Conflict Then and Now: Historical and Modern Perspectives on World War III

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Global Law Scholars Class of 2025

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Conflict Then and Now: An Introduction

Zoe Owens

Despite the hopes of countless optimists, war has not disappeared. The institutions created to prevent war have not been successful, and the principles of international law that purportedly restrain a State's ability to use force against another have not served their intended purpose.[1] International law is an important discipline that has been useful in other ways, but its failure to create universal peace or prevent conflicts necessitates an examination of war in order to understand its present and future. While it is easiest to look backward to try to prevent the repetition of the most recent war, we must recognize the ever-changing nature of war to look for new ways that war can develop.

This year, the Global Law Scholars Class of 2025 have reckoned with conflict, influenced by the uptick in international armed conflict and the recognition of the new dimensions of war that have arisen in the past century. To set the stage for the forthcoming essays, it is important to recognize that the current conflicts represent outgrowths and developments of international law and are deeply influenced by the international law and transnational legal system that has been built since World War II. The starting point of this introduction is World War I, with a discussion of the legalistic characteristics of that war and the subsequent peace process in Part I. Part II examines the aftermath of World War II, particularly the lasting impacts of the Nuremberg Trials and the United Nations. Part III focuses on the proliferation of collective security agreements and the developments in the right to self-defense that arose throughout the Cold War. Part IV reckons with the United States' War on Terror and the power of the principle of "unwilling or unable."

[1] U.N. Charter art. 2 ¶ 4.

Throughout Parts I-IV, the modern manifestations of the historical developments are examined next to their foundational principles. Finally, Part V introduces the essays in this collection.

I. WORLD WAR I: A LEGALISTIC WAR

The first World War was an outgrowth of imperialism interconnecting the world,[2] a network of alliances, and deliberate German policy favoring war being ignited with the assassination of Archduke Franz Ferdinand.[3] The unique brutality of the war, including the introduction of chemical weapons and the machine gun,[4] was complimented by uses of international law to justify the actions on all sides.[5] International law was a necessary gloss to place on State's actions to confer legitimacy in a post-Napoleonic era.[6] For example, Britain clothed its declaration of a war zone in the North Sea as a necessary response to the "illegal" features of German naval warfare;[7] Germany intentionally read Article 113 of the Declaration of London to eliminate the distinction between the right to destroy enemy merchant ships and neutral ships.[8]

The Paris Peace Settlement that ended the war continued to be imbued with legalism, which shaped the aftermath of the war.[9] The Covenant of the League of Nations, which was included within the Versailles Peace Treaty, established the important precursor to the United Nations, and states its purpose as the promotion of peace "by the firm establishment of the understandings of

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[2] RAQUEL VARELA, A PEOPLE'S HISTORY OF EUROPE: FROM WORLD WAR I TO TODAY 2 (2021).
[3] Zachary Keck, *The Great Myth: World War I Was No Accident*, THE DIPLOMAT (Aug. 30, 2014) https://thediplomat.com/2014/08/the-great-myth-world-war-i-was-no-accident/.
[4] *World War I*, BRITANNICA, https://www.britannica.com/event/World-War-I (last visited Jan. 12, 2024).
[5] ISABEL V. HULL, A SCRAP OF PAPER: BREAKING AND MAKING INTERNATIONAL LAW DURING THE GREAT WAR 2 (2014).
[6] *Id.*
[7] *Id.* at 183-84.
[8] *Id.* at 214-15.
[9] Marcus M. Payk, *'What we seek is the reign of law': The legalism of the Paris peace settlement after the great war*, 29 EUR. J. OF INT'L L. 809, 816 (2018).

international law as the actual rule of conduct."[10] The responsibility for war and peace was shifted into the legal domain through the language of the treaty.[11] Nevertheless, this legalism and the League of Nations did not prevent another World War from happening. The Article 12 obligations to submit matters of war to arbitration or judicial settlement and the required three month "cooling off" period were designed with World War I in mind, but did not conceive of Germany invading France and the Netherlands in May 1940.[12]

II. THE PROGENY OF WWII

World War II and the Holocaust reflected a complete disregard for both international law and human rights. In their aftermath, the Allied powers spearheaded a strong legalistic turn, with two events that created both law and gaps within it that are of particular relevance in the current conflicts: the Nuremburg and Tokyo War Crimes Trials and the creation of the United Nations.

A. The Nuremburg Trials and the Growth of International Criminal Law

The Nuremburg trials were not inevitable, as some individuals and governments were in favor of summary executions rather than a trial.[13] They were concerned about both the legal difficulties and the possibility of the trials backfiring to legitimize the Nazis.[14] Nevertheless the trials proceeded, and resulted in a pro-tribunal orthodoxy that legitimizes trials for war crimes while setting the stage for how the new crime of aggression could be prosecuted.[15] The Nuremberg Charter listed three categories of crimes under which a person may be prosecuted:

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[10] *Id.*
[11] *Id.* at 818.
[12] League of Nations Covenant; VARELA, *supra* note 2, at 67.
[13] Gary Jonathan Bass, *War Crimes and the Limits of Legalism*, 97 MICH. L. REV. 2103, 2103 (1999).
[14] *Id.*
[15] *Id.* at 2104, 2107.

crimes against peace, war crimes, and crimes against humanity.[16] International criminal law was greatly advanced by the Nuremberg trials, and the success of the Nuremberg trials allowed for other tribunals.

Following the Nuremberg trials, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were constituted in reaction to the atrocities committed in the named nations. The ICTY indicted 161 individuals and sentenced 90,[17] and the ICTR indicted 93 individuals and concluded proceedings for 82.[18] The deficiencies of these ad hoc tribunals led to calls for a permanent court, which was finally achieved in 2002 when the Rome Statute of the International Criminal Court went into effect.[19]

The International Criminal Court has been mired in controversy since the beginning, as demonstrated by the Bush administration "unsigning" the Rome Statute the month before it was set to become effective.[20] More recently, the controversy over the ICC has been set aside by certain non parties and thrust to the forefront for others. Russia's invasion of eastern Ukraine sparked global outcry, and led to something previously inconceivable: U.S. cooperation with the ICC.[21] At the other end of the spectrum, after the judges of the ICC issued an arrest warrant for Putin for the policy of unlawfully deporting children and transferring them from Ukraine to

[16] *The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)*, OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1945-1952/nuremberg (last visited Jan. 12, 2024).
[17] U.N. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, https://www.icty.org/ (last visited Jan. 12, 2024).
[18] *Key Figures of Cases*, U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS (Oct. 2019), https://unictr.irmct.org/en/cases/key-figures-cases.
[19] ROME STATUTE OF THE INT'L CRIM. CT.: OVERVIEW https://legal.un.org/icc/general/overview.htm (last visited Jan. 12, 2024); Claire Klobucista & Mariel Ferragamo, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELS. (Aug. 24, 2023, 10:15 AM), https://www.cfr.org/backgrounder/role-international-criminal-court.
[20] *United States "Unsigning" Treaty on War Crimes Court*, HUMAN RIGHTS WATCH (May 6, 2002, 8:00 PM) https://www.hrw.org/news/2002/05/06/united-states-unsigning-treaty-war-crimes-court.
[21] *Biden administration moves to assist ICC in Russia investigation*, AL JAZEERA (Jul. 26, 2023), https://www.aljazeera.com/news/2023/7/26/biden-administration-moves-to-assist-icc-in-russia-investigation.

Russia,[22] the Kremlin responded by declaring the warrant "outrageous and unacceptable" but ultimately void against Putin.[23] The world leader has since had to avoid traveling to any of the 123 nations party to the Rome Statute, and the outcome of the war will inevitably determine the result of the arrest warrant and the direction taken by the ICC.[24]

B. The Fragile United Nations

The establishment of the United Nations has had a profound impact on the language around war and the justifications thereof, even if it has not led to a perpetual peace. This section outlines the most relevant and ideologically important provisions of the United Nations Charter for any discussion of conflict. In particular, the power and membership of the Security Council are relevant to an understand the current conflict in Gaza. Finally, this section will analyze the record of the Security Council in relation to the Israel-Gaza conflict what it can reflect about the UN in general.

The United Nations Charter contains numerous important provisions that are meant to outlaw or discourage war. In its preamble, the very first enumerated purpose of the organization is to "save succeeding generations from the scourge of war," and that ethos is present in the substantive provisions of the charter. Article 2(4) of the charter declares that "All Members shall refrain in their international relations from the threat or use of force against the territorial

[22] *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, ICC (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.
[23] *Kremlin: ICC warrants outrageous and unacceptable, but null and void for us*, REUTERS (Mar. 17, 2023, 12:45 PM), https://www.reuters.com/world/europe/russia-warrant-against-putin-meaningless-russia-does-not-belong-icc-2023-03-17/#:~:text=Europe-,Kremlin%3A%20ICC%20warrants%20outrageous%20and%20unacceptable%2C%20but,null%20and%20void%20for%20us&text=March%2017%20(Reuters)%20%2D%20The,meaningless%20with%20respect%20to%20Russia.
[24] Erik Larson, *Where Can Putin Travel? How Arrest Warrants for War Crimes Limit Places He Can Visit*, BLOOMBERG (Dec. 7, 2023), https://www.bloomberg.com/news/articles/2023-12-05/where-can-putin-travel-how-icc-arrest-warrant-limits-places-he-can-visit.

integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[25] The limited exceptions to this clause are (1) "the inherent right of individual or collective self-defence if an armed attack occurs"[26] and (2) by the decision of the Security Council if it determines that there is a "threat to the peace, breach of the peace, or act of aggression" that cannot be addressed with measures less severe than the use of force.[27]

There are currently 193 Member States of the UN, but membership does not translate to equal rights for each nation. The General Assembly, of which all member states are automatically a part, does not have much substantive powers; for the most part, the members of the General Assembly make recommendations to the Security Council or other members.[28] In contrast, the Security Council has the power to make international law that binds the other members, and holds to ultimate power to use the resources of the member nations in a use of force under the auspices of the UN.[29] Of the fifteen members of the Security Council, 10 are rotating, non-permanent members and the others are the Permanent Five (P5): China, France, Russia, the United Kingdom, and the United States. The P5 possess effective veto power over all substantive resolutions.[30] The veto power, permanent membership, and the Security Council's exclusive domain over the creation of binding international law within the UN, concentrate disproportionate power in the P5, which is relevant for the United Nations' response to the Israel-Hamas conflict.

The combined power of the P5 members has stalled action on present conflicts. In 2023, after the Hamas terrorist attacks and subsequent invasion of Gaza by Israel, two draft resolutions were

[25] U.N. Charter Preamble.
[26] U.N. Charter art. 51.
[27] UN Charter arts. 39, 41-42.
[28] UN Charter chapter IV.
[29] UN Charter chapter VII.
[30] UN Charter art. 27.

vetoed and four were not adopted regarding "the situation in the Middle East, including the Palestinian question" before a resolution was passed.[31] One resolution was vetoed by the United States, and one was vetoed by China and Russia.[32] Both of the vetoed resolutions called for humanitarian ceasefires or pauses while condemning the terrorist attacks.[33] The Security Council was unable to pass a resolution over a veto until November 15, 2023, over a month after the October 7 Hamas attack and the beginning of the humanitarian crisis.[34] In contrast, the General Assembly adopted a resolution calling for an immediate humanitarian truce on October 17, 2023, but due to the nature of the GA's powers, it was nonbinding.[35] The inefficiencies of the United Nations' response to the Israel-Hamas Conflict are symptomatic of the larger problems of international law-making on a tilted stage and the permanent vesting of disproportionate power in a handful of nations.

C. COLLECTIVE SECURITY AGREEMENTS AND THE RIGHT OF SELF-DEFENSE

In the aftermath of World War II, the promise of an easy peace was quickly compromised by the Cold War tensions that erupted between the Eastern and Western Blocs. The corresponding collective security agreements, the North Atlantic Treaty Organization and the Warsaw Treaty Organizations, were opposing organizations that escalated to an arms race.[36] After the fall of the

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[31] *UN Security Council Meetings & Outcomes Tables*, DAG HAMMARSKJÖLD LIBRARY, https://research.un.org/en/docs/sc/quick/veto (last visited Jan. 12, 2024).
[32] *Id.*
[33] S.C. Draft Res. 792 ¶ 9 (Oct. 25, 2023); S.C. Draft Res. 773 ¶ 7 (Oct. 18, 2023).
[34] S.C. Res. 2712 (Nov. 15, 2023); Daniel Byman et al, *Hamas's October 7 Attack: Visualizing the Data*, CTR. FOR STRATEGIC AND INT'L STUD. (Dec. 19, 2023), https://www.csis.org/analysis/hamass-october-7-attack-visualizing-data.
[35] Press Release, General Assembly, General Assembly Adopts Resolution Calling for Immediate, Sustained Humanitarian Truce Leading to Cessation of Hostilities between Israel, Hamas; Member States Fail to Adopt Amendment Condemning 7 October Terrorist Attacks by Hamas in Israel, U.N. Press Release GA/12548 (Oct. 27, 2023).
[36] *What Was the Warsaw Pact?*, NATO, https://www.nato.int/cps/en/natohq/declassified_138294.htm#:~:text=The%20Warsaw%20Pact%20embodied%20what,lasted%20throughout%20the%20Cold%20War (last visited Jan. 12, 2024).

Soviet Union, the Warsaw Treaty Organization dissolved, but NATO prevails to this day.[37] NATO has continued to expand, with Finland being the most recent country joining the organization.[38] Russia has been particularly hostile to the eastward expansion of NATO, and cites this expansion as a triggering the right of self-defense that justified the invasion into Ukraine.[39] This reasoning, and the fact that two nations are currently at war based on this theory of international law, demonstrates the fragility of the United Nations as a means of preventing war and the progressive weakening of the meaning of "self-defense."

When Russia launched its invasion of Ukraine, Putin claimed a right of self-defense to legitimize the invasion, as it is the only means of legally engaging in an armed attack besides a Security Council authorization.[40] This "anticipatory self-defense" rationale claims a right to self-defense when the "last window of opportunity" before an attack is about to close, and with it close an avenue for self-defense.[41] This understanding is not present in the original charter, although it has been adopted by other nations, notably the United States.[42] The gradual shifting of the acceptable genesis of a right to self-defense has been supplemented by the power of a member of the P5 to allow the commission of a crime of aggression that is very difficult to respond to using the power of international organizations or international law.

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[37] *The Warsaw Treaty Organization*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1953-1960/warsaw-treaty (last visited Jan. 12, 2024); *North Atlantic Treaty Organization (NATO), 1949*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1945-1952/nato (last visited Jan. 12, 2024).
[38] *NATO Member Countries*, NORTH ATLANTIC TREATY ORGANIZATION (June 8, 2023), https://www.nato.int/cps/en/natohq/topics_52044.htm.
[39] Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, LIEBER INST.: WEST POINT (Feb. 28, 2022), https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense.
[40] *Id.*; U.N. Charter.
[41] Schmitt, *supra* note 39.
[42] *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, U.S. DEP'T OF JUST. (Nov. 8, 2011), https://irp.fas.org/eprint/doj-lethal.pdf.

D. UNWILLING OR UNABLE: THE LEGITIMIZING FORCE OF THE WAR ON TERROR RHETORIC

Terrorist organizations short-circuit the traditional paradigm of international law of armed conflict because they transcend the boundaries of traditional actors, namely States. Prior to 9/11, terrorism (at least, in the United States context) was addressed through intelligence agencies like the CIA and domestic law enforcement bodies.[43] After the 9/11 terrorist attacks, the desire to invoke the right to self-defense was limited by the fact that any cell or base of Al Qaeda that the U.S. wished to target would be within the sovereign territory of another State that had not personally committed any attacks against the U.S. Thus was born a revolution in the doctrine of self-defense: "unwilling or unable." This test holds that "unilateral use of force in self-defence on behalf of a victim state on the territory of a host state that is unwilling or unable to prevent a non-state actor located on its soil from carrying out attacks against the victim state" are justified as a lawful form of self-defense.[44] The self-judging nature of this understanding of the right of self-defense has the potential to be used as a weapon by those who wish to act with impunity. For example, the repeated allegations of a genocide of ethnic Russians in Donbas and Luhansk as a justification for the invasion of Ukraine is emblematic of the type of overreach that has become commonplace when great powers wish to wage war.[45] The slippery slope of "unwilling or unable" has further degraded the guardrails of international law.

V. OUR OFFERINGS

The prior journey through the developments of war leads to the inevitable questions: what does war look like now, and what might it look like in the near future? We see shadows of

[43] David S. Kris, *Law Enforcement As a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 3-4 (2011).
[44] Kinga Tibori-Szabó, *The 'Unwilling or Unable' Test and the Law of Self-defence, in* FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW (C. Paulussen et al, eds, 2016).
[45] Schmitt, *supra* note 39.

the previous eras of war in the ongoing conflicts, but only in ways that raise more questions rather than clarify the confusion. The ongoing war in Ukraine demonstrates a failure of the United Nation's mechanisms for preventing war and illustrates the power of Cold War politics and ever-changing conceptions of self-defense. The conflict between Israel and Hamas has shown the ineffectiveness of the UN in the when a member of the P5 choses to exercise their veto power.

The collection of essays attempts to navigate these questions within four parts. Part I will focus on the causes of war. The first essay, by Alexis Gorfine discusses renewable energy projects as being potentially conflict-sensitive, requiring a conflict sensitivity approach from the international community with regards to project funding and development. In the second essay, Jakob Kerns examines instances where resource scarcity may lead to armed conflict, using water and rare earth elements as two relevant examples. Ruth Mekonnen, our third essayist, focuses on ethnic federalism as a cause of conflict, using Ethiopia as a case study, and proposes recommendations to halt the development of ethnic based conflict in the context of ethnic federalism. The fourth essay, by Erika Sloan, approaches the causes of war through a complex systems lens to look for the points where small changes could have a large impact on preventing war. The final essay in Part I, written by Terry McWang, turns towards the failure of our current institutions to prevent war, and proposes an International Court of Human Rights to prevent or delegitimize certain types of conflict.

Part II transitions to the instruments of war. The first essay, by Sarah Abdelbaki, analyzes the IMF's conditionality program as a tool of economic warfare that violates the principle of non-intervention. Alejandro Barrett Lopez, in the second essay, tracks the evolution of naval warfare from the early 20th century to today, particularly the effect of naval regulations intended

to make naval warfare less dangerous. The third essay, by Matthew Johnson, reflects on the ICJ's failure to declare that the use of nuclear weapons is *per se* illegal, the ramifications of that decision, and whether law exists that contradicts the ICJ opinion. Genevieve McCarthy, in the fourth essay, examines the U.S. embargo on Cuba as unique among trade measures, an illegal tool of war, and argues that it should be ended. Lauren McNeal, in our final essay of this Part, focuses on social media as a tool of warfare, particularly by terrorist actors, and delineates the current regulations, and the challenges facing other responses.

Part III will examine reactions to war, particularly focused on the reactions that actors have during the immediate hostilities. The first essay, by Andres Calzada, explores the involvement of the business community in the Russia-Ukraine War. In the second essay, Leah Hebron examines war crimes in the same conflict and beyond with an eye toward international legal responses to some of the world's most egregious acts. Patrick Powers, in the third essay of this part, analyzes the disparate responses of two Central Asian nations, Kazakhstan and Kyrgyzstan, in their relations with Russia in the aftermath of Russia's invasion of Ukraine and continuing hostilities. In the final paper of this section, Will Rowe identifies the non-alignment movement of the Global South as an important part of the current international regime that will give its members an opportunity to reshape international law in a more balanced direction.

The final part of this collection, Part IV, will examine the impacts of war as a means of understanding and responding to future conflicts, and to preventing the worst conflicts from recurring. The first paper, by Lauren Bauer, will use a transitional justice lens to examine the ways that human rights activists and other legal figures have brought justice to victims of the last dictatorship within the Argentinian court system and the impact on the transnational and global human rights legal system. In the second paper, Sean Cailteux analyzes the novel understanding

of law that Russia has used to justify its invasion of Ukraine and the likely effects of the consistent abrogation of international law. Emily Murphy, in the third paper, discusses internally displaced persons (IDPs), the inadequacies of international law for addressing their situation, and proposes measures that could alleviate the worst of the atrocities. In the fourth paper, by Samantha Ortiz-Clark, the author examines key laws that were developed in the wake of the Rwandan genocide and assesses them for their compliance with Rwanda's international human rights obligations. The final paper, by Jemison Tipler, will focus on the 2023 Conflict in Sudan and contribute to a theoretical framework around post conflict rule of law theory and practice.

The papers represent a cumulation of our efforts to probe into the many facets of war. Each of the nineteen perspectives provides unique insights and arguments. The authors have all dedicated themselves to their topics, and we are thrilled to present them.

Part I: Causes of War

Local Sustainability for Sustainable Energy Projects: Conflict Sensitivity & A Case Study of the Lake Turkana Wind Power Project

Alexis Gorfine

I. INTRODUCTION

Across the world, conflicts are fueled by competition over oil and gas reserves.[1] However, in the past decades, the world has collectively agreed that fossil fuels are harmful for both the planet and human health.[2] A global shift from fossil fuels towards sustainable and renewable energy is underway, as evidenced by the United Nations' Sustainable Development Goals (SDGs), 13 and 7, which create ambitious goals for climate action and the transition to affordable and clean energy.[3]

While this shift to renewable energy is crucial to tackling climate change and the many threats—including increased conflict[4]—that it poses, renewable energy can present its own set of challenges and consequences without careful management. In particular, renewable energy projects, just like fossil fuel projects, can contribute to conflict among local communities, especially in fragile states where the projects are most needed.[5] How should renewable energy projects be managed so that they contribute to peace and security instead of contributing to

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[1] *See generally* Jeff D. Colgan, *Oil, Conflict, and U.S. National Interests*, BELFER CENTER FOR SCIENCE AND INTERNATIONAL AFFAIRS (Oct. 2013), https://www.belfercenter.org/publication/oil-conflict-and-us-national-interests; Michael T. Klare, *Twenty-first century energy wars: how oil and gas are fuelling global conflicts*, ENERGYPOST (Jul. 15, 2014), https://energypost.eu/twenty-first-century-energy-wars-oil-gas-fuelling-global-conflicts/.

[2] *See Taking action for the health of people and the planet*, UNITED NATIONS https://www.un.org/en/climatechange/science/climate-issues/health#:~:text=The%20production%20and%20burning%20of,are%20harmful%20to%20human%20health (last visited Nov. 13, 2023).

[3] *17 Goals to Transform Our World*, UNITED NATIONS, https://www.un.org/en/climatechange/17-goals-to-transform-our-world (last visited Nov. 13, 2023).

[4] *Conflict and Climate*, UNFCCC (Jul. 12, 2022), https://unfccc.int/blog/conflict-and-climate#:~:text=The%20evidence%20is%20clear%20that,climate%20change%20into%20conflict%20risks.

[5] *See* SHARON BEIJER ET AL., TOWARD A PEACEFUL AND JUST ENERGY TRANSITION 6 (2023) https://www.ecorys.com/app/uploads/2019/02/Towards-a-peaceful-energy-transition.pdf.

tensions that fuel conflict? This paper explains why a conflict sensitivity approach is needed for all renewable energy projects and provides examples of ways that international organizations and the international community can develop a framework for project funding and development to support conflict-sensitive projects that contribute to peace and combat climate change.

This paper will first present the background on the topic, introducing conflict-sensitivity as a framework for renewable energy project development and management. The paper will then examine a case study of a wind farm, the Lake Turkana Wind Power (LTWP) project, demonstrating its contributions and the conflict it has created or renewed for the local communities in rural northwest Kenya. Finally, the last section will examine the conflicts from the case study through a conflict-sensitive lens to propose potential legal and policy solutions to advance security and peace in the clean energy transition.

II. CONFLICT-SENSITIVITY

In energy security literature, there are two main beliefs among researchers as to the global geopolitical effects of the transition to clean energy: some believe levels of conflict will remain constant or that there will be new, but just as severe types of conflict, and others believe that there will be reduced conflict.[6] A conflict-sensitive approach to renewable energy projects offers a framework to mitigate conflict and shift towards the pathway of reduced conflict.

Conflict sensitivity refers to 1) "the ability of an organization to understand the context it operates in, 2) understand the interaction between its intervention and that context, and 3) act upon this understanding in order to minimize negative impacts and maximize positive impacts on

[6] *See* Roman Vakulchuk et al., *Renewable Energy and Geopolitics*, 122 RENEWABLE AND SUSTAINABLE ENERGY REVIEWS 3-7 (2020), https://doi.org/10.1016/j.rser.2019.109547.

conflict."[7] To accomplish this, an organization preparing a project must undertake a conflict-sensitive analysis. To understand the context that the organization is operating in, it must learn about the political, economic, and socio-cultural context of the area, the relevant issues in that context, what conflict prone areas there are, the history of conflict in the area, and what triggers there are in the affected communities.[8] Additionally, it is important to identify the main actors and their interests, goals, and relationships, as well as what institutional capacities for peace exist, what opportunities there are for positive developments, and what all scenarios are that might be predicted based on this information.[9]

Community consultations are crucial to undertaking a conflict analysis. A consultation process works best when it begins as soon as possible, so that the affected community has the time and opportunity to provide input and ensure representative participation.[10] Consultations should begin during the earliest programmatic stage, often the assessment phase, so the project is designed based on conflict-aware realities of the region.[11] Additionally the assessments should consider who is being consulted, how that affects perceptions of partiality, and if local community members can make introductions to ensure true community integration from the outset.[12] Conflict analyses must be continuously updated at all stages of development to adapt to shifting relations and events.[13]

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[7] CONFLICT SENSITIVITY CONSORTIUM, *HOW TO GUIDE TO CONFLICT SENSITIVITY* 2 (2012), https://actionaid.org/sites/default/files/conflict_sensitivity_how_to_guide_-_feb_2012.pdf.
[8] *Id*. at 4-5.
[9] *Id*.
[10] Gina Kallis et al., *The Challenges of Engaging Island Communities: Lessons on Renewable Energy from a Review of 17 Case Studies*, 81 ENERGY RSCH. & SOCIAL SCIENCE 6-8 (2021) https://doi.org/10.1016/j.erss.2021.102257.
[11] CONFLICT SENSITIVITY CONSORTIUM, *supra* note 7, at 6.
[12] *Id.* at 8.
[13] *Id.* at 5.

III. THE LAKE TURKANA WIND POWER (LTWP) PROJECT

A. Project Background

The Lake Turkana Wind Power Project is Africa's largest wind energy project, providing 17% of the electricity on the country's energy grid, and is the biggest public-private partnership (PPP) investment in Kenyan history.[14] Conceptualized in 2004 and fully completed in March of 2019,[15] the project is owned by six shareholders, including investors from the United Kingdom, Africa, Denmark, and Finland.[16] The project's website highlights that it has worked with 17 community groups around the site[17] and that company employs 3,000 people, 85% from Marsabit County, where the project is located.[18] The project further claims that its conflict resolution mechanisms have decreased interethnic conflicts in the region and increased peace and security by increasing police officer presence and encouraging alternative livelihoods.[19] Additionally, the project describes providing additional aid to the community through their NGO, Winds of Change (WoC), which focuses on increasing access to education, water, and health, as well as supporting other community development projects.[20]

While many of these claims are based in truth, and the project has positively contributed to Kenya and the local communities around the wind project, the project has also faced criticism

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[14] Zoe Cormack, *Kenya's huge wind power project might be great for the environment but not for local communities*, QUARTZ (Sept. 3, 2019), https://qz.com/africa/1700925/kenyas-huge-wind-power-project-in-turkana-hurts-local-people; https://ltwp.co.ke/overview/; Hannah Akuiyibo, *Public-Private Partnerships in Africa: Some Lessons from Kenya's Lake Turkana Wind Power Project*, WILSON CENTER (Sept. 23, 2019), https://www.wilsoncenter.org/blog-post/public-private-partnerships-in-africa-some-lessons-from-kenyas-lake-turkana-wind-power-project.
[15] LAKE TURKANA WIND POWER, *Our Journey,* https://ltwp.co.ke/our-journey/ (last visited Nov. 15, 2023, 2:30 PM).
[16] LAKE TURKANA WIND POWER, *Overview*, https://ltwp.co.ke/overview/ (last visited Nov. 15, 2023, 2:30 PM).
[17] *Id.*
[18] LAKE TURKANA WIND POWER, *Economic Impact,* https://ltwp.co.ke/economic-impact/, (last visited Nov. 15, 2023, 2:34 PM).
[19] *Id.*
[20] LAKE TURKANA WIND POWER, *Winds of Change,* https://ltwp.co.ke/winds-of-change/ (last visited Nov. 15, 2023, 2:35 PM).

and created conflict in the region. The project is built on land that pastoralist communities, the Rendille, Samburu, El Molo, and Turkana peoples, have ancestral land rights to.[21] The groups hold the land in an intergenerational trust for future generations, and the land is crucial to their culture, survival, and livelihood, as it provides grazing land and is central to their traditions.[22]

B. 2014 Lawsuit

In 2014, community members filed a lawsuit against the LTWP project over the company's acquisition of 150,000-acres of community land for the project.[23] The communities argued that there had not been proper public consultation with or compensation for the local communities.[24] The communities also cited concern about the project's potential to permanently change the area's landscape, affecting their cultural, social, and environmental rights.[25]

In 2021, after the project had already been completed and was creating energy for the Kenyan grid, the court found that the LTWP project had not consulted the proper entity to acquire the land for the project.[26] As such, although some consultations were done with the local residents, the community was not properly consulted through the legally required means under Kenyan law.[27] While the court acknowledged the project's benefits for the economy, Kenya,

[21] Mohamad Iltarakwa Kocahle & others v. Lake Turkana Wind Power Ltd. & others (2021) H.C.K. 2J (Kenya), https://media.business-humanrights.org/media/documents/Lake_Turkana_Wind_Power_Judgment_October_2021.pdf?fbclid=IwAR1CWK61-TnoE0fWTnngWp7f43uZRaG7A-oeBmOn9B7rWvsznOuLH80lXkU.
[22] *Id.*
[23] Mohamad Iltarakwa Kocahle & others v. Lake Turkana Wind Power Ltd. & others (2015) , http://kenyalaw.org/caselaw/cases/view/116298/; Kocahle v. Lake Turkana (2021) at 1J.
[24] Gargule A. Achiba, *Navigating Contested Winds: Development Visions and Anti-Politics of Wind Energy in Northern Kenya*, CENTRE FOR DEVELOPMENT AND ENVIRONMENT (2019), https://doi.org/10.3390/land8010007.
[25] *Id.*; Kocahle v. Lake Turkana (2021) at 3J.
[26] Kocahle v. Lake Turkana (2021) at 38J.
[27] *Id.* at 38J, 40J.

employment, and through its NGO, it held that such benefits do not substitute for consultation.[28] After finding that the process of land acquisition was "highly irregular [and] eminently and plainly illegal," the court ordered LTWP to complete the proper, legal method of acquisition of the land, including consultation, within the year, or the land would revert to the community.[29]

As of spring of 2023, the LTWP project has not complied with the court's order and has sought an application for review of the decision, claiming that one year was not enough time to comply.[30] The LTWP project's judicial review was denied, although the company still has the opportunity to appeal the decision.[31] There have been no further legal updates, although it appears that the project is still operating and providing electricity to Kenya.[32]

C. Other Conflicts

The project has also caused additional local conflict. The company's promise of jobs, education, and healthcare led to an influx of people to the area.[33] Still, the company cannot provide jobs to all, and many people in the area remain unemployed and have abandoned their traditional cattle raising.[34] The only land in Kenya available to host large-scale land investments, such as renewable energy projects, is land with ancestral communal ownership land rights.[35]

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[28] *Id.* at 42J-44J.
[29] *Id.* at 58J-60J.
[30] Waweru Wairimu, *Multi-million Turkana Wind Power Project in Limbo; Land Acquired Irregularly,* NATION, KENYA EDITION (May 25, 2023), https://nation.africa/kenya/counties/marsabit/multi-millionturkana-wind-power-project-in-limbo-land-acquired-irregularly-4246328.
[31] *Id.*
[32] Africanews, *Kenya: Controversy Over the Cause of a Blackout* (Aug. 28, 2023. 12:27 PM), https://www.africanews.com/2023/08/28/kenya-controversy-over-the-cause-of-a-blackout/.
[33] *A village in the way of progress,* DANWATCH, https://old.danwatch.dk/undersogelseskapitel/a-village-in-the-way-of-progress/.
[34] *Id.*
[35] *Id.*

Despite the fact that this land is abundant in resources, it does not receive good access to basic government services,[36] which has resulted in the local community over relying on LTWP project, with some even mistaking the company for the government, given its provision of services.[37]

Other conflicts, often based on pre-existing tensions, have also arisen. There has been conflict between the community and the company around the lack of local electricity access and perceived injustice in the company's land purchase and in the distribution of benefits among local communities.[38] The project has also increased tensions between ethnic groups and lineage groups over perceived injustice in the allocation of benefits. Moreover, as the value of land has increased, so has land competition. Additionally, there is increased conflict between local communities and immigrants due to increased resource competition.[39] Furthermore, the project has increased local conflict due to increased identity grouping based on lineage and geography and increased interest-based group formation in support of or against the project.[40] Finally, some communities have been unable to access their cultural and grazing land where the project now is, despite the project's claims that the communities are permitted to continue using that land.[41]

Although LTWP did research and issued reports about the impacts of their projects, they have not fully explained and explored the conflict and security impacts of the project.[42] Unlike

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[36] *Id.*
[37] FINNFUND, *SOCIO-ECONOMIC IMPACT OF LAKE TURKANA WIND POWER IN MARSABIT* 5 (2010) https://ltwp.co.ke/main/wp-content/uploads/2022/03/Socio-economic-impact-of-Lake-Turkana-Wind-Power-in-Marsabit.pdf.
[38] Jake Lomax et al., *Does renewable energy affect violent conflict? Exploring social opposition and injustice in the struggle over the Lake Turkana Wind Farm, Kenya,* 100 ENERGY RSCH. & SOCIAL SCIENCE 6-7 (2023), https://www-sciencedirect-com.proxy.library.georgetown.edu/science/article/pii/S2214629623001494#:~:text=The%20study%20advances%20understanding%20of,conflict%20actions%20by%20project%20developers.
[39] *Id.*
[40] *Id.*
[41] Kocahle v. Lake Turkana at 5J.
[42] *See* FINNFUND, *supra* note 38; Lomax, *supra* note 39, at 5.

the only three negative conflict-related outcomes that LTWP reported, there were 38 conflict reports represented in independent research.[43] Researchers found that the project likely lacked an understanding of the region's existing socioeconomic and political relationships and conflict history prior to and during the construction and implementation of the project.[44]

IV. LEGAL & POLICY CONSIDERATIONS

As highlighted by the case study, local communities were largely concerned about the LTWP project's consultation process regarding land acquisition and the project's impact on their environmental, social, and cultural rights. The project further created tension through its benefit allocation and relationship management with the different ethnic groups. Furthermore, the project attracted settlers to the area, which did not have the capacity to support additional people.

