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RGNUL STUDENT RESEARCH REVIEW

From the Margins to the Centre

Exploring Third World Approaches to International Law

Foreword by

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MASTHEAD

FOREWORD

I am pleased to contribute a foreword to this Issue of the RGNUL Student Research Review (RSRR) on the theme 'From the Margins to the Centre: Exploring Third World Approaches to International Law'. I believe that notwithstanding the egregious violations of international law by powerful nations, the idea of international rule of law needs to be promoted and the study of public international law actively encouraged. Of course, it has to be admitted international law is today in deep crisis.[1] Arguably, the global order is in transition from a liberal to an illiberal, or even a fascist, order in which power alone counts. In such a global order even the principles of the Charter of United Nations are brushed aside with disdain. However, for that very reason there is an urgent need for progressive scholars to defend the foundational principles of international law. These not only offer weak nations a shield against the doings of powerful actors but are also the basis on which collective action can be rallied by them to challenge and delegitimise unlawful acts of omission and commission. Put differently, even in the face of severe violations of principles and norms of international law that we are witnessing today international lawyers should not give into cynicism.

In fact, in the present scenario international law researchers from Global South have to undertake several critical epistemic and pragmatic tasks. A significant responsibility is to advance theoretical approaches which help expose the colonial origins of modern international law and its neo-colonial incarnation. I am therefore happy to see that the current Issue of RSRR explores the Third World Approaches to International Law ('TWAIL'). TWAIL is particularly suitable to explaining and understanding the present conjuncture as it allows a critical reading of the history of modern international law to contend that international law has been the handmaiden of western imperialist nations from the time that it emerged around the sixteenth century. In the postcolonial era these nations used the power asymmetry with Global South nations to shape a liberal international order constituted of international laws and institutions that worked to their advantage. This liberal order is today being undermined by these very nations as it no longer serves their interests in a global order in which

[1] BS Chimni, 'Crisis and International Law: A Third World Approaches to International Law Perspective' in Makane Morse Mbengue and Jean D'Aspremont eds., *Crisis Narratives in International Law* (Nijhoff Law Specials, 2021) 40-53.

key Global South nations are growing and resisting imperialist policies and laws. In short, the use of TWAIL lens helps demonstrate that powerful western nations have never shied away from being dismissive of constraints of international law when it does not benefit them. At the same time, TWAIL appositely seeks to harness those aspects of international law which helps assert the independence of Global South nations and advance the welfare of their peoples. Indeed, Global South nations have, through international cooperation and joint action, been at the forefront of defending the basic principles of international law as contained in the Charter of United Nations and later elaborated at their initiative in the landmark Friendly Relations Declaration of 1970. Further, to advance their development prospects these nations called early on for the establishment of a new international economic order (1974), a demand that, in its essentials, has relevance even today.

The practical task before Global South researchers is four-fold: the first is to continue to challenge those international laws and institutions that work against the interests of weak groups, peoples and nations of the Global South; the reference to weak groups is necessary as ruling elites in Global South nations often collaborate with their counterparts in the Global North resulting in a global class divide; a transnational capitalist class has emerged which is flourishing at the expense of the transnational exploited and oppressed classes.[2] The second task is to evidence and expose the violation of the foundational principles of international law by powerful nations such as the principles of sovereign equality of states, the principle of non-use of force, and the principle of non-intervention into the internal and external affairs of states. A third task is to produce rigorous studies which record the contravention by powerful nations of particular rules and regimes of international law, whether these be of international humanitarian law or international human rights law or international investment and trade law. A final task is to produce work that, even in these difficult times, point to ways in which the international law doctrines and regimes can be reformed and strengthened in favor of the weak.

In sum, Global South researchers have to appreciate the complexity of the task at hand viz. on the one hand to critique those aspects of laws and practices that are not in the interest of Global South peoples and nations and on the other hand to defend the basic principles of international laws along with progressive

[2] BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, Cambridge University Press 2017).

rules, institutions and practices that have either been adopted or sustained through the struggles of marginalised nations, peoples and groups in the period after decolonisation. In other words, there is a need to avoid a nihilistic view in the face of the brazen violation of international laws. It is the rules of international law which provide the measure by which to determine the validity and legitimacy of the acts of omission and commission of nations.

The six essays in this volume attend in different ways to these the epistemic and practical tasks. Needless to add, there is no singular interpretation or understanding of rules and practices of international law that is shared by all Global South scholars. Even TWAIL is internally diverse and encourages a plurality of views. But it is hoped that these essays will collectively contribute to igniting interest in public international law and stimulating debate on important issues confronting the international community.

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EDITORIAL NOTE

In recent years, many have proclaimed the death of international law, citing its repeated failures to protect the most vulnerable and its inability to hold powerful states accountable. Yet this crisis is not new. For decades, post-colonial societies have approached the institutions and doctrines of international law with a healthy suspicion, born from a history of exploitation and exclusion.

This scepticism first found expression in the Non-Aligned Movement, as newly decolonised nations in Asia and Africa charted an independent course through Cold War geopolitics. Refusing to be drawn back into the orbit of imperial powers, these states rejected the predatory bargains of neo-colonialism and sought to participate in international politics on their own terms.

With the end of the Cold War, these patterns were merely reshaped. Under the banner of a 'rules-based international order', the 1990s witnessed the proliferation of new institutions and legal regimes, largely steered by the United States and its allies. It was against this backdrop that Third World Approaches to International Law ('TWAIL') emerged as a critical discipline, driven by scholars committed to asking how international law continued to reproduce structures of dominance. In this regard, we are honoured to have Prof. (Dr) BS Chimni, one of the foremost thinkers of TWAIL, contribute the Foreword to this Issue.

TWAIL compels us to see international law not merely as a system upholding sovereignty and global cooperation, but as a historical and ongoing project of imperial power. Today's global crises starkly illuminate why this critical lens is indispensable. For nearly two years, Israel's relentless assault on Palestinian civilians in Gaza has proceeded with impunity, underwritten by the repeated use of the United States' Security Council veto to block a permanent ceasefire. Meanwhile, the very language of international law is routinely invoked to justify wars of aggression as acts of global guardianship, whether in Russia's ongoing invasion of Ukraine or in other theatres of conflict.

Beyond the realm of armed conflict, the same hierarchies pervade international economic and corporate regimes. The World Trade Organization, champion of neo-liberal trade policy, has long been criticised for sustaining unequal exchanges that allow First World economies to flood Southern markets and destabilise local industries. At the same time, domestic courts in Western states exploit gaps to protect corporate interests in foreign jurisdictions, whether

by enabling Nestlé and Cargill to evade responsibility for child labour in West Africa, or by protecting Union Carbide in the aftermath of the Bhopal disaster.

In this context, TWAIL's mission to expose and challenge how international law continues to uphold the subjugation of the Global South is more pressing than ever. However, TWAIL itself is not without its critiques and complexities.

Through this RSRR Issue, we seek to examine both the promises and the shortcomings of international law across varying contexts, bringing together six contributions from students and leading TWAIL scholars alike.

In *Navigating the Tensions Between Universal International Criminal Justice and Third World Obstacles: An Analysis of the Ljubljana-The Hague Convention*, Akshith Sainarayan and BV Sai Rishi examine how the Convention, despite its promise of bolstering global justice mechanisms, places disproportionate burdens on Third World states by disregarding their resource constraints and legal contexts. They call for reforms through principles of common but differentiated responsibilities and stronger regional cooperation.

Rohan Karan Mehta, in *Nutcracker or Sledgehammer? A TWAIL Perspective on Proportionality Test in Indirect Expropriation*, critiques the use of the proportionality test in international investment law, arguing that it imports Eurocentric standards that erode regulatory sovereignty in the Global South. As a more equitable alternative, he advocates adopting the sole effects doctrine.

In *Prosecuting Corporations Under International Criminal Law: Who is it Protecting?*, Pulkit Goyal highlights how the Rome Statute's exclusion of corporate criminal liability undermines the legitimacy of international criminal law. Through a TWAIL lens, he reveals how the state–corporate nexus and selective ICC prosecutions protect powerful actors from accountability.

Rashmi Raman, in *Reimagining Victimhood Under International Law – From Margins to Mandate: Transitional Justice, Legal Personality and Lessons from the Bhopal Gas Disaster*, critiques the fragmented and impersonal treatment of victims in international legal regimes. Using the Bhopal gas disaster as a case study, she calls for a more relational and agency-focused approach, showing how domestic experiences expose critical gaps in global frameworks.

Kailash Jeenger's *Third World View of the Laws of Armed Conflict: An Introduction* traces how these laws were historically crafted by colonial powers

to serve imperial interests, excluding colonised peoples and dismissing anti-colonial struggles. His paper argues that the Eurocentric character of these laws continues today, privileging powerful states while marginalising Third World realities.

Lastly, in *TWAIL and the Question of Caste and Misappropriation of Decolonisation: Some Provocations*, Vijay Kishor Tiwari and Madhav Pooviah critique TWAIL's shortcomings in addressing internal hierarchies such as caste and warn against the co-optation of decolonial narratives by Hindu nationalist forces. They argue that without confronting Brahminical dominance and the exclusion of minorities, TWAIL risks becoming a merely performative exercise.

The Editorial Board, together with the Peer Review Board, has dedicated considerable time and effort to shortlist and finalise these contributions. This Issue would not have been possible without the thoughtful collaboration of all our authors and the unwavering commitment of the Editorial Board. With this, we are proud to present Volume 10, Issue 2 of the RGNUL Student Research Review.

S LAVANYA
Editor-in-Chief, RGNUL Student Research Review

DEB GANAPATHY
Managing Editor, RGNUL Student Research Review

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NAVIGATING THE TENSIONS BETWEEN UNIVERSAL INTERNATIONAL CRIMINAL JUSTICE AND THIRD WORLD INTERESTS: AN ANALYSIS OF THE LJUBLJANA-THE HAGUE CONVENTION

Akshith Sainarayan[*] and BV Sai Rishi[**]

The recently signed Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes proposes an international legal framework to regularise the obligations of mutual legal assistance between sovereign states. The Convention seeks to create a system of international legal cooperation by procedurally facilitating mutual legal assistance and extradition cooperation. This is achieved through provisions on the transfer of sentenced persons and joint investigations, among other strategies. While the Convention could be heralded as a step forward in tackling impunity for crimes under international law, it appears to be less adequate in the obligations it imposes on its Third World stakeholders. By creating such methods of integrating global justice systems, however, the Convention discounts the disproportional obligations on its Third World signatories. This includes requiring them to criminalise genocide, crimes against humanity, and war crimes under domestic law and to establish jurisdiction over these crimes in specified circumstances, furthering the aut dedere, aut judicare principle. While numerous other such treaty regimes require States to prevent and prosecute, the Ljubljana-The Hague Convention is the first of its kind to mandate a universal international legal framework. However, the Convention does not fully account for the broader geopolitical dynamics and historical patterns, particularly in relation to the Global South. The interplay between issues of self-determination, operational selectivity, and the concentration of wars and humanitarian interventions in these regions highlights the need for a more nuanced understanding of how such obligations affect these states. Through this study, the authors analyse the provisions of the Ljubljana-The Hague Convention, and examine how its methods disproportionately affect Third World nations in carrying

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out their treaty obligations, contradicting the intent it was drafted with. In doing so, the authors argue for a more inclusive and concessional method of reforming the international criminal justice system.

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I. INTRODUCTION

The Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes and Other International Crimes ('Ljubljana-The Hague Convention' or 'the Convention'), adopted in May 2023[1] is a culmination of almost twelve years of effort, initiated by Belgium, the Netherlands, Slovenia

[1] Ljubljana–The Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes (adopted 26 May 2023, not in force) (Ljubljana–The Hague Convention).

and Argentina under the garb of the Mutual Legal Assistance ('MLA') Initiative.[2] The Initiative was proposed to promote the eventual adoption of a 'gap filler treaty',[3] to bridge the gap in international law for a multilateral treaty that sought to regulate mutual legal assistance and extradition for the domestic investigation and prosecution of core international crimes.

The current regime on MLA was opined to be a limited and outdated set of regulations. This was because the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ('Genocide Convention')[4] and the Geneva Conventions, being dated in the 1940s, were unable to reach a conclusion on the comprehensive provisions related to mutual legal assistance.[5] It was not customary for multilateral treaties to include provisions related to mutual legal assistance while adopting international agreements in the early 20th century.[6] For instance, the Genocide Convention requires states *to grant extradition in accordance with Article VII,* while it does not, however, contain multilateral provisions on mutual legal assistance.[7] Treaty regimes as practice only tend to regulate certain specific crimes against humanity, such as torture.[8]

The vacuum in the sphere of coordinating international efforts towards mutual legal assistance necessitates the adoption of a framework akin to the Ljubljana-The Hague Convention. The inability of the current regime in creating a system that effectively prosecutes the *core crimes* has often hampered their effective prosecution – either by delays in national systems, or delays in foreign

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[2] Ministry of Foreign and European Affairs, 'MLA (Mutual Legal Assistance and Extradition) Initiative' (*Republic of Slovenia GOV.SI*, 31 May 2024) <https://www.gov.si/en/registries/projects/mla-initiative> accessed 3 July 2024.

[3] Bruno de Oliveira Biazatti & Ezéchiel Amani, 'The Ljubljana – The Hague Convention on Mutual Legal Assistance: Was the Gap Closed?' (*EJIL: Talk!*, 12 June 2023) <https://www.ejiltalk.org/the-ljubljana-the-hague-convention-on-mutual-legal-assistance-was-the-gap-closed/> accessed 5 July 2024

[4] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 8 December 1948, entered into force 12 January 1051) 78 UNTS 277 (Genocide Convention).

[5] Ward Ferdinandusse, 'Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty? (2014) 18(15) ASIL <https://www.asil.org/insights/volume/18/issue/15/improving-inter-state-cooperation-national-prosecution-international> accessed 6 July 2024.

[6] ibid.

[7] Genocide Convention, art 7.

[8] Juan Pablo Pérez-León Acevedo, 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses' (2017) 18 Anuario Mexicano de Derecho Internacional 145, 149.

jurisdictions due to the inability of states to extradite (however willing they may be to do so).

The Convention has hence been heralded as a significant step forward in strengthening investigation and prosecution mechanisms under international criminal law. To ensure that MLA is implemented in practice and to ease the burden on state parties, the Convention incorporates provisions such as hearing by video conferencing,[9] the procedure relating to the transfer of objects and evidence,[10] and allows for the transfer of proceedings.[11]

Counterfactually, however, the Convention seeks to place upon states a higher threshold of responsibility to take the necessary measures to prosecute alleged criminal offenders. This includes obligating member states to recognise certain classes of international crimes as domestic crimes,[12] and calling for states to prosecute these crimes within domestic judicial systems.[13]

The Convention has currently been signed by thirty-three states, and is pending formal adoption by signatories.[14]

II. EXISTING LEGAL REGIMES ON MUTUAL LEGAL ASSISTANCE

Conventions with the objective of furthering mutual legal assistance often incorporate the principle of *aut dedere aut judicare* (the obligation to extradite or prosecute).[15] One of the earliest attempts urging states to abide by *aut dedere aut judicare* specifically for international crimes was made by the 1996 Draft Code of Crimes Against the Peace and Security of Mankind ('Draft Code').[16] Article 8 of the Draft Code requires states to establish jurisdiction over international crimes referenced in Article 9,[17] including genocide, crimes against

[9] Ljubljana–The Hague Convention, art 34.
[10] ibid, art 38.
[11] ibid, art 48.
[12] ibid, art 7.
[13] ibid, art 8.
[14] Ministry of Foreign and European Affairs, 'The Ljubljana-The Hague Convention is signed in The Hague after a decade of effort' (*Republic of Slovenia GOV.SI,* 14 April 2024) <https://www.gov.si/en/news/2024-02-14-the-ljubljana-the-hague-convention-is-signed-in-the-hague-after-a-decade-of-effort/> accessed 9 November 2024; thirty-four states had signed this convention on 14 February 2024.
[15] ILC, 'Report of the International Law Commission on the Work of its 66th Session' (5 May–8 August 2014) UN Doc A/69/10.
[16] ILC, 'Draft Code of Crimes against the Peace and Security of Mankind' (6 May–26 July 1996) UN Doc A/2673 (Draft Code of Crimes against the Peace and Security of Mankind).
[17] Draft Code of Crimes against the Peace and Security of Mankind, art 8.

humanity, crimes against United Nations and associated personnel, and war crimes, while Article 9 of the Draft Code stipulates an obligation to either extradite or prosecute individuals accused of these offences.[18] This principle has been interpreted by the ICJ in the case of *Questions relating to the Obligation to Prosecute or Extradite*,[19] with reference to obligations arising out of Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that requires states to extradite or prosecute individuals alleged to have committed any offence prohibited by the convention.[20] The ICJ interpreted the obligation to prosecute broadly recognising that a state must submit the case to its competent authorities for the purpose of prosecution,[21] irrespective of the existence of an extradition request.[22] This interpretation of the ICJ also places a greater degree of responsibility on states to prosecute rather than extradite.

There have been multiple regional and international conventions over the last few decades that incorporate the *aut dedere aut judicare* principle in relation to various crimes. For instance, a critical global convention that encourages mutual legal assistance to fight crime is the United Nations Convention against Transnational Organized Crime ('UNTOC').[23] This convention is the primary international instrument that obliges states to combat transnational organised crime, including human trafficking. As far as the UNTOC's obligations are concerned, states must criminalise the laundering of proceeds of crime, establishing domestic legislation to combat money laundering[24] and mutual legal assistance.[25] Article 18 of the UNTOC obligates state parties to fully afford MLA possible under relevant laws, treaties, agreements and arrangements of the requested state party concerning investigations, prosecutions and judicial proceedings concerning the offences for which a legal person may be held liable.

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[18] Draft Code of Crimes against the Peace and Security of Mankind, art 9.

[19] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* [2012] ICJ Rep 422.

[20] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[21] Mads Andenas and Thomas Weatherall, 'International Court of Justice: Questions Relating to The Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012' (2013) 62 International and Comparative Law Quarterly 753, 763.

[22] *Questions relating to the Obligation to Prosecute or Extradite* (n 19), 50-51.

[23] United Nations Convention against Transnational Organized Crime (adopted 15 November, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC).

[24] ibid, art 7.

[25] ibid, art 18.

The scope for Mutual Legal Assistance under this treaty is limited to specific crimes, including that of money laundering and corruption. Its mandate does not account for more severe crimes of international character, such as genocide, crimes against humanity and violations of the Geneva Conventions.

However, with the adoption of the Rome Statute in 2002[26] and the establishment of the International Criminal Court ('ICC'),[27] crimes relating to the crime of genocide, crimes against humanity, war crimes, and crimes of aggression have primarily been dealt with by the ICC.[28] The Ljubljana-The Hague Convention's primary objective is to facilitate international cooperation in criminal matters between states parties.[29] The primary application of this Convention extends to the list of 'international crimes' defined under Article 5 – crimes of genocide,[30] crimes against humanity,[31] war crimes,[32] and crimes of aggression.[33] Pursuant to Article 6, this can be extended to an extraditable offence under the domestic law of the requested state party.[34] The Ljubljana-The Hague Convention aims to strengthen national jurisdictions and foster international cooperation to prosecute international crimes. In contrast, the Rome Statute creates a permanent, centralised ICC with its own judicial authority to prosecute such crimes when necessary. The benefits of working these two statutes together have been elaborated on in subsequent sections.

The concept of a multilateral legal assistance treaty is not new to the jurisprudence of international law. One of the earliest examples of such treaties is the European Convention on Mutual Assistance in Criminal Matters,[35] dating back to 1959. As a regional exclusive to the European Union, it requires parties to afford the broadest possible mutual legal assistance in proceedings with respect to offences, the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the

[26] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).
[27] ibid, art 1.
[28] ibid, art 5.
[29] Ljubljana–The Hague Convention, art 1.
[30] ibid, art 5(1).
[31] ibid, art 5(2).
[32] ibid, art 5(3).
[33] ibid, art 5(4).
[34] ibid, art 6(c).
[35] European Convention on Mutual Assistance in Criminal Matters (adopted 20 April 1959, entered into force 12 June 1962) ETS No 30 (European Convention on MLA).

requesting Party.[36] Some other regional conventions drafted along these lines include the Association of Southeast Asian Nations Treaty on Mutual Legal Assistance in Criminal Matters,[37] and the Inter-American Convention on Mutual Legal Assistance in Criminal Matters.[38] As the titles of all these conventions indicate, they are regionally specific, either to a continent or only a slightly broader geographic region. The Ljubljana-The Hague Convention, on the other hand, envisions a universal legal framework for severe international crimes such as genocide,[39] crimes against humanity,[40] and war crimes.[41] These provisions can greatly help international criminal tribunals such as the ICC to ensure the perpetrators of these crimes are brought to justice. The two work complementary to each other. The Rome Statute creates grounds to prosecute individuals, and hold them individually responsible for crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression in the ICC; the Ljubljana-The Hague Convention, however, creates mechanisms for collaboration and mutual legal assistance – effectively aiding the prosecution process that would lie before the ICC.

III. KEY PROVISIONS OF LJUBLJANA-THE HAGUE CONVENTION

The scope of the Ljubljana-The Hague Convention can be derived from a combined reading of Articles 2[42] and 5, where Article 2 reads the application of the Convention into those crimes defined under Article 5.[43]

A. EXPANDING *AUT DEDERE AUT JUDICARE*

The Ljubljana-The Hague Convention elevates the *aut dedere aut judicare* principle to a higher standard. Article 14[44] imposes a duty on state parties under whose jurisdiction a person alleged to have committed any crimes to which this Convention applies in accordance with Articles 2 and 5 to surrender or extradite a person to another state or an international court or tribunal for prosecution of

[36] ibid, art 1.
[37] Treaty on Mutual Legal Assistance in Criminal Matters (adopted 29 November 2004, entered into force 28 January 2009) (Association of Southeast Asian Nations).
[38] Inter-American Convention on Mutual Legal Assistance in Criminal Matters (adopted 23 May 1992, entered into force 14 April 1996) (Organisation of American States).
[39] Ljubljana–The Hague Convention, art 5(1).
[40] ibid, art 5(2).
[41] ibid, art 5(4).
[42] ibid, art 2.
[43] ibid, art 5.
[44] ibid, art 14.

the alleged offender.[45] Failing compliance with this provision, the Convention requires the state to proceed with the prosecution of the alleged offender under the domestic law of the state party. This obligation is the first of its kind in the context of genocide and crimes against humanity. Both the Genocide Convention and the 1977 Additional Protocol II to the 1949 Geneva Conventions[46] ('Additional Protocol II') that covers war crimes do not trigger the *aut dedere aut judicare* obligation. This is because the Genocide Convention does not *explicitly* create an obligation to extradite or prosecute – it only criminalises and hands over the *au dedere au judicare* obligation to the tenets of customary international law.[47] The Ljubljana-The Hague Convention hence elevates the obligation – relaying the custom into obligations to follow as domestic legal process.[48]

B. Treaty as the Basis for Judicial Assistance

Part IV of the Ljubljana-The Hague Convention, through Articles 49[49] and 50,[50] becomes indispensable in the circumstances where an MLA treaty, be it in the form of an extradition treaty or otherwise, is absent between two states. Specifically, Article 50 of the Convention enables state parties to use the Convention as the legal basis for extradition in instances where state Parties do not have an extradition treaty with each other.[51] Member states of the Ljubljana-The Hague Convention that do not have an MLA treaty between them can take recourse to Article 29. When a state receives a request for MLA from another state party with which it lacks such a treaty, Article 29 allows it to proceed as if a treaty exists. In these cases, the provisions of the Convention serve as the legal basis for providing MLA on any crime covered by the Convention.[52] The provisions following Article 29 provide a standardised procedure, including grounds for refusal.[53] By additionally imposing binding obligations, it enables states to cooperate effectively in investigating and prosecuting these offences,

[45] ibid.

[46] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 75 UNTS 1125 (Additional Protocol II).

[47] Genocide Convention, art VI.

[48] Ljubljana–The Hague Convention, art 7.

[49] ibid, art 49.

[50] ibid, art 50.

[51] ibid.

[52] ibid, art 29.

[53] ibid, art 30.

even without a formal extradition agreement in place. This enhances the global fight against impunity and strengthens the international criminal justice system.

IV. INTERPLAY OF THE CONVENTION WITH EXISTING LEGAL INSTRUMENTS

The Ljubljana-The Hague Convention is designed to complement and reinforce a broader framework of international law aimed at combating the most serious crimes of concern to the international community. An aspect of the Convention that policymakers, enforcement authorities and other stakeholders should give regard to is that the Convention does not seek to override any existing legal framework. It rather facilitates the smooth functioning of the existing international legal regimes, specifically those concerning grave international criminal law offences. Both domestic and international legal enforcement agencies ought to tread carefully, observing that the Convention and existing laws are not mutually exclusive but rather complementary to each other. For instance, the Ljubljana-The Hague Convention's objective is not to override the authority of the ICC via the Rome Statute,[54] but rather assist the court in ensuring the impugned offenders are brought to justice.[55]

A. A Supporting Mechanism for the ICC

The Ljubljana-The Hague Convention can ease the burden of the ICC with special regard to third-world nations. A large portion of the perpetrators against whom the ICC has issued warrants and those 'at large' come from countries traditionally regarded as the 'third world'.[56] At the time of writing of this article, there are ten impugned offenders for whom the ICC has issued arrest warrants remain at large, indicating that they have not yet been apprehended or brought into custody. Out of which at least 6 of them can be regarded as coming from third world nations.[57]

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[54] Rome Statute.

[55] France Diplomacy, 'Fight against impunity – Signing of the Ljubljana-Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes' (*France Diplomacy*, 14 Feb 2024) <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/news/article/fight-against-impunity-signing-of-the-ljubljana-hague-convention-on> accessed 6 July 2024.

[56] M Owusu, 'Defining the Third World' in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier 2001).

[57] *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision) ICC-02/05-01/09 (4 March 2009).

A prominent case pending before the ICC is the Al Bashir case,[58] concerning the former president of South Sudan. Al Bashir has been charged with five counts of crimes against humanity, namely, murder, extermination, forcible transfer, torture, and rape, and two counts of war crimes, namely, intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, and pillaging along with three counts of genocide. While a warrant for the issue of Al Bashir has been in force since 2009, he has never been brought before the ICC.[59] Cases that follow a pattern, such as that of Al Bashir, where alleged offenders of 'international criminal offences' cannot be brought before the ICC or other international tribunals that have issued warrants can be brought to justice in a less cumbersome manner through the engagement of mutual legal assistance provisions of the Convention. For example, when an impugned offender is no longer on the requesting state's soil, the offender has fled to the responding state, and no mutual legal assistance treaty exists between both states, recourse can be taken to the Convention.

By invoking Article 29 on the grounds of mutual assistance,[60] states can resort to conducting joint investigations by employing the procedure under Article 41 to bring impugned offenders to the limelight.[61] The same provision can be extended to perpetrators like Al Bashir to effectuate the arrest warrants issued by the ICC.

B. Enforcing the Hague Convention Objectives Through the Ljubljana- The Hague Convention

The Geneva Conventions of 1949 and subsequent protocols can greatly benefit from the enforcement of the Ljubljana- The Hague Convention. Both these legal instruments aim to achieve the common goal of upholding international humanitarian law ('IHL') and addressing and enquiring into any breaches of the same. The Ljubljana-The Hague Convention also includes crimes against

[58] ibid.

[59] Leila Nadya Sadat, 'Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising' (*Just Security*, 12 July 2019) <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/> accessed 10 July 2024.

[60] Ljubljana–The Hague Convention, art 29.

[61] ibid, art 41.

humanity under Article 5(4),[62] and includes violations of the Geneva Conventions and customary international law applicable during armed conflict.

Comprehensive investigations are indispensable to safeguard the protections afforded by the Geneva Conventions to both military and civilian victims of domestic and international warfare.[63] The obligation to conduct investigations can be found in the Geneva Conventions of 1949, for instance, Article 49 of Geneva Convention (I) and Article 50 of Geneva Convention (II) and their Additional Protocols I (Article 85 of Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts), which require states to search for perpetrators of the breaches of the Geneva Conventions irrespective of their nationality. The Ljubljana-The Hague Convention can significantly help the cause of bringing perpetrators of 'grave breaches' of the Geneva Conventions and those who commit crimes against humanity. To Ljubljana-The Hague Convention to enforce its objectives, provides for the establishment of joint investigation teams.[64] This can be done through mutual consent by one or more state parties involved and for a limited period of time.[65]

While the provisions of both the aforementioned legal instruments are laudable, their enforceability and applicability are yet to be seen. While the Convention recognises the rights of victims and looks beyond just states, the provisions of the Ljubljana-The Hague Convention remain largely state-centric. Like the Geneva Conventions, even the Ljubljana-The Hague Convention prioritise only the roles of states in enforcing international law and overlooks the experiences and perspectives of non-state actors and marginalised communities.

If history is an indicator, it can be seen that most of the wars and humanitarian interventions of the twenty-first century have occurred in the third world and the global south countries.[66] It is pertinent to note that provisions of the Ljubljana-The Hague Convention such as Articles 23 and 24

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[62] ibid, art 5(4).

[63] Noam Lubell, Jelena Pejic and Claire Simons, 'Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice' (2019) 40 International Committee of the Red Cross 70 <https://www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf> accessed 7 July 2024.

[64] Ljubljana–The Hague Convention, art 41.

[65] ibid.

[66] Eliot A Cohen, 'Distant Battles: Modern War in the Third World' (1986) 10(4) International Security 143 <https://doi.org/10.2307/2538952> accessed 8 July 2024.

can very well be invoked to justify military interventions in the name of protecting civilians, which can often serve the political and economic interests of intervening powers. Article 23 for instance, requires member states to 'afford one another the widest measure of mutual legal assistance'[67] and this includes examining objects and sites,[68] executing searches and seizures,[69] and conducting cross-border observations.[70] In contexts like current crises—such as the ongoing conflict in Sudan[71] or post-conflict regions like Iraq[72]—intervening powers could use these provisions to access evidence of human rights abuses or war crimes to bring cases before international courts, potentially disregarding a state's sovereignty by invoking the Convention.

States globally should ensure that the Convention should be used to assists each other by effectively using Articles 29 and 50 of the Convention as a basis for MLA or extradition, respectively, in the absence of such a treaty between member states. States can benefit significantly from this Convention by ensuring MLA afforded by one state to another is explicitly used within the bounds provided under Article 23.[73] States can further assist each other by employing tools such as video conferencing,[74] effecting service of judicial documents,[75] and using special investigative techniques.[76] Through this, states can bring perpetrators of crimes to justice while ensuring Western states are not perpetuating their already existing power. Special care should be taken to ensure that the state granting MLA is not violated by the requesting state.

V. SHORTCOMINGS OF THE CONVENTION

While the Convention aims to promote universal standards of justice through the allied application of MLA standards, it inadvertently exacerbates existing tensions and inequalities faced by Third World nations. This section will

[67] Ljubljana–The Hague Convention, art 23.
[68] ibid, art 24(b).
[69] ibid, art 24(d).
[70] ibid, art 24(i).
[71] Center for Preventive Action, 'Civil War in Sudan' (*Global Conflict Tracker*, 3 October 2024) <https://www.cfr.org/global-conflict-tracker/conflict/power-struggle-sudan> accessed 14 November 2024.
[72] Center for Preventive Action, 'Instability in Iraq' (*Global Conflict Tracker*, 13 February 2024) <https://www.cfr.org/global-conflict-tracker/conflict/political-instability-iraq> accessed 14 November 2024.
[73] Ljubljana–The Hague Convention, art 23.
[74] ibid, art 24(a).
[75] ibid, art 24(e).
[76] ibid, art 24(h).

examine the Convention's provisions, highlighting how they impose disproportionate responsibilities on developing states, reflect Eurocentric biases, and ultimately undermine the core principles of justice they seek to uphold.

One of the most glaring issues with the Ljubljana-The Hague Convention is its imposition of uniform responsibilities on all signatory states, regardless of their economic or institutional capacity. Article 3 mandates mutual legal assistance, obliging states to cooperate in the investigation and prosecution of serious crimes.[77] This obligation includes an overarching requirement to criminalise genocide, crimes against humanity, and war crimes under domestic law and to establish jurisdiction over these crimes in specified circumstances.[78]

While well-intentioned in the need to harmonise international criminal prosecution, this can disproportionately burden developing nations, many of which lack the necessary infrastructure and resources to engage effectively in such international cooperation. The assumption that all states possess comparable legal frameworks and capacities is fundamentally flawed, leading to a scenario where Third World countries are expected to adhere to standards that may simply be unattainable in their present contexts.[79]

A. Case Study: Republic of Uganda

An important instance where the standards of an international criminal law convention proved challenging for a developing nation is Uganda's implementation of the Rome Statute. While Uganda ratified the Rome Statute and established the International Crimes Division ('ICD') of its High Court[80] to handle crimes under the ICC's jurisdiction, it faced significant hurdles in aligning its domestic legal framework with international obligations.[81]

For instance, the ICC Act of 2010[82] incorporated the Rome Statute's provisions into Ugandan law. However, this Act only covered crimes committed

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[77] ibid, art 3.

[78] ibid, art 6.

[79] Kevin Bloor, *Understanding Global Politics* (E-International Relations 2022).

[80] Asiimwe Tadeo, 'Effecting Complementarity: Challenges and Opportunities: A Case Study of the International Crimes Division of Uganda' (*ASF*, 2010) <https://www.asf.be/wp-content/uploads/2012/10/Case-Study-of-the-International-Crimes-Division-of-Uganda.pdf> accessed 14 November 2024.

[81] Ray Murphy, 'International Criminal Accountability and the International Criminal Court' (2006) 17 Criminal Law Forum 281 < https://link.springer.com/article/10.1007/s10609-006-9020-7> accessed 14 November 2024.

[82] International Criminal Court Act 2010 (Uganda).

after 2002, leaving numerous atrocities committed during Uganda's prolonged civil conflict (1986–2002), such as those by the Lord's Resistance Army ('LRA'),[83] outside its scope. This temporal limitation significantly weakened efforts to address historical crimes within the country. Additionally, the ICD, while created to handle these cases, suffered from inadequate resources, a lack of specialised legal expertise, and procedural inconsistencies, which proved detritus to its effectiveness.

A notable challenge was prosecuting Dominic Ongwen, an LRA commander.[84] Although Uganda referred the case to the ICC, signalling its inability to handle it domestically, the move sparked criticisms. Critics argued that reliance on international mechanisms undermined local justice initiatives and ignored Uganda's structural weaknesses, such as limited access to justice for victims and insufficient reparations mechanisms. These hindrances made it difficult to fully operationalise the system within Uganda's existing legal and institutional capacities.[85]

B. THE TWAIL CRITIQUE

The uniformity in the Convention reflects a much deeper structural problem within international law. It points to the fact that international legal norms often operate as mechanisms of control, replicating colonial hierarchies under the guise of universality.[86] The Convention assumes that all states possess comparable legal frameworks and institutional capacities, a presumption that is fundamentally flawed. Developing countries, many of which continue to grapple with post-colonial legacies of underdevelopment and systemic inequality, are expected to adhere to standards that are unattainable given their current contexts. This imposition of unrealistic obligations effectively marginalises these

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[83] Kevin Dunn, 'The Lord's Resistance Army and African International Relations' (2010) 3(1) African Security 46 <https://www.tandfonline.com/doi/full/10.1080/19362201003608797#abstract> accessed 15 November 2024.

[84] Konstantina Stavrou and Andreas Sauermoser, 'The Prosecutor V Dominic Ongwen: A Judgment Of Many Firsts' (*Human Rights Pulse*, 11 May 2021) <https://www.humanrightspulse.com/mastercontentblog/the-prosecutor-v-dominic-ongwen-a-judgment-of-many-firsts> accessed 15 November 2024.

[85] Anna Macdonald, 'Somehow This Whole Process Became so Artificial': Exploring the Transitional Justice Implementation Gap in Uganda' (2019) 13 International Journal of Transnational Justice 225 <https://academic.oup.com/ijtj/article/13/2/225/5480392> accessed 15 November 2024.

[86] Knut Traisbach, 'International Law (Introduction)' in Stephen McGlinchey (ed), *International Relations* (e-International Relations Publishing 2017).

states within the global legal order, reinforcing the divide between the Global North and South.

The Eurocentric bias embedded in the drafting and implementation of the Convention further exacerbates these disparities. For instance, while developed states have the institutional capability to prosecute complex international crimes and comply with transnational evidentiary obligations, many Third World countries face basic challenges in maintaining judicial independence or adequately resourcing their domestic courts.[87] As Dr Chimni observes, such frameworks often mask their origins in the historical processes of empire, creating norms that privilege the interests of powerful states while relegating the Global South to a subordinate role in international legal systems.[88]

The Convention's mechanisms for MLA also raise sovereignty concerns for Third World states. While framed as reciprocal, these mechanisms predominantly benefit developed countries with advanced investigatory capacities and superior technological infrastructure. This asymmetry enables the Global North to exert disproportionate influence over the legal systems of weaker states. TWAIL scholarship emphasises how such processes can lead to the erosion of sovereignty, particularly in politically sensitive cases where legal cooperation is leveraged to achieve strategic geopolitical objectives. The Convention risks perpetuating a neocolonial dynamic where legal obligations imposed on developing states serve the interests of wealthier nations, rather than fostering genuine international collaboration. The expectation for compliance without adequate support from the international community raises critical questions about the fairness and sustainability of the Convention's framework. Developing nations often face significant hurdles, including political instability, corruption, and limited judicial resources, which ultimately hinder their ability to meet the Convention's expectations.[89]

For instance, post-conflict nations such as the Democratic Republic of the Congo ('DRC'), grapple with weak legal institutions and pervasive violence,

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[87] Lisa Hilbink and Matthew C Ingram, 'Courts and Rule of Law in Developing Countries' in Erin Hannah et al (eds), *Oxford Research Encyclopedia of Politics* (OUP 2019).

