different countries, and other harmful tax practices by individuals and organisations. The OECD recognises three main reasons behind the urgent need for combating the increasing BEPS amongst countries:

- Competition between businesses is highly distorted, since international companies with cross-border operations are allowed to profit from BEPS strategies, putting domestic businesses at a major disadvantage.
- The allocation of resources in any national economy does not reach its optimality, since investment decisions are diverted towards activities giving higher returns after tax.
- The incentive of voluntary compliance of taxation provisions is undermined through the large-scale evasion of tax by international corporate houses and business giants.[2]

The Indian Government provided its position on the driving force behind India's association with the drafting of the BEPS project, on the ground of it acting to the detriment of the Indian economic structure through the drastic reduction in potential tax revenues. This hampers the pace of India's economic development, its dependence on tax revenues being a major chunk of the economic support available to the Government, for dealing with poverty and inequality issues. Also, developing countries like India rely on the power of international tax conventions to tackle inter-country BEPS transactions which escape the radar of domestic tax authorities.[3]

RATIONALE BEHIND ORIGIN OF THE BEPS PROJECT

To combat the festering of the existing international tax regime with increasing BEPS opportunities, the G20 nations joined forces with those associated with the OECD programme to form the OECD Committee on Fiscal Affairs (CFA), comprising of 44 nations in totality, for arriving at a universally acceptable and properly coordinated solution to pervade the problematic walls created with discrepancies between domestic tax laws of different nations. The efforts which had begun in 2012 culminated into the first OECD report in February 2013, which laid the foundational groundwork for the release of the final

[2] 'BEPS Frequently Asked Questions'(*OECD Official Website*) <https://www.oecd.org/ctp/BEPS-FAQsEnglish.pdf> accessed 24 August 2021.

[3] 'Questionnaire – Countries' experiences regarding base erosion and profit shifting issues'(*United Nations Official Website*) <https://www.un.org/esa/ffd/wp-content/uploads/2014/10/ta-BEPS-CommentsIndia.pdf> accessed24 August 2021.

Action Plans in July 2013, aiming for implementation of 15 APs within a highly ambitious two-year timeline.[4]

The countries that were not members of the drafting group of the BEPS Action Plans were consulted extensively through the mode of fora meetings held both regionally and globally, and were included within the "Inclusive Framework" formulated by the OECD members, which focussed mainly on the coverage of the BEPS project to be proactively expanded to non-OECD nations as well. The first 7 APs were released and discussed by the G20 Leaders in the Brisbane Summit held in 2014, while the remaining 8 were delivered within the next 2 years. The 15 APs are listed as follows:

1) AP 1 – Addressing the tax challenges of the digital economy.
2) AP 2 – Neutralising the impacts caused by hybrid mismatch arrangements.
3) AP 3 – Designing effective rules for Controlled Foreign Corporations (CFCs).
4) AP 4 – Limiting Base Erosion through interest deductions and additional finance payments.
5) AP 5 – Effectively countering harmful tax practices through transparency and substance requirements.
6) AP 6 – Preventing abuse of tax treaties.
7) AP 7 – Preventing artificial avoidance of the Permanent Establishment (PE) mandate.
8) AP 8-10 – Aligning transfer pricing outcomes with creation of actual value.
9) AP 11 – Monitoring and calculating BEPS transactions.
10) AP 12 – Mandating disclosure of aggressive tax planning arrangements.
11) AP 13 – Re-examining documentation on transfer pricing.
12) AP 14 – Strengthening dispute resolution mechanisms.
13) AP 15 – Developing a multilateral instrument for maintaining consistency of bilateral tax treaties.

Working on the same objectives gave birth to the 15-point Action Plans (APs) formulated to tackle the problem-riddled BEPS issue. The APs were floated with the foremost object of ensuring taxation of incomes from economic activities which have originated in one country, while the impact and utilisation of the same is being done in a different country. They were drafted in response and accordance to around 3500 pages of comments and recommendations, obtained through both online webcasts and public consultation meetings between business organisations and individuals of the labour sector.

The nations involved in the formulation of the BEPS policies seem to be ideologically invested in developing common solutions to similar issues and obstacles, while retaining their individual sovereignty in taxing the incomes falling within the BEPS bracket. This participation is further consolidating the view of countries addressing the fundamental conflicts between domestic tax laws both amongst themselves and with the international commitments which countries owe under multilateral agreements and conventions.

[4]Jason J. Fichtner and Adam N. Michel, 'The OECD's Conquest of the United States: Understanding the Costs and Consequences of the BEPS Project and Tax Harmonisation'(*Mercatus Research, Mercatus Centre*, March 2016)<https://www.mercatus.org/system/files/Fichtner-BEPS-Initiative-v1.pdf> accessed 25 August 2021.

The viewpoint is substantiated with the calculation of the annual loss of 4-10% of the global corporate income tax (CIT) revenue, amounting to $ 100-240 billion per year.[5]

"Double Irish-Dutch Sandwich" Structure

One of the most appropriate examples explaining a glaring lack of international rules and discrepancies in domestic laws giving rise to BEPS arrangements is the "Double Irish-Dutch Sandwich" arrangement. Booming international technological giants such as Google and Apple are accredited with laying down the foundations for this structure, which notably enabled such companies to escape tax liabilities amounting upto USD 1 trillion, enjoying a single-digit tax rate in all three countries of United States, Ireland and the Netherlands.[6] This structure acts as one of the foremost disadvantages which were proposed to be tackled under the aforementioned BEPS project formulated by OECD. However, this structure does not find its origins in the Indian tax regime, due to the supporting tax rebates made available to home-grown patents and other forms of intellectual property (IP) registered in India.

The forenamed structure can be understood through a hypothetical example. First, a holding company 'A', with both its incorporation and place of control being in the United States, builds a subsidiary 'B' in Ireland. This is done because of the existence of an Irish taxation provision, which does not tax any entity whose control is not located in Ireland itself. Another subsidiary 'C' is formed in the Netherlands, which is credited with the registration of all the intellectual property used by B for carrying out its business activities, which necessitates the payment of certain amounts of royalties by B to C. Thereafter, the transaction works in the manner that B performs the sale and pockets the proceeds, which it then uses to pay royalties to the Dutch subsidiary C. This effectuates the reduction in the profits of B, due to which its tax liability is substantially reduced.

The rationale behind C being situated in the Netherlands is substantiated by the provisions of the Irish-Dutch bilateral tax treaty, which exempts the taxation of certain kinds of incomes such as royalties, for their personal promotion of acquisition of Intellectual Property (IP) from other capable jurisdictions. Therefore, in effect, the income obtained by C is not taxed as per the provisions of the Irish-Dutch treaty, while B is taxed low due to lower profits in their books. This structure undermines the potential tax revenue from all the entities involved, since the entire structure is legal as per the respective domestic tax laws, while the individual countries feel handicapped in acting against such sham entities, brought into existence only for the objective of tax manipulation.

The consequences of this arrangement entail the factum of the profits made by such international business giants being parked in tax havens, wherein the number of employees and the amount of resources employed

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[5] 'Explanatory Statement'(OECD/G20 BEPS Project 2015)<http://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf> accessed 25 August 2021.

[6] Edward Helmore, 'Google says it will no longer use 'Double Irish, Dutch sandwich' tax loophole'*The Guardian*(London, 1 January 2020)<https://www.theguardian.com/technology/2020/jan/01/google-says-it-will-no-longer-use-double-irish-dutch-sandwich-tax-loophole> accessed 27 August 2021.

are too less in comparison to the income shown as profit in such offshore companies. In addition, these profits are covered under the exemptions of taxes levied by individual tax havens, both under their domestic laws as well as the provisions of bilateral tax treaties with other countries. The sales made by entities escape the taxation stream of high-end countries like the United States, even after the consideration of all these entities as one single taxable entity. These subsidiary entities are increasingly used for whittling down the taxable income to extremely low levels, even below zero in some cases. These circumstances have created the need for the BEPS project to address this problem specifically under the APs.

To deal with situations like these, the BEPS Action Plan 6 was specifically drafted for preventing the grant of treaty benefits under inappropriate circumstances, prescribing the following options to be adopted:

1) Principal Purpose Test (PPT) – The particular rule states that if the obtaining of benefits available under a treaty is one of the "principal purposes" behind a particular transaction, the benefits accrued under the treaty must be denied. Resultantly, the determination of what counts as "principal purpose" is open to interpretation with the tax authorities, who have a higher discretion in this regard. The PPT rule is prescribed as the bare minimum standard to be necessarily included within every bilateral treaty or domestic legal framework, and is much broader in scope as compared to the "main purpose" stand taken by the Indian tax regime.

2) Limitation of Benefit (LoB) Clause –The LoB clause, being inclusive of the PPT rule, utilises the "Derivative Test" to analyse whether the benefits of the treaty in question are lesser in essence or restriction to the benefits entailed through the treaty of the taxing country with the country wherein the actual source/residency of the impugned assessee is. For instance, if a Mauritius resident entity is owned by a US-based company, and wishes to take the benefits of the India-Mauritius tax treaty for availing the capital gains tax exemption under the said treaty, the benefits would be denied if found to be greater in comparison to the benefits accrued through the India-US treaty to the companies. This "Derivative Test" is considered to be applicable only if the entity has an "active business" established in the particular taxing country.

Thus, in the example discussed above, while under the PPT rule, B and C would have to prove whether the conduct of their business is one of the "principal purposes" behind their establishment, while under the LoB clause, B would be entitled to the benefits of the Irish-Dutch treaty only if the benefits available as per the Irish-Dutch tax treaty would be lesser or equivalent to the benefits accrued under the tax treaty between Ireland and the US, the US being the source country of the Irish company management. Similar would be the case on the part of C, with the Irish angle under B's case being replaced with the Dutch perspective.

LIMITATIONS OF THE BEPS PROJECT

It must be noted that the following limitations are not simply limited to the drafting of the BEPS project being riddled with certain drawbacks, but are also pertaining to the impact caused by it, as well as the major issues emerging from the statistical and empirical data regarding the execution of the OECD Action Plans. That is not to say that the BEPS Project had its advantages; however, the areas that the project was unable to address subject the beneficiary provisions to certain points of criticism, as briefly explained below.

(i) Sovereignty and legitimacy concerns

One of the foremost issues raised from the fundamental existence and acceptance of international law is the factum of the absence of any superior authority entrusted with the power of governing independent nations regarding their carrying out of international obligations towards other countries. On a *prima facie* level, both the OECD and G20 lack the institutional structure to enforce the standards prescribed under the BEPS Project, depending wholly on the voluntary acceptance of obligations and incorporation of provisions by the concerned nations in lieu of their participation, and a glaring lack of authority to impose sanctions on countries not complying with these rules. This primarily associates itself with every bilateral treaty and multilateral convention entered into by nations on different issues, and the implementation of the BEPS project seems to suffer from the same predicament.

It must be noted that there have been multiple attempts to establish superior bodies of authority, to which the individual nations surrender a part of their sovereignty and agree to be bound by their sanctions, etc. However, this simply translates to the unsaid supremacy imposed by developed countries on developing countries, cemented by the fact of underrepresentation of African countries and complete non-representation of low-income countries in the G20, which includes the well-developed global economies representing roughly 90% of the Gross Domestic Product (GDP) on the global level as well as 80% of the international trade.[7] Furthermore, although the OECD attempts to include the views of the non-member nations in a proactive manner, the decision-making power under the OECD is vested with the OECD Council only, which also suffers from a lack of representation of the non-OECD countries.

Additionally, the participation of developing economies comparable to India in the BEPS project is questioned on the ground of the existence of any valid reasons behind the participation of countries in the initiative. One of the indications points towards the presence of immensely low technical knowledge of such countries on taxation matters coupled with the proper implementation of BEPS policies, which requires a certain level of expertise. Moreover, the countries require some specialised assistance and greater technical knowledge on transfer pricing transactions and provisions, while asking for flexible time schedules and a cost-benefit analysis of preferential tax regimes on their domestic revenues and GDPs. The recent deliberations on the BEPS 2.0 Project portray the increasing pressure imposed by countries like India on

[7] Sissie Fung, 'The Questionable Legitimacy of the OECD/G20 BEPS Project' (2017)2ELR <http://www.erasmuslawreview.nl/tijdschrift/ELR/2017/2/ELR_2017_010_002.pdf> accessed 27 August 2021.

high-end economies to present their issues on the global front for being considered as important factors behind drafting of reformed policies and mechanisms under the BEPS Project.

Major spurt in costs for mandating corporate tax compliance

The new BEPS rules stipulate intricate policies and frameworks for tackling specific problems, which require the employment of certain specialised resources particularly indigenous to such policies, leading to the incurring of costs for procuring them. Tax compliance is already seen as a major cost-expenditure exercise to ensure that the due taxes are obtained from only the liable persons, and the correct amount is detected through a labyrinth of transactions to arrive at an informed and undisputed tax liability. The BEPS project seems to simply add on to the existing exorbitant costs for inducing tax compliance, which is adjudged as nothing more than an added financial burden for the already financially struggling developing and less-developed countries.

The impact falling on the budding international companies and multi-national corporations (MNCs) cannot also be ignored, which might crack under the piling tax compliance targets and fail to compete with the major players leading to oligopolistic markets in the low-income countries.Also, country-to-country reporting under the BEPS project would lead to tax administrations putting immense pressure on the global companies to pay disproportionate taxes due to their inter-country trade and management structure, which would lead to a much more complicated tax structure instead of simplifying the same. While transparency is always appreciated as a high-valued moral virtue, it would merely lead to increased financial burdens on the developing companies and nascent trade entities through automatic information exchange between tax jurisdictions.

Unchecked uniformity of the Multi-lateral Instrument (MLI)

The mechanism of achieving a uniform tax regime for all countries to be followed, the MLI under the BEPS Action Plan, is firstly amenable to the criticism of being tone-deaf towards the specific needs of certain countries. For instance, the bilateral tax treaties of developing countries like India with tax havens such as Mauritius and Cayman Islands would contain peculiar provisions for handling tax exemptions in a sensitive manner, with the backdrop of cultural links or good international relations between the concerned countries for avoiding both double taxation and BEPS. However, the MLI ignores such specialised and individualistic provisions by floating a "one-size-fits-all" structure, which is not suitable for underprivileged countries wishing to create a better global standing.

Further, Parliamentary approval as an underlying but necessary condition for the incorporation of the BEPS project into the domestic sphere would lead to the inevitable requirement of the respective Parliament being up-to-date about the ongoing BEPS transactions, which would require a special kind of knowledge and expertise in the field of international taxation. Not just the Parliament, but even the companies at large recognise the impact which the MLI would have on domestic taxation, especially in high-income and rapidly

growing economies like India, while being completely unaware of the ways in which the BEPS Action Plans would affect the day-to-day business activities of numerous corporate entities around the globe.

Also, it must be noted that the MLI introduced a concept of exclusion under the BEPS project, wherein any country could exempt particular treaties from the purview of the BEPS project, or skip the execution and implementation of certain provisions altogether, as per its capabilities and special needs and requirements. A consequential example is the exclusion of the Mauritius-India Double Taxation Avoidance Agreement (DTAA) out of the ambit of the MLI, which results in provisions such as the Principal Purpose Test (PPT) not being applicable on the mentioned treaty. Although the recognition of the General Anti-Avoidance Rules (GAARs) in the Indian tax law sphere aids the tax administration of the country to combat any discrepancies or violations of the DTAA, the option of excluding the treaty from the scope of operation of the OECD project would result in the concerned MLI being rendered as mere show.

In order to address these problems, around 130 member nations of the OECD/G20 Inclusive Framework on BEPS (IF) have entered into a "historic" agreement in July 2021 for assuring a revised framework to reform the international tax rules in order to increase the adaptability of these rules by the wide range of tax regimes existing throughout the globe. As per the statement issued by OECD named "Statement on a Two Pillar Solution to Address the Tax Challenges Arising from the Digitisation of the Economy", the new framework rests its implementation on the two pillars of BEPS 2.0 – "Pillar One" referring to the proposals reallocating taxing rights and profits, and "Pillar Two" comprising of global minimum tax rules or measures. Steps like these taken collectively by nations on the international front represent the ideal of an inclusive framework consistent with individual tax regimes having peculiar concessions and tax compliance mechanisms, satisfying the requirements of both strict tax regimes like India and popular tax havens like Luxembourg.

Looming threats on viability of business organisations

Apart from the afore discussed issue of immense financial burdens on young businesses to deal with increased tax compliance in consonance with the BEPS project, a major sphere of concern for all kinds of enterprises operating on the international sphere would be the enormous loss to companies which can be gauged in terms of the release of sensitive and even confidential information of businesses to the public, and consequently to other market competitors, under the reporting standards for countries for honouring the obligations under the BEPS project. Specifically addressing the impact of the BEPS architecture on the "Double Irish-Dutch Sandwich" structure, it must be understood that the mere introduction of the PPT rule as well as the Limitation of Benefit (LoB) clause would not solve the purpose, unless and until a fool proof mechanism is created to embed the requirement of commercial substance in the transaction. In other words, the entity created solely for the purpose of tax evasion or BEPS must be subjected to a detailed course of action, irrespective of the economic threshold, to prove their substance through specialised audits or other schemes and policies.

This also ignores the alleged participation of developed countries such as the United States and the United Kingdom in deliberately framing tax laws and policies with glaring loopholes, introduced with the objective to promote corporate growth in their regions. The incorporation of provisions and policies asunder the BEPS project in all the bilateral tax treaties entered into by individual nations, especially low-income tax jurisdictions, would not only be tone-deaf in relation to the nuances and hidden objectives of individual treaties, but also require some specialised knowledge and skill-set to be able to analyse the drawbacks of the existing treaty provisions and bringing them in consonance to the BEPS mandate while also maintaining special relations between the nation parties to the treaty.

In addition, the COVID-19 pandemic which rocked the entire world in 2020, the repercussions of which are still being borne by the budding businesses in their nascent stages, forced an overwhelming majority of both Government-owned as well as private business organisations to shut shop temporarily, being subjected to widespread layoffs and lockdown restrictions. These had a direct impact on the everyday functioning of many businesses, with numerous entities losing their significance due to their inability to transition from the physical to the online mode of sale-purchase.

The issue is that the BEPS Project, being formulated and released half a decade ago, did not account for any such major development which wreaked havoc not only on a domestic level, but also on the international trade map. Many businesses could not compete with the instant technological transition, the reason majorly being the pandemic coupled with high level of tax liabilities and compliances, as mandated by the BEPS project. The provisions under the BEPS Action Plans exhibit a total exclusion of the impact of such a pandemic on the monetary income thresholds set for considering an entity eligible to enjoy the benefits of, say, the LoB clause.

HOW BENEFICIAL WAS THE BEPS PROJECT FOR THE INDIAN ECONOMY?

In relation to the enforcement of international conventions and obligations at the domestic level, it has always been seen that developing countries like India are expected to have a proactive approach towards self-awareness, more supported by the economic sanctions impending from the developed nations for non-observance of such obligations. However, the participation of developing countries in the decision-making process and the recognition of their interests, though attracting increased attention in recent times, still requires individual attention to factor in the specific problems faced by individual nations, more affected by countries such as India adopting strict tax regimens instead of becoming tax havens to attract foreign investments. The possible reformative measures such as the July 2021 agreement keeps the same aim in mind, incorporating changes to increase its suitability in developing economies like India, giving them an opportunity to present their views to the world.

(i) India's legislative and judicial position on domestic taxation of BEPS

Both before and after the initiation of the BEPS project, the Indian Government had acknowledged the existence of sham BEPS transactions entered into by corporate entities to enter into treaty shopping.

However, there was no uniformity on the part of India in terms of the same provision being inserted under all its treaties with different countries. For instance, the India-Singapore tax treaty provided for an expenditure-based test for screening the eligibility of companies applying for the tax exemption granted to capital gains transactions. On the other hand, while Indian treaties with countries like Mexico, Ireland and the United States contained elaborate LoB clauses, its tax treaties with Kuwait, Finland and the notoriously tax-friendly Luxembourg contained the PPT rule specifying the requirement of substance in the alleged BEPS transactions, while also giving supremacy to the Indian domestic anti-abuse provisions like GAAR.

Coming to the domestic framework of the Indian tax regime, which has been continually strengthened post the global acceptance of the OECD/G20 BEPS project, the Indian Parliament repeatedly amended their income tax laws to establish the supremacy of the Act on any provision contained under any treaty or bilateral agreement which India has entered into with any nation(s) for granting relief on taxation or avoiding double taxation.[8] Additionally, the insertion of Chapter XA into the Act in 2013 stipulates the existence of the GAAR as an overriding provision over the Act, which if read with Section 90(2), would create a legal deadlock for sham companies to engage into BEPS arrangements.

The Income-tax Act defines an "impermissible avoidance arrangement" to include any enlisted transaction which has been entered into with the "main purpose" of obtaining any tax benefit, which is more in consonance with the PPT rule.[9]On the other hand, the Act also defines the characteristic features of recognising "commercial substance" under any trade arrangement.[10]The relevant sanctions are imposed through an exhaustive list of options available with the Indian tax authorities to adopt as consequences for entering into such "impermissible avoidance arrangements".[11] Thus, the Indian Government has specifically addressed both the PPT principle as well as the requirement of some "commercial substance" in the BEPS arrangements, applicable on any assessee covered under either the domestic law or the treaties and bilateral agreements of the Indian Government with other countries.

The BEPS Project involved India's participation as a proactive and fully supportive member of the OECD/G20 nations indulged in the drafting of the BEPS Action Plans. Before the BEPS project, the jurisprudence and reasoning of the Indian courts in this regard was on the principle of respecting the form of the corporate entity or entities involved in the concerned transaction, unless the form itself has been made on sham or non-genuine considerations. The Supreme Court of India itself, in the landmark Azadi Bachao Andolan[12] and Vodafone International[13]cases, rejected the contention of "treaty shopping" against the petition to deny treaty benefits to such sham entities. The Court particularly observed that because of the absence of the LoB clause in the Indian treaties, the treaty benefits accrued to the parties could not be

[8] The Income-tax Act 1961 (India), s 90(2).
[9] ibid s 96.
[10] ibid s 97.
[11] ibid s 98.
[12] *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1, (2003) 263 ITR 706 (SC).
[13] *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 757, (2012) 341 ITR 1 (SC).

revoked and were valid, unless and until it has been proved that the entire entity was formed with the perspective of avoiding tax, and did not possess any commercial substance in its essence.

Recognition of international BEPS rules by Indian authorities

India has always established its standing as a forerunning contender influencing digital companies in the new age to pay their fair share of taxes. This is evident from it being one of the first countries to introduce the concept of equalisation levy on almost all kinds of online cross-border sale and purchase of goods and services. Additionally, it has improved its global tax standing by incorporating the nexus rule of "significant economic presence" (SEP) into the income tax law sphere in 2018, with due recognition being given to the principles under the recommendations provided by BEPS Action Plan 1.[14] Despite the initial unacceptance of BEPS guidelines by the Indian tax authorities, India has made its mandate to reform its domestic taxation structure to bring it in line with globally accepted tax structures and principles.

The Indian Government has realised the due importance to be accorded to the drafting and formulation of BEPS policies to be dealt with on an international level, since acting on this issue on the domestic front may present differences and even conflicts in opinions of different countries. However, the need to pursue the breaking down of corporate structures and practices which propagate BEPS must still be persistently given attention. Ms. Anita Kapur, former chairperson of the Central Board of Direct Taxes (CBDT) went to the extent of saying that the BEPS project by the OECD/G20 can virtually be considered as giving express recognition to the stand India has taken on BEPS, transforming India "from a minority to a majority voice".[15] The four major areas of BEPS transactions being practised in India and requiring immediate scrutiny by the Indian Government through the BEPS radar have been identified:

- Shifting of profits by international business organisations and MNCs through aggressive transfer pricing policies, involving payments being made to foreign-affiliated companies.
- Non-taxation of transactions pertaining to the digital economy, in the country of their source or origin.
- Rampant treaty shopping through sham entities and masked transactions.
- Artificial avoidance of the Permanent Establishment (PE) status.

On the other hand, the Indian representatives at the OECD interpreted the meetings to be giving an impression of the real and material issues being "swept under the carpet", while the superficial ones that are ancillary to the main problem are being addressed with greater detail and precision than required. It is

[14] Karanjot Singh Khurana and S. Vasudevan, 'Significant economic presence in Indian tax law: How significant will it be?' (International Tax Review, 29 June 2021) <https://www.internationaltaxreview.com/article/b1sgt2plmxj9df/significant-economic-presence-in-indian-tax-law-how-significant-will-it-be> accessed 06 December 2021.