A. Consultation

Ensuring local communities have an opportunity to engage in a deliberation process before permits for renewable energy projects are issued by the state government would make communities feel like they are part of the decision-making process.[45] This limits later conflict by facilitating relationship-building and providing the community a sense of ownership. Similarly, communities must provide input at all stages of the project to prevent later conflict and build a stronger project that considers, understands, and can incorporate a community's needs, values,

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[43] *See* Lomax, *supra* note 39, at 5.
[44] *Id.* at 8.
[45] Paola Villavicencio Calzadilla, *The UN's new sustainable development agenda and renewable energy: the challenge to reach SDG7 while achieving energy justice*, 36 JOURNAL OF ENERGY & NATURAL RESOURCES LAW 233, 252 (2018), https://www.proquest.com/docview/2073254870?accountid=36339&parentSessionId=QINees%2F5ri8v7GDVG8%2FN9VV0d5Z0eMPvAC1bpgeAmH8%3D&pq-origsite=primo.

and knowledge into the project.[46] This continued, good-faith consultation process is crucial to conflict sensitivity frameworks and to ensuring a project is aware of and responsive to the context in which it operates. Additionally, there must be broad engagement with community members beyond elites; meaningful participation and sharing of cultural and traditional knowledge is crucial to a peaceful and successful renewable project.[47]

In particular, for the LTWP project, the developers did not consider the ethnic groups in the region indigenous, which prevented the pastoralist groups from receiving land compensation under international frameworks.[48] It also means that the groups were not entitled to free, prior, and informed consent, despite international definitions of indigeneity that should include them.[49] This was furthered by the fact that Kenya abstained from voting for the UN Declaration of Rights of Indigenous Peoples (UNDRIP) and, until recently, indigeneity was not recognized in Kenya, resulting in fewer protections like prior and informed consent for Indigenous people.[50] Foreign direct investors and international organizations funding renewables projects should create policies to partner only with countries that have signaled approval of UNDRIP or signed onto specific human rights and environmental treaties so as to encourage countries to be bound by provisions that contribute to conflict-sensitive project development. Even though privately funded projects are not bound by international law, the LTWP project should have followed

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[46] *Id.*
[47] PRISCILLA ATEYO, INTERNATIONAL ALERT, *Fueling conflict? The impact of the green energy transition on peace and security* 13 (2022), https://www.international-alert.org/app/uploads/2022/09/Green-Energy-Transition-Peace-Security-Impact-EN-2022.pdf.
[48] Calzadilla, *supra* note 46, at 252.
[49] *See* Cormack, *supra* note 15; Ateyo, *supra* note 48, at 12; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.
[50] ILSE RENKENS, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, *The Impact of Renewable Energy Projects on Indigenous Peoples*, 14, 17 (2019), https://www.iwgia.org/images/publications/new-publications/IWGIA_report_28_The_impact_of_renewable_energy_projects_on_Indigenous_communities_in_Kenya_Dec_2019.pdf.

global best practices to protect the rights of the indigenous ethnic tribes in the Lake Turkana area, as it is in the company's best interest to respect the rights of the community with whom they will have to co-exist.

Additionally, the LTWP project should have better managed community expectations or ensured they could continue to provide for the communities at the same level to prevent dissatisfaction and further communal conflict. Better considering pre-existing ethnic or other local group conflicts could help ensure equitable distribution of benefits to not worsen ethnic divides and competition. The company also should have ensured community access to the project's services to electrify the area, instead of only transporting that energy to the capital.[51]

B. Additional Roles of International Organizations

International organizations can play a huge role in funding or encouraging developed member states to fund renewable energy projects, especially in developing countries where there might not otherwise be capacity to undertake such infrastructure projects.

Currently, policies specifically surrounding the development of renewable energy projects are absent from prominent international treaties promoting sustainable development and fighting climate change. For example, the United Nations Framework Convention on Climate Change (UNFCCC) mentions energy six times, all mostly about the need to reduce energy consumption or share technology.[52] International organizations such as the United Nations (UN), under treaties such as the Paris Agreement, should turn more attention to the challenges and

[51] Calzadilla, *supra* note 46, at 245.
[52] United Nations Framework Convention on Climate Change May 9, 1992, 1771 U.N.T.S. 107, https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

possibilities posed by renewable projects and address these challenges directly. Including more specific funding regulations would assist in encouraging or requiring public investments to include conflict sensitivity frameworks and would provide best practices for private investors.

The World Bank's International Finance Corporation (IFC) has extensive frameworks on Environmental and Social Sustainability, including free, prior, and informed consent for projects on Indigenous lands and consultation mechanisms for all communities.[53] Still, even this detailed framework, while referencing post-conflict areas, does not offer specific guidance on how to incorporate conflict sensitivity. While the World Bank does have extensive frameworks for operating in countries or regions experiencing fragility, conflict, and violence (FCV), and areas that face fragile governance and active conflict and violence,[54] it is missing a framework to collaborate with communities to ensure conflict sensitivity even when not in a more intense FCV situation. In cases like the Turkana Project in Kenya, where the country is not actively in conflict but the project itself could cause smaller-scale conflict based on local, historical tensions, the World Bank offers no community-focused policy.

Although the LTWP project did consult international legal standards throughout portions of the project, such as when it resettled Sarima residents in order to build the wind farm,[55] international conflict-sensitive standards provided by customary international law or treaties could create a plan for private companies to follow even though they are not bound to do so and

[53] INTERNATIONAL FINANCE CORPORATION, PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 8-9 (2012), https://www.ifc.org/content/dam/ifc/doc/2010/2012-ifc-performance-standards-en.pdf.
[54] WORLD BANK GROUP, WORLD BANK GROUP STRATEGY FOR FRAGILITY, CONFLICT, AND VIOLENCE (2020-2025) viii, https://documents1.worldbank.org/curated/en/844591582815510521/pdf/World-Bank-Group-Strategy-for-Fragility-Conflict-and-Violence-2020-2025.pdf.
[55] LAKE TURKANA WIND POWER, RESETTLEMENT ACTION PLAN 10-14 (2014), https://old.danwatch.dk/wp-content/uploads/2016/05/Ressetlement-Action-Plan-2014.pdf.

incentivize private companies, especially those in PPPs, to engage in more frequent consultations through increased public and international pressure.

V. Conclusions

Conflict sensitivity must be built into all renewable energy projects, especially those funded by non-local, international, and/or private actors, to ensure that the projects contribute to achieving the SDGs and promote peace instead of exacerbate or create local conflict. The LTWP project in northern Kenya provides an example of a project that, although provides many important benefits to the local community and to Kenya's clean electrification process, has created additional conflict for the local community due to a lack of full sensitivity to the context of the region in which it operates. Moving forward, public and private investors alike should approach renewable projects with a conflict-sensitive approach to save them money, prevent future challenges, and create the most effective project. Additional international frameworks can support this work through providing guides to conflict-sensitive approaches and creating norms for the development of renewable projects. Together, public and private entities can collaborate to create sustainable development projects that advance the SDGs and bring the world, including local communities, into a cleaner, greener future.

Aqua Dementia: Navigating the Currents of Water and Rare Metal Conflict in Contemporary International Law

Jakob Kerns

I. INTRODUCTION AND OVERVIEW

Throughout history, global powers have striven against each other for control of vital resources. Whether for control over gold or iron mines; access to oil or guano, resource scarcity and the national security implications drawn therefrom have been the start of many conflicts. The changing nature of the global climate and economy today are digging up new potential resource flashpoints: namely, water[1] and rare metals[2]. A burgeoning global population and the effects of climate change have placed increased stress on the freshwater supplies of various nations[3]; at the same time, the global transition to a clean and electric economy brings with it a new dependence on batteries and electronics which require significant amounts of rare metals that are asymmetrically distributed globally[4]. In this paper, I will analyze the impact of water and rare elements as drivers of future conflict and give an overview of several specific areas where resource insecurity may lead to future armed conflict. For clarity, in this paper the term Rare Earth Elements (REE) will refer to the lanthanide series of elements plus scandium and yttrium; whereas the term "rare metals" will refer to the collection of the REEs plus the elements tantalum, niobium, cobalt, zirconium, gallium, indium, and lithium.

[1] World Bank, *Water Resources Management*, https://www.worldbank.org/en/topic/waterresourcesmanagement.
[2] Julie Michelle Klinger, *Rare earth elements : Development, sustainability and policy issues*, 5 The Extractive Industries and Society 1, 1-7 (2018), https://www.sciencedirect.com/science/article/abs/pii/S2214790X17302472.
[3] *Water Resources Management*, *supra* note 1.
[4] *Rare earth elements*, *supra* note 2.

II. RESOURCES ARE AN IMPORTANT HISTORICAL WELLSPRING OF CONFLICT

Throughout history, access to scarce resources has been a primary driver of armed conflict. Oftentimes, community-based natural resource conflicts begin organically, when groups of people of different nationalities desire to use the same resource for rival reasons, issues which their respective States will then espouse on their behalf; this is often the case for water disputes where an important water source straddles a national border. Other times, a specific resource is considered to be strategically important by the State itself, and thereby becomes a more direct source of inter-State conflict when it becomes more difficult to obtain. The Food and Agriculture Organization of the United Nations (FAO) provides a useful framework for analyzing the risk of a resource need generating a community-based resource conflict; there are four main factors in this framework.[5] These are 1) the scarcity of the natural resource, 2) the extent to which the supply of the resource is shared by two or more groups, 3) the relative power of the groups that share the resource, and 4) the degree of dependence on this particular resource or, otherwise stated, the ease of access to alternative sources. Finally, the degree of State response to a community-based resource conflict varies, from mediation of local disputes to inter-State diplomacy and negotiation to open armed conflict.

The degree to which a given natural resource is generating community-based conflict is never static, as realities adapt to changing exogenous circumstances. Fundamental changes to society and the economy shape interests and competition over natural resources, which can lessen, intensify, or create new sources of conflict. As an example, in the Edo Period of Japan's

[5] Food and Agriculture Organization of the United Nations, *An introduction to natural resource conflicts, collaborative management and sustainable livelihoods,* https://www.fao.org/3/a0032e/a0032e04.htm#:~:text=Natural%20resource%20conflicts%20are%20disagreements,or%20inequities%20in%20resource%20distribution.

history, Japan was a pre-modern state with largely localist/nativist objectives; the need for industrial and state-building goods such as fossil fuels was muted.[6] As the Meiji Period began, Japanese society rapidly changed into a technologically sophisticated and open society, and Japanese policy objectives increasingly turned to state-craft, industrialization, and empire-building.[7] These new societal realities created a profound dependence on oil, as it was necessary as the fuel of modern industry, yet Japan had nearly nonexistent deposits of oil in their home islands.[8] This dependence on a resource that was vital to national policies yet inaccessible domestically was a dominant driver in Japan's wars of conquest during the early 20th Century, as they sought to achieve oil independence through military might.[9] Today, global climate change presents our world with rapid and radical change. Quickly, societies are learning that, among other issues, their supplies of potable water are being disrupted and that they will need to adapt their economies to reduce greenhouse gas emissions.[10] As economies change to become greener – and more sophisticated – there is an increasing reliance on rare metals.[11] As the factors determining conflict over these resources, water and rare metals, are heavily in flux, the possibility of conflict over access to them is much greater today than in the past.

III. RIFTS OVER WATER PRESENT GLOBAL RISKS OF CONFLICT

[6] National Graduate Institute for Policy Studies, *The Edo Period: Pre-conditions for Industrialization,* https://www.grips.ac.jp/vietnam/VDFTokyo/Doc/EDJ_Chap02-04.pdf.
[7] Asia For Educators, *The Meiji Restoration and Modernization,* http://afe.easia.columbia.edu/special/japan_1750_meiji.htm
[8] *Id.*
[9] National Graduate Institute for Policy Studies, The 1930s and War Economy, https://www.grips.ac.jp/teacher/oono/hp/lecture_J/lec09.htm
[10] *Water Resources Management*, *supra* note 1.
[11] *Rare earth elements*, *supra* note 2.

As the global population continues to grow and global climate change continues to change patterns of water distribution, the need for access to clean, fresh water has become an increasingly salient issue in geopolitics. Climate change affects the world's water supplies by disrupting rainfall patterns, increasing the frequency and severity of droughts and floods, and exacerbating water pollution.[12] About two billion people worldwide do not have access to safe drinking water.[13] Around half of the world's population is experiencing severe water scarcity for at least one month per year.[14] These figures are projected to worsen as the globe warms. Changing weather patterns also lead to water-related disasters, which have accounted for around seventy percent of all deaths related to natural disasters over the past fifty years.[15]

By applying the FAO's framework for analyzing the risk of community-based resource conflict to the facts around water access, we can see that water access is fast becoming a major flashpoint for global conflict. First, potable water is scarce. Only around one-half of one percent of the water on Earth is freshwater that is able to be gainfully used – let alone cleanly drunk – and it is only becoming scarcer.[16] The augmenting global population of the past century as well as the effects of climate change increasingly put greater strain on water availability. Second, supplies of water are often shared between societies and nations. Globally, important rivers and water supplies often form the borders between nations, with the watersheds extending into each nation that borders the water supply creating multilateral dependence on the one source of

[12] United Nations, *Water – at the center of the climate crisis,* https://www.un.org/en/climatechange/science/climate-issues/water#:~:text=Water%20and%20climate%20change%20are,water%20water%20(UN%20Water).
[13] *Id.*
[14] United Nations Department of Economic and Social Affairs, *Goal 6 Clean Water and Sanitation,* https://unstats.un.org/sdgs/report/2019/goal-06/
[15] *Water Resources Management*, *supra* note 1.
[16] United Nations World Meteorological Organization, *Wake up to the looming water crisis, report warns,* World Meteorological Organization (Oct. 5, 2021), https://public.wmo.int/en/media/press-release/wake-looming-water-crisis-report-warns.

water.[17] Third, many of these areas of community-based resource conflict over water exhibit significant power imbalances. Particularly in the Global South, where droughts – and therethrough water conflicts – are more common, power imbalances and regional instability abound, which increases the possibility that one nation will use force to protect its water interests. Finally, water is an absolutely essential resource for water-insecure nations, that can mean the difference between life and death, between prosperity and poverty, and oftentimes there is no viable alternative source of water. Taken together, these factors all point toward the possibility of future conflict over water rights and access.

A. Tensions Rise Over the Helmand as Water Levels Drop

Iran and Afghanistan are currently and actively engaged in a longstanding conflict over the Helmand River which lies near the countries' border. Water disputes over this issue have flared up from time to time since the 1870s, but have been growing in intensity recently due to changing conditions. Increasingly frequent droughts and the new Taliban-led government of Afghanistan are new factors driving today's conflicts in the area.[18]

Historically, the conflict can be partially attributed to the after-effects of colonialism. In the 19th Century, Afghanistan became a British protectorate, and the British drew the Iran-Afghan border along the main branch of the Helmand River without creating a system for managing water access for residents of the watershed on both sides of the border.[19] The

[17] *Water Resources Management*, *supra* note 1.
[18] Holly Dagres, *Iran and Afghanistan are feuding over the Helmand River. The water wars have no end in sight.,* Atlantic Council (Jul. 7, 2023), https://www.atlanticcouncil.org/blogs/iransource/iran-afghanistan-taliban-water-helmand/.
[19] *Id.*

Helmand River is the primary watershed for the Sistan Basin, which is a region that encompasses large parts of southwestern Afghanistan and small parts of southeastern Iran.[20] The basin is one of the driest regions in the world and is commonly subjected to long droughts with occasional flooding.[21] Historically, conflict in the region has coincided with droughts, and the present day is no exception. Increased drought due to climate change and increased agricultural buildup on the Afghan side of the border has only served to exacerbate water scarcity, presenting an old dispute more forcefully now than ever.[22] Satellite data shows that groundwater levels have dropped by an average of eight and a half feet from 2003 to 2021; the Hāmūn Lakes along the countries' border have shrunk by over ninety percent since 1999; and researchers estimate that Iran is receiving less than half the water that it did two decades ago.[23]

A treaty was negotiated over water rights to the Helmand River in 1939, but it was never ratified by the Afghan government.[24] Then, a newer treaty was agreed to in 1973 which has largely been sufficient to avoid armed conflict over the water source, but it is becoming clear that the 1973 treaty does not reflect current realities and needs to be updated.[25] As an example, the Iranian government claims that it has been receiving less than 4% of the promised amount of water this year; the Iranian government blames the Taliban for withholding water while the Taliban blames drought for the restricted flow of water.[26] It is obvious that serious negotiation needs to occur for a more lasting solution to the water dispute here, but political realities are

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[20] Ruchi Kumar, *On the Afghanistan-Iran border, climate change fuels a fight over water,* Science (Aug. 4, 2023), https://www.science.org/content/article/afghanistan-iran-border-climate-change-fuels-fight-over-water#:~:text=Other%20recent%20research%20finds%20that,covers%20some%2040%25%20of%20Afghanistan.
[21] *Id.*
[22] *Iran and Afghanistan are feuding over the Helmand River*, *supra* note 18.
[23] *On the Afghanistan-Iran border, climate change fuels a fight over water*, *supra* note 20.
[24] *Iran and Afghanistan are feuding over the Helmand River*, *supra* note 18.
[25] *Id.*
[26] *On the Afghanistan-Iran border, climate change fuels a fight over water*, *supra* note 20.

unfortunately making this difficult. The Taliban are *persona non grata* to the Iranian government, and there is therefore little opportunity for fruitful dialogue.[27] Something will need to change, however, as tensions rise. Just this May, for example, a border conflict left around 30 dead. Future clashes may be more disruptive and fatal unless more is done to present a lasting solution. If these consequences are to be avoided, some level of détente and dialogue is necessary.

B. Let Justice Roll Down Like Waters, And Righteousness Like An Ever Flowing Stream[28]

The Nile River is the lifeblood of Egypt, as it is the primary water source for all of the nearly 110 million citizens of Egypt. Egypt, for all its history up to this day, has been defined by the Nile, however the most significant tributary of the river, the Blue Nile, originates in Ethiopia, a fact that is making modern Egypt weary in its inability to ultimately control access to the river that sustains its existence. Ethiopia is aiming to exploit the Blue Nile through the construction of the Grand Ethiopian Renaissance Dam for the purpose of electricity production for Ethiopia's population of over 120 million.[29] When the dam is completed, it will be the largest hydroelectric power plant in all of Africa and will do much to ameliorate the economic conditions in Ethiopia by providing a more stable source of power for the Ethiopian economy and potentially allowing the sale of excess output during times of peak production.[30]

Egypt, on the other hand, is fiercely opposed to the dam's construction. Egypt sees the dam as a major geopolitical threat, as the Nile supplies 97% of Egypt's fresh water and the

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[27] *Iran and Afghanistan are feuding over the Helmand River*, *supra* note 18.
[28] *Amos* 5:24.
[29] Gary Polakovic, *Water dispute on the Nile River could destabilize the region,* USC Today (Jul. 13, 2021), https://today.usc.edu/nile-river-water-dispute-filling-dam-egypt-ethiopia-usc-study/.
[30] Feilding Cage et al., *Power Struggle*, Reuters (Jul. 29, 2021), https://www.reuters.com/graphics/ETHIOPIA-DAM/movanmkbmpa/index.html.

government fears that the construction of the dam may threaten Egypt's secure access to this water.[31] The reservoir volume of the Grand Ethiopian Renaissance Dam is about one and a half times the average annual flow of the Blue Nile, so filling the reservoir will take time and Egypt fears that this will threaten the livelihoods of millions of farmers in the meanwhile. Furthermore, Egypt alleges that Egypt's hydropower electricity supply could be affected by twenty-five to forty percent while the dam is being built, though that amounts to less than three percent of Egypt's total electricity generation.[32] The potential threats to Egypt are serious, however, as the construction of the dam would allow Ethiopia crucial control over Egypt's most important natural resource. Due to this threat, certain Egyptian politicians have discussed the possibility of violently sabotaging the dam[33], a potential act of aggression that could quickly lead to a wider conflict. In response, Ethiopia has purchased air defense systems from Russia and Israel to thwart potential airstrikes on the dam.[34]

Despite the aggressive rhetoric, the dam is not a zero-sum game for the nations along the Nile. Studies have shown that, due to decreased evaporation, the dam may be able to lead to an *increase* in Egypt's water supply.[35] This, however, will depend on the details of negotiations between the involved parties. Ethiopia, Sudan, and Egypt will all be parties to any negotiations, however, Egypt is *currently* the only party opposing the dam being built.[36] Recently,

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[31] Menna Zaki, *Troubled waters for Egypt as Ethiopia pushes Nile dam*, Phys.org (Dec. 3, 2019), https://phys.org/news/2019-12-egypt-ethiopia-nile.html.
[32] Al Jazeera, *Death on the* Nile, Al Jazeera (May 30, 2013), https://www.aljazeera.com/program/inside-story/2013/5/30/death-on-the-nile.
[33] Hamza Hendawi and Associated Press, *Egyptian politicians: Sabotage Ethiopia's new dam*, AP News (June 3, 2013), https://apnews.com/article/72049ba7e3164ee6a24ef157f71215e5.
[34] The Low Ethiopian Reports, *Ethiopia Ready to fight off Egypt missile attacks from Dam*, The Low Ethiopian Reports (Dec. 6, 2021), https://lekreports.com/ethiopia-ready-to-fight-off-egypt-missile-attacks-from-dam/.
[35] Jennifer Holleis, *Ethiopia's GERD dam: A potential boon for all, experts say,* Deutsche Welle (Apr. 8, 2023), https://www.dw.com/en/ethiopias-gerd-dam-a-potential-boon-for-all-experts-say/a-65254058.
[36] *Id.*

negotiations have shown signs of denouement; in July, the governments of Egypt and Ethiopia announced that they are aiming to finalize an agreement on the dam within four months.[37] However, the current agreement is not legally binding, as Egypt has openly desired, and negotiations have taken sharp detours in the past, so more work will have to be done to create a negotiated solution that avoids conflict.[38] Ultimately, the Grand Ethiopian Renaissance Dam represents both the hopes and the fears endemic to modern water issues: the dam has the potential to bring both economic benefits and *increased* water security to the region; it also, however, has the potential to bring instability and violent conflict. Whether the dam brings peace and progress or conflict and insecurity will be decided by diplomacy.

IV. Rare Metals Have the Potential to Catalyze Global Disputes

As the world transitions to a new, greener economy, the need for rare metals for use in batteries, electronics, and defense applications will only grow. In the new economy needed to fight global climate change and adapt to new technologies, certain natural resources are set to become of paramount importance.[39] Chief among these are the rare metals, such as cobalt and lithium, which are essential in batteries, electronics, semiconductors, and other important products. These products may be seen as taking analogous positions to the fossil fuels of the economy of the last few centuries. Like oil, rare metals are not, in reality, particularly rare when

[37] Al Jazeera, *Second round of negotiations on Ethiopia's mega-dam wrap up*, (Sep. 25, 2023), https://www.aljazeera.com/news/2023/9/25/second-round-of-negotiations-on-ethiopias-mega-dam-wrap-up`.
[38] Khalil Al-Anani, *The Grand Ethiopian Renaissance Dam: Limited Options for a Resolution*, Arab Center Washington DC (Sep. 16, 2022), https://arabcenterdc.org/resource/the-grand-ethiopian-renaissance-dam-limited-options-for-a-resolution/.
[39] *Rare earth elements*, *supra* note 2.

measured by prevalence in the Earth's crust.[40] Most rare metal deposits are, however, not economically viable for extraction.[41] Because of this, a few countries produce the vast majority of the world's supply of rare metals, which may lead to conflict over access to these raw materials.

Utilizing again the four factors identified by FAO as useful to understanding community-based resource conflict, we can see that while there is less intrinsic risk of conflict arising from rare metals, it is potentially a significant source of conflict. First, rare metals are scarce in terms of reserves which are economically viable to exploit.[42] For example, fifty percent of the world's lithium deposits lie in Bolivia alone.[43] Even as new reserves are discovered, demand for these metals continues to increase – and prices continue to rise.[44] Second, because these rare metals are becoming, and in many ways already are, integral parts of the new economy and originate from only a few sources, countries must share through trade the sources that do exist. Third, many of the suppliers of rare metals are significantly weaker nations than the major consumers, whether militarily, politically, or economically. In the case of lithium, the largest reserves are in South America; for cobalt, the primary supplier is the Democratic Republic of the Congo while the primary destinations of these raw materials are the advanced economies of the US, EU, and China. Only in the case of Rare Earth Elements - the lanthanide group of elements that are increasingly essential to the construction of electronics from phones to computers - is the

[40] Sotiris N. Kamenopoulos & Zach Agioutantis, *Geopolitical Risk Assessment of Countries with Rare Earth Element Deposits,* 37 Mining, Metallurgy & Exploration 51 (2019), https://link.springer.com/article/10.1007/s42461-019-00158-9.
[41] *Id.*
[42] *Id.*
[43] Harvard International Review, *The Lithium Triangle: Where Chile, Argentina, and Bolivia Meet*, Harvard International Review (Jan. 15, 2020), https://hir.harvard.edu/lithium-triangle/.
[44] *Id.*

primary supplier a global superpower in China.[45] Finally, while these rare metals are not essential to the well-being of society in the same way that water is, they are increasingly vital to the world's economy, and a secure supply of them is increasingly becoming a top policy objective of the advanced economies. Because of this, rare metals are less likely to be the direct cause of a full-scale armed conflict than water access is, but still present global challenges that can increase political conflict between already rivalrous nations.

A. The Charting of A New Cartel In South America

In the southern Andes region of South America lies an area known as the Lithium Triangle – the triangle spreads over the countries of Argentina, Bolivia, and Chile and contains more than seventy-five percent of the world's proven lithium deposits.[46] Bolivia, which has over fifty percent of the world's lithium deposits alone, has nationalized its lithium industry, attempting to harness the economic benefit of this "white gold."[47] Argentina and Chile both have privatized lithium industries. In Chile, the national government grants licenses to lithium-extraction companies, and currently only two companies are granted licenses: Sociedad Química y Minera de Chile and Albemarle.[48] However, in April 2023, Chile announced that it would be nationalizing its lithium industry once the two lithium-extracting companies' licenses expired.[49] This is potentially part of a plan to create an organization of lithium-exporting

[45] Christina Lu, *America Dropped the Baton in the Rare-Earth Race*, Foreign Policy (Jun. 23, 2023), https://foreignpolicy.com/2023/06/23/america-rare-earths-industry-china/.
[46] *The Lithium Triangle*, *supra* note 43.
[47] *Id.*
[48] Alexander Villegas and Ernest Scheyder, *Chile plans to nationalize its vast lithium industry*, Reuters (Apr. 21, 2023), https://www.reuters.com/markets/commodities/chiles-boric-announces-plan-nationalize-lithium-industry-2023-04-21/.
[49] *Id.*

nations, similar to OPEC, alongside Bolivia and Argentina.[50] Were this plan to materialize, this new Andean trading block could be much more concentrated than OPEC, which has thirteen members and produces forty percent of the world's oil compared to three members and seventy-five percent of deposits.[51] Economic theory dictates that the more concentrated a cartel is, the more potential for market distortion there is. This is due to the fact that cartel members must remain in collusion and refrain from undercutting other members through price competition. A sustained pricing scheme among cartel members becomes more difficult to maintain the more members there are, and the consequent increase in suspicion of undercutting action being taken by one of the numerous other cartel members. Because of this, a Lithium Triangle cartel would likely be more market-distorting than OPEC, in their respective markets.[52]

This development is still tentative and speculative, but the possibility of a multinational lithium cartel has wide-ranging implications for the global lithium market and global energy security. OPEC has oft been a thorn in the side of the US, such as during the economic crises of the 1970s when US energy security was at its nadir. Because of the increased concentration of market power as compared to OPEC, though lithium is not and will not be as essential to the global economy as oil was and is, this potential Lithium Triangle cartel presents an analogously destabilizing threat to global economic relations as OPEC has in the past.[53] The US – and other

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[50] Centro Estratégico Latinoamericano de Geopolítica, *Hacia una Organización Latinoamericana de Países Exportadores de Litio (OLPEL)*, (May 23, 2022), https://www.celag.org/hacia-una-organizacion-latinoamericana-de-paises-exportadores-de-litio-olpel/.

[51] US Energy Information Administration, *What drives crude oil prices: Supply OPEC*, https://www.eia.gov/finance/markets/crudeoil/supply-opec.php#:~:text=OPEC%20member%20countries%20produce%20about,the%20total%20petroleum%20traded%20internationally.