[88] BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3.

[89] Mushtaq H Khan, 'Governance and Anti-Corruption Reforms in Developing Countries: Policies, Evidence and Ways Forward' (2006) 42 UNCTAD Research papers for the Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development 1, 4.

making compliance with international legal obligations exceedingly challenging.[90] This pattern is also prevalent in conflict and post-conflict ridden regions in the Middle East as well. In the Syrian Arab Republic, there have been instances of numerous violations of international humanitarian law as well as non-compliance with customary international law, posing higher challenges for complying with international obligations.[91]

Moreover, Article 6 encourages states to enact domestic laws that criminalise genocide, crimes against humanity, and war crimes.[92] While this provision aims to align national legislation with international standards, it places an undue burden on developing nations to reform their legal systems. States might oppose the ratification of the Convention in its entirety or might not accede to the obligations under Article 6, in particular, owing to instances such as the disparity in the prosecutions undertaken by the ICC against members from the Global North against the South,[93] which has led states from the African Union to establish regional courts like the African Court of Human and Peoples' Rights ('ACHPR') and the Court of Justice of the African Union ('ACJ'). Many of these states, already grappling with limited financial and administrative resources, face significant challenges in implementing such reforms. For instance, after the Rwandan Genocide, Rwanda struggled to process thousands of cases domestically, relying heavily on foreign aid and ad hoc mechanisms like the Gacaca courts.[94] To prosecute such perpetrators, Rwanda allocated financial resources towards constructing prisons and arresting impugned offenders instead of rebuilding an already financially depleted country.[95] Article 6 may compel states to reallocate scarce resources from essential services, such as education and healthcare, toward expensive legal and investigative processes.

The notion of altering domestic prosecution regimes is particularly concerning when the major stakeholders of the Convention are realised. The

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[90] M Bassiouni, *International Criminal Law* (DePaul University 2008) 151.

[91] Rebecca Ingber, 'International Law is Failing Us in Syria' (*Just Security,* 12 April 2017) <https://www.justsecurity.org/39895/international-law-failing-syria/> accessed 13 November 2024.

[92] Ljubljana-The Hague Convention, art 6.

[93] Natalie Hodgson, 'Resisting the State Crimes of the Global North: Exploring the Potential of International Criminal Law' (2024) 22 Journal of International Criminal Justice 151, 156.

[94] Maureen Laflin, 'Gacaca Courts: The Hope for Reconciliation in the Aftermath of the Rwandan Genocide' (2003) UIdaho Law 19 <https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1502&context=faculty_scholarship> accessed 15 November 2024.

[95] Maya Sosnov, 'The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda' (2007) 36 Denver Journal of International Law & Policy 125, 132.

absence of experienced legal professionals, forensic experts, and investigative resources can hinder the capacity of these states to fulfil their obligations under the Convention. Consequently, the Convention's framework may inadvertently perpetuate a cycle of impunity for serious crimes as developing nations struggle to prosecute perpetrators effectively.

C. Lack of a Bottom-Up Approach

In aligning its provisions towards harmonised legal assistance, the Convention's failure to differentiate responsibilities based on states' developmental contexts is another significant flaw. By holding all signatories to the same standards, the Convention overlooks the unique challenges faced by developing countries, many of which are still recovering from conflict or grappling with political instability.[96] This uniformity risks reinforcing existing power dynamics such as those observed with enforcing the Geneva Conventions. Leaders and military officials from Rwanda, Sierra Leone, and Sudan have been prosecuted under IHL frameworks, such as through the International Criminal Tribunal for Rwanda and the ICC.[97] However, despite the existence of well-documented violations of IHL by Western powers such as the United States during the Iraq war, steps were not taken to hold the perpetrators liable under IHL.[98] These disparities within the international legal system privilege wealthier nations that have the means to comply even though they may choose not to while marginalising those that do not possess such resources.[99]

The absence of a tiered approach to responsibilities can lead to inequitable outcomes. For instance, the Convention does not account for even nations facing economic sanctions, the situation of import driven economies in assisting in mutual legal procedures. Such consequences can further entrench existing inequalities, as wealthier nations may evade accountability for their own failures while disproportionately penalising those with fewer resources.[100]

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[96] Yolanda Kemp Spies, 'Africa, the International Criminal Court and the Law-Diplomacy Nexus' (2021) 16 Hague Journal of Diplomacy 421.

[97] Roger Bartels, 'The Classification of Armed Conflicts by International Criminal Courts and Tribunals' (2020) 20 International Criminal Law Review 595.

[98] Nsama Jonathan Simuziya, 'The (Il)legality of the Iraq War of 2003: An Analytical Review of the Causes and Justifications for the US-led invasion' (2023) 9 Cogent Social Sciences 1, 9.

[99] Frédéric Mégret, 'The Politics of International Criminal Justice' (2002) European Journal of International Law 1261.

[100] William A Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017).

Furthermore, the Convention's lack of flexibility in addressing the specific contexts of developing nations can lead to a one-size-fits-all approach that fails to recognise the complexities of different legal systems and cultural practices. For example, in many African countries, customary law plays a significant role in the legal landscape.[101] The Convention does not adequately account for these practices, which can create tension between international obligations and local traditions.[102] The imposition of Western legal norms without consideration for local contexts can lead to resistance and non-compliance, undermining the Convention's objectives. Such a juxtaposition is particularly relevant when we peruse the number of under trial and imprisoned war criminals, situated before the ICC as well as other region-specific International Crime Tribunals.[103]

D. Implications for International Criminal Accountability

The Ljubljana-The Hague Convention's implications for international criminal accountability are influenced largely by the practicability of its application, insofar as the aforementioned stakeholders are concerned. Given the severe incapacity of conflict-torn nations to try these prisoners, perpetrators of serious crimes evade justice due to the inadequacies of national legal systems.[104]

Furthermore, the Convention's reliance on national jurisdictions raises concerns about the impartiality and effectiveness of prosecutions. In regions plagued by political instability, such as Syria or Iraq, the ability of national courts to hold perpetrators accountable is often compromised. The Convention does not address concerns relating to judicial bias and natural justice considerations either, creating loopholes in even appellate procedures in national courts.[105] The lack of international oversight or intervention in cases where national systems fail to act can perpetuate a culture of impunity, undermining the Convention's objectives.

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[101] Harald Sippel, 'Customary Law in Colonial East Africa' (2022) Oxford Research Encyclopaedia of African History <https://doi.org/10.1093/acrefore/9780190277734.013.1033> accessed 10 July 2024.

[102] Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) Indiana Journal of Global Legal Studies 87.

[103] 'Accused States Cases' (*International Criminal Court*) <https://www.icc-cpi.int/cases> accessed 13 July 2024.

[104] Jessica Lynn Corsi, 'An Argument for Strict Legality in International Criminal Law' (2018) 49 Georgetown Journal of International Law 1321, 1343.

[105] Ndulo (n 102) 119.

The Convention's focus on national prosecutions also raises concerns about the potential for selective justice. In many cases, political considerations may influence decisions about which cases to pursue, leading to a situation where only certain individuals are held accountable while others remain untouched. This selective application of justice can undermine public confidence in the legal system and perpetuate a culture of impunity.

E. Financial Burdens on Developing Nations

The costs associated with mutual legal assistance—including the establishment of communication channels, training for law enforcement, and the protection of witnesses—can be prohibitive for nations with limited budgets. This financial strain raises questions about the sustainability of the Convention's implementation in resource-constrained environments, potentially undermining its objectives.[106] The expectation for states to comply with the Convention without adequate financial support or technical assistance reflects a significant oversight in its design.

The expectation for developing nations to shoulder the financial burdens of the Convention without adequate support from wealthier states raises ethical questions about the equity of the international legal system.[107] The principle of shared responsibility is often overlooked, as wealthier nations may fail to provide the necessary resources or expertise to assist developing countries in meeting their obligations.[108] This lack of support can further entrench existing disparities and undermine the Convention's objectives.

F. Stakeholder Impact: The case of Affected Regions

The real stakeholders of the Convention, particularly in regions such as Africa, the Balkans, and the Middle East, face complex challenges in the wake of its adoption. For countries like Sudan or the DRC, where serious crimes have been

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[106] Alexis Jori Shanes, Hannah Sweeney and Olivia B Hoff, 'An Assessment of the Ljubljana-The Hague Convention on Mutual Legal Assistance' (*Lawfare*, 1 September 2023) <https://www.lawfaremedia.org/article/an-assessment-of-the-ljubljana-the-hague-convention-on-mutual-legal-assistance> accessed 8 July 2024.

[107] Zhu Dan, 'Who Politicizes the International Criminal Court' (2014) 28 TOAEP <https://www.toaep.org/pbs-pdf/28-zhu> accessed 13 July 2024.

[108] Andre Nollkaemper, *Principles of Shares Responsibility in International Criminal Law* (CUP 2014).

rampant.[109] In Sudan, the Rapid Support Forces ('RSF') have committed war crimes of rape, sexual slavery, and pillage. Further the RSF has been accused of committing torture and displacing civilians.[110] It becomes increasingly difficult to ensure accountability for such crimes, committed by entities such as RSF that enjoy state support and are powerful paramilitary organisations, owing to which the perpetrators of such crimes are never brought to justice. Similarly in the DRC, the M23 armed group that enjoys governmental support from Rwanda and Uganda have been found of killing civilians, gang rapes and looting.[111] There have been instances where the M23 has committed such crimes with the Rwandan military,[112] the involvement of Government officials makes it difficult for both domestic and international tribunals to take cognisance of such offenders. The Convention's emphasis on accountability is crucial. However, the effectiveness of this accountability is contingent on the willingness and capacity of national governments to engage with the Convention.

In the Balkans, the legacy of the Yugoslav Wars underscores the importance of international cooperation in prosecuting war crimes.[113] The Convention's framework could enhance collaboration among states in the region, facilitating the sharing of evidence and resources. Yet, the political will to engage with these processes remains a significant barrier. The historical

[109] 'Why is the Democratic Republic of Congo wracked by conflict?' (*Amnesty International*, 29 October 2024) <https://www.amnesty.org/en/latest/campaigns/2024/10/why-is-the-democratic-republic-of-congo-wracked-by-conflict/> accessed 13 November 2024; 'Sudan: UN Fact-Finding Mission outlines extensive human rights violations, international crimes, urges protection of civilians' (*United Nations Office of the High Commissioner of Human Rights*, 6 September 2024) <https://www.ohchr.org/en/press-releases/2024/09/sudan-un-fact-finding-mission-outlines-extensive-human-rights-violations> accessed 13 November 2024.

[110] 'Crimes Committed in Sudan by Rapid Support Forces, Allied Militias Undermining National, Regional, International Stability, Delegate Tells Security Council' (*United Nations Meetings Coverage and Press Releases*, 13 September 2023) <https://press.un.org/en/2023/sc15408.doc.htm> accessed 13 November 2024.

[111] Maria Elena Vignoli, 'International Criminal Court Takes Important Step in DR Congo' (*Human Rights Watch*, 16 October 2024) <https://www.hrw.org/news/2024/10/16/international-criminal-court-takes-important-step-dr-congo> accessed 13 November 2024.

[112] Paul Kamage, 'DRC files second complaint to ICC against Rwanda army, M23 rebels' (*Al Jazeera*, 24 May 2023) <https://www.aljazeera.com/news/2023/5/24/drc-files-new-complaint-to-icc-against-rwandas-military-and-m23-rebels> accessed 13 November 2024.

[113] Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 American Journal of International Law 78.

context of these conflicts complicates the implementation of the Convention, as national interests often overshadow commitments to international justice.[114]

In the context of Syria, where the ongoing conflict has led to widespread atrocities, the Convention's potential to promote accountability is severely limited by the realities of war.[115] The lack of a stable legal environment hampers efforts to investigate and prosecute crimes, leaving victims without recourse to justice.[116] Thus, while the Convention aspires to support stakeholders in affected regions, its practical impact is often constrained by local conditions.[117]

G. Sovereignty vs International Justice: Why do Nations lack the Political Will to Engage with International Criminal Prosecution

The tension between national interests and international justice is a recurring challenge for developing countries, as they often face competing priorities that limit their capacity to comply fully with global legal frameworks. This consequently precludes their interest, or ability to stay involved in international criminal prosecution.[118] Concerns on sovereignty are a critical factor, with many states perceiving international mechanisms as intrusions on their autonomy. Kenya's resistance to the ICC's involvement in prosecuting post-election violence also stands as evidence to this dynamic.[119] Domestic leaders argued that ICC interventions jeopardised reconciliation efforts and disrupted the fragile balance of national stability, framing compliance with international justice as secondary to pressing internal concerns.[120] Such cases highlight the inherent conflict between respecting national sovereignty and enforcing global accountability mechanisms.

Geopolitical influences also play a significant role in shaping how developing nations interact with international justice systems. Many states

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[114] Karl A Hochkammer, 'The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law' (2021) 28 Vanderbilt Journal of Transnational Law 119.

[115] Michael Scharf, Milena Sterio and Paul Williams, *The Syrian Conflict's Impact on International Law* (CUP 2020).

[116] Jeanne Koopman, 'When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda by Mahmood Mamdani' (2002) 35 International Journal of African Historical Studies 462.

[117] Mégret (n 99) 1270.

[118] Robert Cryer, 'International Criminal Law *vs* State Sovereignty: Another Round?' (2005) 16 European Journal of International Law 979, 991.

[119] Tim Murithi, 'Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan' (2015) 40(2) Africa Development 74, 79.

[120] Cryer (n 118) 83.

perceive these mechanisms as tools wielded by powerful nations to advance their geopolitical interests rather than impartial instruments of justice. The African Union's critique of the ICC for disproportionately targeting African leaders also solidifies this perception,[121] reinforcing the idea that international justice selectively applies its standards. This belief leads to selective cooperation, where states may tend to align their participation with broader foreign policy goals or resist mechanisms perceived as biased or, rather, politically motivated.

These instances flesh out the systemic imbalances within international legal systems rather palpably, where developing countries face disproportionate burdens and limited support. International justice mechanisms often fail to accommodate the unique socio-economic and institutional challenges faced by the Global South, creating a framework that prioritises formal adherence – a hard and fast rule of adhering to the framework – over equitable participation. Addressing this imbalance requires reform that not only provides technical and financial assistance to under-resourced nations but also rethinks the universal applicability of legal standards that do not consider historical and structural inequalities.

VI. CURRENT STATUS: WHERE DOES THE WORLD STAND?

The current status of the Ljubljana-The Hague Convention, pending ratification, underscores a critical juncture in the evolution of international criminal justice. The Convention's ambitious goals are tempered by the reality that many signatory nations, particularly those in the Global South, face significant obstacles that could hinder effective implementation. This situation raises important implications for the future of international legal cooperation.

Until formally ratified by its Third World stakeholders, it is possible to foresee a lack of political will among states, particularly those grappling with internal conflicts or governance challenges. This reluctance may stem from fears of external interference or the imposition of foreign legal standards that do not align with local practices. A notable instance of this can be seen in Nigeria's opposition to the enforcement of customary international law on foreign court jurisdiction over acts of state,[122] where during the Sani Abacha regime, the

[121] 'Invited Experts on African Question' (*ICC Forum*) <https://iccforum.com/africa> accessed 16 November 2024.

[122] Tiwalade Aderoju, 'Cross-border enforcement of judgments against States' (*International Bar Association*) <https://www.ibanet.org/document?id=cross-border-enforcement-Nigeria> accessed on 13 November 2024.

Nigerian government opposed foreign attempts to hold its officials accountable for abuses of human rights through universal jurisdiction or other forms of customary international law.[123] As a result, the Convention risks being perceived as a tool of Western dominance rather than a genuine effort to foster global justice. Such perceptions can further entrench resistance to international legal frameworks, leading to a cycle of non-compliance and impunity.

The implications of these dynamics extend beyond the immediate context of the Convention. They reflect broader tensions within the international legal system, where disparities in power and resources often dictate the terms of states and their engagement with international law. If the Convention is to serve its intended purpose, it must evolve to incorporate mechanisms that genuinely consider the realities faced by all signatories, particularly those from the Global South.

VII. THE WAY FORWARD AND CONCLUSION

The Ljubljana-The Hague Convention represents a landmark attempt to establish a universal framework for mutual legal assistance and extradition in addressing core international crimes. By introducing mechanisms for the transfer of sentenced persons, joint investigations, and procedural cooperation, the Convention aims to strengthen accountability and tackle impunity under international law. However, its implementation raises critical concerns, particularly for Third World and Global South nations. The Convention imposes significant obligations on states to criminalise core international crimes under domestic law and establish jurisdiction over them, thereby advancing the *aut dedere, aut judicare* principle. Yet, the lack of attention to geopolitical asymmetries, operational selectivity, and historical injustices affecting these regions undermines its equitable application. The disproportionate burden on resource-constrained states highlights the need for a more inclusive and context-sensitive approach. To ensure effective and fair global justice, reforms should integrate perspectives from the Global South, address systemic inequalities, and provide capacity-building support to states facing disproportionate challenges. Given that only 70 states participated in the discussions surrounding the

[123] Hussein Abdullahi, 'Statement by Ambassador Hussein Abdullahi, Former Under-Secretary, Regions and International Organizations (RIO), Ministry of Foreign Affairs, Abuja The Scope and Application of the Principle of Universal Jurisdiction' (UNGA Sixth Committee, 72nd Session, 10 October 2017) <https://www.un.org/en/ga/sixth/72/pdfs/statements/universal_jurisdiction/nigeria.pdf> accessed 27 April 2025.

adoption of the Convention, it is evident that stakeholder involvement remains limited, and a larger consensus amongst states globally is required.

To mitigate these, a reimagining of the Convention's framework and implementation is essential. The Convention may particularly benefit from two ideas: including incorporating a bottom-up approach and the involvement of regional cooperatives. These mechanisms address the disparities among states in capacity and resources and may ensure that the Convention's objectives are achieved equitably and effectively across diverse jurisdictions.

An approach similar to Common But Differentiated Responsibilities ('CBDR'), established in international environmental law, recognising the shared responsibility of states to tackle global challenges while accounting for their differing capabilities and historical contexts. The Ljubljana-The Hague Convention, by incorporating an approach that identifies the needs of the Global South, can fulfil its true objectives on a global level while ensuring justice is delivered to all stakeholders. For instance, in agreements such as the United Nations Framework Convention on Climate Change ('UNFCCC')[124] and the Kyoto Protocol to the United Nations Framework Convention on Climate Change ('Kyoto Protocol'),[125] CBDR has allowed differentiated obligations for developed and developing countries. For instance, the Kyoto Protocol imposed binding emission reduction targets solely on industrialised nations, acknowledging their greater historical contribution to emissions and superior technical resources. Similarly, in the Ljubljana-The Hague Convention context, states with robust legal and institutional frameworks could bear greater responsibility for facilitating mutual legal assistance and providing technical expertise. In contrast, less-resourced states could focus on developing foundational capacities through phased obligations. The Montreal Protocol on Substances that Deplete the Ozone Layer serves as a compelling example of how the challenges faced by resource-constrained states were effectively addressed.[126] Developing states received financial and technical assistance to comply with the treaty, alongside extended timelines for meeting obligations. Drawing from this model, wealthier states could provide financial support under the Ljubljana-The

[124] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.
[125] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 Feb 2005) 2303 UNTS 162.
[126] Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.

Hague Convention to help less-resourced countries establish systems for handling extraditions, evidence sharing, and cross-border legal cooperation. This approach could include funding specialised training for law enforcement and judicial officers, creating modernised legal infrastructure, and ensuring the availability of translation and communication tools necessary for international collaboration.

Regional cooperative bodies can assist in this cause by addressing their jurisdictions' specific legal, cultural, and logistical challenges. These organisations possess the localised expertise necessary to tailor the implementation of global agreements to regional contexts. For example, the ASEAN Agreement on Transboundary Haze Pollution demonstrates how regional cooperation can address shared challenges.[127] Similarly, the African Union could coordinate regional mechanisms within the continent to support the Ljubljana-The Hague Convention, such as joint investigative bodies or shared forensic facilities. These mechanisms would reduce duplication of effort, foster trust among member states, and streamline cross-border prosecution processes.

In Latin America, regional organisations like the Organization of American States and MERCOSUR provide valuable models for harmonising legal frameworks. For example, the Inter-American Convention on Mutual Assistance in Criminal Matters reflects the potential of regional agreements to complement global treaties.[128] Building on this, regional bodies could develop standardised protocols for handling evidence, facilitate joint training initiatives, and create secure communication networks to enhance the exchange of sensitive information related to genocide, crimes against humanity, and war crimes.

Financial mechanisms established by regional bodies could further support implementation. Regional organisations could create funds to finance the development of legal infrastructure, advanced investigative tools, and capacity-building programmes. These funds would be particularly valuable for states with limited resources, ensuring their meaningful participation in the Convention's framework. These two possibilities may aid in creating a symbiotic framework where global solidarity is enhanced by regional-specific investment,

[127] ASEAN Agreement on Transboundary Haze Pollution (adopted 10 June 2002, entered into force 25 November 2003) (ASEAN).

[128] Inter-American Convention on Mutual Legal Assistance in Criminal Matters.

ensuring that the Convention is implemented equitably and effectively across diverse legal systems.

The Ljubljana-The Hague Convention, while a critical instrument for enhancing mutual legal assistance in prosecuting the most heinous international crimes, risks reinforcing global inequities if its limitations are not addressed. Its state-centric approach, coupled with uniform obligations, overlooks the stark disparities between the Global North and South. The Convention's reliance on a one-size-fits-all framework exacerbates existing power imbalances, leaving less-resourced states struggling to meet obligations and depriving marginalised victims of the justice they deserve. Without reform, it risks becoming a mechanism that disproportionately benefits wealthier, more developed states while sidelining those most in need of support. Ultimately, any effort aimed at universalising international criminal justice must actively incorporate Third World perspectives, needs and challenges, fostering a framework that is both equitable and reflective of diverse global realities. This would ensure that a soft law mechanism such as this could serve as a stepping stone leading to wider acceptance, eventually transforming into binding hard law as consensus grows.

To be truly effective, developed nations, which possess the resources, as well as the historical responsibility for global injustice, must take on a larger share of the burden to undo these inequities. Financial and technical support for less-resourced states will enable them to build the necessary legal and institutional frameworks for meaningful mutual assistance, ensuring that all states, regardless of their economic status, can effectively participate in the Convention's objectives. This approach is neither novel nor untested but simply unused in the context of legal assistance or international criminal justice and prosecution. Furthermore, regional mechanisms should harmonise legal standards, facilitate joint investigations, and mediate inter-state disputes, ensuring that all member states can contribute meaningfully.

The Ljubljana–The Hague Convention cannot afford to be another hollow promise in the realm of international justice. It must transcend procedural formalities, address structural inequalities, and prioritise substantive accountability. Anything less will render it a failure in the fight for global justice.

NUTCRACKER OR SLEDGEHAMMER? A TWAIL PERSPECTIVE ON PROPORTIONALITY TEST IN INDIRECT EXPROPRIATION

Rohan Karan Mehta[*]

Proportionality or trying to find the balance seems to have become ubiquitous; be it domestic law or international law, all over the globe, the adjudicatory authorities' primary imperative seems to be to find the balance. Through this paper, I challenge the prevalence of proportionality in International Investment Law. I shall employ TWAIL to problematise this application of proportionality. International Investment Law often pits developing nation-states against powerful corporations from the First World. This inherent inequality of International Investment Law has been subject to multiple criticisms from TWAIL scholars. Building on this rich tradition, I argue that the usage of proportionality in International Investment Law produces inequitable outcomes for the Third World. To build this critique, I shall focus on the locus classicus of Te´cnicas Medioambientales Tecmed S.A. v The United Mexican States *that introduced proportionality, and will analyse the subsequent cases that have used proportionality. What, then, can be a possible solution or a doctrine that the tribunals can rely upon? I suggest that perhaps going back to the roots of International Investment Law and adopting the doctrine of sole effects would lead to more equitable outcomes as compared to proportionality.*

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I. INTRODUCTION

'A sledgehammer should not be used to crack a nut'.[1]

Through the above remark, Lord Diplock encapsulates the utility of the proportionality test. The often labeled 'precise and delicate' proportionality test has been used to crack a plethora of cases in constitutional and administrative law.[2] But now it finds itself in a previously uncharted domain: International Investment Law ('IIL').[3] Though proportionality is used in multiple areas of IIL, through this paper I focus on its application in indirect expropriation.[4]

The core concept of expropriation is reasonably clear: it is a governmental taking of property for which compensation is required.[5] The difference between a direct expropriation and an indirect expropriation is the question of whether the legal title of the owner is affected by the Government measure.[6] Indirect expropriation removes the investor's ability to use their investment in a meaningful way while retaining the title. A feature of indirect expropriation is the State's denial of expropriation and refusal to provide compensation.[7]

The underlying issue here then becomes distinguishing between indirect expropriation and a regulatory action of the host state.[8] This distinction is important because regulatory actions do not give rise to claims of compensation,

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[1] *R v Goldstein* (1983) 1 WLR 151, 157.

[2] *Anuradha Bhasin v State of Jammu & Kashmir* (2020) 3 SCC 637; *Association for Democratic Reforms v Union of India* 2024 INSC 113.

[3] Over the last decade, both scholars and tribunals have increasingly resorted to principle of proportionality. See Alex Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 Law & Ethics of Human Rights 47; Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' in Albert Jan van den Berg (ed), *50 Years of the New York Convention* (Series No 14, Kluwer Law International 2009).

[4] See Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, OUP 2022).

[5] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017).

[6] Dolzer, Kriebaum and Schreuer (n 4) 146.

[7] ibid 153.

[8] See August Reinisch, 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 753. For who is host state, see Collins Erin, 'Obligations of the Host State' (*Jus Mundi*, 2 April 2025) <https://jusmundi.com/en/document/publication/en-obligations-of-the-host-state> accessed 24 November 2024.

whereas indirect expropriation does. To elaborate, States have an inherent right to regulate themselves, and not every interference or regulatory action amounts to expropriation requiring compensation.[9]

Tribunals have espoused divergent perspectives to solve this dilemma.[10] Proportionality is the latest one to be thought of as the panacea to this issue.[11] The reason proportionality is starting to be used more correlates with the perceived failure of other doctrines.[12]

Much ink has been spilled on the above issue.[13] Overwhelmingly, the proportionality test has been favoured.[14] Though some scholars have critiqued proportionality, there has not been a Third World Approach to International

[9] For further explanation, see Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 Journal of World Investment & Trade 717.

[10] For sole effects, see *Starrett Housing Corp v Government of the Islamic Republic of Iran* (1983) 4 Iran–US CTR 122, 156*; Saipem SpA v People's Republic of Bangladesh*, Case No ARB/05/7. For police powers, see *Too v Greater Modern Insurance Associates & the USA*, 23 Iran-US CTR*; Marvin Feldman v United Mexican States*, Final Award (2002) 18 ICSID Rev-FILJ 488 (2003).

[11] *Tecnicas Medioambientales Tecmed, SA v Mexico*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) 43 International Legal Materials 133; *Azurix Corp v Argentine Republic*, ICSID ARB/01/12, Award (14 July 2006).

[12] Other doctrines include sole effects, police powers etc. All of them are criticised because they focus on a particular aspect, like effect or purpose of the regulation. Whereas proportionality is thought to be balancing multiple interests.

[13] Jaunius Gumbis and Rapolas Kasparavicius, 'State's Right to Regulate: What Constitutes a Compensable Expropriation in Investor-State Arbitration' (2017) 5 Yearbook on International Arbitration 153; Mojtaba Dani and Afshin Akhtar-Khavari, 'The Uncertainty of Legal Doctrine in Indirect Expropriation Cases and the Legitimacy Problems of Investment Arbitration' (2016) 22 Widener Law Review 1.

[14] Giovanni Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay' (2017) 14 Brazilian Journal of International Law 95; Mojtaba Dani and Afshin Akhtar-Khavari (n 13); Kiratipong Naewmalee, 'Indirect Expropriation: Property Rights Protection, State Sovereignty to Regulate and the General Principles of Law' (PhD thesis, University of Wollongong 2017); Stephen Olynyk, 'A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 International Trade & Business Law Review 254; Prabhash Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay' (2019) 9 Asian Journal of International Law 98; Jeffrey Waincymer, 'Investor-State Arbitration: Finding the Elusive Balance between Investor Protection and State Police Powers' (2014) 17 International Trade & Business Law Review 261; Omer Erkut Bulut, 'Drawing Boundaries of Police Powers Doctrine: A Balanced Framework for Investors and States' (2022) 13 Journal of International Dispute Settlement 583.

Law ('TWAIL') appraisal of this issue.[15] I attempt to fill this gap by using TWAIL to evaluate the proportionality test.

I argue that the current application of the proportionality test produces inequitable outcomes for the third world. Then I argue that a more equitable solution would be the utilisation of the sole effects doctrine. Therefore, in Part II, I elaborate on how I employ TWAIL. Subsequently, in Part III, I use TWAIL to evaluate the *locus classicus* of *Te´cnicas Medioambientales Tecmed S.A. v The United Mexican States* ('Tecmed') that introduced proportionality and analyse the subsequent cases that have used proportionality.[16] Through this part, I highlight the flaws of this doctrine. Finally, in Part IV, I argue for the invocation of the sole effects doctrine by demonstrating how it resolves the flaws of proportionality and then demonstrate its practical application through a concise hypothetical.

II. TWAIL: THE OTHER SIDE OF INTERNATIONAL LAW

TWAIL has famously been described as a network of third-world scholars using their unique perspective to critique the history, structure, and process of evolution of international law.[17] The third world here refers to a geographical as well as a political space.[18] There are further generations within the TWAIL scholarship. However, due to the limited scope of this paper, it aims to contribute towards the general TWAIL scholarship.[19]

But, despite the above amorphous description, the aims and purposes of TWAIL lend a semblance of consistency in its usage. Broadly, TWAIL aims to

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[15] For an introduction to TWAIL, see BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3. For other approaches of critiques, see Prabhash Ranjan, 'Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal' (2014) 3 Cambridge Journal of International and Comparative Law 853; Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15 Journal of International Economic Law 223.

[16] ICSID Case No. ARB(AF)/00/2. ('*Tecmed*').

[17] BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (CUP 2017) 10-30.

[18] ibid. Third world united by common ties against the capitalist regimes that continue to produce colonial or neo-colonial ideologies.

[19] ibid. The primary reason being that the differences themselves are contested. Therefore, it is hard to conclusively come to common ground or a demarcating line.

deconstruct the international law norms that perpetuate racialised ideas and instead propose more equitable alternatives.[20]

This perspective becomes especially important considering the international investment law where due to the nature to proceedings itself, States are pitted against corporations. More specifically even within IIL, expropriation represents the crudest iteration of this inherent inequality. For instance during the Argentinian financial crisis, the state was forced fight multiple expropriation claims before ICSID tribunals which further exacerbated its financial issues.[21] However, symbolically, let us visualise the imagery of a third world country battling is financial issues, being questioned in an adversarial setting about the ambit of its sovereign right to regulate through expropriation cases by massive conglomerates from the Global North. This visual is enough as Chimni argues to cast doubt on the entire IIL regime.[22]

All this becomes even more problematic when proportionality is thought of as a panacea that would bring balance to the table when the question of expropriation arises.[23] Therefore, given this context, TWAIL becomes particularly important to highlight the inherent biases within the balancing framework that is proportionality which seems to gloss over the inherent inequity and paper over the fault lines within the IIL regime.

Generally, this is carried out by a critical evaluation of narratives through their global historicisation.[24] An example of this approach would be Chimni's analysis of customary international law by historicising it.[25] Therefore, in a similar vein, I attempt to carry out my TWAIL analysis by historicising the usage of the proportionality test in IIL cases dealing with expropriation.

Historicisation of the jurisprudence is important and relevant in this case. The reason is that as I will demonstrate in later parts, proportionality is not a concept that has always been prevalent in IIL. To contextualise, IIL lies at the

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[20] Makau Mutua and Antony Anghie, 'Proceedings of the Annual Meeting (American Society of International Law)' (April 5-8, 2000) 94 ASIL Proc 31-40.

[21] ICSID Case No ARB/02/1; ICSID Case No ARB/03/9; ICSID Case No ARB/03/15. Also see Charity L Goodman, 'Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina' (2007) 28 University of Pennsylvania Journal of International Law 449.

[22] BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 American Journal of International Law 1.

[23] Reinisch, 'Expropriation' (n 8) 773.

[24] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 International Community Law Review 371.

[25] Chimni (n 22).

intersection of international private and public law. Whereas traditionally proportionality as a remedy was common only in domestic administrative courts, even then usually when adjudicating upon rights.

Therefore, assessing the roots of how this balancing act came to the fore in IIL is essential for the primary reason of it being vital to uncover the hidden agenda, if any behind the reliance of this supposedly foreign concept in a then new and emerging field of law. By appreciating the historical context behind the usage of proportionality in IIL, we can ascertain whether it is politically charged or tends to favor certain outcomes/states over others. Consequently, only through historicisation can we understand the million dollars 'why' question: why does proportionality seem to lead to certain outcomes in IIL.

III. EXPROPRIATION- PROPORTIONALITY PREDICAMENT

In this section, I first critique the *Tecmed* usage of proportionality due to it being the most relied-upon conception of proportionality in IIL.[26] Then I trace and analyse cases that have relied on proportionality since *Tecmed*. Through this, I highlight that proportionality produces inequitable outcomes for the third world.

A. TECMED V MEXICO

In *Tecmed*, a subsidiary of a Spanish company acquired land, buildings, and other assets to operate a hazardous waste landfill in Mexico. Subsequently, the Mexican Government denied the license renewal for the operation of the landfill to the subsidiary. The company alleged indirect expropriation, whereas Mexico argued that this was done for environmental interests and public health.[27]

According to the tribunal, the main question was whether the State's actions were *proportional* to the concerns of public interest and the protection of foreign investments.[28] For this, there must be a legitimate aim.[29] Additionally, there must be a relationship of proportionality between the burden on the foreign investor and the aim in question.[30] Interestingly the tribunal found the

[26] *Tecmed* (n 11).
[27] See generally Mexico-Spain BIT (1995) art 5.
[28] *Tecmed* (n 11) 122.
[29] ibid. Citing *James v UK*, App No 8793/79 (ECtHR, 21 February 1986).
[30] ibid.

basis for these principles in the jurisprudence of the European Court of Human Rights ('ECtHR').[31]

In *Tecmed*, the tribunal first determined the aim for regulation, which was a hostile reception from the local community.[32] Then, it evaluated the legitimacy of the aim and concluded that this cannot amount to an aim that denies investors rights.[33] Thus, as an investor was affected disproportionately, there was indirect expropriation.[34]

I critique this conception of proportionality on two grounds. Firstly, on its reliance on the ECtHR jurisprudence and secondly, on the discretion granted to tribunals to make value judgments.

1. Proportionality and ECtHR Jurisprudence

To clarify, here I do not deal with the overall history of the proportionality test, but rather its origin in IIL from the ECtHR. *First,* I argue that the proportionality test is not a rule of customary law or even a general principle recognised by all nations.[35] It is often a tendency of the 'Developed World' to universalise their principles, a TWAIL perspective would therefore entail questioning such claims. The phrasing of Article 38(1) of the International Court of Justice statute mentions that international custom and general principles recognised by civilised nations should be applied when disputes are before the Court. The phrase 'civilised nations' in this article when evaluated from a TWAIL lens underscores the inherent inequality.

As Akehurst argues custom is constituted by two elements, the objective one of 'a general practice', and the subjective one 'accepted as law' (opinio juris). The main evidence of customary law is in the actual practice of states. This can be ascertained from published material, newspaper reports of actions taken by states, statements made by government spokesmen to Parliament, to the press,

[31] ibid.
[32] ibid 127-38.
[33] ibid 133-148.
[34] ibid 148-149.
[35] Chinese constitutional-administrative law appears not to recognise a principle of proportionality at all. See Han Xiuli, 'The Principle of Proportionality in Tecmed v. Mexico' (2007) 6 Chinese Journal of International Law 635, 650. Similarly, there is a lack of evidence that proportionality is recognised as a rule of customary international law. See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 236.

at international conferences and meetings of international organisations; and also, state laws and judicial decisions.[36]

On the other hand, the ambit of general principles is contested. One view is that it refers to the 'general principles of international law'. While another is that it refers to general principles of national law. According to the first definition (general principles of international law) – the phrase is not a source of law as a method of using existing sources – extending existing rules by analogy, inferring the existence of broad principles from more specific rules using inductive reasoning. According to the second definition of general principles of law (general principles of national law), gaps in international law may be filled by borrowing principles that are common to all or most national systems of law.[37]

Therefore, it seems that to establish proportionality as either CIL or general principle, it has to be shown that it is ubiquitous in the domestic legal system or practices of states. To this end, scholars like Bücheler analyse the German, Canadian, South African, and Israeli domestic courts and argue that proportionality is a general principle of law.[38] However, while proportionality is commonly used for adjudication in domestic legal systems of Europe and North America, there are nations where proportionality is not used, with China being the biggest example among other Asian nations.[39] Additionally, proportionality does not exist in all 'civilised nations'.[40] Consequently from a critical third world lens, it seems arrogant of the 'civilised nations' to place a principle which might be ubiquitous in their domestic systems at a pedestal and universalise it. Even among the countries where it exists, it is not uniformly applied as cultural factors shape judicial review in different legal systems.[41] Most investment treaties do not refer to proportionality.[42] At the present juncture, according to Scholars like

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[36] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (Routledge 2022).

