University of Qom - Iran

Online ISSN: 2980-9584
Print ISSN: 2980-9282

IRANIAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

ARTICLES

STATE PRACTICE

BOOK REVIEW

Iranian Journal of International and Comparative Law

Volume 3, Issue 1, 2025

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PUBLISHER
University of Qom, Qom, Iran
https://ijicl.qom.ac.ir
ijicl@qom.ac.ir
Online ISSN: 2980-9584
Print ISSN: 2980-9282

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

Table of Contents

Iranian Journal of International and Comparative Law
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Judicial Legislation, Not Lawmaking: How the ICJ Fills Legal Gaps Without Creating New Law

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Article Info

Article type:
Research Article

Article history:
Received
11 April 2025

Received in revised form
9 May 2025

Accepted
13 May 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3786.html

Keywords:
ICJ, UN ILC, Judicial Legislation, Lawmaking, Legal Gap, Evolutive Interpretation..

ABSTRACT

The International Court of Justice (ICJ) often faces criticism for allegedly exceeding its mandate by engaging in what some perceive as lawmaking. This debate, though not new, continues to spark significant scholarly discourse and is even echoed by some of its own judges. Although the ICJ consistently denies having a lawmaking function, its practices demonstrate its role in the development of international law. This raises the question: How can the Court contribute to the development of international law, particularly in addressing gaps, if it lacks formal lawmaking capacities? Are the criticisms of the Court exceeding its mandate valid? Existing literature often conflates 'judicial legislation' with 'lawmaking', creating a bottleneck in reasoning which causing scholars to necessarily conclude that the ICJ inevitably exceeds its judiciary mandate and engages in creating new laws. However, understanding the ICJ's role in developing international law and addressing gaps, despite its statutory limitations, requires distinguishing between 'judicial legislation' and 'lawmaking'. While the latter involves creating new laws, 'judicial legislation' refers to a method of interpretation for adapting existing laws and establishing new legal relationships to address emerging legal requirements. This article goes further to identify which types of interpretation are most effective for such judicial legislation. By examining the approaches of the UN International Law Commission (ILC), the article highlights 'evolutive interpretation' as a particularly suitable method. Evolutive interpretation enables the Court to rejuvenate existing laws, clarify ambiguities, and develop legal frameworks for unregulated issues – all while staying within its adjudicative-only mandate and avoiding lawmaking.

Cite this article: Naderi, A (2025). Judicial Legislation, Not Lawmaking: How the ICJ Fills Legal Gaps Without Creating New Law, *Iranian Journal of International and Comparative Law*, 3(1), pp: 3-32.

10.22091/ijicl.2025.12712.1150
Publisher: University of Qom

Table of Contents

Introduction

In his recent dissenting judgment of 13 July 2023 in the case concerning the Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia, Judge *ad hoc* Skotnikov criticized the International Court of Justice (ICJ) as follows:

> *"In its attempt to legislate instead of interpreting and applying the existing law, the Court has disregarded its function, as provided in Article 38, paragraph 1, of the Statute. Indeed, it has ignored the fundamental principle, according to which the Court, as a court of law, cannot render judgment sub specie legis ferendae."*[1]

It is an undisputed fact that lawmaking falls outside the scope of the ICJ's functions. Article 38 of the Statute of the ICJ defines the Court's role as adjudicating disputes in accordance with international law. The Court itself has repeatedly emphasized its strong adherence to a purely judicial role, including, *inter alia*, in the 1996 'Legality of the Threat or Use of Nuclear Weapons' Advisory Opinion, where it refused to accept the suggestions of some States that it had taken on a legislative role, affirming that the Court only 'states the existing law and does not legislate.'[2] This implies that the Court regards the term 'legislation' as synonymous with lawmaking. In this context, legislation means the creation of new laws that did not previously exist. Therefore, both 'legislation' and 'lawmaking' refer to the same concept – the creation of new legal norms. By this reasoning, using the 'existing' law is not legislation. Thus, the Court cannot engage in either legislation or lawmaking, as its mandate is limited to adjudication through interpreting and applying existing law. However, it is essential to acknowledge that judicial decisions can transcend their subsidiary status. The significant role of judicial practice in international law is evidenced by the frequent citation of such decisions, underscoring their substantive value.[3] Some scholars argue that a tribunal may encounter situations where it must address legal gaps and develop applicable laws.[4] Lara M. Pair has said that:

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1 *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v Colombia) (Judgment) [2023] ICJ Rep 1, 4 [18] (Judge ad hoc Skotnikov); *Fisheries Jurisdiction* (Federal Republic of Germany v Iceland) (Judgment) [1974] ICJ Rep 175, 192 [45]: *"In the circumstances, the Court, as a court of law, cannot render judgment sub specie legis ferendae, or anticipate the law before the legislator has laid it down".*

2 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 237[18]. In his separate Opinion, Judge Guillaume reiterate this dictum: *"I should like solemnly to reaffirm in conclusion that it is not the role of the judge to take the place of the legislator." see:* 293 [14].

3 Alain Pellet, 'Decisions of the ICJ as Sources of International Law?' in Enzo Cannizzaro et al (eds), *Decisions of the ICJ as Sources of International Law* (International and European Papers Publishing, 2018) 7-62; Yunus Emre Acikgonul, 'Today's Notion of International Case Law: From a Subsidiary Source to a Binding Authority' (2019) 5(8) *McGill Journal of Dispute Resolution* 188, 185-215.

4 Yang Liu, 'The Judicial Construction of Gaps at the International Court of Justice' (2016) 110 *Proceedings of the ASIL Annual*

> *"[E]very judicial body makes law and that indeed, lawmaking is an essential function of the adjudicative role. The role of the judges is to state the law, and in doing so, judges necessarily add color or flavor to the rule, thereby adding and making new law."*[1]

As the ICJ has rejected any involvement in lawmaking processes,[2] it is crucial to address how development of international law by the Court can be effectively carried out. It remains important to recognize that the evolution of legislative processes is inevitable.[3] In the same vein, the concepts of international law 'were not static but were by definition evolutionary'.[4] It must be recalled that in the 1971 Namibia case, the ICJ stated that the Court "must take into consideration the changes which have occurred ... and its interpretation cannot remain unaffected by the subsequent development of law."[5] In this context, interpretation is a legal operation designed to determine the precise meaning of a rule,[6] fully encompassing all possible aspects of its application,[7] including the changes or evolutions that have occurred over time.[8] This *obiter dictum* from the ICJ raises a pertinent question: If the Court does not have a legislative or lawmaking role, how can ICJ judges address gaps created by changes in international applicable laws over time?

My response to these questions contributes to the current legal scholarship, where it is mistakenly established that the Court inevitably performs a lawmaking function that exceeds its statute and mandate. This misunderstanding sustains the unnecessary ongoing criticism and debate regarding whether the Court has the capacity to legislate.[9]

In this article, I will argue that understanding the ICJ's role in developing international law and addressing gaps, despite its statutory limitations, requires distinguishing between 'judicial legislation' and 'lawmaking' or 'legislation'. While the ICJ explicitly clarifies that it lacks the authority to legislate, meaning it cannot engage in lawmaking or create entirely new laws. However, this does not prevent the Court from engaging in what should be known as *judicial legislation*.

In other words, lacking capacity to legislate does not suggest an inability to interpret or adapt existing laws to meet the needs of the international community. While this is not 'legislation' in the traditional sense of lawmaking, 'judicial legislation' involves a dynamic

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Meeting 209, 209-12. Thirlway refers to this as *judicial activism*. Hugh Thirlway, 'Judicial Activism and the International Court of Justice' in Nisuke Ando et al (eds), *Judge Shigeru Oda Liber Amicorum* (Kluwer Law International, 2002) vol 1, 77.

1 Lara M. Pair, 'Judicial Activism in the ICJ Charter Interpretation' (2001) 8(1) ILSA JICL 181, 219.

2 *Rights of United States Nationals in Morocco* (France v United States of America) (Judgment) [1952] ICJ Rep 176, 196; *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, 33 [57]; Teresa F. Mayr and Jelka Mayr-Singer, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law' (2015) 76(1) HJIL 425, 434.