[52] Ciara Nugent, *What Would Happen if South America Formed an OPEC for Lithium*, Time (Apr. 28, 2023), https://time.com/6275197/south-america-lithium-opec/; *but see*, David Mares, *Understanding Cartel Viability: Implications for a Latin American Lithium Suppliers Agreement*, 15 Energies 5569 (2022), https://www.mdpi.com/1996-1073/15/15/5569.

[53] *Id.*

major international economies – will certainly be wary of another century of a major energy cartel, and the US does not lack a history of interventions in South America. If the plans for the Lithium Triangle trading block materialize, economic conflict and tumult, at the least, could be on the horizon.

B. China's Rare Earth Hegemony Raises Concerns

China dominates the market for Rare Earth Elements (REEs). This set of seventeen metallic elements is vital to all kinds of technological goods.[54] It is not an overstatement to say that modern advanced economies depend on a steady supply of REEs. And yet, in 2022, China alone mined fifty-eight percent of all REEs, refined eighty-nine percent of all raw REE ore, and manufactured ninety-two percent of REE-based components.[55] As REEs form a highly important part of many technological products and devices, including being important for various defense technologies, it is dangerous for China to have such a monopoly while the US and its allies are in mounting conflict – especially economic conflict – with China. Currently, the supply of REEs for the economies of the West is not in jeopardy, however, the economic warfare, which began in earnest under President Trump but has been continued under the presidency of Biden, has brought the stability of trade with China into question.[56] President Trump justified his unilateral raising of tariffs during his term under the Article XXI national security exception of

[54] United States Geological Survey Mineral Resources Program, *The Rare-Earth Elements – Vital to Modern Technologies and Lifestyles,* https://pubs.usgs.gov/fs/2014/3078/pdf/fs2014-3078.pdf
[55] Brandt Mabuni, *Breaking China's rare earths monopoly*, Asia Times (Mar. 15, 2023), https://asiatimes.com/2023/03/breaking-chinas-rare-earths-monopoly/#:~:text=The%20PRC%20still%20dominates%20the,rare%20earths%2Dbased%20components%20worldwide.
[56] Anshui Siripurapu and Noah Berman, *The Contentious U.S.-China Trade Relationship*, Council on Foreign Relations (Sept. 26, 2023), https://www.cfr.org/backgrounder/contentious-us-china-trade-relationship

the GATT.[57] The WTO Dispute Resolution Body, however, ultimately deemed this invocation of Article XXI to be illicit.[58] This decision was and is controversial as, prior, Article XXI was considered to be self-executing in that nations were able to adjudicate for themselves when and if there was a national security issue justifying the Article XXI exception. In response to this ruling, the US has neutered the Appellate Body, refusing to nominate new members, and rendering the body a current nullity.[59] If tensions continue to rise between the West and China, China may ultimately deem it necessary to restrict its own trade in REEs through the national security exception. In this case, however, there would be no Appellate Body in order to adjudicate the validity of China's actions – or to help facilitate negotiation and economic denouement. If tensions rise between China and the West over these precious resources, serious national defense issues could be implicated, and the West would have no other recourse to securing sufficient access to REEs than to confront China.

[57] General Agreement on Tariffs and Trade art. 21, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
[58] Panel Report, *United States – Origin Marking Requirement*, WTO Doc. WT/DS597/R (adopted Dec. 21, 2022).
[59] Center for Strategic and International Studies, *The World Trade Organization: The Appellate Body Crisis,* https://www.csis.org/programs/scholl-chair-international-business/world-trade-organization-appellate-body-crisis.

Ethnic Conflict Through an African Perspective

Ruth Mekonnen

I. INTRODUCTION

There have been various approaches by African states in recognizing ethnicity's ability to exacerbate conflict. At one end of the approach there is South Africa, which has rejected the claims of certain ethnic groups to self-govern based on their groups, and on the other there is Ethiopia, which has fully compartmentalized into ethnic federalism.[1] Ethnicity and ethnic identity "derive from the notion of a common ancestry and are associated with a variable set of objective identity markers such as language, religion, and physical appearances. However, though relatively stable over time, ethnic identity finally results from self-and outside ascription and may be principally subject to change."[2] While ethnic conflict, as it is broadly understood, "denotes any conflict in which at least two ethnic groups are opposed—at least as the main bases of the warring factions—with regard to incompatibility such as access to power, and resources or more symbolic incompatibilities such as discourses on history."[3] This paper seeks to identify whether the recognition and adaptation of ethnic federalism gives rise to conflict through a case study of Ethiopia and gives forth recommendations regarding what could be done to halt the development of ethnic based conflict.

II. ETHOPIA'S ETHNIC FEDERALISM

[1] Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 54 WILLIAM & MARY L. REV. 28,51 (2003).
[2] Matthais Basedau, Managing Ethnic Conflict: The Menu of Institutional Engineering, 7 (German Institute for Global and Area Studies 2011).
[3] *Id.* at 7.

Ethnicity remains an important part in people's identities. It provides them a form of belonging and provides them with cultural context that can provide individual fulfillment. [4] This ability to connect to a community is so important to society that members are willing to relinquish their personal freedoms and civil liberties, and even die and kill for it. [5] By combining both their political and ethnic identities, ethnic federalism occupies a solution to promote national unity and political legitimacy.[6] However, as identified by the case study of Ethiopia, it could also exacerbate conflict within regions.

Ethiopia's ethnic makeup is unique as it is home to more than 80 ethnic communities with different linguistic, cultural, and religious diversity.[7] Although Ethiopia is one of the only countries in Africa that has never been colonized, Ethiopia's makeup during the Battle of Adwa was determined and delineated by the boundary agreements with the adjoining colonial powers—giving rise to Amhara, one of the major ethnicities, control. [8] This resulted in the imposition of Amharic culture, religion, and the Amharic language. As a result of wanting to assimilate with the new world order, the last emperor Haile Selassie's (1930-1974) focus on state bureaucracy in the country's education and ruling was met with imminent resistance that eventually gave rise to ethnic liberation movements. [9]

In order to understand the effects of ethnic federalism, it is important to first distinguish between the integrationist and consocialist approach Ethiopia took in order to prevent ethnic conflict.

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[4] Alemante, *Supra* note 1, at 70-71.
[5] *Id.* at 72.
[6] *Id.* at 82.
[7] Hashim Tewfik, Transition to Federalism: The Ethiopian Experience, 4 (Forum of Federations 2010).
[8] Matthais, *Supra* note 2, at 4
[9] *Id.* at 5.

A. Approach One: Integrationalism

To combat the rise of these ethnic liberation movements, Ethiopia took an integrationist approach. Integrationists "deny ethnicity as a source of political articulation and aim to remove or at least reduce ethnic identity as a source of political mobilization."[10] Respective measures involve blocking ethnicity from being involved within politics to encourage other forms of non-ethnic institutions to "overcome ethnicity as a source of political mobilization."[11] Many African countries also partook in this mode of stabilization to promote nationalism post scramble for Africa. However, as seen by a case study conducted by Basedau and Moroff on the effects of bans on particularistic parties, it was determined that they are "not a universal remedy for inter-communal conflict."[12] In fact, "in most cases, hardly any effect can be detected, and in Kenya violence increased because of such a ban." [13]Additionally, "frequently, banks are rather part of the 'menu of manipulation' and are abused to exclude political opponents" which "in the long run… may well have a negative effect on inter-communal relations by fostering resistance in the politically excluded groups."[14]

Additionally, the wake of 1974's uprising that deposed the emperor enabled the Derg military junta to come to power. They also continued this integrationist approach but due to the extreme violence, mixed with the unfortunate famine and economic deterioration that occurred from their Marxist ruling, the country ended up having to break down state power along ethno-linguistic lines spearheaded by the Ethiopian People's Revolutionary Democratic Front

[10] *Id.* at 8.
[11] *Id.* at 8.
[12] Matthias Basedau and Anika Moroff, Parties in chains: do ethnic party bans in Africa promote peace, 217 (German Institute for Global and Area Studies 2011).
[13] *Id.* at 217.
[14] *Id.*

(EPRDF).[15] Therefore, what seemed to be a solution to promote national unity in Ethiopia, resulted in ethnic clashes that eventually led to the adoption of the consociationalism model.

B. Approach Two: Consociationalism

The consociationalism model "accept[s] ethnicity as a source of political mobilization" and "will ensure the fair or adequate representation of ethnic groups within political institutions, including, for instance, a federal state structure or a proportional representation electoral system."[16] However, as outlined in the below case study, combining ethnicity with the politics of the country did not result in peace but rather exacerbated the brewing ethnic tensions that were developing in the state creating the current day ethnic federalism system.

1. Transitional Period Charter

First, EPRDF called for a national conference on peace and democracy that adopted a Transitional Period Charter to create the legal framework for restructuring the state and state power along ethno-regional lines.[17]

First, the Charter emphasized individual human rights and freedoms as opposed to the collective human rights that most non-ethnic federalist societies adopted.[18]

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[15] Matthais, *Supra* note 2, at 5.
[16] *Id.* at 8.
[17] *Id.* at 5
[18] *Id.* at 6.

Additionally, it established two parallel central and regional/national governments—the Council of Representatives and the Council of Ministers. [19] The Council of Representatives consisted of representatives of national and ethnic liberation movements, organizations, and individuals whilst the Council of Ministers was made up of a Prime Minister and other ministers, approved by the Council of Representatives, and appointed by the President based on the Charter and broad national/ethnic representation. [20]

Lastly, the Proclamation No. 7/1992 devolved state power to territorially based ethno-linguistic communities in all matters that were not expressly assigned to the central government to give effect to the rights of nations, nationalities, and peoples to self-determination.[21] These regional self-governing groups contained a council, executive committee, judicial administration office, public prosecution office, audit and control office, police and security office, and service and development committee but were still subordinate to and financially dependent on the central government. [22]

2. 1995 Constitution

Additionally, EPRDF also created a constitution that recognized and institutionalized the rights of ethno-linguistic communities by the establishment of federal and regional states and distributed powers and functions of both entities, allowing each entity to exercise legislative, executive, and judicial powers and requiring them to respect the powers of one another.[23]

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[19] *Id.*
[20] *Id.*
[21] *Id.* at 7.
[22] *Id.* at 8.
[23] *Id.* at 15.

However, although the constitution delineated power, it also created independence by authorizing the federal state to oversee overall policies, set the criteria for matters of education, health, science, technology, and cultural/historical legacies and allowing regional states to have control over the administration of land and other natural resources, and enable their state supreme and high courts to hold authority over federal High and First-Instance Courts, and execute federal laws.[24] But the most important right, and the one that gave rise to the current problem facing the nation, is the ability for an ethnic group to secede from its country to establish its own state.[25]

3. Current state of Ethiopia

Since the establishment of the constitution, there have been ongoing conflicts that have occurred in Ethiopia due to the brewing tensions outlined. For example, in November 4, 2020, the Tigray region held regional elections in defiance of the current Prime Minister Abiy Ahmed that led to the federal government to withhold funds from the region.[26] As expected, this led to increased tensions that intensified into a two year war filled with killings, rapes, and starvation.[27] Although a cessation was announced and the government announced that they were dismantling the regional forces, because Amhara nationalists felt as though they were not included in the negotiations and feared the weakening of the nation coupled with the polarization of other

[24] *Id.* at 16-17.
[25] Alemante, *Supra* note 1, at 64.
[26] WHAT'S BEHIND THE CRISIS IN ETHIOPIA'S AMHARA REGION? A SIMPLE GUIDE AL JAZEERA, https://www.aljazeera.com/news/2023/8/10/whats-behind-the-crisis-in-ethiopias-amhara-region-a-simple-guide (last visited Nov 11, 2023).
[27] *Id.*

ethnicities facing similar sentiments of the Tigray people has led to a current clash with no end in site.[28]

III. Analysis Of Ethnic Federalism

A major challenge of Ethiopia's ethnic federation program is that there is no balance between national identity and ethnic identity. Although, as identified earlier, the identification with one's ethnicity provides many benefits such as the maintenance of language, history, and identity, politicizing ethnicity contributes heavily to ethnic conflict. The ethnic federalism structure requires that in order "participate in the Ethiopian political life individual citizens must first identify themselves as being a member of a given ethnic group … implying that individual citizens cannot simply be considered as Ethiopians rather they belong to the state because of their prior membership of a particular nationality. Hence, the construction and re-construction of ethnic identity in post 1991 Ethiopia have led to the emergence and re-emergence of a new local based fragmented identity with no sign of ending which not only impacts cultural coexistence and harmony between ethnic groups but also the integrity of Ethiopian state."[29] In addition, politicizing ethnicity contributes to blaming and stereotyping various ethnicities and contributing to conflict on the ground level. It has also led to various sentiments regarding the state of the country and what the government should look like.

[28] Two years of Ethiopia's tigray conflict: A timeline Al Jazeera, https://www.aljazeera.com/news/2022/11/10/two-years-of-ethiopias-tigray-conflict-a-timeline (last visited Nov 11, 2023).
[29] Bekele Bayu, *Religación. revista de ciencias sociales y humanidades*, 4 Religación (2021).

Some theorists argue that Ethiopian federalism was not the cause of the conflict but rather "is the outcome of the coming together of nations, nationalities, and peoples of the country who freely agreed to restructure their shared policy on a new basis."[30] Critics, however, argue that ethnic federalism in itself was created as a means of holding the continent together to prevent the rise of ethnic conflict and that those in power, such as EPRDF, adopted the system without democratic content, "imposed by EPRDF with little or no participation from opposition political forces and even the larger public."[31]

Even though Ethiopia is a multicultural state with various ethnicities, although "the 1994/5 FDRE constitution, which guarantees nations, nationalities and people the right to self-administration and up to secession, and regional constitution has also tied regional economic and political power to group's originality to certain areas" what occurred was that "the reconfiguration of the state along mere ethnic line created ethnic dichotomy within the same region in the form of majority versus minority, titular versus settler or native versus non-native" and "this is where ethnic antagonism takes roots in a society."[32] In addition, "the political economy which organized alone the ethnic line has paved the way for elites in the country to take the advantage of exploiting the cultures, values, and practices of ethnic groups and thereby mobilize the same to realize their private dream of controlling political power and ethnic resources" as seen by the many occurrences of "political elites removed from power due to mismanagement and incompetence then they inform and equip their ethnic followers with false and wrong information as if the group ignored, mistreated and misrepresented in different level of administration. In this way they mobilize their particular ethnic groups and thereby incite

[30] *Id.* at 3.
[31] *Id.*
[32] *Id.* at 10-11.

conflict with other ethnic groups who coexisted with them for many years."[33] As seen, the political arrangement "exclusively focused on the construction and promotion of ethnic identity at the cost of common values and norms that the society shares as Ethiopian" and "as a result, groups began to build their identity and values in a way that threaten the existence and identity of others" and spent years "implementing ethnic based political system where they made to see the world only from their ethnic identity point of views" thus creating "widespread mindset problem in relation to the perception, understanding and facts of their ethnic background vis-a-vis others."[34] The system has made it so that "citizens think ethnically while less effort has been exerted to promote their Ethiopian identity. This has created a favorable ground for the ethnic elites to mobilize the young generation instrumentally to use them for their power dream and capital accumulation." [35] Therefore, the question then becomes, if recognizing ethnicities as political parties builds gives rise to conflict and the ban of ethnic federalism in states doesn't determine peace then what is the solution?

IV. RECOMMENDATIONS

First, the Ethiopian government must hold "open democratic national dialogue, consultation, and negotiation among and between various groups and community representatives on the spectrum about fundamental questions that revolve around the Ethiopian state which guarantees the foundation for democratic politics in the country. Further, carrying out political referendum on the constitution and its federal system is paramount important so as to win

[33] *Id.* at 12.
[34] *Id.* at 13.
[35] *Id.*

national consensus. This would play a major role to ease the increasing ethnic tension and political crisis to the end of building sustainable peace across the country."[36] Especially as many of the sentiments surrounding the constitution are that the people do not feel involved in the delineation and decision making of the country.

Second, "since the problem is structural, the political economy of the state has to be restructured in accordance with realities on the ground, long term societal security, and development needs in the manner that would reduce ethnic tension and troubles in the country."[37] The Foreign Policy report outlines that "fixing Ethiopia's broken federal system will require a constitutional reform that establishes new checks and balances to mitigate the risk of ethnic politics exploding into downright violence" such as "a referendum on political devolution that elevates administrative zones to the level of administrative status, thus replacing regions."[38] These zones will still "ensure ethnic self-administration" while also "keeping with the constitutional emphasis on autonomy and self-rule. At the same time, it would significantly reduce the likelihood of major military or political clashes between neighboring regions, and between regions and the federal government" and "lead to zonal states that are relatively uniform in size, facilitating a more fair and equitable sharing of political and other forms of power across them."[39] This is a measure that was put in place and was effective for Kenya following the 2007 post-election violence as well as in Nigeria and Ghana.[40]

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[36] *Id.* at 14.
[37] *Id.*
[38] HOW TO STOP ETHNIC NATIONALISM FROM TEARING ETHIOPIA APART FOREIGN POLICY, https://foreignpolicy.com/2021/02/11/ethiopia-how-stop-ethnic-nationalism-conflict-constitution/ (last visited Nov 11, 2023).
[39] *Id.*
[40] *Id.*

Lastly, in regions that have ethno-cultural diversity, such as the major city of Addis Ababa, "there is a need to establish an inclusive local administration and create inclusive governance that would represent the needs and interests of different ethnic groups" such as emphasizing "common institutions to deal with cultural and linguistic issues and enacting policies/proclamations that assure the depoliticizing of ethnicity in business activities, government services and political party formation."[41]

V. Conclusion

As identified, the pre-federal state had "overlooked diversity and even attempted to eliminate ethno-cultural diversity" in order to "build a homogenized society" which has proven to be ineffective.[42] However, even though "federalism is a pragmatic compromise between diversity and unity as well as self-rule and shared-rule, the practice of federalism in the Ethiopian case reflects a different experience. On the one hand the system failed to reconcile the persistent tension between the management of ethno-cultural diversity and the promotion of national unity. On the other hand, due to the principle of 'democratic centralism it failed to balance self-rule and shared rule affecting the trust between regional authorities and elites at the center which is vital in managing political conflicts within the state."[43] Although the system was meant to provide power to various groups, in practice "the one-party rule which is defined by narrow ethnic alliances coupled with the undemocratic nature of the system created favorable ground for ethnic conflict to emerge among various groups and between the central governments and various

[41] Bekele, *Supra* note 29, at 15.
[42] *Id.* at 7.
[43] *Id.*

ethnic based arm movements"[44] Additionally, "the adoption of ethnic federalism as a diagnosis and response to Ethiopia's century-long divisions between nationalities and history of exploitation has created further challenges at various levels in the country" such as the current ongoing conflict. As seen through the case study, ethnic federalism leads to the polarization of different ethnic groups, exacerbating inter-ethnic tensions. It at times leads to the marginalization of ethnic groups based on those that are in power at a given time, as well as contributing to territorial conflicts based on the boundary divisions leading to the current outcome of the state. By adopting the models outlined, Ethiopia can prevent further ethnic conflict from ensuring and get one step closer to peace.

[44] *Id.* at 7-8.

To Kill the God of War:

Introduction to the Predictors of War and Armed Conflict from a Complexity Perspective

Erika Sloan

I. INTRODUCTION

A god symbolizes something above the will of humanity and its power reflects a characteristic or affliction of mortals that is ever-present and unchanging. However, though there is almost always a god of war within any culture's pantheon,[1] should we accept that god's presence? Is war simply a moral affliction that we will always suffer?

As history continues forward, humanity continues to be enraptured with the thought that we, as a species, are progressing forward. However, the world continues to experience war, and as we advance in other areas, it seems that how violence is exhibited only becomes more complex, taking new forms rather than becoming more scarce. The wide expanse of issues covered within this compilation speaks to this point.

In the effort to combat this issue, academics and policymakers have spent time identifying and trying to understand the causes of armed conflict. Yet in the face of this growing, intricate understanding, there still seems to be a lack of a similar level of creativity and nuance in the approach to intercepting these causes. This has resulted in a brute force legal approach, essentially telling states to not "do" war, which as exemplified both in history and the present has not been the most effective.

If we truly want to progress on this front and "kill" the god of war, the world must be willing to not only acknowledge current failures but adopt and test new—and, at times,

[1] Even in cultures or religions with a single deity, there is often some symbolic and never-ending "war" against some evil.

counterintuitive—approaches that might be more successful than one would originally imagine. One such approach is the complex systems or systems thinking lens, which accepts and engages directly with the complexity of social environments and looks for hidden leverage points that can alter outcomes—like war—from the bottom up. The complexity approach offers rich ground to discover mechanisms that substantially reduce and eliminate war and should be given more consideration as the effort to end armed conflict continues.[2]

II. BACKGROUND & PROBLEM SETTING: THE PREEMINENCE OF THE GOD OF WAR

Steven Pinker made waves in 2011 when he claimed that "we may be living in the most peaceable era in our species' existence."[3] This statement, as even Pinker acknowledges, seems almost immediately incorrect, especially considering the recent conflicts between Ukraine and Russia and between Israel and Palestine.[4] In spite of this, Pinker points to the fact that the percentage of people who experience violent war-related deaths have dropped significantly over time.[5] Approaching the 21st century, battle deaths per 100,000 people drops to near zero, as populations grow, become more organized, or transition "from 'nonstate' status—such as hunter–gatherer societies—to fully fledged 'states.'"[6]

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[2] This paper will serve as a brief preview into a longer upcoming piece.

[3] Steven Pinker, The Better Angels of Our Nature: Why Violence has Declined, xxi (2011).

[4] This pervasive sense of war was also present at time of writing for Pinker as "the U.S. was mired in two wars in the Middle East and Central Asia, the conflict in Darfur had just come to a close and terrorist insurgent group Boko Haram was setting off bombs across northern Nigeria." *Id.* at 1; Bret Stetka, *Steven Pinker: This Is History's Most Peaceful Time--New Study: "Not So Fast"*, Scientific American, https://www.scientificamerican.com/article/steven-pinker-this-is-historys-most-peaceful-time-new-study-not-so-fast/.

[5] Pinker, *supra* note 3, at 48-52; Bret Stetka, *Steven Pinker: This Is History's Most Peaceful Time--New Study: "Not So Fast"*, Scientific American, https://www.scientificamerican.com/article/steven-pinker-this-is-historys-most-peaceful-time-new-study-not-so-fast/.

[6] Pinker, *supra* note 3, at 50-51; Bret Stetka, *Steven Pinker: This Is History's Most Peaceful Time--New Study: "Not So Fast"*, Scientific American, https://www.scientificamerican.com/article/steven-pinker-this-is-historys-most-

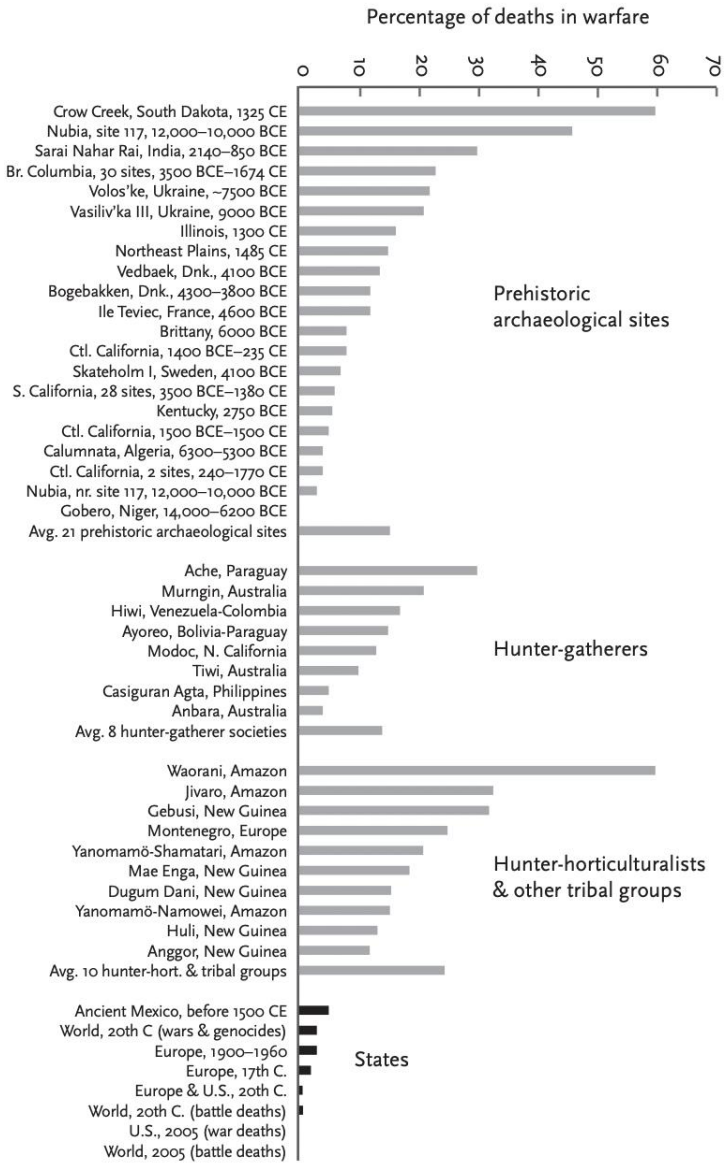

Figure 1. Percentage of deaths in warfare in nonstate and state societies[7]

peaceful-time-new-study-not-so-fast/; Zack Beauchamp, *600 years of war and peace, in one amazing chart*, Vox, https://www.vox.com/2015/6/23/8832311/war-casualties-600-years.

[7] Pinker, *supra* note 3, 49.

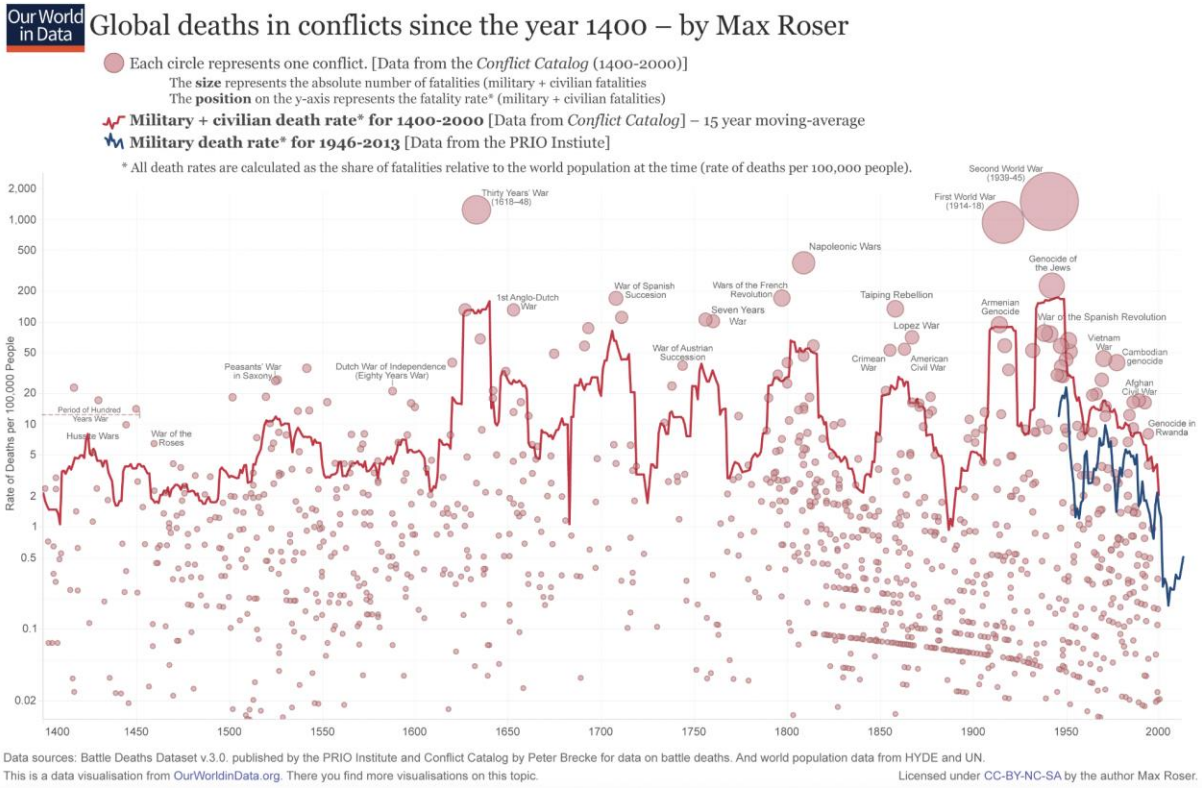

Figure 2. Global deaths in conflicts from 1400-2000[8]

While Pinker uses a combination of data and history to strengthen his point, many have found flaws in his analysis, indicating that humanity could be just as violent, if not more so, than in the past. Specifically, many scholars have countered Pinker's analysis as a result of statistical error.[9] Rather than looking at percentages, Falk and Hildebolt have found that the actual number of war deaths increased in tandem with an increasing population size.[10] Others have pointed to

[8] Zack Beauchamp, *600 years of war and peace, in one amazing chart*, Vox, https://www.vox.com/2015/6/23/8832311/war-casualties-600-years.

[9] See, e.g., Dean Falk and Charles Hildebolt, *Annual War Deaths in Small-Scale versus State Societies Scale with Population Size Rather than Violence*, 58(6) Current Anthropology, (2017); Pasquale Cirillo and Nassim Nicholas Taleb, *On the statistical properties and tail risk of violent conflicts*, Tail Risk Working Paper (2015).

[10] Dean Falk and Charles Hildebolt, *Annual War Deaths in Small-Scale versus State Societies Scale with Population Size Rather than Violence*, 58(6) Current Anthropology 5, (2017).

the underestimation of deaths in past periods and an incorrect comparison of small and large time periods.[11] One should also consider that Pinkerman's analysis ended with data from 2011 and, since then, there has been a substantial increase in battle deaths, especially upon entering 2022.[12]

Humanity killing less also does not mean we are more peaceful. As the Global Peace Index indicates, global peacefulness has "deteriorated by five per cent since 2008, with 95 countries deteriorating and 66 improving in the GPI. The average level of global peacefulness has deteriorated for 13 of the last 15 years, with no year-on-year improvements recorded since 2014."[13] Even if we grant no statistical error to Pinkerman's approach, other relevant measures are also not captured by the analysis, which might also lead one away from his conclusion. For example, the number of ongoing state-based conflicts have only increased since 1946.[14] Internationalized intrastate conflicts have become as common as intrastate conflicts.[15] New technology, such as drones, are increasingly performing strikes and racking up death counts.[16]

[11] Pasquale Cirillo and Nassim Nicholas Taleb, *On the statistical properties and tail risk of violent conflicts*, Tail Risk Working Paper 3-4 (2015).
[12] Institute for Economics & Peace, *Global Peace Index 2023: Measuring Peace in a Complex World*, 53 (2003) https://www.visionofhumanity.org/wp-content/uploads/2023/06/GPI-2023-Web.pdf.
[13] *Id*. at 4.
[14] Max Roser, Joe Hasell, Bastian Herre and Bobbie Macdonald, *War and Peace*, Our World in Data (2016) https://ourworldindata.org/war-and-peace.
[15] Institute for Economics & Peace, *supra* note 12.
[16] *Id*. at 55.