[37] RB Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51 American Journal of International Law 734, 739.

[38] Gebhard Bücheler, 'Proportionality as a General Principle of Law' in Valentina Vadi (ed), *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar Publishing 2018) 37.

[39] ibid.

[40] Abdulkadir Gülçür, 'The Necessity, Public Interest, and Proportionality in International Investment Law: A Comparative Analysis' (2019) 6(2) University of Baltimore Journal of International Law 215.

[41] Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar Publishing 2018).

[42] ibid.

Vadi, further study is required and any decisive conclusion would be premature.[43] Furthermore, none of the IIL tribunals try to justify it as a custom or general principle, rather they adopt it from ECtHR jurisprudence. Therefore, proportionality cannot be justified as a part of CIL or a general principle of law.

Second, the proportionality test necessarily has some normative content. It cannot be seen as merely an analytical tool. The test entails considering whether a state action is proportionate to its aims.[44] The tribunal considers whether the means are necessary, suitable, and the least restrictive alternative for the aim.[45] In answering these questions, the tribunal moves away from 'what is' to 'what ought to be'.[46] To illustrate, suppose a tribunal is adjudicating on whether measure X is necessary to achieve goal Y. The tribunal here is considering whether measure X should be employed or whether some other measure Z ought to be sufficient.[47] Engaging with this normative content requires an understanding of the roots of the principle.

Therefore connectedly, *third*, this normative content of proportionality in ECtHR is contingent on and made coherent through European constitutionalism. The character of proportionality in ECtHR jurisprudence is constitutional. To elaborate, the European Convention on Human Rights is treated as a constitutional charter, specifically a European constitutional charter.[48] An example would be the ECtHR jurisprudence on Protocol No. 1.[49] This protocol suggests a balancing test between an individual's possession of the property and the state's right to regulate.[50] The ECtHR courts, while using proportionality to balance interests, also have to rely on other considerations to

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[43] Valentina Vadi, 'The Migration of Constitutional Ideas: The Strange Case of Proportionality in International Investment Law and Arbitration' in Andrea K. Bjorklund (ed), *Yearbook on International Investment Law and Policy 2013-2014* (OUP 2015) 337, 340.

[44] Michael Fordham and Thomas de la Mare, 'Identifying the Principles of Proportionality' in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing 2001) 27.

[45] Moshe Cohen-Eliya and Iddo Porat, Proportionality and Constitutional Culture (CUP 2013)

[46] N Jansen Calamita, 'The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties' in Andrea K Bjorklund (ed), *Yearbook on International Investment Law and Policy 2013-2014* (OUP 2015) 157-200.

[47] The argument is inspired from Prof Lon Fuller's classic examples in 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) Harvard Law Review 630.

[48] *Ireland v United Kingdom* (1978) 2 EHRR 25; *Loizidou v Turkey* (1995) 20 EHRR 99.

[49] European Convention on Human Rights, Protocol No 1. Also, interestingly the case that *Tecmed* has relied upon was relating to Protocol No. 1 of the Convention.

[50] *Sporrong & Lönnroth v Sweden* (1983) 5 EHRR 35, 69. See generally Camilo B. Schutte, *The European Fundamental Right of Property* (Kluwer 2004) 51–58.

determine the hierarchy of interests.[51] This hierarchy is influenced by the constitutional nature of the convention.[52]

Thus, I argue that considering its normativity and embeddedness in European constitutionalism, the ECtHR proportionality test cannot be used in IIL expropriation disputes. Considering that European constitutionalism influences its normative nature, the test may be appropriate when governing ECtHR disputes between European nations. But from a TWAIL perspective it cannot be universalised to adjudicate on investment issues concerning the third world. The reason is that a particular set of European values cannot act as a universal standard governing the particular policies of other nation-states, especially one peculiar to the third world.

The principle of proportionality is at its core a principle of constitutional and administrative law.[53] The migration of constitutional ideas in international law is a contested topic.[54] Methodologically, there are as Vadi argues two views, the first, a functionalist and the second, a cultural approach.[55]

In a functionalist approach, law can be taken from one place and used in any other.[56] On the other hand, in a cultural approach, law cannot be separated from its context.[57] The assumption underlying the functional approach is that law is a tool meant to address social issues and that all societies have similar issues.[58]

Considering this, I argue that a cultural approach is more aligned with the realities of the present world and the divide between the global north and the third world. Different societies do indeed face different issues, from a TWAIL lens, the most glaring example, to illustrate this point would be the struggles of the third world, be it apartheid or the imposition of a hegemonic capitalist order.

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[51] Vadi (n 41).

[52] ibid.

[53] VC Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale Law Journal 3094, 3098.

[54] G Teubner, 'Fragmented Foundations: Societal Constitutionalism beyond the Nation State', in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 327, 328.

[55] Vadi (n 41).

[56] A Watson, 'Comparative Law and Legal Change' (1978) 37 Cambridge Law Journal 313–36, 314–15.

[57] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1.

[58] R Michaels, 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 339–82.

These struggles are not present in the first world, as they are the ones who are if not playing the role of oppressors are the ones who are complicit.

A cultural approach realises that law cannot be separated from its context. Legal systems and principles are embedded in particular cultures. A meaningful usage of proportionality would be engaging with its particular ECtHR context and the values underlying it. However, IIL in their usage of proportionality has lacked such nuance. Rather, instead of nuance, a 'balancing' principle based in European constitutionalism has been relied upon by Europeans against the third world.

Scholars argue the historical, political, and cultural background of the principles have to be closely evaluated.[59] The reason is that constitutional principles are formed in very particular connotations of power and relationships between different institutions. Considering the international setting of IIL, such principles of particular jurisdiction cannot be incorporated at the international level.

A meaningful engagement with the principles entails more than blindly copy-pasting excerpts from ECtHR, it entails consideration of whether the principle has proven to be satisfactory in its field of origin, and whether it would be satisfactory to solve the unique concerns of the IIL regime. To clarify, I am not opposed to the usage of proportionality in IIL. However, its current conception based on ECtHR constitutionalism is not something that can be utilised without deliberation and taking cognisance of values underlying the same.

Now, it may be argued that another way to use proportionality in IIL is not by taking on from ECtHR, but rather using it as an analogy to transplant the concept, essentially a legal transplant.

To contextualise, constitutional ideas such as proportionality migrate across disciplines through predominantly three ways: (a) cross-judging (essentially referring to the jurisprudence of other tribunals); (b) legal transplant (transplanting legal principles or law from one country to another), and (c) when they become general principles of law. As argued before, ECtHR cannot be used for cross-judging because of its peculiar character, for instance: IIL is concerned with investor-state disputes in a neo-liberal world where capitalistic

[59] P Zumbansen, 'Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance' (Research Paper No 1/2012, Osgoode Hall Law School 2012).

interests play a predominant role. Whereas ECtHR is concerned with human rights violations; legal instruments in ECtHR such as Protocol No.1 underlies the logic of proportionality, but there is no such backing in the IIL framework. Similarly, as argued before, proportionality at the current stage cannot be said to be a general principle of law. Therefore, (a) and (c) cannot be used to justify proportionality in IIL.

However, I argue that even the logic of legal transplant cannot be used to justify proportionality in IIL. The reason is because of the issues inherent in the legal transplant of constitutional principles in international law.[60] The major issue is selection bias. There is the possibility that arbitrators would choose the cases or principles that they are familiar with (European arbitrators and EtCHR jurisprudence) rather than ones that reflect the position of law or are more suited to the present issue. Additionally, given that in IIL cases, there are already BITs that govern any dispute between the parties, going out of their way to choose principles such as proportionality is in some sense altering the very text of the treaty chosen by parties. Finally, for transplants, the legal systems have to be comparable. But considering the supranational law setting of IIL, it is not desirable to transpose the experience of any national jurisdiction, especially one where the principle seems to more often than not weighed against a particular group, that is the third world.

To conclude, *Tecmed* encapsulates this point. It highlights how Mexico's particular policy considerations were delegitimised by a supposedly universal standard. Thus, the infusion of ECtHR jurisprudence, particularly its proportionality test is problematic for third-world countries. In the next subsection, I *arguendo* ignore the infusion of ECtHR and focus on the fallacies of the test itself.

2. Methodological Flaws and Legitimate Policy

Even in the ECtHR, proportionality has three steps, namely necessity, suitability, and then a balancing analysis.[61] The tribunal in *Tecmed* however skipped the first two prongs and proceeded directly to balancing.[62] In the third step, benefits from

[60] Vadi (n 41).

[61] Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 65.

[62] *Tecmed* (n 11) 122. There is also no apparent reason why *Tecmed* didn't use the complete test, see Henckels (n 15).

the measure are weighted against the restriction of the investor's right. But in *Tecmed* this was done without deciding whether the regulatory measure is suitable or whether less restrictive alternative measures are available to the host country.

Thus, going directly to the third prong entails the making of a judgement about the importance of achieving the objective vis-a-vis the importance of preventing harm to the investor's interests.[63] It may be argued that since proportionality is a conjunctive test, ultimately all prongs must be analysed, which would mean that the order of the analysis is irrelevant. However, the point I am trying to establish is not that the order of the proportionality test was misapplied by the tribunal. Rather the tribunal altogether skipped the first two prongs. In any case, despite proportionality being a conjunctive test, the balancing stage has to be at the last, as the earlier two prongs inform the content of the balancing stage. In *Tecmed*, the tribunal is balancing the benefits and harms of the restriction without deferring to the host state regarding the suitability of the measure or the presence of less restrictive alternative measures.

The lack of deference, combined with the methodological fallacies, creates problems for host states. As shown by *Tecmed*, it grants the tribunal the discretion to decide which public objectives are worth pursuing and legitimate, instead of the State. This casts doubt over the host state's sovereignty and undermines its right to regulate itself.

This application of proportionality also intensifies the TWAIL critiques of IIL and BIT as being neo-colonial institutions that undermine the host state's right to make decisions for public objectives.[64] Some major TWAIL critiques of the international investment regime are that they are based upon an understanding of the law that does not align with considerations relating to human rights, environmental protections, and the sovereignty of host states, an issue that is particularly exacerbated in the cases of developing countries acting as host states.[65]

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[63] Henckels (n 15) 232.

[64] Nicolás M Perrone, 'Foreign Investment Law: A TWAIL View' in Tony Anghie, Michael Fakhri, Vasuki Nesiah, Karin Mickelson and B.S. Chimni (eds), *TWAIL Handbook* (Edward Elgar) (forthcoming).

[65] Centre for Trade and Investment Law, 'International Investment Law and TWAIL' (ctil.org.in, 2023) <https://ctil.org.in/cms/docs/Papers/Publish/02International%20Investment%20Law%20and%20TWAIL.pdf> accessed 14 November 2024.

Another connected critique TWAIL critique that can be made here is one of the 'chilling effect' thesis, which posits that the entire regime of IIL deters host states from making decisions for public purposes, in fear of facing penalties from tribunals.[66] All of these ultimately hamper the development of nations, usually third-world countries, thus replicating the current hegemonic and inequitable systems. In the next subsection, I evaluate other IIL cases that have applied the proportionality test.

B. Cases Post *Tecmed*

Despite there being no stare decisis in IIL, the majority of indirect expropriation awards following *Tecmed*, have cited and applied its proportionality test.[67] Soon after *Tecmed*, the tribunal in *Azurix v Argentina*, applied a *Tecmed*-esque proportionality test, and the award was eventually won by the investor.[68] Following that, an interesting award was *Fireman's Fund Insurance v The United Mexican States*.[69] Here, the tribunal questioned *Tecmed's* application of the proportionality test because it imported the test from ECtHR without any basis. This case was won by the host state.

However, it appears that *Fireman's Fund Insurance* was an aberration. The dominant trend has been that cases have used *Tecmed's* proportionality without any questions. As in future cases like *LG&E v Argentina*,[70] *Continental Casualty v The Argentine Republic*,[71] and *El Paso v Argentina*,[72] the holdings have favoured the investor.

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[66] Maryam Malakotipour, 'The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: a Call for a Legislative Response' (2020) 22 International Community Law Review 235.

[67] Jan Paulsson, 'The Role of Precedent in Investment Treaty Arbitration' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018) ch 4.01.

[68] *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006).

[69] *Fireman's Fund Insurance Company v United Mexican States*, ICSID Case No ARB(AF)/02/1, Award (17 July 2006).

[70] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v Argentine Republic*, ICSID Case No ARB/02/1, Award (25 July 2007).

[71] *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008).

[72] *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011).

However, the award in *Occidental Petroleum Corporation v Ecuador,*[73] is particularly interesting. Here the Ecuadorian constitution and local laws were in support of proportionality. However, the tribunal stated that proportionality is a matter of general international law and cited *Tecmed*. However, as I have argued above, proportionality is not a general international law principle. Merely because it has been cited by a few tribunals does not make it a general principle or customary international law.[74] Still, the trend of *Tecmed's* proportionality being applied and investors winning continues in subsequent cases like *Deutsche Bank AG v Sri Lanka*,[75] *Total v Argentina*,[76] and *Suez and InterAgua v Argentina* prevails.[77]

The last award I will highlight is *Philip Morris v Uruguay*.[78] Here, the tribunal also attempted to use the proportionality test from *Tecmed*. Interestingly, however, the host state won. Here, the tribunal equated the meaning of proportionality with reasonableness. This award highlights another flaw with the underlying current proportionality test – its unclear content. This is problematic because it grants ad hoc tribunals the leeway to mould the content of the proportionality test.

To clarify, this is different from my previous critique of methodology. There, due to the flawed methodology, the tribunals determined the legitimacy of state policy. Here, I argue that as there is no basis in IIL, there is ambiguity regarding what proportionality entails in investor-state disputes. Combining this

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[73] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012).

[74] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th revised edn, Rutledge 2002) ch 3 – Sources of International Law.

[75] *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012).

[76] *Total SA v The Argentine Republic,* ICSID Case No ARB/04/1, Award (27 November 2013).

[77] *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Award (9 May 2010). Here, the award was granted based on FET violation rather than indirect expropriation. Interestingly, *Tecmed's* proportionality was applied for both standards. The interplay between proportionality and FET is out of the scope of the paper. However, current academic scholarship suggests a close relationship between the claims. See also Christoph H Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards' (2007) 4(5) Transnational Dispute Management; Dalia Višinskytė, *Indirect Expropriation in Investor-State Arbitration* (PhD thesis, Mykolas Romeris University 2023).

[78] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016).

with the no *stare decisis* aspect and the flawed approach of *Tecmed*, the ad hoc tribunals usually composed of Western and privileged sections of the society are empowered to determine its content.[79] This is problematic as proportionality then becomes a catch-all term for the tribunal to consciously or unconsciously impose their Eurocentric conceptions of values. A perusal of parties that usually end on the losing side (Mexico, Argentina, Sri Lanka) brings into the fore the issue of proportionality and challenge the veracity of using the principle without being cognisant of its inherent biases. From a critical third world lens, is proportionality's supposed balancing act able to actually weigh investor interests with goals of third world?

To sum up, in this section, I posited a broad critique of proportionality in IIL with two prongs. The proportionality test in IIL traces its roots to the ECtHR. This conception of proportionality is embedded in European constitutionalism and cannot be used as a universal standard. In the particular context of how IIL tribunals have used proportionality, this critique has two implications. Firstly, due to the flawed methodology of proportionality, it has granted ad hoc tribunals the discretion to determine the legitimacy of public policy. This raises concerns about the third world's right to regulate their sovereignty and even their development. Secondly, due to a lack of stare decisis and no basis for proportionality in IIL, the tribunals have the discretion to use proportionality as a catch-all term and impose their values to adjudicate. In the subsequent section, I suggest an alternative and present a hypothetical.

IV. BACK TO BASICS: SOLE EFFECTS STRIKES BACK

To hark back to Part I, the underlying issue is the difficulty in distinguishing between indirect expropriation and regulatory action. I argue that instead of a qualitative measure like proportionality. A quantitative measure like the 'sole effects doctrine' should be used to solve this issue.[80] The doctrine looks at the *effect* of the regulation or government action on investment.[81] This provides a more equitable resolution. Here, the effect is not only limited to economic loss but extends also to the loss of control that investors have suffered.[82] The loss must

[79] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) European Journal of International Law 387.

[80] Kriebaum (n 9).

[81] Dolzer, Kriebaum and Schreuer (n 4) 169.

[82] August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (CUP 2020).

cause substantial deprivation to the investor.[83] It is to be noted that substantial deprivation grants the tribunal discretion to determine what exactly is substantial.

To illustrate with a few classic examples of sole effects in IIL, per Dolzer, the authority from sole effects doctrine in IIL comes from the practice of the Iran-US Claims Tribunal.[84] There, in awards such as *Starrett Housing v Iran*,[85] the tribunal focused on the *effect* of interference with property rights. This doctrine has further been expanded to see the effect on use or control and value or income.[86]

However, I argue that this discretion is much lower than what the tribunal enjoys when it employs proportionality. As it is primarily a quantitative measure, the discretion of the tribunal is significantly lower and does not in any circumstance culminate in the tribunal determining the legitimacy of policy. This also resolves one of my primary critiques of proportionality. Therefore, from a TWAIL lens, this seems more appetible than proportionality.

There may be some element of normative judgment about the clear boundaries of substantial deprivation. However, the scope is limited as compared to proportionality. It may be argued that even the sole effects doctrine, being a legal principle, can be developed by tribunals in a manner to alter its existing contours, hence making it similar to proportionality. The tribunals, as scholars like Kammerhofer argue, have expanded or rather muddled the contours of sole effects by highlighting questions such as sole effect on what (value, use, income, etc.)? and the extent of effect (total or substantial)?[87] Therefore if the argument is that sole effect doctrine is also not inherently clear, I accept it. However, my claim is that the sole effect, no matter how much it is altered by the tribunals, cannot ever lead to tribunals making normative judgments about the aims and concerns of nation-states, at least not to the level of proportionality. This in turn alleviates the one of the primary concerns that

[83] ibid.

[84] Dolzer, Kriebaum and Schreuer (n 4) 170.

[85] *Starrett Housing Corporation v Iran* (1983) 4 Iran-USCTR 122.

[86] *Burlington Resources Inc. v Republic of Ecuador,* ICSID Case No ARB/08/5, Decision on Liability, (14 December 2012) 397; *Alpha Projektholding GmbH v Ukraine,* ICSID Case No ARB/07/16, Award, (8 November 2010) 408; *I.P. Busta & J.P. Busta v Czech Republic* (SCC Case No V 2015/014, Final Award, 10 March 2017) [389-390]; *Cargill, Incorporated v Republic of Poland,* ICSID Case No ARB(AF)/04/2, Award, (29 February 2008) 587

[87] Jörg Kammerhofer, *International Investment Law and Legal Theory* (CUP 2021).

TWAIL scholars might have as using sole effects. The reason being that it does not amount to adjudicating on policy and due to its limited scope does not lend itself easily to judicial discretion.

The reason being, at its core, the doctrine is concerned with the deprivation of investment. Akin to Dworkin's chain novel thesis, even if there is discretion afforded to tribunals, ultimately, they cannot mold or alter the principle into what it is not.[88] The principle's core cannot be eviscerated, and as long as that is the case, the sole effect is better suited for the needs of the third world as compared to proportionality. Thus, its content cannot be decided by the tribunal.

Finally, unlike proportionality, the sole effects doctrine arguably has its basis in general principles of investment law.[89] As mentioned before, the doctrine has been used in IIL for over 40 years, though the its basis is unlikely to be found in domestic legal systems, as it is concerned with expropriation, which by definition does not arise in domestic scenarios. The basis can be found, unlike proportionality in treaty practice. For instance, Article 1110 of NAFTA defines expropriation itself in terms of affecting the investment.[90] Many expropriation clauses expressly state that the state measure is to be deemed expropriatory due to its effects.[91] These clauses use terms like 'having the same effect' or 'having a similar effect'.[92]

The main argument against the sole effects doctrine is that it infringes upon the state's right to regulate. I argue that this is not the case, since the threshold for substantial deprivation as established by tribunals is very high.[93]

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[88] Ronald Dworkin, 'Law as Interpretation' (1982) 9(1) Critical Inquiry 179.

[89] Rudolf Dolzer and Felix Bloch, 'Indirect Expropriation: Conceptual Realignments?' (2003) 5 International Law Forum 155, 164; *Pope & Talbot v Canada,* UNCITRAL (NAFTA) Interim Award (26 June 2000); Jason Gudofsky, 'Shedding Light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: An Environmental Case Study' (2000) 21 Northwestern Journal of International Law and Business 243, 287–88; J Martin Wagner 'International Investment, Expropriation and Environmental Protection' (1999) 29 Golden Gate University Law Review 465.

[90] North American Free Trade Agreement (NAFTA) art 1110. This interpretation was also supported by *Pope & Talbot*.

[91] Jenny Santikko, 'When regulation is expropriation' (Master's thesis, University of Helsinki 2019).

[92] ibid.

[93] Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 Australian International Law Journal 151; Todd Weiler, 'Interpreting Substantive Obligations in Relation to Health and Safety Issues', in Todd Weiler

Usually, regulations do not meet this threshold and this grants the host state ample leeway.[94] Thus the third world concern of it hampering on them making independent policy decisions is resolved. If despite this a regulatory action meets the threshold, then it is more equitable for the investor to be compensated.

To illustrate briefly how the sole effects approach would have been applied, I use a basic hypothetical with facts akin to *Tecmed*. A Spanish company 'X' has a waste recycling plant in Mexico with a one-year permit. The community surrounding it did not like it due to generation of noise, smell, etc. The local government found some procedural error and canceled the permit. Mexico claims environmental and public health reasons for its decision whereas X claims indirect expropriation. Here, based on a subtle difference of fact: namely whether Mexico offered relocation in good faith,[95] I present two scenarios to argue how it is equitable to both parties:

Scenario A: No relocation offered – The effect of the regulation has substantially deprived the investors of the value that they paid for the plant. As relocation has not been offered, the company has no recourse left. In this case, there has been indirect expropriation.

Scenario B: Relocation offered – Here, the effect of the regulation has not substantially deprived X of their investment. They still have access to it, albeit its value may be reduced. But it cannot be said to be an indirect expropriation. However, they may have other remedies like violation of fair and equitable treatment.

V. CONCLUSION

To end as I began, proportionality in IIL expropriation claims seems like a sledgehammer that is not precise enough to crack the tough nut of indirect expropriation. To establish this, I have done three things. First, I have argued how the proportionality test in IIL is derived from the ECtHR jurisprudence that is embedded in European Constitutionalism. Second, I have argued that the proportionality analysis eventually leads to the ad hoc tribunal to determine the

(ed), *NAFTA: Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (2004). See also Ranjan (n 14) 123.

[94] Ranjan (n 14).

[95] Interestingly in *Tecmed*, it was argued by Mexico that it would offer relocation. However, in actuality it never came into fruition and the dispute started. To resolve all of these issues as Kriebaum argues, we may need to move away from "all or nothing" approach we rethink IIL regime. See Kriebaum (n 9).

legitimacy of public policy. Thirdly, the ambiguity surrounding the contents of proportionality grants tribunals enormous discretion. All of these have cumulatively disadvantaged the host states which are usually third world countries. Finally, I proposed a solution via a quantitative determination of expropriation, by reverting to the sole effects doctrine and illustrated a hypothetical for the same.

PROSECUTING CORPORATIONS UNDER INTERNATIONAL CRIMINAL LAW: WHO IS IT PROTECTING?

Pulkit Goyal[*]

The Russia-Ukraine conflict has reignited debates concerning the selectiveness of the International Criminal Court ('ICC'): which situations it actively pursues and who it chooses to prosecute. The conflict has also once again highlighted the role of capital and finances in enabling and sustaining such atrocities. This paper builds on the selectiveness critique of the ICC and explores the possibility of holding corporations, responsible for financing atrocities, responsible for violations of International Criminal Law ('ICL'). It observes that while under the Rome Statute of the ICC, the ICC lacks jurisdiction to hold corporations liable, the development of the ICL in this area shows that charging corporations under ICL is possible in the past. The paper argues that the argument of complementarity, often used to justify lack of corporate criminal liability in the Rome Statue, is inadequate. The paper adopts a TWAIL framework and questions the legitimacy implications of this exclusion to argue that such an exclusion serves to protect western capital and invisiblises structural causes of conflict.

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I. INTRODUCTION

Following the recent and ongoing invasion of mainland Ukraine by Russia in 2022, there has been a renewed interest in International Criminal Law ('ICL') by scholars and states alike. The growing interest resulted in the Offic of the Prosecutor ('OTP') of the International Criminal Court ('ICC') launching an investigation into the situation in Ukraine on 2 March 2022, following referrals by 39 state parties.[1] Other state parties have also subsequently referred the matter.[2] The ICC has also issued arrest warrants for Vladimir Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Russian Commissioner for Child Rights.[3]

The promptness of the OTP in Ukraine has reignited debates concerning the selective nature of prosecutions at the ICC.[4] The legitimacy threat extends not only to the situations the OTP chooses to investigate but also to the range of actors that the ICC can hold accountable.[5] The role of multi-national corporations ('MNCs') in supplying Russia with arms and unarmed aerial vehicles ('drones' or 'UAVs') in its efforts against Ukraine has been well

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[1] Karim AA Khan, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (*International Criminal Court*) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> accessed 23 April 2025; ICC, 'State Party Referral under article 14 of the Rome Statute' <https://www.icc-cpi.int/sites/default/files/2022-04/State-Party-Referral.pdf> accessed 23 April 2025.

[2] Karim AA Khan, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia; Contact Portal Launched for Provision of Information' (*International Criminal Court*) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and> accessed 23 April 2025.

[3] PTC II, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (*International Criminal Court*) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> accessed 23 April 2025.

[4] Vava Tampa, 'Justice should be colour blind. So why is it served for Ukraine but not the Congolese?' *The Guardian* (23 August 2022); Amnesty International, 'The ICC at 20: Double Standards Have No Place in International Justice' (*Amnesty International*, 1 July 2022) <https://www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice/> accessed 23 April 2025.

[5] While the author recognises that ICL extends beyond the ICC, the ICC occupies a special position as the only permanent international court competent to try offences defined under ICL. Alternate perspectives from other courts are discussed below as well to offer a comparison with the practice of the ICC.

established,[6] but whether they will be held responsible under ICL for the role they have played remains to be seen.

Concerns regarding the liability of corporations for violations of norms of international law are not new. As Ramasastry demonstrates, MNCs might be liable '(1) directly for certain violations, (2) as an accomplice, or (3) as a joint actor who is complicit in state action that violates international law.'[7] She also argues that ICL may act as a stronger deterrent because of its ability to stigmatise, which may prevent MNCs from engaging in gross violations of human rights.[8]

This paper explores the legitimacy threat posed by the question of corporate criminal liability under ICL by considering the possibility of holding corporations liable under ICL before the ICC. The paper observes that while corporations possess the required legal personality to be held liable under ICL, the ICC lacks jurisdiction to hold them liable. It proceeds to assess the legitimacy implications of this *de facto* immunity by adopting a TWAIL framework to locate the exclusion of corporate criminal liability in the corporation-state nexus that exists in the global north, and demonstrates that the exclusion of corporate criminal liability is a logical extension of the ICC's design that has favoured the global north.

The second part of the paper reviews the international law relating to the responsibility of corporate actors and observes that while MNCs possess personality under public international law, as the Rome Statute stands, it is impossible to hold corporations themselves responsible for crimes under it. It reviews the opposing views concerning the liability of MNCs under ICL and argues that it is possible to hold MNCs responsible under ICL. Part three locates the ICC's inability to hold corporate actors accountable under a larger umbrella

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[6] US Department of Treasury, 'Treasury Targets Actors Involved in Production and Transfer of Iranian Unmanned Aerial Vehicles to Russia for Use in Ukraine' (*U.S. Department of the Treasury*, 15 November 2022) <https://home.treasury.gov/news/press-releases/jy1104> accessed 23 April 2025; Sumathi Bala, 'Ukraine Wants Big Banks to Be Prosecuted for "war Crimes," Zelenskyy's Top Economic Aide Says' (*CNBC*, 26 July 2022) <https://www.cnbc.com/2022/07/26/ukraine-wants-jpmorgan-citi-hsbc-prosecuted-for-war-crimes-zelenskyy-aide.html> accessed 23 April 2025; see also Raphael Oidtmann, 'Fighting on the Business Front: On Corporate Criminal Liability and the War in Ukraine' (*Verfassungsblog,* 1 August 2022) <https://verfassungsblog.de/fighting-on-the-business-front/> accessed 23 April 2025.

[7] Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 Berkeley Journal of International Law 91.

[8] ibid 153.

of accountability and legitimacy concerns regarding the functioning of the ICC. Part four concludes.

II. LIABILITY OF CORPORATIONS

ICL is split between two factions: the first and the classical view, labelled the liberal view, grounds criminal liability in individual agency.[9] According to this view, actors acting for corporations can be held responsible, but not the corporations themselves, as corporations only act through their agents.[10] This view is often attributed to the Nuremburg Military Tribunals ('the Tribunal(s)').[11] In *IG Farben,* the Tribunal noted:

> But corporations act through individuals and, under the conception of personal individual guilt … the prosecution… must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.[12]

The second view, which this paper argues is the correct position, is called the romantic view. According to this view, international crimes by their very nature happen through collaborations and are thus more closely connected with collective wills and corporate cultures.[13] It identifies corporations as having a separate legal personality, autonomy, and capabilities extending beyond just its members. So, under this view, MNCs possess the necessary personality for being prosecuted under ICL. In fact, this position is better supported in light of the development of ICL post World War II.

So, while the Tribunal held 'crimes against international law are committed by men, not by abstract entities,'[14] it needs to be understood in its proper context. When deciding this, the tribunal was specifically rejecting the defence's plea that states are the only subjects of international law and hence

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[9] Carsten Stahn, 'Liberals vs. Romantics: Challenges of an Emerging Corporate International Criminal Law' (2018) Vol 50(1) Case Western Reserve Journal of International Law 91 <https://scholarlycommons.law.case.edu/jil/vol50/iss1/7/> accessed 12 June 2025.

[10] ibid 102.

[11] ibid 98-100; see also Ryan Long, 'Bioethics, Complementarity, and Corporate Criminal Liability' (2017) 17(6) International Criminal Law Review 997.

[12] *The United States of America v Carl Krauch et al* (1948) VIII Trials of War Criminals Before the Nuremberg Military Tribunals 1081 (International Military Tribunal, Nuremberg) 1153.

[13] Stahn (n 9).

[14] *United States v Goring* (1946) 22 The Trial of German Major War Criminals Proceedings of the International Military Tribunal sitting at Nuremberg, Germany III (International Military Tribunal, Nuremberg) 447.

individuals cannot be held responsible under international law.[15] To read it, as the liberal view reads it, to mean that corporations cannot be held responsible for crimes under international law would be to read against the grain.[16]

As Bernaz notes, the Tribunal in practice labelled groups as criminal, thus recognising that legal persons can engage in criminal activity.[17] The prosecution tied individual responsibility to decision-making at different levels within a corporation, and thus, it becomes impossible to separate individual guilt from the guilt of the corporation.[18] Ramasastry has demonstrated through references to the texts of the judgments that the tribunals fastened liability on individuals because of their connection with corporations that violated the Hague regulations and were considered criminal.[19] She goes further to suggest that the situation was likely similar in tribunals set up to punish Japanese war crimes.[20] As Bush has shown through reliance on internal communications, at Nuremberg, criminal charges against companies were considered entirely permissible.[21] These were not pursued because of prosecutorial choices and not because of any legal determination that corporations cannot be held responsible for crimes in ICL. [22]

To this analysis, the Special Tribunal for Lebanon ('STL') adds in *New TV S.A.L.* that ICL has long recognised the possibility of holding non-humans liable. It notes that while enforcing the prohibition on the slave trade, entire vessels

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[15] Photeine Lambridis, 'Corporate Accountability: Prosecuting Corporations for the Commission of International Crimes of Atrocity' (2021) 53 Journal of International Law and Politics 144 <https://www.nyujilp.org/wp-content/uploads/2021/07/4-Online-Annotations-Lambridis-144-151.pdf> accessed 23 April 2025.

[16] Stahn (n 9) 98-100; Kai Ambos, 'Article 25: Individual Criminal Responsibility' (*SSRN*, 29 August 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2831626> accessed 6 June 2025.

[17] N Bernaz, 'Corporate Criminal Liability under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon' (2015) 13 Journal of International Criminal Justice 313 <https://media.business-humanrights.org/media/documents/files/documents/JICJ_Lebanon_Contempt_Case_Bernaz.pdf> accessed 6 June 2025.

[18] ibid 321.

[19] Ramasastry (n 7).

[20] ibid 113-117.

[21] Jonathan A Bush, 'The prehistory of corporations and conspiracy in international criminal law: What Nuremberg really said' (2009) 109(5) Columbia Law Review 1094.

[22] ibid 1176.

used to be condemned.[23] The appeals chamber of STL finally held 'New TV', a corporation liable for the crime of contempt and obstruction of justice under Rule 60bis of the Rules of Procedure and Evidence for the STL ('RoPE').[24] Thus, from the above discussion, culminating in the *New TV S.A.L.* decision, it is clear that corporations have the personality to be held responsible under ICL.

While the discussion is insufficient to conclude that corporations can be proceeded against under ICL as a matter of customary international law, it provides conceptual clarity and disturbs the view that some authors have had that corporations cannot be proceeded against under ICL at all. The reliance of commentators on the industrialist trials for the proposition that corporations cannot be held liable under ICL is misplaced, and charges against corporations, conceptually, as well as in the past, have been considered completely possible.

III. JURISDICTION

The STL in *New TV S.A.L.* decided it had jurisdiction to try legal persons based on its interpretation of Rule 60bis of the RoPE, which used the phrase 'any person' as the subject of the rule.[25] Applying the rules of treaty interpretation, as per the Vienna Convention on the Law of Treaties ('VCLT'), to interpret 'person,' the STL concluded that the ordinary meaning of the word included legal persons.[26] It further held that the purpose of the contempt provision is to hold those who interfere with the administration of justice accountable.[27] This would require 'person' to include legal persons who are also capable of interfering with the administration of justice.

In contrast, Article 25(1) of the Rome Statute of the International Criminal Court ('the Rome Statute') states '[t]he Court shall have jurisdiction over natural persons pursuant to this Statute.'[28] This excludes jurisdiction over MNCs. This was a conscious choice by the drafters as at the time, there was insufficient

[23] *New TV S.A.L. and Karma Mohamed Tashin Al Khayat*, Case No STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction and Legal Elements of Offence (Special Tribunal for Lebanon).

[24] Rules of Procedure and Evidence for the Special Tribunal for Lebanon 2009 (STL-BD-2009-01-Rev10) Rule 60bis.

[25] ibid.

[26] *NEW TV SAL* (n 23).

[27] ibid.

[28] Rome Statute, art 25(1).

domestic jurisprudence regarding corporate criminal liability.[29] It was thought that the introduction of corporal criminal liability would not allow the principle of complementarity under the Rome Statute to function as intended.[30]

Further, it was thought that the novelty of corporate criminal liability would render many states hesitant to ratify the Rome Statute.[31] There was also too little time left in the negotiations to meaningfully incorporate corporate criminal liability.[32] So, despite attempts by France to introduce some form of corporate liability, the final version of the treaty ended up restricting the jurisdiction of the ICC to natural persons only.[33]

One last example worth taking a look at is the Malabo Protocol to the African Court of Justice and Human Rights, which extends the jurisdiction of the Court to legal persons, including corporate entities.[34] Article 46C provides that an intention to commit an offence by a corporate entity can be established by proof 'that it was the policy of the corporation to the act which constituted an offence.'[35] It also provides that knowledge may be proved constructively even if the relevant information is divided between personnel.[36]

The above three examples show us distinct ways of dealing with corporations in ICL. The STL approach leaves it to the discretion of the court to decide on a crime-by-crime basis, based on the object and purpose of criminalisation, whether its jurisdiction extends to corporations or not. The Malabo Protocol approach very clearly extends the jurisdiction of the court to corporations. The Rome Statute variant chooses not to prosecute legal persons, *inter alia,* on the grounds of complementarity. This ground, amongst other issues, is considered in the following section.

IV. CRITICISMS OF ICL FOR FAILING TO PROSECUTE CORPORATIONS

[29] David Scheffer, 'Corporate Liability under the Rome Statute' (2016) 57 Harvard International Law Journal 35 <https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/Scheffer_0615.pdf> accessed 6 June 2025.

[30] ibid. This objection is revisited in Part III when discussing the legitimacy of ICL.

[31] ibid.

[32] ibid.

[33] Stahn (n 9).

[34] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, not yet in force) (Malabo Protocol), art 46C(1).