[15] 'BEPS – Global and Indian Perspective'(PricewaterhouseCoopers,February 2016)<https://www.pwc.in/assets/pdfs/publications/2016/beps-global-and-indian-perspective.pdf> accessed 29 August 2021.

believed that if the problem can be considered as a leaking bucket, it is the bucket which needs repair or replacement, and not the quantity or manner of inflow of water into the bucket.

It is suggested by the Indian authorities that in order to tackle the problem of developing countries being underrepresented, technical assistance can be provided on the part of the OECD or G20 group of nations through regional tax organisations and associations of countries, such as the African Tax Administrative Forum or the Inter-American Centre of Tax Administration for Latin America.Also, effective Exchange of Information pertaining to contemporary BEPS techniques and mechanisms being employed by international entities to surpass the tax radar of multiple countries can easily address many major areas of BEPS which require immediate or urgent attention by nations. This would be strengthened by the mandate of preferential tax rulings being spontaneously exchanged, along with its collaboration with the implementation of the Common Reporting Standards on Automatic Exchange of Information.

CONCLUSION

A major thread of scrutiny, which emerges from the analysis made in the preceding paragraphs, is the high level of subjectivity and discretion which is exercisable on the part of countries to adopt the BEPS Action Plans as per individual convenience and incorporate them into their domestic tax laws. Even the initiatives such as the measurement of the impact of the BEPS Project under Action Plan 11, or the Pillars 1 and 2 for the implementation of Action Plan 1, or even the Inclusive Framework for the BEPS Project to address the concerns of the developing and underprivileged nations, cannot work to its optimum level unless the affected countries themselves arrive at a consensus to adopt the BEPS Project and participate proactively to bring out the limitations of the existing scheme and the options for newer solutions to BEPS problems.

In the context of India accepting the OECD/G20 project, it might be seen that India already has the domestic legal framework needed to tackle BEPS arrangements and regimens, introducing the "commercial substance" requirement and the "main purpose" test in the Income Tax Act, 1961 during the initial stages of the discussions and sessions on BEPS. Additionally, as opined by Mr. Kamlesh Varshney, the Joint Secretary of Tax Policy and Legislation in the Indian Finance Ministry, the BEPS Project has somehow failed to address the very problem of BEPS which it sought to combat, leading to unilateral measures in India such as the equalisation levy policy primarily concerned with the growing number of e-commerce transactions.[16] The recent deliberations on the BEPS 2.0 project, still undergoing the discussions stage, is argued to have been the base for certain countries including India to recall its unilateral measures like the equalisation levy for e-commerce operators.[17]

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[16] Anjana Haines, 'BEPS fell short of revenue expectations, says Indian official'(International Tax Review, 23 March 2020) <https://www.internationaltaxreview.com/article/b1kwfg9dcjcpnq/beps-fell-short-of-revenue-expectations-says-indian-official> accessed 29 August 2021.

[17] 'India, US reach settlement on 2% equalization levy on e-comm operators' (Business Today, 25 November 2021) <https://www.businesstoday.in/latest/economy/story/india-us-reach-settlement-on-2-equalisation-levy-on-e-comm-operators-313320-2021-11-25> accessed 05 December 2021.

However, as the current political bent of mind in India demonstrates, there are a large number of relaxations and exemptions introduced for body corporates, with the ultimate aim to invite further investments and revenues to the country's coffers. It is still debated with respect to amendments in other corporate laws that in the race of the luring of investments through legally sanctioned relaxations, the situation may spiral out of control from the hands of the Indian Government itself.This approach creates a precarious situation for the Indian Government and authorities to strike a considerable balance between the BEPS mandate and the incentivising of foreign corporate investors to set up shop in the Indian playing field, something which *prima facie* brings out a fundamental dichotomy and which can only be achieved through an intense tax policy on BEPS.

(i) Recommendations and India's suggested contribution to the BEPS Project

Thus, the OECD/G20 efforts manifested through the BEPS project require a thorough fact check at the very grassroot level, as sought to be achieved by the BEPS 2.0 Framework alongside the OECD statement in July 2021. This is to float universally sound principles to be equally followed by all nations ignores *inter alia* the difference between the economic standings of countries, and their motives of meting out lesser restrictions for countries with better trade opportunities, since the ultimate aim of revamping the tax structures of countries seems to be the creation of an attractive investment environment, and not achieving universal uniformity of taxation schemes and policies.

On the other hand, the Indian taxation regime must merge its existing tax infrastructure with the BEPS regulation mechanisms, to achieve a two-fold objective of shedding its status of being a strict tax regime for inviting prospective investors as well as not letting any corporate transactions escape scrutiny by tax authorities. This dual purpose will not only put the Indian economy on the map of global tax regimes for coming into the eyes of international investments, but will also strengthen its motive of erasing tax evasion by eradicating as many loopholes as possible. India must recognise the importance of being a part of a global initiative like the BEPS project, in order to satisfy its expectations as a tax regime alongside the economic perspective of increasing investments, and possibly build on the existing success of developed countries like the United States in this respect.

India's current standing on the international front is adequately aggressive to put forth the needs and issues of developing and underprivileged economies affected by international BEPS transactions. Its participation in the BEPS 2.0 or future deliberations would ensure putting the lower-ranking tax regimes on the world map, replete with all the problems faced by them in combating advanced tax evasive manoeuvres like BEPS. In fact, India can be considered as one of the only countries which can take the initiative for bridging the knowledge gap between developed and less-developed countries in this regard. It is expected that the new BEPS 2.0 initiative may address the inadequacies brought forth by the implementation of the original BEPS plans, with developing countries like India acting as catalysts to speed up the smooth transition of countries

to well-developed tax economies in accordance with their existing knowledge resources as well as gradually built international relations.

WTO'S ROLE IN ASSUAGING MARINE EXPLOITATION: THE DRAFT AGREEMENT ON FISHERIES SUBSIDIES

Aditi Dehal[1]

ABSTRACT

Since the start of the Doha round in 2001, talks on fisheries subsidies have been ongoing at theWTO. Globally, capture fishing is on the rise, with overexploitation of marine fisheries resources causing environmental issues. Fisheries exploitation is fueled by a variety of causes,including the commercial element of the industry as well as the fact that it provides a source of income for millions of fish workers across the world. Subsidies to the fishing industry and fishermen have a vital role in supporting the sector and its workers. However, the form of fisheries subsidies, as well as the proportion of fish workers or industries that benefit from them, varies substantially between major fish-producing countries. Fisheries subsidies may besupporting large-scale commercial fisheries in numerous rich economies as well as some developing nations. Given the various interests of major fish producing nations, regulating fisheries subsidies is complicated. In this article, the author has most importantly attempted todiscuss the recent draft agreement on fisheries subsidies and their effects worldwide. The paperhas been divided into six sections. The first section talks about the introduction, the second explores the classification of fisheries subsidies. It is followed by the third section which further discusses a global talk on fisheries subsidies. The fourth section talks about the recent draft WTO agreement on fisheries subsidies along with its key features. The fifth section covers the future challenges in fisheries and aquaculture. Sixth section entitled 'A Sea Change?' covers the summary of the paper and recommendations too.

Keywords: *Fisheries subsidies, WTO, marine exploitation, draft agreement, worldwide, negotiations*

I. INTRODUCTION

A fisheries subsidy[2] is a government measure that gives customers or fish extractors an advantage to supplement their income or reduce their costs. Target 14.6 of Sustainable Development Goal 14 focuses on prohibiting subsidies that contribute to overcapacity and overfishing, as well as unreported and uncontrolled fishing, and refraining from additional suchsubsidies.

Since the start of the Doha Round in 2001, the WTO has been negotiating on fisheries subsidies. At the Nairobi Ministerial in December 2015, the difference amongst WTO Members on whether or not to continue the Doha Round on a variety of topics was clear. However, everyone agreed that after Nairobi, they

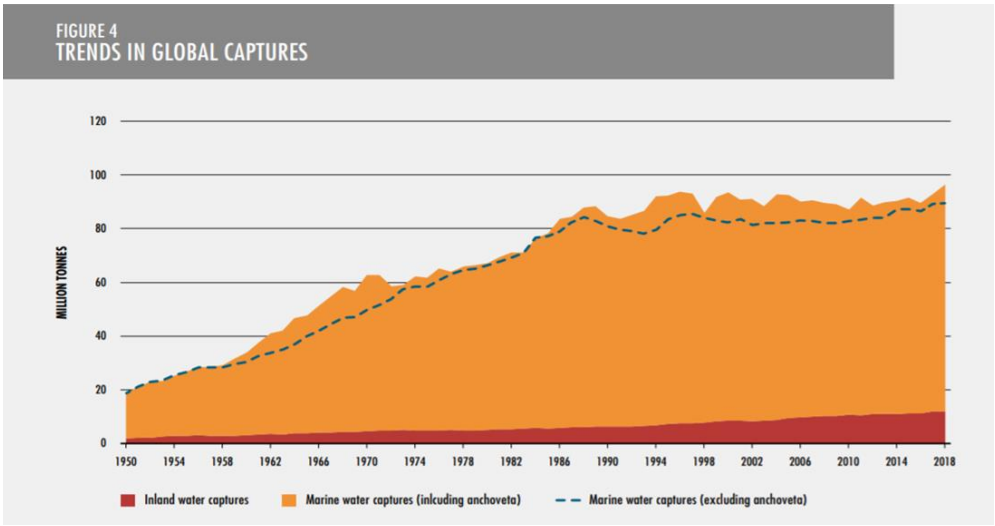
[1] The author is a B.A. LL.B. (Hons.) student at the Himachal Pradesh National Law University, Shimla.
[2] *Report of the Expert Consultation on Identifying, Assessing and Reporting on Subsidies in the Fishing Industry* (FAO 2003) <https://www.fao.org/3/y4446e/y4446e00.htm#Contents> accessed 1 October 2021.

would tackle the Doha concerns. Negotiations over fisheries subsidies, which are motivated by environmental concerns, will continue to occupy WTO Members' attention in the wake of the TPP Agreement and the UN Sustainable Development Goals.[3] Food production, the economic side of fish trading, and the livelihood of millions of fish workers throughout the world, all drive the exploitation of fisheries resources. Subsidies to the fishing sector and fishermen play a fundamental role in providing support. However, the kind of fisheries subsidies and who receives them vary profoundly across major fish-producing countries. Given the different interests of major fishery producing nations, policing fisheries subsidies is difficult.

For a large section of the world's population, fish is a significant source of sustenance. It is anessential part of many people's diets around the world. Global fisheries output has increased asa result of the growing global population and rising affluence. As part of its mandate, the United Nations' Food and Agriculture Organization ("FAO") analyses and publishes statistics on fisheries and aquaculture production, trade, and utilization data every year. Since the late 1980s, the long-term trend in total world capture fisheries has been relatively constant, with harvests ranging between 86 million and 93 million tonnes per year (Figure 4).[4] However, total global capture fisheries production reached 96.4 million tonnes in 2018, the highest amount ever recorded, with inflation of 5.4 per cent from the previous three years' average (Table 1).[5] The graph below has been extracted from the State of World Fisheries and Aquaculture Report, 2020.

With a continued rise in population and wealth, it is projected that global fish supplies would be exploited to suit a variety of purposes, with aquaculture likely to meet the growing need for fish. The major advantage of the exploitation of fish populations is that it provides vital employment and economic gain. The fishing industry is a major source of employment, supporting the livelihoods of 10-12 per cent of the world's population. According to the FAO,employment in this industry has expanded at a faster rate than the global population. The sector is also crucial for small-scale fish worker employment. According to the International Collective in Support of Fisher workers, a non-governmental organization based in the United Kingdom:

[3] *Sustainable Development Goals* (UNDP) <file:///C:/Users/Aditi_Dehal/Downloads/SDGs_Booklet_Web_En.pdf> accessed 2 February 2022
[4] *State of World Fisheries and Aquaculture 2020: Sustainability in Action* (FAO 2020) <www.fao.org/3/ca9229en/ca9229en.pdf> accessed 3 October 2021
[5] Ibid



Over 90% of the world's fishers and fish workers are employed in small-scale fisheries, which catch, process, trade, and market fish. Women make up about half of this group. Small-scale fishing accounts for around half of all global fish catches. When it comes to captures intended for direct human consumption, this sub-sector accounts for two-thirds of the total. Small-scalefishing and related activities are often the lifeblood of local economies in coastal, lakeshore, riverine, and other riparian communities, acting as a generator of jobs and revenue in other sectors via forwarding and backward connections. Fishing activities are often part-time and seasonal, but they provide an essential supplemental source of food and revenue in many communities.[6]

Another major component of the fisheries sector is that it is a widely traded food item in the international market, with developing nations accounting for more than half of all fish exports by value. However, as with any other environmental resource, rising demand for fish has put a strain on existing world fish stocks; exploitation of fish stocks has resulted in over-exploitationof particular species' stocks.

Due to the existence of damaging fish practices, illegal, unreported, and unregulated fishing ("IUU fishing"), and excessive subsidies to the fisheries sector in many countries, fisheries exploitation has worsened. The issue of excessive subsidisation in the fisheries sector is the most troublesome of these three concerns, as it encourages unsustainable fishing practices. In 2010, the United Nations Committee on World Food Security formed a High-Level Panel of Experts on Food Security and Nutrition to give evidence-based and policy-oriented assessments to the Committee. In 2014, it published a study titled *Sustainable Fisheries and Aquaculture for Food Security and Nutrition*, in which it stated that "many fishing resources are severely depleted, while many nations continue to pay subsidies, particularly fuel subsidies."[7] The situation is aggravated by the fact that most of the nations do not disclose the exact amounts of these subsidies.

[6] 'Small-scale fisheries: Their contribution to food security, poverty alleviation and sustainability' *(International Collective in Support of Fishworkers)* <https://igssf.icsf.net/en/page/1050-Small-scale%20fisheries.html> accessed 4 October 2021

[7] HLPE, 'Sustainable fisheries and aquaculture for food security and nutrition. A report by the High-Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security' (FAO 2014) <www.fao.org/3/i3844e/i3844e.pdf> accessed 5 October 2021

It is widely acknowledged that fisheries access rights agreements when combined with excessive subsidies result in the shift of fishing capacity from small businesses to major corporations and fishing fleets. It might contribute to overfishing and the decline of fish stocks critical to residents' livelihoods. Many investigations have looked into the relationship between exorbitant fisheries subsidies and fish stock availability. The World Trade Organization's Secretariat produced a report on Trade and Environment in 1999 that underlined the link between overfishing and fisheries subsidies. "A reduction in trade-distorting fishing subsidies, which currently amounts to over $54 billion annually, would reduce overcapitalization in the industry and minimize overfishing," according to the research.[8]

CLASSIFICATION OF FISHERIES SUBSIDIES

Many WTO subsidies for the fisheries industry are broad, extending to other sectors such as transportation or fuel subsidies. The WTO's Subsidies and Countervailing Agreement ("SCM Agreement") stipulates a specificity requirement that makes it difficult to challenge the consistency of such subsidies under the SCM Agreement's auspices; the SCM Agreement in its current form is insufficient to address subsidies in the fisheries sector. This is exactly why WTO members are proposing to carve out different procedures for dealing with fisheries subsidies within the SCM Agreement.

(i) Classification under the WTO'S Negotiating Group on Rules

The Chair of the NGR, in its Draft Consolidated Chair's Texts of the Anti-Dumping and SCMAgreements, published on November 30, 2007, took a comprehensive approach in classifying fisheries subsidies. Based on the Chair's proposed text, the following classification of fisheries subsidies can be made:

1. CAPACITY-RELATED – acquisition, construction, repair, renewal, restoration, modernisation, or any other alteration of fishing or service vessels, including subsidies to boat or shipbuilding facilities for these reasons.

2. OPERATING COSTS – including licence fees or similar charges, fuel, ice, bait, personnel, bait, gear, insurance, social charges, and at-sea support); or landing, handling, or in- or near-port processing activities for products of marine wild capture fishing; or subsidies to cover operating losses of such vessels or activities; or subsidies to cover operating losses of such vessels or activities.
3. PORT-RELATED – port infrastructure or other physical port facilities used solely or primarily for marine wild capture fishing activities (for example, fish landing facilities,fish storage facilities, and in- or near-port fish processing facilities).

4. DIRECT PAYMENTS – Income assistance; Price assistance

[8] Håkan Nordström and Scott Vaughan, *Trade and the Environment* (World Trade Organization 1999) vol 4 <www.wto.org/english/res_e/booksp_e/special_study_4_e.pdf> accessed 6 October 2021

5. FISHING ACCESS RIGHTS – originating from a government's subsequent transfer of access rights acquired from another government in exchange for the right to fish within that other government's purview.

6. DESTRUCTIVE PRACTISES – in respect to IUU fishing vessels; fishing vessels or activities engaged in overfishing of depleted stock.

Many types of special subsidies were proposed to be brought inside the purview of rule- making, as the Chair's comment demonstrates.

The proposed text took a comprehensive bottom-up approach, aiming to include the most common types of fishery subsidies, which were inextricably linked to fishing capacity and operation costs, in the scope of the proposed restriction.

FAO classification

Fishery subsidies are divided into four categories by the FAO. Direct financial transfers, services, and indirect financial transfers, as well as rules and absence of action, are all examples.

1. DIRECT FINANCIAL TRANSFERS – "All direct payments by the government to the fisheries industry are included in this category." These subsidies are likely to have a direct impact on the industry's earnings, and they can also be detrimental (i.e. payments from the industry to the government). Their cost to the government is normally included in the public budget, and their direct benefit to the industry is reflected in the recipient enterprises' cash flow.[9]

2. SERVICES AND INDIRECT FINANCIAL TRANSFERS – "Any additional active and explicit government involvement that does not include a direct financial transfer as defined under direct financial transfers falls under this category." Subsidies in this category include public-sector services and indirect financial transfers, such as tax rebates. Their cost may or may not be defined in the public budget, and they are worth to the recipient industry are rarely recorded directly in the recipient industry's accounting.[10]

3. REGULATIONS – "Governmental regulatory interventions fall under the third type." The government's cost of these subsidies, which is usually an administrative cost, maybe hidden among other public expenditures for administration and regulations. Unless it is a profit-decreasing subsidy entailing expense for the business, the value to the industry does not generally occur in the accounting

[9] Lena Westlund, *Guide for Identifying, Assessing and Reporting on Subsidies in the Fisheries Sector* (2004) FAO Fisheries Technical Paper No. 438, 15 <www.fao.org/3/y5424e/y5424e07.htm> accessed 5 October 2021
[10] Ibid

of the industry.[11]

The FAO categorizes countries based on the way through which subsidies or assistance are supplied. As a result, there is considerable overlap in the types of assistance given. Agovernment regulation, for example, could provide both damaging and useful subsidies to the sector. Furthermore, the categorisation is ambiguous in its terms. For example, if all other areas are strictly regulated omitting the fishing sector, "absence of intervention" could be achieved through a government rule. This would be considered indirect conferral of a benefit and would fall under both the "Regulations" and "Lack of Intervention" sections.

UNEP Classification

Fisheries subsidies can be grouped into the following categories, according to the UNEP[12]:

1. Infrastructure for fishing
2. Management services and research
3. Subsidies for access to foreign waters
4. Subsidies for vessel decommissioning and licence retirement
5. Capital cost subsidies
6. Variable-cost subsidies
7. Income assistance and unemployment insurance
8. Subsidies for price support

This classification is highly comprehensive, with no overlap between the eight groups. However, this classification has one flaw: it "excludes subsidies that emerge through government inaction, such as the non-recovery of fishing resource rents, which some have claimed might be considered an economic subsidy to the business."[13]

Classification by WWF

The WWF published a position paper on fisheries subsidies in 2004.[14] The WWF has developed a four-part

[11] Ibid

[12] Anja von Moltke, *Fisheries Subsidies, Sustainable Development and the WTO* (UNEP 2011) 20

[13] Alice V. Tipping, *A 'Clean Sheet' Approach to Fisheries Subsidies Disciplines* (International Centre for Trade and Sustainable Development and World Economic Forum 2015) <www.e15initiative.org/wp-content/uploads/2015/04/E15_Subsidies_Tipping_final.pdf> accessed 6 October 2021

[14] David K. Schorr, 'Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization' (World Wildlife Fund 2004) <https://www.wto.org/english/forums_e/ngo_e/posp43_wwf_e.pdf> accessed 2 October 2021

normative taxonomy of fisheries subsidies in this position paper:

1. MOST DETRIMENTAL – fishing subsidies that are so closely linked to negative outcomes that they should be prohibited in general.

2. LIKELY TO BE HARMFUL – those that are frequently but not always destructive, thus they should be permitted but subject to very tight conditions.

3. POTENTIALLY DETRIMENTAL – those that may be harmful on rare occasions, but should be tolerated and subjected to fewer restrictions.

4. BENEFICIAL – those that are so closely linked to favourable outcomes that they should be allowed in under WTO law.

This can be termed as the simplest way of classification of fisheries subsidies.

All of the classification approaches provide different perspectives on studying fisheries subsidies and aid in understanding their nature. However, as the analysis shows, some classifications are more beneficial in the construction of a framework to govern subsidies than others.

There is a decent possibility that WTO negotiations on fisheries subsidies would resume with reinvigorated vigour. Members of the WTO will be assigned the task of identifying the types of subsidies that may be prohibited; whether there will be some general exceptions; what conditions will be associated with these general exceptions; and what will be the scope of S&DT for developing countries and LDCs in these negotiations. These are challenging and complex issues that have hampered previous agreements, and negotiators will have a challenging task in resolving them.

THE DRAFT AGREEMENT ON FISHERIES SUBSIDIES, 2021

The World Trade Organization (WTO) has taken a step closer to an agreement on abolishing harmful fishing subsidies after more than two decades of talks. The agreement will establish new standards for the worldwide fishing sector and restrict government funding that leads to unsustainable fishing and global fish stock depletion.

WTO members pledged to end the negotiations before the Twelfth Ministerial Conference(MC12) in late November and to empower their representatives in Geneva to do so, in a meeting with government ministers and leaders of national delegations. It would certainly be a good move in my opinion as the existing negotiation text can be used as the foundation for a final agreement.

Subsidies for illicit, unreported, and unregulated (IUU) fishing were to be phased down, and certain subsidies that contribute to overcapacity and overfishing were to be prohibited. Since 2001, talks have been

ongoing, although progress has been hampered by disputes between administrations. The timeframe for reaching an agreement was set for 2020, but talks were postponed owing to Covid-19 limits and the US presidential election. After that, a deadline was set for July, which was again missed. Now, Okonjo-Iweala, who took over as WTO president in March, is seeking to negotiate a settlement by the end of 2021 and there will be a major test for the organization's integrity, with members deadlocked on other issues.

Ministers examined an eight-page draft agreement at the conference, which includes several subsidies bans as well as some requirements for poorer nations' exemptions, all of which have still to be finalized. While some of the delegations, such as the EU, was enthusiastic, several ministers expressed concerns about the draft's content. In response to one element of the text, Indian trade minister Piyush Goyal remarked during the meeting, "Clearly, it will lead to capacity limits for developing countries, while advanced nations will continue to offer subsidies." The proposal was criticised as "regressive and unbalanced" by Pakistan, while the African coalition said, "major gaps" remained.

In essence, the agreement proposes three types of illegal subsidies: those that assist IUU fishing, have an impact on overfished stocks, or lead to overcapacity and overfishing. While this may appear to be a straightforward task, the political, economic, and cultural intricacies are significant obstacles.

One of the key difficulties has been the need for so-called special and differential treatment for emerging countries and the poorest nations. While this is largely acknowledged for the poorest countries, it has been difficult to accept claims from self-identified underdeveloped countries to be excluded from subsidy limitations.

The importance of concluding a deal cannot be understated. According to author's observation, it would provide both an opportunity to reach a global agreement at last to curb harmful fisheries subsidies, and an opportunity for the WTO to build trust in multilateralism, not least since the negotiations on new disciplines on fisheries subsidies are the only multilateral trade negotiations currently ongoing.