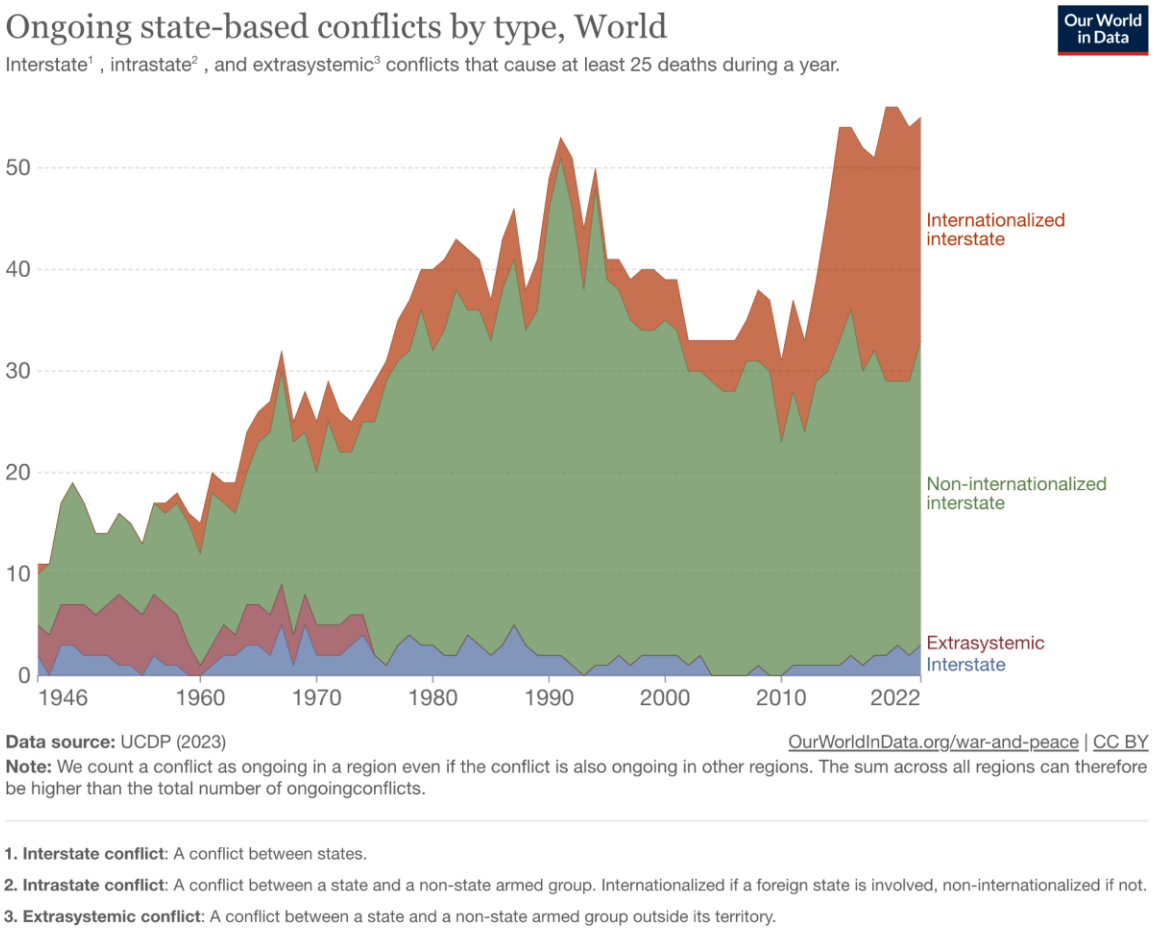

Figure 3. Ongoing state-based conflict by type[17]

In the end, no matter where the scale tilts: war and armed conflicts still exist, and whether we are making gains or losses doesn't take away from the fact that there is more work to be done.

III. CURRENT BAND-AID APPROACH: TELLING THE GOD OF WAR "DON'T!"

[17] Roser, Hasell, Herre and Macdonald, *supra* note 14.

Given that there are still deaths, conflicts, and raised state tensions present and if we are able to assume that the world is not more peaceful, our next question should be, "Why?" What have we currently been doing that has been so ineffective?

A. From WWI: The Covenant Of League Of Nations & The Kellogg-Briand Pact

Achieving world peace is by no means a novel concept. However, there seemed to be more alignment among countries towards that goal after the devastation of World War I. In particular, the world climate became more favorable to the regulation of war.[18] The first two major steps in that direction were the League of Nations and the Kellogg-Briand Pact.

The first step was the procedural approach offered by the League of Nations. After a devastating world war, the international community wanted to protect against any repetition of the event.[19] While the Covenant did not have a prohibition against war or the use of force, it did set up a procedural framework to reduce aggression to more "acceptable" levels.[20] In particular, the Covenant required members to submit disputes "likely to lead to a rupture to arbitration or judicial settlement or inquiry by the Council of the League" and were supposed to not resort to war until a three-month period had passed after an award, decision, or report.[21] This reflection period was thought as a good mechanism to ward off the "heat of the moment" decision-making believed to have started WWI.[22]

[18] Ian Brownlie, International Law and the Use of Force by States 51 (1963).
[19] Malcolm Shaw, International Law 813-814 (2003).
[20] *Id*.
[21] *Id*.
[22] *Id*.

The Kellogg-Briand Pact took this even further, declaring that member states "renounce [war] as an instrument of national policy in their relations with one another."[23] This essentially expressed that war was illegal and something states could no longer engage in upon entering the treaty.

Though these two steps reflected a shift in how the world thought about war, the procedure of the Covenant of the League of Nations and the optimism of the Kellogg-Briand Pact could not contend against the deliberate aggression that marked World War II.

B. United Nations Provisions: Art 2(4), Art. 51, And Chapter Vii

After the two actions above failed to prevent WWII, the international community attempted to take a more comprehensive approach to the law on the use of force.[24] Similar to before, Article 2(4) required member states to "refrain in their international relations from the threat or use of force."[25] However, the UN Charter provided two important carve outs to give the international community more flexibility. Specifically, Article 51 provides that countries will have right of self defense while the United Nations Security Council (UNSC) works on reinstating international peace and security,[26] and Chapter VII gives the UNSC the authority to use force if it views that it is in the interests of collective security.[27]

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[23] The General Treaty for the Renunciation of War, 40 Stat. 2343, 94 L.N.T.S. 57.

[24] Language shifted from "war" to the "use of force" to better encapsulate all the types of armed conflict that occur. The language intended to outlaw "traditional war [and] . . . also other uses of force, whether or not in declared war, whether or not in all-out hostilities." Louis Henkin, *How Nations Behave: Law and Policy* 139-140 (1979).

[25] U.N. Charter art. 2,¶ 4.

[26] U.N. Charter art. 51.

[27] U.N. Charter Chapter VII.

The Charter, thus, encapsulates two concepts: the prohibition of war and collective action against those who engage in war.[28] Article 2(4) represents an idealized hope for peace in the world, while Article 51 and Chapter VII outline realistic mechanisms to remedy any breaches of that idealized state.[29]

C. Approach Evaluation: Solving Nothing & Reducing Damages

This supposed more comprehensive approach, however, has not been able to realize the ideal state of peace originally envisioned. First, after the onset of WWII, the world was thrust almost immediately into the Cold War. With the Soviet Union and the US at odds and both armed with veto power, the UNSC was prevented from accomplishing any work under Chapter VII.[30] During this period, states also began engaging in "proxy wars" or indirect aggression by meddling in other nations' civil wars. This approach creatively blocked the application of Article 2(4) and Chapter VII, which were designed for more blatant, frontal aggression.[31]

The UN's provisions also didn't account for future developments in terms of technology and human rights. As technology created more powerful weaponry and delivery systems, the once straightforward understanding of Article 51's self-defense argument became mostly unworkable as it would require a country to wait until it experienced devastating harm before it could react.[32] States, thus, began to adapt Article 51 into an anticipatory self-defense argument

[28] Thomas M. Franck, Recourse to Force: State Action against Threats and Armed Attacks 1-7 (2002).
[29] Kieran R. J. Tinkler, *Does International Humanitarian Law Confer Undue Legitimacy on Violence in War?*, Articles of War (2023) https://lieber.westpoint.edu/does-international-humanitarian-law-confer-undue-legitimacy-violence-war/.
[30] Franck, *supra* note 28.
[31] *Id*.
[32] *Id*.

that became overly broad and flexible,[33] as can be seen most recently with Russia's justification for its attack on Ukraine.[34] In terms of human rights, the "Charter puts human rights…at its periphery while focusing on the prevention of aggression,"[35] which creates conflicts between state sovereignty and a duty to protect.[36] This conflict in ideas eventually led the UN and its member states to only watch the atrocities from afar for the majority of the genocide in Rwanda—a miscalculation the international community has continually and imperfectly tried to correct.[37]

In fact, some might even argue that the current law on armed conflict actually legitimizes war. While this body of law was "conceived on the battlefield to abate human suffering," many states have flipped the intention, instead using the rules as a legitimizing force for military operations.[38] For example, the Kosovo campaign was viewed as having taken extreme care in abiding to international law, and the US' Operation Iraqi Freedom was justified using the same legal language.[39] Chris Jochnick and Roger Normand, for one, have even noted that beyond legal restrictions that accord to generally accepted "good military practice," states refuse higher legal obligations despite humanitarian rhetoric in that space.[40]

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[33] *Id*.
[34] Morning Edition, *Putin describes the attack on Ukraine as an act of self-defense*, NPR (2022) https://www.npr.org/2022/02/24/1082736117/putin-describes-the-attack-on-ukraine-as-an-act-of-self-defense.
[35] Franck, *supra* note 28.
[36] Louise Arbour, *The responsibility to protect as a duty of care in international law and practice*, 34(03) Review of International Studies 445-458 (2008).
[37] UNHCR, The Rwandan genocide and its aftermath, The State of The World's Refugees 2000: Fifty Years of Humanitarian Action 245-46 (2000).
[38] Kieran R. J. Tinkler, *Does International Humanitarian Law Confer Undue Legitimacy on Violence in War?*, Articles of War (2023) https://lieber.westpoint.edu/does-international-humanitarian-law-confer-undue-legitimacy-violence-war/.
[39] *Id*.
[40] Roger Normand and Chris af Jochnick, The Legitimation of Violence: A Critical Analysis of the Gulf War, 35 Harv. Int'l. L. J. 387 (1994).

Though the UN began in the name of reducing armed conflict and maintaining international security and created more legal stipulations for member states to follow, given the numbers reflected in Section I, these measures seemed to have solved nothing. At the end of the day, war still exists. The historical approach of telling states not to engage in armed conflict and to follow procedure seems to have only reduced damages for certain conduct rather than solving the problem at its root.

IV. Proposed Approach: Tricking the God of War

With the straightforward, band-aid approach of asking states to refrain from armed conflict yielding disappointing results for peace, we must begin searching for a new approach. For one, it might be useful to review the problem we are claiming to solve.

As readers might be beginning to understand with the discussion throughout this compilation of papers—if they weren't aware beforehand—war is an incredibly complex act that contains a multitude of actors and experiences countless numbers of interactions everyday it continues to exist. The actions that these actors and interactions eventually produce are complex, non-linear, multi-level, and dynamic, which make outcomes difficult to predict and emergent at the international level. In other words, it would be hard to predict from the simple words and actions of a single individual that a whole nation would somehow end up in war.

However, in many respects the way the law of armed conflict has been crafted reflects a more reductionist lens. It assumes that setting laws at the state-level will create a top-down chain reaction that constrains those within the nation—governments, companies, NGOs, and individuals—from engaging in acts that promote war. Given that the international community is

currently experiencing states broadening the language of the law of armed conflict and twisting it in ways that weren't intended, it might be best to look for a method that better encapsulates and responds to the many unique underlying causes that academics continually identify for war from the bottom-up.

One approach that both recognizes and directly deals with the many actors in a social system is the complex systems or systems thinking approach. As using a reductionist lens can easily oversimplify both a problem state and a proposed solution, it might be best to consider complexity as a way to destroy the god of war.

A. What Is The Complexity Perspective?

As defined by Sayama, complex systems are adaptive "networks made of a number of components that interact with each other, typically in a nonlinear fashion…[and] may arise and evolve through self-organization, such that they are neither completely regular nor completely random, permitting the development of emergent behavior at macroscopic scales."[41] Complex systems are systems of organized complexity and stand in contrast to those of disorganized complexity or simplicity.

To put it in simpler language, in problems of simplicity, there are a few variables that relate to each other in a linear way or, in other words, the change or action of one variable produces an effect on the other that can be calculated or predicted once the problem is understood.[42] Simplicity or organized simplicity is exemplified best in classical mechanics or the

[41] Hiroki Sayama, Introduction to the modeling and analysis of complex systems 3 (2015).
[42] *Id*. at 3-4.

physical sciences.[43] For example, a car or boat engine might seem complex with its many components, but each part and variable can be measured, allowing a designer to predictably make it run once certain requirements are met (e.g., fuel, a switch being flipped).

Disorganized complexity is found in situations where a variety of variables interact randomly as seen in the motion of atoms or the thermodynamics of gasses.[44] While a solution can't be directly calculated like in problems of simplicity because history and behavior of elements are difficult to pinpoint, Ramalingam states that "scientists could, through the application of statistics, [still] explain average behaviors across systems, thereby generating insights."[45]

Problems of organized complexity or complex systems, however, are different from these two cases and much more difficult to understand and solve.[46] As put by Vallacher, et al.:

> "The elements of [complex] systems are not related to one another in a linear manner, but interact according to a non-linear, recursive process so that each element influences the others. In other words, a change in any one element in a system does not necessarily constitute a proportional change in others; such changes cannot be separated from the values of the various other elements which constitute the system."[47]

Unlike simplicity, changes in one component of a system doesn't produce a linear effect, and unlike disorganized complexity, the interactions in the system aren't completely random.[48] For

[43] Ben Ramalingam, Aid on the Edge of Chaos 134 (2013).
[44] *Id*; Sayama, *supra* note 41, at 3-4.
[45] Ramalingam, *supra* note 43, at 134-35.
[46] *Id*.
[47] Robin R. Vallacher, Peter T. Coleman, Andrzej Nowak, Lan Bui-Wrzosinska, Larry Liebovitch, Katharina Kugler, and Andrea Bartoli, Attracted to Conflict: Dynamic Foundations to Destructive Social Relations 31 (2013).
[48] Sayama, *supra* note 41, at 4.

these systems, at the microscopic level, individual components follow specific rules, behaviors, and patterns. However, at the macroscopic level, these components spontaneously self-organize without any top-down direction to produce an emergent property or nontrivial behavior or structure that wouldn't have been expected from the actions of the microscopic level.[49]

For example, cells follow specific patterns of behavior over the course of its lifespan, which humans have identified in biology. However, when we zoom out from that level of analysis, we see humans, animals, and a whole host of other living organisms that are made up of all these cells performing their particular functions. This is a complex system because "living entities made up of a variety of interdependent and interactive elements, nested within other, increasingly complex entities" produce a world that wasn't easily predicted at that first, microscopic level.[50]

The examples of course don't end there. One can see complexity in the flight patterns of birds, the creation of different types of weather, the destruction of forest fires, diseases, or riots.[51] However, with each example, several key components can be identified:

1. Emergence or the production of properties at the macroscopic level that weren't apparent or are hard to explain simply from the microscopic level and its properties[52]
2. Self-organization or the spontaneous organization of the system to produce emergent properties when no top-down system exists to coordinate these interactions[53]

[49] *Id*.
[50] Vallacher et al., *supra* note 47.
[51] Sayama, *supra* note 41, at 427.
[52] *Id*. at 4-6.
[53] *Id*.

3. Multiple scales or levels to understand the functioning of the system that affect each other[54]
4. Non-linearity or that outputs don't linearly relate to the inputs of a system[55]

Given these key elements, it becomes obvious that the concept of war should be considered part of a complex system. War involves multiple scales from the individuals fighting on the ground to the international organizations, international and domestic courts, and member states inserting their opinions on what should be done. Individuals who work within the system tend to follow routines and rules, yet the decisions, successes, and failures that lead to war are rather unpredictable. Essentially, how certain individuals act regularly within their network isn't easily related to how member states eventually decide to start a conflict. Therefore, the war isn't something that can be broken into component parts to understand the whole. It is a system that is more than its component parts. It exhibits organized complexity and should be treated as such in order to effectively change it.

Granted, systems science is a relatively new field and can, at times, be criticized for its lack of specificity[56] and concrete, empirically proven frameworks.[57] However, the progress the field has made can shed a helpful light on the intricacies of the problem and potential paths to a solution.[58]

B. Using Complexity To Tackle War

[54] *Id*.
[55] *Id*.
[56] Vallacher et al., *supra* note 47.
[57] Ramalingam, *supra* note 43, at 138.
[58] *Id*.

Nonetheless, if war is a complex system, where should we begin? When using a systems approach to a situation, identifying the internal structure of the situation is an important starting point.[59] As explained by Ostrom in more detail:

> "Institutions [or structures] are the prescriptions that humans use to organize all forms of repetitive and structured interactions...Individuals interacting within rule-structured situations face choices regarding the actions and strategies they take, leading to consequences for themselves and for others. The opportunities and constraints individuals face in any particular situation, the information they obtain, the benefits they obtain or are excluded from, and how they reason about the situation are all affected by the rules or absence of rules that structure the situation. Further, the rules affecting one situation are themselves crafted by individuals interacting in deeper-level situations. For example, the rules we use when driving to work every day were themselves crafted by officials acting within the collective-choice rules used to structure their deliberations and decisions. If the individuals who are crafting and modifying rules do not understand how particular combinations of rules affect actions and outcomes in a particular ecological and cultural environment, rule changes may produce unexpected and, at times, disastrous outcomes. Thus, understanding institutions is a serious endeavor."[60]

In other words, institutions as structures instill rules in individual actors, which guide behaviors and generate patterns. Despite the external events that seem to be contributing to the problem in a system, understanding this institution at different levels of analysis is the first step "because the

[59] Craig W. Kirkwood, System Dynamics Methods: A Quick Introduction 2 (1998).
[60] Elinor Ostrom, Understanding Institutional Diversity 3 (2005).

system structure is often the core source of difficulty" and not directly addressing it means that problems will likely resurface or evolve into something worse.[61] However, as Ostrom pointed out in the quote above, changing the structure before understanding how it affects individual actors can have substantial negative consequences.[62]

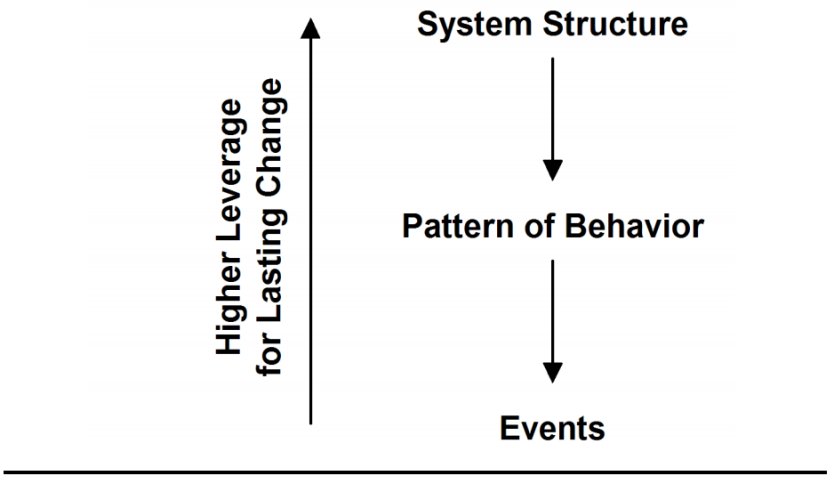

Figure 4. A diagram showing how system structure affects events. As pointed out with the arrow on the left, to instill lasting change requires moving to the top of this hierarchy and changing the structure.[63]

C. Steps to Destroy a God

For the specific topic of war, this deep understanding of the relevant institutions will take time. It requires an analysis of not only how the international community through its institutions, treaties, and customary law influence the individual, but also how certain national governments

[61] Kirkwood, *supra* note 59, at 2-3.
[62] Ostrom, *supra* note 60.
[63] Kirkwood, *supra* note 59.

and organizations were structured in a way that slowly shaped how the individual interacted with the world.

That is a weighty endeavor, but we are not starting from nothing. The studies and papers completed by scholars who seek to understand the causes of war provide rich ground to understand this space. These efforts just need to be more systematically directed to not only identify the causes of war but understand how they interact. For example, given a nation with deep economic disparity, needs for resources only sourced abroad, a government or laws that oppress a certain section of society, widespread corruption and a less powerful standing in the international community, how did each "cause" alter the day-to-day of an individual within that nation, if it did at all? Which causes were most important? How did that change in daily rules eventually create a state of war?

The process, however, does not end there. While studies can help shed light on the institutions and our hypotheses at how individuals are affected, complex systems are by definition difficult to understand and often counterintuitive. Thus, the work to understand war gives us only the foundation. From there, hypotheses must be tested, and the one most commonly used in this field is an agent-based model.

An agent-based model is, in essence, a computer simulation that inputs the specified individuals or agents, the rules they follow, the relationships that exist between them, and the environment they exist within.[64] The design of these models tend to involve a level of simplification but are still helpful in understanding if certain variables truly change what

[64] CM Macal and MJ North, *Tutorial on agent-based modelling and simulation*, 4 Journal of Simulation 151-52 (2010).

eventually emerges within the system.[65] For the specific topic of war, an agent-based model could help test whether hypotheses are true or even identify new leverage points that might shift the system into a dynamic state with no war. Finally, with that more nuanced understanding, scholars can begin testing laws that might more effectively but indirectly counter the causes of war without ever needing to acknowledge that as their main purpose.

V. Conclusion: A Prelude to Peace

A state of war and violence has always existed in some corner of humanity's history, and though we have tried to counteract it, we haven't succeeded in the ways we might have hoped. However, it is far past time to consider new methods to try to eliminate war. It is important as we do this to consider how complex war has become and directly engage with that state of affairs. The complexity perspective offers a new approach that does just that. However, though the above proposed steps for the complexity lens seem relatively simple and straightforward, the process itself will be long and difficult but hopefully fruitful, and even if it isn't, perhaps its study will lead us into an even more productive path for change. The long struggle to kill the god of war is only small change in the grand goal of world peace.

[65] There have been agent-based models for traffic, disease-spread, fire-spread, and more. Sayama, *supra* note 41.

How an International Court of Human Rights Could Reduce Armed Conflicts Worldwide - A Proposal for A New International Legal Order Centered on Human Rights

Terry McWang

I. INTRODUCTION

This paper proposes the establishment of a dedicated International Human Rights Court within the United Nations system. The first part of the paper will explain why such a court is necessary in our era and how the UN's current legal branch—the International Court of Justice (ICJ) —is not sufficient for human rights jobs. The second part of this paper will illustrate the functions, expectations, and potential limitations of this Court with recent major regional armed conflicts between Russia and Ukraine and between Palestine and Israel regarding both justice of war (*jus ad bellum)* and justice in war (*jus in bello).*

It has seemed like the concept of "just war" has finally expired, and maybe it should. In the wake of the devastating World Wars in the first half of the 20th century, the international community sought to establish a new world order characterized by peace, stability, and the rule of law. This led to the development of a body of international law aimed at preventing armed conflicts, safeguarding human rights, and promoting diplomacy and cooperation among nations.[1] The major objective of the UN-based international legal structure as finalized after WWII was the prevention of a third world war among world's greatest powers, and as a result the "permanent five" of the UN Security Council, the five powerful victor states from both communist and capitalist worlds, the states with the first and most nuclear weapons till this day,[2] were granted vast veto power including that over the actions of UN's own force for global peace-

[1] The United Nations. *Peace, Dignity, and Equality on a Healthy Planet.* https://www.un.org/en/global-issues/international-law-and-justice/.

[2] Kile, Shannon; Kristensen, Hans. *Military Spending and Armaments*, Chapter 10: "World nuclear forces." "Table 10.1. World nuclear forces, January 2020", Stockholm International Peace Research Institute (SIPRI).

enforcement tasks—the peacekeepers.[3] Over the past half-century, there has been an even more notable trend towards pacifism within the realm of international law, with a strong emphasis on peaceful conflict resolution and the prohibitions on the use of force with the exception of self-defense[4] and authorization by the UN Security Council, eliminating ideological differences and even most humanitarian concerns as justifiable grounds for intervention following the costly Korean and Vietnam poxy Wars.[5] While the promotion of peace and diplomacy is certainly a laudable objective, and admittedly by and large the system has prevented a third world war so far, the pacifist tendency towards its maximal form in recent developments of international law has at least one notable unintended consequence—the failure to protect human and civil rights.[6] This paper aims to explain how such a failure may lead to preventable armed conflicts, and how a world order centered on rule of law guaranteeing human rights rather than superficial pacifism among superpowers is a better structure to preserve world peace in our era.

Under the "just war theory," other than the right to self-defense, a state has the right or even responsibility to militarily react to atrocious acts against humanity, such as genocide, committed by another country.[7] Without a doubt, the theory of "just war" is not without its realistic problems. Since antiquity, humanitarian crises have been used by ambitious and self-interested state leaders as a justification or excuse to intervene in foreign conflicts to further their own political and military ends, to invade, coerce, occupy, colonize, or conquer. The 2022 Russian invasion of Ukraine, which Putin initially attempted to justify with the baseless

[3] The United Nations (UN) Charter Chpt. VII.
[4] UN Charter Article 6.
[5] Richmond, Oliver; Visa, Gezim. The Oxford Handbook of Peacebuilding, Statebuilding, and Peace Formation. June 14, 2021. Chpt.7: Pacifism in International Relations.
[6] Stanford Encyclopedia of Philosophy. Pacificism. Chpt. 2.2: Maximal vs. Minimal Pacifism https://plato.stanford.edu/entries/pacifism/#:~:text=One%20difficult%20issue%20for%20some,response%20to%20human%20rights%20violations.
[7] Walzer, Michael. Interview: On Just War Theory. Big Think. Aug. 29, 2011. https://www.youtube.com/watch?v=LcBovmGZSPU.

accusation of "genocide" committed by the Ukraine's "neo-Nazi" government against the Russian-speaking population living in Donbas, may be the most recent illustration of this type of hypocrisy.[8] Even some direct humanitarian interventions with honest motives have proved disastrously costly and become proxy wars due to the often insolvable ideological differences of the parties.[9] Realizing these problems of the just war theory, the international community has gradually accepted not only the non-intervention concept that a people's self-determined success should not be impeded, but even that "their [self-determined] failure [should also not] be prevented by the intrusions of an alien power,"[10] with only one single exception for extreme brutality committed by a state's government not short of wide-scale massacre.[11] Empirically this non-intervention approach might be the safest for the world to avoid huge clashes of nuclear powers, but it almost certainly leaves the fate of millions, if not billions, of civilians across the globe helpless in the hands of either various forms of domestic dictatorship, including, as John Stuart Mill termed, the "tyranny of the majority,"[12] or foreign occupation, colonization, and apartheid.[13]

When assessing just war theory, people often fail to recognize the root problem for all forms of interventions under the theory, pretentious or not, as that the intervening states are taking the matters in their own hands. When the triers of fact and the executors of justice are the

[8] Aljazeera. "'Smells of genocide': How Putin justifies Russia's war in Ukraine." March 9, 2022. https://www.aljazeera.com/news/2022/3/9/smells-of-genocide-how-putin-justifies-russias-war-in-ukraine
[9] Korean War Educator. Topic: Cost of Korean War. http://www.koreanwar-educator.org/topics/p_cost_war.htm
[10] Walzer, Michael. Just and Unjust Wars: A Moral Argument with Historical Illustrations. New York: Basic Books, 2006. 4th Edition.
[11] Walzer, Michael. Big Think video: "Michael Walzer on Just War and Humanitarian Intervention." 2008. https://bigthink.com/videos/michael-walzer-on-just-war-and-humanitarian-intervention/
[12] Mill, John Stuart (1859). On Liberty. Chpt.1
[13] Amnesty International. "Israel's apartheid against Palestinians: a cruel system of domination and a crime against humanity." Feb. 1, 2022 https://www.amnesty.org/en/latest/news/2022/02/israels-apartheid-against-palestinians-a-cruel-system-of-domination-and-a-crime-against-humanity/

same party, as the American founding fathers profoundly realized more than two centuries ago, injustice as well as problems follows.[14] The contentions of facts and propaganda innate to political arena and media, let alone policy considerations, necessarily make a military or political leader of any state unfit for the role of objective assessor of factual human rights conditions either in that same state or in another. In the scene of the Russia-Ukraine war, neither Russia, nor Ukraine, nor NATO should be entrusted with their assessments of the living conditions of ethnic Russians living in Donbas. In their stead, an international judicial branch capable of giving binding resolutions must be established and relied upon as the impartial factfinders and human rights adjudicators, before any real-world action by any party is made. The ICJ serves such a purpose only in an insufficient way—it takes years to adjudicate any case, limits parties to states, and does not issue orders with sufficient binding power to restrain acts of powerful nations on Earth, all of which make the ICJ although valuable in many other grounds concerning state-to-state diplomacy, unfit to treat humanitarian crises.[15] Until a judicial branch not bound by these three limits is established, there will forever be competing and often exaggerated reports about human rights conditions portrayed by opposing states fanned by opposing media, which would not only misrepresent facts but even tend to exacerbate the conflicts by inciting mutual spite. For instance, both sides were accused of propaganda during the information war between Kremlin-leaning media and Western-Ukrainian media.[16] Since facts lie at the foundation of the law, and the law arises from the facts (ex facto jus oritur), when facts die, there is no longer a possibility for rule of law.

[14] James Madison (1788). the Federalist Paper, no. 47, 323--31
[15] John R. Crook (2004). The International Court of Justice and Human Rights. https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1001&context=njihr#:~:text=¶%204%20The%20only%20contentious,some%20type%20of%20direct%20access.
[16] The Moscow Times. March 11, 2014. The Media War Behind the Ukraine Crisis.

Thus it is vital to have an impartial international judicial branch apart from ICJ to adjudicate alleged human rights violations worldwide. Due to the nature of humanitarian crises, in order for such a judicial branch to deliver what it promises, it needs to be able to process the facts and adjudicate promptly; it needs to allow non-state parties as petitioners; it needs to have jurisdiction over non-state parties such as a non-governmental military group; and it needs to have the power to grant immediate and sufficient injunction or other kinds of humanitarian relief often against the wishes of the local sovereignty, and make other UN branches enforce its binding judgments through negotiations, sanctions, peacekeeping, or other mechanisms allowed in the UN Charter including the suspension and expulsion of UN memberships.[17] Many of this institution's necessary aspects go beyond the functional realities of International Court of Justice, which has dealt with only less than 190 cases since its creation in 1946, adjudicates on the basis of years if not longer, and allows only states as petitioners against other state respondents.[18] Due to the importance of having an international judicial branch to adjudicate global human rights disputes and the reality that the International Court of Justice is not suitable for human rights cases for the above-mentioned reasons, this paper proposes the establishment of an International Court of Human Rights.