[35] ibid, art 46C(2).

[36] ibid, art 46C(3), 46C(4).

A. Legitimacy Implications

There has been no shortage of criticism of the ICC's functioning. The criticism can broadly be criticised as (1) selectiveness in prosecution and (2) failure to hold all actors accountable. The first criticism is born from Article 1 of the Rome Statute. It provides that the ICC 'shall have the power to exercise its jurisdiction over persons for the *most serious* crimes of *international concern*[.]'[37] Further, article 17, which deals with admissibility, renders inadmissible cases which are not of sufficient 'gravity'.[38] As Koskenniemi reminds us, what counts as *most serious*, *of international concern,* and of *sufficient gravity* depends on informal epistemic networks dominated by the West.[39] Vasiliev also notes, 'the exceptionality of 'crisis' pervading the international criminal law field and seeping into the strategic and operational workings of the Rome Statute system is fraught with serious legitimacy risks for the ICC.'[40]

The prosecutor, according to the Rome Statute, has significant independence and autonomy in deciding to commence an investigation into the situation.[41] This was designed to prevent the politicisation of the ICC or the OTP.[42] However, there is growing criticism from African states that they are disproportionately targeted by the OTP.[43] In its first decade of operations, the operations of the ICC were limited entirely to the African states.[44] This is not because there have not been opportunities for such investigation or that they have not been considered. The prosecutor had an opportunity to prosecute UK nationals following the UK and US invasion of Iraq.[45] It decided not to by citing

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[37] Rome Statute, art 1.

[38] Rome Statute, art 17.

[39] Martti Koskenniemi, *What Is International Law For?* (Malcolm D Evans ed, 4th edn, OUP 2014).

[40] Sergey Vasiliev, 'Watershed Moment or Same Old?' (2022) 20 Journal of International Criminal Justice 893.

[41] Rome Statute, art 15(1).

[42] *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (2010) International Criminal Court ICC- 01/09.

[43] Yvonne McDermott, *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (William A Schabas ed, 1st ed, Routledge 2013); Joanna Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project' (2017) 30 Leiden Journal of International Law, 221 <https://www.cambridge.org/core/services/aop-cambridgecore/content/view/B1B861A5B2E55EE9CA1B96A30D0D1FD4/S092215651600065.pdf/corporations-before-international-criminal-courts-implications-for-the-international-criminal-justice-project.pdf> accessed 6 June 2025.

[44] Schabas (n 43).

[45] ibid 400–401.

the aforementioned gravity requirements and stating that the number of victims was too few and that British courts were prosecuting the accused.[46] However, later the OTP proceeded to bring charges against two rebel leaders in *Darfur* for crimes of similar magnitude.[47] Even when investigations are opened against great powers, they remain in limbo for years, as is the case with the situation in Georgia, or become deprioritised, as is the case with Afghanistan.[48]

The issue is structural. As Schabas explains, a court that is stripped of resources will be forced to choose from an enormous number of possible situations, and the choice inevitably becomes political.[49] The resource constraints don't only affect which situations get investigated but also who gets investigated in specified situations, and the gravity requirement supplies the justification for these choices.[50] In Uganda, the prosecutor chose to pursue only rebel leaders and not government military leaders. Again, gravity was cited as a justification for this.[51]

B. A Neocolonial Framework

While budgetary constraints are cited as a reason for the ICC's selectiveness, the choice also goes against the register of civilisation, which is relatively independent of the ICC's budgetary constraints and forwards a neo-colonial narrative.[52] One of the requirements of admissibility is that the concerned state is unable or unwilling to carry out an investigation and prosecution, which is also known as the complementarity requirement. This was another reason cited by the OTP to not pursue the UK, as it considered the UK able and willing to carry out independent prosecutions.[53] The same has not been the case when the states or the actors concerned are from the global south.[54] Such reasoning stands

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[46] Luis Moreno-Ocampo, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' (International Criminal Court, 2005).

[47] *Prosecutor's Application under Article 58 of the Rome Statute for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09, 14 July 2008) (ICC).

[48] Vasiliev (n 40).

[49] Schabas (n 43).

[50] ibid 399.

[51] Statement by Luis Moreno-Ocampo (n 46).

[52] Kyriakakis (n 43) 5.

[53] Statement by Luis Moreno-Ocampo (n 46).

[54] For a discussion on the connection between the argument of civilization and the doctrine of unable or unwilling (albeit in the context of terrorism) *see* Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (1st edn, Cambridge University Press 2020) ch 6.

independent of the budgetary capabilities of the ICC and represents an active choice not to pursue the 'civilised' north as opposed to the 'savage' south. Thus, the legitimacy threat can be traced to the design of the ICC, in the Rome Statute, and the discretion with which the OTP is allowed to operate.

Adding to the argument, Chimni and Anghie offer a TWAIL critique of the functioning of ICL by noting that the short arms of the ICC never reach financial institutions that are often responsible for creating situations that led to situations where atrocity crimes were committed.[55] As Kyriakakis notes, ICL can provide an efficacious way to deal with corporate crime in an unequal and globalised world.[56] Resource scarcity and economic underdevelopment are also causes of modern-day conflicts.[57] International Financial Institutions such as the World Bank and International Monetary Fund ('IMF') have been responsible for creating the environment within which atrocity crimes are then committed.[58] The report of the Organisation for African Unity ('OAU') panel responsible for investigating the Rwandan Genocide noted:

> Rwanda's economic integration with the international economy had been briefly advantageous; now the inherent risks of excessive dependence were felt. Government revenues declined as coffee and tea prices dropped. International financial institutions imposed programs that exacerbated inflation, unemployment, land scarcity, and unemployment. Young men were hit particularly hard. The mood of the country was raw.[59]

However, the International Criminal Tribunal for Rwanda did not prosecute any World Bank or IMF executives, let alone the World Bank or the IMF. The non-prosecution of corporations principally belonging to the global north, responsible either for financing the war or for supplying arms to perpetrators of atrocity crimes, adds to the growing discontent of the global south with respect to ICL. It is through the business side of criminality, acting through an organisational mind that transcends the mental states of individuals,

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[55] Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2(1) Chinese Journal of International Law 77 <https://doi.org/10.1093/oxfordjournals.cjilaw.a000480> accessed 6 June 2025.

[56] Kyriakakis (n 43).

[57] ibid 2-3.

[58] Anghie and Chimni (n 55) 89.

[59] Rachel Murray, 'Report of the International Panel of Eminent Personalities Asked to Investigate the 1994 Genocide in Rwanda and the Surrounding Events' (2001) 45(1) Journal of African Law <https://www.jstor.org/stable/3558971> accessed 6 June 2025.

that individual crimes reach unprecedented scale.[60] This is not to suggest that criminal liability for corporations would solve the issue of economic triggers of atrocities. The OAU's findings go beyond individual corporations and seem to point to larger structural issues in the economic order. But the immunity enjoyed by corporations before the ICC prevents public conversations on the active role of finance and capital in these atrocities from occurring at a global level. The above-quoted passage from the OAU's report should make us all think seriously about the violence of the international financial and economic system more broadly.

C. Revisiting the Exclusion

At this stage, it is appropriate to revisit the legal justification given for excluding corporate criminal liability from the Rome Statute, namely that it would interfere with the principle of complementarity. The principle is given in Article 17 of the Rome Statute, which provides, as a condition to admissibility, that the state must be 'unwilling or unable genuinely' to carry out the investigation and prosecution. The underlying premise is that the ICC should only step in when national justice systems fail to hold accountable those responsible for international crimes.[61] Accordingly, national systems are given primacy in prosecuting violations of ICL.

The objection is that since states lack a common standard on which to hold corporations criminally liable, the introduction of corporate criminal liability into the Rome Statute would render the principle of complementarity unworkable.[62] It has been suggested that the lack of a national system to hold corporations criminally responsible would *de facto* lead to satisfying the complementarity requirement and give the ICC jurisdiction over MNCs.[63] However, it is difficult to see how that's a tenable objection considering the object and purpose of the Rome Statute, ie, to end impunity,[64] especially in light of the lack of objections during the negotiations to the principle of holding corporations criminally responsible.

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[60] Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia, 2010) 61.

[61] William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 187.

[62] Ambos (n 16) 4.

[63] Kathryn Haigh, 'Extending the International Criminal Court's jurisdiction to corporations: overcoming complementarity concerns' (2008) 14(1) Australian Journal of Human Rights 199 <https://classic.austlii.edu.au/au/journals/AUJlHRights/2008/8.pdf> accessed 6 June 2025.

[64] Rome Statute, Preamble.

Kyriakakis recognises that the objection in its above form is under-elaborated.[65] Within complementarity, there is a tension between sovereignty and the 'establishment and progressive development of functional international criminal justice.'[66] The objection lends itself to two interpretations. First, the inclusion of provisions on corporate criminal liability would be inconsistent with the complementarity framework based on the text of the complementarity provision in the Rome Statute (Article 17).[67]

This version of the objection is untenable in light of the interpretation accorded to the complementarity requirement.[68] Inaction on the part of a state vis-à-vis the perpetrators has been held to satisfy the complementarity requirement.[69] The inaction may be because of legal impediments as well.[70] Further forms of unwillingness not explicitly recognised by the Rome Statute have also been held to be included where they forward the object and purpose of the Rome Statute 'to put an end to impunity'.[71] Thus, the lack of provisions on corporate criminal liability domestically would not be inconsistent, nor interfere with the operation of the complementarity requirement as articulated in the Rome Statute and interpreted by the ICC. Its codification in the Rome Statute could have, instead, acted as a catalyst for the adoption of similar provisions in domestic legislations, which would further the goal of ending impunity.[72]

The second interpretation objects to the discriminatory effect it would have on states that do not have provisions concerning corporate criminal responsi-

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[65] Joanna Kyriakakis, 'Cooperations and the International Criminal Court: The Complementarity Objection Stripped Bare' (2008) 19(1) Criminal Law Forum 115.

[66] ibid 121-122.

[67] ibid 122.

[68] ibid 126.

[69] *Katanga et al, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial by Chamber II of 12 June 2009 on the Admissibility of the Case*, 25 September 2009 (ICC-01/04–01/07 OA 8) 78.

[70] Kyriakakis (n 65) 126-128. The practice of the ICTR also supports this, see *Bagaragaza, Decision on the Prosecution's Motion for Referral to the Kingdom of Norway*, [2006] ICTR-2005-86-R11bis; *Bagaragaza, Decision on Rule 11bis Appeal*, [2006] (Appeals Chamber) ICTR-05-86-AR11bis. See also Antonio Cassesse, *International Criminal Law* (OUP 2003) 352. Alternatively, Kyriakakis also relies on the wording of art 17(3) which states 'total or substantial collapse *or* unavailability' (emphasis Kyriakakis') to note that the notion of collapse and unavailability are disjunctive and thus the lack of provisions for corporate criminal liability in domestic law would fall within the phrasing of art 17(3).

[71] Schabas (n 61) 194.

[72] Kyriakakis (n 65) 130-136.

bility and the corresponding undermining of their sovereignty.[73] This objection misinterprets complementarity as always privileging the sovereignty of states over objects of ICL rather than understanding it as a compromise between the two. Complementarity represents a balance between sovereignty and the objectives of ICL as it allows the ICC to bypass sovereignty in case the proceedings undertaken by the state are a sham.[74] Understanding complementarity simply as sovereignty and not for the tension it represents perverts its meaning and claims a political consensus that is not reflected in the text and was never achieved during negotiations.[75] Instead, it could be argued that by prosecuting corporations, the ICC would plug a gap that exists in several national systems and therefore complement or complete their systems.[76]

Another objection that may be raised to prosecuting corporate entities is that they lack *mens rea* or the subjective element, which is an essential part of establishing criminal liability. As per the travaux of the Rome Statute, *mens rea* is required for criminal responsibility.[77] Generally, in law, culpability assumes a subject with free will[78] and considers their immediate mental states.[79] This is reflected in the defences available to the accused under the Rome Statute, such as lack of mental capacity and intoxication, which hinge on an accused person's 'capacity to appreciate the unlawfulness or nature of his or her conduct.'[80]

This requirement can be fulfilled for corporations through a combination of nominalist and organisational models. The nominalist models consider the mental states of individuals within a corporation to establish constructive mental states of the corporation, whereas the organisational model focuses on corporate culture, attitudes, monitoring, and oversight mechanisms. 'Corporate fault can be established when flawed formal procedures or informal practices have been approved, encouraged, or condoned at the management level.'[81] This

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[73] ibid 136.

[74] Rome Statute, art 17.

[75] Kyriakakis (n 65)140.

[76] ibid 141.

[77] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Proceedings of the Preparatory Committee during March-April and August 1996* (Vol I, UN GAOR, 51st Session, Supp No 22, UN Doc A/51/22 1996) 45.

[78] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP 1968) 22.

[79] Anthony Kenny, *Freewill and Responsibility* (Routledge 1978).

[80] Rome Statute, art 31.

[81] Elies van Sliedregt, 'The Future of International Criminal Justice is Corporate' (2025) 1(4) JICJ <https://doi.org/10.1093/jicj/mqaf004> accessed 6 June 2025.

would exclude cases where corporations were inadvertently contributing to international crimes.[82]

It is worth reiterating here the discriminatory impact that the complementarity regime has had on states situated in the global south, which have been held to be unwilling and unable to prosecute violations of ICL as opposed to states in the global north. This exclusion and *de facto* immunity of corporations is better understood in the 'intimate historical links between the state and the corporation.'[83] Chimni illustrates the point by taking the example of the East India Company, a company established through a royal charter which administered India as a company state from the 17th Century till 1857, and Great Britain. He demonstrates that the corporation and the state are mutually constituted and 'derive from shared ideological and historical context.'[84] Deep and structural ties continue to exist between MNCs and States in the form of a symbiotic relationship as state policy heavily influences decisions businesses make.[85]

The financial institutions that are shielded by such methodological individualism belong to the global north. In the case of Ukraine, the banks known to have ties to the Russian war effort belong to the very countries that are enthusiastically contributing to the ICC in its investigation against Russia.[86] The very states responsible for putting into motion mechanisms of accountability are responsible for not preventing the violence they now seek to address through ICL.[87] If ICL aims to contribute to a durable peace, it needs to find ways to address economic networks that sustain conflict, especially when abuses of their status as transnational corporation violate norms of ICL.

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[82] What counts as inadvertent, however, is a separate question and outside the scope of the paper. It is possible that activities of a business contribute to crimes not simply because management is unaware of some of the business' activities but because the management is uncritical of them. For example, if a business decides to purchase goods from a company that is known to support a regime that is committing war crimes. In this case, it can hardly be said that the business is unaware of its dealings with the company, but the firm may be uncritical in reflecting how its business contributes to the company's ability to fund war crimes.

[83] BS Chimni, 'The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective' (2020) 31(4) EJIL 1211, 1214-1215.

[84] ibid.

[85] ibid.

[86] Bala (n 6); Vasiliev (n 40) 897, 901.

[87] Anghie and Chimni (n 55) 90.

V. CONCLUSION

As Pomerantz, one of the strategists during the Nuremberg trials, noted, targeting corporations instead of individuals has several benefits. It is easier to achieve sufficiency of the evidence with respect to an entire corporation than with respect to specific actors in the corporation.[88] And it helps set the record straight concerning historic wrongs by holding all those who are responsible accountable.[89] It also has the added advantage of rendering certain elements of crime easier to prove, as knowledge of a crime that is spread across actors within a corporation can be constructively attributed to the corporation alone.[90] Even issues of *mens rea* can be solved by focusing on corporate policy instead of the intention of specific actors in the corporation.[91] This can provide compensation to victims of atrocities.[92] Lastly, this also has the potential to initiate public conversations about the role of capital and finance in international atrocities. However, these advantages are yet to be realised by ICL.

For corporations to be prosecuted in ICL, it is required that they have personality for ICL and that the relevant tribunal has jurisdiction. While initially there seemed to be some confusion regarding whether or not corporations have personality for ICL, that was largely because of a misreading of the Nuremberg Tribunal's decisions in the industrialists' case. The lack of prosecution of corporations was not because of a lack of personality but because of prosecutorial choices. Further adverse remarks against crimes being committed by abstract entities were made to prevent the defendants from hiding behind the veil of the state. As the STL has noted in its *New TV S.A.L.* decision, there is nothing inherent in the nature of criminal law that prevents corporations from being put on trial.[93]

Jurisdiction of the relevant tribunal, on the other hand, ends up being a question of positive law: whether the drafters chose to bestow such a jurisdiction or not. The paper has reviewed three variations that have been adopted in different ICL instruments, which can serve as models from which the drafters may choose. However, it is clear that the ICC, which is the only permanent

[88] Bush (n 21) 1150.

[89] ibid.

[90] Malabo Protocol.

[91] ibid art 46C(2).

[92] Stahn (n 9) 101; Armina T Savanovic, 'Corporate Criminal Liability in International Criminal Law' (Lund University 2017) 66.

[93] *NEW TV S.A.L.* (n 23) 66.

international criminal tribunal, lacks the jurisdiction to prosecute legal persons. Natural persons working in corporations can still be targeted,[94] but this requires a high mental element and has an unclear causation requirement that may not be met in the case of individual actors.[95] This has led some commentators to argue that an amendment should be made to the Rome Statute to allow the ICC to prosecute corporations.[96]

The lack of jurisdiction is often justified by citing the complementarity requirement present in Article 17 of the Rome Statute. However, as the paper has shown, this objection is merely a smokescreen, and the exclusion is better understood in the corporate-state nexus that exists in the global north, which allows states and corporations to benefit from each other. When the lack of jurisdiction to proceed against corporations is contextualised in view of Russia's invasion of Ukraine, it becomes glaringly clear that if ICL is to fulfil its promise to hold perpetrators of atrocity crimes responsible, it must prosecute corporations as well. The corporations responsible for financing and fuelling conflicts in general, and in Russia's case in particular, belong to the global north.

The choice of the OTP to focus on situations in the global south has already raised eyebrows in the past. The lack of priority and investigation of situations that adversely affect Western interests in general and American interests in particular, such as Afghanistan and Iraq, shows a political bias present in the working of the OTP. While the resource scarcity of the ICC would inevitably cause the OTP to make political decisions, the constancy of targeting the global south is a cause of concern.

Though now ICC is investigating a hegemon, it is only after the West demonstrated an interest in the situation that this happened. Before the 2022 invasion, ie, after the annexation of Crimea, there was no similar sense of urgency in the functioning of the ICC. Adding on to this legitimacy crisis, the inability of the ICC to hold corporations accountable reflects its indirect role in providing impunity to Western actors and capital. Alternative tribunals, innovations, and amendments are required in ICL if it is to safeguard its legitimacy against allegations of Western bias.

[94] Rome Statute, arts 25(3)(c), 25(3)(d).

[95] Scheffer (n 29) 35.

[96] Lambridis (n 15) 145–146.

REIMAGINING VICTIMHOOD UNDER INTERNATIONAL LAW – FROM MARGINS TO MANDATE: TRANSITIONAL JUSTICE, LEGAL PERSONALITY AND LESSONS FROM THE BHOPAL GAS DISASTER

Rashmi Raman[*]

This paper reconceptualises victimhood in international law by grounding it in domestic legal experience and analysing it through Wesley Hohfeld's theory of jural correlatives. It argues that current frameworks in international human rights law, international criminal law, and transitional justice offer fragmented and often static conceptions of the victim. These frameworks fail to capture the complex, mediated relationship between individuals and the state in the aftermath of conflict or mass atrocity. Using the Bhopal gas tragedy as a case study, the paper shows that domestic contexts, especially in mass tort cases, are where the contours of victimhood are most sharply contested and where the asymmetry between individuals and the state becomes most visible. From this dynamic, a more relational and nuanced understanding of victimhood emerges, that can inform and reshape international legal norms. The Bhopal case, marked by catastrophic industrial harm, the involvement of a transnational corporate actor, and a state that acted both as a regulator and legal representative of victims, illustrates the limitations of current legal categories for addressing complex, large-scale harm. The Indian government's assumption of exclusive standing in foreign litigation and its control over of compensation processes raise fundamental concerns about agency, participation, and voice. These concerns intersect with evolving theories of state responsibility and international legal personhood. Hohfeld's framework enables a

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detailed analysis of the shifting legal relations among victims, the state, and corporate actors. It disaggregates the rights, duties, powers, and privileges involved, revealing how the state exercised the authority to act for victims while simultaneously denying them legal standing to assert their own claims. The paper contends that Bhopal provides a critical template for interrogating the limits of victimhood in international law and for proposing a redefinition that places the individual–state relationship at the centre. While rooted in domestic jurisprudence, this redefinition aligns with broader trends in international law that seek to enhance individual agency and visibility as rights-holders. It also imposes positive obligations on states not only to remedy violations but to build legal systems that empower victims to assert their rights in autonomous and meaningful ways. In this view, victimhood is not merely a response to individual harm but a juridical status shaped through institutional structures and political choices. Contributing to the growing discourse on the relational turn in international law, this paper highlights the interaction between national legal orders and international legal obligations. It locates itself within critical traditions of international legal scholarship and recognises that its insights are drawn from jurisprudence originating in the Global South, particularly Indian legal experience. The paper calls for a shift in the understanding of victimhood that acknowledges structural injustice, moves beyond procedural recognition alone, and supports a more inclusive and contextually grounded approach to legal redress. In doing so, it seeks to reposition victimhood as central to both the legitimacy and the effectiveness of international legal regimes.

TABLE OF CONTENTS

I. INTRODUCTION

Victimhood in international law remains a concept marked by fragmentation and under-theorisation. While international criminal law, international human rights law, and transitional justice each articulate frameworks for recognising victims, these are often partial, reactive, and shaped by rigid legal categories that obscure the lived complexity of harm. Predominantly situated within post-conflict or atrocity contexts, prevailing definitions of the victim tend to abstract the individual from their legal and institutional surroundings, treating victimhood as a status conferred rather than a relation produced. This paper argues that to fully grasp the normative and legal implications of victimhood, we must turn to domestic legal contexts, particularly those involving mass atrocities or post conflict assessment, where the relationship between the individual and the state is both contested and visible in practical terms.

It is here that the asymmetries of legal agency, representational authority, and access to justice are most starkly realised, and where the state's dual role as both guarantor and violator of rights becomes most apparent. An overwhelming number of international human rights norms are addressed to the States and not individuals or groups of persons.[1] The language in these human rights covenants and documents refers to 'state parties' to respect and promote certain rights instead of individuals.[2]

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[1] See generally Jost Delbruck, 'International Protection of Human Rights and State Sovereignty' (1982) 57(4) Indiana Law Journal 567. But see Article 5 of International Convention on the Elimination of all Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) where there is a provision for an individual's possession of a specific right. See generally International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); GAOR 'Resolutions and Decisions adopted by the General Assembly during its 18th Session, Supplement No. 15' (17 September-17 December 1963) UN Doc A/5515.

[2] See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); GAOR 'Resolutions and Decisions adopted

Recent developments across various international legal regimes underscore the growing recognition of victims not merely as passive recipients of justice but as active agents whose perspectives are central to legal and institutional processes. In *The Prosecutor v Dominic Ongwen* before the International Criminal Court ('ICC'), the Chamber explicitly recognised the importance of victims' lived experiences, allowing over 4,000 victims to participate, thereby shaping both the proceedings and the reparations phase.[3] Similarly, in the Trust Fund for Victims proceedings following the ICC's *Lubanga* and *Katanga* cases, victims' voices were integrated into the design and implementation of reparative measures, reflecting a move toward participatory justice models.[4]

At the regional level, the Inter-American Court of Human Rights has continued to prioritise victim-centred jurisprudence. In *Guzmán Albarracín v Ecuador (2020)*, the Court recognised the role of the victim's family in demanding accountability and emphasised the structural context of gender-based violence in its reasoning, grounding its judgment in the dignity and agency of the victim.[5] Meanwhile, the European Court of Human Rights ('ECtHR') has also broadened standing and participatory rights in cases such as *Kurt v Austria (2021)*, where it acknowledged the state's failure to prevent domestic violence from the perspective of the victim's autonomy and rights.[6]

Beyond courts, the UN Human Rights Committee and the Convention on the Elimination of All forms of Discrimination Against Women ('CEDAW') Committee have increasingly issued views that stress state obligations to ensure victim participation and to remedy structural barriers to justice, as seen in *Angela González Carreño v Spain (CEDAW, 2014)*,[7] where the Committee focused on the denial of victim agency in domestic violence contexts. Collectively, these cases and institutional practices signal a doctrinal and

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by the General Assembly during its 21st Session, Supplement No. 16' (20 September-20 December 1966) UN Doc A/6316; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD); GAOR 'Resolutions and Decisions adopted by the General Assembly during its 18th Session, Supplement No. 15' (17 September-17 December 1963) UN Doc A/5515.

[3] *The Prosecutor v Dominic Ongwen* (Judgment) ICC-02/04-01/15 (4 February 2021).

[4] *The Prosecutor v Thomas Lubanga Dyilo* (Judgment) ICC-01/04-01/06 (14 March 2012); *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07 (7 March 2014).

[5] *Guzmán Albarracín et al v Ecuador* Series C No 405 (IACtHR, 24 June 2020).

[6] *Kurt v Austria* App no 62903/15 (ECtHR, 15 June 2021).

[7] *Angela González Carreño v Spain* CEDAW/C/58/D/47/2012 (UNHRC, 16 July 2014).

normative shift: victims are no longer ancillary to international adjudication but are emerging as central figures, whose narratives, interests, and agency increasingly shape the substance and direction of international law.

While the role of the State as a key law enforcement agent under international law remains important, the simultaneous recognition and promotion of *individual* human rights also remains the States' obligation.[8] This notion has been recognised under the Universal Declaration of Human Rights under Articles 1 and 2.[9] As Simon Chesterman rightly pointed out, 'if the individual is absent, the human rights discourse neither exists nor has meaning.'[10] The individual is the vessel of human rights, and the protection from any violence, guaranteeing their freedom and dignity, has become an essential concern of the international community. As noted by Quincy Wright,[11] 'the rights of States must be considered relative to the rights of individuals. Both the State and the individual must be considered as subjects of world law and the sovereignty of the State must be regarded not as absolute but as a competence defined by that law.'[12] An individual's rights exist outside the jurisdiction of States and are concerns of the international community.[13] The individual, and more specifically, a victim of a human rights violation, has emerged as a key actor in the international system.[14] An individual's evolution is apparent when one compares the recent treatment of individual rights under present international law with the old 'classical' international law, which only recognised States and

[8] See UNGA Res 41/128 (4 December 1986). Declaration on the Right to Development, which stated 'the human person is the central subject of development and should be the active participant and beneficiary of the right to development.'

[9] UNGA Res 217(10 December 1948). Article 1 of the Universal Declaration of Human Rights, states that 'all human beings are born free and equal in dignity and rights.' Article 2 of the Universal Declaration of Human Rights, states that 'everyone is entitled to all rights and freedoms without any discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

[10] Simon Chesterman, 'Human Rights as Subjectivity: The Age of Rights and the Politics of Culture' (1998) 27(1) Millennium: Journal of International Studies 97.

[11] Quincy Wright, 'Relationship Between Different Categories of Human Rights' in UNESCO staff (ed), *Human Rights: Comments and Interpretations* (1949).

[12] ibid 149.

[13] Barcelona Traction, Light and Power Co, Ltd (*Belgium v Spain*) [1970] ICJ Rep 3.

[14] See Alexander Orakhelashvili, 'The Position of the Individual in International Law' (2001) 31(2) California Western International Law Journal 241 <https://scholarlycommons.law.cwsl.edu/cwilj/vol31/iss2/10> accessed 3 March 2025.

their corresponding rights and duties.[15] This evolution is portrayed in a statement drafted by the Committee of Experts at UNESCO.[16] The Committee of Experts stated:

> These rights must no longer be confined to a few. They are claims which all men and women may legitimately make, in their search, not only to fulfil themselves at their best, but to be so placed in life that they are capable, at their best, of becoming in the highest sense citizens of the various communities to which they belong and of the world community, and in those communities of seeking to respect the rights of others, just as they are resolute to protect their own.[17]

With this in mind, an important issue begins to arise: what is the relationship between an individual and a State in the recognition and protection of fundamental human rights? Hohfeld's schema of jural correlatives—rights/duties, privileges/no-rights, powers/liabilities, and immunities/disabilities, offers a compelling analytical framework for rethinking the individual's position in international law, traditionally circumscribed by the sovereignty-centric paradigm.

The increasing juridification of individual rights through human rights treaties, international criminal law, and environmental obligations suggests a reconfiguration of international legal subjectivity. Within the Hohfeldian lens, an individual emerges not merely as a passive beneficiary of state action but as a holder of rights that impose corresponding duties on states. For example, where international law prohibits torture, the individual holds a claim-right, and the state a correlative duty, thus disaggregating sovereignty into distinct normative obligations.

This analytic shift unsettles the conventional fiction of state exclusivity in international law and foregrounds the dyadic legal relationships that now exist between individuals and sovereigns across multiple legal regimes. Yet this apparent empowerment of the individual belies the structural asymmetries that persist within the international legal order. Hohfeld's correlatives presuppose

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[15] For an understanding of the classical theory where states were the only and sole subject of international law, and where there was no relation between the law and the individuals, See Carl Aage Nørgaard, *The Position of the Individual in International Law* (11th edn, 1962)

[16] A memorandum and questionnaire was circulated by UNESCO on the theoretical bases of the rights of man. See Edward Hallett Carr and Jacques Maritain, *Human Rights: Comments and Interpretations; A Symposium Edited by UNESCO* (Allan Wingate 1949).

[17] ibid 260.

institutional mechanisms capable of enforcing the obligations they map, a presumption that remains tenuous in a system defined by decentralised authority and voluntarism. While international adjudicatory bodies have incrementally acknowledged individual standing and responsibility, the enforceability remains inconsistent and is often subject to state discretion or non-compliance. Thus, the individual's rights, though formally articulated, often lack the material efficacy that Hohfeld's framework assumes. This tension, between normative recognition and practical enforcement, reveals the incomplete transformation of international law from an inter-sovereign to a truly cosmopolitan order. Hohfeld's insights thereby serve both as a diagnostic tool and a critical mirror, exposing the aspirational yet ambivalent legal status of the individual in a system still deeply structured by sovereignty.

This Article examines the evolving legal status of the individual in international law, with particular attention to the figure of the 'victim' of human rights violations. It seeks to interrogate the shifting normative boundaries between the individual, the State, and other international legal actors, clarifying the current juridical configuration of their interrelations. Central to this inquiry is an application of Wesley Hohfeld's theory of Jural Relations to the dialectic between sovereignty and individual rights, illuminating how legal entitlements and correlative obligations are structured and contested in contemporary international law. Victims have long been marginalised in international law, often regarded as passive recipients of protection rather than as active legal subjects with enforceable rights. Even within human rights frameworks, mechanisms for redress have largely operated through state channels, offering victims limited opportunity to directly participate in legal processes or shape outcomes that affect them. However, this outlook began to change since the discourse of transitional justice has arisen as a response to the challenges faced by a society emerging from conflict. In the next section, we will examine the changing role of a victim and transitional justice as a victim-centered discipline.[18] Transitional justice challenges the traditional, state-centric understanding of the victim in international law by repositioning victims as central agents in processes of accountability, truth-seeking, and reparations. Unlike classical international legal frameworks, which often treat individuals as

[18] For an introduction and historical evolution of transitional justice, See Marie Soueid and Ann Marie Willhoite and Annie E Sovcik, 'The Survivor Centered Approach to Transitional Justice: Why a trauma informed handling of witness testimony is a necessary component' (2017) 50(1) George Washington International Law Review 125.

peripheral to inter-state obligations, transitional justice mechanisms, such as truth commissions, reparations programs, and victim participation in hybrid or international courts, affirm the victim's role not merely as a subject of harm but as a key stakeholder in the reconstruction of legal and political order. This shift reframes the victim from a passive object of state benevolence to an active participant whose dignity, agency, and narratives are integral to the legitimacy and effectiveness of post-conflict justice.

To ground this theoretical framework, the Article undertakes a case study of the Bhopal gas disaster an emblematic instance of mass harm and state-mediated relief within Indian jurisprudence.[19] The Bhopal case encapsulates broader tensions between state sovereignty, corporate impunity, and victim redress, serving as a poignant lens through which to explore the normative architecture of post-disaster justice.[20] By mapping the relational legal positions that emerged in its aftermath, between the State, victims, and transnational corporate actors, through a Hohfeldian schema, the analysis aims to contribute to a deeper understanding of how victimhood is constructed, recognised, and operationalised under international law in the context of mass harm and transitional justice.[21]

II. DEFINING THE VICTIM IN INTERNATIONAL LAW

The development of the term 'victim' in international law finds its origin post-World War II, as the drastic situation demanded measures to strengthen a victim's intervention within criminal proceedings.[22] Under the United Nations ('UN') framework, the General Assembly adopted Resolution 40/34, on the 29th

[19] On 3rd December, 1984, in a city named Bhopal in Madhya Pradesh, India, tonnes of chemical methyl isocyanate split out from Union Carbide India Ltd.'s pesticide factor. This remains attributable to some of the key operational decisions of Union Carbide Corporation which controlled its Indian subsidiary, Union Carbide India Limited. See Ingrid Eckerman, 'The Bhopal Gas Leak: Analyses of Causes and Consequences by Three Different Models' (2005) 18(4-6) Journal of Loss Prevention 213; Ingrid Eckerman, *The Bhopal Saga Causes and Consequences of the World's Largest Industrial Disaster* (University Press India Private Ltd 2005); Upendra Baxi and Amita Dhanda, *Valiant Victims and Lethal Litigation: The Bhopal Case* (NM Tripathi, 1990).

[20] For a reading about the aftermath of the Bhopal disaster, See Kim Fortun, *Advocacy After Bhopal* (University of Chicago Press 2001); Paul Shrivastava, 'Preventing Industrial Crises: The Challenges of Bhopal' (1987) 5(3) International Journal of Mass Emergencies & Disasters 199.

[21] For a reading on the international law aspects to the Bhopal disaster, See YK Tyagi and Armin Rosencranz, 'Some International Law Aspects of the Bhopal Disaster' (1988) 27(10) Social Science and Medicine 1105.

[22] See Alon Confino and Robert G Moeller, 'Remembering the Second World War, 1945-1965: Narratives of Victimhood and Genocide' (2005) 4 Cultural Analysis, University of California 46.

of November in 1985, titled the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.[23] Under this resolution, 'victims of crime' included three categories of persons. The first category included the person who has individually or collectively suffered harm. The second category included the immediate family or the dependents of the direct victim. The last category included persons who have suffered harm in intervening to assist the victims in distress or prevent victimisation. According to the Declaration:

> "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment or their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
>
> A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.
>
> The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[24]
>
> Under the same resolution, 'victims of abuse of power' were described as:
>
> Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.[25]

The United Nations Commission on Human Rights, in its Resolution 2005/35, formally recognised and codified a bifurcated approach to victimhood in international law, distinguishing between *victims of gross violations of international human rights law* and *victims of serious violations of international humanitarian law*.[26] This differentiation reflects the dual normative regimes

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[23] This was adopted by UNGA Res 40/34 (29 November 1985). It is based on UNGA Res 217(10 December 1948).

[24] The last paragraph of this definition adds: The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

[25] UNGA Res 40/43 (29 November 1985).

[26] UNCHR Res 35 (19 April 2005).

governing the protection of individuals—human rights law applying in peacetime and conflict alike, and humanitarian law operating specifically within armed conflict contexts. Resolution 2005/35 endorsed the Basic Principles and Guidelines on the Right to a Remedy and Reparation,[27] adopted by the General Assembly in A/RES/60/147,[28] which elaborates the procedural and substantive rights of victims to access justice, obtain reparations, and benefit from guarantees of non-repetition. Gross violations of human rights, such as torture, enforced disappearance, and extrajudicial killings, are recognised as entailing non-derogable obligations and often trigger obligations *erga omnes*, while serious breaches of international humanitarian law, including war crimes and grave breaches of the Geneva Conventions, engage complementary responsibilities under international criminal law and the law of armed conflict. The articulation of these two victim categories underscores the growing juridical recognition of the individual as a subject of international law, while also revealing the normative complexity and fragmentation that characterise the evolving landscape of victim rights.

In international criminal law, under the statute of the ICC, the scope of victims is wider than that under the Criminal Tribunals of the former Yugoslavia and Rwanda. The rights of victims are recognised more actively by the ICC, whereas the former Yugoslavia and Rwanda acknowledged the role of victims as mere witnesses.[29] Under the criminal tribunals of Yugoslavia ('ICTY') and Rwanda ('ICTR'), there was no provision for protecting victims' rights outside the scope of the protection offered for being a witness. There was no scope for victims to participate in the court procedure either.

ICTY and ICTR adopted a definition of a victim that excluded the victim's family. A victim under Yugoslavia Rules was defined as 'a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.'[30] A victim's role under ICTY and ICTR Rules is that of a mere witness, which reduces the victims to objects rather than subjects capable of presenting their

[27] ibid.

[28] UNGA Res 60/147 (16 December 2005).

[29] The relevant provisions are Article 19(1), 21 in the Statute of the International Criminal Tribunal for Rwanda and Article 20(1), 22 in the Statute of the International Criminal Tribunal for Yugoslavia.