(i) The Scale of the Problem

The global fishing sector receives roughly US$35 billion in subsidies each year (228 billion yuan). According to the European Parliament's Committee on Fisheries, $20 billion is supplied in forms that strengthen the capability of large fishing fleets, such as fuel subsidies and tax exemption programmes.[15] According to a survey by Oceana, the world's top ten donors of damaging fisheries subsidies distributed $15.4 billion in

[15] U. Rashid Sumaila and others, *Global Fisheries Subsidies* (Directorate General to Internal Policies 2013) <www.europarl.europa.eu/RegData/etudes/note/join/2013/513978/IPOL-PECH_NT(2013)513978_EN.pdf> accessed 30 September 2021

total in 2018. The EU as a whole contributed $2 billion, putting it in third place behind China and Japan.[16]

Eliminating any detrimental subsidies could contribute to the recovery of fish populations. It would result in a 12.5 per cent rise in world fish biomass by 2050, resulting in approximately 35 million metric tonnes of fish - over three times Africa's entire fish consumption in a single year.[17] As the world's fish populations have continued to decline below sustainable levels, the need for progress on an agreement has become even more urgent in recent years. According to the latest numbers from the UN Food and Agriculture Organization, 60 per cent of evaluated stocks are completely exploited, while 30 percent are over exploited. As the world's fish populations have continued to decline below sustainable levels, the need for progress on an agreement has become even more urgent inrecent years. According to the latest numbers from the UN Food and Agriculture Organization, 60 per cent of evaluated stocks are completely exploited, while 30 percent are overexploited. The elimination of damaging subsidies, which is part of the UN Sustainable Development Goals (SDGs), would be considered as a significant step forward in ocean sustainability ahead of the UN biodiversity conference in Kunming in October and the COP26 climate summit in Glasgow in November.

"This is the year in which the contract must be delivered. The head of the World Trade Organization (WTO) has expressed optimism that a deal will be achieved this year. There is a ray of hope at the end of this 20-year journey. "Being in the tunnel shadows at a time when ocean life is decreasing is a sad prospect," Peter Thomson, UN special envoy for theocean, said in a webinar.

Key Features of the Draft[18]

1. Existing WTO rules regulate governments that provide financial assistance in three situations: when it is linked to export performance (export subsidies) when it is linked to the use of domestic rather than imported products (local content subsidies — collectively known as "prohibited" subsidies), and when it causes injury or serious prejudice to another Member's industries (or "nullifies" subsidies). Assistance must provide an 'advantage' in all three circumstances, and it must be given to a specific group of people. The agreement veers away from this starting point by disciplining subsidies not (only) for

[16] 'New Oceana-Supported Research Maps Wealthy Nations' Harmful Fisheries Subsidies Supporting their Fleets Abroad, Including in the Waters of Least Developed Countries' *(Oceana 30 June 2021)* <www.globenewswire.com/en/news-release/2021/06/30/2255500/0/en/New-Oceana-Supported-Research-Maps-Wealthy-Nations-Harmful-Fisheries-Subsidies-Supporting-their-Fleets-Abroad-Including-in-the-Waters-of-Least-Developed-Countries.html> accessed 1 October 2021

[17] Ernesto Fernandez Monge & Reyna Gilbert, 'Ending Harmful Subsidies Could Increase Amount of Fish in the Ocean, Research Shows' *(PEW Charitable Trust 28 October 2021)* <www.pewtrusts.org/en/research-and-analysis/articles/2021/06/07/ending-harmful-subsidies-could-increase-amount-of-fish-in-the-ocean-research-shows> accessed 2 October 2021

[18] Callum Musto, 'The draft WTO agreement on fisheries subsidies: Are we closing the net?' *(EJIL: Talk! 1 June 2021)* <www.ejiltalk.org/the-draft-wto-agreement-on-fisheries-subsidies-are-we-closing-the-net/> accessed 2 October 2021.

distorting product competitiveness, but also for incentivizing ecologically damaging activities. In essence, the draft text proposes an additional layer of obligation for certain subsidies based on recipients' behaviour. As a result, it both adds to and expands on current rules. The agreement includes subsidies that match the existing definition of a subsidy in Art 1 SCM Agreement — that is, a financial contribution, income, or price support supplied by a governmental entity that confers a benefit on a defined type of recipient (draft Art 1.1). However, it has the potential to broaden existing laws by regulating fuel subsidies that would otherwise go unregulated since they do not benefit specific recipients (draft Art 1.2).

2. The proposal essentially creates four new categories of prohibited subsidies: (1)subsidies that support vessels that are "engaged in illegal, unreported, and unregulated fishing" (draft Art 3.1); (2) subsidies that support "fishing or fishing related activities regarding an overfished stock" (draft Art 4.1); (3) subsidies that "contribute to overcapacity or overfishing" (draft Art 5.1); and (4) subsidies that support fishing in areas that are neither protected nor regulated by a regional fisheries management organisation (RFMO) (draft Art 5.3).

3. The draft piggybacks on Members' reporting obligations under Art 25 SCM Agreement, requiring them to provide information on the fishing activities, its subsidies and species-specific catch data in subsidised fisheries (draft Art 8.1(a)), as well as the conservation and management status of stocks within subsidised fisheries, existing conservation and management reserves for appropriate stocks, the names and registration numbers of subsidized vessels, as well as the fleet storage in subsidized fisheries (draft Art.8.1(b). Members must also furnish the (new) Fisheries Subsidies Committee with a list of vessels they believe are involved in IUU fishing each year, as well as details of any access arrangements they have with other countries (draft Art 8.2). Members must communicate any additional required information to other Members in a timely and comprehensive manner (draft Art 8.3)

4. Perhaps most importantly, the plan is compatible with existing dispute resolution and remedy procedures (draft Art 10). WTO members frequently utilise unilateral countervailing duties (retaliatory tariffs) to respond to both 'prohibited' and 'actionable' subsidies.

5. In a nutshell, this means that Members can challenge subsidies in dispute settlement proceedings and/or impose countervailing duties and according to the author, this would effectively turn unilateral trade remedies into an environmental tool — though one that can only legitimately negate (rather than prevent) incentives for exploitative practices.

Notable Points

1. Competence and responsibility for living resources and environmental protection are shared on a functional and geographic basis under the law of the sea. As a result, fisheries management and conservation necessitate a complex matrix of overlapping and conflicting jurisdictional and institutional

competencies shared across multiple States and RFMOs. How to accurately identify unsustainable activities — and hence illegal subsidies — is a key issue in the negotiations. When deciding if IUU activities have occurred, a stock is overfished, or fishing happens outside of national authority or RFMO competence, whose recommendations should be authoritative?

2. Importantly, the proposed text explicitly relates its operation to the FAO's 2001 Plan of Action (IPOA-IUU) definition of IUU fishing (paras. 3.1–3.3). If a subsidy supports a wide range of activities, it will be forbidden under draft Art. 3. Fishing without or in excess of a licence in a State's EEZ or an RFMO management area, exceeding catch limits for targeted or by-catch species, employing prohibited gear or methods, fishing during closures, or inadequately reporting effort or capture are all examples of IUU fishing, according to the IPOA-IUU.

3. The proposal distributes power for IUU operations among coastal states, flag states, and regional fisheries management organisations (RFMOs) (draft Art. 3.2). Subsidies shall be prohibited if they benefit a vessel or operator that is listed by its flag State or identified as engaging in IUU operations within its maritime zones or by an RFMO within its geographical and species competencies (draft Arts. 3.2–3.3). The proposed requirements aim to guarantee that investigations are evidence-based and transparent (draft Art. 3.3).

4. Similarly, the document gives the coastal State in whose seas fishing takes place or the RFMO the competence over the activities, authority to determine when a stock is 'overfished,' with the proviso that assessments be 'based on best scientific evidence available' (draft Art 4.2). Importantly, port and market state members do not have explicit determination authority; consequently, their involvement in identifying unsustainable practices appear to be confined to reporting flag and coastal States, as well as RFMOs, of vessels' or operators' actions.

5. The necessity to provide special and differentiated treatment (SDT) for developing country Members — notably coastal communities in the least developed country (LDC) members who rely on artisanal and subsistence fishing — has become a more serious sticking point in discussions. SDT is a fundamental notion that may be found in all WTO Agreements. The challenge is to provide enough flexibility to accommodate true reliance on coastal fisheries without jeopardising the agreement's goals, particularly the elimination of subsidies for unsustainable commercial fishing.

6. Two different paths are outlined in the proposal. The first would exempt LDCs and developing nation members from the restriction on overcapacity subsidies (draft Art 5.5(a) ALT 1), as well as all fishing activities in their territorial sea (draft Art 5.5(b) ALT 1). If conditions relating to a member's economic development and share of global marine capture surpass specific limits, these exclusions would be

revoked (proposed Art 5.5(c) ALT 1). The second strategy calls on developing country members to gradually phase down overcapacity subsidies, particularly those for artisanal and subsistence fishing.

7. While LDC Members would remain exempt from Art 5.1, developing country members would be allowed to keep over-capacity subsidies for seven years for 'low income, resource-poor or livelihood fishing or fishing related activities' within the territorial sea, and for five years for other activities within the EEZ and RFMO-managed areas (draft Art 5.5(a)–(c) ALT 2). Members with a proportion of annual worldwide marine catch of less than 0.7 percent and annual subsidies for marine fisheries activities of less than USD 25 million could ask the Fisheries Subsidies Committee to extend these periods.

The author observes that while the first strategy gives developing nation members more flexibility, the second approachmore explicitly advances the agreement's primary objectives. The willingness of members to compromise on these topics will probably decide the final path to be taken and, maybe, the success of negotiations.

A GLOBAL DIALOGUE ON FISHERIES SUBSIDIES

USA, China and EU have been global leaders. Whereas China spends a lot of money every year to encourage ocean fishing, including fuel subsidies, which have been criticised for incentivizing fishing regardless of fish population health, USA is a supporter of restrictions on harmful fisheries subsidies, and it has highlighted restrictions on harmful fisheries subsidies as a major area where trade agreements may contribute to environmental protection and development. The author has tried to compare the three different perspectives of three global leaders on fisheries subsidies and also what India has to say in the said matter.

(i) USA

Since 2001, the US has pursued promises to minimise detrimental fisheries subsidies and offer greater transparency for fisheries subsidies as part of the Doha Round of World Trade Organization (WTO) discussions. The US will continue to seek and support multilateral commitments on fisheries subsidies at the WTO. The United States is advocating clarity in fisheries subsidies and their eventual abolition in the Asia-Pacific Economic Cooperation (APEC) forum, as expressed in the 2014 Xiamen Declaration of the APEC ocean-related Ministerial Meeting. In the ongoing free trade agreement negotiations for a Trans-Pacific Partnership (TPP) agreement with 11 other Asia-Pacific countries and a Transatlantic Trade and Investment Partnership (T-TIP) agreement with the European Union, the US is also pursuing ambitious

commitments to discipline harmful fisheries subsidies.[19]

European Union

Fleet, aquaculture, and processing, collective activities and infrastructures, and sustainable development of fisheries regions were among the EU's fisheries subsidies. Management, control, scientific guidance, and research were among the indirect subsidies. The EU fisheries sector receives around €850 million in structural support each year, including subsidies for vessel modernization and €150 million for access agreements. The EU's commitment to control, enforcement, and data collecting are capped at around €50 million per year. Since the 1970s, EU subsidies to boost industry has been steadily increasing and regional development, as well as food security.

China

As mentioned above, China spends a lot of money every year to encourage ocean fishing, including fuel subsidies, which has been criticised for incentivizing fishing regardless of fish population health. China is the world's largest seafood producer. In 2013, China provided its fishing industry $6.5 billion in subsidies China announced a quantifiable aim for limiting fuel subsidies in its waters in 2015, but it's uncertain whether its policy on distant-water fishing (DWF) will alter. Fuel subsidies account for 94 per cent of China's fishing subsidies. Around 95% of China's fishery subsidies were damaging to the environment. China suggested banning some subsidies that contribute to overcapacity and overfishing in June last year, with progressive reductions rather than an outright ban, to "give space for sustainable social and economic development."

India

The Indian government offers direct and indirect subsidies to the fishing industry. Subsidies for the acquisition of vessels, gear, and engines, as well as fuel subsidies and aquaculture aid, are all examples of direct subsidies. Indirect subsidies cover financial aid for various welfare initiatives, the construction of ports, fishing harbours, and fish landing centres, and the development of post-harvest and market infrastructure. Subsidies to marine fisheries development infrastructure and post-harvest activities, as well as export subsidies, are regarded as damaging subsidies among the many categories.

The proposed WTO rules will affect subsidies or grants for buying or modernising boats, engines, fishing gear, and other fishing equipment (iceboxes, GPS, communication systems, fish finders) in mechanised sectors, as well as the HSD fuel tax exemption for mechanised boats in India, according to the WTO's draft proposals on subsidies released in 2007.

FUTURE CHALLENGES IN FISHERIES AND AQUACULTURE

[19] 'Recommendation 5: International - Fishery Subsidy' *(National Ocean Council Committee on IUU Fishing and Seafood Fraud)* <www.iuufishing.noaa.gov/RecommendationsandActions/RECOMMENDATION5.aspx> accessed 4 October 2021

FAO (1999c) identified a number of significant concerns that cover the entire sector and are of primary policy importance when assessing future difficulties for the fisheries sector.[20]

1. Maintaining the contribution of fisheries and aquaculture to food security, employment, national economic development, and recreation are among these concerns. Fish contributes to food security in a variety of ways, depending on geography, access to markets, and affordable technology. These include fish produced for direct local consumption, as well as aquatic products of all kinds that can be sold domestically or exported for funds, as well as those that generate income through recreation, tourism, and other means.

2. By improving data collection and scientific assessment, the foundation for fisheries management and aquaculture development may be strengthened, allowing for more rational and informed management and development decisions. This necessitates a multi-faceted approach in which I data users are consulted to ensure that they receive the data they require for their work, (ii) appropriate data collection mechanisms and data management systems are in place, (iii) a national commitment to provide data exists, and (iv) FAO and non-FAO regional fishery bodies, as well as other appropriate institutions and organizations, are involved in regional data collection.

3. As fisheries resources grow scarcer, regional fishery conflicts could be expected to intensify; boosting national capacity building and regional institution enhancement; producing objective governance performance metrics; supporting unified management techniques and improved coordination among regional institutions to address growing issues of mutual interest.

4. Increasing stakeholder participation in national and regional processes to facilitate more transparency in fisheries sector decision-making at all levels. Such transparency, whichis now widely advocated in many international fisheries instruments, has the benefit of facilitating access to, and distribution of, high-quality, timely information in the most appropriate formats, in support of responsible fisheries and aquaculture, as well as commerce.

5. Reducing by-catch and discards through the use of more selective gear and fishing operations, as well as developing innovative and value-added processing and market development for currently discarded species, and expanding and promoting uniform quality criteria for internationally traded fish and fish products. Prevention of post- harvest losses should be pursued as a matter of high priority in the interests of food security and the best use of limited resources; promoting cooperation in the fish trade

[20] Veravat Hongskul, 'Into the Next Millennium: Fishery Perspective' (1999) FAO RAP 1999/26 Working Paper Series 1/3, 10 <https://www.fao.org/3/x6947e/x6947e00.htm#Contents> accessed 3 October 2021

in order to avoid disputes and imposition of sanctions; minimising the impact of international fish trade on those groups most vulnerable to food insecurity.

The region's aquaculture industry has a lot of room for expansion. Improvements in technology and resource utilisation, intensification, integration of aquaculture with other farming activities, and the development of new aquaculture regions could all contribute to this rise. Aquaculture, on the other hand, will encounter severe hurdles, including:

a) meeting the expanding demands for seed, feed and fertilizers, in terms of quantities and quality;

b) abatement in production losses through improvement in fish health management;

c) gradually severe competition with another resource (land/water/feed) users;

d) denigrating the quality of water supplies as a consequence of aquatic pollution;

e) a successful amalgamation of aquaculture with other farming activities, and promotion of small-scale low-cost aquaculture in aid of rural development;

f) augmentation in environmental management including depletion of environmental impacts and avoidance of risks to biodiversity through better site selection, congruous use of technologies, including biotechnologies, and more streamlined resource use and farm management; and

g) affirmation of food safety and quality of products.

While some increase in marine capture fishery production may be expected in the long run as the benefits of effective management are realised and production from under- and non-utilized resources is enhanced, the primary goal for marine fisheries in the medium term is to make sure that production and the overall contribution of marine fisheries to global food security areat least sustained.

Improved and responsible stock management is the major issue facing marine fisheries in the medium to long term. Such management necessitates the cautious regulation of production (ideally, taking into consideration both inputs and outputs in a fishery) so that target stocks are not subjected to the excessive effort, resulting in overfishing. Furthermore, ecosystem management, which considers the effects of fishing on non-target stocks, is becoming increasingly frequent, adding still another layer of complexity to the management process.

THE ACTUAL TROUBLE WITH SUBSIDIES

Subsidies to fisheries are not all negative. However, capacity-enhancing subsidies contribute to overfishing by artificially raising profits, either by lowering the cost of fishing or by increasing the money fishers get.

Subsidies might take the form of tax breaks and loans or grants for infrastructure development. In reality,

they may result in situations where fishing boats get discounted fuel in order to access remote fishing areas that would be too costly to reach otherwise. Alternatively, businesses may get funding to acquire otherwise pricey fish-finding technologies, gear, and vessel modifications. Even beneficial subsidies might be detrimental in the wrong hands. Thus, the WTO discussions seek to reduce subsidies to fishermen who participate in illicit, unreported, and unregulated fishing (IUU).

According to a survey issued in July by academics at the University of British Columbia and backed by the NGO Oceana, China leads the list of damaging subsidisers, followed by Japan, the EU, South Korea, Russia, the United States, and Thailand in order of contribution amount. Over two-thirds of detrimental fisheries subsidies are funded by the top ten largest subsidisers. The other 164 member nations of the WTO contribute far less to damaging fishing subsidies. Ironically, those who contribute the least often bear the brunt of the consequences of diminishing fish fisheries. "Harmful fisheries subsidies allow affluent nations to engage in industrial-scale distant-water fishing in poor countries' seas.

WTO'S FISHERIES-SUBSIDIES CURBS NEEDS BALANCE: INDIA'S RESPONSE

India is right, developing nations that don't do distant-water fishing must not be clubbed with rich nations that do.

India's worries, as expressed by Union commerce and industry minister Piyush Goyal, are that several nations' unjustifiable subsidies and overfishing are harming Indian fishermen and their livelihoods. To achieve the desired balance in the draft text, it is critical that large subsidy providers—such as Japan, Spain, China, South Korea, and the United States—assume more responsibility for reducing their subsidies and fishing capacities in accordance with the principle of "polluter pays." To achieve a more equitable agreement, it is necessary to embrace the notion of "shared but differentiated" duties. These global fisheries subsidies endanger low-income nations that rely on fish for food sovereignty. India would fight any effort to phase off support to fishermen in underdeveloped countries. Differentiated treatment includes safeguarding the livelihoods of disadvantaged fishermen while also addressing concerns about food security. India's position is that the WTO agreement must offer developing countries with policy room to grow the fisheries industry and a longer transition time for subsidy elimination. The proposed language must take into account the developing world's current and future fishing demands.[21]

India's particular concerns with the draft text do not concern the unique and differentiated treatment accorded to small-scale subsistence fishers. Indeed, one of the clauses stipulates that developing nation members, including LDC members, may award or sustain subsidies for low-income, resource-poor, and livelihood fishing or fishing-related activities up to 12 nautical miles measured from baselines. The problem is primarily with the effort to establish a schedule for subsidies provided or maintained by developing nation

[21]The Financial Express, 'WTO's fisheries-subsidies curbs need balance' *(Financial Express 5 November 2021)* <https://www.financialexpress.com/opinion/wtos-fisheries-subsidies-curbs-need-balance/2362951/> accessed 2 February 2022

members, particularly LDC members, for fishing or fishing-related businesses inside their Exclusive Economic Zone (EEZ), which would have their exemptions revoked in a few years. Such a deadline constrains India's blue economy plans aimed at developing the country's fishing industry sustainably. India intends to leverage its EEZ by strengthening its deep sea fishing capability. For these reasons, India has requested that poor countries that do not participate in distant-water fishing be excused from subsidy bans for 25 years, taking their development requirements into consideration, while wealthier countries should phase down their fisheries subsidies far before that time.

India's objections must undoubtedly be addressed in order to achieve a more fair and equitable WTO agreement on global fisheries subsidy reduction.

A SEA CHANGE: CONCLUSION AND SUGGESTED REFORMS

While we wait for the discussions to be completed, it's worth considering what success might entail. Securing an agreement would demonstrate that the WTO is still capable of enabling difficult international negotiations, which would be a triumph in and of itself given the WTO's recent track record. By straining the limits of its mandate, the WTO will have to adapt and become more agile in dealing with extraneous international law, national decision-making bodies, and the intricate network of external international organisations with fisheries competence.

While it may be a stretch, we can question whether victory on fisheries subsidies will pave the way for regulations on other environmentally destructive subsidies — such as the trillions spentannually to support fossil fuels — or even pave the way for an agreement relaxing existing limits on green subsidies.

Finally, the author observes that success will have no bearing on WTO Members' ability to lawfully adopt trade- restrictive fisheries protection measures as coastal, port, or market states, because such measures will often violate trade disciplines and their WTO consistency will frequently hinge upon successful invocation of the WTO Agreements' exceptions. However, it is possible that apanel (or, dare we hope, an Appellate Body division...) will be more receptive to measures justified under GATT Articles XX(a) or (g).

(i) Recommendations

1. Get rid of capacity-enhancing incentives, which encourage overfishing.

2. Increase useful subsidies, such as financial aid for data collection, control, and enforcement, as well as those that improve fisheries management by lowering fishing capacity and effort, reducing by-catch, and supporting essential policy goals;

3. Significantly improve transparency and accountability in subsidy reporting, including effective WTO notification requirements.

4. Demand greater clarity in the industry's financial records to properly quantify the need for subsidies;

5. Take into account the unique problems of developing countries and small-scale fishermen, which must be addressed in a way that does not jeopardise the resource base;

6. Increased monitoring of the impact of these subsidies on the industry to assess which subsidies are most useful;

7. Redirect capacity-building subsidies to foster sustainable activities, such as 'fishing forplastic' rather than fishing exhausting fish stocks, resulting in a win for fishermen (whokeep their subsidy money), a win for the ocean (which is cleaned of plastic), and a win for the fish (who may not be targeted by fishing vessels);

8. Increase the number of job opportunities for fishermen by bringing education and skill development to coastal communities.

TENUOUS ACCOUNTABILITY: ARMED GROUPS, INTERNATIONAL LAW AND THE ISRAEL-PALESTINE CONFLICT

Md Tasnimul Hassan[1]
Deeksha Tiwari[2]

ABSTRACT

The Israel-Palestine conflict has been a subject of numerous studies. In this article, building upon the recent large-scale confrontation between Israel and Hamas in May 2021, the authors argue that armed groups are not prohibited under international law to be involved in conflicts in occupied territories. The article examines the inhibiting force of international law on armed conflicts and argues that international law, per se, does not help negotiate the conflict that involves a non-state entity due to its legal constraints. It specifies the role of the provisional measures of the ICJ in upholding IHL and holding aggressor States accountable for acts of violence. Further, it highlights the issue that fixing accountability for a non-state or a State is vexed and perplexed due to the politicisation of UN measures. The authors argue that Israel uses indiscriminate and disproportionate military force against Palestinians as "deterrence," which violates international law and needs to be fixed accountability for. The paper highlights that IHL cannot be expected to be effectively applied to armed conflicts unless adequate measures are put into place in advance in times of peace. The paper summarises the role that the UN has inadequately played in upholding peace in this conflict. Conclusively, it discusses mechanisms that can be put into place as possible inceptive solutions while acknowledging that it is very difficult to envision and chalk out an international legal framework that can even begin to address the years of anguish and trauma endured by those affected by the conflict.