II. Russia-Ukraine War

On February 24, 2022, the day Russia invaded Ukraine, Russian President Vladimir Putin published a video, citing Article 51 of the UN Charter, and explained the goal of the "special military operation" is to protect "their" people who "during eight years have suffered from abuse

[17] UN Charter. Chap. II Art. 5-6.
[18] International Court of Justice. List of All Cases. https://www.icj-cij.org/list-of-all-cases

and genocide from the Kyiv regime."[19] In a matter of weeks, Russian forces took and occupied large pieces of land in the Eastern part of Ukraine[20] and had a large column of military vehicles stretching some 64 kilometres (40 mi) march towards Kyiv from its ally Belarus, threatening Ukraine's capital and largest city.[21] For reasons unpublished by the Kremlin, the convoy stopped and later reverted. By doing so Russia gave up its chance to win a quick war by engaging in an urban war in Kyiv and turned to the big battles in the East.[22] Ukraine brought Russia's allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation, now pending) before the ICJ on February 26, 2022.[23] On 16 March 2022, the court ruled that Russia must "immediately suspend the military operations" in Ukraine, while waiting for the final decision on the case.[24] Russia did not comply and the war has continued till this date. As of August 2023, 18 months into the ongoing war, at least 9,444 civilians were killed by the conflicts according to UNCHR,[25] and tens of millions left in dire need of humanitarian assistance.[26]

This paper aims not to study and decide for the ICJ whether or not Putin's accusation of genocide committed by Kyiv regime had any factual elements in it or was purely a fabrication to

[19] Aljazeera. Supra, note 8.
[20] Aljazeera. "Russia-Ukraine war military dispatch: March 15, 2022." https://www.aljazeera.com/news/2022/3/15/russia-ukraine-war-military-dispatch-march-15-2022
[21] BBC. "Ukraine: Why has Russia's 64km convoy near Kyiv stopped moving?" March 3, 2022. https://www.bbc.com/news/world-europe-60596629
[22] Washington Post. "Why Russia Gave Up On Urban War In Kyiv and Turned To The Big Battles In the East." April 19, 2022. https://www.washingtonpost.com/world/interactive/2022/kyiv-urban-warfare-russia-siege-donbas/
[23] International Court of Justice (ICJ), Order of Provisional Measures. "Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)." Feb. 27, 2022. https://www.icj-cij.org/public/files/case-related/182/182-20220227-PRE-01-00-EN.pdf
[24] ICJ Press Release. "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)." March 16, 2022. https://www.icj-cij.org/public/files/case-related/182/182-20220316-PRE-01-00-EN.pdf
[25] Office of the High Commissioner for Human Rights. "Ukraine: civilian casualty update. 14 August 2023." https://www.ohchr.org/en/news/2023/08/ukraine-civilian-casualty-update-14-august-2023
[26] Aljazeera. "Ukraine confronts two enemies: Russia and corruption." Feb. 14, 2023. https://www.aljazeera.com/news/2023/2/14/ukraine-confronts-two-enemies-russia-and-corruption

justify his military and political ambitions. It admits the high possibility that human rights concerns were not the sincere motive behind the invasion, and therefore the proposed ICHR could no more stop the war than the provisional measures order the ICJ issued about one month after the outbreak of the war. However, it is still possible that the proposed ICHR would have procedurally changed the sequence of matters and potentially deescalate the issues years ago, or at least would have stripped Putin of false humanitarian excuse for his expansion ambitions.

With an ICHR in place, if Russia sincerely suspected mistreatment of its people living in Donbas for the past eight years, Russia or any aggrieved group within Donbas would have brought the case or cases against Ukraine in front of ICHR years ago, alleging concrete human rights violations by the Ukrainian government. Instead of prolonging the adjudication process for years, and not taking up the case unless started by a state-party such as Russia, ICHR would have given Ukraine a limited time to promptly counter the evidence before it weighs on the claim's legitimacy and factualness and delivers a binding resolution in a timely manner as human rights crises often require.

If that resolution favors Ukraine, then Russia would have no just cause to engage in any form of intervention under jus ad bellum, without which the UN and the international community could use any mechanism possible to condemn the aggression without the uncertain legal underpinnings. Even if the resolution does find favor for Russia, the ICHR should mandate that Ukraine solve its problems first, advise negotiations and reconciliation, and intervention would be a last resort for enforcement reserved only for the most egregious conducts or blatant disobedience of the Court's orders. In effect, the jurisdiction and function of the ICHR would eliminate "responsibility to protect" as one of the possible justifications for military interference, and leaves resilience to direct invasion as the only "self-defense" any state party can legitimately

take. This elimination of legal uncertainty and factual contentions surrounding human rights issues shall prove helpful in unifying international response and deescalating or resolving conflicts in the long run.

III. Palestine-Israel Conflict

The October 2023 outbreak of Palestine-Israel conflict is one illustration that even when the legal facts are unambiguous, the lack of a human rights-dedicated judicial institution such as the ICHR still may lead to disastrous suffering of civilians from both sides. Since the establishment of the State of Israel in 1948 and the first Arab-Israeli War, which ended in 1949 resulting in Israeli victory and displacement of 750,000 Palestinians and division of the territory into three parts: the State of Israel, the West Bank (of the Jordan River), and the Gaza Strip, and throughout its thirty-year of tension with Egypt which ended in 1979, Israel has rendered harsh living conditions to Palestinians, including the construction of a separation barrier wall on West Bank territory that was deemed illegal by both ICJ[27] and ICC.[28] The United Nations Security Council, the United Nations General Assembly, the International Committee of the Red Cross, the International Court of Justice and the High Contracting Parties to the Convention have all affirmed that the Fourth Geneva Convention applies to the Israeli-occupied territories, as well as opposing the establishment of Israeli settlements in the occupied territories.[29] Human rights

[27] Benvenisti, Eyal (2012). The International Law of Occupation. pp. xvii, 140 Oxford University Press.
[28] Center for Preventive Action (Updated October 16, 2023). "Israeli-Palestinian Conflict." https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict#:~:text=On%20May%2014%2C%201948%2C%20the,)%2C%20and%20the%20Gaza%20Strip.
[29] Roberts, Adam. "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967". American Journal of International Law. 84 (1): 44–103. p. 69. (Jan. 1990)

institutes around the globe, including Nobel Peace Prize winner Amnesty International, as well as UN human rights expert, have almost unanimously seen Israel's occupation as apartheid.[3031]

In early October 2023, war broke out between Israel and Hamas, the militant Islamist group that has controlled Gaza, a relatively small strip between Israel and Egypt housing more than two million Palestinians, since 2006.[32] Hamas fighters fired rockets into Israel and stormed southern Israeli cities and towns across the border of the Gaza strip, killing and injuring hundreds of soldiers and civilians and taking dozens of hostages.[33] The attack took Israel by surprise, though the state quickly mounted a deadly retaliatory operation. One day after the October 7 attack, the Israeli cabinet formally declared war against Hamas, followed by a directive from the defense minister to the Israeli Defense Forces (IDF) to carry out a "complete siege" of Gaza.[34] Since then Israel ordered more than one million Palestinian civilians in northern Gaza to evacuate ahead of a full-blown ground assault.[35] Meanwhile, Gaza ran out of water, fuel, and supplies amid an Israeli aid blockade, and the conflict risked spreading as cross-border strikes escalate in Lebanon and Syria.[36] Israeli airstrikes alongside the ground invasion killed thousands of civilians, many of whom were children,[37] obliterated religious sites and hospitals housing

[30] Amnesty International. "Israel's Apartheid Against Palestinians- A Look Into Decades of Oppression and Domination." (Feb.1, 2022) https://www.amnesty.org/en/latest/campaigns/2022/02/israels-system-of-apartheid/
[31] OHCHR. Israel's 55-year occupation of Palestinian Territory is apartheid – UN human rights expert. (March 25, 2022). https://www.ohchr.org/en/press-releases/2022/03/israels-55-year-occupation-palestinian-territory-apartheid-un-human-rights
[32] NPR. "Half of Gaza's population is under 18. Here's what that means for the conflict." (Oct. 18, 2023.) https://www.npr.org/2023/10/18/1206897328/half-of-gazas-population-is-under-18-heres-what-that-means-for-the-conflict#:~:text=I%20started%20by%20asking%20her,is%20an%20overwhelmingly%20young%20population.
[33] OHCHR. Supra, note 25.
[34] Center for Preventive Action. Israeli-Palestinian Conflict. (Updated Jan. 8, 2024) https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict
[35] OHCHR. Supra, note 25.
[36] Id.
[37] Amnesty International. "Damning evidence of war crimes as Israeli attacks wipe out entire families in Gaza." (Oct. 20, 2023). https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza/#:~:text=Since%207%20October%20Israeli%20forces,Ministry%20of%20Health%20in%20Gaza.

refugees in the name of "eliminating Hamas."[38] Calls for humanitarian pause in besieged Gaza was vetoed in the UN Security Council by the United States alone. [39]

For whatever reason but most likely out of political concerns, Palestine had not brought a case against Israel to the ICJ despite the consensus by international communities in large of Israel's illegal occupation in Palestine and its desperate living conditions of the Palestinian people in the past decades. Due to the state-party-only nature of ICJ, no other groups or individuals, including Hamas, the de facto government of Gaza Strip, could do so as well. In turn, Israel, together with its patron supporter the United States, have not taken sufficient measures to address the long-term humanitarian crises the Palestinians experienced. As a result, it is only fair to conclude that Palestine had at least two traditional just causes of war both satisfied under traditional jus ad bellum—the right to resist illegal occupation and assert self-determination and the right to protect its own people in its own land, despite its disputed leadership authority.[40] Eventually, the most unfortunate but predictable result, violence and war, happened. It is arguable that the lack of an international legal authority with the suitable platform to evaluate human rights crises and enough power to grant sufficient relief had allowed the crises to go on and the conflicts to exacerbate. Until the international community has a court dedicated to human rights matters that has the authority to overwrite the random will of a prominent P5 member such as the United States, we should unfortunately envision tensions like this in the Middle East to continue into the future for an infinite amount of time with the potentiality to rise to armed conflicts and cause even more civilian sufferings at any moment.

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[38] Aljazeera. "Israel-Hamas war updates: Hundreds killed in Gaza hospital 'massacre'". (Oct. 16, 2023). https://www.aljazeera.com/news/liveblog/2023/10/16/israel-hamas-war-live-iran-warns-resistance-front-may-attack

[39] CNN. "US vetoes Security Council call for 'humanitarian pause' in Israel-Hamas war." (Oct. 18, 2023). https://www.cnn.com/2023/10/18/europe/us-veto-security-council-israel-gaza-war-intl/index.html

[40] Natasha Matloob. Analyzing the War in Gaza through Just War Theory. (Nov. 26, 2023) https://thediplomaticinsight.com/analyzing-the-war-in-gaza-through-just-war-theory/

Though arguably with just causes under jus ad bellum, it is without a doubt that what Hamas did in early October was by all means against jus in bello since it failed to discriminate military targets from civilians, and the same goes with the Israeli retaliations that followed, both of which caused immeasurable cost of life and human sufferings.[41] Therefore it is vital that the proposed ICHR shall have subject-matter jurisdiction over not only alleged human rights violations that can potentially constitute a just cause for intervention, but also over conducts during armed conflicts that may affect human rights of both militants and civilians. Once the aggrieved party faces aggression that is illegal either because of jus ad bellum or jus in bello, thus giving rise to its own right of self-defense, it shall be ICHR's role to make sure that the counteraction shall not go beyond the boundary of self-defense, and is within the boundaries allowed under jus in bello. The only military objective allowed international law should be defending the land and border, and that should never overreach to occupying enemies' land even when the enemy is the original aggressive party. It should be the realm of international law instead of military prowess to deliver remedies for loss of life, property, and individual dignity involved in an illegal aggression, and any state should not take the issue in its own hand beyond defending its territories which would necessarily escalate the conflict. Failure to respect this boundary then should be treated as no less an aggression in the eyes of international law than the original aggression and shall be dealt with in both ICC, for its violation of law of armed conflict, and ICHR, for its violations against international humanitarian law.

IV. Limitations and Future Studies

[41] Aljazeera. Supra, note 38.

The biggest limitation of this proposal is two-fold. Firstly, it may be extremely hard, if at all possible, to gain broad enough support from the international communities to embrace such an idea that an International Human Rights Court should give binding resolutions to all member states of the UN and self-determination claims will be made against it. However, with a carefully drafted treaty protecting only the most basic rights already included in customary international law and enshrined in related Universal Declaration of Human Rights and other corresponding treaties such as the Covenant on Civil & Political Rights (ICCPR), we should hope that at some point in the future the global community will recognize such an institution's benefits and largely accept its jurisdiction. In the meantime, when an IHRC is still a long shot, a regional human rights court in the Middle East is desperately needed to deal with the desperate human rights conditions in the region and avoid further escalations of relations of different ethnic and religious groups through the mediations of international law. The Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights (ACHPR), the Intergovernmental Commission on Human Rights established by Association of Southeast Asian Nations (ASEAN), and the European Convention on Human Rights are all ready examples to borrow and learn from.

Secondly, just as any other form of international legal institutions in the world right now, ICHR may likely suffer from lack of support for the enforcement of its verdicts from the P5 power houses, especially in terms of overwriting power over them all. In the end, in the present global structure based on power and might, we have never even nearly achieved anything like that either with the ICC, or ICJ. The international community, including the UN, needs to have more bargaining chips against powerful individual states such as the United States and China to make this happen, and to set it as a goal is the only way to start on this route. What is proposed in

this paper is: the establishment of an International Human Rights Court under the United Nations is of course a long shot, but if our generation wants to have any chance of not only delivering what we declared 75 years ago in Universal Declaration of Human Rights to global citizenry at large, as well as securing prolonged peace that is both just and sustainable, it is a necessary step to take. It is one we should not turn our heads away from it just because of how infeasible we deem it to be at the moment limited by the temporal political and power structures of the world.

Part II: Instruments of War

IMF Conditionality as a Tool of Economic Warfare

Sarah Abdelbaki

I. INTRODUCTION

"Fear and debt drive this system. We are hammered with messages that terrify us into believing that we must pay any price, assume any debt, to stop the enemies who, we are told, lurk at our doorsteps."[1]

Opinions on the efforts of the International Monetary Fund as one of the world's chief financial institutions and the lender of last resort for many Member States exist in a wide assortment. Born out of the 1944 Bretton Woods Conference to remedy the global destruction following World War II, the International Monetary Fund (hereinafter "the Fund") was meant to "promote international monetary cooperation . . . [by providing] the machinery for consultation and collaboration on international monetary problems."[2] This machinery includes the Fund's lending facilities that supposedly aids Member States in "correct[ing] maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity."[3]

Tied to the Fund's lending is a conditionality framework that requires Member States to meet certain targets to use Fund resources.[4] This framework lies at the core of scholarly critique

[1] JOHN PERKINS, THE NEW CONFESSIONS OF AN ECONOMIC HITMAN 1 (2nd ed., 2016)

[2] Articles of Agreement of the IMF, Art. 1(i).

[3] Articles of Agreement of the IMF, Art. 1(v).

[4] REZA MOGHADAM & SEAN HAGAN, IMF, CONDITIONALITY IN FUND-SUPPORTED PROGRAMS—PURPOSE, MODALITIES, AND OPTIONS FOR REFORM 7 (2009).

toward the Fund that deem it a "neo-colonialist" institution,[5] "grant[ing] developed countries the ability to wield political influence, dictate policy, and undermine state sovereignty in developing countries."[6] Scholars simultaneously indicate specific cases where these conditional loans not only force restructuring, but don't actually succeed in improving economic outcomes for participating Member States.[7]

However, minimal literature exists that questions the legality of the Fund's conditionality agreements under international law. This paper first attempts to frame conditionality agreements as a tool of economic warfare. It highlights sources that describe the mechanisms and goals of traditional economic warfare such as sanctions and then fits Fund conditionality under this definition.

Next, the paper analyzes international legal sources to describe when economic warfare violates State sovereignty and the principle of non-intervention. This will illustrate that the current conditionality framework of the Fund is not only a tool of economic warfare, but one that in effect violates norms of international law.

II. ANALYSIS

[5] Chloe Cain, *The IMF Loan Conditionalities and Neo-Colonialism: Understanding Through the Third World Approach to International Law*, 47 EXETER L. REV. 7, 15 (2022); *see* JIM GUENZA, THE IMF AND THE WORLD BANK: A NEO-COLONIAL INTERPRETATION 2 (n.d.); Brian Domitrovic, *The IMF's Colonial Impulse*, LAW & LIBERTY (Sept. 15, 2022), https://lawliberty.org/book-review/the-imfs-colonial-impulse/; Daniel Steinmetz-Jenkins, *The Rotten Roots of the IMF and the World Bank*, THE NATION (June 15, 2022), https://www.thenation.com/article/culture/the-rotten-roots-of-global-economic-governance/; Thamil Venthan Ananthavinayagan, *Sri Lanka and the Neocolonialism of the IMF*, THE DIPLOMAT (Mar. 31, 2022) https://thediplomat.com/2022/03/sri-lanka-and-the-neocolonialism-of-the-imf/.

[6] GUENZA, *supra* note 5, at 1.

[7] Ananthavinayagan, *supra* note 5; Randall W. Stone, *The Political Economy of IMF Lending in Africa*, 98 AM. POL. SCI. REV. 577, 577 (2004).

A. What is Economic Warfare?

General Definition.

President Woodrow Wilson once described economic sanctions as "an absolute isolation . . . that brings a nation to its senses just as suffocation removes from the individual all inclinations to fight."[8] Groups have employed economic strategies of warfare for centuries, beginning in ancient Greece through modern times, and these strategies vary in form.[9]

Economic warfare is viewed as a tactic to be used either as a compliment or an alternative to force.[10] One older form of economic warfare includes naval blockading linked to military operations, where forces target the ports and other maritime resources of enemy forces. However, this paper focuses on economic sanctions outside the context of armed conflict. Sanctions are broadly defined as a "withdrawal of customary trade and financial relations for foreign- and security-policy purposes" and include "travel bans, asset freezes, arms embargoes, capital restraints, foreign aid reductions, and trade restrictions."[11]

Trade embargoes, for example, are the prohibition of importing from and exporting to a given group.[12] Boycotting, a term often used interchangeably with "sanctions" and "embargos,"[13]

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[8] WOODROW WILSON, CASE FOR THE LEAGUE OF NATIONS 71 (Hamilton Foley ed., 1923)

[9] IRYNA BOGDANOVA, *The History and Effectiveness of Economic Coercion*, *in* UNILATERAL SANCTIONS IN INT'L LAW AND THE ENFORCEMENT OF HUMAN RIGHTS 15, 15 (2022); Vaughan Lowe & Antonios Tzanakopoulos, *Economic Warfare*, MAX PLANCK ENCYC. OF INT'L LAW (Mar. 2013), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e292; Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1168-69 (1987).

[10] Carter, *supra* note 9, at 1169; *see also* BOGDANOVA, *supra* note 9, at 45.

[11] Jonathan Masters, *What Are Economic Sanctions*, COUNCIL ON FOREIGN REL. (Aug. 12, 2019, 08:00 AM), https://www.cfr.org/backgrounder/what-are-economic-sanctions.

[12] Lowe & Tzanakopoulos, supra note 9; Bogdanova, supra note 9, at 19.

[13] Carter, supra note 9, at 1166.

is "the practice of refusing to buy from, or sell to other merchants, or to have commercial relations with other political entities."[14]

1. Impacts.

Tools of economic warfare are diverse but find unity in their general impacts on the target State. First, economic warfare weakens an adversary's economy.[15] One study found that sanctions significantly and negatively impact GDP growth, as well as trade and foreign direct investment.[16]

Second, Barry E. Carter lists three rationales for imposing sanctions as one of the more common forms of economic warfare in modern times: "Seeking to influence a country to change its policies . . . ; punishing a country for its policies; and symbolically demonstrating opposition against the target country's policies to many possible audiences."[17] Targeted policies include those related to human rights, terrorism, and nuclear proliferation among other issues where accepted norms of international conduct are veered away from.[18] In the United States, sanctions were used in the 1970s to promote certain human rights efforts in foreign countries, particularly

[14] BOGDANOVA, *supra* note 9, at 17.

[15] Lowe & Tzanakopoulos, *supra* note 9.

[16] Jerg Gutmann et al., *The Economic Effect of International Sanctions: An Event Study* 18-19 (Univ. of Trier Dept. of Econ., Working Paper No. 3/21, 2021), https://www.econstor.eu/bitstream/10419/243481/1/2021-03.pdf; Maria Perrotta Berlin, *The Impact of Economic Sanctions*, FREE NETWORK (May 10, 2022), https://freepolicybriefs.org/2022/05/10/effects-economic-sanctions/ (In [one] study, the target country's GDP per capita decreases on average by 4 percent over the two first years after sanctions imposition and shows no signs of recovery in the three years after sanctions are removed. [Another] study estimates a reduction in GDP growth that starts at between 2,3 and 3,5 percent after the imposition of UN sanctions).

[17] Carter, *supra* note 9, 1170.

[18] *Id.* at 1166, BOGDANOVA, *supra* note 9, at 16.

in communist bloc states.[19] The United States also employed trade and investment sanctions against South Africa during apartheid, and banned trade and froze Iranian assets during the hostage crisis among other instances.[20] In sum, linked to the foregoing rationale behind economic warfare is an element of coercion meant to compel some policy-related action from the target entity.[21]

B. Classifying Conditionality Agreements as a Form of Economic Warfare

1. Explanation of Conditionality

Outlined in Article V, Section 3(a) of the Fund's Articles of Agreement,[22] program-related conditions are meant to "ensure that Fund resources are provided to members to assist them in resolving their balance of payments problems [and in achieving medium-term external viability while fostering sustainable economic growth] in a manner . . . consistent with the Fund's Articles and that establishes adequate safeguards for the temporary use of the Fund's resources."[23]

During the Fund's early years, This description left open a wide space for the Fund to implement structural conditionalities that "increase[] the degree of intrusiveness on the domestic processes of political decision."[24] Along with macroeconomic conditionalities, in the 1970's, the Fund began requiring measures from enlarging tax bases and reforming tax collection, to

[19] BOGDANOVA, *supra* note 9, at 25.

[20] Carter, *supra* note 9, at 1163.

[21] Phillip Dehne, *How World War I Transformed Economic Warfare*, WALL ST. J. (June 28, 2019, 06:00 AM), https://www.washingtonpost.com/outlook/2019/06/28/how-world-war-i-transformed-economic-warfare/.

[22] Articles of Agreement of the IMF, Art. V § 3(a).

[23] Int'l Monetary Fund, *Guidelines on Conditionality*, SELECTED DECISION AND SELECTED DOCUMENTS OF THE INT'L MONETARY FUND 1, 320 (2021).

[24] FERNANDO J. CARDIM DE CARVALHO, ONCE AGAIN ON THE QUESTION OF IMF'S CONDITIONALITIES 10 (n.d.).

liberalization measures "related to foreign trade and capital movements" in line with capitalist economic theory.[25]

Structural conditions were streamlined in the Fund's Guidelines on Conditionality, where the term "condition" is seemingly interchangeable with the term "economic and financial policies."[26] In these Guidelines, the "scope of conditions" section is vague, describing that conditions will be established on the basis of measures "*reasonably* within the member's *direct or indirect control* and that are, *generally*, either (i) of critical importance for achieving the goals of the member's program or for monitoring the implementation of the program, or (ii) necessary for the implementation of specific provisions of the Articles or policies adopted under them."[27]

That section then explains "conditions will *normally* consist of macroeconomic variables and structural measures . . . within the Fund's core areas of responsibility. *Variables and measures . . . outside [this area] may also be established* as conditions but may require more detailed explanation of their critical importance."[28] Some studies argue that this streamlining forced the Fund to focus on economic variables more narrowly, but that structural reforms related to liberalization that are not of a critical nature are still required by some conditionality

[25] *Id.*
[26] *Id.*
[27] *Id.* (emphasis added).
[28] *Id.* (emphasis added).

agreements.[29] However, other studies argue that the number of structural conditions in Fund agreements has increased since 2008, including in the area of labor-reform.[30]

2. Conditionality as Economic Warfare

The Fund's conditionality agreements can be defined as economic warfare by paralleling their impacts with the impacts of traditionally recognized tools of economic warfare such as economic sanctions.

First, conditionality weakens the economies of States in practice, even though this isn't its advertised purpose. One study specific to African countries involved in conditionality agreements highlights that Fund programs "reduces growth and redistributes income away from the poor" and that some governments may even choose to participate in conditionality agreements "in order to shift the distribution of income to benefit owners of capital, regardless of the consequences for national economies."[31] In countries such as Portugal, Greece, and Romania, Fund programs "undermined collective bargaining structures, held down wages,

[29] BENEDICTE BULL ET. AL, THE WORLD BANK'S AND THE IMF'S USE OF CONDITIONALITY TO ENCOURAGE PRIVATIZATION AND LIBERALIZATION: CURRENT ISSUES AND PRACTICES 23-25 (2006); *see also* Zach Weissmueller & Liz Wolfe, *Was the Radical Left Correct About the IMF and World Bank?*, REASON (Aug. 9. 2023, 04:09 PM), https://reason.com/video/2023/08/09/was-the-radical-left-correct-about-the-imf-and-world-bank/ ("Washington-based organizations agreed to restructure the loans of debtor countries, if they would agree to move in the direction of privatization, deregulation, and free trade").

[30] Alexander Kentikelenis et al., *Did the IMF actually ease up on structural adjustment? Here's what the data say.*, THE WASH. POST (June 2, 2016, 06:00 AM). https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/02/did-the-imf-actually-ease-up-on-demanding-structural-adjustments-heres-what-the-data-say/.

[31] Stone, *supra* note 7, at 577.

encouraged excessive labour market flexibilization, and led to drastic job cuts in the public sector," which has led to wage stagnation and inequality among other economic repercussions.[32]

Second, the main concept behind Fund conditionality agreements is to compel target States to engage in certain macroeconomic and structural policy change in order to receive Fund resources. As previously elucidated, the Fund's structural conditions often push ideals of privatization and liberalization on the involved States.[33]

C. When is Economic Warfare Illegal Under International Law?

Following the argument that Fund conditionality agreements qualify as a form of economic warfare, this paper proposes a secondary argument that, in practice, the implementation of Fund conditionality violates certain norms of international law. Article 2(4) of the United Nations Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[34] However, this provision irrelevant in addressing the legality of economy warfare because Article 2(4) only refers to armed force.

[32] Liz Nelson, *The damage of International Monetary fund 'conditionality': call for urgent rethink*, TAX JUST. NETWORK (July 6, 2018), https://taxjustice.net/2018/07/06/the-damage-of-international-monetary-fund-conditionality-call-for-urgent-rethink/.

[33] BULL, *supra* note 29, at 23-25.

[34] U.N. Charter art. 2, ¶ 4.

Under Article 2(1) of the United Nations, economic warfare may be prohibited where it infringes on the sovereignty and self-determination of a targeted state.[35] This infringement arguably occurs when economic warfare pressures reform in domestic systems.[36]

Furthermore, Article 2(7) of the Charter is argued to codify the customary international law principle of non-intervention, where a state or group of states cannot "interven[e] directly or indirectly in the internal or external affairs of other states."[37] This was supported in a 1986 judgment of the International Court of Justice in *Nicaragua v. United States of America*, which outlines that interventions are prohibited when they aim to force a State choices related to their political, economic, social, and cultural systems.[38]

D. Do Conditionality Agreements Violate International Law?

Although the Fund's intended purpose is purely economic,[39] the Fund's use of structural conditions serves as evidence of its violation of principles of State sovereignty and non-intervention as outlined by the United Nations Charter and customary international law. Structural conditionality undermines the sovereignty and democratic processes of States.[40] Some reports expose that "the executive branch of borrowing nations . . . use [Fund] conditions to

[35] U.N. Charter art. 2, ¶ 1; NILS OLE OERMANN & HANS-JÜRGEN WOLFF, TRADE WARS, ECONOMIC WARFARE, AND THE LAW 70 (2022).
[36] *See id.* at 70-71.
[37] *Id.* at 70; *see* U.N. Charter art. 2, ¶ 7.
[38] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 205, 258, 265 (June 27); *see* OERMANN & WOLFF, *supra* note 35, at 70.
[39] Ananthavinayagan, *supra* note 5 ("In theory . . . the IMF . . . [is] explicitly prohibited from engaging in the political affairs of member states. But in practice [it has] metamorphosed from [an] apolitical institution[] to [an] political actor[] with wide-ranging powers to impact the economies of the Third World.").
[40] Stephen Knack, *Does Foreign Aid Promote Democracy?,* 48 INT'L STUD. Q. 251, 253 (2004).

exact concessions from their legislatures," which "distort[s] . . . constitutionally established system[s] of checks and balances" in those countries.[41]

In Poland, conditionality ultimately forced changes in the State's employment laws in the late 1980's, which can be described as an infringement on political independence.[42] More recently, Fund agreements required changes in domestic labor in Honduras, Moldova, and the Ivory Coast.[43] In 1997, Fund programming in the Republic of Korea involved major economic restructuring and the privatization of many large government-owned companies.[44] Conditions for Korea also involved passing and rescinding certain legislation.[45] Such privatization and liberalization conditions continue to exist in Fund programming and have arguably increased in number within each agreement since 2008.[46]

In Pakistan, the Fund suspended financing when the State "conducted a nuclear weapons test and . . . restored [it] when it agreed to cooperate with the United States-led operation against the Taliban government of Afghanistan in 2001."[47] A similar situation occurred in Turkey where the Fund conditioned resources on cooperation with a United States operation in the Middle East.[48]

This handful of examples exhibits how the structural conditions by the Fund have forced political reforms in states (i.e., mass privatization in the Republic of Korea, employment laws in

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[41] *Id.* (emphasis added).
[42] Cain, *supra* note 5, at 23, 25.
[43] Kentikelenis, *supra* note 30.
[44] Cain, *supra* note 5, at 32.
[45] Il-Hyun Yoon, *The Changing Role Of The IMF: Evidence From Korea's Crisis*, 29 ASIAN PERSP. 179, 186 (2005).
[46] Kentikelenis, *supra* note 30,
[47] Stone, *supra* note 7, at 577.
[48] *Id.* at 578.

Poland) and forced certain choices within States' political and social systems (i.e., cooperation with U.S. operations in Pakistan and Turkey). Therefore, the Fund, acting as a group of States, has infringed on State sovereignty by pressuring political reform in domestic systems, and, relatedly, has violated the customary international law principle of non-intervention.

III. CONCLUSION

In addressing popular claims of the International Monetary Fund's neo-colonialist qualities and participation in economic subordination of certain developing states by larger economies in the Fund, this paper advances the following arguments: (1) Fund conditionality programs qualify as forms of economic warfare, and (2) Fund conditionality violates State sovereignty and non-intervention principles of international law in practice.

The Fund must make changes in their Guidelines on Conditionality to do away with the option of structural conditions and to narrow the scope to requiring macroeconomic conditions alone. Perhaps this will bring the Fund back from functioning as a political actor to delivering its originally intended goal of maintaining global economic stability.

Bridling the Hippocampi

Alejandro Barrett Lopez

"They that go down to the sea in ships, that do business in great waters; These see the works of the LORD, and his wonders in the deep. For he commandeth, and raiseth the stormy wind, which lifteth up the waves thereof…"[1] It is with these words of the psalmist that, from the 19th century onwards, the ships of the Royal Navy have been launched. The "seaman's prayer" from Psalm 107 is a reminder of both the biblical and legal truism that man is an unnatural intruder upon the physically and legally roiling sea – a territory upon which the sovereignty of states finds difficult purchase, and whereupon the battleships of nations serve as isolated and fragile islands of Grotian sovereignty. For that reason, perhaps, ships have always carried an element of the unnatural – a sensation which achieved a particular keenness in the late 19th century when the twin strands of industrialism and the pursuit of thalassocratic dominance resulted in the construction and launching of hundreds of steam-belching steel behemoths upon the sea.

This paper seeks to examine the legal efforts at curbing the danger of naval war and weaponry upon the seas from the early 20th century to the present day. This paper shall present a gradual evolution of naval regulation from an interwar treaty regime characterized by an early codification of rules and restriction on tonnage levels characterized by the Washington and London Naval Agreements, postwar attempts at international multilateralism characterized by the drafting of UNCLOS, and the post-Cold War codification of customary international law relating to maritime warfare and challenges to this structure both in ongoing armed conflicts as well as

[1] Psalms 107:23-28.

freedom of navigation operations. The reader will come away with a navigable chart of the multifaceted manners in which the law in maritime armed conflict has evolved.