[30] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (adopted 11 February 1994, entered into force 14 March 1994) IT/32/Rev.50, rule 2(A).

own issues and fighting for their own interests in a criminal proceeding.[31] The relationship between the victim and the tribunal is one of power and liability. The victims are liable to the tribunal to represent them as they do not have the power to participate in the criminal proceedings.

The victim's position as a mere object in criminal proceedings was made better when the ICC was established.[32] In 1998, when the Rome Statute of the ICC was adopted,[33] it was the first time that the rights of victims in international criminal proceedings were materialised.[34] The definition adopted in the Rome Statute was similar to the one established in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Discussed above as UN General Assembly resolution 40/34. 1985). The Rome Statute defines victims as:

a. 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
b. Victims may include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.[35]

An innovative aspect of the Rome Statute of the ICC is its emphasis on the victim's active participation in criminal proceedings.[36] The Rome Statute states that:

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[31] For a detailed analysis of the study of the Rome Statute of the International Criminal Court, See Claude Jorda and Jérôme Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese, Paola Gaeta and John R.W.D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002).

[32] Compare the Statutes of the former ICTY and ICTR with the Rome Statute. See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 68 that discusses the Protection of the victims and witnesses and their participation in proceedings.

[33] UNGA, 'Rome Statute of the International Criminal Court' (15 June-17 July 1998) UN Doc A/CONF. 183/9; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF. 183/9.

[34] See Gabrielė Chlevickaitė, Barbora Holá and Catrien Bijleveld, 'Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There "Standard Practice" in International Criminal Justice' (2020) 18(1) Journal of International Criminal Justice 185.

[35] Rules of Procedure and Evidence of the International Criminal Court (adopted 9 September 2002) ICC-ASP/1/3, rule 85.

[36] Rome Statute (n 33) 127.

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented considered at stages of the proceedings deemed to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[37]

From the above observations, we can notice a pattern in international criminal law where the victim is recognised as an actor in the criminal proceedings. The ICC is described as a victim-friendly and a victim-centered Court in comparison to the ICTY and ICTR.[38] The victim is a subject of the criminal proceedings under international criminal law. They have a right to present their own interests, views, and concerns directly to the ICC judges.[39]

Victimhood under international human rights law is defined not merely by the occurrence of harm but by the infringement of rights enshrined in binding international instruments such as the *International Covenant on Civil and Political Rights* ('ICCPR') and regional conventions like the *European Convention on Human Rights* ('ECHR'). The Human Rights Committee, in cases such as *Toonen v Australia* (CCPR/C/50/D/488/1992),[40] has affirmed that individuals may be considered 'victims' where they are personally and directly affected by a violation, even in the absence of physical harm, thereby expanding the scope of legal victimhood. Similarly, the ECtHR has elaborated a nuanced jurisprudence on victim status, holding in *Klass and Others v Germany* (1978) that individuals may qualify as victims where they are potentially subject to surveillance laws, thereby acknowledging the preventive dimension of human rights protection.[41] Victimhood in this context carries with it procedural entitlements—such as standing before quasi-judicial bodies and access to reparations—as articulated in *Velásquez Rodríguez v Honduras* (IACtHR, 1988),[42] where the Inter-American Court held that the state's failure to

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[37] ibid.

[38] ICC'S official website has declared that victim participation and reparations represent a 'balance between retributive and restorative justice.' International Criminal Court, 'Victims Before the ICC' *ICC Newsletter* (October 2024) <https://www.icc-cpi.int/NR/rdonlyres/4E898258-B75B-4757-9AFD47A3674ADBA5/278481/ICCNL2200410_En.pdf> accessed 10 February 2020. See Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the processes of Justice' (2017) 5(2) Restorative Justice 198.

[39] Rome Statute, art 68(3).

[40] *Toonen v Australia* CCPR/C/50/D/488/1992 (UNHRC, 31 March 1994).

[41] *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978).

[42] *Velásquez Rodríguez v Honduras* Series C No 4 (IACtHR, 26 July 1988).

investigate and remedy violations itself constituted a breach of the victim's rights. These developments underscore a shift from a reactive to a proactive model of legal subjectivity, in which individuals are empowered to claim redress directly under international law, reinforcing the erosion of state-centric exclusivity in the human rights domain. Under international human rights law, the victim is acknowledged only when the state is the author of an international obligation breach.[43] Meaning that, in human rights law, when there is a breach of international obligations by a non-state actor, the affected party would not be considered a victim. In contrast, under international criminal law and international humanitarian law, individuals would be victims because of acts committed by other individuals (who may be individuals performing public actions) or even non-state actors.[44]

III. TRANSITIONAL JUSTICE AND THE EVOLUTION OF VICTIMHOOD

Transitional justice is a hybrid discipline that draws upon, yet ultimately transcends, the doctrinal boundaries of international criminal law, international human rights law, and international humanitarian law. While it replicates key normative commitments, such as accountability, truth, reparation, and non-repetition, from these fields, it departs from them in both its methodological flexibility and its contextual orientation. Unlike international criminal law, which centres on individual liability and retributive justice, transitional justice often embraces non-punitive mechanisms such as truth commissions and amnesties to accommodate fragile political transitions. Similarly, while it inherits the rights-based logic of international human rights law and the protection imperatives of humanitarian law, transitional justice frequently operates in legal grey zones where formal rule-of-law frameworks have broken down or are in flux. It is thus a discipline defined by its pragmatism and political contingency, privileging processes that restore civic trust, institutional legitimacy, and collective memory, rather than rigid adherence to pre-existing legal paradigms. In doing so, it both mirrors and unsettles the foundational assumptions of the legal traditions from which it emerged. Transitional justice is an approach to moving a society from a phase of chaos to that of peace and is

[43] Example, terrorists. Carlos Fernández de Casadevante Romani, *International Law of Victims* (Springer 2012).

[44] See The Statutes of the ICC and of the former ICTY and ICTR.

closely linked to nation-building.[45] To define it more simply, it is the 'conception of justice associated with periods of political change'[46] It has been described by the International Centre for Transitional Justice as:

> Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition and democracy. Transitional justice is not a special form of justice, but justice adapted to societies transforming themselves after a period of pervasive human rights abuse.[47]

Across the spectrum of transitional justice, mechanisms like truth recovery, memorialisation, and reparations all point to victims' needs and their protection.

The UN has recognised that transitional justice is not a static moment but is dynamic and ongoing. Ruti Teitel has described the orientation of transitional justice as 'caught between the past and future, between backward-looking and forward-looking, between retrospective and prospective.'[48] She explains the peculiar nature of transitional justice as one that is related to its temporal reach and one that spans between the past regime and the desired (liberal) shift.[49] One cannot properly grasp the contours of transitional justice because it operates in the normative and institutional interstices between international human rights law and international criminal law, yet does not fully align with either. Unlike human rights law, which emphasises ongoing state obligations to protect and fulfil individual rights, transitional justice often deals with exceptional periods of rupture—times of transition where these obligations have been systematically violated and where legal continuity is itself in question.

At the same time, while international criminal law focuses on individual criminal accountability for the most serious violations, transitional justice recognises that justice in such contexts may require a broader set of tools—truth commissions, reparations, institutional reform—that go beyond punitive measures. The result is a hybrid framework that prioritises moral legitimacy, social repair, and political transformation over strict legalism, making

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[45] Kieran McEvoy and Kirsten McConnachie, 'Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy' (2012) 9(5) European Journal of Criminology 527.

[46] Ruti G Teitel, 'Transitional Justice in a New Era' (2002) 26 Fordham International Law Journal 893.

[47] International Centre for Transitional Justice, 'What is Transitional Justice' (ICTJ) <https://www.ictj.org/what-transitional-justice> accessed on 5 January 2020.

[48] Ruti (n 46).

[49] ibid.

transitional justice both conceptually fluid and politically contingent. Its aims are thus not reducible to either the protection of rights or the prosecution of crimes, but involve negotiating tensions between truth and justice, peace and accountability, memory and reconciliation—tensions that resist resolution within the boundaries of traditional legal regimes. An attempt will be made to test this hypothesis that transitional justice falls between the two disciplines and fills in the gap.

A. International Criminal Law and Transitional Justice

The Nuremberg Trials[50] post the Second World War led to the 'first phase of transitional justice,'[51] as described by Teitel. During this phase, there was 'a striking innovation to turn to international criminal law and the extension of its applicability beyond the state to the individual.'[52] Professor Naomi Roht-Arriaza's approach to understanding the relationship between transitional justice and international criminal law is a good starting point. In the first approach, the relationship between the two disciplines is interrelated,[53] in the sense that it is based on certain broad conceptions of transitional justice and international criminal law; transitional justice could be a precursor to international criminal law and can act as a catalyst to fill in any gaps in international criminal law.[54] In the second approach, the disciplines are placed parallel, meaning that the two are unrelated and irrelevant to each other, as international criminal law aims to enforce the law regardless of the circumstances.[55] Nevertheless, central to both disciplines is the role of victims.[56]

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[50] For a general overview on the Military Tribunal at Nuremberg, See Eugene Davidson, *The Trials of the Germans: An Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg* (University of Missouri Press, 1972); George A Finch, 'The Nuremberg Trial and International Law' (1947) 41(1) The American Journal of International Law 20; Quincy Wright, 'The Law of the Nuremberg Trial' (1947) 41(1) The American Journal of International Law 38. See for a counterpoint on the historicity of international criminal law and its institutions, Rashmi Raman and Rohini Sen, 'Retelling Radha Binod Pal: The Outsider and The Native' in Frédéric Mégret and Immi Tallgren (eds), *The Dawn of a Discipline International Criminal Justice and Its Early Exponents* (Cambridge University Press 2020).

[51] Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69.

[52] ibid 73.

[53] Naomi Roht-Arriaza, 'Editorial Note' (2013) 7(3) International Journal of Transitional Justice 383.

[54] ibid 389.

[55] ibid.

[56] For the increasing role of victims in international criminal law, See Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90(870) International Review of the Red Cross 441.

Under the framework of international criminal law, victims are granted the right to participation, but when they are not participating as witnesses, they are granted participatory rights when their personal interests are likely to get affected. Under the Rome Statute, there is a provision for victims to participate when their personal interests are affected in a proceeding.[57] However, this participation will be determined by the Court. In transitional justice, victims play a significant role and are the backbone of the criminal process; without their participation, it is almost impossible for a criminal trial to proceed. The culpability and criminal liability of the accused depend on the evidence gathered from the victim's testimony. Thus, they can participate from time to time in the different phases of the proceedings which include investigation, pre-trial, and appellate stages.[58]

The links between international transitional justice and international human rights law are significant. The Human Rights Council has requested the Office of the High Commissioner for Human Rights ('OHCHR')[59] 'to continue to enhance its leading role, including with regard to conceptual and analytical work regarding transitional justice, and to assist States to design, establish and analytical work regarding transitional justice, and to assist States to design, establish and implement transitional justice mechanisms from a human rights perspective.'[60] International human rights law assists in responding to past abuses and building a better society, which is the central objective of transitional justice.[61] The way victims are defined under international human rights (as defined in the previous section) depicts that the interpretation of the term victim and the rights associated with a victim are wider than its equivalent in international criminal law. The way international human rights and transitional justice are connected is that violations in human rights can trigger transitional justice responses that aim to rebuild a disintegrated society.[62] Human rights law provides for a framework for non-discrimination and inclusivity, and human

[57] See Decision on Victim's Participation in Proceedings Related to the Situation in Uganda (*Pre-Trial Chamber II*) ICC-02/04 (9 March 2012).
[58] ibid.
[59] See UNGA, 'Report of the Secretary General' (14 December 2006) UN Doc A/61/636-S/2006/980; UNHRC Res 9/10 (15 September 2008), UNHRC, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General' (6 August 2009) UN Doc (A/HRC/12/18).
[60] UNHRC Res 9/10 (18 September 2008).
[61] For the convergence of different branches of international law, See Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP 2012).
[62] Naomi (n 53).

rights approaches are best suited to accommodate complementary visions of justice that fit into domestic law and customary norms.[63] By adapting some transitional justice measures, there is an improvement in human rights and democratisation of society.[64]

B. Third World Approaches to International Law and Victimhood

From a critical perspective, the Bhopal gas tragedy, which will be explored in a subsequent section of this paper, exposes the limitations of existing transitional justice mechanisms, which remain largely tethered to post-conflict or post-authoritarian paradigms and are insufficiently responsive to structural and peacetime harms. Traditional transitional justice ('TJ') frameworks often rely on a dichotomy between victims and perpetrators, rooted in contexts of political violence, failing to account for complex entanglements such as corporate-state collusion, regulatory failure, and systemic neglect that defined Bhopal. The Indian state's self-appointment as the sole legal representative of victims, while simultaneously being implicated in the lax oversight that enabled the disaster, highlights a deeper institutional contradiction that existing TJ models are ill-equipped to address. Moreover, the absence of meaningful victim participation and the lack of sustained reparative or truth-seeking processes reveal the inadequacy of mechanisms that prioritise legal closure over transformative justice. Bhopal challenges the assumption that harm must be politically motivated or conflict-driven to warrant a TJ response, and it calls into question the moral economy of victimhood that underpins conventional TJ frameworks. By foregrounding state complicity, structural violence, and the erasure of victim agency in a non-war setting, the Bhopal case demands a radical reimagining of transitional justice—one that expands its conceptual and normative boundaries to address the enduring injustices of global capitalism, environmental degradation, and regulatory indifference.

Third World Approaches to International Law ('TWAIL') critically interrogate the concept of the 'victim' in international law by exposing how this legal category often reflects colonial and neo-colonial power structures.[65]

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[63] Ruti (n 46).

[64] Tricia D Olsen, Leigh A. Payne and Andrew G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32(4) Human Rights Quaterly 980.

[65] For TWAIL accounts that challenge the mainstream, See JT Gathii, 'International law and Eurocentricity' (1998) 9 European Journal of International Law 184; Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 Wisconsin International Law Journal 353; Makau W Mutua, 'What is TWAIL?' (2000) 94 Proceedings of

TWAIL scholars argue that the mainstream legal discourse tends to construct victims in ways that depoliticise and individualise suffering, obscuring the historical and structural causes rooted in imperialism, global capitalism, and racial hierarchies. For example, in the context of international humanitarian and criminal law, victims are typically portrayed as passive recipients of harm who await justice from institutions that may themselves be complicit in global inequities. This narrow framing, TWAIL argues, marginalises collective experiences of oppression and erases the political agency of communities in the Global South. As Makau Mutua contends, international human rights discourse often casts the Third World subject as a 'savage-victim-saviour' trope, reinforcing a paternalistic dynamic in which Western actors are seen as rescuers of passive, voiceless victims.[66]

TWAIL perspectives also emphasise the need to redefine victimhood in ways that acknowledge historical injustice, colonial violence, and socio-

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the ASIL Annual Meeting 31; Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (1999) 15(2) Third World Legal Studies 1; David Kennedy, 'My talk at the ASIL: What is New Thinking in International Law?' (2000) 94 American Society of International Law 104; David W. Kennedy, 'When Renewal Repeats: Thinking Against the Box' (2000) 32 New York Journal of International Law and Politics 335; Duncan Kennedy 'Two Globalizations of Law & Legal Thought: 1850-1968' (2003) 36 Suffolk University Law Review 631; Antony Anghie and B.S. Chimni 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2(1) Chinese Journal of International Law 77; Antony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Chinedu Okafor, *The Third World and International Order: Law, Politics, and Globalization* (Martinus Nijhoff 2003); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005); Martti Koskenniemi, 'On the Idea and Practice for Universal History with a Cosmopolitan Purpose' (2006) 984 Shiso 4; B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3; Bindu Puri and Heiko Sievers, *Terror, Peace and Universalism: Essays on the Philosophy of Immanuel Kant* (OUP 2007); A Imseis (ed), Third World Approaches to International Law and the persistence of the question of Palestine' (2008) 15 *Palestine Yearbook of International Law https://brill.com/edcollbook/title/18612;* Karin Mickelson, 'Situating Third World Approaches to International law (TWAIL): Inspirations, Challenges and Possibilities' (2008) 10(4) International Community Law Review 351; Karin Mickelson, 'Taking Stock of TWAIL Histories' (2008) 10 International Community Law Review 355; Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 International Community Law Review 371; Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens, *International Law and the Third World: Reshaping Justice* (1st edn, Routledge 2008); Anne Orford, *International Law and its Others* (CUP 2009); B.S. Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3(1) Trade, Law, and Development; Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3(1) Trade, Law and Development 103.

[66] See Makau wa Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 201.

economic exploitation. Scholars such as Vasuki Nesiah and Balakrishnan Rajagopal highlight that legal mechanisms such as transitional justice, while purporting to serve victims, often rely on liberal legalism that is disconnected from the lived realities of postcolonial societies. Instead, they argue for a conception of victimhood that recognises the collective, systemic, and enduring nature of harm, particularly as experienced by marginalised communities. This reconceptualisation shifts focus from mere compensation or retributive justice to structural transformation and historical redress. In this light, victims are not simply individuals who suffer violations but also communities who resist and challenge the legal and political systems that sustain their marginalisation. This approach aligns with TWAIL's broader goal of decolonising international law and recovering the voices and agency of the oppressed.[67]

IV. INTERSECTIONALITY AND THE POLITICS OF VICTIMHOOD

International criminal law and international human rights law fall under the framework of reference for transitional justice. In its human rights dimension, transitional justice seeks to respond systematically to widespread violations of human rights. In its international criminal law dimension, it coexists with the discipline and ties the two fields together, filling in the gaps and expanding the purview of international criminal law.[68]

Across the spectrum of transitional justice, mechanisms like truth recovery, memorialisation, and reparations all point to victims' needs and their protection. Despite the definition of a victim and the role of a victim under different disciplines of international law as discussed in Sections II & III, there is a lack of a comprehensive, globally accepted definition for the term 'victim.' In the aftermath of a mass violence, it could be complex to place the identities of 'victim' and 'perpetrator' on an individual when in some situations, individuals can be both victimised and victimiser over a period of time.[69] As a result, the intersection between innocence and blame presents a difficulty in awarding

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[67] See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003); Vasuki Nesiah 'The Ground Beneath Her Feet: "Third World" Feminisms' (2003) 4(3) Journal of International Women's Studies 30.

[68] Naomi Roht-Arriaza, 'Transitional Justice and International Criminal Justice: A Fraught Relationship?' (*OUPblog* 25 November 2013) <https://blog.oup.com/2013/11/transitional-justice-international-criminal-justice-relationship-pil/> accessed 5 January 2025.

[69] Mike Morrissey and Marie Smyth, *Northern Ireland After the Good Friday Agreement: Victims, Grievance and Blame* (Pluto Press 2002).

victim-status to an individual under transitional justice, as victims may also have committed human rights abuses.

This section proposes a unique interpretation of the term victimhood. Victimhood is that incident that allows an individual to exercise their personhood before a Court or Tribunal.[70] Victimhood is the central aspect of an individual's personality, and this legal personality of the individual empowers them and serves as grounds for granting personal and social power instead of representing weakness. Using the insights of Martha Minow in her article on *Surviving Victim Talk*,[71] when individuals are suffering from exclusions and degradations based on certain characteristics like race, gender, disability, or sexual orientation, they can claim protection by asserting that they are victims of this unacceptable bias. This shows that victimhood is the central aspect of a person that can be utilised to reinforce in the courts that the individual has been subject to bias. She asserts this by providing the example of an individual who may want to establish their innocence by sharing their stories of immigration and hardship to show their innocence and indicate how they have never participated in exploitation or discrimination.[72] Victimhood is therefore that part of an individual's 'identity' that can be reinforced by a person to obtain legal recognition and claim legal protection.

Victimhood can be conceptualised as an axis of identity.[73] The 'identity characteristic' in victimhood can be comprehensively understood through the concept of intersectionality developed by Kimberle Crenshaw.[74] Intersectionality refers to society's characterisation that stems due to the presence of several identity axes.[75] Identity axes refer to an imaginary line where everyone present

[70] This is the author's own interpretation of victimhood and has been proposed to fill the gaps in the definitions under international law. See in this context, Rashmi Raman, 'Changing of the Guard: A Geopolitical Shift in the Grammar of International Law' in Frans Viljeon, Humphrey Sipalla and Foluso Adegalu (eds), *Exploring African Approaches to International Law: Essays in Honour of Kéba Mbaye* (University of Pretoria 2022).

[71] Martha Minow, 'Surviving Victim Talk' (1993) 40(6) UCLA Law Review 1411.

[72] ibid 1418.

[73] See Hadar Dancig-Rosenberg, 'Crime Victimhood and Intersectionality' (2019) 47(1) Fordham Urban Law Journal 85.

[74] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) University of Chicago Legal Forum 139 [hereinafter Crenshaw, Demarginalizing the Intersection of Race and Sex] (creating the concept of intersectionality).

[75] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) Stanford Law Review 1241. [hereinafter Crenshaw, Mapping the Margins] Crenshaw discusses the way both racism and sexism affect women of

on the line shares a common characteristic. The theory suggests that some identity axes are axes of oppression, whereas others are seen as axes of denomination. The ones positioned on dominant axes have certain social privileges, and the ones on the oppression axes face discrimination.[76] Crenshaw maps certain similarity and variation that create hierarchy, subordination, and exclusion amongst different groups. The identity characteristics generally revolve around sex, sexual orientation, race, and other social forces. Crenshaw explains the identity axes by using the example of black women who are at the intersection of two axes of oppression. These axes are sexist oppression (stemming from the fact that the person is biologically a woman) and racist oppression (stemming from their racial affiliation, which is an African American). This situation of a black woman differs from that of a white woman and a black man and thereby results in discrimination, preventing the recognition and uniqueness of a black-woman's needs.[77] Crenshaw's theory exposes the theory of intersectionality and how power can dictate a social structure. The ones located at the intersections of oppression are discriminated against, and the ones located at the intersections of domination enjoy various social privileges.[78]

In conformity with the intersectionality theory, victimhood is where an individual is effectively demonstrating an identity that they associate with. This identity is one where the individual is exposed to unacceptable bias. Due to this unacceptable bias, the individual is falling on the identity axes of oppression. Upon being able to successfully demonstrate this personality, the individual can obtain powers and obtain legal recognition, and claim legal protection. Intersectionality in international human rights law remains underdeveloped, often subsumed within a formal equality framework that inadequately accounts

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color. As she states: [W]hen one discourse fails to acknowledge the significance of the other, the power relations that each attempt to challenge are strengthened. For example, when feminists fail to acknowledge the role that race played in the public response to the rape of the Central Park jogger, feminism contributes to the forces that produce disproportionate punishment for Black men who rape white women, and when antiracists represent the case solely in terms of racial domination, they belittle the fact that women particularly, and all people generally, should be outraged by the gender violence the case represented.

[76] ibid.

[77] Crenshaw (n 75).

[78] See Kathy Davis, 'Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful' (2008) 9(1) Feminist Theory 67, where intersectionality has been defined as 'the interaction between gender, race, and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies and the outcomes of these interactions in terms of power.'

for the layered, compounding experiences of discrimination and harm. While international human rights law nominally recognises the universality of rights, its doctrinal and institutional architecture tends to isolate rights violations along singular axes, such as gender, race, or disability, thereby obscuring how intersecting identities intensify vulnerability and shape access to justice. This reductive treatment of identity translates into a flattened conception of victimhood in international law, where victims are too often categorised through generic legal templates that fail to reflect the structural and systemic dimensions of their marginalisation. The result is a form of legal recognition that is simultaneously visible and insufficient; individuals are acknowledged as victims of violations, but the socio-political conditions that render them disproportionately vulnerable remain unaddressed. A critical analysis thus reveals that intersectionality is not merely a descriptive tool but a normative imperative, demanding a reconfiguration of victimhood that centres complexity, structural inequality, and historically embedded forms of exclusion within the adjudicatory and reparative practices of international law.

V. HOHFELD'S JURAL RELATIONS AND THE STATE-INDIVIDUAL DYNAMIC

The state is a key law enforcement agent under international law, and the simultaneous recognition and promotion of human rights principles is the member states' obligation.[79] An overwhelming number of international human rights norms are addressed to the states and not individuals or groups of persons.[80] The individual too holds a place of importance in international law, 'if the individual is absent, the human rights discourse neither exists nor has

[79] See UNGA Res 41/128 (4 December 1986). Declaration on the Right to Development stated, 'the human person is the central subject of development and should be the active participant and beneficiary of the right to development.'

[80] See Jost Delbruck, 'International Protection of Human Rights and State Sovereignty' (1982) 57(4), Indiana Law Journal 567; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, art 5 (ICERD) where there is a provision for an individual's possession of a specific right; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); GAOR 'Resolutions and Decisions adopted by the General Assembly during its 21st Session, Supplement No. 16' (20 September-20 December 1966) UN Doc A/6316; GAOR 'Resolutions and Decisions adopted by the General Assembly during its 18th Session, Supplement No. 15' (17 September-17 December 1963) UN Doc A/5515.

meaning.'[81] With this in mind, an important issue begins to arise: what is the relationship between an individual and a State in the recognition and protection of fundamental human rights? Wesley N.= Hohfeld's[82] theory of jural relations can aid in answering this question.

In two celebrated essays published in the Yale Law Journal,[83] Hohfeld[84] sought to eliminate any obscurity and vagueness surrounding the terms 'rights' and 'duties.'[85] Hohfeld proposed a semiotic analysis with eight different forms of legal relations.[86] He claimed that these were the fundamental legal concepts and titled them the 'lowest generic conceptions' that all legal issues could be reduced down to.[87] He did not offer a substantive theory, but rather an analytical method of deconstructing legal relations into their smallest atoms.[88] He arranged these eight legal concepts in a logical system by linking the legal concept with its respective opposite or correlative.[89] This arrangement provides a distinction

[81] Simon Chesterman, 'Human Rights as Subjectivity: The Age of Rights and the Politics of Culture' (1998) 27(1) Millennium: Journal of International Studies 97.

[82] For a biography on Wesley Hohfeld, See Carl Wellman, *An Approach to Rights: Studies in the Philosophy of Law and Morals* (Springer 1997).

[83] See Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) Yale Law Journal 16. The sequel is Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) Yale Law Journal 710 [hereinafter Hohfeld 1917]. This article later appeared at Wesley Newcomb Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning: And Other Legal Essays* (Walter Wheeler Cook, YUP 1946).

[84] Carl Wellman (n 82).

[85] See Hohfeld (n 83); A year after Hohfeld's death, the Yale University Press printed Hohfeld's two articles in a small volume. See Walter Wheeler Cook (n 83).

[86] See Hohfeld (n 83); Arthur L Corbin, 'Legal Analysis and Terminology' (1919) 29 Yale Law Journal 163. Though Hohfeld's endeavour was to provide an analytical scheme, his theory was criticised for not providing an argument for the logical relationship between the propositions and for being deceptive as it disguises the fact that the basic relationships could be complex. See Peter Westen, 'Poor Wesley Hohfeld' (2018) 55(2) San Diego Law Review 449; Chhatrapati Singh, 'The Inadequacy of Hohfeld's Scheme: Towards a More Fundamental Analysis of Jural Relations' (1985) 27(1) Journal of the Indian Law Institute 117.

[87] Christopher Berry Gray, *The Philosophy of Law An Encyclopedia* (1st edn, Routledge 1999); Hohfeld (n 83). This method of reducing complex legal notions in terms of duties and rights has been criticised for yielding a more complex network that what one starts out with. See Chhatrapati (n 86).

[88] Henry Smith calls it a 'theoretical construct' that can be used to analyze legal relations. See Henry E Smith, 'Property as the Law of Things' (2012) 125(7) Harvard Law Review 1691. Hohfeld's theory of jural relations was framed in a purely analytical manner. This was critiqued for not containing any direct and explicit implication and arose controversy. See Gregory S Alexander, *Commodity And Property: Competing Visions Of Property In American Legal Thought* 1776-1970 (University Of Chicago Press 1997).

[89] Hohfeld (n 83). See Alan D Cullison, 'A Review of Hohfeld's Fundamental Legal Concepts' (1967) 16(3) Cleveland State Law Review 559; Corbin (n 86). An alternative to this arrangement

between four sets of different juridical relationships[90] and advocated for a two-party legal relationship. A person's right, privilege, power, or immunity is linked to its correlative, i.e., a duty, no-right, liability, or disability respectively.[91] Hohfeld's theory's application can yield beneficial insights and provide practical usefulness and map out the relationship between two parties.[92] As Hohfeld's conceptions gain meaning only upon specifying its relation with the others, his theory can be applied by choosing one of the eight fundamental conceptions and applying it to specify the relation between two parties.[93]

In that context, Hohfeld's theory of jural relations can help define the legal relationship between State and an individual, and between sovereignty and human rights. Sovereignty is a recognised, fundamental principle of the UN Charter.[94] Simultaneously, it is a relative concept that is subject to limitations that the international system may necessitate.[95] The Charter obligates the member

was proposed, wherein a square of oppositions containing 'duty' and 'right' were proposed to separate the semantic problems of meaning from questions of logical relationships. See Chhatrapati (n 86).

[90] Hohfeld exhibited the various relations by using a scheme of opposites and correlatives. See Hohfeld (n 83). This is shown as:

Jural Opposites	rights	privilege	power	immunity
	no-rights	duty	disability	liability
Jural Correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

[91] Corbin (n 86). The analytical power of two-party relations was demonstrated by Hohfeld in his analysis of *in rem* concepts. Hohfeld (n 83) 1917. See Wesley Newcomb Hohfeld, 'The Nature of Stockholders' Individual Liability for Corporation Debts' (1909) 9(4) Columbia Law Review 285; Wesley Newcomb Hohfeld, 'The Individual Liability of Stockholders and the Conflict of Laws' (1909) 9(4) Columbia Law Review 492.

[92] Pierra Schlag, 'How to Do Things With Hohfeld' (2015) 78 Law and Contemporary Problems 185. See Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (CUP 1993). Jeremy Waldron comments on the two-party conception of Hohfeld as it only applies to legal relations and not to moral relationships.

[93] See Mark Andrews, 'Hohfeld's Cube' (1983) 16(3) Arkon Law Review 471; J.M. Balkin, 'The Hohfeldian Approach to Law and Semiotics' (1990) 44(5) University of Miami Law Review 1119. Critics of Holfeld have stated that his theory only addresses the legal relations between two parties and not the moral ones. For a commentary on Hohfeld not being adapted to moral relationships, See Philip Montague, 'War and Self-Defence: A Critique and a Proposal' (2010) 23 Diametros 69. See Judith Jarvis Thomson, *The Realm of Rights* (HUP 1990).

[94] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 2(1).

[95] The relative character of sovereignty has been emphasised in James Wilford Garner, *Recent Developments in International Law* (University of Calcutta 1925); Robert Lansing, 'Notes on World Sovereignty' (1921) 15(1) American Journal of International Law 13; James W Garner, 'Limitations on National Soverignty in International Relations' (1925) 19(1) American Political

states to promote and respect human rights without discriminating based on race, sex, and nationality.[96] In that context, the international community's principle of non-intervention does not apply to questions of human rights violations.[97]

VI. THE BHOPAL GAS TRAGEDY AS A CASE STUDY FOR VICTIMHOOD

The Bhopal gas tragedy serves as a compelling and strategic case study to foreground the discussion on victimhood in international law and Hohfeld's theory of jural relations as it encapsulates the complex interplay between state power, corporate impunity, and the legal marginalisation of victims, within both domestic and international frameworks. Unlike conventional cases of human rights violations or armed conflict, Bhopal occurred in a peacetime regulatory context. Nonetheless, the scale of harm, the systemic denial of justice, and the state's monopolisation of victim representation expose profound deficiencies in how international law conceptualises and operationalises victimhood. Hohfeld's analytic framework provides a critical tool to deconstruct the relational legal positions at play, revealing how the Indian state assumed not only duties but also strategic liberties, effectively displacing victims' claims and insulating transnational corporate actors from accountability. By situating Bhopal within this analytical matrix, the case illuminates the inadequacies of prevailing legal doctrines and challenges the narrow, actor-specific definitions of victimhood, offering instead a model that foregrounds structural harm, mediated agency, and the evolving subjectivity of victims in international law. Hohfeld's theory of jural relations will be applied to the relationship shared between the State and an individual and between sovereignty and human rights. To begin this analysis, we are applying Hohfeld's theory to an illustration of the Bhopal gas leak.[98] The

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Science Review 1; James L. Briely, *The Law of Nations: An Introduction to the International Law of Peace* (2nd, OUP 1936); Clyde Eagleton, 'Organization of the Community of Nations' (1942) 36(2) American Journal of International Law 229.

[96] ibid art 1(3); art 13(1); art 55(1).

[97] The United Nations Assembly in 1947 to address the issue of human rights violations in Bulgaria, Hungary and Rumania is an example of the international response. For the United Nations response to human rights, see Repertory of United Nations Practice, vol 1, supplement 2, 121-123 (1955–1959).

[98] On 3rd December, 1984, in a city named Bhopal in Madhya Pradesh, India, tonnes of chemical methyl isocyanate split out from Union Carbide India Ltd's pesticide factor. This remains attributable to some of the key operational decisions of Union Carbide Corporation which controlled its Indian subsidiary, Union Carbide India Limited. See Ingrid Eckerman, 'The Bhopal Gas Leak: Analyses of Causes and Consequences by Three Different Models' (2005) 18(4-6)

Bhopal gas leak carries a larger narrative message of the State's response towards addressing suffering and providing relief to the victims of the disaster.[99] Applying Hohfeld's theory to the relationships that originated in the aftermath of the Bhopal gas leak can pave the way to the evolution of victim rights and the State's treatment of a mass disaster under international law.[100]

The facility at Bhopal, operated by Union Carbide of India Ltd ('UCIL') was a plant manufacturing the chemical methyl-isocyanate,[101] which is known to be extremely dangerous, volatile, and toxic.[102] On the night of 2nd December 1984, a chemical reaction ruptured the MIC tank, causing a leak and spewing over forty-five tons of toxic gas, causing a catastrophe affecting many lives.[103] The quantum of damage was so huge that the Indian government decided to represent all the victims of the disaster and sue on their behalf by using *parens patriae*.[104] *Parens patriae* is a common law doctrine adapted by English Courts [105] and in India, the turning point in the jurisprudence of the doctrine was post

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Journal of Loss Prevention 213; Ingrid Eckerman, *The Bhopal Saga Causes and Consequences of the World's Largest Industrial Disaster* (University Press India Private Ltd 2005); Upendra Baxi and Amita Dhanda, *Valiant Victims and Lethal Litigation: The Bhopal Case* (NM Tripathi, 1990).

[99] For a reading about the aftermath of the Bhopal disaster, See Kim Fortun, *Advocacy After Bhopal* (University of Chicago Press 2001); Paul Shrivastava, 'Preventing Industrial Crises: The Challenges of Bhopal' (1987) 5(3) International Journal of Mass Emergencies & Disasters 199.

[100] For a reading on the international law aspects to the Bhopal disaster, See YK Tyagi and Armin Rosencranz, 'Some International Law Aspects of the Bhopal Disaster' (1988) 27(10) Social Science and Medicine 1105.

[101] For a summary of the accident, See Tze Lin Kok, Yeuan Jer Choong, Chee Kean Looi and Jing Han Siow, 'Bhopal Gas Tragedy- The Scar of Process Safety' (2019) 269 Loss Prevention Bulletin 11; 'Articles and Case Studies from Around the World' (2014) 240 Loss Prevention Bulletin 1.

[102] For a reading on the long-term effects of methyl isocyanate, See Bhupesh Mangla, 'Long-Term Effects of Methyl Isocyanate' (1989) 334(8654) LANCET Journals 103; Neil Anderson, 'Long-Term Effects of Methyl Isocyanate' (1989) 333(8649) LANCET Journals 1259.

[103] Upendra Baxi terms the Bhopal disaster as the 'Bhopal catastrophe' and presents it as a series of interlinked catastrophes which include the levels of human, social and environmental suffering, the failures of the Union Carbide Corporation and the failure of the State to deliver retributive justice for the Bhopal-violated. See Upendra Baxi, 'Writing About Impunity and Environment: The "Silver Jubliee" of the Bhopal Catastrophe' (2010) 1(1) Journal of Human Rights and the Environment 23.

[104] The term *parens patriae* was first mentioned in *Charan Lal Sahu v Union of India* 1989 1 SCC 674. The term was used to justify the passing of the Bhopal Gas Leak Disaster (Processing of Claims) Act.

[105] *Parens patriae* translates to 'parent of the country.' Its evolution dates back to the common law concept of the royal prerogative developed in England. The royal prerogative includes the rights and capacities that the King exclusively enjoys and has over all other persons. Henry Campbell Blacl, *Black's Law Dictionary* (Bryan A Garner ed, 5th edn, The Publisher's Editorial Staff 1979). See *Pfizer Inc v Lord* 522 F.2d 612, 616 (8th Cir. 1975); *Fakland v Bertie* [1696] 2 Vern 333; *Eyre v Countess of Shaftsbury* [1722] 2 P Wms 103; *Beverley's Case* [1603] 76 Eng Rep 1118; *Wellesley v*

the Bhopal Gas Leak Disaster.[106] By invoking *parens patriae*, the Indian government asserted its right to sue Union Carbide on behalf of the individual plaintiffs.[107] This *parens patriae* control came from the Bhopal Processing of Claims Act ('the Act'),[108] as the Act preserved the victims' right to retain counsel and allowed the government to make claims on behalf of the victims.[109] It was a way to dictate strategy and to scurry ongoing settlement negotiations.[110] The objective of this was to ensure that the victims 'are fully protected, and that compensation claims were pursued speedily, effectively, equitably, and to the best advantage of the claimants.'[111]

Both the Indian government and the Union Carbide Corporate ('UCC') assumed defensive positions and tried to control the damage. They sought to shift responsibility and public attention away and shift the locus and blame on

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Duke of Beaufort [1827] 2 Russ 1, 38 Eng Rep 236; *Smith v Smith* [1746] 26 ER 977; *Skinner v Warner* [1792] 21 Eng Rep 473; *De Manneville v De Manneville* [1804] 32 Eng Rep 762; *Re M & N* (Minors) [1990] 1 All ER 205.