I. INTRODUCTION

The historical conflict between Israel and Palestine seemed to be on its peak in May 2021 ("May Attack"), when Israel launched a brutal and bloody Operation named "Guardians of the Wall."[3] The Palestinian territories looked like post-apocalyptic world due to destruction caused by Israel, whereas the sky in Israeli territory was filled with rockets fired Palestinian armed group Hamas. However, after 11 days of intense fighting, a ceasefire was announced.[4] Later, the United Nations ("UN") revealed that the Israel Defence Forces ("IDF") killed 260 Palestinians, including at least 129 civilians.[5] On the other hand, Israeli authorities

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[3] Maram Humaid, "In Gaza, young victims of Israeli bombing recount a brutal 2021" (*Al Jazeera*, 31 December 2021) <www.aljazeera.com/news/2021/12/31/palestine-gaza-young-victims-israel-bombardment-may> accessed 20 October 2021. See also, Jamal Juma, "'Operation Guardian of the Walls' Will Not Fix Israel's Apartheid Walls" (*Palestine Chronicle*, 13 May 2021) <www.palestinechronicle.com/operation-guardian-of-the-walls-will-not-fix-israels-apartheid-walls/> accessed 20 October 2021.
[4] BBC News, "Israel-Gaza ceasefire holds despite Jerusalem clash" (*BBC News*, 21 May 2021) <www.bbc.com/news/world-middle-east-57195537> accessed 20 October 2021.
[5] See, *Apparent War Crimes,* (n 62).

claimed that the Palestinian rocket fire killed 12 Israeli civilians.[6] Although both Israel and Palestine claimed[7] victory, the real impact of the deadly confrontation seems to have been on Palestinians, considering the heavy infrastructural and human cost. Israeli strikes destroyed at least 2,000 housing units and damaged more than 15,000 others in Gaza during the May Attack.[8] The UN estimated[9] that more than 75,000 Palestinians were displaced in the fierce attack, while the total material cost of the indiscriminate bombardment was estimated to be beyond $322 million.[10] However, Israel claimed that they have done serious damage to the "infrastructure of terror" run by Hamas and other factions in Gaza.[11]

The Israel-Palestine conflict has been a matter of repeated attention since the 20th century. In the wake of the First World War, the Ottoman Empire was dissolved, and the League of Nations gave the mandate of Palestine to Britain. In 1917, the Balfour Declaration was issued, which explicitly pledged to establish "a national home for the Jewish people" in what was then Palestine, resulting in the gradual but global influx of Jews into Palestine.[12] During the Second World War, Zionism gained momentum, leading to the planned expulsion of Palestinians and destruction of Palestinian villages in the events which established the State of Israel in 1948. Israel, the official Jewish State, declared its statehood in 1948 and became a UN member[13] a year later. On the other hand, Palestine is recognized as a "non-member observer State," through UN General Assembly Resolution A/RES/67/19,[14] which urges "all States and the specialized agencies and

[6] Israel Ministry of Foreign Affairs, "Operation Guardian of the Walls" (*MFA.GOV.IL*, 20 May 2021) <https://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Operation-Guardian-of-the-Walls-10-May-2021.aspx> accessed 20 October 2021.
[7] *BBC News* (n 4).
[8] See, Jessie Williams, "Will Israel be held accountable for war crimes?" (*Al Jazeera*, 3 June 2021) <www.aljazeera.com/news/2021/6/3/will-israel-be-held-accountable-for-war-crimes> accessed 4 October 2022.
[9] Bayram Altug, "At least 75,000 Palestinians displaced due to Israeli attacks: UN" (*Anadolu Ajansı*, 20 May 2021) <www.aa.com.tr/en/middle-east/at-least-75-000-palestinians-displaced-due-to-israeli-attacks-un/2248059> accessed 17 October 2021.
[10] Linah Alsaafin, "What Is Behind Israel's Targeting Of Prominent Buildings In Gaza?" (*Al Jazeera*, 2021) <https://www.aljazeera.com/news/2021/5/19/what-is-behind-israels-targeting-of-prominent-buildings-in-gaza> accessed 17 October 2021.
[11] Jeremy Bowen, "Israel-Gaza: A Conflict On Pause As Both Sides Claim Victory" (*BBC News*, 23 May 2021) <https://www.bbc.com/news/world-middle-east-57218428> accessed 17 October 2021.
[12] Zena Al Tahhan, "More than a century on: The Balfour Declaration explained" (*Al Jazeera*, 2 November 2018) <www.aljazeera.com/features/2018/11/2/more-than-a-century-on-the-balfour-declaration-explained> accessed 17 October 2021. Tahhan notes, "The Declaration came in the form of a letter from Britain's then-foreign secretary, Arthur Balfour, addressed to Lionel Walter Rothschild, a figurehead of the British Jewish community. It was included in the terms of the British Mandate for Palestine after the dissolution of the Ottoman Empire. The mandate system, set up by the Allied powers, was a thinly veiled form of colonialism and occupation. The system transferred rule from the territories that were previously controlled by the powers defeated in the war – Germany, Austria-Hungary, the Ottoman Empire and Bulgaria – to the victors...Unlike the rest of the post-war mandates, the main goal of the British Mandate in Palestine was to create the conditions for the establishment of a Jewish 'national home' – where Jews constituted less than 10 percent of the population at the time." See also, Zack Beauchamp, "How did Israel become a country in the first place?" (*Vox*, 20 November 2018) <www.vox.com/2018/11/20/18080016/israel-zionism-war-1948> accessed 17 October 2021.
[13] United Nations, "Israel membership in the UN - GA resolution - Question of Palestine" (*United Nations*, 11 May 1949).
[14] UNISPAL, "Resolution adopted by the General Assembly: Status of Palestine in the United Nations" (*United Nations Information System on the Question of Palestine*, 4 December 2012) <https://unispal.un.org/UNISPAL.NSF/0/19862D03C564> accessed 19 October 2021.

organizations of the UN system to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom."

Palestinians who lived in the newly created Israel, were placed under Israeli rule, restricting and violating their human rights. Thereafter, Israel fought five major full-scale wars with neighbouring Arab nations. In the Six-Day War of 1967, Israel seized the Gaza Strip and the Sinai Peninsula from Egypt, West Bank from Jordan, the Golan Heights from Syria. However, the IDF withdrew from Gaza in 2005, while the occupation of Sinai Peninsula ended in 1978 with Egypt's recognition of Israel in return. As of now, the West Bank including the East Jerusalem, the Gaza Strip, and the Golan Heights are referred to as the Occupied Palestinian Territories ("OPTs"). Several means have been employed since then, to reach an agreement, yet the Israeli authorities continue to discriminate, harass, intimidate and kill Palestinians.[15]

The term *status quo* (or secular–religious *status quo*) in Israel refers to a political agreement between secular and religious political parties not to change the community arrangement in religious matters. The established Jewish religious communities in Israel want to preserve and enhance the State's religious identity, whilst the secular population wants to lessen the impact of religious rules on their daily life. Changes to intercommunal arrangements are occasionally sought by one political side, but they are frequently met with political opposition by the other. The *status quo* in Israel preserves established religious connections, and very minor adjustments are made on a regular basis. The struggle for Israel's spiritual identity did not begin in 1947. Difficulties relating to religion and the Mandatory administration in Eretz Yisrael began in the 1920s, when waves of immigration brought more Zionists to Palestine than any other group (due to their favoured standing in the quest for "certificates of entrance"). The British saw the Zionists as the spokesmen of all Jews, whereas the Orthodox Jews were seen as a "tolerated entity" who deserved only token recognition.[16] However, Orthodox Jews oppose the idea of Zionism and view the establishment of the State of Israel as an anti-messianic act.[17]

Hugo Grotius, a Dutch philosopher, wrote *De Jure Belli Ac Pacis*, a foundational work in international law, which provided the conditions for a just war. Thereafter, international humanitarian law ("IHL") developed through the Geneva Conventions of 1864, 1929 and 1949, the Additional Protocols of 1977, and the Hague Conferences of 1899 and 1907. IHL is a set of rules designed to regulate armed conflict. In an armed

[15] UNISPAL, "Israel and the Occupied Territories: Conflict, occupation and patriarchy" (*United Nations Information System on the Question of Palestine*)
<https://unispal.un.org/DPA/DPR/unispal.nsf/0/ABE29CA944AF099385256FD50055F789> accessed 17 October 2021. See also, *Threshold Crossed* (n 60).
[16] Ruth Lichtenstein, "The History of the 'Status Quo' Agreement - Hamodia.com" (*Hamodia*, 31 December 2013) <https://hamodia.com/2013/12/31/history-status-quo-agreement/> accessed 28 November 2021.
[17] Aviezer Ravitzky, "Ultra-Orthodox & Anti-Zionist" (*My Jewish Learning*)
<www.myjewishlearning.com/article/ultra-orthodox-anti-zionist/> accessed 15 October 2021.

conflict, the use of force is regulated by *jus ad bellum*[18], of which Article 2(4)[19] and 39[20] of the UN Charter are the major sources. On the other hand, *jus in bello*[21] or IHL. At the heart of IHL lies the Geneva Conventions of 1949 and their Additional Protocols ("AP I/II")[22] and the Hague Conventions of 1899 and 1907,[23] which are universally applicable as customary international law. Moreover, the four Geneva Conventions of 1949 apply to every occupied territory.[24]

These operational principles are codified and comprise the principles of distinction,[25] proportionality,[26] precautions[27] and the prevention of unnecessary suffering.[28] These principles altogether prohibit any civilian harm, collateral damage, or superfluous injury. The principles of proportionality, distinction, and precaution are part of customary IHL and of AP I.[29] The principle of distinction, an "intransgressible"[30] part of customary international law, provides that no civilian shall be the object of a military attack and that the distinction between a civilian and military objective should be created.[31] The principle of proportionality provides that any attack that is excessive, is prohibited and must be avoided if it could cause injury to civilians. The principle of precaution states that all viable measures to avoid civilian casualties and harm must be taken with an appropriate assessment of the timing of attack and choice of arms.[32]

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[18] It refers to situations where States may resort to war or use their armed forces.
[19] United Nations, "Chapter I: Article 2(1)(5), Charter of the United Nations, Repertory of Practice of United Nations Organs" (*United Nations*, 10 March 2021) <https://legal.un.org/repertory/art2.shtml > accessed 19 October 2021.
[20] United Nations, "Chapter VII: Article 39 - Charter of the United Nations, Repertory of Practice of United Nations Organs" (*United Nations*, 23 August 2016) <https://legal.un.org/repertory/art39.shtml> accessed 19 October 2021.
[21] It seeks to moderate the actual conduct of hostilities.
[22] International Committee of the Red Cross, "The Geneva Conventions of 1949 and their Additional Protocols" (*International Committee of the Red Cross*, 1 January 2014) <www.icrc.org/en/document/geneva-conventions-1949-additional-protocols> accessed 17 October 2021.
[23] Doctors Without Borders, "The Practical Guide to Humanitarian Law" (*Doctors Without Borders*) <https://guide-humanitarian-law.org/content/article/3/the-hague-conventions-of-1899-and-1907/> accessed 17 October 2021.
[24] "Occupation and international humanitarian law: questions and answers - ICRC" (*International Committee of the Red Cross*) <www.icrc.org/en/doc/resources/documents/misc/634kfc.htm> accessed 17 October 2021.
[25] "Distinction | How does law protect in war? - Online casebook" (*International Committee of the Red Cross*) <https://casebook.icrc.org/glossary/distinction> accessed 20 October 2021.
[26] "Proportionality | How does law protect in war? - Online casebook" (*International Committee of the Red Cross*) <https://casebook.icrc.org/glossary/proportionality> accessed 20 October 2021.
[27] "Customary IHL - Rule 15. Principle of Precautions in Attack" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15> accessed 17 October 2021.
[28] "Unnecessary suffering | How does law protect in war? - Online casebook" (*International Committee of the Red Cross*) <https://casebook.icrc.org/glossary/unnecessary-suffering> accessed 20 October 2021.
[29] See, AP I, part I.
[30] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports, 1996.
[31] "Treaties, States parties, and Commentaries - Additional Protocol (I) to the Geneva Conventions, 1977 - 51 - Protection of the civilian population" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/4e473c7bc8854f2ec12563f60039c738/4bebd9920ae0aeaec12563cd0051dc9e > accessed 17 October 2021. See also, "Customary IHL - Rule 12. Definition of Indiscriminate Attacks" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule12> accessed 17 October 2021.
[32] "Customary IHL - Rule 17. Choice of Means and Methods of Warfare" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule17> accessed 17 October 2021.

There arises a necessity to examine whether armed groups can engage in hostilities in occupied territory and why it might be difficult to establish accountability for war crimes in such a context? We argue that international law, *per se*, does not help negotiate the conflict that involves a non-state entity due to its legal constraints. Further, we highlight the issue that fixing accountability for a non-state, or a State is vexed and perplexed due to the politicisation in view of the involvement of UN Security Council member States. We highlight that IHL cannot be expected to be effectively applied to armed conflicts unless adequate measures are put into place in advance in times of peace. We also discuss mechanisms that can be put into place as possible inceptive solutions while acknowledging that it is very difficult to envision and chalk out an international legal framework that can even begin to address the years of anguish and trauma endured by those affected by the conflict.

In this paper, building upon the May Attacks, the authors argue that armed groups are not prohibited under international law to be involved in conflicts in occupied territories. We argue that the occupied territories, in this case the OPT, have the right of resistance. However, we highlight that the death of civilians and destruction of civilian properties in the armed conflict should amount to violating several of the international law statutes. Part II of the paper examines the inhibiting force of international law on armed conflicts and argues that international law, *per se*, does not help negotiate the conflict that involves a non-state entity due to its legal constraints. It specifies the role of the provisional measures of the International Court of Justice ("ICJ") in upholding IHL and holding aggressor States accountable for acts of violence. Part III of the paper attempts to situate accountability for armed groups under international criminal law. It has been argued that international criminal law does not expressly prohibit or penalise the existence or functioning of armed groups in territories that are occupied by another armed nation. In Part IV, the paper summarises the role that the UN has inadequately played in upholding peace in Palestine and Israel. There is a necessity to examine whether armed groups can engage in hostilities in occupied territory and why it might be difficult to establish accountability for war crimes in such a context. In Part V, we argue that Israel's right to self-defence and Palestine's struggle for liberation from occupation are diametrically opposite, where the former is propagated in a manner misattributing and subjugating the latter. Conclusively, the paper discusses mechanisms that can be put into place as possible inceptive solutions while acknowledging that it is difficult to envision and chalk out an international legal framework that can even begin to address the years of anguish and trauma endured by those affected by the violent conflict.

THE INHIBITING FORCE OF INTERNATIONAL HUMANITARIAN LAW ON ARMED CONFLICTS

IHL is primarily concerned with upholding humane standards of conduct in times of armed conflict when human security is at its most vulnerable. The term "international humanitarian law" alludes to the knowledge of the importance of the *jus in bello*, or war laws. IHL consists of several laws and concepts that govern parties to armed conflicts, such as requiring combatants to distinguish between military and civilian targets, not to use civilians as a purposeful target of operations, and to avoid utilising warfare methods that

cause excessive suffering. It also includes extensive guidelines regarding the humane treatment of civilians, prisoners of war, and the sick and wounded within a party's control. IHL has a long and illustrious history.

The laws of war are as old as battle, and conflict is as old as life on this planet. Although the rules of conflict or warfare were first written in 1863 following the Solferino War, they had existed and been practised from the dawn of time. The earliest communities, including the Papua, Sumerians, Babylonians, Persians, Greeks, and Romans, all had fighting regulations that were rigidly followed by the people.[33] While this area of international law has generally evolved slowly and incrementally, it has undergone radical transformation in the recent decade. A synergy between the innovative jurisprudence of the ad hoc tribunals, the drafting of the International Criminal Court ("ICC") Statute, and State initiatives has re-energized international human rights law.[34]

(i) Israel's Occupation of the Gaza Strip and its Global Perception

The phrase "Occupied Palestinian Territories" is rejected by the Israeli government. Instead, it prefers the term "administered areas," where these places are no longer considered "enemy territories." Israel has ruled the West Bank and Gaza Strip under the military government established during the wars since the occupation began in 1967. The West Bank and Gaza Strip are not covered by Knesset legislation. The military administration has assumed full legislative and executive authority in the Occupied Territories by military order. Any power of "government, legislation, appointment, or administration with respect to the Region or its inhabitants shall henceforth be vested in me alone," proclaimed the Commander of the IDF in "Judea and Samaria" in June 1967.[35] The same proclamation said that existing legislation in the area would continue to be valid if it complied with that proclamation and any subsequent proclamations issued by the military government. This last phrase was supposed to bring the military government into compliance with international law obligations. International law requires an occupying power to apply all previous laws in occupied areas, however it allows for changes to prior laws based on military necessity or altered circumstances that necessitate the changes to protect public interests. The military government has rarely been hampered by this criterion. Over 1200 military orders have been issued by the military government since 1967, bringing significant changes to the administrative structures and substantive laws of the Occupied Territories.[36]

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[33] Mohammad Saidul Islam, "The Historical Evolution of International Humanitarian Law (IHL) from Earliest Societies to Modern Age" (2018) 09(02) Beijing Law Review 294, <http://dx.doi.org/10.4236/blr.2018.92019> accessed 17 October 2021.

[34] Valerie Oosterveld and Darryl Robinson, "The Evolution Of International Humanitarian Law", *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (McGill-Queen's University Press, MQUP 2001).

[35] Howard Grief, "Think-Israel" (*Think-israel.org*, 2022) <http://www.think-israel.org/grief.letterstoshamgar.html> accessed 16 October 2021.

[36] George E Bisharat, "Land, Law, And Legitimacy In Israel And The Occupied Territories" (1994) 43(2) American University Law Review 467 <https://digitalcommons.wcl.american.edu/aulr/vol43/iss2/3/> accessed 11 October 2021.

Israel's policy of settling civilians in occupied Palestinian territory and displacing the native population violates international humanitarian law's most basic principles. As the occupant, Israel is prohibited from using State territory and natural resources for anything other than military and security purposes, or for the benefit of the local population. The illegal acquisition of property by an occupying power is referred to as "pillage" under the Hague Regulations and the Fourth Geneva Convention, as well as a war crime under the international criminal law.[37] Israel's settlement strategy also violates a subset of international law responsibilities known as peremptory norms (*jus cogens*), from which no exceptions are authorised. The norms of the Geneva Conventions are "intransgressible principles of international customary law," according to the ICJ. Only a few numbers of international norms are granted this status, indicating the severity and relevance with which the world community regards them.

Israel's settlements have long been regarded as unlawful under international law by most States and international organisations. The European Union while criticizing the settlements has stated "settlement building anywhere in the occupied Palestinian Territory, including East Jerusalem, is illegal under international law, constitutes an obstacle to peace and threatens to make a two-state solution impossible."[38]

Many UN Security Council and other UN resolutions have criticised the settlements as illegal. Settlements are illegal under international humanitarian law, according to the International Committee of the Red Cross and the Conference of High Contracting Parties to the Fourth Geneva Convention. The illegality of the settlements was recently reaffirmed by UN Security Council Resolution 2334[39], which reiterated the Security Council's request for Israel to cease all settlement operations in the OPT. International agencies and experts have consistently addressed and denounced the major human rights breaches resulting from Israeli settlements.

Constraints of International Humanitarian Law

A consideration of the three principles namely, humanity, impartiality, and neutrality, which form the basic core and ideally should lead humanitarian intervention in times of crisis, can help to address that issue. The first principle is that of humanity. Humanitarian intervention in war and conflict scenarios must be driven entirely by a passion to assist the victims, based on their needs and objective assessment. Impartiality is the second principle of humanitarian action. Humanitarian assistance should in no circumstance "sort" victims based on anything other than their necessities. One must not give in to the pressures and prejudices of bigotry and isolation. The neutrality principle is a supplement to the preceding two. A humanitarian operation is in no way a military operation and treating it like one by attaching any political goal to it does

[37] Amnesty International, "Chapter 3: Israeli Settlements and International Law" (*Amnesty International,* January 2019) <www.amnesty.org/en/latest/campaigns/2019/01/chapter-3-israeli-settlements-and-international-law/> accessed 20 October 2021.
[38] ibid
[39] UNSCR, Security Council Resolution 2334 (*UNSCR*, 2016) <http://unscr.com/en/resolutions/2334> accessed 15 October 2021.

nothing but undermines its legitimacy and, as a result, its acceptability by all parties involved in a conflict situation.[40]

The above principles are still valid and relevant in today's setting. Yet, there continue to be certain challenges to the implementation and application of IHL. There are situations where specific rules of humanitarian law are placed at crossroads, and the fundamental issue no longer remains the ability to apply those laws, but the willingness to do so. An instance of this is the practice of "ethnic cleansing," which entails forcibly relocating or even exterminating segments of the population. In this type of conflict, a spiral of propaganda, terror, aggression, and hostility develops, boosting group identification at the price of national identity and obliterating any prospect of coexistence with other communities.

While the suffering associated with conflict and war has remained constant, the world has seen an increase in common knowledge of IHL and its core principles – and thus of acts that violate those rules. IHL principles and standards have been the focus of extensive administrative, scholastic, and journalistic scrutiny, in addition to the typical expert debates. The fact that IHL has left expert circles and completely entered the public realm has heightened the potential of partisan interpretations and application of its standards. This overall trend has been demonstrated throughout recent years. On several occasions, States have declined to apply IHL even though the cold hard facts indicated the presence of an armed conflict.[41]

Civilians and non-combatants are the main beneficiaries of IHL, which is built on the premise that specific groups of people should be spared as much as possible from the impacts of violence, no matter which side they happen to be on or what reason was given for the crisis, to begin with. Non-application or selective application of IHL, as well as a misreading of its standards for domestic or other political goals, has a direct impact on individuals who never had nor continue to have any direct involvement in the conflict in the first place.

The inclination of States to identify any acts of warfare performed against them by non-state armed organizations as "terrorist" has posed a contemporary problem for IHL, particularly in non-international armed conflicts. While armed combat and terrorist attacks are distinct forms of aggression controlled and governed by separate legal entities, due to continual conflation in the public domain, they have become almost identical. The usage of the phrase "terrorist act" against the backdrop of armed conflict fosters ambiguity which may lead to a situation in which non-state armed organizations neglect IHL rules because they believe they have no obligation to do so.

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[40] Alpaslan Ozerdem and Giovanni Rufini, "Humanitarianism And The Principles Of Humanitarian Action In Post-Cold War Context" <https://www.researchgate.net/publication/242183027_Humanitarianism_and_the_Principles_of_Humanitarian_Action_in_Post-Cold_War_Context> accessed 9 October 2021.

[41] International Committee of the Red Cross, "West Bank: Israel must abide by International Humanitarian Law" (*International Committee of the Red Cross*, 13 September 2018) <www.icrc.org/en/document/west-bank-israel-must-abide-international-humanitarian-law> accessed 17 October 2021.

The rapid advancement of new technology[42] employed as weapons and techniques of conflict, such as cyberwarfare and unmanned weapon systems, has highlighted the importance of evaluating the legal, humanitarian, and ethical issues that these innovations raise. Although IHL treaties do not directly govern new military technology, they must be employed according to IHL. In this context, legal evaluations of new weapons are an important step for States to take to ensure that IHL is followed. However, because of their distinctive qualities, the intended and foreseeable parameters of their deployment, and their foreseeable humanitarian repercussions, issues in understanding and applying IHL to new technologies of warfare may emerge.

Situating Accountability in Armed Conflicts through the International Court of Justice

Incidental proceedings on provisional measures are an essential part of the ICJ's legal practice. A State can submit a written request to the Court, either concurrently with the application starting proceedings or subsequently, requesting that the Court indicate interim actions to protect its interests in the case. The Court has been given the discretion, under Article 41 of its Statute, to designate any provisional steps that should be taken to maintain the respective rights of either party if the circumstances so necessitate. Provisional measures, as suggested by the ICJ, could be a beneficial instrument in ensuring the safety of civilians.[43]

The ICJ has developed a set of standards that must be met in order to indicate the required provisional remedies, also known as interim measures of protection. Before issuing an order, the following conditions are to be met in *Georgia* v. *Russia (I)*[44]: (1) the court must have prima facie jurisdiction; (2) the order is important to prevent irreparable harm to the parties' rights; and (3) there is urgency, i.e., an immediate risk to either party's rights. Provisional measures are especially essential in disputes that threaten international security. An armed conflict between the two States jeopardises world peace and security. Unwillingness to resolve such a scenario increases the likelihood of further conflict escalation. The *Georgia* v. *Russia (I)* case illustrates that in instances of armed conflict, urgency is often a given, especially given the enormous risk of irrevocable damage to civilian life and property.

In *Democratic Republic of Congo* ("DRC") v. *Uganda,*[45] the DRC submitted claims that by engaging in military and paramilitary activities against the DRC and by occupying DRC territory, Uganda violated several statutes of international law by committing acts of violence against DRC nationals and destroying their

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[42] Mian Nairab Khurshid, "International Humanitarian Law And Technological Advancement In Weaponry" (*Courting The Law*, 20 March 2017) <https://courtingthelaw.com/2017/03/20/commentary/ihl-technological-advancement-in-weaponry/> accessed 17 October 2021.