On the 27th of May, 1889, the arch-conservative Prime Minister and Foreign Minister the Marquess of Salisbury stood in the House of Lords and spoke in support of the tabled motion for that day, "My Lords…It has been laid down as a sort of general rule or maxim for the guidance of this country as a great maritime nation that we ought always to have at our command a Fleet which would be equal to a combination of any two great Powers which might be brought against us."[2] Lord Salisbury went on to detail that, by 1894, the British would boast of 77 battleships whereas the French would possess 48 and the German Empire only 40.[3] By 1889, Britain had been the unmolested monarch of the seas for three-quarters of a century and the Royal Navy had become emblematic of the British Empire's prestige and power.[4] It was unsurprising, therefore, that multiple aspiring imperial powers were taking due notice of Britain's imperial sway.

Just one year after Lord Salisbury's speech and the passage of the Naval Defence Act of 1889, the American naval captain Alfred Thayer Mahan published *The Influence of Sea Power Upon History*. This book, far from a simple historical overview, detailed the essential nature of a powerful navy for any aspiring imperial power.[5] Mahan was writing his book even as French efforts to construct the Panama Canal were underway and following the American acquisitions of the Philippines and Hawaii, and his book was intended as an entreaty to the U.S. admiralty to shift to become a 'two-seas' power with a large enough navy to project its power both in the

[2] HL Deb (27 May 1889) (336) cols. 1059-89.
[3] Ibid.
[4] Jan Rüger, The Great Naval Game: Britain and Germany in the Age of Empire, p. 28 (2007).
[5] Alfred Thayer Mahan, The Influence of Sea Power Upon History 1660-1783 55-60, (12 ed. 1890).

Atlantic against its European would-be competitors and in the Pacific.[6] Mahan found his champion in the erstwhile Assistant Secretary of the Navy and Future President Theodore Roosevelt. Upon Roosevelt's accession to the presidency, the United States engaged both in the expansion of its navy as well as the purchase of the failed French Panama Experiment.

Mahan's popularity was not restricted to his home country, however. Mahan was quickly translated into German by the future Admiral Friedrich Ludwig Borckenhagen, who eventually published his own further commentary to Mahan, *Zum Stiudium der Seekriegsgeschichte*.[7] Mahan soon become mandatory reading at the German Naval Academy at Kiel, and Großadmiral Alfred von Tirpitz embarked on a substantial naval construction project sponsored by the Kaiser to achieve parity with the Royal Navy.[8] Similarly, in Japan, Mahan's work became standard reading among the Imperial Japanese Navy and contributed to their *Kantai Kessen* doctrine of decisive naval engagement – a doctrine which, fed by the construction of the Kure Naval District in Hiroshima in 1889, permitted the Japanese victory in the Russo-Japanese War of 1905.[9] The result of especially German shipbuilding was a naval arms race that kept the dockyards of Portsmouth, Strathclyde, and Rosyth churning out the steel behemoths necessary to defend the Empire. From Lord Salisbury's projected 77-strong fleet in 1894, the British Home Fleet alone numbered more than 150 ships in 1909.[10]

It was perhaps precisely the British Naval Review of 1909 which "animated" the First London Naval Conference with "the desire to ensure henceforward a greater measure of

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[6] Ronald St John, European Naval Expansion and Mahan, 1889-1906, 23 Naval War College Review 74, 78-80, (1971).
[7] Ludwig Borckenhagen, *Zum Studium der Seekriegsgeschichte, Aeltere und neuere Literatur,* (Marine Rundschau 1896).
[8] Jan Rüger, The Great Naval Game: Britain and Germany in the Age of Empire, 28, (Cambridge University Press, 2007).
[9] Cite needed
[10] Jan Rüger, *supra* note 8, at 12.

uniformity" of the general principles of international law "in the unfortunate event of a naval war."[11] The draft treaty built upon international prize courts and their caselaw, seeking to standardize conduct in the case of naval war – including provisions on the seizure of vessels, blockades, and neutral vessels.[12] The 1909 treaty was rejected by the British House of Lords and went subsequently unratified by all the conference members.

Seven years later, the Royal Navy engaged the German *Hochseeflotte* in the Battle of Jutland or *Skagerrakschlacht*. 151 British ships engaged the smaller 99-vessel German fleet. The resultant battle was humiliation for both sides. The German navy was permanently neutered and would remain in port for the majority of the war, acquiescing to British blockade of Germany; the Royal Navy had experienced a horrendous loss of life as well as fourteen ships sunk – a loss bearable only by the otherwise vast numbers of the fleet.[13]

It is to no surprise, therefore, that the interwar period saw three separate Naval Conferences intending to limit the sort of arms race which had placed Germany and Britain at odds leading up to 1914. The London Naval Conference of 1930 was the greatest interwar treaty success and was seen by most as avoiding a similar arms race between Britain and the United States. The resultant treaty limited the tonnages of each signatory nation's fleets to restrained parameters.[14] For nations like Italy and France, their tonnage limit was well above what the displacement of their navies and did not cause much upset at all. The United States, however, was obliged to dispose of the capital ships *Florida*, *Utah,* and either the *Arkansas* or *Wyoming*. The British were forced to similarly scupper the HMS *Benbow*, HMS *Iron Duke*, HMS

[11] Dietrich Schindler & Jiri Toman, The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents 845-56 (1988).
[12] *Id*. Art 2, 14, 33.
[13] Robert K. Massie, Castles of Steel, 403-415 (Ballantine Books, 1st ed. 2003).
[14] Treaty for the Limitation and Reduction of Naval Armament, 22 April 1930, art. VIII L.N.T.S. 830, art. 4-6.

Marlborough, HMS *Emperor of India*, and HMS *Tiger*.[15] The Japanese, for their part, were to dispose of the battleship *Hiyei*. The most novel legal development in the 1930 treaty, particularly, pushed for by the British was the total restriction of submarines exceeding displacements of 2,000 tons from being constructed by any signatory power.[16]

The relative success of both the Washington Naval Treaty of 1922 and the London Treaty of 1930 was meant to be built upon by the London Treaty of 1936. Indeed, this treaty combined both the provisions of the Washington Treaty's arms restrictions with the London treaty's tonnage restrictions and went further in limiting the proliferation of 'super-dreadnought' ships exceeding 35,000 tons of displacement.[17] The success of the 1930 treaty had been twofold – first in achieving greater security in peace for all the parties while also sparing the States parties the economic costs of massive naval armament. In a hearing before the Committee on Naval Affairs of the U.S. Senate, Rear Admiral Jones stressed that America should only possess enough naval power to safeguard its security and to "[seek equality of opportunity where its trade lines and interests lie." Jones was joined in his sentiments by Admiral Coontz, "[The US] should build ships we can use, not only with the battle fleet, but for other needs, such as defending commerce and keeping open lines of communication."[18] Unlike the 1930 treaty, however, the 1936 treaty proved a rapid failure with the Imperial Japanese refusal to ratify – ultimately followed by the British suspension of the treaty with the outbreak of war in 1938.

Although the treaty mechanisms of Washington and London had proven to be failures, the principles laid down in them survived as statements of customary international law. Part IV

[15] *Id*. Art. II.
[16] *Id*. Art VII
[17] Treaty for the Limitation of Naval Armament, 25 March 1936, art. XVI L.N.T.S.
[18] S. Rep. No. 197 at 30 (1930)

of the 1930 treaty, motivated by the British fear of submarine warfare, had placed strict restrictions on the usage of submarines vis-à-vis merchant shipping – including the duty of surface and submarine vessels to "not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew, and ship's papers in a place of safety."[19] This rule, despite Germany never having been party to either the 1930 or 1936 treaty, was enforced against Großadmirals Karl Donitz and Erich Raeder in their respective judgements at the Nuremberg War Crimes Tribunal.[20]

The postwar maritime world could perhaps best be described as a legal and practical vacuum. Though the principles of maritime freedom were reinforced at the Nuremberg and Tokyo Tribunals, the treaty structure underpinning those principles was shredded – not only by the Japanese, but also by the British and American repudiations of the 1930 and 1936 treaties once the demands of the war required renewed naval buildup.[21] However, there was also little demand for any renewed naval treaty in the postwar status quo. The Japanese Imperial Navy and the *Kriegsmarine* were both disbanded by the allies, while the *Regia Marina* was severely constrained by the 1947 Italian peace treaty.[22] Occupied by internal rebuilding, the French *Marine Nationale* would fail to compensate for the sinking of its ships at Mers-el-Kebir in 1940 and the scuttling of its ships at Toulon in 1942. Similarly, the USSR—with the Red Fleet's naval officer class still decimated from Stalinist purges as well as damage to naval facilities and ships from the Nazi occupation—would reorganize as the smaller submarine-focused Soviet Navy. The most significant decline, however, was that of the Royal Navy in the postwar years. Suffering

[19] Treaty for the Limitation and Reduction of Naval Armament, 22 April 1930, Article XXII L.N.T.S. 830.
[20] U.S.A., France, UK, and USSR v. Göring, Hess, von Ribbentrop, … Dönitz, Raeder, etc., (The International Military Tribunal in Session at Nuremberg, Oct. 1, 1946).
[21] H.R. 1776, 77th Cong. (1941).
[22] Treaty of Peace with Italy, 10 February 1947, 1956 U.N.T.S. 3297.

from a heavily indebted postwar treasury as well as the loss of the Royal Navy's imperial *raison d'être* with the independence and partition of India, the Royal Navy would steadily shrink to the point that—by the 1980s—even British cabinet ministers described the Navy as "increasingly obsolescent."[23]

The 1940s and 50s were an era of American naval hegemony. This was not so much because the United States navy was particularly large, but rather because other nations' navies had declined so extensively. As such, this is a period in which the likelihood of maritime war seemed negligible. However, by 1973 and the commencement of negotiations for the UN Convention on the Law of the Seas, the USSR had significantly invested into the expansion of the Soviet Navy – including the arming of submarines with nuclear missiles.[24] The reinvention of the Soviet Navy from a small and strategically insignificant force to becoming a large, nuclear-powered, and nuclear-armed fleet deeply affected the subsequent UNCLOS negotiations. At UNCLOS, one can identify three broad types of relevant nations. The first were the sea powers – the most exclusive 'club' which included only the United States and the Soviet Union. The second were the prominent maritime powers with a combination of large commercial or military fleets with a substantial amount of coastline; this category included the United Kingdom, France, Spain, Japan, Chile, Argentina, Mexico, and China. The third were those emerging postcolonial nations in Africa and Asia – Nigeria, Angola, Indonesia, etc. – which, though possessing large coastlines in certain cases, lacked the larger industrial fishing and commercial fleets to lack protection.

[23] David Bosco, The Poseidon Project 143 (Oxford University Press, 1st ed. 2022)
[24] *Id*. 108-110

The tensions in UNCLOS are, however, primarily regarding fisheries and territorial demarcations at sea – the tension between nations favouring freedom of navigation versus nations preferring more protectionist territorial seas being resolved by the establishment of the 'Exclusive Economic Zones' appended to the territorial seas.[25] When it came to the regulation of warfare upon the seas, the UNCLOS amounts to – in essence – a legal restatement of customary international law, though this does not detract from its importance as a confirmation of many of the concepts emphasized at Nuremberg against Raeder and Donitz. With the expansion of the territorial sea from the pre-war norm of the 'cannon shot' 3-nautical-mile range to the comparatively expansive 12-nm limit established by the UNCLOS, the treaty limited the high seas – previously the maritime playground of those thalassocracies able to field world-girdling fleets both in peacetime and warfare – by a factor of thousands of square nautical miles.[26]

Naval warships, being floating fortresses of State sovereignty were legally inviolable on the high seas, therefore – but subject to the requests of individual States within their national jurisdiction.[27] Though this initially bears little difference to the pre-UNCLOS status quo, the most important element of UNCLOS is that the high seas – legally defined in Part VII of the treaty – were no longer the 'lawless' high seas. The freedom of the high seas went from being a legal theory enforced through the brawn of the Royal Navy to being enshrined in a near-on universally recognized treaty.[28] This, in many senses, was a triumph of *English* (not Anglo-American) legal theory. Even as the British lost out on their policy of curtailed 3-nm territorial seas, they triumphed in the broader principle.

[25] U.N. Convention on the Law of the Sea, art. 55-58 Dec. 10, 1982, 1833 U.N.T.S. 31363.
[26] *Id*. Art. 3
[27] *Id*. Art. 30 & 95
[28] *Id*. Art. 87

The other notable element in the UNCLOS relating to violence at sea is the codification of the Ciceronian maxim of pirates being *hostis humani generis*. The UNCLOS specifically states that "[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."[29] The legal radicality of the UNCLOS here cannot be understated. Even as it affirms certain Grotian maxims, it undermines Grotius's reasoning that the law cannot penetrate far beyond the shore. Rather, the UNCLOS is sweeping in its determination to permeate the entire world ocean with the law and banish – insofar as is practicable – violence upon the world ocean. In this goal, national warships are expected to participate and are permitted to board with near-impunity vessels which are "engaged in piracy," "engaged in the slave trade," or "without nationality."[30]

The UNCLOS cements certain general maxims of customary law into treaty, and many of these by necessity brush upon the conduct of warships. However, the UNCLOS does not strictly regulate the actual conduct of these warships except in their general rights upon the high seas, straits, EEZs, and other maritime areas. This is, in a sense, unsurprising as maritime warfare in the style of fleet conflicts seemed an impossibility since Jutland and even sustained submarine warfare seemed unlikely with long-range missile capabilities of submarines and aircraft carriers. In sum, the idea that ship to ship violence would occur seemed an increasingly remote possibility.

That is, up until terribly recently. As China expanded the People's Liberation Navy, it also laid claim to an expanded territorial sea not compatible with the UNCLOS model – the now

[29] *Id*. Art. 105
[30] *Id*. Art. 110

well-known Nine-Dash line. This territorial claim of China's conflicts with the territorial seas and EEZs of several nations – including those of Taiwan, the Philippines, Brunei, Malaysia, and Vietnam. The United States and its allies have, in defiance to China, conducted several 'freedom of navigation' operations wherein a US ship traverses through the maritime territory formally claimed by China.[31] The Chinese, seeking to defend their 'waters' then claim to 'chase away' the U.S. ship which attempts this operation. Though these operations are sufficiently frequent to have settled in something of a routine for both the Americans and Chinese, the matter remains that both nations are conducting naval operations which could very well imperil the peace in South East Asia. It is perhaps for this reason that, in 2014, both nations signed the Memorandum of Understanding between the Department of Defense of the USA and the Ministry of National Defense of the People's Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters. This memorandum, though "not intended to be binding under international law", maintains "mutual trust" and established "military-to-military relations between the two Sides."[32]

In the annexes of the memorandum, the document stresses "effective communication" in the case of risk of collision, refraining from "using uncivil language or unfriendly physical gestures" when in communication or proximity.[33] This memorandum artfully dodges around precisely *why* there is such a strong possibility of naval collisions between their two forces and why it is necessary for their naval military commands to enjoy such close communication, but it nevertheless amounts to a joint US-Chinese regulation of possible violence between the two. In

[31] Heather Mongilio, *China Protests U.S. South China Sea Freedom of Navigation Operation*, USNI News, March 24, 2023.
[32] U.S. Department of Defense, Memorandum of Understanding between the Dept. of Defense of the USA and the Ministry of National Defense of the People's Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, (2014).
[33] *Id*. Annex I.

the modern age, it is likely that this form of bilateral negotiation and discussion is the future of naval conduct at sea. With the general dearth of genuine maritime conduct, it will be sparing and avoid multilateral solutions which can easily be scuppered. The other two major ongoing conflagrations in Ukraine and Israel both are one-sided in terms of maritime strength, with only Russia possessing warships in the former and with Palestine bereft of a navy in the latter.

The theory of multipolarity has been resoundingly disproven since, contrary to expectations, the dismal performance of the Russian military machine in the invasion of Ukraine. What remains is a continued bipolar world order between the United States and China – this is as true with naval conflict as it is with any other economic or political realm. What can be said, therefore, of the transition and development of maritime conflict and its place in international law, from the beginning of the 20th century until the present day? In most respects, it practically mirrors most other military developments – with European NATO allies' navies (most prominently the British and Italian navies) becoming auxiliaries to the U.S. 'imperial' Navy. Legally, this development is matched by a *realpolitik* understanding that the grand multilateral treaties of the 1930s are irrelevant and impracticable. This impracticability is a fait accompli rendered by the advanced nature of missile technology taking warships away from the Mahanian vision to becoming distant arms platforms unlikely to get into large fleet engagements. Rather, warships have become legal tools useful to assert sovereignty or to enforce the larger general norms and laws of the world ocean.

In other words and in conclusion one can expect that the grand naval summits of the 1930s are over – at least until a multipolar world order arises. Rather, legal naval conduct is conducted broadly through general norms which are sharpened by bilateral communication and

negotiation between whichever two great world and naval powers dominate the world seas – or at least, those which can threaten it.

Turning Forward the Doomsday Clock: The International Court of Justice's 1996 Advisory Opinion and its Repercussions for Modern Conflict

Matthew Johnson

I. INTRODUCTION

The risk of nuclear warfare looms as the conflict in Ukraine rages. Russia's threat to use nuclear weapons against Ukraine and its allies suggests that the possibility of nuclear conflict is at its most relevant point since the fall of the Soviet Union.[1] In tandem, the conflict between Israel, which possesses an estimated 90 nuclear warheads, [2] and Hamas, Hezbollah, and Iran places nuclear war into the purview of reality. Alarmingly, the Doomsday Clock is at 90 seconds to midnight, the closest it has ever been to Armageddon.[3]

While not used in conflict since WWII, Fat Man and Little Boy are testaments to the destructive capacity of nuclear weapons. An estimated 80,000 to 100,000 people were instantly killed as the result of the bombing of Hiroshima, with as many as 60,000 more dead by the end of 1945.[4] In regard to Nagasaki, nearly 74,000 people died as a direct result of the blast, 75,000 more were injured, and 121,000 more suffered illnesses and other trauma.[5] "Since Hiroshima," wrote Judge Bedjaoui, former President of the International Court of Justice ("ICJ"), "fear had

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[1] Pierre de Dreuzy & Andrea Gilli, *Russia's Nuclear Coercion in Ukraine*, NATO REVIEW (Nov. 29, 2022), https://www.nato.int/docu/review/articles/2022/11/29/russias-nuclear-coercion-in-ukraine/index.html [https://perma.cc/8F77-CVE5].

[2] Einar H. Dyvik, *Number of Nuclear Warheads Worldwide as of January 2023*, STATISTICA (Oct. 12, 2023), https://www.statista.com/statistics/264435/number-of-nuclear-warheads-worldwide/ [https://perma.cc/U8A3-SHP9].

[3] John Mecklin, *A Time of Unprecedented Danger: It it 90 Seconds to Midnight*, BULLETIN OF THE ATOMIC SCIENTISTS (Jan. 24, 2023), https://thebulletin.org/doomsday-clock/current-time/ [https://perma.cc/87MF-3XD8]; The Bulletin of the Atomic Scientists, founded by Albert Einstein and scientists behind the first atomic weapons, created the Doomsday Clock, using the imagery of apocalypse (midnight) and the contemporary idiom of nuclear explosion (countdown to zero) to convey threats to humanity and the planet. *See id.*

[4] Ved P. Nanda & David Krieger, NUCLEAR WEAPONS AND THE WORLD COURT 36 (1998).

[5] *Id.* at 38.

gradually become man's first nature."[6] And as Judge Weeramantry articulated in his dissent to the ICJ's 1996 Advisory Opinion: "50 years of development have intervened [since 1945], with bombs being available now which carry 70 or 700 times the explosive power. . . [T]he devastation of Hiroshima and Nagasaki could be magnified several-fold by just one bomb today, let alone a succession of bombs."[7] Nonetheless, the ICJ never declared the use of nuclear weapons *per se* illegal.[8]

Pursuant to Article 96, paragraph 1, of the UN Charter,[9] the United Nations General Assembly ("UNGA") requested that the ICJ render an advisory opinion on the query: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[10] The ICJ concluded in its 1996 Advisory Opinion that 1) international law does not authorize the threat or use of nuclear weapons, 2) a threat or use of force by nuclear weapons is unlawful if contrary to Article 2, paragraph 4, and Article 51 of the Charter, 3) a threat or use of nuclear weapons should be compatible with the requirements of international law applicable in armed

[6] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 268, ¶ 2 (July 8) (declaration by Bedjaoui, M.).

[7] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 429, at 447 (July 8) (dissenting opinion by Weeramantry, C.).

[8] On three occasions legal questions pertaining to nuclear weapons came before the ICJ, two in an advisory context and one in an adversarial context. The Court only heard the merits of a single advisory case, dismissing the other two cases on procedural grounds. *See generally* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (July 8); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections, Judgment, 2016 I.C.J. 833 (Oct. 5).

[9] U.N. Charter art. 96, ¶ 1.

[10] G.A. Res. 49/75, at 16 (Dec. 15, 1994).

conflict, and 4) there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament.[11] [12]

The remaining conclusions were met with fierce dissent. By a vote of eleven to three, the ICJ concluded there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.[13] In a contentious seven to seven vote, broken by President Bedjaoui, the Court declared that while the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict and humanitarian law, the Court could not conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense.[14] Thus, the threat and use of nuclear weapons, to this day, is not *per se* illegal.

Given contemporary conflicts in an international regime in which the use and threat of nuclear weapons is not illegal, an assessment of law and the use of nuclear weapons is pressing, if not urgent.[15] This paper examines the repercussions, evident in modern conflict, of the ICJ's failure to conclude that the threat and use of nuclear weapons is illegal. Section I analyzes portions of the 1996 Advisory Opinion. Section II assesses the repercussions of the Opinion and

[11] The ICJ's advisory opinions are not binding. Nevertheless, the Court's advisory opinions carry significant legal weight and moral authority; after all, advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of peaceful relations between States. *See* Int'l Court of Justice, *Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/advisory-jurisdiction (last visited Nov 9, 2023).

[12] 1996 I.C.J. at 265-267.

[13] *Id.* at 266

[14] *Id.*

[15] 12,500 known nuclear warheads are in possession by States as of January 2023. *See* Mecklin, *supra* note 3.

the posturing of nuclear weapons in contemporary conflict since 1996. Lastly, section III considers whether conventional or customary law exists today to prohibit nuclear weapons.

II. The Advisory Opinion of 8 July 1996: Legality of the Threat or Use of Nuclear Weapons

Following the UNGA's 1994 advisory opinion request, a "wave of global interest unparalleled in the annals of the ICJ" gripped States, international organizations, and the public.[16] Not only did a multitude of organizations and NGOs send communications to the Court in conjunction with two million signatures from organizations and individuals, but the Court received shipments of signatures so voluminous that it could not physically receive them.[17] Thirty-five States, including nuclear weapon States ("NWS") and non-nuclear weapon States ("NNWS"), filed impassioned written statements opining on applicable environmental, humanitarian, and international law.[18] Additionally, twenty-four States delivered oral submissions.[19]

NNWS emerged as advocates of illegality. "The Government," wrote Japan, "believes that, because of their immense power to cause destruction, the death of and injury to human

[16] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 429, at 438 (July 8) (dissenting opinion by Weeramantry, C.).

[17] *Id.*

[18] *Id.* For a list of written statements, *see* Int'l Court of Justice, *Legality of the Threat or Use of Nuclear Weapons – Written Proceedings*, International Court of Justice, https://www.icj-cij.org/case/95/written-proceedings (last visited Nov. 9, 2023).

[19] *Id.* For a list of oral proceedings, *see* Int'l Court of Justice, *Legality of the Threat or Use of Nuclear Weapons – Oral Proceedings*, International Court of Justice, https*://www.icj-cij.org/case/95/oral-proceedings* (last visited Nov. 9, 2023).

beings, the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation."[20] Iran alleged the existence of an *opinio juris* on the right of every person to life and security, to which the UNGA adopted a number of resolutions on the illegality of the threat or use of nuclear weapons.[21] Iran further wrote that in accordance with paragraph 1(a) of UNGA resolution 1653(XVI) . . . the use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of United Nations and, as such, a direct violation of the Charter.[22] Pacific States stressed the impact on the environment and human health.[23]

NWS were proponents of legality, offering alternative interpretations of international law offered by NNWS. For example, while many NNWS emphasized the applicability of the Martens Clause to nuclear weapon use,[24] the Russian Federation asserted that the Martens clause

[20] Letter dated 14 June 1995 from Minister at the Embassy of Japan, together with Written Statement of the Government of Japan, 1 (June 14, 1995), https://www.icj-cij.org/sites/default/files/case-related/95/8670.pdf.

[21] Note Verbale dated 19 June 1995 from the Embassy of the Islamic Republic of Iran, together with Written Statement of the Government of the Islamic Republic of Iran, 5-6 (June 19, 1995), https://www.icj-cij.org/sites/default/files/case-related/95/8678.pdf.

[22] *Id.* at 1.

[23] Letter dated 19 June 1995 from the Permanent Representative of Solomon Islands to the United Nations, together with Written Statement of the Government of Solomon Islands, 77-91 (June 20, 1995), https://www.icj-cij.org/sites/default/files/case-related/95/8714.pdf.

[24] The Martens Clause was introduced in the Preamble of the 1899 Hague Convention. It reads: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protections and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscious." *See* Int'l Comm. of the Red Cross, *Martens Clause,* INTERNATIONAL COMMITTEE OF THE RED CROSS, https://casebook.icrc.org/a_to_z/glossary/martens-clause (last visited Nov. 9, 2023).

"is not working at all" and inapplicable to nuclear weapons.[25] The United Kingdom ("UK"), while acknowledging the Martens Clause, wrote that the terms make it necessary to point to a rule of customary international law which might prohibit nuclear weapons.[26] Thus, the Martens Clause, according to the UK, "adds little."[27] The United States ("US") rested a portion of their argument on the assertion that the law of armed conflict does not prohibit the use of nuclear weapons, writing: "Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians."[28]

In regard to conventional law that forbids the use or threat of nuclear weapons, the ICJ considered instruments that prohibit the use of poisonous weapons, which some States argued apply to nuclear weapons given radioactivity.[29] Such weapons, as these States assert, are prohibited via the Second Hague Declaration of 1899, which bans "the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gasses," Article 23(a) of the Regulations annexed to the Hague Convention IV of 1908, whereby "it is especially

[25] Letter dated 19 June 1995 from the Ambassador of the Russian Federation, together with Written Comments of the Government of the Russian Federation, 13 (June 19, 1995), https://www.icj-cij.org/sites/default/files/case-related/95/8796.pdf.

[26] Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom, 48 (June 16, 1995), https://www.icj-cij.org/sites/default/files/case-related/95/8802.pdf.

[27] *Id.*

[28] Letter dated 20 June 1995 from the Acting Legal Advisory to the Department of State, together with Written Statement of the Government of the United States of America, 23 (June 20, 1995), https://www.icj-cij.org/sites/default/files/case-related/95/8700.pdf.

[29] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 54 (July 8).

forbidden . . . to employ poison or poisoned weapons," and the Geneva Protocol of 1925, which prohibits "[T]he use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices."[30] The ICJ, however, stated that the prohibitions of poisonous weapons have been understood "as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate."[31] The ICJ emphasized that "the pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments."[32] Thus, prohibitions against poisonous weapons were inapplicable to nuclear weapons.

The Court also acknowledged the negotiations which have resulted in treaties limiting nuclear weapons. Such limits include the acquisition, manufacture and possession of nuclear weapons (i.e. Treaty on the Non-Proliferation of Nuclear Weapons), the deployment of nuclear weapons (i.e. Antarctic Treaty), and the testing of nuclear weapons (i.e. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water).[33] From the significant list of treaties the Court identifies, it ultimately finds that while they circumscribe nuclear weapons, each falls short of outright prohibiting the threat or use of such.[34] Rather, the ICJ stated these treaties merely "point to an increasing concern in the international community."[35]

Next, in its search for positive law, the ICJ analyzed instruments that eliminate nuclear weapons in certain regions, including the Antarctic Treaty of 1959, which bans deployment of

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at ¶ 58.

[34] *Id.*

[35] *Id.* at ¶ 62.

nuclear weapons in the Antarctic, and the Treaty of Tlatelolco, Treaty of Rarotonga, Treaty of Bangkok, and Treaty of Pelindaba, which create nuclear weapon free zones in Latin America, the South Pacific, Southeast Asia, and Africa, respectively.[36] Although the latter four treaties contain protocols which prohibit parties from using or threatening to use nuclear weapons against contracting parties, which some NWS ratified,[37] the Court was not convinced these protocols constitute conventional law on the prohibition of nuclear weapon use. Instead, the regional treaties "testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons."[38] Moreover, the Treaty of Bangkok and Treaty of Pelindaba, contemporary to the 1996 Advisory Opinion, do not amount "to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons."[39]

Furthermore, the ICJ could not articulate any customary international law forbidding the threat or use of nuclear weapons, stating:

> "[T]he emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other."[40]

NNWS attempted to demonstrate the existence of a customary rule prohibiting nuclear use by referring to the consistent practice of non-utilization of nuclear weapons since 1945, which

[36] *Id.* at ¶ 59, 63.

[37] *Id.* at ¶ 59.

[38] *Id.* at ¶ 63.

[39] *Id.*

[40] *Id.* at ¶ 73.

creates an *opinio juris* on the part of NWS.[41] NWS, however, bellied this assertion by invoking the doctrine and practice of deterrence, reserving the right to exercise their nuclear arsenal in self-defense.[42] Moreover, NNWS point to a series of General Assembly resolutions that affirm the illegality of nuclear weapons in order to establish customary international law.[43] Nonetheless, "because several of the resolutions under consideration were adopted with substantial numbers of negative votes and abstentions," the Court asserted that "the resolutions fall short of establishing the existence of an *opinio juris* in the illegality of the use of such weapons."[44]

The dissenters to the 1996 Advisory Opinion wrote thoughtful yet impassioned opinions. Judge Weeramantry's dissent is an example of such. He admitted that there exists positive aspects of the Opinion, as it reminds nations of their obligation to bring nuclear negotiations to their conclusion and articulates a principle of a prohibition of methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe environmental damage.[45] Nevertheless, he asserts that "the use or threat of nuclear weapons is illegal *in any circumstance whatsoever*."[46] Judge Weeramantry articulates that nuclear weapons "violate the fundamental principles of international law, represents the negation of humanitarian concerns which underlie humanitarian law, and offends conventional law, such as the Geneva

[41] *Id.* at ¶ 65.

[42] *Id.*

[43] *Id.* ¶ 68.

[44] *Id.* ¶ 71.

[45] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 429, at 434 (July 8) (dissenting opinion by Weeramantry, C.).

[46] *Id.* at 433.

Gas Protocol and Article 23(a) of the Hague Regulations of 1907."[47] The latter two treaties, according to Judge Weeramantry, are among the conventional law that asserts a comprehensive limitation of nuclear weapon use.[48]

III. The Repercussions of the 1996 Advisory Opinion: Nuclear Weapons & Modern Conflict

When the ICJ issued its 1996 Advisory Opinion, many international legal scholars met the opinion with praise and bravado. Two scholars opined:

> "The Court has demonstrated that it has the courage to enter the dispute on one of the most serious issues of our time. It refused to silence itself, as some states would have had it do. In rendering its Opinion, the Court indicated that international law does not always favor the interests of the most powerful states. Similarly, it has helped to create a legal foundation in which those who oppose the threat or use of nuclear weapons are supported, and those who seek the elimination of nuclear weapons can refer to the call for good faith negotiations on nuclear disarmament."[49]

Such "courage" rings hollow, however, to victims of nuclear weapons. Many, including the mayor of Hiroshima, were angered by the failure of the Court to declare the threat or use of nuclear weapons unconditionally illegal.[50] Mayor Takashi Hiraoka stated: "the authority of the court is ruined. It is not an exaggeration to say that the Court is manipulated by the nuclear powers."[51] A representative of the Japan Confederation of A and H Bomb Sufferers

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[47] *Id.*

[48] *Id.* at 435.

[49] Nanda & Krieger, *supra* note 4, at 164.

[50] *Id.* at 160.