[106] The first instances of the application of *parens patriae* in India were seen while deciding the matters of custody and guardianship of infants and minors, See Banku *Behary Mondal v Banku Behary Hazra and Anr* 1943 AIR Cal 203; *Medai Dalavoi T Kumaraswami v Medai Dalavoi Rajammal* 1957 2 MLJ 211; *Marilynn Anita Dhilon v Margaret Nijar and Ors* 1984 ILR 1Punjab and Haryana; *Manuel Theodore D'Souza*, 2000 2 Bom CR 244; *Rosy Jacob v A Chakramakkal*, 1973 1 SCC 840; *Anuj Garg and Ors v Hotel Association of India* 2008 AIR 2009 SC 557; *Gaurav Nagpal v Sumeda Nagpal* AIR 2009 SC 557*; Ashish Ranjan v Anupma Tandon and Anr.* 2010 14 SCC 274; *Sheoli Hati v Somnath Das* AIR 2019 SC 3254. For the applicability of *parens patriae* in cases of disability (physical, mental, economical or legal), See *Aruna Ramchandra Shanbaug v Union of India & Ors* 2011 4 SCC 454. See *Shankar Kinsanroa Khade v State of Maharashtra* 2013 4 ABR 567; *Perry Kansagra v Smriti Mada Kansagra* 2019 3 CTCT 827. The doctrine of *parens patriae* has also been applied by Indian Courts to declare rivers, tributaries and streams as juristic and legal persons. See *Mohd Salim v State of Uttarakhand and Ors* 2017 2 RCR (Civil) 636; *Court on its Own Motion and Ors v Chandigarh Administration and Ors* 2020 4 RCR (Civil) 1.

[107] The Government of India to protect and safeguard the rights of the victims was entitled to act as *parens patriae* and this position was reinforced by the Bhopal Gas Leak Disaster (Processing of Claims) Act. See Charan Lal Sahu (n 104).

[108] The Union of India enacted an ordinance in 1985, that granted it 'an exclusive right to represent and act on behalf of the victims of the disaster' and make a claim against the Union Carbide Corporation for the Bhopal disaster. See 'The Bhopal Tragedy: Social and Legal Issues' (1985) 20(2) Texas International Law Journal 267, (summarises the provisions of the Bhopal Ordinance). Post this, the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 was enacted.

[109] ibid s 4.

[110] For an in-depth analysis of *parens patriae* in the Bhopal disaster, See LF Butler, 'Parens Patriae Representation in Transnational Crises: The Bhopal Tragedy' (1987) 17(1) California Western International Law Journal 175.

[111] *Union Carbide Corporation v Union of India* 1990 AIR 273 (India).

other parties and delete any factual knowledge and evidence of culpability.[112] By exercising *parens patriae*, the Indian government became a negotiator between the UCC and the victims of the disaster.[113] This shifting position of the Indian government will be examined in the next section of this Article. The analysis of the relationships shared between the Indian government and the victim, the Indian government and the UCC, and the UCC and the victims will help determine a State's response in a mass disaster and the evolving role of a victim of a human rights violation.

A. The Relationship between the Government of India and the Victims of the Disaster

In 1985, the Government of India ('GOI') passed the Processing of Claims Act, which authorised it to act as *parens patriae* to represent the victims of the disaster exclusively.[114] The rationale for this move was to ensure that the victims 'are fully protected, and that compensation claims were pursued speedily, effectively, equitably, and to the best advantage of the claimants.'[115] This relationship of the GOI and the victims is a classic example of the jural correlative of power and liability proposed by Hohfeld.[116] Hohfeld decoded the notion of power by stating that legal relations could be changed due to external influences in nature and which are beyond the control of human volition or within the control of human volition. The one who has a volitional control to effect a change in another's legal relations is known to have legal power. [117]

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[112] Jamie Cassels, 'The Uncertain Promise of Law: Lessons from Bhopal' (1991) 29(1) Osgode Hall Law Journal 1, 11. See also Marc Galanter, 'When Legal Worlds Collide: Reflections on Bhopal, the Good Lawyer and the American Law School' (1986) 36(3) Journal of Legal Education 292, 307.

[113] By invoking *parens patriae* that was granted legitimisation through the Bhopal Gas Leak Disaster (Processing of Claims Act), the government of India became a mediator as it was suing and settling claims on behalf of the victims. For a full analysis of the power of the Government of India, see Bhopal Gas Leak Disaster Act (n 104).

[114] For a reading of the provisions, see Bhopal Gas Leak Disaster (n 104).

[115] Union Carbide Corporation case (n 111).

[116] See Peter Jaffey, 'Hohfeld's Power-Liability/Right-Duty Distinction in the Law of Restitution' (2004) 17(02) Canadian Journal of Law and Jurisprudence 295.

[117] Hohfeld gives the example of an offeror and offeree where the offeree has a power to bind the offeror in a contract and the offeror is under a liability as there is a possibility that the offeree will oblige the offeror by accepting the offer. Hohfeld (n 83) 44. But see Roy L Stone, 'An Analysis of Hohfeld' (1963) 48(313) Minnesota Law Review 313, 325, where Hohfeld's arrangement of correlatives and opposites and power and liability is said to be inconsistent. Hohfeld's definition of the jural conceptions is described as ambiguous and lacking a logical sense.

When Hohfeld was talking about power, he was declaring that when 'Y' has power, 'Y' can change the external relations of 'X' and therefore, 'X' is under a liability with relation to 'Y'.[118] Power denotes the ability to alter existing legal conditions for better or for worse. [119]

The GOI had the power to alter the legal relationships of the victims with the Corporation, as it was representing and settling claims with the UCC on behalf of the victims. This indicates the victims' liability in relation to the GOI, which could alter and impact the victims' legal relations. This power placed the victims in a position of helplessness and liability towards the GOI. This power of the GOI corresponds to liability in the victims, and this liability, among other things (right, privilege), could also carry the possibility of a duty being created.[120]

B. Power, Liability, and the State-Victim Relationship – Applying Hohfeld To Bhopal

Hohfeld's terms were not necessarily pigeonholed in nature. Instead, the fundamental basic conceptions can coexist and interconnect amongst each other. The GOI's power to represent the victims and settle their claims under its *parens patriae* jurisdiction makes it duty-bound to represent them effectively and settle claims adequately.

The GOI, by invoking the doctrine of *parens patriae*, had the power to represent victims and a duty to represent them with this power, ensuring that the compensation was 'just, reasonable and adequate.' After a couple of months of preparation and argument, the GOI agreed to cap off the settlement to 470 million dollars and shut down any further claims arising out of or connected to the gas leak.[121] Chief Justice R.S. Pathak responded by stating, 'in light of the enormity of the human suffering caused by the Bhopal gas disaster and the pressing urgency to provide immediate and substantial relief to victims of the

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[118] Hohfeld spoke about power by using illustrations: 'Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property "in a tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and- simultaneously and correlatively-to create in other persons privileges and powers relating to the abandoned object- e.g., the power to acquire title to the latter by appropriating it.' See Hohfeld (n 83) 45.

[119] Peter (n 86).

[120] See Hohfeld (n 83) 54; Liability could also create a privilege and a power. *Dougherly v Creary 30* Cal. 290, 298 (1866). But see *Booth v Commonwealth* 16 Grat. (1861).

[121] Union Carbide (n 111); S Hazarika, 'Bhopal Payments by Union Carbide Set at $470 Million' *The New York Times* (New York, 15 February 1989) A1 and D3.

disaster the case was pre-eminently fit for an overall settlement.'[122] Further, the estimates of the number of deaths and injuries can only be guessed. But worst of all, the GOI did not account for the consequences of the disaster that unfolded in the years that followed.

VII. HOHFELDIAN PERSPECTIVES ON THE STATE - INDIVIDUAL DYNAMICS

The GOI represented the victims to decide the quantum of compensation; in exchange, it also sought immunity from any liability. While power is the ability to affect someone's legal relations, disability is the opposite of power, meaning it is the absence of the ability to affect legal relations.[123] The correlative of disability is immunity, which refers to the protection of one's legal relations from being affected by another's power. Hohfeld pointed out:

> As already brought out, immunity is the correlative of disability ("no-power") and the opposite, or negation, of liability. Perhaps it-will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation. [124]

In the Bhopal disaster, the GOI, by invoking the *parens patriae* doctrine (through the Processing of Claims Act), diverted its position from liability to immunity and disabled or took away the courts' power to affect or alter its legal relations. This move of the GOI was a way of limiting liability and incorruptly avoiding any responsibility for allowing an ultra-hazardous corporation to function in Madhya Pradesh. Bhopal tragedy was a classic case of transferring a hazardous substance to a third-world/developing country.[125] The Indian government authorised the plant in India to manufacture 5000 tons of MIC

[122] Union Carbide (n 111) 675.

[123] See also Arthur (n 86); Allen (n 86).

[124] Hohfeld (n 83) 55.

[125] See Gunther Handl, 'Environmental Protection and Development in Third World Countries: Common Destiny-Common Responsibility' (1988) 20 NYU Journal of International Law and Politics 603; Craig D Galli, Note, 'Hazardous Exports to Third World: The Need to Abolish the Double Standards' (1987) 12 Columbia Journal of Environmental Law 71; Maureen Bent, Note, 'Exporting Hazardous Industries: Should American Standards Apply?' (1988) 20 NYU Journal of International Law and Politics 777.

based pesticides at Bhopal, Madhya Pradesh.[126] It knew about the dangers and refused to take any technical assistance from the parent company to run the Indian plant.[127] Though the GOI should have been answerable to the victims as a joint tortfeasor, it hid behind the *parens patriae* canon and took away the victims' right to be heard.

As discussed in the previous subsection, the GOI invoked its *parens patriae* jurisdiction through the Processing of Claims Act and took on the power to act as a negotiator in settling claims between UCC and the victims. As a negotiator, it could alter the relations of UCC with the victims. In that aspect, it had the power of deciding the fate of UCC and the compensation it had to pay to the victims, thereby making UCC liable to the GOI.

The use of the *parens patriae* doctrine is rather problematic, as the GOI is in a situation of considerable conflict of interest. The GOI became a shareholder of UCC in 1970, when India had designed policies to invite and encourage foreign companies to invest in the country. UCC was one such company that paved its way to the Indian market. As part of the deal, the GOI invested a significant percentage in UCC. The Bhopal factory was operated by Union Carbide of India. The project was initiated in 1969 through negotiations between UCC and UOI. UCC owned 50.9 percent, while Indian government financial institutions owned approximately 20 percent.[128] Being a stakeholder of UCC, the GOI had an interest in the protection of UCC and could structure the settlement to safeguard the interests of UCC.

Because of the GOI's position as a negotiator, it had safeguarded and immunised itself from any liability. The GOI can either be immune or liable. It cannot be both immune and liable simultaneously, as immunity and liability are jural opposites. Hohfeld's jural opposites refer to situations where, when one constituent is present in a factual context, its jural opposite cannot reside simultaneously in the same factual context.[129]

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[126] The Bhopal plant was constructed in accordance to the Indian government's policies and laws. The plant had to be modified in order to accommodate the growing developmental needs and most of the times, these modifications are not environmentally safe or economically sound. See Upendra Baxi and Amita Dhanda, *Valiant Victims And Lethal Litigation: The Bhopal Case* (NM Tripathi, 1990).

[127] ibid 39.

[128] *Charan Lal Sahu v Union of India* 1989 1 SCC 674 (India); Upendra Baxi (n 92).

[129] Hohfeld (n 83) 53.

VIII. VICTIMS AND THEIR RIGHTS IN BHOPAL

In the Bhopal Disaster, the GOI diverted its position of being liable as a shareholder of UCC to being a negotiator and settling claims on the victims' behalf. The GOI shifted its position from liability to that of immunity, disabling the judiciary's power to hold it liable as a tortfeasor in the disaster.

The facility in Bhopal was a disaster waiting to happen. Though the Union Carbide Corporation argued that the disaster was a result of 'a unique combination of unusual events,'[130] the signs of danger were there throughout its operations. When the GOI agreed to allow the manufacture and storage of such large quantities of MIC, it failed to assess the risks involved. There had already been several leaks at the plant and reported deaths and injuries.[131] The Union Carbide Corporation, being an employer, failed to assess risk and communicate hazards.[132] A local journalist's[133] report proves that the facility had been losing money for some years, and there was an absence of skilled workers. The plant was badly and poorly maintained and the safety equipment was either inadequate or inoperative.[134]

The law that governs the operation of hazardous processes in India is the Factories Act, 1948.[135] In the present context, UCC is the occupier, and as an occupier, UCC owes general duties to the workers that include: maintaining the plant and systems in the factory and ensuring that they are safe and do not pose

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[130] Larry Everest, *Behind the Poison Cloud: Union Carbide's Bhopal* Massacre (Chicago, Banner Press, 1986).

[131] In 1981, one worker had died and three others were severely injured due to a gas leak. Later, in 1982 twenty-five workers were hospitalised because of another leak. This was reported in Union of India, Memorandum that was reproduced in Upendra Baxi and Thomas Paul, *Mass Disasters and Multinational Liability: The Bhopal Case* (NM Tripathi, 1986) at 72.

[132] UCC had a duty of reasonable care to assess risk and warn the employees of any dangers associated with the manufacture of methyl isocyanate. It failed to warn the employees of these dangers and acted negligently. Micheal Ciresi of Robins, Zelle represented the Union of India and this was drafted by him in the complaint.

[133] A local journalist named Rajkumar Keswani tried to warn the people of the dangers of the facory. He wrote an article titled 'Please Save this City.' In the Union Carbide's report it was found that there was a 'potential for the release of toxic materials' and a consequent 'runway reaction' due to 'equipment failure, operating problems or maintenance problems.'

[134] ibid. See affidavit of Rajkumar Keswani in the Supreme Court in *Rajkumar Keswani v Union of India* WP 281 of 1989 (India).

[135] Factories Act 1948, s 2 defines 'hazardous process' as any process or activity in relation to an industry specified in the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, by-products, wastes or effluents thereof would cause material impairment to the health of the persons engaged in or connected therewith, or result in the pollution of the general environment.

any risk to the workers, providing arrangements for ensuring the safety and health of the workers while handling, storing and transporting hazardous items, providing information and training and providing supervision to the workers.[136] In a nutshell, the occupier has a duty to ensure that the working conditions are safe and adequate.[137]

With this duty comes a correlative right of the worker to be warned about any imminent danger.[138] The occupier has a duty to take immediate remedial action if he is satisfied that there is an imminent danger to the workers' lives. As previously stated, UCC defaulted on this duty as there were previous warnings in 1976 and 1982 of pollution within the plant and a phosgene leak, and UCC took no steps to curb this. Apart from these general duties of an occupier, there are specific duties imposed upon the occupier in relation to hazardous processes.[139] The occupier of a factory engaging in hazardous processes has to maintain accurate and up-to-date health records of the workers, appoint only those persons who are qualified in handling these hazardous substances, and provide for medical examination of every worker.[140] UCC defaulted on these duties as an occupier, resulting in the largest chemical industrial accident ever.[141] The Bhopal disaster was not a coincidence or a combination of unexpected events but a series of failures at the planning, implementing, and managing stages.

The principles enunciated in *Rylands v Fletcher*[142] on strict liability are guiding principles to the law on liability. Strict liability imposes the obligation to

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[136] Micheal Cmichiresi of Robins (n 132).

[137] Factories Act 1948, s 41C specifies the occupier's responsibility concerning hazardous processes. Every occupier of a factory involving any hazardous process shall maintain accurate and up-to-date health records or, as the case may be, medical records, of the workers in the factory who are exposed to any chemical, toxic or any other harmful substances which are manufactured, stored, handled or transported and such records shall be accessible to the workers subject to such conditions as may be prescribed; appoint persons who possess qualifications and experience in handling hazardous substances and are competent to supervise such handling within the factory and to provide at the working place all the necessary facilities for protecting the workers in the manner prescribed.

[138] The Factories Act, 1948.

[139] ibid.

[140] ibid.

[141] An industrial disaster such as the Bhopal gas leak repeated recently at Visakhapatnam, India from the LG polymers plant. For a detailed description of the accident, see V Ramana Dhara, '35 years later, Bhopal gas leak failures resurface in *Vizag*' *Hindustan Times* (8 May 2020) <https://www.hindustantimes.com/india-news/35-years-later-bhopal-gas-leak-failures-resurface-in-vizag/story-blOMncph2Az8RJO4yKTvUO.html> accessed 27 July 2025.

[142] *Rylands v Fletcher* 1868 LR 3 HL 330.

repair, which arises from the perception that the intentional infliction of harm may give rise to responsibility to repair even in a situation where the infliction could be justified. The law on strict liability gave rise to absolute liability, which does not accommodate any exceptions and holds the occupier of a dangerous item absolutely liable upon its escape. In India, the law on absolute liability has been set out in the *M.C. Mehta v Union of India*,[143] where the court stated:

> [A]n enterprise which is engaged in a hazardous or inherently dangerous industry. . . owes an absolute and non-delegable duty to the community to insure that no harm results to anyone. . . . [A]nd if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm. . . .[144]

If we were to apply Hohfeld to a rule such as absolute liability, it would mean that the occupier would be liable for any damage caused by the escape of a thing that is likely to make mischief. In that sense, there is a duty imposed on the occupier, and this duty is of a particular kind and begins from the time the occupier has kept the dangerous thing under his control. There is a duty to stop the thing from escaping and creating mischief.

The correlative is a right to be protected from any injury caused because of the thing escaping. Another correlative to fit into the equation of Union Carbide Corporation and the victims is power and liability. The victims have the power to hold Union Carbide Corporation liable by using the legal process, and Carbide is susceptible to such a process. The victims have a legal power to secure a remedy by way of legal proceedings, and this power has been exercised to enforce a duty or secure a remedy for that breach of duty by the Union Carbide Corporation. The victims' power stems from Union Carbide Corporation's liability to take all steps to anticipate any risks and plan and prevent them from materialising.

The Bhopal story depicts the *parens patriae* power of the GOI to shift focus and flip the role of the GOI from a tortfeasor to a negotiator. Hohfeld's theory can only act as an analytical tool when applied to two parties to determine their relationship.

In the above discussion, there is ambiguity in categorising who the victim of the Bhopal disaster was? Was the GOI also a victim, as it was siding with the

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[143] *MC Mehta v Union of India* 1987 SCR (1) 819.
[144] ibid.

victims of the disaster and representing and settling their claims? Was it the ones injured during the gas leak? Was it the ones who lost their families to the disaster? Was it the ones who continued to suffer in the years to come? While responding to this question, the Indian courts in the case of *Charan Lal Sahu v Union of India*,[145] termed 'victims' as those who were disabled due to physical, mental, financial, and economic situations. It stated that they were the 'ones who needed the State's protection to assert, establish and maintain their rights against the wrong-doers in the mass disaster.'[146] Though this statement by the Indian Courts provides some perspective into defining the term 'victim', there remains an opening for evasion and avoidance that could be imposed on the deciding bodies to attract liability.

IX. REDEFINING VICTIMHOOD IN INTERNATIONAL LAW

The Hohfeldian Analysis of jural rights, when applied to the Bhopal gas leak, demonstrates the changing relationship between parties in the aftermath of an industrial disaster. The examination of the denotation of 'victim' under different schools of international law paints a picture for us to interpret our meaning of victimhood. The relationship between a State and its individuals, and more significantly, a class of individuals who have suffered oppression, demonstrates that victims have been evolving as a powerful class, inevitably making a State responsible for upholding and protecting their rights. The interrelation between the State and the victims has been changing, mostly unpredictably. From being a mere witness in a criminal proceeding to becoming the prime focus and backbone of a proceeding, it has become impossible to proceed without a victim's active participation from time to time in the different phases of the proceedings.

We can observe that their role has been transcending. This has strengthened the idea that individuals are central to human rights law and are entitled to these rights without discrimination. States are bound to respect these rights by refraining from interfering with or curtailing the enjoyment of these rights. States are obligated to protect individuals and groups against human rights abuses.

Sovereignty and international human rights law are complementary. Human Rights law strengthens the moral foundations of a State and lends it

[145] *Charan Lal Sahu* (n 39).
[146] ibid.

more credibility in the world community. In several human rights treaties and conventions, there is an obligation placed on the State to investigate, prosecute, and punish perpetrators of mass atrocities.[147] Furthermore, since the end of the Cold War, there has been an expectation on the international community to involve itself in addressing peace and stability issues in countries emerging from conflict. The international community plays an unquestionably large role in establishing systems that acknowledge and respond to human rights violations. Take, for instance, the genocide in Rwanda in 1994. In addition to the Rwandan government of establishing 'Gacaca Courts' to address challenges,[148] the International Criminal Tribunal for Rwanda was established by the United Nations Security Council to prosecute individuals responsible for crimes against humanity and other serious violations of humanitarian law.

X. CONCLUSION

The Bhopal gas tragedy presents a paradigmatic case for rethinking the concept of victimhood in international legal discourse. While initially framed as a mass tort and addressed through domestic civil litigation, the scale, complexity, and transnational dimensions of the disaster reveal deeper normative tensions in the treatment of victims under international law. What emerges from Bhopal is not merely a failure of corporate accountability, but a reframing of the relationship between the state and the individual: the Indian government positioned itself simultaneously as the representative, gatekeeper, and litigant on behalf of the victims, thereby monopolising access to justice while excluding those directly affected from substantive participation. This model unsettles the conventional frameworks of international human rights law, which often presuppose direct victim agency and procedural standing, as well as international criminal law,

[147] For example, take Article IV of the UN Convention on the Prevention of the Crime of Genocide UN Convention on the (Prevention of the Crime of Genocide 1948). Furthermore, Article IV of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.) Both these lay an obligation on the State concerning genocide and torture. Another source is the International Covenant on Civil and Political Rights. An important judgment in light of this obligation is the case of *Velázquez Rodriguez v Honduras* (Inter-American Court of Human Rights). The Inter-American Court on Human Rights stated that states are responsible for preventing, investigating, and punishing violations of rights recognised by the Convention. Additionally, there has to be an attempt to restore the right that has been violated and provide compensation

[148] The law on Gacaca laid out four categories of suspects. These included: the people that conceived, planned, and executed genocide and were tried by the convention courts, the second, third, and fourth categories were tried by the Gacaca courts.

which largely confines victimhood to atrocity crimes committed within the context of conflict. In Bhopal, however, the victim is entangled in a postcolonial state's performance of sovereignty, development, and global capital, raising urgent questions about who may speak for the victim and under what institutional and normative conditions.

This case study thus provides a critical site for an innovative redefinition of victimhood, one that foregrounds the relational dynamics between state and subject rather than treating victim status as a static legal designation. By applying Hohfeld's theory of jural relations, the analysis exposes the shifting legal positions of the Bhopal victims, not simply as holders of rights against a negligent corporation, but as subjects whose entitlements and exclusions were mediated through the state's strategic legal positioning. In this sense, Bhopal functions as a hybrid model that engages, yet also unsettles, the normative assumptions of international human rights law, international criminal law, and transitional justice. It challenges the prevailing notion of the victim as an individual harmed by clearly delineated state or non-state actors in conflict or authoritarian contexts, and instead introduces a model in which structural violence, regulatory complicity, and delayed justice in peacetime contexts constitute equally pressing sites for the legal recognition of victimhood. In doing so, the Bhopal case demands a recalibration of international legal frameworks to account for victims not only as recipients of post-facto redress but as central figures in the construction and critique of legal responsibility itself.

The increasing emergence of a victim's rights and a victim's participation in international law has caused the emergence of a new kind of interpretation of victimhood. The individual has been contacted with international law and is no longer a mere witness but rather an active participant from time to time in the different phases of proceedings. The developments in various international law areas, more specifically, international human rights law obligate the State to protect individuals and lay down rules on State responsibility in the context of human rights.[149] As observed under Sections I and II of this article, the victim's role under international law has been asserted by creating different categories of victims. These include victims of abuse of power, victims of crime, victims of gross violations of international humanitarian law, victims of international

[149] Charter of the United Nations, art 1(3).

criminal law violations, and victims of serious violations of international humanitarian law.

Consequently, these categories have their own definition of a 'victim.' However, despite the diversity, we can find certain common elements in all these definitions. These common elements have helped us interpret our definition of a victim by joining the dots between victimhood and intersectionality under Section III.

Hohfeld's fundamental legal relations have permitted us to describe the power-liability dynamic between the State and an individual in the context of human rights. By defining the victim as a powerful actor in international law, we recognise an individual's legal personality under international law.[150] States are no longer the subjects of international law, and there is an increasing disposition to treat individuals as the subjects of international law.[151] Victims in international law have risen as powerful actors, holding the State liable and abiding the State to protect individuals and groups against human rights abuses.

[150] This opinion of the recognition of an individual's legal personality in international law has been shared in LFL Oppenheim, *International Law* (8th edn, H Lauterpacht ed, Longmans, Green & Co 1955) 636.
[151] ibid 639.

THIRD WORLD VIEW OF THE LAWS OF ARMED CONFLICT: AN INTRODUCTION

*Kailash Jeenger**

The Third World perspective on International Law provides an alternate account of the origin, development, and impact of international law. Third World scholars have tried to argue that International Law is a product of the colonisation of a huge landmass, and it justifies the oppression and subjugation of the colonised peoples. A major segment of colonial international law comprises the laws of war or armed conflict. A Third World perspective to the laws of armed conflict seeks to investigate, among others, how the colonies were deliberately excluded from the making of the laws of war; how the law was not just discriminatory to the colonised peoples but hostile too; how the rules of war facilitated imperialism; how the law was primarily based on a Western view of armed conflicts, and how the concerns and lived experiences of the Third World were either ignored or barely addressed in the law.

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I. INTRODUCTION

The law of armed conflict or law of war or international humanitarian law is one of the constituents of international law. Its field of application is war. In relation to war, two questions are important from a legal standpoint: 'Why war happens

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and what happens in war'.[1] These questions are responded to by two components of international law respectively: *jus ad bellum* and *jus in bello*. The former relates to the right to wage war and seeks to determine the legality of the use of force.[2] The latter, however, is not concerned with the lawfulness of waging war; rather, it aims at regulating the hostile conduct of the parties at war. It constitutes the laws of armed conflict. Irrespective of the legality of an attack, the laws of armed conflict get triggered on the occurrence of an armed conflict, 'the determination of which depends solely on an assessment of the facts on the ground'.[3] The rules of armed conflict seek to control the violent actions and mitigate the effects of war. They do so by prohibiting certain means and methods of war and protecting from attack persons who do not,[4] or are unwilling,[5] or are unable[6] to participate in the hostilities.[7] The law, thus, aims at limiting the violence to the scale inevitable to achieve the ends of war and to weaken the military potential of the adversary.[8]

The codification[9] of the laws of armed conflict and the adoption of corresponding treaties[10] mainly started during the colonial era. However, the law

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[1] Geoffrey Best, *War & Law since 1945* (OUP 1994) 4.

[2] Charter of the United Nations (entered into force 24 October 1945) XV UNCIO 335 ('UN Charter'), arts 42, 51. See also Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) ch 2, 3 (for more on jus ad bellum and jus in bello).

[3] International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (32nd International Conference of the Red Cross and Red Crescent, October 2015) 7.

[4] Such as civilians.

[5] For instance, a soldier who has surrendered.

[6] Such as, a soldier who is wounded or sick (*hors de combat*).

[7] Srinivas Burra, 'Collective Engagement and Selective Endorsement: India's Ambivalent Attitude Towards Laws of Armed Conflict' in Srinivas Burra and Rajesh R Babu (eds), *Locating India in the Contemporary International Legal Order* (Springer 2018) 52 (internal citations omitted).

[8] Marco Sassoli and Antonie A Bouvier, *How Does Law Protect in War?* (ICRC 2006) 81.

[9] Francis Lieber, *Instructions for the Government of Armies of the United States, in the Field* (New York, D van Nostrand 1863).

[10] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (signed 11 December 1868, entered into force upon signature) 138 CTS 297; Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 ('Hague Convention II'), art 2; Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 ('Hague Convention IV'); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 ('Geneva Convention III'); Geneva Convention for the Amelioration of the Condition of

significantly developed after World War II with the adoption of the four Geneva Conventions[11] and their Additional Protocols.[12] The development of all these instruments, however, cannot be examined in isolation. It must be realised that they were actually a product of a particular historical setting. They reflect the specific political and economic environment, hierarchical power structures, and particular geographic location which moulded the form and content of these treaties. They were a result of exclusionary and unequal negotiations. They have a history, not just documented, but undocumented also, which has received scant attention. In this backdrop, Part II of the article seeks to investigate how the colonies were deliberately excluded from the making and application of the laws of war, and how the law was not just discriminatory to the colonised peoples but hostile too. Part III explains the way the rules of war were formulated and employed in order to facilitate imperialism. Part IV intends to demonstrate that the applicability criteria of the law reflected a Western view of armed conflicts. The position of guerrilla and freedom fighters in the laws of armed conflict is dealt with by Part V. Finally, Part VI attempts to underline that some of the rules and principles of the law are problematic and prejudicial to the interests of the Third World.

The expression 'Third World' mainly refers to States which do not fall into the groups of 'industrialised (First World) or communist/socialist (Second World) countries'.[13] It has been argued that the term 'Third World' was coined

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Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ('Geneva Convention II').

[11] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ('Geneva Convention I'); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ('Geneva Convention II'); Geneva Convention III; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 ('Geneva Convention IV').

[12] Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('Additional Protocol I'); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 ('Additional Protocol II'); Protocol (III) Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007) 261 UNTS 2404 ('Additional Protocol III').

[13] Srinivas Burra, 'Four Geneva Conventions of 1949: A Third World View' in Md. Jahid Hossain Bhuiyan, Borhan Uddin Khan (eds), *Revisiting the Geneva Conventions: 1949-2019* (Brill Nijhoff 2019) 191.

by the French demographer Alfred Sauvy.[14] While the mainstream accounts of international law in general overlook the impact of capitalism and colonisation on the origin and development of international law,[15] the Third World Approaches to International Law ('TWAIL') maintain that these two phenomena were central to the origin of international law and they also legitimised subjugation of the Third World.[16] TWAIL unveils the hierarchical nature of international law[17] and the exclusion of the Third World from its making. It offers an alternative account of the history of international law[18] by taking into consideration the lived experiences of colonialism[19] and challenging the claims of universality of international law.[20] In doing so, TWAIL employs multiple approaches, such as Marxist, critical, feminist, and post-colonial.[21] Using these tools, the author seeks to examine the laws of armed conflict from a Third World perspective.

II. HISTORICAL EXCLUSION OF THE THIRD WORLD

The historical exclusion of the Third World (former colonies) from the making of international treaties was mainly premised on cultural differences and power. These differences were introduced in the sixteenth century by a Spanish jurist, Francisco de Vitoria,[22] in order to justify entry into, and colonisation of the newly discovered territories of America. In this 'dynamic of difference',[23] the non-European world was seen as culturally inferior (barbarian), uncivilised[24] and less advanced as compared to European standards, and, therefore, lacking sovereignty.[25] Eventually, he also prescribed rules of war with the barbarians

[14] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2005) 25.
[15] BS Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective' (2022) 35 Leiden Journal of International Law 29, 30-31.
[16] Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 Chinese Journal of International Law 77, 80-84.
[17] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 209.
[18] Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 European Journal of International Law 7, 9.
[19] Anghie and Chimni (n 16), 78.
[20] Makau Mutua, 'What is TWAIL?' (2000) 94 American Society of International Law Proceedings 31.
[21] Anghie (n 18) 118-119.
[22] Fransico de Vitoria, *Francisco de Vitoria: Political Writings* (Anthony Pagden and Jeremy Lawrance eds, CUP 2010).
[23] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 37.
[24] RP Anand, *New States and International Law* (Hope India Publications 2008) 19.
[25] Anghie (n 23) 26-27.

justifying indiscriminate violence and enslavement of the aboriginals.[26] Subsequent to the Treaty of Westphalia (1648), the idea of sovereignty attained more prominence as an attribute of statehood.[27] After the Industrial Revolution in the 1770s, the advanced European nations colonised more and more territories of the Global South for raw material, markets and cheap labour.[28] They also formed a 'family of nations' because of sharing 'a common civilisation and a way of life'.[29] The idealised European standard of civilisation,[30] sovereignty,[31] and power[32] were identified as the main prerequisites for becoming a member of the family of nations. Accordingly, the so-called uncivilised and semi-civilised nations were not part of the family of nations.[33] They could neither participate in international law-making nor be the subjects of international law. Indeed, they were simply the objects of international law.[34] This segregation of colonies from the application of international law was less a result of express political approval by the colonisers and more of an outcome of inherent colonial prejudices.[35] Besides the colonial masters' creation of the 'family', the prominent nineteenth century European writers formulated prejudiced ideological foundations and vocabulary justifying domination of the uncivilised and their exclusion from the realm of international law.[36] Thus, for instance, Stuart Mill writes that applying the international law, as already applicable between civilised nations, to barbarians is a grave error.[37] Holland declares that no one outside the family of nations can be regarded as a 'wholly normal international person'.[38] Similarly, Wheaton states that the law of nations is that which is observed

[26] ibid 27.
[27] ibid 6.
[28] Edward Said, *Culture and Imperialism* (Vintage Books 1994) 8.
[29] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2004) 438.
[30] ibid.
[31] Anghie (n 23) 55.
[32] Anand (n 24) 48.
[33] ibid.
[34] ibid 25.
[35] Frédéric Mégret, 'From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'' in Anne Orford (ed), *International Law and its Others* (CUP 2006) 278.
[36] Said (n 28) 9; Mégret (n 35) 278-281; For the views of John Stuart Mill, TE Holland, and Westlake, see Anand (n 24) 22-23; For similar opinion of Wheaton, see Anghie (n 23) 53-54.
[37] Anand (n 24) 22.
[38] ibid.

between the most civilised nations.[39] Thus, the exclusion of the colonies was a result of collaborative efforts of colonial mindset.

The nineteenth century treaties related to the conduct of war gave a formal shape to the exclusion of the uncivilised. For instance, in the St. Petersburg Declaration, the ban on the use of a particular projectile during the war was seen by the parties as a mark of civilisation,[40] which was of course a Europe-centric conception. It also implied that civilisation had nothing to do with the uncivilised colonised peoples and, thus, sought to justify the exclusion of the Third World from participating in the negotiation of the Declaration at the International Military Commission. The substantive prohibition laid down by the Declaration was also meant to apply in case of war between 'civilised' States only.[41] The Declaration expressly stated its non-application in war with non-Contracting Parties.[42] Thus, the 'civilised' European States assumed for themselves the liberty to use any lethal weapon in case of war with colonies. This pattern of exclusion and impunity continued subsequently also. In relation to the rules of war, the Hague Conventions of 1899 and 1907 were quantitatively greater but narrower in scope. They reflected a unique, narrow-minded, and hostile idea of a civilisation, specific to the colonisers. For instance, the Hague Convention II (1899) provided:

> The provisions contained in the Regulations mentioned in Article I are only binding on the Contracting Powers, in case of war between two or more of them.
>
> These provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents.[43]

These exclusionary practices cannot be seen in isolation as they had a far-reaching impact on the capitalist and imperialist ambitions of the settlers. Ostensibly, Europe and America were on a 'civilising mission'[44] in order to

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[39] Anghie (n 23) 53.

[40] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (signed 11 December 1868, entered into force upon signature) 138 CTS 297, Preamble.

[41] ibid.

[42] ibid.

[43] Hague Convention II, art 2. See also Hague Convention IV.

[44] According to Anghie, 'the civilizing mission asserts that we are civilised, enlightened, universal, peaceful; they are barbaric, violent, backward, and must be therefore pacified, developed, liberated, enlightened, transformed.' Antony Anghie, 'On Critique and the Other' in Anne Orford (ed), *International Law and Its Others* (CUP 2006) 394.

develop the Third World peoples; actually, however, the settlers were colonising and occupying the Global South as part of a mission in disguise, which was: gaining supremacy in the trade and colonial competition among them. This was possible through imperialism only.

III. FACILITATING IMPERIALISM

In the second half of the nineteenth century, the colonialist European nations had accumulated plenty of wealth by looting the colonies and selling in huge volumes the goods made up of their raw materials.[45] Gradually, capitalism in the Global North reached its highest stage,[46] that is imperialism,[47] which implies swallowing more colonies so that the excessive wealth accumulated with settlers can be exported to the colonies in order to establish industrial enterprises there also and make more profits.[48] Thus, trade rivalry and colonial competition among the colonisers fuelled the process of subjugation of the poor masses.