3 Narendra N. Singh, 'The Legislative Process in International Law: A General Comment' (1990) 2(2) BLR 172, 175.

4 Katayoun Hosseinnejad, 'Critical Evaluation of the ICJ Approach in Evolutionary Interpretation' (2018) 1(1) IRUS 119, 129.

5 *Rights of United States Nationals in Morocco* (n 6) 196; *Namibia Case* (n 6) 31 [53].

6 Carlos Iván Fuentes, *Normative Plurality in International Law: A Theory of the Determination of Applicable Rules* (Springer, Comparative Perspectives on Law and Justice 57, 2016) 154.

7 Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) JIDS 31, 32; Odile Ammann, 'Domestic Courts and the Interpretation of International Law' (Brill, 2021) 191.

8 *Rights of United States Nationals in Morocco* (n 6) 196; *Namibia Case* (n 6) 31 [53].

9 See section 1 on review of the current legal scholarship.

mode of interpretation of existing laws to address indispensable requirements of the international community. This nuanced distinction between lawmaking, legislation, and judicial legislation is essential and often overlooked, particularly since the term was employed by Lauterpacht in the broader context of the prohibition of non-liquet in international law and the role of international courts in this regard.[1]

In my view, this distinction rectifies the erroneous conclusions in existing legal scholarship that conflate 'judicial legislation' with 'lawmaking'. This conflation creates a bottleneck in reasoning, leading scholars to falsely accept that the ICJ necessarily exceeds its statutory limitations and creates new law in some of its judgments, as there seems to be no apparent alternative explanation.

For this purpose, in this article, I will argue that 'judicial legislation' by the ICJ does not involve creating law from scratch, which is beyond its mandate. Instead, the Court can contribute to the development of international law by considering the needs of the international community and addressing potential gaps and ambiguities in existing legal frameworks. In doing so, the ICJ does not create new laws but rather fills potential gaps through an interpretative method and advances the development of international law. Furthermore, by reviewing reports of the UN International Law Commission (ILC), I will argue that the most suitable mode of interpretation for judicial legislation is an evolutive interpretation – also known as evolutionary, dynamic, or purposive interpretation.[2] This approach allows the Court to adapt to changes in the international community's circumstances during the interpretation process, thereby clarifying the scope of international rules and obligations.[3] I will demonstrate how the ICJ can employ these dynamic interpretative methods in its proceedings to develop international law while refraining from lawmaking.[4]

To this end, in Section 1, I will review the existing literature on the ICJ's role in developing international law and explain why most of these perspectives fall short in accurately addressing the Court's developmental function within its statutory limitations, often mistakenly perceiving the Court as exceeding its mandate. In Section 2, I will define and explain the concept of gaps in international law, areas where the development of international law is necessary. Following this, in Section 3, I will address the development of international law through 'judicial legislation' and its discrepancies with 'lawmaking' or 'legislation'. Then, in Section 4, I will turn to the evolutive method of interpretation and its application as a tool for [judicial] legislation through adjudication, concluding that this interpretive method is effective for addressing gaps in international law. Next, in Section 5, I will argue that, despite the statutory limitations of the ICJ in lawmaking, the Court's evolutive interpretation capacities enable it to clarify ambiguities, expand the scope of existing rules, and develop new legal relations in areas where the law is silent or unclear.

1 Hersch Lauterpacht, *The Development of International Law by International Court* (Cambridge University Press, 1958) 68.
2 International Law Commission uses these terms interchangeably. *See:* 'Report of the Commission to the General Assembly on the Work of its Sixty-Fifth Session' [2013] 2(II) *Yearbook of the International Law Commission* 11, 24.
3 Sondre Torp Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6(1) EJLS 161; Zdenek Novy, 'Evolutionary Interpretation of International Treaties' [2017] 3 CYIL 205, 205-40; Gabrielle Marceau, 'Evolutive interpretation by the WTO Adjudicator' (2018) 21(4) JIEL 791.
4 *Dispute regarding Navigational and Related Rights* (Costa Rica v Nicaragua) (Judgment) [2009] ICJ Rep 214, 214; *Pulp Mills on the River Uruguay* (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 13.