[43] Gentian Zyberi, "Provisional Measures of the International Court of Justice in Armed Conflict Situations" (2010) 23(3) Leiden Journal of International Law 571, <http://dx.doi.org/10.1017/s0922156510000221> accessed 20 October 2021.

[44] *Georgia v. Russia*, Council of Europe: European Court of Human Rights, 31 January 2019, Application No. 13255/07 (France) <www.refworld.org/cases,ECHR,5c530a824.html> accessed 16 October 2021.

[45] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, I.C.J. Reports 2005, p. 168.

property and violated international legal obligations to respect human rights, including the obligation to distinguish between civilian and military objectives during armed conflict.[46] After holding Uganda guilty and accountable for acts in infringement of international humanitarian law, the Court held that Uganda did not conform with the Court's Order on provisional measures. Since, the DRC had only requested a declarative statement, the Court did not consider the issue of the kind of remuneration the DRC would have the right to for this infraction.[47]

Additionally, in *Bosnia and Herzegovina* v. *Serbia and Montenegro,*[48] when the Socialist Federal Republic of Yugoslavia began to disintegrate in the early 1990s, the Republics of Bosnia and Herzegovina, Croatia, Macedonia, and Slovenia declared independence. Serbia and Montenegro declared themselves the Federal Republic of Yugoslavia ("FRY"), because of which, 8000 Bosnian Muslim men were massacred by Serbian forces in a small village called Srebrenica in July 1995, during violent events that erupted in Bosnia and Herzegovina from 1992 to 1995. Bosnia and Herzegovina sued Serbia and Montenegro at the ICJ in 1993, alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide, based on the premise that the FRY committed genocide.[49] Bosnia and Herzegovina claimed that Serbia had violated its international obligations by not complying with the Court's provisional measures and for that violation, Serbia had to pay symbolic remuneration, the amount of which was to be ascertained by the Court. Serbia maintained that any inquiry of legitimate liability regarding indicated infringement of such orders was outside the Court's purview when it came to granting reasonable solutions for a State with regards to the procedures. The Court found Serbia in violation of the orders; however, it did not really accept that it was fitting to concede Bosnia's solicitation for symbolic remuneration. Nonetheless, the Court chose to add a declaration that the respondent had failed to adhere with the Court's Orders suggesting provisional measures in the operative section of the judgement as satisfaction.[50]

It is important that as far as managing remuneration for international law infringement, a simple decisive assertion, even in the operative paragraph, does not appear to satisfactorily address the mischief and damage caused to the Court's own reputation and is considerably farther from addressing the damage done to the State requesting the compensation. Since States have a helpless history of not following the Court's temporary measures, the Court might need to think about different types of satisfactions, like a written

[46] Margaret E. McGuinness, "Case Concerning Armed Activities on the Territory of the Congo: The ICJ Finds Uganda Acted Unlawfully and Orders Reparations" (*ASIL*, 9 January 2006) <www.asil.org/insights/volume/10/issue/1/case-concerning-armed-activities-territory-congo-icj-finds-uganda-acted> accessed 5 February 2022.
[47] ibid
[48] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, ICJ Reports 2007, p. 43.
[49] J Craig Barker and Sandesh Sivakumaran, "Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia And Herzegovina v. Serbia And Montenegro)" (2007) 56 International and Comparative Law Quarterly <https://www.jstor.org/stable/4498097> accessed 11 October 2021.
[50] See, *ICJ Reports 2007* (n 48).

declaration of a conventional expression of remorse to the influenced party and the Court, and the creation of a fund to make a critical commitment to the advancement of agreeable relations between the two nations.

ACCOUNTABILITY FOR ARMED CONFLICTS UNDER INTERNATIONAL CRIMINAL LAW

Armed conflicts are categorised as international armed conflict ("IAC") and non-international armed conflict ("NIAC"). IAC occurs between two or more States, whereas NIAC occurs between groups within the boundaries of a State, without any direct external influence. In a technique that emerged during the Cold War, countries now use a different mechanism to counter their enemies without even being involved in a conflict directly, which is essentially regarded as an NIAC.[51] Notwithstanding the type of conflict, international criminal law prohibits all crimes that are committed during peace or an armed conflict, with special emphasis on protection of non-combatants. This prohibition originates from the 1945 Charter of the International Military Tribunal, which created the court to conduct the Nuremberg Trials.[52] Later, the 1998 Rome Statute, set out crimes that can be committed as part of a planned or widespread attack.[53]

The Rome Statute established the ICC having jurisdiction against the crime of genocide, war crimes, crime of aggression, and the crime against humanity. Unlike Israel, Palestine acceded to the Rome Statute in 2015.[54] Nevertheless the ICC has decided that besides exercising its jurisdiction on Palestine, the territorial scope of this jurisdiction extends to the OPT as well.[55] Moreover, ICC has jurisdiction to prosecute any person, when it is evident that any prescribed crimes has been committed within any State that has acceded to the Rome Statute. ICC opened an investigation into the alleged war crimes committed by Israel and Palestinian armed groups since June 2014.[56] In the wake of May Attacks, the UN Human Rights Council agreed to investigate the alleged crimes committed in Gaza.[57] However, fixing accountability is perplexing in international criminal law.

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[51] Daniel L Byman, "Why engage in proxy war? A state's perspective" (*Brookings*, 21 May 2018) <www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/> accessed 20 October 2021.

[52] Antonio Cassese and Paola Gaeta, Cassese's International Criminal Law (2nd edition, Oxford University Press; 2008), pp. 101, 104, in *Threshold Crossed* (n 60) 29.

[53] UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002), art 7(1).

[54] Israel signed the Rome Statute in 2000 but did not ratify it and said in August 2002 that it did not intend to do so. See, "Palestine and the Rome Statute" (*Parliamentarians for Global Action - Mobilising Legislators as Champions for Human Rights, Democracy and Peace*) <www.pgaction.org/ilhr/rome-statute/palestine.html> accessed 17 October 2021. See also, UNTC (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en> accessed 17 October 2021.

[55] See, *Threshold Crossed* (n 60), 42-43. See also, "Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'" (*International Criminal Court*) <www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-143> accessed 17 October 2021.

[56] Peter Beaumont, "ICC opens investigation into war crimes in Palestinian territories" (*The Guardian*, 3 March 2021) <www.theguardian.com/law/2021/mar/03/icc-open-formal-investigation-war-crimes-palestine> accessed 17 October 2021.

[57] Stephanie Nebehay, "U.N. launches investigation into whether Israel, Hamas committed crimes" (*Reuters*, 27 May 2021) <www.reuters.com/world/middle-east/un-rights-chief-bachelet-says-israeli-strikes-gaza-may-be-war-crimes-2021-05-27/> accessed 17 October 2021.

Israel's apartheid against Palestinians is a well-documented and a widely accepted fact. In February 2022, Amnesty International published a report[58] concluding that the "Israeli authorities must be held accountable for committing the crime of apartheid against Palestinians." The Report details how the expropriation of Palestinian land and property, unlawful killings, forcible transfer, severe movement restrictions, and the denial of Palestinian nationality and citizenship are all elements of a system that amounts to apartheid.[59] Earlier in April 2021, Human Rights Watch released a report concluding that Israeli authorities are committing crimes against humanity of "apartheid and persecution," against Palestinians.[60] Moreover, Israel has long been accused of committing war crimes in Palestine, including unlawful killings,[61] use of disproportionate force causing civilian casualties[62] and forced eviction[63] of Palestinians. Israel has further been accused of unleashing "collective punishment" and systematically repressing and discriminating against Palestinians.[64] Israeli apartheid severely violates international law.[65]

Israel is often accused of committing war crimes in OPT. War crimes constitute grave breaches of the laws applicable in an IAC.[66] Under the IVth Geneva Convention, war crimes include the grave breaches of the principles of wilful killing, destruction of civilian property, and serious injury or death of civilians.[67] Violation of the customs code that includes the intentional targeting of civilians without any distinction or

[58] Amnesty International, "Israel's apartheid against Palestinians: a cruel system of domination and a crime against humanity" (*Amnesty International*, 1 February 2022) <www.amnesty.org/en/latest/news/2022/02/israels-apartheid-against-palestinians-a-cruel-system-of-domination-and-a-crime-against-humanity/> accessed 5 February 2022.
[59] ibid
[60] Human Rights Watch, "A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution" (*Human Rights Watch*, 27 April 2021) <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution > accessed 17 October 2021.
[61] Amnesty International, "Israel And Occupied Palestinian Territories 2020" (*Amnesty International*, 2021) <https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/> accessed 17 October 2021.
[62] Human Rights Watch, "Israel: Apparent War Crimes in Gaza" (*Human Rights Watch*, 13 June 2018) <www.hrw.org/news/2018/06/13/israel-apparent-war-crimes-gaza> accessed 17 October 2021.
[63] "World Report 2021: Rights Trends In Israel And Palestine" (*Human Rights Watch*, 2021) <https://www.hrw.org/world-report/2021/country-chapters/israel/palestine> accessed 17 October 2021.
[64] ibid
[65] Omar Shakir, "Israeli Apartheid: 'A Threshold Crossed'" (*Human Rights Watch*, 19 July 2021) <https://www.hrw.org/news/2021/07/19/israeli-apartheid-threshold-crossed> accessed 17 October 2021. Omar writes, "International criminal law, including the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid and the 1998 Rome Statute to the International Criminal Court, define apartheid as a crime against humanity consisting of three primary elements: (1) an intent by one racial group to dominate another; (2) systematic oppression by the dominant group over the marginalized group; and (3) particularly grave abuses known as inhumane acts. Racial group is understood today also to encompass treatment on the basis of descent and national or ethnic origin. International criminal law also identifies a related crime against humanity of persecution. Under the Rome Statute and customary international law, persecution consists of severe deprivation of fundamental rights of a racial, ethnic, or other group with discriminatory intent. The ratification by the State of Palestine of these two treaties in recent years has strengthened the legal application of these two crimes in its territory. A ruling by a chamber of the International Criminal Court earlier this year confirmed that it has jurisdiction over war crimes and crimes against humanity – including apartheid and persecution – committed in the Occupied Palestinian Territory since 2014."
[66] Rome Statute, art 8(2).
[67] IVth Geneva Convention, art 147. See also, "Customary IHL - Practice Relating to Rule 50. Destruction and Seizure of Property of an Adversary" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter16_rule50> accessed 17 October 2021.

military objective are also regarded as war crimes.[68] Further, targeting civilian areas with the knowledge that incidental loss of life is possible constitutes war crimes. Both Palestine and Israel are parties to the 1949 Conventions, that also apply to a territory under total or partial occupation.[69] The Hague Regulations of 1907[70] define an "occupied territory" as a territory under the control of a "hostile" army. Gaza and the West Bank have been regarded as OPTs since the six-day war of 1967.[71]

Article 42 of the 1907 Hague Convention States that a "territory is considered occupied when it is actually placed under the authority of the hostile army."[72] The ICJ has stated that Israel is an occupying power in OPT.[73] Moreover, the Israeli Supreme Court has recognized that Israel is an occupying power in Gaza.[74] Although Israel withdrew its armed forces from Gaza, its "occupation" persisted, nevertheless. Occupying power is under a duty to respect the laws in force in the occupied territory and prevent the destruction of property and death of non-combatants.[75]

Palestine is recognized as a "non-member observer State" by the UN General Assembly and is recognised as a state by 139 countries.[76] However, the May conflict was majorly between Israel and Hamas, which is an armed group and does not represent the State of Palestine. The UN General Assembly explicitly "*Reaffirms* the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by all available means, including armed struggle."[77]

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[68] "Customary IHL - Practice Relating to Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter2_rule7> accessed 17 October 2021.

[69] Common Article 2 to the 1949 Geneva Conventions provides, they "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

[70] "Treaties, States parties, and Commentaries - Hague Convention (IV) on War on Land and its Annexed Regulations, 1907" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/ihl/INTRO/195> accessed 17 October 2021.

[71] Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory* (A/HRC/40/CRP2, Human Rights Council 2019) <www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A_HRC_40_74_CRP2.pdf> accessed 20 October 2021.

[72] "Occupation and international humanitarian law: questions and answers - ICRC" (*International Committee of the Red Cross*) <www.icrc.org/en/doc/resources/documents/misc/634kfc.htm> accessed 17 October 2021.

[73] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004.

[74] "National Implementation of IHL - Physicians for Human Rights et al. v. Commander of the IDF Forces in the Gaza Strip" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=B9A1E6326E561640C125738A00292E2C&action=openDocument&xp_countrySelected=IL&xp_topicSelected=GVAL-992BUG&from=state> accessed 17 October 2021.

[75] "Occupation and international humanitarian law: questions and answers - ICRC" (*International Committee of the Red Cross*) <www.icrc.org/en/doc/resources/documents/misc/634kfc.htm> accessed 17 October 2021.

[76] "Diplomatic Relations" (*State of Palestine Mission to the United Nations*) <http://palestineun.org/about-palestine/diplomatic-relations/> accessed 17 October 2021.

[77] "A/RES/35/35" (*United Nations Documents*) <http://undocs.org/A/RES/35/35> accessed 17 October 2021.

The accountability for armed groups like Hamas emerges from the UN Charter which refers to "[a]ctions with respect to threats to the peace, breaches of the peace, and acts of aggression."[78] The general notion is that IHL is binding on organised armed groups, i.e., groups that are sufficiently organised for them to be considered a party to a conflict.[79] Although, as David Scheffer explained, "[t]here is no opportunity for the ICC to prosecute an individual for aggression when [s]he acts in a leadership capacity to guide a non-state entity."[80] In the May Attacks, Israel has continuously been bombarding what they perceived as Hamas targets in the Gaza strip, without providing any evidence for the same, not even to the UN.[81] Nevertheless, in case of there being actual legitimate targets, which is totally not the case here,[82] the burden of civilian deaths would be on Hamas, as they are conventionally expected not to be based in civilian areas.

The Israeli "settler-colonialism"[83] is derived from the idea of Zionism that dreams of creating a State exclusively for Jews and the construction of Temple Mount in place of the Dome of the Rock.[84] Thus, it is argued that Israeli apartheid is a form of colonialism, as it looks at the Palestinians as a subjugated race.[85] The Jews arrived in Palestine, and started their illegal settlements colonising the Palestinian land, bringing forward the State of Israel. Even though, the occupying force transferring its local civilians into the occupied territory is strictly prohibited under the IVth Geneva Convention,[86] while the excessive and unjustified destruction of property is prohibited under the First Geneva Convention.[87] Moreover, transferring civilians into the occupied territory or the deportation of the civilians under occupation would

[78] "Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51)" (*United Nations*) <www.un.org/en/about-us/un-charter/chapter-7> accessed 18 October 2021.
[79] Jann K Kleffner, "The applicability of international humanitarian law to organized armed groups" (2011) 93 (882) International Review of the Red Cross 443, 444 <http://dx.doi.org/10.1017/s181638311200001x> accessed 17 October 2021.
[80] David Scheffer, "The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute" (2017) 58 (Spring) Harvard International Law Journal 83, 84 <https://harvardilj.org/wp-content/uploads/sites/15/Scheffer-Formatted.pdf> accessed 17 October 2021.
[81] Stephanie Nebehay, "U.N. launches investigation into whether Israel, Hamas committed crimes" (*Reuters*, 27 May 2021) <www.reuters.com/world/middle-east/un-rights-chief-bachelet-says-israeli-strikes-gaza-may-be-war-crimes-2021-05-27/> accessed 18 October 2021.
[82] Several investigations into the May Attacks concluded that the buildings Israel destroyed were neither related to Hamas, nor were being used for military purposes. See, Al Jazeera English, "Gaza: 60-Minute Warning" (29 September 2021) <www.youtube.com/watch?v=qNoxt-I6MOY> accessed 4 February 2022.
[83] Kathryn Medien, "Israeli settler colonialism, 'humanitarian warfare,' and sexual violence in Palestine" (2021) 23(5) International Feminist Journal of Politics 698, <https://doi.org/10.1080/14616742.2021.1882323> accessed 18 October 2021.
[84] VICE News, "Inside the Battle for Jerusalem" (19 May 2021) <www.youtube.com/watch?v=ZiSRCPiklhI> accessed 5 February 2022.
[85] Noura Erakat, "Beyond Discrimination: Apartheid is a Colonial Project and Zionism is a form of Racism" (*EJIL Talk*, 5 July 2021) <www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism/> accessed 17 October 2021.
[86] "Treaties, States parties, and Commentaries - Geneva Convention (IV) on Civilians, 1949 - 49 - Deportations, transfers, evacuations" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/ihl/WebART/380-600056> accessed 17 October 2021.
[87] "Treaties, States parties, and Commentaries - Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field,1949 - 50 - Grave breaches" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/WebART/365-570061> accessed 17 October 2021.

constitute a war crime under the Rome Statute.[88] As a result, a UN Special Rapporteur in the OPT, echoed designating the creation of Israeli settlements as a war crime under the Rome Statute.[89] Yet, Israel has remained protected from external intervention, as it gets solid backing from the United States, which has exercised its veto powers on at least 53 UN Security Council resolutions[90] critical of Israel over the past five decades. Further, the US being the only nation that does not consider the Israeli occupation illegal gives Israel a constant escape from accountability.[91] In fact, rights groups believe that the US is complicit in Israel's commission of crimes against humanity and war crimes.[92]

ISRAEL'S RIGHT TO SELF-DEFENCE OR PALESTINE'S STRUGGLE FOR LIBERATION FROM OCCUPATION?

As the besieged Gaza strip was indiscriminately bombarded, some argued[93] that Israel's attacks on civilian buildings are an attempt to demoralise Palestinians and weaken their resolve. The strategy adopted by Israel while bombing Palestinians is based on the "Dahiya Doctrine," a policy that dates to Israel's indiscriminate attacks on military and civilian infrastructure in a locality of Beirut in 2006. The policy stresses the Israeli army should use "force that is disproportionate to the enemy's actions and the threat it poses."[94] This doctrine is broadly based on the idea of "collective punishment," which is employed to deter the entire population and "turn back the clock"[95] of a country's infrastructure and development. Israel understands that it cannot provide evidence for its military actions and consequently, denies cooperating with investigations and labels efforts of fixing accountability as "anti-semitic."[96]

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[88] See, Rome Statute, art 8(2)(b)(viii). See also, "Elements of Crimes" (*International Criminal Court*) <www.icc-cpi.int/resourcelibrary/official-journal/elements-of-crimes.aspx> accessed 17 October 2021.

[89] Display News, "Occupied Palestinian Territory: Israeli settlements should be classified as war crimes, says UN expert" (*OHCHR,* 9 July 2021) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27291&LangID=E> accessed 17 October 2021.

[90] Creede Newton, "A history of the US blocking UN resolutions against Israel" (*Al Jazeera*, 19 May 2021) <www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel> accessed 17 October 2021.

[91] Mohammed Haddad, "Palestine and Israel: Mapping an annexation" (*Al Jazeera*, 26 June 2020) <www.aljazeera.com/news/2020/06/26/palestine-and-israel-mapping-an-annexation/> accessed 17 October 2021.

[92] The Centre for Constitutional Rights, issued their statement, that the "United States is complicit in Israeli war crimes and crimes against humanity against Palestinians." See "U.S. Complicit in Israel's War Crimes and Crimes Against Humanity Against Palestinians: Center for Constitutional Rights Responds to Israel's Violent, Illegal Attempts to Suppress Palestinian Freedom Struggle" (*Center for Constitutional Rights,* 12 May 2021) <https://ccrjustice.org/home/press-center/press-releases/us-complicit-israel-s-war-crimes-and-crimes-against-humanity> accessed 17 October 2021.

[93] Linah Alsaafin, "What is behind Israel's targeting of prominent buildings in Gaza?" (*Al Jazeera*, 19 May 2021) <www.aljazeera.com/news/2021/5/19/what-is-behind-israels-targeting-of-prominent-buildings-in-gaza> accessed 4 October 2021.

[94] TRT World, "Israel's 'Dahiya Doctrine,' a plan for mass civilian deaths in Gaza" (*TRT World*, 14 May 2021) <www.trtworld.com/magazine/israel-s-dahiya-doctrine-a-plan-for-mass-civilian-deaths-in-gaza-46709> accessed 5 February 2022.

[95] ibid. In 2006, Israel's General Dan Halutz stated that the Israeli military would target Lebanon with the aim to "turn back the clock" by 20 years.

[96] See, *Gaza: 60-Minute Warning* (n 82).

The phrase "Israel's right to self-defence" has long been cited to justify the slaughter of Palestinians, even though it is the Palestinians who have the right to resist Israeli occupation.[97] Hannah Arendt argued that "a trial resembles a play in that both begin and end with the doer, not with the victim...In the centre of a trial can only be the one who did – in this respect, he is like the hero in the play – and if he suffers, he must suffer for what he has done, not for what he has caused others to suffer."[98] Ever since its creation, Israel has been occupying and creating settlements exclusively for Jewish settlers, while hundreds of thousands of Palestinians have been kicked off their land.[99] Despite repeated tragic loss of human lives, the Israeli and Palestinian authorities have historically failed to investigate human rights violations.

Human Rights Watch investigated three IDF strikes on Gaza during the May Attacks that killed 62 Palestinian civilians and concluded that these attacks were "apparent" war crimes, since there were "no evident military targets" in the vicinity.[100] Whereas several unguided missiles were launched from Gaza towards Israel which killed and injured civilians in Israel and Gaza, also amounted to war crimes, the rights group said.[101] The IDF bombed four major and crucial towers in the Gaza Strip, alleging all of them to be linked to Hamas, however, several investigations have revealed that they were not being used for military purposes.[102] Therefore, the narrative that Israel engages in "humanitarian warfare" against a "terrorist" adversary elevates Israel to a democracy while delegitimizing Palestine's struggle for liberation from occupation.[103]

During the May attacks, the US extended its support to the Israeli strikes, and Israel claimed that it bombed Gaza to defend Israelis from Hamas' rocket fire.[104] However, self-defence, which was clearly meant as an exemption to the prohibition on the use of force in interstate relations, cannot be used to justify the use of

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[97] CJ Werleman, "No phrase distorts reality more than 'Israel's right to self-defence'" (*TRT World*, 12 May 2021) <www.trtworld.com/opinion/no-phrase-distorts-reality-more-than-israel-s-right-to-self-defence-46640> accessed 20 October 2021.

[98] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published 1963, Penguin Group 1994) 9 *in* Michael Bachmann, "Theatre and the Drama of Law: A 'Theatrical History' of the Eichmann Trial" (2010) 14 Law Text Culture 94, 98-99 <https://ro.uow.edu.au/ltc/vol14/iss1/7> accessed 20 October 2021.

[99] Amnesty International, "Israel's Occupation: 50 Years of Dispossession" (*Amnesty International*, June 2017) <www.amnesty.org/en/latest/campaigns/2017/06/israel-occupation-50-years-of-dispossession/> accessed 20 October 2021.

[100] See, *Apparent War Crimes*, (n 62). See also, Human Rights Watch, "Gaza: Israel's May Airstrikes on High-Rises" (*Human Rights Watch,* 23 August 2021) <www.hrw.org/news/2021/08/23/gaza-israels-may-airstrikes-high-rises> accessed 17 October 2021.

[101] Human Rights Watch, "Palestinian Rockets in May Killed Civilians in Israel, Gaza" (*Human Rights Watch.* 12 August 2021) <www.hrw.org/news/2021/08/12/palestinian-rockets-may-killed-civilians-israel-gaza> accessed 17 October 2021.

[102] See, *Gaza: 60-Minute Warning*, (n 82).

[103] See, *Kathryn Medien* (n 83) 15.