International law in general, and the treaties related to the conduct of war in particular did not create any obstacle in occupying foreign territories or in curbing ruthlessly armed rebellion by colonised peoples. The nineteenth century international law doctrines, such as sovereignty, recognition, protectorate[49] and unequal treaty[50] explained the discriminatory practices adopted by the Western nations towards the rest of the world. Thus, for instance, most of the Asian, African and Latin-American nations were kept away from the family of nations because they were treated as 'uncivilised'.[51] Moreover, because of the lack of membership in international civilised society, they were not considered

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[45] According to Frantz Fanon, the Europe prospered because of colonies and their wealth belongs to us also. See Frantz Fanon, *The Wretched of the Earth* (Penguin Books 1961) 76, 81.

[46] Lenin calls imperialism as the highest stage of capitalism. See VI Lenin, *Imperialism, the Highest Stage of Capitalism* (Lawrence & Wishart 1988).

[47] In the words of Edward Said, 'imperialism means the practice, the theory, and the attitudes of a dominating metropolitan centre ruling a distant territory; 'colonialism,' which is almost always a consequence of imperialism, is the implanting of settlements on distant territory. He further cites Michael Doyle who notes that, 'Empire is a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social, or cultural dependence. Imperialism is simply the process or policy of establishing or maintaining an empire.'; See Said (n 28) 9.

[48] Anand (n 24) 27.

[49] For instance, conferment of protectorate over land of Congo, see Anand (n 24) 32; Protectorate of Tunisia, see Koskenniemi (n 29) 142. Often, the colonial protectorate system was used to veil de facto annexation, see Koskenniemi (n 29) 151, 273.

[50] Anand (n 24) 43.

[51] ibid 19-20.

sovereigns.[52] The criterion of civilisation was also used to justify non-recognition of colonies as States.[53] This also made the European Powers assume for themselves, ostensibly though, a duty to civilise the Global South. The duty, actually imperialism, was given a formal shape under the Covenant of the League of Nations in the name of the well-being and development of the mandated territories.[54]

On the other hand, the non-application of the Hague and other such Conventions to anti-colonial conflicts helped in smoothly colonising the dark and coloured peoples and maintaining control over them. Notably, most of the Latin American and Asian nations (except Turkey, China, Japan, Siam and Persia), and the whole of the African continent were not represented in the Hague Conferences of 1899 and 1907.[55] By prescribing the distinction of civilised-uncivilised and assuming themselves on a civilising mission, the colonisers set themselves free from any moral responsibility for committing inhuman acts on the Third World peoples. On the other side, they absolved themselves of any legal responsibility also for committing horrendous crimes on the natives by keeping the anti-colonial wars outside the scope of the Conventions regulating belligerent conduct. The (self-given) legal concession and moral justification ultimately led to the enhancement of the size of the colonial empire beyond three-fourth of the globe at the inception of World War I. Here are some statistics:

> Consider that in 1800 Western powers claimed 55 percent but actually held approximately 35 percent of the earth's surface, and that by 1878 the proportion was 67 percent, a rate of increase of 83,000 square miles per year. By 1914, the annual rate had risen to an astonishing 240,000 square miles, and Europe held a grand total of roughly 85 percent of the earth as colonies, protectorates, dependencies, dominions, and commonwealths. No other associated set of colonies in history was as large, none so totally dominated, none so unequal in power to the Western metropolis.[56]

[52] Anghie (n 23) 58.
[53] ibid 75; Koskenniemi (n 29) 71.
[54] Covenant of the League of Nations (adopted 28 April 1919, entered into force 10 January 1920) 225 CTS 195, art 22; Anghie (n 23) 158-159.
[55] Anand (n 24) 24.
[56] Said (n 28) 8.

Thus, the colonial exceptionalism from the laws of war not only facilitated the imperial expansion but also legitimised it on the premise that what is not prohibited is not unlawful.

IV. APPLICABILITY CRITERIA REFLECTING THE WESTERN VIEW OF ARMED CONFLICTS

The applicability criteria or the material field of the laws of armed conflict refers to the violent situations to which the law applies and regulates the conduct of military operations. Initially, the law applied to inter-State armed conflicts only. On the other side, there were some other hostile situations specific to the Third World, which were kept away from the scope of the law for a long time. The impact of colonial tendencies and Western domination on the drafting of material fields is discussed below.

A. Armed Freedom Struggles

Before World War II, the scope of the law was confined to inter-State wars only,[57] and anti-colonial wars and colonial occupation were beyond the regulation of the international laws of war. However, the holocaust of World War II had a severe impact on the need to reconsider the existing treaties on war and update them.[58] Based on the preparatory works,[59] the International Committee of the Red Cross ('ICRC') submitted the following proposal in respect of the scope of application of the draft Conventions:

> Beyond the stipulations to be implemented in peace time, the present Convention shall 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 should the state of war not be recognised by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even should the said occupation meet with no armed resistance.
>
> …

[57] Hague Convention II, art 2; See also Hague Convention IV, art 2.

[58] Burra (n 13) 192.

[59] International Committee of the Red Cross, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems relative to the Red Cross* (Geneva 1946); International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva 1947).

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status.[60]

The proposal was shared in the seventeenth Red Cross Conference in Stockholm (1948). The last paragraph was certainly a radical move considering the existing global material realities and, therefore, unacceptable[61] to the advanced countries. Express mention of categories, like 'civil war, colonial conflicts and wars of religion' and their proposed regulation by international law would have been a severe blow to imperialism. Therefore, at the insistence of colonial States, such as Britain and France, the ICRC agreed to drop the expression 'especially cases of civil war, colonial conflicts, or wars of religion' from the fourth paragraph.[62] The revised draft was tabled by the ICRC for negotiations at the Diplomatic Conference, 1949.[63] Despite the deletion of the specific reference to colonial conflicts from the proposal, the delegations of Mexico[64] and Soviet bloc[65] repeatedly underscored the horrific nature of anti-colonial wars and insisted on the need to include them within the purview of non-international armed conflicts. However, they did not find much favour, and the negotiations mainly focused on the threshold of civil wars and a number of rules applicable to non-international armed conflicts.[66] Thus, the efforts to extend the laws of armed conflicts to colonial conflicts could not materialise in 1949 and the same were not included expressly in the description of international[67] or non-international[68] armed conflicts. This is despite the fact

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[60] ICRC, *Revised and New Draft Conventions for the Protection of War Victims* (XXVIIth International Red Cross Conference, Stockholm 1948) 5, 52.

[61] Boyd van Dijk, 'Internationalizing Colonial War: On the Unintended Consequences of the Interventions of the International Committee of the Red Cross in South-East Asia, 1945–1949' (2021) 250(1) Past & Present 243.

[62] Burra (n 58) 203.

[63] *Final Record of the Diplomatic Conference of Geneva of 1949* (Library of Congress 1949) vol I, 47, 61, 73.

[64] ibid vol II, s B, 333.

[65] ibid vol II, s B, 325-326, 334.

[66] See also Kailash Jeenger, *International Humanitarian Law: A Humanitarian Critique* (Springer forthcoming) ch 8.

[67] Geneva Convention I, art 2.

[68] ibid, art 3.

that many colonies were still struggling to gain independence from the colonial rule.

However, in the 1950s and 1960s, the newly independent States emerged impressively and used various international stages[69] in order to emphasise the international legal regulation of wars of national liberation consistent with the respect for human rights in every situation of armed conflict. The growing sentiment reflected in the United Nations resolutions[70] and also influenced the negotiating space at the Diplomatic Conference (1974-1977) which was held to consider the Draft Protocols additional to the 1949 Geneva Conventions. Ultimately, the former colonies succeeded in including wars of national liberation within the scope of international armed conflict in Additional Protocol I.[71] By this time, however, a major portion of the decolonisation process had already been over, and the new provision remained merely a formal victory for the Third World.

It, thus, demonstrates how imperialist tendencies determined the material scope of the law of armed conflict and also how the colonial States continued to remain free from any legal obligation towards colonies. It explains that the political and economic motives actually decide the limits of humanitarianism. Although, the Third World had the occasion to celebrate, however, the occasion came at the convenience of the powerful.

B. Colonial Occupation

The question of international legal regulation of colonial occupation arises because the Geneva Conventions[72] apply to belligerent occupation also. Belligerent occupation means placing the enemy territory under one's own temporary control and authority consequent upon invasion or military defeat of the adversary. It is an intermediate stage before the final outcome of armed

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[69] See Eleanor Davey, 'Decolonizing the Geneva Conventions' in A Dirk Moses, Marco Duranti and Ronald Burke (eds), *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* (CUP 2020) 379-380.

[70] UNGA Res 2444 (XXIII) (19 December 1968) UN Doc A/RES/2444 (emphasised on application of humanitarian law in all armed conflicts); Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes, UNGA Res 3103 (XXVII) (12 December 1973) (stated that wars of national liberation are international armed conflicts); 'Final Act of the International Conference on Human Rights' (13 May 1968) UN Doc A/CONF.32/41(stressed on respect for the humanitarian law in all types of armed conflicts).

[71] Additional Protocol I, art 1(4).

[72] Geneva Convention I, art 2(2).

conflict. Burra explains[73] in detail the exclusion of colonial occupation from the Hague and four Geneva Conventions from the TWAIL perspective. For this purpose, he employs the colonial conceptual framework wherein colonies were declared to be uncivilised and therefore lacking sovereignty. On the other hand, European nations were treated as civilised and sovereign. The situation of belligerent occupation could result from a war between States only. Colonies lacked sovereignty and were not States under colonial international law. Therefore, violent encounters between a European State and a colony did not amount to armed conflict within the meaning of the Conventions and, thus, consequent occupation and control over the colony did not amount to belligerent occupation.[74] This again shows that under the colonial international law, the vows to protect the interests of humanity were selective and the idea of humanity was meant for the people of colonial States only. As a result of the colonial occupation in huge proportion, the colonisers were successful in retaining their control over huge colonies and exploiting their resources in order to aggrandise their own wealth.

C. Civil Wars

Besides wars of national liberation, the post-World War II era witnessed interesting deliberations on the international platform in respect of internal or civil wars. These events portray the approach adopted particularly by post-colonial (or newly independent) States towards internal conflicts which is also a subject matter of analysis by TWAIL scholars. During the negotiation of the draft Geneva Conventions in 1949, a group of Asiatic nations led by Burma was not in favour of applying the Conventions to civil wars. The Burmese delegate suspected that the recognition of non-international armed conflicts would benefit 'those who desire loot, pillage, political power by undemocratic means, or those foreign ideologies seeking their own advancement by inciting the population of another country'.[75] The delegate further stated that these observations were based on their 'bitter experience of insurgencies'.[76] Hidden in these submissions was also a colonial mindset to suppress resistance movements freely. However, in order to negate any such allegations in future, the delegate

[73] Burra (n 13) 194-200.
[74] ibid 195-196.
[75] *Final Record of the Diplomatic Conference of Geneva of 1949* (Library of Congress 1949) vol II, s B, 329.
[76] ibid vol II, s B, 330.

made a 'terribly naïve and insincere'[77] submission that 'no Government of an independent country can, or will ever, be inhuman or cruel in its actions towards its own nationals'.[78] This argument is far-away from the realities of internal strife, past, present, and future, irrespective of geographic location.

Another sight of interesting arguments in respect of the regulation of civil wars was the Diplomatic Conference, 1974-1977. In the Conference, a separate Draft Protocol was being debated in respect of non-international armed conflicts. During the negotiations, India, a post-colonial State, contextualised the Common Article 3 in the background of colonial conflicts.[79] India understood that Article 3 was originally meant to cover wars of national liberation.[80] This is mainly because the Stockholm Draft introduced a legal category of 'armed conflict not of an international character, which, though, included not only colonial conflicts, but also civil wars and wars of religion'.[81] It is important to note here that the scope of humanitarian protection afforded by the Common Article 3 is narrower than that provided by the Additional Protocol II. The Indian delegate stated that:

> […] the Indian delegation was glad that the Conference had accepted the status of liberation movements in Article l, paragraph 4 of Protocol I. The Indian delegation therefore believed that common Article 3 reflected the historical situation as it had then existed and was no longer applicable to present circumstances. Consequently, Draft Protocol II, which was supposed to be based on common Article 3, was pointless.[82]

This understanding was developed and shared despite the fact that in 1949, the debate with respect to non-international armed conflict revolved around the scale of civil war, State-like features of insurgent groups, recognition of belligerency and combatant privileges of insurgents.[83] The abrupt deletion of the

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[77] Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar 2017) 34.

[78] *Final Record of the Diplomatic Conference of Geneva of 1949* (Library of Congress 1949) vol II, s B, 329.

[79] Burra (n 13) 204.

[80] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977)* (Library of Congress 1978) vol VII, 202-204.

[81] ICRC, *Revised and New Draft Conventions for the Protection of War Victims* (XXVIIth International Red Cross Conference, Stockholm, 1948) 5, 52.

[82] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977)* (Library of Congress 1978) vol XIV, 204.

[83] Jeenger (n 66).

term 'colonial conflicts' from the draft was also ignored by the delegate.[84] Notably, India is not a party to the Protocol II which contains extensive rules of regulating the conduct of armed operations in non-international armed conflicts.[85]

V. STATUS OF GUERILLA AND FREEDOM FIGHTERS

Yet another form of neglect of the concerns of the Third World in the laws of armed conflict relates to combatant privilege and the status of prisoner-of-war in respect of guerrilla and freedom fighters. Under the Hague Conventions, in order to be considered a combatant, a fighter has to satisfy the following four conditions: acting under a responsible command, having a distinctive emblem, carrying arms openly, and respecting the laws of war.[86] Non-observance of these conditions would disentitle a combatant to the status of prisoner-of-war and render them liable under domestic criminal law. The Hague approach was followed in the Geneva Conventions (1949) with an extension that the four conditions may also apply to members of organised resistance movements.[87] These rules certainly reflect a Eurocentric vision of armed conflicts and disciplined and organised combatants. This approach ignored the lived experiences of the Third World who used to conduct violent operations against colonial masters through guerrilla and loosely organised freedom fighters. These fighters could not afford to adhere to these conditions of well-ordered combatants. Secrecy of operations, the need to conceal identity, and unpredictability of attack were the essential and inevitable guerrilla techniques because of the lack of advanced military equipment. In such a situation, the imposition of standards that suit the powerful countries and jeopardise the weak, was certainly unfair and one-sided. It deprived them of the status of prisoner-of-war. Moreover, the application of the Common Article 3 to guerrilla warfare by freedom movements was also not certain. The result was the torture and execution of hundreds of freedom fighters during anti-colonial wars. Such a piece of drafting, thus, underlines the consequences of the insignificant presence of the Third World during the negotiations of 1949 Geneva Conventions. The dominating Western States found it convenient to make the law reflect their experiences and address their concerns.

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[84] Burra (n 13) 205.

[85] Additional Protocol I.

[86] Hague Convention II, art 1. See also Hague Convention IV.

[87] Geneva Convention III, art 4(2).

In the 1970s, the ICRC had the occasion to revisit and update the existing Conventions, however, it adopted the usual approach in its draft proposals. Draft Protocol I proposed disciplined army-like conditions with respect to the combatant status for all fighters.[88] In the Diplomatic Conference, the Third World countries expressed their discontent with the draft on the ground that the proposal ignored the realities of anti-colonial and anti-racist armed operations. They argued that ill-equipped freedom fighters engaging with powerful States cannot be expected to wear distinctive emblems and respect the rules of war as it will render them easily targetable and weaken their position on the battlefield.[89] In the end, these concerns of the Third World were accommodated by inserting the following exception for those fighters who cannot differentiate themselves:

> Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly, (a) during each military engagement, and (b) during such time as he is visible to the adversary …[90]

It must be noted, however, that the above concession becomes applicable only when an authority representing a people and engaging in a war against colonial domination or racist regimes undertakes to apply the 1949 Geneva Conventions and Protocol I by depositing a unilateral declaration to this effect under Article 96(3) of the Protocol.

VI. 'HUMANITARIAN' PRINCIPLES AND THIRD WORLD

The framework of the laws of armed conflict is said to be based on some basic principles: military necessity, distinction, proportionality and humanity. The principle of military necessity is a product of colonial origin.[91] It continues to be a significant doctrine of the law. It helps justify military conduct of different proportions. Although, the principle of military necessity itself is problematic in several ways, and belligerents invoke it during hostilities as per their

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[88] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977)* (Library of Congress 1978) vol I, pt 3, 13-14.

[89] ibid vol XIV, 466.

[90] Additional Protocol I, art 44(3)(a).

[91] See eg Francis Lieber, Instructions for the Government of Armies of the United States, in the Field (New York, D van Nostrand, 1863) art 14; Hague Convention II, arts 15, 23(g); Hague Convention IV.

convenience, its invocation by mighty States often aggravates the vulnerability of poor States. The powerful countries are, often, in a better position to employ the principle during armed conflicts and justify their intense military operations, causing death and destruction in usually a weak country. The Gulf War (1990) is an appropriate example in this context.[92] Thus, the principle ignores the inherent subjectivity, the lack of parameters measuring necessity and its probable adverse impact on the Third World.

The principle of military necessity does not compromise with military goals. It shapes the language of other principles, such as distinction and proportionality, and related rules. Distinction requires an attacker to distinguish between members of armed forces and civilians, and between military objectives and civilian objects.[93] The principle thus presupposes that every belligerent possesses the necessary advanced equipment in order to identify a target from remote locations also. However, it ignores the fact that many Third World countries are poor and militarily ill-equipped. They have not been able to raise their economic condition after colonial exploitation. On the other hand, the principle suits well the advanced mighty colonial States who attained prosperity through the loot of Third World resources and cheap labour.[94] The formulation of such a rule speaks about whose voice matters during the negotiation of a treaty and whose concerns take a backseat.

One of the concomitant rules of the principle of distinction declares that civilians directly participating in hostilities are not entitled to protection,[95] but it provides no guidelines as to what direct participation in hostilities means. Involvement of civilians in hostilities is a typical experience of the Third World. It can be realised in the increasing number of asymmetrical warfare in the recent past occurring mainly in Africa and the Middle East. Organised and loosely organised armed groups are active participants in these conflicts. The ICRC has come up with its own interpretation of the notion of direct participation in

[92] Roger Normand and Chris af Jochnick, 'The Legitimation of Violence: Critical Analysis of the Gulf War' (1994) 35(2) Harvard International Law Journal 387.
[93] Additional Protocol I, art 48.
[94] Fanon (n 35) 76, 81.
[95] Additional Protocol I, art 51(3); Additional Protocol II, art 13(3).

hostilities,[96] however, it is not authoritative and remains highly disputed.[97] Thus, a huge concern of the Third World remains unaddressed in the Protocol.

Next is the principle of proportionality. Driven by military necessity, it permits incidental civilian loss in certain conditions. It says that where 'attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated', such an attack is prohibited.[98] Thus, the principle requires an assessment and estimation of probable military gain and civilian loss beforehand without providing any parameters and precise guidelines for this purpose. It expects an attacker to foresee the two components, calculate the probable outcome and weigh them in order to decide whether to launch the attack or not. Subjectivity and military necessity are most likely to affect the judgment. During the drafting of the provision, many delegates including those from the Third World objected to the vague wording of the provision and requested to amend it, however, the dominant countries did not allow it to happen and supported the draft.[99]

In the absence of any yardstick of assessment in the proportionality provision, the calculation is bound to be subjective. Therefore, the value attributed to human life by a military commander from the Third World and from an advanced European State may be different. From a Third World perspective, it must be argued that given the historically continuing inferior status (from barbarian, uncivilised and savage to poor and backward) and the

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[96] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

[97] See Bill Boothby, "And for Such Time as': The Time Dimension to Direct Participation in Hostilities' (2010) 42 New York University Journal of International Law and Politics 741; WH Parks, 'Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 New York University Journal of International Law and Politics 769; Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 New York University Journal of International Law and Politics 697; Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in the Hostilities' Interpretive Guidance' (2010) 42 New York University Journal of International Law and Politics 641. For a reply to these critics, see Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC'S Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 New York University Journal of International Law and Politics 831.

[98] Additional Protocol I, arts 51(4), 51(5)(b), 57(2)(a)(iii) and 57(2)(b).

[99] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977)* (Library of Congress 1978) vol IV, 164-165; see also Jeenger (n 66), ch 13.

merciless infliction of brutalities on the peoples of the Third World, arguably a military commander from a former colonialist State might find the incidental deaths of numerous civilians of a Third World country insignificant as compared to the military advantage. Although, such an attack may be held unlawful by a tribunal because an attacker is expected to act like a 'reasonable commander',[100] however, the possibility of such a subjective assessment reemphasises the concerns raised by the Third World countries in the Diplomatic Conference.

Proportionality assessment also requires advanced tools equipped with latest technology and linked with satellites in order to collect sophisticated information in respect of the target, so that a precise assessment of a target can be made. Many Third World countries suffering from the exploitative colonial trauma and armed foreign interventions post-independence lack the necessary infrastructure and, therefore, may not be able to make the proportionality calculations as expected. It reflects the domination of powerful voices in the negotiation process and inherent weakness and bias in the principle of proportionality and associated rules.

VII. CONCLUSION: MAKING OUR SKIES CLEARER

The historical overview of the colonial era reveals that the laws of armed conflict are an outcome of colonisation of the Third World. Specifically, the arms race, trade and colonial competition created an environment fertile for the development of the laws of war. However, the law excluded the Third World from its ambit and facilitated the oppression of the Third World. The developments in the law after World War II are also Eurocentric in nature as they are largely based on a European-imagination of war wherein wars are primarily inter-State and the combatants are well-organised. The laws of armed conflict ignore the lived experiences of the Third World peoples in matters such as the combatant status of freedom and guerrilla fighters and scope of direct participation in hostilities. The imprecise terms of the rules and principles of distinction and proportionality are advantageous to powerful countries, and often put the weak countries at risk. Overall, the laws of armed conflict preserve the essential structures of power.

[100] Ian Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff Publishers 2009) 73.

TWAIL AND THE QUESTION OF CASTE AND MISAPPROPRIATION OF DECOLONISATION: SOME PROVOCATIONS

Vijay Kishor Tiwari[*] *and Madhav Pooviah*[**]

Third World Approaches to International Law ('TWAIL') is a powerful alternative episteme to counter the hegemonic impulses of Mainstream International Law Scholarship ('MILS') that presents the partial knowledge of the Eurocentric worldview as universal. TWAIL attempts to decentre Europe by mounting a serious challenge to MILS by unmasking the colonial, capitalist, and patriarchal biases of MILS. It also refuses the epistemic gaslighting of scholarship coming from the Western geography that claims to have a 'correct' methodology of doing international law and international relations. TWAIL fights an unequal but brave battle that requires epistemic valourisation. However, TWAIL is no longer a suppressed epistemic vision. It cannot be tabooed as naïve knowledge. Serious scholars of international law cannot ignore a TWAIL voice anymore. We are at a moment of history where TWAIL, too, needs to interrogate its own hegemonic impulses. It must interrogate what voices long to be heard within TWAIL itself. In our modest contribution, we attempt to highlight TWAIL's inability to address the caste question within its scholarship and its contemporary failure to mount any serious challenge to the misappropriation of the decolonisation narrative by the Hindu right-wing in order to exclude minorities from claims in the national narrative. We fear that these failures may render TWAIL merely a performative critique.

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I. INTRODUCTION

The Indian subcontinent has served as the battleground for not only a range of rulers but also for a multitude of ideologies. Since the 1600s, the land has borne witness to the regime of various empires, with the consequences and evolution of various variants of hegemony still being posthumously present, vide Eurocentric international law and hegemonic socio-economic structures. The ever-grasping hand of imperialism was reliant on Eurocentric jurisprudence, such as Vitoria's construction of Secular Natural Law[1] in order to establish the seeming legitimacy of the colonist's *praedatorius* regime over the 'Third World'. Subsequently, W. E. Lawrence[2] and Hart's seminal writings on positivism upheld the neo-imperialistic façade of international law and its continuous scouring of the 'Third World'. Contemporaneously, in light of the prejudiced entomology and contentious phrasing surrounding the 'Third World', the terminology of 'The Majority World'[3] seems far more apt with Vijay Prasad stating that the 'Third World was not a place. It was a project. … people of Asia, Africa, Latin America longed for human dignity above all else but also necessities of life…. The 'Third World' comprised these hopes and institutions produced to carry them forward'.[4]

Third World Approaches to International Law ('TWAIL') thus became a scholarly avenue for the hopes and institutions of the Third World. However, there are blind spots within TWAIL which, in our opinion, hinder its transformative potential. This paper identifies two such blind spots, particularly

[1] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005) 4.
[2] ibid 23.
[3] Shahidul Alam, 'Majority World: Challenging the West's Rhetoric of Democracy' (2008) 34 Amerasia Journal 88 <https://doi.org/10.17953/amer.34.1.l3176027k4q614v5> accessed 5 June 2025.
[4] Vijay Prashad, 'Introduction' in *The Darker Nations: A People's History of the Third World* (The New Press 2007).

in the Indian context: the question of caste and the hegemonic rise of Hindu nationalism.

This paper first explores the relevance and achievements of TWAIL, tracing its history through its various stages and explaining its role in countering epistemological misappropriation. The subsequent sections address the two central concerns related to caste and Hindu nationalism respectively. The paper concludes by reflecting on how addressing these blind spots would contribute to a more inclusive and transformative TWAIL jurisprudence.

II. TWAIL AND ITS RELEVANCE

As affirmed by Anghie, the enduring significance of issues such as racial discrimination, economic exploitation and cultural subordination can best be understood by re-examining the relationship between international law and colonialism.[5] Following the decline of the British Raj and the independence of India in 1947, there has been a plethora of literature critiquing the Eurocentric framework of international law with the Third World Approaches to International Law ('TWAIL') proving indispensable in altering the thus-far discriminatory discourse concerning the laws which dictate the terms vide which nation-states behave on the global stage. A component central to this paper, is the role TWAIL plays in establishing and advocating for a subaltern approach to international law, with it being prudent to first explain the history of TWAIL briefly and the critical complexities it brings into question. The history of TWAIL is rooted in the Harvard conference of 1997[6] attended by eminent scholars from the Global South such as B.S. Chimni, James Gathii, Anthony Anghie, and others.

The primary prerogative of TWAIL is to challenge the hegemony of the dominant narratives of international law, in large part by teasing out encounters of difference along many axes – race, class, gender, sex, ethnicity, economics, trade – and in inter-disciplinary ways – social, theoretical, epistemological, ontological et cetera.[7] As a consequence, a key dynamic concerning TWAIL's endeavour was to re-examine the nature of power and the dissemination of

[5] James Thuo Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade, Law and Development 26 <https://docs.manupatra.in/newsline/articles/Upload/D8CD65E2-41B5-4CA7-B9F9-AEFAD4B9E444.pdf> accessed 5 June 2025.

[6] For more in reference to the Harvard Conference of 1996–97, see Gathii (n 5) 14.

[7] ibid 4.

knowledge in order to combat the traditional positivist approach to international law which thus far only served to impose ideological hegemony rooted in the Global North's civilising attempts of the 'savage'.[8] Herein, the theme of knowledge ie, epistemologies being either entirely destroyed or tragically transformed becomes especially pertinent. In light of the systematic violence perpetuated against the Global South, the dismissal of all systems of knowledge which failed to meet the standards of the so-called universal tenets of rationality[9] and law as set by the Global North – without accounting for the differences of culture, context, and experience – became a dire reality. Since the institutionalisation of TWAIL, the movement's core principles have spread across nations, with various noteworthy TWAIL conferences since 1997 whilst the basis of TWAIL has since, been consolidated by a plethora of prominent scholarly works.[10]

Having gained a preliminary understanding of TWAIL's founding and purpose, we can proceed to highlight the various strains of TWAIL and examine their relevance in today's globalist mire. The writings of TWAIL's foundational scholars extensively include Anghie's critical approach to post-colonial jurisprudence and B. S. Chimni's works which integrated a Marxist[11] and a Global South-centric approach to international law in addition to feminist, post-modern, critical race theory, and literary approaches.[12] Though an array of disciplines,[13] one must also bear in mind that TWAIL has a fluid architecture of

[8] Upendra Baxi, 'What May the "Third World" Expect from International Law?' (2006) 27 Third World Quarterly 713 <https://www.jstor.org/stable/4017773> accessed 5 June 2025.

[9] Made in reference to Santos's critique of the Eurocentric construction of rationality ie, for the globalist neo-liberalist powers who believe in self-proclaimed universal concepts of reason, rationality, human nature, and human mind, all that does not fit such a concept is deemed to be irrational, superstitious, primitive, mysticism, prelogical thinking, and emotivism – thereby deeply instituting anti-cognitivism. For more, see Boaventura de Sousa Santos, *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South* (Duke University Press 2018), 52–54 <http://www.jstor.org/stable/j.ctv125jqvn> accessed 5 June 2025.

[10] See Gathii (n 5) 9.

[11] Referring to the Integrated Marxist Approach to International Law (IMAIL). For more concerning IMAIL, see BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (CUP 1993) 30–35; Rosa Luxemburg, Kenneth J Tarbuck and Nicholas Grey, *The Accumulation of Capital: An Anti-Critique; Imperialism and the Accumulation of Capital* (Monthly Review Press 1972).

[12] See Gathii (n 5) 13.

[13] BS Chimni, 'Crisis and International Law: A Third World Approaches to International Law Perspective' in Makane Moïse Mbengue and Jean d'Aspremont (eds), *Crisis Narratives in International Law* (Brill 2022) 46–47 <http://www.jstor.org/stable/10.1163/j.ctv2gjwx54.9> accessed 5 June 2025.

many different individuals who mix, reuse, and re-combine various TWAIL and non-TWAIL ideas and, in turn, no single individual, or set of individuals has direct control of TWAIL scholarly production.[14] Additionally, one also witnesses a necessary evolution in TWAIL since its inception in 1997, with the initial focus on *contributionism*[15] leading to modern TWAIL-ers investigating, selectively embracing, and combining the egalitarian values of the Third World and those of the Global North. Doing so serves to prevent TWAIL's discourse from relying on dominant narratives which may serve to reinforce the hierarchical aims of either side.[16]

At this junction, it is crucial to briefly take note of how the Harvard Conference of 1997 shaped a new uprising in this Global South-centric approach to international law given that the scholars who met in 1997 were the bearers of a torch which had already been lit. The ideological basis of TWAIL was initially formulated in light of the Declaration of a New International Economic Order ('NIEO Declaration')[17] and parallel international declarations.[18] Various scholars such as R.P. Anand, Mohammed Bedjaoui, TO. Elias, and Kéba Mbaye wrote extensively on a fairer global system and how it could be achieved through a reformation of international law in a post-colonial world[19] given that the wounds made by imperialism were still raw. This knowledge was duly labelled as the First Generation of TWAIL ie, 'TWAIL I' whilst the successive efforts resulting from the conference at Harvard were duly labelled as 'TWAIL II'. Preceding the rise of TWAIL II scholars of the Global South suffered from a degree of disenfranchisement with the impact of imperialism whilst anti-colonial nationalism had collapsed into racist politics that led to ongoing ethnic conflicts in many parts of Asia and Africa with various post-colonial regimes proving to be corrupt and authoritarian.[20] Disappointed in the promises of NIEO and its

[14] See Gathii (n 5) 13.

[15] As explained by Gathii, contributionism – devised upon the model of international participation by diverse entities in establishing global norms – overstates the participation by diverse constituencies in the creation of global norms and understates the biases and blind spots that evidence the interests that prevail at crucial stages of implementation of international legal norms. For more, see Gathii (n 5) 15.

[16] See Gathii (n 5) 16.

[17] GA Res 3201 (S-VI) (1 May 1974).

[18] For more details regarding these international declarations, see Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' 34(1) European Journal of International Law 18 <https://doi.org/10.1093/ejil/chad005> accessed 5 June 2025.

[19] ibid.

[20] Anghie (n 18) 19.

adjacent understandings, TWAIL-ers of the second generation such as M. Sornarajah, B. S. Chimni, and C. Raghavan were prompted to build upon the work of their predecessors, in turn writing targeted commentaries regarding the dominance of neo-liberal globalism, relevance of Marxist ideals, colonising ploys of the WTO, and a reimagination of the subaltern's rights in the international forum.[21] As aptly put by L. Eslava, the resultant TWAIL II movement and those which may succeed it are hence combating the post-modern vestiges of 'formal' empires and expanding multi-dimensional forms of 'informal imperialism' over societies and nature.[22]

III. TWAIL'S ROLE IN COUNTERING EPISTEMOLOGICAL MISAPPROPRIATION

Having noted the origins and workings of TWAIL, we can now elucidate upon this paper's prerogative ie, to build upon the critical approach to epistemological misappropriation and subsequently evaluate instances wherein certain socio-political narratives concerning our social roots and civilisational origins have been intentionally manipulated. Such *mala fide* manipulation thereby serves the agenda of hegemonic bureaucracy with the integral right to memory[23] witnessing further degradation. Moreover, the basis of knowledge established by TWAIL shall allow this paper to target specific instances wherein those who claim to represent the vox populi of the Global South have failed to fulfil the original purpose of TWAIL ie, to quote Arturo Escobar,

> Dissolving the strong structures of Euro-modernity at the level of theory by favouring flat alternatives; positing the fact that epistemic differences can be – and indeed are – grounds for the construction of alternative worlds; calling on scholars and activists to read for difference rather than just for domination; or imagining that aiming for worlds and knowledges otherwise is an eminently viable cultural-political project.[24]

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[21] ibid 21–23.

[22] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) Verfassung und Recht in Übersee 195 <https://www.jstor.org/stable/43256852> accessed 5 June 2025.

[23] Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (1st edn, Routledge 2014) 84–85.

[24] Arturo Escobar, *Territories of Difference: Place, Movements, Life, Redes* (Duke University Press 2008) 310–311.

Attempting to decipher such antagonistic usurpation of epistemological discourse is interestingly enough highlighted by Foucault's 'Regime of Truth'[25] given that such misappropriation proves paramount when organising and regulating relations of power.[26] As stated by Foucault,

> The intellectual can operate and struggle at the general level of that regime of truth which is so essential to the structure and functioning of our society … there is a battle 'for truth', or at least 'around truth'.[27]

Concurrently, this unending battle concerning the realisation of epistemological truth – pivotal for totalitarian globalisation[28] – is not a new phenomenon, with Santos's commentary on *Nuestra America*[29] serving as one such instance of epistemological misappropriation. *Nuestra America*, as conceptualised by Jose Marti in 1891, is composed of certain principles; it is the *mestiza*[30] America; in its mixed roots resides infinite complexity being a new form of universalism from the Global South that has made the world richer; it focused on endowing itself with genuine indigenous knowledge; its political thinking, rather than being merely nationalistic is in fact internationalistic and strengthened by an anti-imperialist stance.[31] Over the centuries this counteractive ideology contributed to various revolutionary movements such as those in Mexico and Bolivia, however this novel notion also witnessed the actualisation of internal oligarchies, civil and military dictatorships, foreign interventions, the war on communism, massive violations of human rights, extrajudicial executions by paramilitary militias et cetera.[32]

Resultantly, seeing how the implications of *Nuestra America* were purposefully misconstrued in order to fulfil the domineering agendas of various

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[25] Stuart Hall, 'The West and the Rest: Discourse and Power' in Stuart Hall and others (eds), *Modernity: An Introduction to Modern Societies* (Blackwell 1996) 184–227.

[26] As an example, note how the primary Western powers themselves built our current framework of international law used to further globalist agendas with the domineering influence of the WTO's compulsory dispute resolution procedure is one such example of a specific maintain the ever-hungry flow of mercantile capitalism. For more, see Hall (n 25) 208–209.

[27] Martin A Hewett, 'Michel Foucault: Power/Knowledge and Epistemological Prescriptions' (2004) Honours Theses, Paper 534, University of Richmond <http://scholarship.richmond.edu/honors-theses/534> accessed 5 June 2025.

[28] See Santos (n 9) 49.

[29] ibid 49–69.

[30] Mestiza ie, a concept of a mixed race originating from the violent intersectional interactions amongst indigenous South Americans, Europeans, and Africans.

[31] See Santos (n 9) 51–54.

[32] ibid 64.

political entities in turn proves counterintuitive to the original agenda of *Nuestra America*. Santos makes clear that such epistemological misappropriation took place given that its leading purpose of achieving total transculturation was overtly idealistic with the concept failing to wholly consider the true extent of the influence exerted by hegemonic forces. Simultaneously, *Nuestra America* also seemed unable to fully ground its ideology due to the fact that it chose to not take cognisance of the intricacies involved with distinctive racial/social groups whilst the downtrodden reality of subaltern identities remained majorly unresolved.[33] In turn, in order for one to bring light to this regime of truth, Santos's formative evaluation of the *Angelus Novus*[34] in relation to one's roots and options[35] provides the provident mind with insight necessary for confronting epistemological misappropriation.