[51] *Id.*

Organizations, commented: "We would like to ask, is it all right to kill all human beings under the banner of self-defense?"[52] The outrage reflects the reality that a repercussion of the 1996 Advisory Opinion is that a nuclear catastrophe may occur once again.

A consequence of the 1996 Advisory Opinion is that NWS still consider the use of their nuclear arsenal a legal policy option.[53] The US Department of Defense's ("DoD") Law of War Manual indicates that "nuclear weapons are lawful weapons for the United States," as the US has not accepted a treaty rule that prohibits the use of nuclear weapons *per se*, and there is no general prohibition in treaty or customary international law on the use of such.[54] Although the DoD's manual constrains nuclear weapons to the law of war and thus considers incidental harm to civilians compared to military advantage to be gained, the US will consider nuclear weapons in extreme circumstances to defend the vital interests of the US or its allies and partners.[55] The UK's Ministry of Defence states in its Manual of the Law of Armed Conflict that the UK would consider "using nuclear weapons in self-defence, including the defence of its NATO allies, and even then only in extreme circumstances."[56] To the UK, whether the use, or threatened use, of nuclear weapons in a particular case is lawful depends on all the circumstances.[57] The ICJ's

[52] *Id.*

[53] For a database of State manuals of war, *see* Int'l Comm. of the Red Cross, *National Practice,* INTERNATIONAL COMMITTEE OF THE RED CROSS, *see* https://ihl-databases.icrc.org/en/national-practice/all-national-practice (last visited Nov. 9, 2023).

[54] DEP'T OF DEF. OFF. OF GENERAL COUNSEL, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, 426 (June 2015, updated July 2023).

[55] *Id.*

[56] MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT (JSP 383) at 117 (UK).

[57] *Id.*

failure in 1996 to declare nuclear weapons *per se* illegal leaves open the door for NWS to use nuclear weapons in conflict.

This open door galvanizes nuclear posturing in contemporary conflict. A focal point of this assertion is demonstrated by the hostilities between India[58] and Pakistan[59] over the control of Kashmir. India's nuclear weapons program began in 1974 and became viable in May 1998, two years after the 1996 Advisory Opinion.[60] This acquisition of nuclear weapons bellies the ICJ's assertion that there exists an obligation to pursue in good faith negotiations leading to nuclear disarmament. Pakistan implied as early as 1987 that it has a successful nuclear weapon program.[61] The nuclear tests carried out by India on May 11 and 13, 1998 (the Chagai Tests), and by Pakistan on May 28 and 30, 1998 (the Pokhran-II Tests) aroused the rivalry between India and Pakistan.[62] As the tensions continued to spark in the early 2000s over Kashmir, neither of the parties ruled out the use of nuclear weapons, and Pakistan, to this day, has not declared a No First Use policy.[63] While India originally maintained a No First Use policy, following the Pakistan-based terror group Jaish-e-Mohammd's 2019 attack in Kashmir resulting in the death of forty Indian personnel, Indian Defense Minister Rajnath Singh suggested that India is

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[58] India possesses an estimated 164 nuclear weapons in their arsenal. *See* Ctr. For Arms Control And Non-Proliferation, *India and Pakistan*, CENTER FOR ARMS CONTROL AND NON-PROLIFERATION, https://armscontrolcenter.org/countries/india-and-pakistan/ (last visited Nov 9, 2023).

[59] Pakistan possesses an estimated 170 nuclear weapons in their arsenal. *See id.*

[60] Fakiha Khan, Note, *Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute*, 29 GA. J. INT'L & COMP. L. 361, 367-68 (2001).

[61] *Id.* at 369.

[62] *Id.* at 361; *See* Ctr. For Arms Control And Non-Proliferation, *supra* note 58.

[63] *See* INT'L CRISIS GROUP, KASHMIR: CONFRONTATION AND MISCALCULATION, ASIA REPORT No. 35, at 9 (July 11, 2002), available at https://www.crisisgroup.org/asia/south-asia/kashmir/kashmir-confrontation-and-miscalculation; *Id.*

reconsidering the policy.[64] Until relations between New Delhi and Islamabad cool, the fact that the use and threat of nuclear weapons is not *per se* illegal could trigger a nuclear crisis; even a small nuclear exchange between the two could kill 20 million people in a week.[65]

Additional nuclear posturing that implicates the Doomsday Clock include the ongoing Russia-Ukraine and Israel-Hamas hostilities, as well as a possible China-Taiwan conflict. In regard to Ukraine, despite warnings to Russia by the US against using nuclear weapons in Ukraine, Vladimir Putin moved a batch of tactical nuclear weapons to Belarus, under the guise of "deterrence."[66] Belarusian President Alexander Lukashenko further stated he would show no hesitation in using Russia tactical nuclear weapons stationed on Belarusian soil.[67] Dmitry Medvedev, former Russian president, stated that Russia may be forced to use a nuclear weapon if Ukraine's counteroffensive succeeds.[68] Not only did Medvedev warn of Russian nuclear expansion should Sweden and Finland join NATO, but he further stated that strategic nuclear weapons could be used to defend territories incorporated into Russia from Ukraine.[69]

In the scope of Israel-Hamas, which re-ignited following Hamas' terror attack on Israel on October 7th, 2023, some Israeli officials have called on nuclear weapon use against Hamas.

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[64] *See* Abigail Stowe-Thurston, *Added Ambiguity Over India's No First Use Policy is Cause for Concern,* CENTER FOR ARMS CONTROL AND NON-PROLIFERATION (Aug. 22, 2019), https://armscontrolcenter.org/why-india-and-pakistan-should-both-have-no-first-use-policies/.

[65] *See* Ctr. For Arms Control And Non-Proliferation, *supra* note 58.

[66] *See* Josh Pennington, Alex Stambaugh, & Bred Lendon, *Medvedev says Russia could use nuclear weapon if Ukraine's fightback succeeds in latest threat*, CNN (July 31, 2023, 11:35 AM), https://www.cnn.com/2023/07/31/europe/medvedev-russia-nuclear-weapons-intl-hnk/index.html.

[67] *Id.*

[68] *Id.*

[69] *Id.*

One Israeli lawmaker, Revital Gotliv, urged the use of nuclear weapons on Gaza, stating: "Only an explosion that shakes the Middle East will restore this country's dignity, strength, and security! It's time to kiss doomsday."[70] Israeli government minister Amihai Eliyahu suggested in an interview that Israel should drop an atomic bomb on Gaza.[71] Even if these threats remain empty and are assertions by minor officials, the conflict threatens to invoke a larger war between Hezbollah, on Israel's northern border, and Iran. Given indiscriminate terror tactics by Hamas and Hezbollah, Israel could deploy a nuclear weapon in order to protect itself.

Furthermore, a conflict between China and Taiwan over Taiwan's sovereignty implicates Armageddon. While Taiwan does not possess nuclear weapons,[72] the US DoD asserts that China increased its arsenal of operational nuclear warheads from an estimated 400 in 2021 to more than 500 as of May 2023.[73] Moreover, President Biden confirmed that US forces would defend Taiwan in the event of a Chinese invasion.[74] As the DoD represented at the beginning of 2023 that it maintains approximately 3,708 nuclear warheads, and has stated in its Law of War Manual

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[70] Ishaan Tharoor, *As Israel ramps up war with Hamas, backers cheer destruction of Gaza*, THE WASHINGTON POST (Oct. 13, 2023, 12:09 AM), https://www.washingtonpost.com/world/2023/10/13/israel-rhetoric-gaza-response-retribution-punishment/.

[71] Najib Jobain, Wafaa Shurafa, & Kareem Chehayeb, *Gaza has lost telecom contact again, while Israel's military says it has surrounded Gaza City,* AP News (Nov. 5, 2023), https://apnews.com/article/israel-hamas-war-news-11-05-2023-eb1dfa6afe40ba267024c7d819e17194.

[72] *See* Nuclear Threat Initiative, *Taiwan Overview*, NUCLEAR THREAT INITIATIVE (Sep. 6, 2023), https://www.nti.org/analysis/articles/taiwan-overview/.

[73] *See* Emily Feng, *New Pentagon Report Claims China Now Has Over 500 Operational Nuclear Warheads*, NATIONAL PUBLIC RADIO, (October 19, 2023, 4:27 PM), https://www.npr.org/2023/10/19/1207156597/new-pentagon-report-claims-china-now-has-over-500-operational-nuclear-warheads.

[74] *See* David Brunnstrom & Trevor Hunnicutt, *Biden says U.S. forces would defend Taiwan in the event of a Chinese invasion*, REUTERS (Sep. 19, 2022), https://www.reuters.com/world/biden-says-us-forces-would-defend-taiwan-event-chinese-invasion-2022-09-18/.

that the US views the use of nuclear weapons as legal,[75] a head-to-head nuclear conflict between the US and China, which is a reality given the 1996 Advisory Opinion, could result in a global nuclear catastrophe.

Lastly, as nuclear weapon use remains within the scope of legality, NNWS have sought to obtain nuclear weapons. North Korea, who signed the Treaty on the Non-Proliferation of Nuclear Weapons in 1985 (and withdrew in January of 2003), shocked the world with its underground nuclear test in October of 2006.[76] Despite President Biden's 2021 promise to the United Nations of "relentless diplomacy" to halt North Korea's nuclear program,[77] North Korea has continued to test ballistic missiles with nuclear capabilities,[78] threatening stability in East Asia and placing Seoul at risk of nuclear elimination. In regard to Iran, in February of 2023 the Annual Threat Assessment of the U.S. Intelligence Community asserted that "since the 2020 assassination of nuclear scientist Mohsen Fakhrizadeh, Iran has accelerated the expansion of its nuclear program . . . and undertaken research and development activities that would bring it closer to producing the fissile material for completing a nuclear device following a decision to do so."[79]

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[75] *See* Dep't of Def. Off. of General Counsel *supra* note 54, at 426.

[76] *See* Council on Foreign Rel., *North Korean Nuclear Negotiations*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/timeline/north-korean-nuclear-negotiations (last visited Nov. 14, 2023); Arms Control Ass'n, *Chronology of U.S.-North Korean Nuclear and Missle Diplomacy*, *1985-2022*, ARMS CONTROL ASSOCIATION (Apr. 2022), https://www.armscontrol.org/factsheets/dprkchron.

[77] *See* Arms Control Ass'n, *supra* note 76.

[78] In January of 2022, North Korea launched two short-range ballistic missiles as well as an intermediate-range Hwasong-12 ballistic missile. *See id.*

[79] OFF. OF THE DIR. OF NAT'L INTELLIGENCE, ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 18 (Feb. 6, 2023), available at https://www.odni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf.

As long as nuclear weapons remain in the realm of legality, NNWS will likely continue to research and develop nuclear weapons.

IV. Twenty-Seven Years Later: Does Customary or Convention Law Prohibit Nuclear Weapons?

This paper is a part of a series entitled *Conflict Then and Now: Historical and Modern Perspectives on World War III*, a reprise of conflict that seeks to offer perspectives and solutions to catastrophe in the event of future global conflicts. Needless to say, offering a solution to the use and threat of nuclear weapons is, to put it mildly, next to impossible. Nevertheless, given that twenty-seven years have passed since the ICJ's 1996 Advisory Opinion, this paper can, at minimum, opine on whether conventional or customary international law exists today as to prohibit the threat of and use of nuclear weapons outright, in the event the Court would take up the question once again. It appears that while the world is inching toward a system of nuclear prohibition there is not yet sufficient international consensus to eliminate nuclear weapons use.

On September 20, 2017, the Treaty on the Prohibition of Nuclear Weapons was opened for signature.[80] The treaty forbids the use, threat of use, development, production, manufacturing, acquisition, possession, stockpiling, transfer, stationing and installment of nuclear weapons or assistance with any prohibited activities.[81] Overall, the treaty contains a comprehensive set of prohibitions on participating in any nuclear weapon activities whatsoever, including the use and

[80] *See* Treaty on the Prohibition of Nuclear Weapons, *opened for signature September 20, 2017*, 3379 U.N.T.S. 56487.

[81] Arms Control Ass'n, *Treaty on the Prohibition of Nuclear Weapons*, Arms Control Association, (last visited Nov 9, 2023) https://www.armscontrol.org/treaties/treaty-prohibition-nuclear-weapons.

threat of such weapons.[82] While this treaty points in the direction of a flat elimination of nuclear weapon use, universal ratification of the treaty has not yet occurred; as of November 10th, 2023, 93 States have signed the treaty, while 69 States are parties to the treaty.[83] None of the NWS have signed or ratified the treaty.[84] Given this, there is not yet "comprehensive and universal conventional prohibition on the use, or the threat of use" [85] of nuclear weapons, or even a broad consensus, to which the ICJ could articulate a prohibition of nuclear weapons.

Another post-1996 treaty is the Central Asian Nuclear Weapon-Free Zone Treaty (CANWFZ). Like the Bangkok Treaty, Treaty of Tlatelolco, Treaty of Rarotongo, and Treaty of Pelindaba, this treaty is a regional ban of nuclear weapons in Central Asia. China, France, Russia, the UK and the US signed the protocol to the treaty, whereby the five nuclear powers provided guarantees not to use nuclear weapons against the five Central-Asia Treaty participants.[86] The US, however, has not ratified CANWFZ.[87] As the ICJ in 1996 did not perceive regional bans of nuclear weapon use as a prohibition against nuclear weapons, instead viewing these treaties as a part of the emergence of a rule of complete prohibition of all uses of

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[82] United Nations Off. For Disarmament Affairs, *Treaty on the Prohibition of Nuclear* Weapons, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, https://disarmament.unoda.org/wmd/nuclear/tpnw/ (last visited Nov. 10, 2023).

[83] For a list of States that are parties and signatories of the treaty, *see* United Nations Treaty Collection, *Treaty on the Prohibition of Nuclear Weapons*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26 (last visited Nov 10, 2023).

[84] *See id.*

[85] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 63 (July 8).

[86] Erlan Idrissov, *A New Step Forward to Greater Regional and Global Security*, THE ASTANA TIMES (May 13, 2014), https://astanatimes.com/2014/05/new-step-forward-greater-regional-global-security/.

[87] *See* United Nations, *Protocols to the Nuclear-Weapon-Free-Zone Treaties*, UNITED NATIONS PLATFORM FOR NUCLEAR-WEAPON-FREE-ZONES, https://www.un.org/nwfz/content/protocols-nuclear-weapon-free-zone-treaties#_ftn3 (last visited Nov 10, 2023).

nuclear weapons, the ICJ would likely see CANWFZ merely as a further element of the rule's emergence.

Regarding customary international law, *opinio juris* is likely not strong enough to emerge as *lex lata*. While the UNGA has continued to issue resolutions addressing nuclear weapons, such as UNGA Resolution 75/65 (General and Complete Disarmament: Towards a Nuclear-Weapon-Free World: Accelerating the Implementation of Nuclear Disarmament Commitments),[88] and the Security Council has issued resolutions on the matter,[89] NWS continue to brandish their nuclear arsenal to deter belligerents.[90] Moreover, since 1996 additional States have acquired nuclear weapons, such as India and North Korea. Overall, the emergence of customary international law has been hampered by deterrence as well as the increase of NWS.

V. CONCLUSION

In sum, the International Court of Justice's failure to declare the threat or use of nuclear weapons *per se* illegal in 1996 ushered in consequences, evident in modern conflict. Such repercussions of the 1996 Advisory Opinion include NWS viewing nuclear weapons as a legal policy option, dangerous nuclear posturing, and the acquisition of nuclear weapons by NNWS. The ICJ could have maintained there existed in conventional and customary international law a prohibition against the threat and use of nuclear weapons, as maintained by Judge Weeramantry.

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[88] *See generally* G.A. Res. 75/65 (Dec. 15, 2020).

[89] *See e.g.* S.C. Res. 1540 (Apr. 28, 2004) (affirming support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of nuclear, chemical or biological weapons and the importance for all States parties to these treaties to implement them fully in order to promote international stability).

[90] *See* Department of Defense, *21st Century Nuclear Deterrence & Missile Defense*, DEPARTMENT OF DEFENSE, https://dod.defense.gov/News/Special-Reports/21st-Century-Nuclear-Deterrence-and-Missile-Defense/ (last visited Nov. 15, 2023).

By not doing so, nuclear weapons remain an ever-looming threat. While considerable progress has been made since 1996 toward disarmament, there is still an absence of conventional or customary international law suggesting a prohibition on nuclear weapon use. If the ICJ were to address once again whether the threat or use of nuclear weapons is in any circumstance permitted under international law, it would likely render an opinion similar to its 1996 Advisory Opinion.

Nevertheless, not all is doom and gloom. New Zealand penned an optimistic written submission for the 1996 Advisory Opinion, still relevant today:

> "International law and relevant state practice [of nuclear weapons] has been steadily increasing and developing at both the regional and the global levels and . . . at the national level through the enactment of legislation. Emerging principles and developments in related areas of international law, such as protection of the environment, can also be pointed to. All of this provides reinforcement for the view that various norms of international law have emerged in this area. Even if it may not yet be possible to say that, in every circumstance, international law proscribes the threat or use of nuclear weapons, there can be little doubt that the law has been moving in that direction. In New Zealand's view, the sooner that point is reached, through the progressive development of international law, including the negotiation process, the more secure the international community will be."[91]

Not only have the UNGA and Security Council issued recent resolutions affirming their commitment to circumscribing nuclear weapons, but the existence of treaties such as the Treaty on the Prohibition of Nuclear Weapons and CANWFZ point towards a growing desire to circumscribe and outright eliminate nuclear weapons. As New Zealand wrote in 1996, there can be little doubt that the law has been moving, and is continuing to move, in the direction of

[91] Note Verbale dated 20 June 1995 from the Embassy of New Zealand, together with Written Statement of the Government of New Zealand, 24 (June 20, 1995), https://www.icj-cij.org/sites/default/files/case-related/95/8710.pdf.

eliminating the threat and use of nuclear weapons. As international law develops towards prohibition, perhaps humanity can rewind the Doomsday Clock.

The World's Oldest Embargo: Imperialism, the Cold War, and the Helms-Burton Act

Genevieve McCarthy

I. INTRODUCTION

In many ways, the U.S. Embargo on Cuba is a remnant of the Cold War; however, in other ways, it is a unique product of the long history of U.S.-Cuba relations, which predated the Cold War and the Cuban Revolution. The U.S. Embargo on Cuba is an act of warfare that serves neither country nor the world trading system. Unfortunately, that does not mean that its end is near. The United Nations has recognized that the U.S. and Cuba have each violated international law, and that the embargo is illegal.[1] The embargo is a form of unilateral sanctions in countermeasure law, which gets its guidance from the International Law Commission's non-binding 2001 Articles on State Responsibility,[2] and the standards of proportionality and necessity.[3] In the most recent United Nations General Assembly vote about the legality of the embargo, in 2022, 185 countries voted for a resolution condemning the embargo, with only the U.S. and Israel voting against the resolution.[4] This was the 30th consecutive year, since 1992, that the UN General Assembly has voted to condemn the U.S. embargo.[5]

Embargoes are a common form of warfare in the international community, and the U.S. used them during the Cold War against Eastern Europe, China, North Korea, and Vietnam.[6]

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[1] Frank J. Prial, U.N. Votes to Urge U.S. to Dismantle Embargo on Cuba, THE NEW YORK TIMES, November 25, 1992.; Edith M. Lederer, *UN Votes Overwhelmingly to Condemn US Embargo of Cuba*, ASSOCIATED PRESS, November 3, 2022.

[2] United Nations International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Res. 56/83 (December 12, 2001).

[3] NIGEL D. WHITE, THE CUBAN EMBARGO UNDER INTERNATIONAL LAW: EL BLOQUEO, 88 (2014).

[4] The United States and Israel opposed the resolution, and Brazil and Ukraine abstained from voting. Lederer, *supra* note 1.

[5] In 2021, there was no vote due to Covid. Lederer, *supra* note 1.

[6] Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 AMERICAN BUSINESS LAW JOURNAL 293, 316 (2017).

Other sanctions, that were significant but did not amount to embargoes, were imposed on Bolivia, Guatemala, El Salvador, Nicaragua, and other Latin American countries with communist insurgencies.[7] The embargo on Cuba is the longest-standing embargo in the world, having begun officially 1962 as a President John F. Kennedy executive order, and existing to some degree earlier during the Eisenhower administration.[8] The embargo was molded by subsequent presidents until the passage of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, better known as the Helms-Burton Act.[9] Since then, the embargo has been controlled by Congress, with influence from the Cuban congressional lobby, instead of the executive branch which oversaw the policy from the 1960-90s.[10]

Sanctions are easy to enact and difficult to repeal.[11] International trade was a hot topic during presidential elections and any reversal of the embargo would subject a president to scrutiny.[12] Even if a president sought to push back on the embargo, as Obama began to do, this requires congressional approval since the embargo was legislated in 1996. The U.S. would be better served by trade liberalization with its neighbor; however, domestic politics pose limitations. Revisions to the Helms-Burton Act that provide value to the Cuban economy in its areas of concern, like infrastructure and food shortages, can align with or even promote the transition to democracy that many U.S. domestic stakeholders continue to demand as a

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[7] C. William Walldorf, *Sanctions, Regime Type, and Democratization: Lessons from U.S.-Central American Relations in the 1980s*, 129 POLITICAL SCIENCE QUARTERLY 643, 644 (2014).

[8] Isabella Oliver and Mariakarla Nodarse Venancio, *Understanding the Failure of the U.S. Embargo on Cuba*, THE WASHINGTON OFFICE ON LATIN AMERICA. "Understanding the Failure of the U.S. Embargo on Cuba." (Feb. 4, 2022), https://www.wola.org/analysis/understanding-failure-of-us-cuba-embargo/.

[9] Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (also known as the Helms-Burton Act), 22 U.S.C. §§ 6021-6091.

[10] Fandl, *supra* note 6, at 295.

[11] Jessica Karl, *America Is Addicted to Sanctions. Time for an Intervention?*, BLOOMBERG, August 1, 2023.

[12] *Id.*

prerequisite, regardless of whether doing so violates international law. The embargo is not just representative of the Cold War but also a long war with Cuba that could potentially come to an end in the coming years.

A. Warfare and Embargo in the 1960-90s

The United States' relationship with its neighbor, only 103 miles off the coast of Florida, began long before the embargo. Tension began between the two in the late 19th century, when Cuba was a Spanish colony.[13] Historians attribute the Spanish-American War of 1898 in large part to the Spanish monarchy's refusal to sell Cuba to the U.S.[14] The U.S. intervened in Cuba's successful uprising against Spain, on the side of Cuban independence forces.[15] Cuba was subsequently occupied by the U.S. between 1898-1902 and 1906-9, followed by what is known as a period of U.S. imperialism from 1902-59.[16] The latter period included administration of the U.S.-backed president (1940-1944) and military dictator (1952-1959) Fulgencio Batista.[17] Batista regularly imprisoned and killed leftist dissenters, claiming an estimated 20,000 victims.[18]

In 1959, Batista was ousted by Fidel Castro in the Cuban Revolution. This regime change was a drastic shift for the U.S., which had been trading nickel ore and sugar with Cuba since before the Spanish-American War.[19] The U.S. was Cuba's largest importer of sugar by the

[13] White, *supra* note 3, at 183.
[14] *Id.*
[15] *Spanish-American War: Summary, History, Dates, Causes, Facts, Battles, & Results*, BRITANNICA ONLINE. https://www.britannica.com/event/Spanish-American-War.

[16] White, *supra* note 3, at 183.
[17] Sondra K. Marshall, *State Violence and the Cuban Diaspora Since 1959*, 2 UNIV. OF NEB. GRADUATE REVIEW 79, 83 (2022).

[18] *Id.*
[19] Fandl, *supra* note 6, at 319.

1850s.[20] By the 1910s, 60 percent of farmland was owned by U.S. corporations and individuals.[21] In response to the Cuban Revolution, President Eisenhower significantly cut the quota for Cuban sugar.[22] At this time, the Cuban sugar industry employed over 500,000 on the island, and the U.S. hoped that ensuing wage cuts would lead to uprising against the Castro regime.[23] In a declassified 1960 State Department memorandum, Deputy Assistant Secretary of State for Inter-American Affairs wrote that the goal was to "bring about hunger, desperation, and overthrow of government."[24] He wrote, "Communist influence is pervading the Government and the body politic at an amazingly fast rate... The only foreseeable means of alienating internal support is through disenchantment and hardship."[25] Eisenhower prohibited U.S. refineries in Cuba from refining Soviet crude oil, which Cuba had begun to import at subsidized prices.[26] In response, Castro began expropriating U.S. oil refineries and other property, as he would continue to do throughout the early 1960s.[27] In January 1961, Eisenhower officially cut diplomatic ties with the Cuba.[28]

The first embargo took the form of an executive order, passed by President John F. Kennedy in 1962. This embargo banned "importation into the United States of all goods of Cuban origin and all goods imported from or through Cuba."[29] JFK banned travel to Cuba and

[20] White, *supra* note 3, at 21.
[21] *Id.*
[22] Fandl, *supra* note 6, at 319.
[23] R.T. NAYLOR, ECONOMIC WARFARE: SANCTIONS, EMBARGO BUSTING, AND THEIR HUMAN COST, 183 (2001).
[24] Memorandum from the Deputy Assistant Secretary of State for Inter-American Affairs Lestor Mallory on the Decline and Fall of Castro (Apr. 6, 1960) (on file with the National Security Archive).

[25] *Id.*
[26] Naylor, *supra* note 23, at 183.
[27] *Id.*, at 154.
[28] White, *supra* note 3, at 26.
[29] Cuban Democracy Act 22 U.S.C. ch. 69, §§6001-6010.

froze all Cuban assets in the U.S.[30] At the onset of the 1962 embargo – the early years of Castro's regime – the embargo's provisions were strictly enforced.[31] The U.S. deployed a warship to the Florida Straits to patrol the vessels that came and went.[32] The effects of the original embargo were more attributable to executive volition than the provisions of the embargo itself, since its enforcement would rise and fall over subsequent presidencies.[33]

In the early 1960s, executive volition took the form of Central Intelligence Agency (CIA) operations and U.S. pressure on international organizations and financial institutions to condemn the Cuban regime.[34] The Bay of Pigs invasion, devised by Eisenhower and ordered by JFK, was a failed attack by CIA-funded and trained Cuban exiles, "Brigade 2506," on the Cuban Revolutionary Armed Forces. Fidel Castro's army held over 1,200 survivors for ransom for $10 million cash and $53 million of food and medicine.[35] One year later, in what is known as the Cuban Missile Crisis, the U.S. and the Soviet Union had the closest encounter with direct nuclear conflict in the Cold War, when Soviet missiles were found just over 100 miles away from the U.S. in Cuba.[36] The U.S. subsequently pledged not to intervene in Cuba.[37] It began to do so through covert activity: CIA Operation Mongoose.[38]

The CIA's Operation Mongoose recruited Cuban exiles in Miami to open "gun shops, travel agencies, air charter services, radio stations, boat and car dealerships, real estate firms and detective agencies as fronts for paying agents, providing supplies or, on occasion, granting

[30] Fandl, *supra* note 6, at 320.
[31] White, *supra* note 3, at 183.
[32] *Id.*
[33] President Jimmy Carter took more steps than other presidents to end the embargo. Fandl, *supra* note 6.
[34] White, *supra* note 3, at 183.
[35] White, *supra* note 3, at 184.
[36] Naylor, *supra* note 23, at 185.
[37] *Id.*
[38] *Id.*

pensions to widows."[39] The CIA trained and funded Brigade 2506 in plots to burn fields, bomb sugar mills, contaminate import and export cargoes, and sabotage equipment imports.[40] For years, the CIA printed counterfeit money to pour into Cuba.[41] Even after Operation Mongoose ended, due to the prioritization of Vietnam over Cuba, Brigade 2506 and other recruits continued to engage in money laundering and drug trafficking.[42] The U.S. embargo remained in place, despite presidents such as Jimmy Carter intending to smooth relations, because of Castro's support of Communist movements in Africa and suppression of dissent.

The U.S. spent much of the 1960s and 1970s wielding its influence in international organizations like the Organization of American States (OAS), World Bank, and International Monetary Fund (IMF) against Cuba. President Lyndon B. Johnson convinced the OAS to sanction Cuba and cease diplomatic relations with the Cuban government, citing Cuban intervention in Central America as a violation of territorial integrity under Article 6 of the Rio Treaty.[43] The OAS lifted its sanctions against Cuba in 1975.[44] The U.S. convinced the World Bank, IMF, and Inter-American Development Bank – all of which are headquartered in the U.S. – to exclude Cuba from membership.[45] The U.S.'s voting power in these institutions ranges from 15-30%, while states like Japan, China, France, and the U.K. tend to have 4-6% voting power.[46]

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[39] Morris Morley, Imperial State and Revolution: The United States and Cuba, 1952-1986, Cambridge: Cambridge University Press, 1987, especially Appendix I.
[40] The CIA secured the cooperation of foreign companies to import defective parts to Cuba; in one instance, a German firm was recruited to send ball-bearings that were off center. Naylor, *supra* note 23, at 185.
[41] *Id.*
[42] Naylor, *supra* note 23, at 186.
[43] White, *supra* note 3, at 101; Organization of American States, Inter-American Treaty of Reciprocal Assistance [Rio Treaty], September 3, 1947, O.A.S.T.S. No. B-29, 21 U.N.T.S. 77.

[44] White, *supra* note 3, at 101.
[45] SURYA P. SUBEDI, UNILATERAL SANCTIONS IN INTERNATIONAL LAW (2021).

[46] *Id.*

Most shareholders have voting power of less than .10%.[47] Cuba remains one of five countries that is not a member of the World Bank or IMF, along with Andorra, Cuba, Liechtenstein, Monaco, and North Korea.

Cuba grew economically from the 1960s through the 1980s, in spite of the embargo and primarily due to smuggling networks and Soviet subsidies.[48] Cuba's economic growth continued even throughout the 1980s, while other Latin American states struggled economically, like during the 1982 Mexican debt crisis.[49] Cuban goods were primarily smuggled through Panama, where goods were stamped with "product of Panama" and sent to U.S. markets.[50] Cuban merchants co-mingled nickel ore with other metals or sent it to another country to be manufactured and sent to the U.S.[51] Planes were loaded with U.S. goods in Mexico and nominally sent to Costa Rica, Panama, or elsewhere in Central America, when in reality they were destined for Cuba.[52] Many of the smugglers were from the CIA-trained Brigade 2506.[53] The Soviet Union traded oil for sugar at highly favorable rates for Cubans, which Cuba would trade at a commercial rate.[54] Soviet subsidies accounted for 20% of Cuba's national income during this period of growth.[55]

Cuba's economic growth ended with the fall of the Soviet Union in 1991. Without Soviet subsidies and food imports, the U.S. embargo hit Cuba harder.[56] The U.S. saw the opportunity to

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[47] *Id.*
[48] Naylor, *supra* note 23, at 186.
[49] *Id*; see e.g. Enrique R. Carrasco, *The 1980's: The Debt Crisis and the Lost Decade of Development*, 9 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 119, 120 (1999).
[50] Naylor, *supra* note 23, at 191.
[51] Naylor, *supra* note 23, at 188.
[52] *Id.*
[53] Naylor, *supra* note 23, at 185.
[54] Naylor, *supra* note 23, at 188.
[55] *Id.*
[56] Naylor, *supra* note 23, at 195.

sow resent in the Cuban government among its citizens, and hoped that sanctions would do so through inevitable wage cuts and food shortages.[57] President George H.W. Bush passed the 1992 Cuban Democracy Act, in an attempt to appeal to Cuban voters right before his election.[58] By this time, the Cuban American National Foundation, founded in 1981, had become a prominent congressional lobby.[59] This first piece of legislation foreshadowed the Helms-Burton Act passed in 1996, and included new additions that are central to the embargo today.[60]

For the first time, the embargo was extended to overseas subsidiaries of U.S. firms and tightened the shipping embargo, which had become more relaxed since the 1960s.[61] Shipping vessels were not able to use U.S. ports within 6 months after docking in a Cuban port, which affects trade from other countries which seek to make these stops in the same trip.[62] At this time, imports from subsidiaries of U.S. firms accounted for 20 percent of non-Communist imports.[63] Bill Clinton was in favor of reconciliation with Cuba, but after the somewhat close election with George H.W. Bush, he caved to pressure to uphold the embargo during his presidency.[64] President Clinton signed the Helms-Burton Act in 1996.