[104] See, United States Department of State, "Secretary Antony J. Blinken and Israeli Prime Minister Benjamin Netanyahu Statements to the Press" (*United States Department of State,* 25 May 2021) <www.state.gov/secretary-antony-j-blinken-and-israeli-prime-minister-benjamin-netanyahu-statements-to-the-press/> accessed 17 October 2021. See also, TOI Staff, "No rocket fire from Gaza or IDF strikes reported, as truce appears to take hold" (*The Times of Israel,* 20 May 2021) <www.timesofisrael.com/liveblog-may-20-2021/> accessed 17 October 2021.

force against individual criminals.[105] Further, any non-state actor, including an armed group acting alone, is incapable of committing an act of aggression.[106] The Rome Statute defines the "crime of aggression" as an act done by a person to direct the political or military actions of a State.[107] Although a legal regime for the armed groups remains largely undefined, they may be held accountable *qua* collective entities.[108] In terms of collective armed action, the current law does not give legal valuation to armed groups. IHL attempts to manage the consequences of the existence of armed groups.[109] However, under the principle of command responsibility, State officials can be held criminally responsible, and vicarious liability is applicable too.[110]

Armed groups are created mainly to challenge the existing order in a society. The law, on the other hand, maintains aloof from the subject, even though armed groups are frequently chastised. The biggest stumbling block is the State, which continues to dominate international law despite practical setbacks, both quietly and violently.[111] The lack of effective governmental authority must be balanced against the concept of self-determination when determining whether an entity under occupation fits the criteria for statehood, especially when the occupying power violates IHL.[112]

Palestine's armed struggle is rooted in the UN General Assembly Resolution A/RES/35/35.[113] The prohibition of the use of armed force only concerns States in their diplomatic relations, and not concerns situations arising within the borders of a State.[114] As a result, armed organisations cannot be considered to be forbidden from employing force against other armed groups or against any government under international law.[115] Under *jus contra bellum*, the UN Charter's prohibition on using force only applies to international relations, and a national liberation struggle against a colonial State can be legally launched.[116] Moreover, the UN Charter does not expressly condemn NIACs,[117] though the UN Security Council has intervened militarily on several occasions of internal conflicts. While significant developments have taken place in the regulation of NIAC, organised armed groups generally remain excluded.[118]

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[105] Zakaria Daboné, "International law: armed groups in a state-centric system" (2011) 93 (882) International Review of the Red Cross 395, <http://dx.doi.org/10.1017/s1816383112000057> accessed 17 October 2021.
[106] ibid 403.
[107] Rome Statute, art 8 bis (1).
[108] *Kleffner* (n 79) 444.
[109] *Zakaria* (n 105) 402.
[110] *Threshold Crossed* (n 60) 41.
[111] *Zakaria* (n 105) 424.
[112] Robert Heinsch and Giulia 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) 18(4) Journal of International Criminal Justice 927, <https://doi.org/10.1093/jicj/mqaa048> accessed 17 October 2021.
[113] "A/RES/35/35" (*United Nations Documents*) <http://undocs.org/A/RES/35/35> accessed 17 October 2021.
[114] *Zakaria* (n 105) 398.
[115] *Zakaria* (n 105) 399. This statement follows from the position that traditional international law made no provision, in whatever shape or form, for NIACs, Zakaria argues.
[116] The exceptions to the prohibition to use force in international relations are: "individual and collective self defense, a decision or an authorization of the UN Security Council and, most people would add, national liberation wars in which a people is fighting in the exercise of its right to self-determination ...". See, *Zakaria* (n 105) 399.
[117] *Zakaria* (n 105) 400.
[118] *Kleffner* (n 79) 460-461.

Unlike Palestine, Israel is not a State party to AP I and is thus not bound by its provisions.[119] However, Israel's attack on civilians including children who are specifically protected under customary IHL, without any legitimate military objective, amounts to grave breaches under the IVth Geneva Convention.[120] Israel's bombardment of civilian buildings, who had no connections to Hamas, violated the principles of proportionality and distinction,[121] and should amount to war crimes. Israel has historically bombed Palestinian infrastructure in the past, accusing it of being linked to Hamas.[122] Even so, the law prescribes that unless there is compelling evidence that an attack on civilian property would provide a definite military objective, such an attack constitutes a war crime, and all feasible measures must be taken to avoid such attacks.[123]

POSSIBLE SOLUTIONS TO THE CONFLICT - WHAT OUGHT TO BE DONE?

(i) The Conundrum of One State v. Two States

The Palestine Liberation Organization ("PLO") was established in 1964 with the objective of establishing an independent Palestinian State.[124] It now has diplomatic connections with 100 countries and has been a United Nations observer since 1974. Things altered in 1967, when Israel was attacked by its neighbours.[125] The Palestinian Declaration of Independence cited two sources of legitimacy. It referred first to the Palestinian people's "inalienable rights in the land of its patrimony." It also referred to General Assembly

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119 Israel's actions tend to infringe IVth Geneva Convention and the AP I.

120 Amira Hass, "Israel is wiping out entire Gazan families on purpose" (*Haaretz*, 19 May 2021) <www.haaretz.com/israel-news/gaza-israel-wiping-entire-palestinian-families-hamas-1.9820005> accessed 17 October 2021. See also, "Customary IHL - Rule 20. Advance Warning" (*International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule20> accessed 17 October 2021. See further, "Customary IHL - Rule 25. Medical Personnel" (*ICRC databases on international humanitarian law | International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule25> accessed 17 October 2021.

121 Although, warning is a minimum and necessary requirement but not sufficient to conform with the principle of precaution. See, Alexandra Olson, "Media demand Israel explain destruction of news offices" (*AP NEWS*, 15 May 2021) <https://apnews.com/article/israel-middle-east-israel-palestinian-conflict-media-business-050b1cc02293d702cfbe7db59b6ecbf4> accessed 17 October 2021. See also, Reuters, "Israel destroys Gaza tower housing AP and Al Jazeera offices" (*Reuters*, 15 May 2021) <www.reuters.com/world/middle-east/gaza-tower-housing-ap-al-jazeera-collapses-after-missile-strike-witness-2021-05-15/> accessed 17 October 2021.

122 Al Jazeera, "Israel resumes bombardment of Gaza" (*Al Jazeera*, 1 January 2009) <www.aljazeera.com/news/middleeast/2009/01/200911815688117 4.html> accessed 17 October 2021. See also, Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (A/HRC/12/48, Human Rights Council 2009) <www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> accessed 20 October 2021.

123 "Customary IHL - Rule 16. Target Verification" (*ICRC databases on international humanitarian law | International Committee of the Red Cross*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule16> accessed 17 October 2021.

124 Zack Beauchamp, "In Defense Of The Two-State Solution" (*Vox*, 2021) <https://www.vox.com/policy-and-politics/22442052/israel-palestine-two-state-solution-gaza-hamas-one> accessed 13 October 2021.

125 Annabelle Quince, "Israel, Palestine and the problem with the two-state solution" (*ABC Radio National*, 22 July 2014) <www.abc.net.au/radionational/programs/rearvision/the-problem-with-the-two-state-solution/5614534> accessed 17 October 2021.

Resolution 181 as providing "the conditions for international legitimacy that guarantees the right of the Palestinian Arab people to sovereignty on their homeland."[126]

The conventional approach to settling the perennial Israel-Palestine problem is the "two-state solution," which strives to establish separate and autonomous Israeli and Palestinian States. On the opposite spectrum are the Palestinian proponents who advocate for the one-state solution over the two-state solution. They contend that the former is morally "superior" or "legitimate" than any other since it allows for the reinvigoration of the concept of popular sovereignty to defend political rights. Unlike the Oslo peace talks, which concentrated on residents of the West Bank and Gaza, the one-state option would include all Palestinian political constituents, whether they live in the Diaspora or in Israel. They consider it to be better positioned than the two-state solution to fulfil Palestinian rights, both political and civil, because it recognizes and preserves the "right of return," as stated by UNGA Resolution 194, allowing Palestinian refugees to return home while simultaneously recognizing the rights of Israelis and Jews who live in the area.[127]

The one-state option is opposed by Israelis in both the mainstream political elite and the public. They are concerned that it will undermine their Jewish identity, and they see a need for their own to shield them from anti-semitism. Palestinians have raised misgivings about the practicality of the one-state solution, both at the official and grassroots levels, due to Israel's vehement rejection, and particularly out of fear of Israel's economic and political dominance over Palestinians inside one State.[128]

The Role of the United Nations

The devastating Israeli-Palestinian conflict is exactly the type of issue that the UN was created to address and settle. After all, it was instrumental in the creation of Israel as a State more than 70 years ago. The UN was founded with the stated goal of preventing wars and conflicts. The attainment of this great goal, however, has proven to be a difficult task. The number of wars waged since the organisation's founding in 1945, as well as ongoing conflicts around the world, begs the question of what is obstructing UN endeavours for peace and stability.[129] A series of UN Security Council, General Assembly, and Human Rights Commission resolutions do signify a possible juncture wherein the UN could return to its long-standing consensus: "an international peace conference under the auspices of the United Nations, based on all relevant UN resolutions." That would necessitate a new peace process based not only on Resolution 242, which calls for an exchange of territory for peace, but also on a slew of other resolutions such as 194, which mandates Palestinian refugees' right to return and compensation, resolutions designating East

[126] John Quigley, "The Case for Palestine: An International Law Perspective" (first published 2005, 2nd edn, Duke University Press).
[127] Ghada Karmi, *Married to Another Man: Israel's Dilemma in Palestine* (Pluto Press 2007).
[128] Leila Farsakh, "The One-State Solution and the Israeli-Palestinian Conflict: Palestinian Challenges and Prospects" (2011) 65(1) Middle East Journal 55, <www.jstor.org/stable/23012093> accessed 17 October 2021.
[129] Nisar Ahmed Khan, "Israel-Palestine Issue: Role of the United Nations" (*Modern Diplomacy*, 27 December 2017) <https://moderndiplomacy.eu/2017/12/27/israel-palestine-issue-role-united-nations/> accessed 17 October 2021.

Jerusalem as occupied territory, resolutions declaring settlements illegal, and so on.[130] That being said, raising the above-mentioned prospect is hopeful at best and does not at all imply that such a thing will happen considering the hegemony of the US in the Security Council.

Recommendations

A closer reading of the humanitarian conventions reveals that their substance is still relevant in general and that the current issues stem mostly from a lack of means and aim to execute these measures. As a result, the issue is more political than legal, and it is very fruitless to look for inaccurate cures for these problems. While it is possible that it could result in some significant changes in some of the areas, it is also possible that it will give certain States an excuse to abandon important concerns that had previously been agreed upon. Furthermore, the goal of universality, which has been nearly achieved in the case of the Geneva Conventions, would have to be pursued again for many years in the case of the new rules.

Ethnic racialism is at the heart of the Israeli-Palestinian conflict, which boils down to a tenacious battle over territory claimed by Israeli Jews as a biblical gift and sought by Palestinians seeking self-determination. Three major issues have been recognized in the Israeli-Palestinian conflict. The nationhood requirement is the first. Both Jews and Palestinians believe themselves to be part of a single country. The second issue is one of land sharing. Palestinians' political identity and nationhood are based on narrow strips of land and denying one group's validity over that region is a devastating defeat for the other. Third, the diasporas have a significant role in instilling a sense of common peoplehood in the two sub-communities, therefore reaching an agreement is viewed as going against the Palestinian or Jewish diasporas psychologically.

At the 26th International Conference of the Red Cross and Red Crescent,[131] some countries proposed implementing a mandatory system wherein States would have to submit reports on the various actions they took to uphold IHL. Most States were opposed to such a system since it was mandatory, even though they recognized the importance of such policies. Instead, they requested the International Committee of the Red Cross ("ICRC") to provide consulting services in that area. The ICRC has since established such services, which not only aid States that request assistance by building relationships amongst them, but also encourage them to take the essential steps through continual communication.

Imposing individual criminal accountability under international criminal law is the need of the hour. The Nuremberg Military Tribunal declared, "Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of

[130] Phyllis Bennis, "What Has Been the Role of the UN in the Israel-Palestine Struggle by Phyllis Bennis" (*TARI*, January 2001) <www.tari.org/index.php?option=com_content&view=article&id=14&Itemid=15> accessed 17 October 2021.

[131] "The International Conferences of the Red Cross as a factor for the development of international humanitarian law and the cohesion of the International Red Cross and Red Crescent Movement- ICRC" (*International Committee of the Red Cross*) <www.icrc.org/en/doc/resources/documents/article/other/57jmr9.htm> accessed 17 October 2021.

international law be enforced."[132] Individuals who are exceptionally responsible for war crimes can thus be prosecuted. The likes of Dahiya Doctrine must be abolished, and those accountable for perpetuating it, must be prosecuted, and held guilty in its strictest terms.

Economic sanctions can be yet another mechanism. The UN Security Council has the authority to impose sanctions on Israel for aggravating the humanitarian crisis in Gaza. Israel has trade agreements with the US, Canada, and the European Union, and is the United States' top receiver of total aid. The US has given Israel a total of $146 billion in bilateral assistance and missile defence funding through 2020.[133] Individual States can put economic pressure on Israel to offer humanitarian relief, reduce embargo limitations, and take a willing stance in ceasefire negotiations. The terrible reality is, however, that action by the UN Security Council is harder to achieve due to the politics and veto powers of its members, particularly the US.

CONCLUSION

The law is one of many instruments used to govern human behaviour, and no field of law, international or domestic, can be expected to fully regulate a problem as multifaceted as violence and armed conflict. While the IHL seeks to prevent specific behaviours in armed conflicts, there will always be States, non-state armed groups, and people who will break the norms regardless of the consequences. In other words, if the law is seen as the sole means of preventing or reducing violence, it must be realised that it has its own limitations. When considering efficient solutions to any form of violence - political, economic, societal, cultural, and other elements that influence human behaviour just as profoundly must also be considered. Furthermore, one cannot just expect IHL to be effectively applied in times of armed conflict unless adequate measures are put into place in advance in times of peace. The OPTs remain hopeful for a solution, even though they suffer indistinct and disproportionate damage because of Israeli violence on supply lines and buildings such as hospitals and schools, which lack a clear military advantage and are thus viewed as war crimes. The Soviet invasion of Afghanistan was faced with resistance from armed groups backed by the US and its allies. Similar occupation is in view in Palestine giving rise to armed groups calling for "liberation," however ineffective the call might be. Notably, international law fails to protect civilian lives, both in Israel and Palestine. As the British Historian Arnold Toynbee said, "The tragedy of Palestine is not just a local one; it is a tragedy for the world, because it is an injustice that is a menace to the world's peace."[134] It is difficult to envision and chalk out an international legal framework that can even begin to address the years of anguish and trauma endured by many families. The only ray of hope is that the Palestinians are granted self-determination to construct a solution that places them on a level footing with Israel in terms of bargaining strength. The intention of IHL is to aid the vulnerable, rather than allowing the law to be used as a device

[132] Philippe Kirsch, "Applying the Principles of Nuremberg in the ICC" XXXX <www.icc-cpi.int/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf> accessed 17 October 2021.
[133] Jeremy M Sharp, *U.S. Foreign Aid to Israel* (CRS Report RL33222, 2020) <https://sgp.fas.org/crs/mideast/RL33222.pdf> accessed 17 October 2021.
[134] "GA 7th emergency special session - Verbatim record - Question of Palestine" (*Question of Palestine*) <www.un.org/unispal/document/auto-insert-178406/> accessed 17 October 2021.

for excusing guilt and flouting the international law that is too vulnerable to be called a law. The international community must stand together to alleviate the grave deaths and sufferings in Palestine.

THE PREJUDICED EVOLUTION OF HUMANITARIAN CONVENTIONS AND POSTCOLONIAL HEGEMONY: DIFFERENT AGGRESSORS, COMMON VICTIM

Shivesh Saini[1]

ABSTRACT

In this paper, the author seeks to question the contentious past and trace the evolution of international humanitarian law that was mainly cultivated from previous international conventions. This article reveals the dissembler approach of the western bloc in both pre and post-colonial eras to overshadow the aspirations of the third world. In the pre- colonised era, the duplicity of colonial powers went unheard for an elongated period. However, the same was explicit in the post-colonial era due to the greater involvement of the underprivileged world and overt violations of human rights by the so-called civilized world. Ascribed to the Machiavellian tactics of the northern bloc, various articles and provisions of the Geneva convention and additional protocols remain imprecise and ambiguous to date. Consequently, these conventions require critical evaluation as they reflect the extent of western hegemony in the way in which they are approved and negotiated. Therefore, the first part of this paper aims to assess the development of humanitarian laws from a third world standpoint. Whereas, another part of the paper analyses the infamous efforts of another hegemon of the post-cold war era i.e. the USA to subvert the authority of the International Criminal Court to conceal its humanitarian violations. The USA attempted to re-interpret the humanitarian laws in a manner that suited its political agenda. As such, this paper concludes that these humanitarian laws formed dramatically by unconventional means should be re-interpreted by overlooking past differences. In doing so, primacy should be given to ICC, ICJ and other international bodies and tribunals with broader jurisdiction and liberty to operate over national agencies and courts.

I. INTRODUCTION

International humanitarian law is described as the *jus Bello*, which means "the law in waging war".[2] By and large, the history of international humanitarian law can be traced and located in the codes and conventions of warfare that dominated different continents and cultures. These conventions are part of both conventional and customary spheres of law that seek to bind the execution of laws of combat. These regulations began to evolve in the late 19th century and recuperated from debates and discussions in the late 20th century where they gained global compliance. The core repository of humanitarian law comprises the Hague Convention and Geneva Conventions of 1949. The distinction could be made between these conventions as customary and conventional regulations of humanitarian law as the Geneva Convention

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[2] Rotem Giladi, '*THE JUS AD BELLUM/JUS IN BELLO DISTINCTION AND THE LAW OF OCCUPATION*'[2008]41 Isr. Law Rev.

provided authoritative humanitarian principles arising from the treaty obligations whereas, the Hague conferences assured the comprehensive attempt to humanize the war. The international jurists owe the nativity of international humanitarian law to Sir Henry Dunant, who was the founder of the International Committee of Red Cross, as he initiated the tradition of the Geneva chain of conventions.[3] As a result, the movement began to codify and assemble humanitarian laws which ultimately led to the dawn of modern-day International Humanitarian law.

However, state-sponsored violence continued to despoil humanity and ravaged it with its utmost force. This is a generic phenomenon that can be observed in the evolution of any customary law. As far as IHL is concerned, this divide can be traced to the era of colonialism which exposed third world countries to various war threats.[4] The Changing aspect of warfare in terms of technology and nature of conflicts demands impartial engagement with prevalent civil wars and undue gross violation of human rights by militarily advanced countries. This lack of proportion of power among states disputes the validity of these laws and raises questions such as *What are these irregularities? What are the institutions that could be set up to avoid their disregard?* This paper attempts to analyse the advent of these questions and to answer them adequately with proper reasoning.

The dawn of the 21st century proved to be challenging for the reliability of humanitarian laws, especially after the 9/11 confrontation. Its legitimacy came into a big dilemma as it failed to deal with the emerging form of enemies and new circumstances of warfare such as non-international armed conflict or civil war. Further, they try to justify their actions by re-interpreting IHL creating an alternative false reality. The same can be observed from the Macedonia conflict of 1949, Kosovo and Iraq in 2003.[5] The supremacy of the UN Security Council in deciding on humanitarian intervention in internal armed conflicts led to the domestication of these laws at the hands of world hegemons[6]. Additionally, the authority of domestic courts over international tribunals in the evolution of IHL prevented the universal applicability of this branch of law. Of course, the enforceability of IHL is subjected to deliberation and negotiations, however, it is evident that the northern bloc owns sufficient complications over the reliability and degree of acquiescence of these laws which will be covered under this paper. Furthermore, various scholars such as Christine Chinkin and Kate Paradin opined that how the concept of nationality can have a depraved impact on the adjudication of cases involving Gender-based discrimination as it might be influenced by local biases generally based on ethnic and religious differences.[7] Thus, the later part of the paper tries to analyse why reliance on the

[3] Seema Agarwal, '*international humanitarian law: a brief history'* (Indian Institute of legal studies)< INTERNATIONAL HUMANITARIAN LAW: A BRIEF HISTORY (jilsindia.com)>accessed on 21 July 2021.
[4] J.G. Gardam and M.J. Jarvis, *Women, Armed conflict and international law* (2001) at 11.
[5] Mohammed Ayoob, '*Third world perspective on humanitarian intervention and international administration'*(2004) 10(1) The politics of international administration http://www.jstor.org/stable/27800512 .
[6] Vesselin Popovski, *'Un security council: Rethinking Humanitarian intervention and the veto'*(2000) 31 Security dialogue https://www.jstor.org/stable/26296647 .
[7] Kate Paradine and Christine Chinkin, 'Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords' (2001) 26 The Yale Journal of International law 103.

national tribunals could create a puddle of the quandary in interpreting the humanitarian laws owing to the inherent biases.

A large number of these ambiguous and prejudiced regulations demands reforms to a notable extent. Kevin Clements, the foundational director of the National Centre for Peace and Conflict Studies, University of Otago also raised the question of accountability as to who should be held accountable, why, and how.[8] This question indicates uncertainty over the operation of IHL due to the absence of any long-standing authority to secure these regulations. This sense of distrust arose from the existence of problematic doctrines of IHL such as military necessity, proportionality and distinction in armed conflict that stem from the dominance of the northern bloc in Geneva and Hague conventions. Therefore, the main synopsis of this paper is about the paralysis of international institutions and laws for the sake of the affluence of certain authoritative states who yearned for political and economic greatness.

THE EVALUATION OF HUMANITARIAN LAWS AND ARRIVAL OF CONTROVERSIES

The contribution of ICRC is inestimable in the formation and evolution of IHL. Going by the definition of ICRC, IHL can be defined as -

> International humanitarian law is part of the body of international law that governs relations between states. It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.[9]

The legal world in the 19th Century, came up with similar definitions to illustrate the dawn of a new branch of law that they were witnessing. Some lawyers continue to differentiate between The Hague part of regulations and the Geneva part of regulations.[10] They expressed that as the Hague convention communicated about the means and integrity of warfare, it should be included in the customary branch of law. However, since the Geneva Convention intensively deals with humanitarian concepts, it should be treated as a conventional branch of law. Nevertheless, another sect of lawyers argued that both parts somewhat contained humanitarian principles and therefore, they intersect each other on frequent occasions. As a result, both of these conventions are sheltered under the wide-ranging umbrella of humanitarian laws whether it is customary or conventional. As Cherif Bassiounni, Professor of Law at DePaul University said "they are so intertwined and so overlapping that they can be said to be two sides of the same coin".[11] Eventually, this particular stance got more acceptance after the Kosovo intervention of 1999 and

[8] Kevin Clements, The challenge of conflict: International law responds(Judith Gardam ed, 13th vol. 2006).
[9] ICRC, *'what is international humanitarian law?'*(ICRC, 31 December 2014) https://www.icrc.org/en/document/what-international-humanitarian-law# accessed 22 July 2021.
[10] Bassiouni, '*the normative framework of international humanitarian law* : o*verlaps, gaps and ambiguities'* (1998) at 200.
[11] Bassiouni, supra note 9 at 200.

International Humanitarian Law emerged as a central branch of international customary law with abundant disagreements ahead.[12]

Primarily, these disagreements owed their existence to the false notion of superiority. The foundation of international Humanitarian law rests on the concept that while western liberal states are civilized, the eastern southern countries embody the characters of regression and savageness. During the 19th and 20th centuries, imperialism absorbed almost the entire continent of Asia and Africa for the triumph of the white man's burden theory. The consequence of this colonisation can be seen lucidly in the formation and evolution of these humanitarian laws. However, when the initial exertion for the formation of IHL took place in the form of the Geneva Convention of 1864,[13], the world was going through excessive forms of exploitation and subjugation in the form of annexation by European powers. This convention was pre-arranged by the western community at a time when concepts such as statehood, democracy and sovereignty were subject to great deliberations and controversies. As a result, only 12 states signed the convention.[14] Not only were the colonized states exploited, but they were also marginalized from such conventions as Turkey was the only non-Christian state that signed the peace treaty of Paris in 1856. However, In the mid 19 Century, the European empires were undergoing a revolution in one form or another. Consequently, the powers were trying to regulate the war as the armies were increasingly bigger in size with the employment of unwilling soldiers in warfare. Therefore, the initial comprehensive effort to regulate the conflict began after the Brussels declaration of 1874, which resulted in the Franco-Prussian war that changed the political scenario of Europe to a notable extent.

(i) The Franco Prussian War: War that Divided the World

In this section of the paper, the author seeks to discover the repercussions of the Franco- Prussian war that eventually led to the expansion of humanitarian laws through the Brussels Conventions of 1874. This war directly moulded the direction of humanitarian laws where the governments themselves were stern and eager for the codification of these laws contrary to their earlier stance where only civilian groups were considered as the protagonist.