The painting of the *Angelus Novus* as evaluated by Walter Benjamin is described as an angel with an aghast look upon his face with his face turned towards the past[36] as it sees an amassing wreckage which he is intent on reviving and making whole once again. To his dismay, a sudden paradisical storm propels him into a future to which his back is turned while the pile of debris he faces grows skyward before him – this storm is *progress*.[37] Subsequently, this depiction represents a truly perilous situation wherein the past's capacity for redemption lies in the possibility of emerging unexpectedly at a moment of danger as a source of nonconformity.[38] Herein, the angel's dilemma serves as a critical metaphor concerning the manipulation of one's historical narrative. Though the painting itself may have multiple interpretations, for our purposes one can see the wreckage itself as representing one's socio-cultural zeitgeist and its *wrecked* state being indicative of the epistemic misappropriation and socio-cultural degradation wrought by any mala fide dominating entities. The 'revival of the wreckage' serves to cleanse the narrative in question ie, correcting the epistemological misappropriation in order to give justice to the subjugated, thereby granting peace to the angel. If we were to frame the angel as a representation of humanity, then it becomes essential to ensure that a sincere

[33] ibid 64–69.
[34] ibid 73–76.
[35] ibid 76–98.
[36] Walter Benjamin, 'Critique of Violence' in Bruce B Lawrence and Aisha Karim (eds), *On Violence: A Reader* (Duke University Press 2007) <https://doi.org/10.1515/9780822390169-037> accessed 5 June 2025.
[37] ibid 257.
[38] Santos (n 9) 75.

and unconditioned narrative remains consistent in order to prevent the dissemination of dangerous occurrences and ideologies. It goes without saying that the categorisation of a phenomenon as 'dangerous' can be subjective, yet a Jungian construction of *interpretation*[39] compounds upon the importance of identifying the disparity between one's own of their interpretation of roots in reality and the truth ie, reality in facts subsists well beyond our own so-inclined interpretations.

Sociologist Boaventura de Sousa Santos uses the metaphor of 'roots' and 'options' to describe the elements necessary for a healthy and balanced society. On the outset, Santos places 'roots' and 'options' in diametric positions with roots being large-scale entities, profound, permanent, singular, and unique, thereby providing one with reassurance and consistency – whilst options are smaller in scale, covering all that is variable, ephemeral, replaceable, and indeterminate from the viewpoint of roots.[40] Santos sees roots as one's memory ie, their memory may become an exercise in melancholy, neutralising its redemptive potential by substituting evocation for the struggle against failing expectations[41] instead of consciously reviving the past. An essential constituent of this struggle is maintaining an equilibrium between the recognition of the past and the distribution of an overwhelming number of options.[42] Casting aside utopian ideals of a perfect equilibrium, our current existence makes clear that our marginalised roots are entrapped in an ironic game, always playing from roots to options and from options to roots with the only variable being the power of each term as a narrative of identity and change.[43]

IV. EPISTEMOLOGICAL MISAPPROPRIATION VIDE GLOBALISATION AND THE CREATION OF THE 'OTHER'

One must recognise that the neo-liberal political perspective, ie, the globalisation of identity and issues, shares an antagonistic relationship with the realisation of a separate identity, given the homogeneity strived for by the globalist agenda. Herein, one must take note of the role nationalism plays not

[39] Homan's reading of Jung stated that *interpretation* discerns the unconscious infrastructure of culture thereby freeing the interpreter from its oppressive and coercive powers. See Peter Homans, *The Ability to Mourn: Disillusionment and the Social Origins of Psychoanalysis* (University of Chicago Press 1989).

[40] ibid 76.

[41] ibid 77.

[42] ibid.

[43] ibid.

only as the realisation of a separate identity but also as an agent of epistemological misappropriation, resultantly impacting how we understand our roots. It can be understood that this disdain for homogeneity arises from a historically deep-seated metropolitan antipathy toward anti-colonial movements in the 'Third World'.[44] Following the 20th-century wave of decolonisation, neo-liberalism, as peddled by the West, has failed to efficaciously adjudicate[45] between the historical claims of Eurocentric globalisation and the specifically anti-Western and/or oppositional development of cultural nationalism[46] in the Global South. In turn nationalism takes root with the careful construction of the 'Other'[47] being essential to consolidating nationalistic sentiment vide stereotypical dualism.[48] The 'Other' as constructed by Hall, is meant to divide, and despairingly simplify complex discourses thereby forming separate camps whose prerogatives can be manipulated by those holding power[49] in a discourse.

Before one can elaborate on Hall's aforementioned contentions concerning the relationship between power and discourse, it is important to consider Foucault's understanding of discourse itself. Discourse is about the production of knowledge through language, with said production taking place via practice ie, the *discursive practice* – the practice of producing meaning.[50] When statements about a topic are made within a particular discourse, the discourse makes it possible to construct the topic in a certain way, whilst also limiting the other ways in which the topic can be constructed.[51] Herein, as per Foucault's interpretation of power, the actions of the sovereign power[52] become the driving force behind defining the discourse, thereby conferring legitimacy upon the determinations of that discourse,[53] in turn meaning that it also limits the other

[44] Leela Gandhi, *Postcolonial Theory: A critical introduction* (1st edn, Routledge 1998).
[45] And/or forcefully harmonise cultures.
[46] See Gandhi (n 44) 103.
[47] See Hall (n 25) 205–215.
[48] The term describes a fallacy wherein multiple characters are collapsed into a single one and this singularity is then used to represent an entity's entirety. See Hall (n 25) 215–216.
[49] See Hall (n 25) 201–203.
[50] ibid 201.
[51] ibid.
[52] This notion stems from a view of power as a thing to be held, to be exercised only in forms of domination and repression from above upon those below, which manifests itself only in putative mechanics and juridical forms, and whose operations can ultimately be reduced to the process of obedience. For more, see Hewett (n 27) 9.
[53] See Hewett (n 27) 12.

ways in which said discourse can be structured.[54] This leads one to question as to how exactly the integrity and sincerity of the discourse may be maintained in case the discourse itself is corrupted. Herein, the concept of Cognitive Justice,[55] as pioneered by Dr Shiv Visvanathan, establishes a fundamental ideological base for the emergence and liberation of those who have been purposefully harmed or neglected by the discourse in order to fulfil the agenda of the powers controlling the discourse.

It must be noted that cognitive justice places great importance upon how different forms of knowledge must be allowed to co-exist thereby granting a necessary *plurality*[56] to humanity's intersecting histories**.** This plurality must proceed beyond tolerance or liberalism to an active recognition of the need for diversity with it, demanding the recognition of knowledges which exist beyond the accepted epistemological nomenclature, not only as mere methods but as an established and respect-worthy way of life.[57] Additionally, a more juristic interpretation of pluralism highlights that,

> The notion that *choices* determine *norms* rather than obey them does away with the idea that there are certain norms that ought to be chosen by societies and thus precipitates a radical cultural relativism. (emphasis supplied)[58]

In this instance, the hegemon's ability to steer choice leads to a construction of norms counterintuitive to plurality and its associated principles, with it being necessary for 'the Other' to be the target of such radical ostracisation.

Furthermore, it must be recognised that though globalisation as advanced by the neo-liberal democratic tradition is guised as being 'all-inclusive', one must recognise that no form of knowledge can be forcibly museum-ised and that memory and innovation intrinsically go together.[59] The wishful construction of 'tolerance' – in a liberal sense – is too lazy a theory of difference given that *difference* becomes an aesthetic, ethical, and political tool which allows

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[54] See Hall (n 25) 201.

[55] Shiv Visvanathan, 'The Search for Cognitive Justice' (*India Seminar*, 2013) <https://www.india-seminar.com/209/597/597_shiv_visvanathan.htm> accessed 5 June 2025.

[56] ibid.

[57] ibid.

[58] Paul B Armstrong, 'The Conflict of Interpretations and the Limits of Pluralism' (1983) 98(3) PMLA 341 <https://doi.org/10.2307/462275> accessed 5 June 2025.

[59] ibid.

democracy to guard itself against populism and majoritarianism.[60] Democracy itself requires a deeper interpretation of ideas beyond pluralism, with a group's right to knowledge ie, to different and diverse ways of knowing[61] (and/or understanding) and the right to memory[62] proving pivotal in redefining reductive conceptions of difference and tolerance. As a result, the application of cognitive justice is centric to taking cognisance of the dire damage envisioned by epistemological misappropriation. Using an extremely pertinent example, the necessitated role of cognitive justice as a deterrence against epistemological appropriation is lent further credence if one were to consider the deficient caste discourse in TWAIL.

V. THE IMPACT OF 'THE OTHER' IN UNDERSTANDING THE DISCOURSE ON CASTE

Though there exist multiple facets to TWAIL, one realm yet to receive the same coverage is the matter of a concrete caste discourse in TWAIL. Additionally speaking, whenever an analysis is made under the ambit of TWAIL, one is often bound to the dichotomy between the Global North and the Global South. Nevertheless, one must also focus on the fact that within the Global South itself, run a multitude of intersections amongst race, sex, gender, and class with the agenda of caste, specifically, receiving lackadaisical importance. As a consequence, most analytical lenses are often solely focused on the Global South's external battles and not on its own unresolved internal conflicts, considering that the idea of equality is not a prominent feature of traditional Asian political systems, which have often been based on hierarchies such as caste.[63] As detailed by Burra, the lack of answers to the caste question can primarily be attributed to the lack of comprehension concerning caste[64] and the absence of people belonging to lower castes in the knowledge production in the field of international law which creates a void of histories and lived experiences which should have otherwise become pivotal points in TWAIL and synonyms scholarship.[65]

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[60] Visvanathan (n 55).

[61] ibid, see section on 'The Forest of Knowledges'.

[62] See Santos (n 9) 84–85.

[63] See Anghie (n 18) 104.

[64] Srinivas Burra, 'Twail's Others: A Caste Critique of Twailers and their Field of Analysis' (2017) 33 Windsor Yearbook of Access to Justice 114.

[65] ibid 122.

At first glance, a reductionist reason for the lack of literature concerning caste-based discrimination would be blaming TWAIL's negligence in combating such discrimination though it remains especially distressing given that it compounds mainstream international law's own comparative neglect of caste even though TWAIL includes extensive commentaries on race, sex, gender et cetera.[66] A more poignant phenomena to consider would be the role played by Brahminic[67] supremacy in reinforcing the imperialistic façade of international law. The relevancy of Brahminic supremacy in the discussion of caste-based discrimination becomes terribly apt when one considers the staggering plight of those belonging to the 'lowest' castes such as Dalits[68] or untouchables. As put by Venkatesh, caste functions as a layered mechanism of immovable social hierarchy and absolute control that aims to dehumanise certain forms of labour through both structural and economical positions, as well as through the cultural practices of endogamy and ritual which is also deeply heteronormative and patriarchal.[69] Resultantly, pro-Dalit activism has instituted a radical resistance focused on caste abolitionism in order to combat the praxis of caste-centric discrimination. Brahminical hegemony has supressed the propagation of various caste perspectives and much of the radical work regarding queer and feminist traditions are found outside of legal and social science scholarship (such as in art and literature).[70]

The contentions regarding the terming and inclusion of caste under descent-based discrimination as per Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as 'the Convention') – at and after the Durban Conference[71] – are a prime example of the disharmony which exists between the position of the India's internal state interests and their seemingly democratic and equitable stance in

[66] Sujith Xavier et al, 'Placing Twail Scholarship and Praxis' (2016) 33(3) Windsor Yearbook of Access to Justice 8 <https://scholar.uwindsor.ca/lawpub/93/> accessed 7 June 2025.

[67] Made in reference to the 'Brahman' caste ie, the collective of priests and other seemingly 'learned' men who constitute the highest strata of the Hindu caste system. For more, see Vasanthi Venkatesh, 'International Casteist Governance and the Dalit Radical Tradition: Reimagining a Counter-Hegemonic Transnational Legal Order' (2022) 3 TWAIL Review 171, 176-179.

[68] The Dalit is constructed as an outcaste from Hinduism who was legally subject to enforced landlessness and agrestic servitude/slavery. For more, see ibid 178.

[69] ibid 173.

[70] ibid 176.

[71] Referring to the World Conference against Racism, Racial Discrimination, Xenophobia, and related Intolerance (WCAR) held in Durban in 2001.

the international forum.[72] In 2001, Dalit groups from India, Nepal, and Japan argued for the recognition of discrimination based on caste and social origin and to incorporate such discrimination within the scope of descent based discrimination, yet nonetheless, the Indian representative at the UN stated,

> We are firmly of the view that the issue of caste is not an appropriate subject for discussion at this Conference… It is neither legitimate nor feasible … for this World Conference or … even the UN to legislate, let alone police, individual behaviour in our societies …. the battle has to be fought within our respective societies to change thoughts, processes, and attitudes.[73]

In 2006, the same position was reiterated in an Indian report submitted to the CERD which reiterated that caste cannot be equated with race or covered under 'descent' under Article 1 of the Convention.[74] Moreover, during the drafting of the Universal Declaration of Human Rights, even though India expressed interests to include caste as one of the prohibited grounds of discrimination, the caste-connotative term ie, descent was not used and instead words such as 'other status' and 'social origin' were deemed to be suitable for covering such discrimination.[75]

Subsequently, one would not be wrong in saying that the Indian state has displayed ineptitude in adequately addressing the caste question, with the Bhima Koregaon incident of 2018 being a notorious example. On an annual basis proud Dalits, especially Ambedkarites, gather at the Vijay Sthamb monument in the Bhima-Koregaon village in order to celebrate the victory of outnumbered Mahar soldiers against the Peshwa forces of Bajirao II.[76] Many seemingly zealous patriots see their celebration as an afront to the 'Indian' national identity, given that the monument was erected by the East India Company and posthumously honoured by the Dalit community as a victory over their Brahmanical Peshwa overlords.[77] Moreover, multiple right-wing Hindutva affiliated parties choose to see the conflict as merely Maratha glory versus imperialist hegemony, however from the Dalit's perspective, the Peshwas exemplified Brahminical oppression,

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[72] See Burra (n 64) 112–119.
[73] ibid 118–119.
[74] ibid 119.
[75] ibid 119–121.
[76] Prabodhan Pol, 'Understanding Bhima Koregaon: Hindutva forces are worried by the conspicuous politicisation of Dalits' (*The Hindu*, 4 Jan 2018) <https://www.thehindu.com/opinion/op-ed/understanding-bhima-koregaon/article22361017.ece> accessed 7 June 2025.
[77] ibid.

hence their victory represents a legendary aspiration for those combating systematic caste marginalisation.[78] In 2018, tensions between the two political entities flared and led to brutal communal riots, with multiple leftist anti-caste activists who participated in the annual celebrations being unjustly prosecuted as 'Maoist' terrorists guilty of criminal conspiracy.[79] The egregious treatment of these anti-caste intellectuals at the hands of the investigating Maharashtra police force and the National Investigative Agency ('NIA')[80] is highly indicative of the caste experience being mediated by the violence of the legal and carceral governance systems of the Brahminical state and social practices of stigmatisation.[81]

Herein, it becomes integral to take cognisance of the subaltern subversion perpetuated by the combined forces of Brahmanical supremacy and imperialism. The hegemonic commonality between the two forces was first witnessed under the British Raj wherein the colonial rule further entrenched dominant caste supremacy out of administrative and reinterest.[82] On the same parallel, the colonists policy of non-interreference in *native* matters allowed for reinforcement of caste supremacy, whilst the subjectification of the Dalit body and identity as *impure* or *untouchable* made way for the blasé romanticisation of Brahminical practices and epistemes as a *pure* and *sacred* 'higher culture' which also portrayed them as being scientifically progressive.[83] This caste dichotomy allowed Brahmins to gatekeep the perceived standards of religious and/or moral decency while also taking advantage of their socio-economic class to dominate professions which required a literate and knowledgeable background[84] later

[78] See Venkatesh (n 67) 179–180.

[79] The anti-caste activists were defending themselves against multiple charges under the Unlawful Activities Prevention Act and the Indian Penal Code. For more, see Pol (n 76).

[80] 'Editorial Note' (2021) 49 Social Scientist 1 <https://www.jstor.org/stable/27099712> accessed 7 June 2025.

[81] See Venkatesh (n 67) 180.

[82] ibid 179.

[83] ibid 181.

[84] In today's era, 'skilled workers' migration schemes in the Global North attract those from the dominant castes, who in turn maintain their 'caste capital' through networks of kinship, caste endogamy, and a discourse of intellectual superiority, all the while. This is an integral instance highlighting the apparent and unjust ramifications of caste standing atop the pillars of capitalism. For more see Venkatesh (n 67) 184; Sanam Roohi, 'Caste, Kinship and the Realisation of 'American Dream': High-Skilled Telugu Migrants in the U.S.A.' (2017) 43 Journal of Ethnic and Migration Studies 2756.

allowing for the generational accumulation of *caste capital*.[85] As highlighted by Venkatesh, simple examples of the diametric nature of the caste dichotomy includes:

> practices such as privileging Sanskrit texts and literature, classical music, and dance *(at the expense of folk music)*, vegetarianism *(prohibition of non-vegetarian food through 'food fascism')*, animal protection *(stigmatisation of leather workers, butchers, etc.)*, purity rituals such as dining practices and social distancing *(that segregate people considered 'impure')*, caste endogamy through arranged marriages et cetera.[86]

Resultantly, it becomes clear that the dehumanisation of Dalits relies on the stigmatisation of non-Brahminical practices – imbued with cultural and ideological legitimacy[87] – and in the India of post-modernity the principles of meritocracy and deservingness structure both Brahminism and white individualism and are deployed to create a discourse towards a post-caste system, where caste-blind narratives such as poverty alleviation are used to sustain hegemonic structures and epistemic violence.[88] In his extensive critique of caste, V Venkatesh provides one with poignant examples of the hegemonic nature of caste capital is the functioning of *Bochasanwasi Shri Akshar Purushottam Swaminarayan* ('BAPS'), a conservative, pro-Hindutva organisation founded in 1907 by upper class Gujaratis in the USA.[89]

BAPS owns 3,850 temples across the world with their structures rooted in the Brahminical Vedas, which, according to their supremacist ideology, 'invented geometry, astronomy, plastic surgery and quantum physics' while maintaining high levels of 'spirituality'.[90] Though the carving of such stones was

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[85] The economically polarising nature of caste capital is highly indicative of caste strongly supporting neo-imperialistic capitalist institutions.

[86] Along with the given examples, casteism, as highlighted by Ambedkar and Phule in the 20th century, is also inseparably interlinked to patriarchal hegemony and gender with strict endogamy, notions of purity, and the discursive/social control of the woman's body maintaining the multi-dimensional subjugation of Dalit women. Moreover, the heteronormative practices of Brahman supremacy fell in line with the Euro-centric constructions of gender and sex, whilst some colonized subjects romanticized the ostensible power of European culture and its intrinsic *'whiteness'* so as to secure greater positions of authority for themselves in the social and economic hierarchy. For more, see Venkatesh (n 67) 179; Shefali Chandra, 'Whiteness on the Margins of Native Patriarchy: Race, Caste, Sexuality, and the Agenda of Transnational Studies' (2011) 37(1) Feminist Studies 127 37 <http://www.jstor.org/stable/23069887> accessed 7 June 2025.

[87] See Venkatesh (n 67) 181.

[88] ibid 183–184.

[89] ibid 185.

[90] ibid.

seen an occupation apt[91] for Brahmin, the nature of industrial scale mandates for the temples to be primarily constructed by Dalit and Adivasi stone-carvers, working for a mere $3 to $7, with one in three workers suffering severe occupational diseases – also bearing in mind that the very same carvers cannot themselves enter the temple grounds post its consecration.[92] In 2021, the FBI raided a BAPS temple construction site in New Jersey and consequently revealed the dire state of the Dalit workers on the site. The workers were paid $1.20/hour and made to work 87 hours per week with it also being discovered that the workers' passports were confiscated immediately upon arrival, and they were fenced in the premises for the duration of their stay whilst also being abused with casteist slurs and were forbidden from talking to any visitors under the threat of docking their pay, dismissal, and deportation.[93] As a consequence, the BAPS case exemplifies the transnational perpetuation and propagation of casteism through discourse building, migration and citizenship laws, and the enmeshing of casteist capitalism and religion.[94] Aside from the presence of Brahmanical supremacy in economic activity it remains prominent at the highest levels of institutionalised epistemic creation – especially present in bodies representing India in the international forum.[95] Legal scholarship in India, in general, and international law scholarship, in particular, fails to take cognisance of the absent caste-perspective[96] and consequently, the lacking perspective – gained vide a detailed understanding and propagation of caste-centric lived experiences – of such a subaltern community in the Global South's discourse only proves detrimental to realisation of TWAIL's true intent.

VI. ON CASTE SUBJUGATION VIA MISAPPROPRIATED DISCOURSE

At this tangent concerning the caste-centric bias in epistemic discourse, a vital topic of importance is the role of Anglocentric norms concerning scientific understanding, academic recognition, and knowledge creation. Herein, such norms perpetuate yet another strain of neo-imperialism ie, by facilitating epistemicide of knowledge stemming from the Global South. Specifically

[91] By apt, we refer to the fact that temple architecture and masonry was previously interpreted as *holy* and *clean.* For more, see ibid.

[92] ibid.

[93] ibid 186.

[94] ibid.

[95] Of the seven Indian judges who have served in the ICJ, six of the seven are upper caste Hindus in addition to five of the six Indian representatives at the International Law Commission being of upper caste. See Burra (n 64) 123.

[96] ibid.

speaking, such practices include predatory journals, unethical review mechanisms, and unfair monetary barriers to knowledge.[97] Such practices serve to undermine the availability and legitimacy of scholarly works originating from the Global South thereby contradicting the universal ethos to make knowledge a more open and democratic process. The correction of this epistemicide vide cognitive justice[98] is not simply tolerance towards difference in knowledge representation but is also an active endeavour towards inter- and intra-cultural dialogues and recognition of diversity.[99] A prime example of such detrimental practices is the processing and accumulation of knowledge through the various journals of academia. As per our current pedagogies, the substance of science is built upon through consistent and novel publications, with such publications serving to expand upon our collective base of knowledge in order to benefit all.

Herein, however, the ethos of democratic[100] and open-source information is defeated by biased and/or false review systems, 'predatory' journals, steep costs of publishing, limited access to publicly funded knowledge et cetera. A primary part of this debacle are 'predatory' journals ie, journals which facilitate for expedited publication at the cost of exorbitant Article Processing Charge's ('APC's') and lacking qualitative fidelity. Our current times present us with a climate wherein publications from the spine of any decent academic are in demand, with predatory journals in turn taking advantage of this demand, hence, one must note how knowledge is now becoming strongly quantified and competitive in a more economic sense. In this instance, comprehending the importance of a knowledge democracy – ie, as per the theory of the commons, knowledge is original: it is a 'commons' that is both immaterial, since it is formed

[97] Hanika Kapoor, Sampada Karandikar and Arathy Puthillam, 'Flaws in Academic Publishing Perpetuate a Form of Neo-Colonialism' (*The Wire*, 11 May 2019) <https://thewire.in/the-sciences/flaws-in-academic-publishing-perpetuate-a-form-of-neo-colonialism> accessed 7 June 2025.

[98] See Visvanathan (n 55).

[99] See Rachel Fischer and Erin Klazar, 'Facts, Truth, and Post-Truth: Access to Cognitively and Socially Just Information' (2020) 4 International Journal of Information, Diversity, & Inclusion 5, 6 <https://www.jstor.org/stable/48645282> accessed 5 June 2025 (Note this paper's focus on cognitive justice).

[100] Referring to the congruent formation of a knowledge democracy that is fundamentally linked to sustainable development wherein, it aims to preserve a sustainable world in which communities use knowledge to flourish. Nonetheless, the knowledge-based economy is, instead, linked to the ideology of growth and neoliberal capitalism. For more, see Florence Piron et al, 'Saying 'No' to Rankings and Metrics: Scholarly Communication and Knowledge Democracy' in Budd Hall and Rajesh Tandon (eds), *Socially Responsible Higher Education: International Perspectives on Knowledge Democracy* (Brill 2021).

of ideas and cognitions, and material, since these ideas must be embodied in reproducible statements that can be shared and transmitted[101] – becomes crucial given that currently our society's production of knowledge adheres to the globalist standards of techno-scientific knowledge.[102]

Resultantly, our epistemic structures function akin to a knowledge-based economy[103] ie, detrimental towards the universal sharing of all knowledge for the common good vide the production of scientific publications able to generate wealth through their content – such as patents, marketable innovations – or their very existence on for-profit platforms where access to the articles is protected by a steep-fee.[104] The financial model of predatory journals thereby contributes to this knowledge economy with such an occurrence being especially concerning given that over half of total predatory journals are Indian[105] with many of the same predatory journals being on the 'approved' list of the University Grants Commission ('UGC').[106] Synchronously, one must also consider that the Global North does benefit from an epistemic ivory tower, given that West has maintained a stronghold on what is globally considered to be the highest echelon of education. Institutions from this very echelon have vast resources and can offer/make available opportunities which are unavailable to the academic community of the Global South. As a consequence, the ideal of a knowledge democracy and the purpose of cognitive justice become the victims of the epistemic gatekeeping reinforced by neo-imperialism.

The stranglehold over what is science, ie, 'made' knowledge being content that has been peer reviewed and institutionalised, is maintained by the Global North, thereby determining the value of knowledge from across the world. A focus on 'made knowledge' is subsequently formulated by the

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[101] ibid 81.

[102] ibid.

[103] Michael Adrian Peters, *Knowledge Economy, Development and the Future of Higher Education* (Brill 2007).

[104] See Piron (n 100) 82.

[105] See Kapoor (n 57).

[106] Rashmi Raniwala and Sudhir Raniwala, "Predatory' Is a Misnomer in the Unholy Nexus Between Journals and Plagiarism' (*The Wire*, 10 August 2018) <https://thewire.in/the-sciences/predatory-journals-fake-journals-plagiarism-peer-review-mhrd-ugc> accessed 15 June 2025; Furthermore, research suggests that the self-referential and mutually reinforcing nature of the ranking metrics minimises the potential for the established Western universities to face ranking challenges from those outside the existing circle of privilege; For more regarding the concerning actions of the UGC, see Ralf St. Clair, 'Marginalizing the Marginalized: How Rankings Fail the Global South' in Michelle Stack (ed), *Global University Rankings and the Politics of Knowledge* (University of Toronto Press 2021).

most powerful discourse, with it being prudent to note that the whole notion of 'discourse' and a 'discourse community' is a circular one ie, a self-referential, self-justificatory practice which determines what may legitimately be considered as knowledge[107]. This domineering discourse becomes *totalitarian*[108] in nature with its prerogative being the imperial colonisation of the target discourse's entire social structure vide the engineered perspective of a singular institution.[109] A change for the better would mean making the process of knowledge accumulation and legitimisation more democratic by widening the ambit of the participatory process. Doing so would mean that non-scientists, non-academics, indigenous peoples, and other knowledge holders in the Global South become similar to actor-researchers[110] thereby furthering the battle against cognitive injustices and decolonising our own systems of knowledge.

VII. ON HINDU NATIONALISM'S ROLE IN EPIDEMIOLOGICAL MISAPPROPRIATION

In the wake of the aforementioned totalitarianism, we must take cognisance of how such epistemic subversion occurs inside our own societies with the rise of the RSS's nationalist and Hindutva-centric dogma in India, being a prime example. In today's India, the central government – in addition to other right-wing nationalists and/or RSS-affiliated *entities*[111] – has proven highly proactive in advocating for the decolonisation of not just our society and institutionalised culture, but also, our history ie, the delicate narrative defining our roots and origins. On the same parallel, we must also understand that knowledge – such as TWAIL's[112] contribution towards decolonising serving as an ode to cognitive justice – can also be usurped, biased and purposefully *misappropriated*. As a consequence, we see various instances wherein the hegemonic state propagates an anti-Western, decolonial agenda however they intentionally repeat certain biased narratives whilst using the episteme of decolonisation. In turn, the state and its agents are able to confidently manipulate specific narratives by tapping into the general

[107] Karen Bennett, 'Epistemicide! The Tale of a Predatory Discourse' (2007) 12 The Translator 151, 153.

[108] For more details concerning the nature of totalitarianism see ibid 153.

[109] ibid 153–154.

[110] See Piron (n 100) 83.

[111] We will subsequently use cited examples of such *entities,* when evaluating specific instances of epistemic misappropriation.

[112] Also, in reference to other credible sources on post-colonial legal theory, existing outside of TWAIL, yet still contributing to the deterrence of epistemicide.

credibility of the scholarly works pertaining to post-colonial legal theory. Any attempt to bend history in one's favour or reshape the histories and understanding of an *other's* culture directly contributes to epistemicide and works against the intent of achieving cognitive justice. Such practices can be seen as a highly problematic expression of diatopical hermeneutics[113] given that it involves the state adopting a terribly patronising stance whereby they not only explain, but also attempt to permanently imprint a set narrative even though the subaltern in such a situation already have their own independent conception of the same. Santos suitably states that,

> The energy that propels diatopical hermeneutics comes from a destabilizing image that I designate *epistemicide*, the murder of knowledge … unequal exchanges among cultures have always implied the death of the knowledge of the subordinated culture, hence the death of the social groups that possessed it (*emphasise supplied*).

The first tangent to study, would be the claims made in 'The RSS: A View to the Inside',[114] a supposedly politically neutral book, which extensively details the philosophy and history of the RSS. One such claim directly corelates the Hindu religion with Indic culture[115] thereby asserting that Indian is a civilisational nation state, sharing a common value system regarding individual and collective life.[116] Afterwards, the author proceeds to perplexingly state that the RSS does not have the intent to make Hinduism the state religion,[117] yet M. S. Golwalkar speaks of the same Indian civilisational nation state ie, a Hindu nation as being a 'living God'.[118] As a result, we are faced with three problematic assertions ie, arbitrary separations between Hindu culture and religion, Hindu culture is synonymous with Indic culture, and the deification of the nation state.

Firstly, what we perceive as Hinduism has been practiced in a vast range of ways, with the diverse Hindu pantheon and varying religious practices across the nation proving the variance within Hinduism. If Hinduism is equated to a culture or 'Way of Life' would other faiths – in a democratic and equitable nation – enjoy the same identity, perception, and security. Penultimately, one cannot

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[113] See Santos (n 9) 91–92.

[114] Walter Anderson and Shridhar Damle, *The RSS: A View to the Inside* (Penguin Viking 2018).

[115] Referring to all cultures arising from the South-Asian Indian sub-continent.

[116] See Anderson and Damle (n 114) 78.

[117] ibid.

[118] ibid 79.

draw such seemingly convenient boundaries between religion and culture when the two social phenomena exist in an intertwined manner with an attempt to sever, oversimplify or distort such common understandings being a blasé attempt at epistemicide. In turn, it appears that the text only draws a distinction between culture and religion when attempting to evade accusations of communal violence and discriminatory ideology. Such an understanding becomes even more troubling when one takes into account that multiple other faiths such as Islam, Buddhism, Sikhism and Christianity have subsisted and spread across the Indian sub-continent for centuries. From a broader perspective, construing the nation to be a God, worthy of worship, becomes even more agitative given that it grants the nation state, divine authority with such bureaucratic institutions being innately authoritarian. The authoritarian nature of a ruling religious institution is highly feudalistic, and a stark reminder of the hegemonic divine law and natural law professed by imperialist ideologues from the 13th century onwards.[119] Additionally, the text states that 'the Hindu cultural identity is applicable to all the inhabitants of India',[120] yet, if one were to not identify with being a Hindu nor with being a patriot, would they be guilty of both treason and heresy? Accordingly, if one were to intrinsically equate Hindu culture to being the sole proprietor of Indic culture one would remain guilty of epistemicide by intentionally casting aside the memories and worth of countless peoples from non-Hindu's who settled, lived, and thrived in India for countless generations.

Concurrently, this very same matter of generational and/or civilisation longevity – ie, for how long has the Indian sub-continent suffered under the imperial yoke – is also brought into this discussion by multiple Hindu nationalist ideologues. In seeming aid of the push for 'decoloniality', the current RSS-affiliated central regime has released various public statements attempting to fuse the perception of 'foreign invaders' and 'Western colonists'. Herein, the espoused narrative of the Hindu nationalists intends to fuse our antagonistic perceptions of Middle Eastern invaders from the eighth century onwards, such as Mahmud Ghazni or Mohammad Ghori[121] *and* the Western imperialists such

[119] Aakash Singh Rathore and Garima Goswamy, *Rethinking Indian Jurisprudence: An Introduction to the Philosophy of Law* (Routledge 2018) 24–31.
[120] See Anderson and Damle (n 114) 79.
[121] Vivek Katju, 'Domestic Ideologies in External Settings' (*The Hindu*, 7 October 2022) <https://www.thehindu.com/opinion/lead/domestic-ideologies-in-external-settings/article65976825.ece> accessed 7 June 2025.

as the British, Dutch, and French with the book *India that is Bharat*[122] by J.S. Deepak espousing an extensive criticism on 'Middle Eastern Coloniality'. *Prima facie*, doing so firstly erases the culture osmosis that has occurred since people of Middle Eastern descent chose to settle in India over 1500 years ago and further demonises current day Islam as if they had never constituted the political right's beloved civilisational nation-state long before India's encounter with Eurocentric imperialism. It would seem that Jaishankar was reciting a shibboleth of Hindutva to demonise the Muslim rulers of Medieval India, thereby equating them with British colonisers, which is an attempt to portray Indian Muslims as foreigners.[123] Concurrently, such a notion was rejected when India was constituted as a pluralist and secular republic, spurning calls for the creation of a Hindu Rashtra ie, Hindustan, as a mirror image of a Muslim Pakistan.[124]

When the 'otherisation' of minorities is produces through the epistemic misappropriation of decolonial logic, it is expected of established and emerging TWAIL scholars to counter such misappropriations. Young TWAIL scholars are honest to the caste question.[125] However, the courage to challenge the misappropriation of decolonisation is lacking. A young TWAIL scholar, Aman Kumar, reflects in this regard which is telling as he ruminates in his blog post:

> I have always told myself that I am too busy with questions of international law and thus have no time to dive deep into India's constitutional law issues or more broadly, its domestic law issues. International Law, hence, was my invisibility cloak. I wear it and pretend to be unfazed by India's domestic law issues … However, since past few years, a lot of holes have developed in my cloak; and while I try to stitch one hold, other one crops up.[126]

Such reflections of young scholars of TWAIL are worrisome. If the established scholars of TWAIL do not give a pushback against misappropriation, young scholars of TWAIL may be forced to choose an exclusionary agenda of Hindutva in the garb of decoloniality to sustain themselves in academia.

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[122] JS Deepak, *India That Is Bharat* (Bloomsbury 2021).

[123] Sushant Singh, 'Paradigm Shift: Two recent articulations of Modi's "New India" paint a grim picture' (*The Caravan*, 1 November 2022) <https://caravanmagazine.in/politics/recent-articulations-modi-new-india-grim-picture> accessed 7 June 2025.

[124] ibid.

[125] Swati Singh Parmar, 'The Internationalisation of Caste' (*Völkerrechtsblog*, 15 June 2023) <https://voelkerrechtsblog.org/the-internationalisation-of-caste/> accessed 1 August 2025.

[126] Aman Kumar, 'What is the Worth of Doing International Law: A Personal Reflection' (*Indian Blog of International Law*, 12 April 2022) <https://allaboutil.wordpress.com/2022/04/12/what-is-the-worth-of-doing-international-law-a-personal-reflection/> accessed 1 August 2025.

Furthermore, such silences of established TWAIL scholars of India will allow critical insights of decoloniality to be abused by right-wing scholars to debilitate and disenfranchise a huge segment of the population by stigmatising a vast segment of the minority population by terming them a perennial enemy or invader.

Decolonial scholar Foluke Adebisi warns us that Hindutva 'co-opts and distorts the language of decolonisation' against those who are considered 'other' to construct a 'pure' national identity.[127] Though one needs to be cautious of uncritical celebration of European modernity, one cannot be oblivious to the fact of such co-optations and distortions. Meera Nanda, in her recent book, writes quite provocatively:

> For its part, the Hindu Right sees itself as the true heir of Edward Said's Orientalism. Indeed, a new generation of Hindu thinkers, who call themselves "*Bauddhika Kshatriyas*", or "intellectual warriors," has emerged that wants to proudly and unabashedly proclaim the superiority and universality of dharmic conceptions of divinity, nature, knowledge, and society, without seeking the West's approbation or fearing its opprobrium. To that end, they strategically appropriate the Saidian framework of postcolonial theory to "provincialize" Europe from a dharmic perspective, and to whitewash Hinduism's peculiar institutions of caste, untouchability, and patriarchy as "colonial constructions."[128]

Even if one may not agree with Nanda's argument of putting postcolonial thinkers and right-wing Hindutva in the same epistemic category by calling them 'two strange bed fellows,' one cannot ignore the fact that postcolonial thinkers have failed and are failing to give a massive pushback against this misappropriation. In international law, too, the story is not different.

VIII. CONCLUSION

In India, TWAIL faces a unique challenge. As an alternative episteme, it came as an insurgent way of looking at international law and challenged the Eurocentric narrative of international law masquerading as a universal narrative. But as TWAIL has become a dominant narrative itself, it must address the question of, to use Frantz Fanon's formulation, 'internal colonies' within the 'Third World'.

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[127] Foluke Adebisi, *Decolonisation and Legal Knowledge: Reflection on Power and Possibility* (Bristol University Press 2023) 24.

[128] Meera Nanda, *Postcolonial Theory and the Making of Hindu Nationalism: The Wages of Unreason* (Routledge 2025) 212–213.

There are two dominant themes of 'Otherisation' in India, which has been traditionally a strong seat of TWAIL scholarship. These themes are: addressing the question of caste and otherisation of the minorities through the exclusionary Hindutva politics. Hindutva forces have also misappropriated the language of 'decolonisation'. There are some murmurs on the caste question and the misappropriation of decolonisation by the far right in India, but TWAIL scholarship so far has been largely silent on these issues. The caste question is slowly being addressed, but the exclusion of minorities through the language of decolonisation must be resisted by TWAIL scholars, else it may risk becoming merely a performative critique.