B. The Helms-Burton Act (1996) and International Law

The Helms-Burton Act imposes a comprehensive, and often extraterritorial, embargo on Cuba until the country implements a "transition government" and subsequent "democratically-

[57] *Id*.
[58] 22 U.S.C. ch. 69, §§6001-6010.
[59] Javier Corrales, *The Cuban Embargo: The Domestic Politics of an American Foreign Policy*, 4 PERSPECTIVES ON POLITICS 437, 401 (2006).
[60] 22 U.S.C. ch. 69, §§6001-6010.
[61] Naylor, *supra* note 23, at 195, 22 U.S.C. ch. 69, §§6001-6010.
[62] Id.
[63] Naylor, *supra* note 23, at 195.
[64] Fandl, *supra* note 6, at 295.

elected government."[65] The Act also has a provision that is notable to legal scholars – Article Three. This Article gives private citizens a right to private action with treble damages against companies that "traffic" in expropriated land. Since over 6000 companies were nationalized in the 1960s, this is difficult to avoid and disincentivizes companies from engaging with Cuba.[66] The broad definition of "trafficking" creates liability for any company in a contract with the Cuban government, or with another party that has a contract with the Cuban government, and so on. This analysis attributes three primary areas of concern to the text of the Helms-Burton Act: the extraterritoriality of subsidiary bans and private actions, isolation of Cuba from international organizations, and the requirement for a U.S.-led transition.

II. INTERNATIONAL LAW

Embargoes and sanctions are governed by customary international law about countermeasures as well as international humanitarian law, to a lesser degree. In the case of the U.S. embargo on Cuba, many states disagree that a six-decade embargo, with no end in sight, can be considered proportional.[67] Under international law, the embargo is a nonforcible countermeasure.[68] Customary international law governs unilateral sanctions and provides little guidance on their permissibility.[69] In one ICJ case, Gabčíkovo-Nagymaros Project (1995), countermeasures were deemed permissible under international law; however, the bounds were

[65] Helms-Burton Act, *supra* note 9, title 2 §201.
[66] Id.
[67] Jhany Marcelo Macedo Rizo, *Nuevos vientos soplan en el malecón de La Habana: Reformas económicas y cambio político en Cuba*, 34 TEMAS DE NUESTRA AMÉRICA REVISTA DE ESTUDIOS LATINOAMÉRICANOS 43 (2018).
[68] MICHAEL P. MALLOY, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE, 305 (2001).
[69] *Id.* at 42.

hardly defined by the Court.[70] One requirement was clearly articulated: for the countermeasures to be lawful, they be "taken in response to a previous international wrongful act of another State and... directed against that State."[71]

While the international community generally agrees that the embargo violates international law, not all countries believe that Cuba's expropriations were illegal.[72] There are no treaties on expropriations and some states deny that compensation is always necessary.[73] Traditionally, however, the idea is that expropriations must be compensated and that compensations must be prompt, adequate, and effective.[74] Cuban exiles in the U.S. have not been granted compensation and the U.S. cites this as the impetus of the embargo. The international community is less convinced, especially since Cuba *did* compensate Cuban exiles in Canada and France (although not entirely prompt, adequate, and effective).[75]

The United States does not make a good case for the embargo as largely based on Cuba's military interventions in leftist movements. Cuba's independence, after all, is a product of U.S. military intervention in the Spanish-American War.[76] The U.S. draws on Article 2(4) of the UN Charter which prohibits violations of the use of force against a state's territorial integrity. The U.S. has cited Cuban intervention in Latin American and African communist movements as a violation of Article 2(4) of the UN Charter.[77] The international community deems the embargo to

[70] Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 92, (Sept. 25).

[71] Malloy, *supra* note 68, at 38.
[72] France 24 English, *Cuba Embargo: Why Does the US Continue to Reject UN Moves to End It?*, YOUTUBE (November 2, 2022), https://www.youtube.com/watch?v=voeSKQH67rg.

[73] Malloy, *supra* note 68, at 317-8.
[74] *Id.*
[75] France 24 English, *supra* note 72.
[76] Britannica, *supra* note 15.
[77] Ironically, Cuba's independence was achieved through U.S. intervention. Malloy, *supra* note 68, at 33.

be illegal partly due to doubt surrounding the illegality of the expropriations or military interventions, which would serve as the requisite illegal act to render the countermeasures permissible.

Under international humanitarian law, countermeasures are a form of self-help, which is guided by the "proportionality and necessity," known as the Caroline test from customary international law.[78] This is recognized by the International Law Commission Draft Articles: "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[79] Another requirement articulated by the International Law Commission is that the countermeasures be temporary and reversible "in their effects and in terms of future legal relations between the two States."[80] This is because countermeasures are not intended to be punitive, but instrumental, with the goal of bringing an end to the illegal activity.[81] Being the longest-standing embargo in the world, outlasting sanctions against other violators of international law, this embargo appears punitive and is not "reversible" in the way that the Draft Articles envisioned. Finally, Article 50(1)(b) of the Draft Articles states that countermeasures cannot affect "obligations for the protection of fundamental human rights."[82] Although causation between human rights issues, such as food shortages, is difficult to prove, Cuba and other actors state that the embargo created the current situation.[83] For example, water sanitation facilities have also suffered because they were constructed before the embargo with U.S.-made machinery, which has been completely cut off

[78] This case, however, was on self-defense.
[79] ILC, *supra* note 2, at Art. 51.
[80] ILC, *supra* note 2, at Art. 49, para. 2-3, and Art. 53.
[81] *Id.*
[82] ILC, *supra* note 2, at Art. 50(1)(b).
[83] White, *supra* note 3, at 178.

since 1962.[84] In one case, an oncology ward of a hospital was blocked from purchasing a CT/PET scan machine.[85]

A particular area of concern is the extraterritoriality of the embargo.[86] While the customs surrounding countermeasures generally is unclear, the UN Human Rights Council has condemned extraterritorial countermeasures.[87] It wrote that the Council,

> "[S]trongly objects to the extraterritorial nature of those measures which, in addition, threaten the sovereignty of States, and in this context calls upon all Member states neither to recognize these measures nor to apply them."

Concerned states believe that the extraterritoriality goes so far as to infringe on their jurisdiction to prescribe.[88] Jurisdiction to prescribe is the right of a state to create the laws that apply to those within its jurisdiction. Generally, a state has jurisdiction over those within its territory and its nationals abroad.[89]

III. RECOMMENDATIONS

Based on these concerns of the international community, but still limited by domestic U.S. politics, there are three provisions that should be removed or revised:

[84] Subedi, *supra* note 45, at 94.
[85] *Id.*
[86] Malloy, *supra* note 68, at 322.
[87] Subedi, *supra* note 45, at 43.
[88] *Id.*
[89] *Id.*

A. Subsidiaries of U.S. Companies

The Helms-Burton Act includes the embargo provisions first passed by President Bush in 1992. One crucial provision stretches the restrictions to subsidiaries of U.S. companies in third countries: §515.559

> "[N]o specific licenses will be issued... for transactions between U.S.-owned or controlled firms in third countries and Cuba for the exportation to Cuba of commodities produced in the authorized trade zone or for the importation of goods of Cuban origin into countries in the authorized trade zone."

The U.S. is the largest economy in the world and accounts for over one-quarter of the global GDP.[90] Notably, some industries have a particularly large U.S. influence: Microsoft, for example, owns 90% of the global share of operating systems like Windows.[91] Some pharmaceuticals are produced exclusively in the U.S.[92] The international community would like to see this provision repealed because it upsets businesses that are outside of the U.S.' jurisdiction to prescribe. Even without this provision, sanctions would still be in place against Cuba, potentially appeasing the embargo's domestic supporters. Article Three's private right against companies "trafficking" in expropriated land is an emblematic provision among congressional lobbyists, and thus would be more difficult to target. President Clinton's administration put Article Three on hold for years, but cases do arise from it now.[93] Article Three can be relaxed, whereas the ban against subsidiaries of U.S. companies has harmed Cuba's

[90] Subedi, *supra* note 45, at 93.
[91] *Id.*
[92] *Id.*
[93] *Id.*

access to food imports and discouraged companies around the world for investing in Cuba. This has led to the "pariah state" effect with regards to Cuba.[94] In order for Cuba to end food shortages, it must be able to import from sellers of agriculture and foodstuff which will likely be doing business with or owned in the U.S.

B. International Financial Institutions (IFIs)

Cuba remains one of the few states in the world that is not a member to the International Monetary Fund (IMF) or World Bank. Cuba is also not a member of the Inter-American Development Bank (IDB). If Cuba sought to gain trust from the international community, the IMF could provide its experience in promoting liberal fiscal and economic policies through its "conditionality" provisions in loans. The World Bank deployed approximately $20.7 billion dollars to Latin America and the Caribbean during the 2020 fiscal year.[95] The IDB similarly mobilized $23.4 billion in 2021.[96] Cuba could benefit immensely from these institutions, and integrate itself into the world financial system; however, the U.S. lobbied to ensure Cuba was not admitted as a member and has maintained this position, which is codified in the Helms-Burton Act:[97]

> "[T]he Secretary of the Treasury shall instruct the United States executive director of each international financial institution to use the voice and vote of the United States to oppose the admission of Cuba as a member..."

[94] *Id.*, at 96.
[95] *See* World Bank homepage.
[96] *See* Inter-American Development Bank homepage.
[97] Helms-Burton Act, *supra* note 9, title §104(a)(1).

(b): If any international financial institution approves a loan or other assistance to the Cuban Government over the opposition of the United States, then the Secretary of the Treasury shall withhold from payment to such institution an amount equal to the amount of the loan or other assistance, with respect to either of the following types of payment:

(1) The paid-in portion of the increase in capital stock of the institution.

(2) The callable portion of the increase in capital stock of the institution.

This provision of the Helms-Burton Act mandates that the executive branch takes a hard stand with serious punishments. In this situation, which is unique to Cuba, the U.S. has unfairly used its position as the host country of these banks and financial institutions. Underdeveloped infrastructure is among Cuba's most significant challenges and the World Bank and IDB have funded no projects in the country. Allowing Cuba to join international institutions could help to pave way for a more open economy and improved humanitarian environment. Refusing to do so runs contrary to these organizations' missions and international law principles of sovereignty.

C. Assistance to a Free and Independent Cuba

Title 2 of the Helms-Burton Act, "Assistance to a Free and Independent Cuba," sets out two phases which could trigger negotiations for the end of the embargo: the transitional government and the democratically elected government.[98] Cuba has had elections and President

[98] Helms-Burton Act, *supra* note 9, title 2.

Díaz-Canel and Raúl Castro both opened the economy somewhat; however, the Castro regime has not come to an end.[99] The Helms-Burton Act states its intention, "To assist a transition government in Cuba and a democratically elected government in Cuba to prepare the Cuban military forces for an appropriate role in democracy."[100] The bar that the Act sets for these phases, Title 2,§205-6, includes numerous government overhauls.[101] Although the requirements are important tenets of democracy, they are unlikely to be accomplished in the next few years. For example, a transitional government will only be identified when Cuba "has dissolved the present Department of State Security in the Cuban Ministry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades."[102] Cuba is struggling in terms of health and food, so negotiations should begin before a complete democratic overhaul. In October 2023, the U.S. traded sanctions relief for fair elections in Venezuela.[103] There are two core provisions:

> (1) Define a specific timeline and process for the expedited reinstatement of all candidates. All who want to run for President should be allowed the opportunity, and are entitled to a level electoral playing field, to freedom of movement, and to assurances for their physical safety.
>
> (2) Begin the release of all wrongfully detained U.S. nationals and Venezuelan political prisoners.

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[99] Raúl Rodríguez Rodríguez, *Las sanciones económicas como pilar de la política de Estados Unidos hacia Cuba a partir de 1959*, 54 ÉTUDES CARIBÉENNES (2023).

[100] Helms-Burton Act, *supra* note 9, title 2 sec 201(11)
[101] Helms-Burton Act, *supra* note 9, title 2,§205-6
[102] Helms-Burton Act, *supra* note 9, title 2 §205(a)(3)
[103] Press Statement from the Department of State on Signing of Electoral Roadmap Between the Unitary Platform and Representatives of Maduro (Oct. 18, 2023) (on file with the U.S. Department of State).

The U.S. sanctions on Venezuela's oil sector began in 2019 yet appear closer to their end than the embargo on Cuba that began on 1962. It is time for negotiations that would allow Cuba to reintegrate into the global economy, but the two-phase time period set out in the Helms-Burton Act makes negotiations unlikely for now. These requirements of the Act are restricting crucial progress.

IV. CONCLUSION

Much uncertainty surrounds the future of U.S.-Cuba relations.[104] During the Obama administration, diplomatic interaction was reestablished, and tourism resumed.[105] During the June 2021 protests in Cuba, some advocacy groups called for the end of the embargo, while Republican members of Congress like Marco Rubio and Floridian constituents[106] called for additional sanctions.[107] Biden sided with the latter and introduced additional sanctions.[108] In the U.S., many groups remain concerned about the Cuban regime's manipulation of the economy and the often-violent suppression of dissent.[109] Scorn from exile persists, whether it be exile due

[104] White, *supra* note 3, at 5.
[105] Council on Foreign Relations, *Cuba 2018: What to Expect* (October 2, 2017), https://www.cfr.org/event/cuba-2018-what-expect.

[106] In July 2021, protesters in Miami shut down several highways, calling for the Biden administration to respond more aggressively to protests in Cuba. Bridgette Matter, Miami-Dade 'SOS Cuba' Protesters on Palmetto Expressway: US Needs to End Communism, LOCAL 10 NEWS, July 13, 2021.

[107] WILLIAM M. LEOGRANDE, NOT A TOP PRIORITY: WHY JOE BIDEN EMBRACED DONALD TRUMP'S CUBA POLICY, AMERICAN UNIVERSITY (2021).

[108] *Id.*
[109] Council on Foreign Relations, *supra* note 105.

to expropriations in the 1960-80s or more recently, due to economic and human rights challenges.[110]

Many stakeholders have views on whether the embargo should be repealed, maintained, or strengthened. The international community is of the opinion that the embargo far surpasses acceptable countermeasures, either at the onset or now, six decades later.[111] This criticism gained additional bite when the U.S. reestablished trade relations with China, another communist regime and non-market economy, in 2000.[112] In 2021, the Cuban and Cuban-American population in the United States was 2.4 million.[113] Although the majority of Cuban-Americans do not support the embargo,[114] those that do form an influential congressional lobby.[115] This conflict has shaped the U.S. domestically; before the arrival of Cuban exiles, Miami was not the booming city that it is today.[116] Neither country has heeded to international law and the U.S. has shown only willingness to collaborate with domestic lobbies.

The U.S. embargo on Cuba is distinct from other embargoes and sanctions imposed during the Cold War. Actually, it's different from all other embargoes in the world in its duration and comprehensiveness. The embargo can be explained by the U.S.' relationship with Cuba in equal parts as it can be explained by the Cold War. The relationship was fraught after the U.S. attempted to purchase, occupied, and instated a military dictatorship in Cuba. The Cold War-era fear of communism, too, drove the embargo. That being said, the Cuban government has blamed

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[110] Naylor, *supra* note 23, at 183.
[111] Subedi, *supra* note 45, at 101.
[112] White, *supra* note 5, at 115.
[113] Mohamad Moslimani, Luis Noe-Bustamante, and Sono Shah, *Facts on Hispanics of Cuban Origin in the United States, 2021*." PEW RESEARCH CENTER'S HISPANIC TRENDS PROJECT (Aug. 16, 2023), https://www.pewresearch.org/hispanic/fact-sheet/u-s-hispanics-facts-on-cuban-origin-latinos/.

[114] Council on Foreign Relations, *supra* note 105.
[115] White, *supra* note 5, at 183.
[116] Naylor, *supra* note 23, at 183.

the population's woes on the embargo, which instills resentment in the U.S. government rather than the Cuban government.[117] Despite the complexity of the history and the various iterations of the embargo throughout the second half of the 20th century, the embargo violates international law and the spirit of the global trading system. At this point, concessions can be made that are beneficial to all parties and take significant steps towards the end of the embargo and the democratization of Cuba.

[117] Malloy, *supra* note 68, at 323-4.

The Weaponization of Social Media by Nonstate Actors

Lauren McNeal

I. INTRODUCTION

Alongside the growth of technology in the 21st century has come the creation of social media. While its primary function is to connect individuals and allow multiple new channels of communication, it has also been weaponized as a tool of misinformation, fearmongering, and recruiting by terrorist organizations. This paper discusses the role of social media in conflict and examines how it can be manipulated by terrorist groups. First, this paper will provide background information on the concern of social media use by terrorist organizations. Next, it will give an overview of Islamic State of Syria and Iraq's (ISIS) use of social media with examples of how social media has successfully influenced ISIS's followers and led to violence. Then, it will discuss the role of social media in the Israel-Hamas conflict. Finally, this paper will review legal reactions to this issue and determine potential future steps.

II. DISCUSSION

Terrorist organizations are progressively using less traditional routes to propagate certain interests. In the past, terrorists primarily used cyberwarfare to attack military or economic infrastructure, but the scope of these attacks has expanded with the creation of social media.[1] Now, U.S. adversaries are increasingly using social media to target individuals by influencing their beliefs and planting mistrust in their governments.[2] Further, many terrorist organizations

[1] *See* Jarred Prier, *Commanding the Trend: Social Media as Information Warfare,* 11 STRATEGIC STUD. Q. 50, 51 (2017).

[2] *See Id.*

use these platforms "as a tool for propaganda via websites, sharing information, data mining, fundraising, communication, and recruitment."[3]

A. Common Tactics By Terrorist Organizations On Social Media

One tactic that terrorist organizations use in weaponizing social media is spreading misinformation through "trends" lists.[4] Terrorist organizations will create automatic "bot" accounts that disseminate propaganda onto a social media platform, which turns into a "trending topic" that quickly spreads the message to a larger market.[5] This technique is popular on X (formerly Twitter) because of its visible "trends" list.[6] While Facebook also has a "trends" list, it is not as visible, and thus less popular among terrorist organizations.[7] Further, X has a "hashtag" function that allows users to make quick references so that other users can find tweets with similar hashtags.[8] For example, the World Cup in 2014 was a highly followed sporting event, and #WorldCup2014 quickly became a trending topic on X during the tournament.[9] ISIS's bots and followers quickly took advantage of the popularity of this hashtag.[10] At one point, almost every tweet using this hashtag was related to ISIS rather than soccer.[11] ISIS used this platform to promote recruitment messages and issue threats of violence against the tournament venue in

[3] Imran Awan, *Cyber Extremism: Isis and the Power of Social Media*, SOC'Y 138, 140 (2017).
[4] *See* Prier, *supra* note 2, at 52.
[5] *See Id.*
[6] *See Id.* at 53.
[7] *See Id.*
[8] *See Id.*
[9] *See Id.* at 64.
[10] *See Id.*
[11] *See Id.*

Brazil, effectively making use of social media as a tool for information warfare.[12] X consequently struggled in its attempt to put an end to the trend and ISIS propaganda.[13]

B. Islamic State Of Iraq And Syria (ISIS)

In regards to nonstate actors who use social media as a weapon in situations of conflict, terrorist groups such as Al-Qaeda and ISIS have been known to use social media to recruit like-minded people and spread propaganda.[14] In fact, ISIS was the first terrorist organization that used social media to obtain its goals.[15] ISIS uses a distinctive technique in its online propaganda, creating an "us" versus "them" narrative.[16] First, ISIS exposes the international community's inadequacy and ineffectiveness in combating the group, both in the digital realm and on the battlefield.[17] Then, ISIS injects fear into mainstream media platforms through posts and videos.[18] Lastly, ISIS enlists fresh recruits to join their ranks in Iraq and Syria, as well as in the digital sphere.[19]

The FBI has released statements detailing ISIS's consistent use of the internet to communicate to sympathetic listeners.[20] ISIS takes traditional media platforms and posts social media campaigns that have the power to go viral within seconds.[21] Further, attackers themselves

[12] *See Id.* at 64-65.
[13] *See Id.* at 64.
[14] *See* Cass R. Sunstein, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 236 (2d ed. 2018).
[15] *See* Prier, *supra* note 2, at 62.
[16] *See* Awan, *supra* note 3, at 149.
[17] *See* Prier, *supra* note 2, at 62.
[18] *See Id.*
[19] *See Id.*
[20] *See* Sunstein, *supra* note 14, at 241.
[21] *See Id.*

who are followers of ISIS have posted to social media following attacks to pledge their allegiance to ISIS.[22] For example, in May of 2015, two gunmen opened fire in Garland, Texas, and before their attack, one gunman posted on X to declare his acts in the name of ISIS.[23] Additionally, a couple opened fire at an office party in December of 2015 in San Bernardino, California, and consequently posted on Facebook to pledge allegiance to a leader of ISIS.[24] Daniel Benjamin, who was the former coordinator for counterterrorism at the U.S. Department of State, has publicly stated that the "Internet is probably the most important technological innovation since dynamite," confirming the influence social media has within terrorist organizations and beyond.[25]

C. Study On ISIS's Use Of Social Media

According to a study completed by Professor Imran Awan in 2017, ISIS has played a significant role in spreading online hate to radicalize and recruit would-be extremists.[26] Professor Awan is one of the United Kingdom's leading specialists in countering extremism.[27] In this study, Professor Awan analyzed 100 Facebook pages and 50 X accounts and generated 2,050 results that allowed Professor Awan to find seven key behavior characteristics of online offenders.[28] The Facebook pages and X accounts that Professor Awan used in this study were

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[22] *See Id.*

[23] *See Id.*

[24] *See Id.*

[25] *Id.* at 243.

[26] *See* Awan, *supra* note 3, at 139.

[27] *See* Birmingham City School of Social Sciences, https://www.bcu.ac.uk/social-sciences/about-us/staff/criminology-and-sociology/imran-awan (last visited Oct. 28, 2008).

[28] *See* Awan, *supra* note 3, at 138.

analyzed between January 2013 and December 2014.[29] The seven different types of behaviors were described as "the Cyber Mobs, Loners, Fantasists, Thrill Seekers, Moral Crusaders, Narcissists and Identity Seekers."[30] The author found that these seven types of behaviors are most associated with direct ISIS sympathizers on social media.[31] The group of individuals who were most likely to either become an ISIS fighter or wanted to become an ISIS fighter were correlated with "thrill seekers" and "moral crusaders."[32] Overall, this study found that while the majority of social media users condemned ISIS, those who fell under the seven different types of behaviors were more likely to sympathize with ISIS.[33] Further, the author found that ISIS uses social media platforms to escalate online hate in order to recruit fighters and spread propaganda.[34]

D. Corporate Responses To ISIS

As of 2016, X has attempted to suspend accounts associated with ISIS, and, in many respects, has been able to wipe the website of these accounts quite successfully.[35] However, some accounts held by ISIS supporters continue to post on this platform, despite X's best efforts.[36] Many ISIS members and supporters adapted to the suspensions, and focused their efforts through

[29] *See Id.* at 144.
[30] *Id.*
[31] *See Id.* at 149.
[32] *See Id.*
[33] *See Id.*
[34] *See Id.* at 138.
[35] *See* Sunstein, *supra* note 14, at 243.
[36] *See Id.*

other social media platforms, creating small accounts to "fly under the radar," or using privacy settings to allow small groups of supporters to see sponsored tweets.[37]

E. State Responses To ISIS

While the United States government does not have as much power as tech companies to curb the use of social media by terrorist organizations, other countries around the world have enacted legislation to combat this issue. In France, the government has the power to block internet sites that promote terrorist attacks or glorify them.[38] France also has a provision in its criminal code that prohibits individuals from directly inciting or glorifying terrorism, and if someone is found guilty of this offense, they can face up to seven years in prison alongside a fine of one hundred thousand euros.[39] Further, any individual who "habitually consults" messages, images, or representations that incite terrorism or glorify it on the Internet can face up to two years in prison with a thirty thousand euro fine.[40]

F. Social Media and Hamas

[37] *See Id.*
[38] *See Id. at* 246.
[39] *See Id.* at 247.
[40] *See Id.*

Since the war between Israel and Hamas began on October 7th, 2023, accounts sympathetic to Hamas on various social media platforms have gained hundreds of thousands of followers.[41]

Social media platforms have been quick in their response to Hamas's use of their platform to spread extreme and gruesome content to their followers and sympathizers.[42] Facebook, Instagram, TikTok, YouTube, and X have already banned accounts related to Hamas and its sympathizers due to their corporate policies against extremism.[43] Before the bans were implemented, a Hamas-linked account called "Gaza Now" had 4.9 million followers on Facebook, 50,000 followers on YouTube, and more than 800,000 followers across other social media sites.[44]

Meanwhile, the European Union has new internet laws that prohibit extremist content on the platforms, and social media companies can face large penalties for terrorist content posted on their platform.[45] Researchers at the Institute for Strategic Dialogue tracked extremist content in support of Hamas over a 24-hour period and found that a collection of these posts on X had over

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[41] *See* Stuart A. Thompson & Mike Isaac, *Hamas Is Barred From Social Media. Its Messages Are Still Spreading.*, THE N.Y. TIMES (Oct. 18, 2023), https://www.nytimes.com/2023/10/18/technology/hamas-social-media-accounts.html#:~:text=From%20Social%20Media.-,Its%20Messages%20Are%20Still%20Spreading.,balance%20on%20moderation%2C%20experts%20say.&text=Stuart%20Thompson%20covers%20the%20spread%20of%20false%20and%20misleading%20information%20online.

[42] *See Id.*

[43] *See Id.*

[44] *See Id.*

[45] *See* Donie O'Sullivan & Brian Fung, *Hamas' social media following has skyrocketed since its attack. America is powerless to stop it*, CNN (Oct. 17, 2023, 4:24 PM) https://www.cnn.com/2023/10/16/tech/hamas-telegram/index.html.

16 million viewers.[46] The European Union has stated that it will investigate these claims and later determine if X violated EU law by failing to mitigate the spread of harmful content.[47]

While Meta and Google have banned Hamas from their platforms,[48] Hamas-linked accounts have continued to use Telegram as a means to spread the gruesome results of Hamas's brutality.[49] Due to Telegram's lax policies on hateful and extremist content, it has become popular among terrorist organizations and other extremist groups.[50] Some harmful content has been removed from Telegram, but the chief executive of Telegram, Pavel Durov, has stated that Hamas will not be banned from Telegram because those accounts "serve as a unique source of first-hand information for researchers, journalists, and fact-checkers."[51] After the attack on the Gaza hospital on October 17, 2023, the followers of the Hamas channel "Gaza Now" tripled on Telegram.[52] Following this attack, "Gaza Now" posted photos of children who were either injured or killed by the attack.[53] The official Hamas channel on Telegram then compelled its followers to "take direct action, show anger. … Do not wait for tomorrow."[54] Hamas has also posted other videos to its channel to glorify their actions and control their own narrative.[55] Other videos posted on the Hamas channel include gruesome depictions of hostages, weapons they

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[46] *See* Thompson & Isaac, *supra* note 41.

[47] *See Id.*

[48] *See* O'Sullivan & Fung, *supra* note 45.

[49] *See* Thompson & Isaac, *supra* note 41.

[50] *See* O'Sullivan & Fung, *supra* note 45.

[51] Thompson & Isaac, *supra* note 41.

[52] *See* Drew Harwell & Elizabeth Dwoskin, *Hamas turns to social media to get its message out – and to spread fear*, THE WASH. POST (Oct. 18, 2023, 3:00 AM) https://www.washingtonpost.com/technology/2023/10/18/hamas-social-media-terror/.

[53] *See* Harwell & Dwoskin, *supra* note 52.

[54] *Id.*

[55] *See Id.*

have built, speeches by Hamas leaders, and even camouflaged men pushing a stroller with a child outside a destroyed Israeli home.[56]

G. LEGAL RESPONSES TO SOCIAL MEDIA AND EXTREMISM IN EUROPE

In recent years, the European Union has cracked down on social media platforms and content moderation through its Digital Services Act.[57] The European Union's legal framework concerning social media platforms requires that platforms remove terrorist content within one hour of an EU authority notifying the platform of the extreme content.[58] If the platform fails to follow these removal guidelines in a timely manner, they may face fines of up to 4% of their annual revenue.[59] In the wake of the Hamas attacks, the European Union warned social media platforms that they could be fined billions if they did not comply with EU law regarding disinformation and illegal content.[60] However, Telegram is different from other large companies like Meta because the Digital Services Act does not list Telegram as an *official* large platform with heighted obligations.[61]

H. Legal Responses To Social Media And Extremism In The United States

[56] *See Id.*
[57] *See* O'Sullivan & Fung, *supra* note 45.
[58] *See Id.*
[59] *See Id.*
[60] *See Id.*
[61] *See Id.*

Unlike the European Union, the United States does not have a strict legal framework regarding the liability of tech companies in content moderation and extremism. Between the First Amendment and Section 230 of the Communications Decency Act, tech companies have little chance of being found liable for content posted on their platforms.[62] The First Amendment protects the freedom of speech of Americans, which limits the Federal Government's ability to moderate content on media outlets. Section 230 of the Communication Decency Act of 1996 provides immunity to online platforms for third-party content posted on their platform.[63] Thus, it is unlikely that content moderation lawsuits concerning Hamas would advance in the U.S. court system.

III. CONCLUSION

Social media platforms in the United States enjoy legal immunity from the content their users generate, shielding them from accountability for defamatory or inflammatory posts and tweets.[64] Therefore, it is important that society does not solely rely upon government intervention to mitigate risks posed by social media during times of conflict. It is equally essential to encourage corporate social responsibility and ethical conduct within large tech corporations.

While it is difficult for a company to balance their users' freedom of expression with the harm that can result from hateful content, the best method a large tech corporation can

[62] *See Id.*

[63] *See* Communications Decency Act, 47 U.S.C. § 230 (1996).

[64] *See* Shirley Leitch & Paul Pickering, Rethinking Social Media and Extremism 4-5 (Shirley Leitch & Paul Pickering eds., 2022).

implement to combat terrorism on their platform begins with a comprehensive policy that includes a low tolerance for terrorist content. In addition, they must have the resources to detect hateful content and review said content. Further, companies must have the tools to enforce their policy, such as removing the content or removing a certain user. While some companies like Meta and Google have used their enforcement mechanisms to remove Hamas from their platforms because of policy violations,[65] other companies with less strict policies around content moderation, such as Telegram, have continued to allow terrorist organizations like Hamas to utilize their platform.[66] Thus, it is important that governments are able to step in and mitigate these situations through legal means.

While repealing or weakening Section 230 of the Communication Decency Act in the United States has been posed as a future possibility, the First Amendment will still likely protect extremist speech of terrorist organizations online. Thus, it seems likely that future cases regarding liability of extremist content on social media platforms will be litigated in European courts or countries with similar content moderation laws to that of the European Union. In this digital era, it is important that other nations heed the European Union's example and develop legal frameworks to address the influence of terrorist organizations disseminating extremist content via social media. In taking these steps, the international community can collectively work towards fostering a safer and more responsible online landscape for all.

[65] *See* O'Sullivan & Fung, *supra* note 45.

[66] *See* Harwell & Dwoskin, *supra* note 52.