The foremost climacteric moment arose when the French troops surrendered before Prussian troops and a new wave of anti-monarchists swept across France.[15] The proletariats of France decided to form their National Defence Government and continue their struggle against the advancing Prussian army. In this

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[12] Amnesty International, *Federal Republic of Yugoslavia: collateral damage or unlawful killings*? Available at https://www.amnesty.org/en/documents/eur70/018/2000/en/ (6 June 2000).
[13] ICRC, *'The 1864 Geneva convention'* (ICRC, 18 august 2013) https://www.icrc.org/en/doc/resources/documents/treaty/geneva-convention-1864.htm accessed on 22 July 2021.
[14] Yale law school, Laws of War: *Amelioration of the Condition of the Wounded on the Field of Battle* (Red Cross Convention); August 22, 1864 (Yale law school) https://avalon.law.yale.edu/19th_century/geneva04.asp accessed on 22 July 2021.
[15] JOHN MERRIMAN, MASSACRE: *THE LIFE AND DEATH OF THE PARIS COMMUNE OF 1871* 18-38 (2014)

tough situation, the French government signed an armistice where they agreed to transfer Alsace and Lorraine.[16] This acknowledgement of chastening peace by the French parliament further ignited the movement known as 'the Commune'.

The decisive phase of the war started when the French government itself sent their regular army to Paris and thus, initiated the horrifying massacre of the 19th century. The French Government exhibited these people as enemies and justified their execution. However, the homicide of these nationalist and virtuous individuals triggered a new discussion in a political world where scholars such as Karl Marx used it as an excuse to initiate the struggle against bourgeois[17]. The short-lived commune has already made a lasting mark on the fluctuating political order of Europe. The atrocities ignited the philosophies of socialism and anarchy which are predominant even today. The feminist drive too was triggered due to the slaughter of commune women[18] that even to one extent denounced the idea of marriage.[19] These muffled voices were now the cause of anxiety in the minds of political authorities who were already shaken by cross-border aggressions. Hobsbawm pointed out the bourgeois apprehension of the proletariat revolution, thus emphasizing their political fear.[20] The ideals of democracy and liberalism became central and the commune slaughter was martyrized and became the figure of worker confrontation on the international stage. Scholars such as Bakunin inspired further insurrections in France thereby ensuring the continuation of sentiments.[21] Feared by such ideas, the capitalist and exploitative regimes of Europe signed the League of three Emperors of 1873.[22] Bismarck conveyed his horrors and apprehensions to his counterparts to infatuate the swiftly mounting movement. This can be apprehended by reviewing the Russian plan of national defence of 1873 which was designed to counter the wave of politically different ideas from European counterparts.[23] Lord Lyons, the British ambassador to France apprehended the communist tendencies which were present in the political atmosphere of England. He was of the view that England was on the verge of destruction in the hands of dissenting nationals.[24]

Thereby, European powers to circumvent these circumstances decided to organise the Brussels convention. This convention was taken as an opportunity to address the encounters that were experienced by governments in this conflict. Therefore, the political establishments of Europe addressed the issue quite seriously and henceforth, refused private entities to partake in the convention.[25] The inspiration behind this non-inclusion was to regulate the war field and prevent any insurrectional group from taking control. The

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[16] See, the debates in the National Assembly, 17 February 1871 – 1 March 1871.
[17] ALISTAIR HORNE, *THE FALL OF PARIS* (2d ed., 1990)at 430.
[18] ROBERT TOMBS, *THE WAR AGAINST PARIS 1871* (1981) at 132.
[19] Id. At 105.
[20] ERIC HOBSBAWM, *THE AGE OF CAPITAL*: 1848–1875 77-79 (1975) at 167.
[21] BERTRAND TAITHE, *CITIZENSHIP & WARS, FRANCE IN TURMOIL 1870-1871* at 38 (2001).
[22] Hobsbawm s*upra* note 19 at 167.
[23] *See*, JOHN L. H. KEEP, SOLDIERS OF THE TSAR: *ARMY AND SOCIETY IN RUSSIA* 1462 –1874, 276 (1985).
[24] Lord Lyons to Lord Granville, Paris, March 4, 1873, in II LORD LYONS: *A RECORD OF BRITISH DIPLOMACY*, 44.
[25] Brussels Conference Protocols 2, 7.

Germans even made it clear that they did not want any non-governmental participation as 'they are notorious enemies of the German Reich'. Consequently, it can be concluded that that convention was held to please the apprehensions and fears of European political establishments and to guard the bourgeois interest which was the greatest urgency. The humanitarian garb was used to conceal their actual intentions to prevent further insurgency which could challenge their authority.

Brussels Convention, 1874

The euro-centric side of IHL suffered countless failed attempts to conceal the irregularities in IHL and such was the case in the Brussels Convention. After the failure of French imperial forces to comply with the Geneva convention of 1864, the destruction of cultural heritages and the mass killings of communards, it was expected that these issues would be addressed by the governments. However, the opportunity was not utilized to elucidate the application of code in a civil war situation, like France. Even the invitees were assured that the conference would not deal with civil war-like situations. After refusing to address this issue, the august gathering of the Brussels convention justified the French position and the acts committed by them during the commune days. Additionally, article 9 of the Russian draft sought to include the irregular combatants within the scope of the Brussels convention however, such a quest proved to be futile.[26] Nevertheless, article 9 of the Brussels convention assigned the rights and duties2 to armies and in some cases to volunteer corps too only if they satisfied the conditions laid down by the convention.[27]Through these conditions, the convention refused to extend the protection to irregular forces such as communards to leave them at the mercy of the enemy. The most advantageous rule of the declaration was to prohibit the launch of firearms and bombardment of open towns. However, it is noteworthy to explain that armies lacked the technology to bombard such towns from a considerable distance. Thus, the only means left to continue the hostility was to march in the town directly which was not even discussed in the declaration. Even the German delegates rejected the proposal of the initial Russian draft wherein it invoked the Rousseau-Portalis doctrine that sought to exclude citizens from the horrors of war. However, this proposal was missing in the final text of the declaration as according to the German delegate, when nations clash and put their resources in wars, it will become difficult to limit the consequences of War. [28] The European powers decided not to sign the agreement considering such principles as 'too humanitarian'.[29] The European motives can be understood by analysing the Brussels Convention in light of the Franco- Prussian war. The western governments sought to secure their base of power by excluding the citizens from the frontline to ensure better control over violence. In the so-called 'Vision of Peace' of these conferences, the principal motive was to shield the interest of the propertied class. The most voiced achievement of these

[26] Compare Tracey Leigh Dowdeswell, *The Brussels Peace Conference of 1874* and the *Modern Laws of Belligerent Qualification*, 54 OSGOODE HALL LAW JOURNAL 805, 831 (2017)
[27] Project of an International Declaration concerning the Laws and Customs of War, Art. 9 (Aug. 27, 1874).
[28] Report sent by German Minister of War Georg von Kameke to Bismarck (July 18, 1874) in preparation for the Brussels conference (Folder R 901/ 28961 No. 46; the German Foreign Office, National Archives in Berlin).
[29] Ibid 17, at 66.

conventions was that the government allowed private associations to treat the wounded and sick soldiers. However, no measures were taken to end the already raging war.

After the mass devastation of WWI and WWII, the international community needed to have well-defined legal treaties for the regulation of warfare. For this purpose, the Geneva conventions of 1949 were formulated that pertains to several matters of warfare. Yet, during its documentation, half of the world was still colonized and therefore, independent participation could not be ensured. Hence, it became significant to analyse the manner that how these conventions prioritized only those issues that were essential to the dominant powers.

The Four Geneva Conventions, 1949

The Geneva conventions of 1949 constitute the backbone of humanitarian laws of modern times. They seek to protect, treat and incorporate fundamental safeguards for the victims of armed conflict.[30] These conventions directly stem from the principles of the First Geneva Convention of 1864. The previous conventions were now prepared to be replaced by these new Geneva conventions in the backdrop of the destruction in world war 2. The maltreatment and callous torture of the armed fighters in world war led to the recognition of a principle of 'prisoners of war'. These conventions adopted several new principles such as common article 2 which illustrates international conflicts[31] and common article 3, which pertains to non-international armed conflicts and civil war.[32] These principles are enshrined in four Geneva conventions of 1949 that dealt with different aspects of humanitarian regulations.

These four Geneva conventions accomplish the main objective of IHL. No doubt that they can be considered a great success in the field of laws of warfare. They are more appropriate in contemporary times and ensure greater participation of the third world as compared to their predecessors. Despite these constructive characteristics of convention, it still cannot escape the one common characteristic of the earlier convention –the triumph of western political interest over apprehensions of the rest of the world. Hence, this section of the paper aims to critically evaluate the formation of the Geneva convention and the involvement of the global south in this process. This analysis also notes that most developing countries were either colonised or in the process of decolonisation from imperial powers. The initial contention was related to the belligerent occupation of territory. The term 'belligerent occupation' can be defined as the hold of an enemy state over the state territory and its people, without varying the sovereignty of the state and without terminating the administrative and institutional system of such an occupied state.[33] On the

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[30] Red cross, '*Summary of the Geneva Conventions of 1949 and Their Additional Protocols'* (American Red Cross, April. *2011*)https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf . Accessed on 23 July 2021.

[31] Rulac, '*International armed Conflicts*' (Geneva Academy) available at International armed conflict | Rulac accessed on 23rd July.

[32] ICRC, '*ARTICLE 3: CONFLICTS NOT OF AN INTERNATIONAL CHARACTER'* (*I*CRC) https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3 accessed on 23 July 2021.

[33] Benvenisti E, '*The Origins of the Concept of Belligerent Occupation'* (2008) 26 Law and History Review 621.

other hand, 'Debellatio' is a situation wherein the state loses its sovereignty and the fortune of the occupied territory lies in the hands of the aggressor.[34] Hence, 'Debellatio' can be considered as the conservative and narrow form of occupying a state. It is worthwhile to note that in the backdrop of WWI and WWII, certain circumstances were predominant in Europe in the 19th century which gave rise to the practice of belligerent occupation. Hence, European powers sought the inclusion of laws that would govern the situation of belligerent occupation.[35] However, there was not even a single provision dealing with debellatio despite its more conservative and coercive nature. Even the colonial situation was not considered to be an occupation. The general excuse that was given behind such discriminative regulation was the lack of sovereignty of these colonial states. As these colonies were not considered as states at that time, they were denied humanitarian protection. Resultantly, it appeared that the situations of debellatio and colonial occupation were excluded to accomplish higher aspirations of European hegemony. It helped the colonizers to regulate large territories and enabled them to exploit the natural resources of colonies for economic advantage. These controversial exclusions and principles justified the contentious articles of previous conventions, such as article 43 of the Hague convention which allowed the belligerent occupant to regulate occupied territories. Article 64 of the fourth Geneva Convention sought to broaden the scope of article 43 of the Hague Convention 1949. This was done by permitting the occupier to bring the necessary changes to regulate the territory by giving the excuse of inevitability.[36]

The delegates of diverse backgrounds were empathetic towards the misery of world war 2. However, they failed to realize that the severity of colonialism was no less than that. At times, due to this rage of tyranny, the struggle between colonies and colonists was more disparaging than any armed conflict. Despite the gravity of this issue, it was not addressed in the Geneva convention thereby ending the optimism of the underdeveloped world. However, the sign of transition appeared with the inclusion of common article 3 which seemed to include civil wars. The background of this argument can be traced to the conference consisting of various governmental professionals who had assembled to discuss the convention for the protection of war victims in 1947.[37] While revising the provisions of the Geneva Convention, the delegates of third world countries argued that these provisions should extend to the situation of colonial civil wars to confer the sovereignty and right to self-determination to colonised territories as these principles were only limited within the borders of colonial powers. Based on this discussion, ICRC presented the initial draft for discussion to all delegates and societies of ICRC at the XVII International Conference of Red Cross in Stockholm in 1948. This draft seemed to be an apparatus to halt the western hegemony as it

[34] Schmitt, Michael N., '*Debellatio'* (October 2009). MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 2009, Available at SSRN: https://ssrn.com/abstract=1610012 Accessed on 24 July 2021.

[35] The regulations related to belligerent occupation was dealt with and attached in the Hague convention (lV) of 1907.

[36] Sassòli, Marco, *'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers'*(2005), Vol. 16, No. 4, pp. 661-694, European Journal of International Law https://ssrn.com/abstract=907198 accessed at 24 July 2002.

[37] Report on the work of the conference of government experts for the study of conventions for the protection of war victims (Geneva, April 14-26, 1947) at 8.

contained the provisions dealing with civil war.[38] This occasion appeared to change the course of history to address concerns of the third world which went unheard for a long time. Unfortunately, this attempt proved to be short-lived as the new and revised draft did not even refer to the term 'colonial conflict' as the text was approved and amended later without any proclamation. Later the report informing about the amendment stated that the words especially cases of civil war, colonial conflicts and wars of religion were deleted.[39] Therefore, this amended draft was presented in the Geneva Convention which did not addressed the issue of colonial conflict as the draft was abruptly amended without any prior notification. The deletion of these words was attributed to the elevated concerns of colonial powers as it might be apprehended that UK, France and fellow colonial powers would never accept this proposal as it would impact their colonial and imperial tendencies. Regrettably, the outcome was quite different from what was earlier anticipated as an absence of any provisions for colonial wars increases the hindrance for justice. This can be substantiated from the assertion of the Soviet delegate, who noted, "civil and colonial wars were often accompanied by violations of international law and were characterized by the cruelty of all kinds. The suffering of the population in the instance of civil and colonial wars was as distressing as that which led Henry Dunant to realize the need for regulating the laws of warfare."[40] This assertion proved to be factual in the instance of the Congo and Yemen civil war. An identical concern was put up by the diplomat of Mexico as well[41]. Therefore, it can be concluded that the exclusion of civil wars from the Geneva convention resulted in the denial of rights of thousands of individuals who lost their lives in civil conflicts.

The Additional Protocols of 1977

As stated previously, there are some contentious issues and lacunas in the Geneva convention. To counterbalance those omissions, the ICRC resolved to convene another conference in 1974 to restructure the law in the right direction. This conference was widely recognized as approximately 700 delegates of over 174 countries attended the meeting[42]. This conference came to be acknowledged as additional protocols of 1977 that proved to be another breakthrough in the formation of humanitarian laws after the Geneva Convention of 1949. While additional protocol 1 deals with international armed conflict, additional protocol 2 deals with non-international armed conflict.[43]In additional protocol 1, novel principles such as the principle of proportionality, military necessity and the definition of guerrilla warfare were materialized

[38] Report on seventeenth International Red Cross Conference (Stockholm, 1948) at 72.
[39] Draft revised for the protection of war victims by International Committee Of Red Cross, XVIIth INTERNATIONAL RED CROSS CONFERENCE (Stockholm, August 1948) at pages 9 and 226.
[40] Final Record of the Diplomatic Conference of Geneva of 1949 Vol.ll, Section B (Examination of all the articles by Joint Committee, Coordination Committee and Drafting Committee) at page 14.
[41] *Ibid*, at 12.
[42] Claude Pilloud, *'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949'*(1987) ICRC at xxxiii.
[43] PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Entered into force 7 December 1978), 1125 UNTS 3 (International Armed Conflict).
Also see, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTION OF 12 AUGUST 1949 (Adopted on 8 June 1977, Entered into force 7 December 1977), 1125 UNTS 609 (Non-international Armed conflict).

which are subjected to contentions. However, factors such as equal participation from the southern block and evolving jurisprudence of human rights ensured the equal and free representation of the Global south.[44]

The initial strife started over the question of liberation movements or colonial conflicts which was disputed in the Geneva convention too. The same question was deliberated in additional protocol 1.[45] Again, the third world saw this as an opportunity to further their motive to include colonial conflicts in the domain of international armed conflict. After the unforeseen result of the Geneva convention, numerous legal experts considered colonial conflicts as an internal dispute and it was cemented as an obvious conclusion. However, the third world was firm on its stance. As a result, the eastern Europe bloc consisting of countries such as Tanzania and Algeria conferred their proposal to include these conflicts within the domain of IHL.[46] Western states countered such a proposal by refusing to differentiate between just and unjust war and argued that it would corroborate the dangerous nature of war.[47] Ultimately, after a few more deliberations, the long-standing dispute was resolved and the proposal was accepted.[48] It was apprehended that the western bloc will be aggravated by such acceptance. Fortunately, this was not the case.[49] This was because the effect of the proposal was limited to much fewer places as the decolonisation process was already completed by the 1950s. This acceptance was seen as the victory for the eastern bloc after years of deliberations and discussions which led to the surge of optimism in the third world. However, certain other contentious issues led to the confrontation between the two blocs and thereby led to conflict.

Guerrilla Warfare

After its first crucial breakthrough, the Additional Protocol 1 of the Geneva Convention entered its next stage. The next contention was associated with the recurrent usage of guerrilla warfare. The history of this irregular warfare can be drawn from the Apalachee resistance to Spanish forces.[50] The delegates of western states, particularly Mr Longva of Norway claimed that such frequent usage of guerrilla tactics was not anticipated and it demands regulation.[51] The Northern block sought to regulate these tactics as it yielded favourable results for revolutionaries in colonial regimes. The west was trying its best to constrain its usage to avoid further fatalities of its imperial forces. To frame firmer regulations, the west argued that laws should be formed to address the changing facets of warfare as guerrilla tactics were not covered under the

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[44] See Amanda Alexander, *'A Short History of International Humanitarian Law'* (2015) 26 European Journal of International Law 124.
[45] International Committee of the Red Cross*, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) xxxi.
[46] Michael Bothe, Karl Josef Partsch and Waldemar A Solf,*' New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*' (Martinus Nijhoff, 1982) 41.
[47] John F DePue, *'The Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949 — Its Impact upon Humanitarian Constraints Governing Armed Conflict'* (1977) 75 Military Law Review 71, 97.
[48] *Supra note*, 40
[49] Charles Lysaght, *'The Attitude of Western Countries'* in Antonio Cassese (ed), The New Humanitarian Law of Armed Conflict (Editoriale Scientifica, 1979) 350, 354.
[50] Gubernia, '*Guerrilla Warfare'*(Marxist.org)< https://www.marxists.org/glossary/terms/g/u.htm> accessed 26 July 2021.
[51] Keith Suter, *An International Law of Guerrilla Warfare* (Pinter, 1984) 1.

law.[52] However, the Western Delegates were silent on the earlier regulations that applied to irregular combat. These regulations were formed in the Hague convention of 1907 and were even applied by the Germans in ww1 and ww2 and by the US in Vietnam.[53] The reason for this silence was to frame much stricter laws as colonial warfare and revolutionary struggles were breeding grounds for guerrilla tactics. On the other hand, the southern bloc viewed such tactics as entirely fair and justified. They also demanded new laws and regulations as according to them, the old laws were incapable of protecting combatants engaged in guerrilla combat.[54] Despite the same plea, both the northern and southern blocs differed on the rationale behind such demand. Therefore, nearly all the delegates were looking forward to negotiating on framing a new set of regulations concerning guerrilla warfare.

As far as the drafting of new regulations is concerned, there were conflicting opinions on both sides. For the third world, the objective was to achieve relaxation on restrictions and assistance to colonial regimes.[55] However, the western bloc saw it as an opportunity to provide incentives to guerrilla fighters to persuade them to follow the law.[56] To achieve their objective, Europeans proposed three conditions to be followed. These conditions consist of 'organized armed struggle 'meaning that they should operate under a responsible command, to distinguish themselves from civilians and to follow the law.[57] The eastern bloc opposed these conditions of organized headship and asserted that following the law will eventually accomplish the western objective to withhold the protection.[58] North Vietnam even argued that the principle of distinction will provide impetus to western forces to attack guerrilla fighters easily.[59] Therefore, the southern bloc chose to stay firm on their stand without any compromise. To facilitate the convention, ICRC was able to present the draft in the fourth session after two years.[60] The draft comprises two preceding conditions however, these were not necessary for the insurgents to be classified as 'prisoner of war ' except in case of military engagement and military deployment. The fascinating part is the lack of any mutual conscience over the term 'military deployment' and it is the reason for the acceptance of this draft as article 44. The very ambiguity of this article becomes the reason for ending this confrontation.[61] It was perceived more as a compromise rather than mutual acceptance.[62] Even those who are in support of this

[52] James E Bond, *'Protection of Non-Combatants in Guerrilla Wars'* (1971) 12 *William and Mary Law Review* 787, 789–90 < https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2757&context=wmlr> accessed 26 July.
[53] Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Quadrangle Books, 1970) 136.
[54] *Official Records of the Diplomatic Conference,* vol 14, 366. Mr Todoric (Yugoslavia) speaking.
[55] *Ibid,* 342 *Mr Belousov* (Ukraine delegate) speaking.
[56] George H Aldrich, '*New Life for the Laws of War*' (1981) 75 American Journal of International Law 764, 770.
[57] 'Draft Protocol Additional to the Geneva Conventions of August 12, 1949' in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Geneva* (1974–1977) (Federal Political Department Berne, 1981) vol 1, 13 ('Official Records of the Diplomatic Conference (FPDB)').
[58] *Ibid*, Algeria at 522.
[59] *Ibid,* at 466.
[60] *Official Records of the Diplomatic Conference,* Vol. 15, 155 (Egyptian representative).
[61] George H Aldrich, *'Guerrilla Combatants and Prisoner of War Status'* (1981) 31 American University Law Review 871, 878–9.
[62] Nigeria described it as a '*victory for reason and justice*': *Official Records of the Diplomatic Conference* (FPDB), above n 60, vol.15 at 180.

draft accepted the ambiguity of this article and were concerned about the reduced protection of civilians.[63]The two strong narratives put forth by both the coalitions could prove to be fatal for the supervision of future warfare. Here, the position of both these blocs was subjected to much criticism. The ambiguous nature of the article endangers the life of many civilians and thus, increases the scope of unjustness. This so-called humanitarian provision has the authority to obscure the civilian status of any individual, consequently making him/her exposed to possible injustice. This was the result of an ideological clash amid two conflicting coalitions at work. On one hand, the idea of sophisticated warfare and military aesthetic of the western side prevails, whereas, on the other hand, the deep-rooted recollections of colonial regimes and imperialism subjugated the eastern thought. Both sentiments were strong enough to be negated and hence, a negotiation was realized as the only route to end the confrontation.

Reprisal

The next contention which surfaced was on the issue of reprisal. The principle of reprisal is contained in paragraph 6 of article 51 of additional protocol 1, which prohibits retaliation against civilians.[64] Some countries were willing to accept this provision contentedly as previous customary law permitted reprisal in certain circumstances and it was being observed as a positive transition from previous laws.[65] Except for France, who argued that this provision would not leave any room for the country with an annihilated population to retaliate, this provision was accepted by the convention without many deliberations.[66]

However, the disagreement was about to commence after the question of reprisal against civilian objects. Many heated debates and discussions were centred around reprisal against objects. Even ICRC apprehended that this provision will entice opposition therefore, it was initially proposed on the committee level where it was approved.[67] After that, it was faced with much opposition and hostility when it was later proposed on an international platform. The developed coalition consisting of Australia, the US, Germany and UK specified that this rule is impracticable to its core and hazardous as it removes the deterrence which will encourage the adversary to commit crimes.[68] Australia even chose to abstain from voting and remained firm on its stance. The Australian delegate asserted that reprisal against the object will do nothing in furthering the objective of IHL.[69] This rule is based on the issue of precautions and instructions of military commanders that itself became the contentious innovation of additional protocol 1 and drew elongated discussions as its implementation is more or less depends on the will of the commander of that force. Finally, a conclusion was reached by adding the ambiguous term 'all feasible precautions' which even

[63] *Ibid*, vol.15 170(*Greece*), 171(*Netherlands*),174(*Sweden*),162(*Mexico*) and 163*(Austria*).
[64] *Ibid*, at 265.
[65] *Ibid*, at 312.
[66] *Official records of Diplomatic Conference* vol.6 at 164.
[67] *Supra note* 49*,* at 323.
[68] Stanislaw E Nahlik*, 'Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law,* Geneva 1974–1977' (1978), Law and contemporary times at 59.
[69] See LC Green, '*The Geneva Humanitarian Law Conference 1975'* (1975) 13 Canadian Yearbook of International Law 295, 302. Also see*, Official Records of the diplomatic Conference* vol.6 at 176.

amplified the hindrance of idiosyncrasy.[70] Similar ambiguity was shaped in the case of the term 'military deployment'. The consequence was also proved to be identical as despite modifying provisions, the countries were still in a dilemma. These predicaments just increased the apprehensions instead of resolving the clashes and encouraging resolutions. These conflicts invited many questions that needed to be answered with rational thought: *Why was the western world justifying the mass killings of civilians in the name of proportionality? How can they try to escape their accountabilities of torturing civilians in colonial territories and why does the third world seem to settle on ambiguous terms and their vague connotations for the sake of satisfying their self-conceit?* The answer is that both these blocs appeared to attain their notion of humanitarian philosophies based on their past experiences and prejudices. The northern bloc was looking to accomplish their former hegemony of military influence and power aesthetics. Contrarily, the eastern bloc sought to avenge those oppressions and tyrannies by opposing the western dominating novel laws even at the cost of ambiguous and vague regulations. This eastern oriented sentiment amplified after world wars and spread during the Vietnamese and Algerian conflicts. These vague laws are subject to indistinctness till date which creates ambiguity over various issues such as the definition of Guerrilla Warfare and the nature of non-international armed conflicts. The only solution perceptible is to frame these laws once again by neglecting the former position and prejudice with a rational and humanitarian frame of mind. However, at the same time, it should also be stated that the obligation of reform is higher on the northern bloc owing to the previous oppression and injustice they had inflicted on the third world. Therefore, the present insecurities of the third world are justified as they have suffered subjugation from similar countries who dominated the procedure of framing these humanitarian laws. Even in current times, the northern bloc seeks to surge this subjugation by asserting their dominance over the International Criminal Court which is a statute based authority to penalize war crimes and human rights abuses. The determination behind such domination is to conceal their atrocities and grave violations of IHL to defend their armed forces and political stalwarts from the jurisdiction of ICC. They used the benefit of being in the hegemonic position to negotiate the downfall of ICC especially by coercing the states to accept their conditions. These unrealistic demands and their fraudulent use by Northern hegemons to dilute the liberty of ICC will be dealt in the next part of the paper.

INTERNATIONAL CRIMINAL COURT: A POLITICAL MANIKIN

The international criminal court, set up by the Rome statute of 2002, delivers the means for implementing the International Humanitarian Law in addition to punishing the criminals of mass atrocities.[71] However, even after 2002, the world experienced the Iraq invasion, Guantanamo detention by the US, the assassination of Saddam Hussain and an upsurge in terrorism.

The American attempt to marginalize ICC is subject to great discussions in the international community. The US sought to protect its army and nationals from prosecution by negotiating bilateral immunity

[70] *Supra note* 49 at 372.
[71] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 90, *entered into force* July 1, 2002, available at rs-eng.pdf (ICC-cpi.int).

agreements with various countries. These agreements dilute the legal power of ICC and deliver immunity to the citizens of the US.[72] Furthermore, authoritative countries tried to overshadow the power of ICC by giving effect to the legislation that sought to confer the power of prosecuting criminals to domestic courts. For instance, countries such as Belgium[73], Australia and the UK have passed legislation to prosecute criminals irrespective of their nationality and place of crime committed.[74]. On similar lines, Spain's High court opted for a firm stand against the universality of tribunals and laws.[75] It empowers the higher judiciary of Spain to prosecute the accused if another state with greater jurisdiction fails to act on the issue. Hence, it can be concluded that state-driven penalization of criminals in domestic tribunals drove the ICC to a secondary position. An imperative instance of the primary role of the state to prosecute international criminals according to their prejudice can be noted in the Pinochet case where the house of lords acknowledged the view that sovereign immunity should be given to representatives for their acts done in an official capacity.[76] These constraints were specifically put up by the countries of the security council who enjoy special control over the working of international courts by the virtue of their permanent membership.

Therefore, it is crucial to look at the political context that will assist us in determining the extent of independence of ICC from the influence of the security council. After its inauguration in 2003, the court managed to get representation from all of the continents. However, the weak foundation of ICC became evident just after one week when the NATO coalition was resolute to invade Iraq with fierceness. Here, the proponents of Hedley's Bull theory rightly concluded that the society of common rules and regulations will cease to exist as the US with its influence decided to invade Iraq without any consideration for ICC and UN.[77] The indication of ICC infancy in front of the security council can be asserted by the statement of ICC's first president Justice Phillippe Kirsch where he said 'by prophets of doom and gloom of the demise of the ICC before it is even born strike me as a little premature'.[78]A lot of unsolicited attention was given to the court after its creation. This can be recognized by reading the resolutions 1422 and 1487 of the security council.[79] These resolutions sought to deliver immunity to United Nations peacekeeping personnel from countries that were non-signatories of the Rome convention. The US intended to intimidate the

[72] Silal Khan, '*Status of the US Bilateral Immunity Agreements under the Rome Statute"* [2020] CILJ.
[73] Stefaan Smis and Kim Van der Borght, '*Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives"* [2003] (8) 18 ASIL <https://www.asil.org/insights/volume/8/issue/18/belgian-law-concerning-punishment-grave-breaches-international> Accessed at 28 July.
[74]See, G Triggs, "*Implementation of the Rome Statute for the ICC: a quiet revolution in Australian Law*" (2003) 25 *Sydney Law Review*, 507-34.
[75] Herve Ascensio, '*Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals'* (2003) 1 Journal of International Criminal Justice 690.
[76] *Reg. v. Bow Street Magistrate, Ex p. Pinochet*, [2000] 1 AC 61 (HL).
[77] Tim Dunne, *'Society and Hierarchy in International Relations'*, (2003) 17 (3) International Relations 316.
[78] Philippe Kirsch, *'Keynote Address'*, (1999) 32 Cornell International Law Journal 437, 442.
[79] UN Security Council Resolution 1422 adopted by the Security Council at its 4572nd meeting, on 12 July 2002, UN Doc S/Res/1422 (2002) ('Resolution 1422'); *UN Security Council Resolution 1487* adopted by the Security Council at its 4772nd meeting, on 12 June 2003, UN Doc S/Res/1487 (2003) ('Resolution 1487').

council to refuse the renewal of all United states peacekeeping missions by using veto power.[80] Despite the robust opposition from the international community, the security council approved resolution 1422, which instructed that ICC must not commence any trial of such military assignments that were authorized by the UN for peacekeeping purposes.[81] This resolution was renewed for another 12 months in 2003[82] which again met with strong criticism from lawyers and members of civil societies, including Phillipe Kirsch, who was about to become the president of ICC.[83] The same criticism can be sensed in UN Secretary-General Kofi Annan's statement where he asserted that its renewal, if routine, will diminish the authority of the court and UN peacekeeping authorities.[84] The United States again in June 2004, tried to renew the resolution but fortunately, was not able to do so. Due to the dread of its notorious activities, the US wants to escape from the jurisdiction of ICC especially after its war on terror in 2003 which led to several cases of human rights and humanitarian law violations.

Owing to their erroneous interpretations of humanitarian codes for their advantage, the international community is now undergoing the consequences of the re-interpretation of humanitarian principles by powerful states and their national tribunals. They carved out exceptions and technicalities that best resemble their agenda. The implication of ambiguity over the principles of prisoners of war and proportionality still exist. Due to the USA's unsubstantiated claim that IHL is not pertinent in the case of Afghanistan and al-Qaeda, the international community is still perplexed on the applicability of common article 3 of Geneva conventions and additional protocol II. Therefore, the next section of the paper will deal with the legal 'Black Hole' that has been created in International Humanitarian Law and how the national tribunals have contributed to it. This contribution highlights the evidentiary hurdles and problem of biases that could influence trials in domestic courts and consequently, discourage the dispatchment of justice.

THE INEFFECTIVE IMPLEMENTATION OF BYGONE IHL

In terms of the evolution and implementation of its substantive principles, IHL is quite comprehensive as compared to its other counterparts in international law. However, this comprehensive nature of IHL is a shortcoming in its effective implementation as the principles and tenets of the subject are quite vague in nature. As can be grasped from the previous section of the paper, these principles are the result of the political urgency to accomplish personal objectives. The reason for such defilement is that the current implementation mechanism is politically motivated based on personal interest. These complications owed their existence to a lack of collaboration, mutual assistance and dearth of political will of concerned states.

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[80] Neha Jain, " *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*" [2005] 16 (2) EJIL < CHI16(2).book(chi116.fm) (ejil.org)> accessed on 28 July.
[81] UN Security Council*, Security Council resolution 1422* (2002) [on United Nations peacekeeping], 12 July 2002, S/RES/1422 (2002)
[82] UN Security Council, *Security Council resolution 1487* (2003) [on the United Nations peacekeeping], 12 June 2003, S/RES/1487 (2003).
[83] Philippe Kirsch, John T Holmes and Mora Johnson, *'International Tribunals and Courts'* in David M Malone (Ed), *The UN Security Council: from the Cold War to the 21st Century* (Rienner, Boulder, 2004) 289-90.
[84] 'States Send Clear Message that ICC Exemption will not be Automatic', CICC, International Criminal Court Monitor, issue 25, September 2003, 4.

One such complication is the over-classification of armed struggle. The recent technological innovations, the emergence of non-state actors and third-party interposition are such complications that act as hindrances in the applicability of IHL as they cannot be fitted in the watertight definition. Even though the Geneva convention of 1949 does not describe the word 'armed conflict', it is divided into two divisions- (a) international armed conflict and (b) non-international armed conflict. However, Professor Pictet defines the expression of armed conflict as "Any difference arising between states and leading to the intervention of members of armed forces is international armed conflict".[85] He further adds that the intensity and time frame of the conflict does not hold any significance.[86] This assertion was relevant for decades however, now the position has been changed and it has been expected that a convinced level of intensity should exist to be qualified as an armed conflict.[87] The reason for such change is the emergence of low intensity and swift wars that are prevalent today. Apart from these wars, the evolution of proxy war and terrorism has not been dealt efficiently in humanitarian law. This has been suggested to contain the intermittent interstate activities such as ceasefire violations and border incursions. However, till date, these offences are not classified in any of the two prearranged categories. Even the recent act of surgical strike by Indian armed forces which resulted in some casualties cannot be classified due to the short time frame of the strike.[88] The Indian side argued that since they attacked terrorists on Pakistani soil, they cannot be held accountable for violating the territorial integrity of Pakistan as they had acted in self-defence.[89] Pakistan denied the happening of such surgical strikes from Indian forces and held them unsubstantiated.[90] However, even if that strike was actually done then in that case too, India cannot be held accountable as the act of surgical strike has not been dealt under humanitarian laws, not as of now to say the least. Thus, it can be determined that IHL till now, does not have any provisions to deal with such inter-state conflicts and they do not qualify as international armed conflicts.

Another such complication concerning the implementation of IHL is correlated with non-international armed conflict that is primarily governed by Common Article 3 of the Geneva convention and additional protocol II. The same problem persists as the common article 3 gives a very broad outlook of the expression 'Non-International armed conflict'. The careful reading of the article suggests that the armed conflict should be of non-international nature in the territory of high-contracting parties of the dispute. Despite this, no remedy has been recommended as to what laws will administer the conflict if that non-state actor is not

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[85] See, *Jean Pictet, Commentary on the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952), 32.
[86] *Ibid.*
[87] ICRC*, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report of 31st International Conference of the Red Cross and Red Crescent* (Geneva, Switzerland, 28 November-1 December 2011) accessed on 20 July 2021. International Humanitarian Law and the challenges of contemporary armed conflicts (rulac.org).
[88] "*4 hours, choppers and 38 kills: How India avenged the Uri attack*," The Economic Times, India, 27 August 2016, accessed on 20 July 2021. India's Surgical Strike: 4 hours, choppers and 38 kills: How India avenged the Uri attack (indiatimes.com).
[89] *Ibid.*
[90] Pakistan's Prime Minister Nawaz Sharif Condemns India's Strike along LoC, accessed May 20 JULY 2021. https://indianexpress.com › India.

present within a sole territory. In contemporary times, it is quite usual that non-state actors such as terrorist organisations usually administer their activities in neighbouring territory. In this case, the hostility between Indian and Pakistani authorities over terrorist organisations such as Jaish-e-Mohammad and Israeli-Hezbollah war becomes imperative in understanding the serious nature of the armed conflict of that kind. Similarly, the Bush administration utilized the lack of well-defined law that could govern the dispute of this nature. The US after the declaration of its war on terror made no vibrant statement concerning the legal nature of war. The US administration denied the applicability of the Geneva convention as Al-Qaeda is neither an international body nor does it exist in the identical territory of the USA. Such American re-interpretation of IHL eventually stripped off the alleged terrorist from their rights granted to them under numerous international conferences. An identical step was taken by Turkey when it refused to acknowledge the applicability of the Geneva convention and the domestic legislation was imposed on PKK activists.[91] Consequently, it can be stated that the thresholds enshrined in Geneva conventions and additional protocols are not conducive to determining the form of armed conflict. The vague and non-determined nature has attracted disparagement from various scholars and thinkers. Hans Peter voiced his displeasure as he asserted that the thresholds given for the application are quite intricate and are thus insufficient[92]. Even scholars and academicians are alienated concerning the US positioning. One school represented by Bianchi and Naqvi emphasized that US intrusion in Afghanistan should be incorporated within the definition of international armed conflict[93]. Another school represented by Lubell asserted the contrary idea that al-Qaeda should not be considered as a state.[94] Hence, irrespective of the different stances of scholars, one can effortlessly conclude that such broader definitions do not even directly deal with the terrorist aggressions.

These are many such subjects that are yet to be addressed by the international community. As earlier asserted and established, these loopholes are the result of the precedence given to the individual objectives rather than humanitarian objectives. Even to date, global civil societies are trying hard to mobilize the governments and armed forces to produce a legally binding document that should be authoritative in its approach. The hegemonic control and influence are gradually diminishing due to the ground-breaking development of other nations which has led to the upsurge of a multipolar world. These projects and earlier notions should be defied especially from the nations that are undergoing the fear of asymmetrical warfare. The histories of these prejudiced evolutions are waiting to be transformed and rehabilitated by the contemporary generation. As a measure, the international community collectively should shape the new

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[91] Marco Sassoli, "*The Implementation of International Humanitarian Law: Current and Inherent Challenges*," Yearbook of International Humanitarian Law 10 (2007): 45–73.
[92] Hans-Peter Gasser, "*International Humanitarian Law: an Introduction," in Humanity for All: The International Red Cross and Red Crescent Movemen*t, ed. H. Haug (Berne: Paul Haupt Publishers 1993), 71.
[93] Andrea Bianchi and Yasir Naqvi, *International Humanitarian Law and Terrorism* (Oxford: Oxford University Press, 2011), 60–61.
[94] Noam Lubell, "*The War (?) against Al-Qaeda*," in International law and Classifications of Conflicts, ed. E. Wilmshurts (Oxford: Oxford University Press, 2012), 431.

treaties that may be more commanding and practical in approach dealing with contemporary emerging issues.

COSMOPOLITANISM AND NATIONAL JURISDICTION OF COURTS: SHORTCOMINGS IN REGIONAL LEGISLATIVE FRAMEWORK

In this contemporary era, along with the evolving nature of conflicts, the redressal and procedural means of providing justice are correspondingly evolving too. Now, the national courts too realised their significance and are consistently giving effect to the international principles universally. This is most ubiquitous in nations that have adopted translational jurisdiction like Britain. The apex courts of countries often incorporate the universal principles in national laws where the constitution of that country provides recognition to international laws.

This novel contemporary redressal system has reconciled the international law mechanism. A municipal court that adopts the international principles in its pronouncements is not merely a national organ. The same conclusion has been stated by Professor Ian Brownlie wherein he asserted that such courts exercise international jurisdiction.[95] This point was also made by the supreme court of Canada where the court acknowledged that national courts of numerous countries are playing the role of international courts.[96] However, while analysing the local functioning, one could analyse that the adjudication of dispute could be problematic when the political climate would be antagonistic to the witnesses where the accused is influential like in *the Tadic* case. Likewise, there are many hurdles in the successful operation of national tribunals. The infrastructure of the country could be damaged and ruined. In most of the cases where the international cases are tried in national tribunals, the political intrusion and biases can prevail especially when there is a multiplicity of regional or cultural groups like in South Sudan. In these circumstances where the international tribunals sought to change the condition through their verdicts then things might not work in the way they wanted to be. These verdicts and judgements might be subjected to the utmost criticism and can be considered politically influenced. Besides, analysing the procedural loopholes in the working of the national tribunal may cause the delay in delivering justice, thus would destroy the motive of the entire judicial system.

The overview of the factual conditioning of the court can be understood by analysing the quality of evidence gathering in national tribunals. The more pertinent example, in this case, is the Blaskic case. In 1993, Bosnian armed forces massacred thousands of Muslims in that area to get rid of them from central Bosnia. Consequently, Tihomir Blaskic, the commander of the army was indicted based on command responsibility[97]and was held liable for 45 years of imprisonment[98]. However, he presented arguments in his

[95] Cf I Brownlie, *Principles of Public International Law* (5th ed, Clarendon, 1998), 584, 708.
[96] See G V La Forest, *'The Expanding Role of the Supreme Court of Canada in International Law Issues'* (1996) 34 Canadian Year Book 89 at 100.
[97] *Prosecutor v Blaskic,* Case No IT-95-14-I, Second Amended Indictment (25 April 1997).
[98] *Prosecutor v Blaskic,* Case No IT-95-14-T, Judgement (3 March 2000).

defence wherein, the massacre was committed by the military police of the Bosnian army which directly is responsible to the government officials. He alleged that president Tudjman and other government leaders should be held accountable and not him. Accordingly, his lawyers and their legal team repetitively tried to contact the government officials to get their access to archives of the Croatian government. However, their request was denied by the officials frequently. These kinds of examples show the risk that might be involved in the trial in national tribunals. In this regard, the case of Milan Vujin can be considered too. He was affiliated with the Tadic team where he tried to influence the witnesses so the culpability of Bosnian leaders could not be proved.[99] Therefore, it can be apprehended that it is nearly imprudent to believe that national courts could convict such national leaders for their acts where they govern the whole political and executive structure of the nation.

There are still countless examples that can be drawn presenting the disappointing work done by states to implement international law in domestic legislation. Exclusively, it has been observed that the under-developed countries generally did not have a decent infrastructure that could assist the procedural implementation of universal laws. However, in the case of developed countries, they did not show the required will that is desirable for the encouragement of international laws. This is so because they conferred less importance to these laws as compared to their 'National criminal law'. For instance, a trial of US Lieutenant Calley for My Lai Massacre during the Vietnamese war is observed as a complete failure of the national judicial mechanism, specifically when the president granted him pardon.[100] Similarly, when the French committers of 'Rainbow Warrior' bombings in Auckland Harbour were given minimum sentences. These examples demonstrate that the countries were reluctant to persecute those perpetrators who were serving the interest of their homeland. In addition to personal interest, biases and political subjectivity too play the role in the corrupt implementation of laws.

Therefore, this paper asserts that states are generally disinclined in taking a revolutionary step concerning the persecution of international war criminals. This reluctancy is generally observed when the offending state has a sound economy and is militarily stronger. Because of trade and military considerations, states generally choose to turn a blind eye to the humanitarian violation in the territory of the offending state. Unfortunately, these strategic, political and military considerations are not to be changed soon as the states are not willing to interfere in the internal matters of other states which is affecting the implementation of international law.

CONCLUSION

This paper sought to highlight the aspects and consequences of two different eras of ascendancy that led to the development of these humanitarian principles that administer warfare to date. Europe predominantly

[99] *Prosecutor v Tadic*, Case No IT-95-1-A, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin (31 January 2000).
[100] See, Geoffrey Robertson, *Crimes Against Humanity – The Struggle for Global Justice* (Penguin Press, 1999) p 167.

took pride in the creation of these laws that was primarily started in 1864 with the inventiveness of Henry Dunant.[101] It faces challenges and variations in terms of new moralities that were added at times quite frequently. European scholars such as Professor Verzijl drew the formation of IHL from European consensus and frame of mind.[102] Correspondingly, Geoffrey Best, a historian, stipulated in his study that one could find these humanitarian principles alone in western history and philosophy. However, what they failed to appreciate is that the procedure of the development of these laws in the mid-18th and 19th centuries was subjugated by Europe. It does not mean that these principles were solely found in western and Christian philosophy. It is quite ironic that the law that claimed to safeguard human dignity was confined to a particular continent and regarded as a product of western thought. Instead of promoting the universalism of IHL, western philosophers and historians took pride in affirming it as their contribution. Such misguided prerogatives can lead to the universal embargo of these principles as the third world may regard it as a remnant of imperialism. In addition, the study of Lawrence Keeley unveiled the western notion of 'primitivity' of non-European wars as equated with the so-called military aesthetics and regulated war of the west. He stressed that western wars were not conducted by legal and humanitarian principles prevalent at that time.[103] Even the so-called primitive wars of the east were less detrimental.[104] Therefore, the imperial tendencies to exclude the other coalition on the supposition of un-civilized and primitive is extremely contentious.

Also, the centralisation of IHL and execution of the western model of humanitarianism forced the 'other' groups to act under their system which ultimately led to the violation of IHL. Hence, the attention of these global contestants should be the elevation of universal culture of compliance through treaties, conventions and legislation which should deal with every circumstance. This can be achieved by the removal of political constraints from ICC and discouraging the current inclination of states to prosecute the criminals in national courts despite the international nature of the crime committed by them. However, regardless of which jurisdiction will prevail in near future, it should be the responsibility of states that they should pursue the enforcement of law legitimately that should be free of any notion of any personal prejudice. Indeed, the desirable model should be the model of universal jurisdiction with an expanded base laid on the principles of impartiality and transparency.

Besides, the international community could also consider the establishment of the world's people court that could be adjudicated by the intellectuals and eminent persons from NGOs and other international bodies. This idea was initially recognized by Bertrand Russell wherein, he established the said tribunal in Paris to hear the allegations of war crimes committed by various states in the Vietnam war.[105] The tribunal had no

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[101] *Supra note 3.*
[102]See, Verzijl JHW, "*Western Influence on the Foundations of International Law*" in International Law in Historical Perspective (1968), 435-6.
[103] Lawrence K., *Wars before civilization: The myth of Peaceful Savage* (1st edn, Oxford University Press, 1996).
[104] *Ibid*
[105] B. Russell, *Speech at the first meeting of members of the War Crimes Tribunal,* (1969) vol 3, p 216.

state or any formal assistance nor did it have any authority to compel the accused to present before the court. This move of Russell inspired the Algiers declaration on the rights of people. This declaration recognized the primacy of people where they could utter their grief and violence inflicted on them. As a result, the declaration instituted permanent people's tribunals which investigated various international war issues such as the Soviet invasion of Afghanistan. Therefore, the world could resort to such people's tribunals and could deliver them with adequate international backing. These tribunals will encourage those unheard voices which were suppressed in the past and would ensure greater accountability. Even if the accused states refused to accept responsibility, the other states would hesitate to take the side of such a state as the victims will have a stage where they could themselves individually more systematically and coherently. This structure will further encourage the new domain of international law where the individuals would no longer need their respective states to represent themselves on the international platform.

Additionally, the international community should also endeavour to find new approaches to ensure the implementation of humanitarian law, especially by non-state armed actors. The means of execution is the nomination of a protecting power to look after the interest and welfare of nationals involved in a conflict. The same responsibility was taken by countries such as Sweden and Switzerland during the second world war. Such appointed countries should ensure compliance with humanitarian principles and should act as a channel of communication between adversaries. On the same line, protocol 1 also laid down the concept of an international fact-finding commission that usually enquires about grave breaches of human rights.[106]

The leading obstacle in the non-implementation of IHL particularly in the case of non-international armed conflict is that most of the humanitarian treaties addressed states and not insurgent bodies. Therefore, to ensure accountability, the international community should look towards customary international and human rights laws which can safeguard the interest of the whole community. On the lines of the Sierra Leone special court, the ad-hoc tribunals could be set up to prosecute the war criminals. Therefore, the alternative of setting up the treaty-based sui-generis courts could be considered that could act on the lines of ICTY and ICTR. In the case of an unsuccessful country that has been devastated by the civil war horrors or in a country where the international community could sense the dawn of civil war, then such country could be inserted in the trusteeship council of the United Nations in the administration of the security council for effective administration.

Finally, what this contribution seeks to establish is that the bygone humanitarian principles which formed as a result of colonial oppression are futile in contemporary times. The gaps, loopholes and ambiguity have to be addressed by the international community to ensure effective applicability. Once again, new treaty obligations should be framed while confirming the appropriate representation from all spheres of the world. Besides, international institutions should be allowed to adjudicate matters freely without any coercion and intimidation from the authoritative states. With the dawn of new powers and influential states, the

[106] See articles 50,51 and 130 of the four Geneva conventions respectively.

international community could secure them more accountable and transparent redressal forums without any undue influence. Now it is high time that the world should forget the previous biases, wrong notions as well as false pride and should take a long stride to admire the principles of human dignity while recognizing the basic civil liberties of individuals irrespective of their nationality and status.

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