While the Court may not view its role as explicit lawmaking, its interpretive methodologies and reasoning have significantly shaped the progressive development of international law across various domains. The theory presented in this article provides a better understanding of how the ICJ navigates its statutory limitations and contributes to the evolving nature of international law through interpretation rather than the creation of new laws. This perspective not only supports the emphasis on the Court's limitations regarding lawmaking found in current legal scholarship but also clarifies the ambiguous boundaries of its adjudicative role. Such a perspective solves the shortcomings of the current dominant theory in legal scholarship, and aligns with the state-centric pillars of the international legal system, where States primarily drive international legislation and lawmaking, while also highlighting the crucial role of the Court in the development of international law.

1. Literature Review: The Inevitable Overstepping of Its Mandate

To fully grasp the nuanced role of the ICJ in the development of international law, it is essential to explore existing scholarly discussions. This section will examine current scholarship to shed light on how other researchers have approached the ICJ's lawmaking or legislative function in developing international law. By investigating various academic viewpoints, we can better understand how scholars have explained this issue so far, and how this article offers a new perspective more aligned with the Court's statutory limitations.

It is widely accepted among scholars that the subsidiary status of judgments under Article 38(1)(d) of the ICJ Statute, combined with Article 59 – which states that the Court's decisions are binding only between the parties involved and only with respect to the specific dispute – prevents the Court from exercising a legislative role.[1] Existing literature accurately reflects these two assumptions. However, some scholars have sought to explain how the Court can and should contribute to the development of international law, and in doing so, have made some erroneous conclusions.

One perspective holds that, despite the limitations on judicial lawmaking, such lawmaking is inevitable due to the inherent incompleteness of the international legal system.[2] In this regard, Tom Ginsburg, for example, has argued that "where there is no clear preexisting rule, the judge [of the ICJ] must thus make a new rule."[3] He contends that in such cases:

> *"[I]nternational judicial lawmaking exists is explicitly acknowledged in state practice. States in their pleadings before international courts often show a concern with the possible rule-creating functions of international judicial decisions."*[4]

The conclusion drawn from this approach is that, despite the formal limitations on lawmaking in the ICJ Statute, judicial lawmaking is considered inevitable due to the inherent gaps and incompleteness of international law. It is argued that States, when seeking adjudication before

1 Dire Tladi, 'The Role of the International Court of Justice in the Development of International Law' in Carlos Espósito and Kate Parlet, *The Cambridge Companion to the International Court of Justice* (Cambridge University Press, 2023) 70.
2 Tom Ginsburg, 'International Judicial Lawmaking' (Working Papers, Research Paper No. LE05-006, University of Illinois, 2005) 3.
3 Ibid.
4 Ibid 5.

the Court, operate under the presumption that some level of lawmaking may be necessary. For instance, parties to disputes often express concerns about the potential legislative effects of international judicial decisions in their pleadings before the ICJ, further supporting the idea that the Court holds an implicit lawmaking capacity.[1] Thus, while the Court was not originally intended to engage in legislation, the necessities of the international community and the tacit acceptance of States have allowed the ICJ to exceed its mandate and contribute to the creation of new laws. However, there are more moderate approaches that, while acknowledging the Court's statutory limitations, focus on its role in developing international law through a sector-based approach.

Christian J. Tams argues that while the ICJ cannot legislate, it can still play a significant role in the development of international law. In his article, Tams asserts that "even in the absence of formal law-making powers, there is room for influential judicial contributions to the process of legal development."[2] Referring to concepts such as *jus cogens*, the legal personality of international organizations, and obligations *erga omnes*, Tams questions whether, in recognizing these principles, the ICJ was merely engaging in legal development or actually creating new law. He concludes that "these examples serve to highlight that the perceived dichotomy between law-making and legal development is a false one."[3]

This approach frames the Court's contributions within a sector-based context, such as human rights and humanitarian law,[4] the law of the sea,[5] or environmental law,[6] where it helps to develop applicable regulations in certain *sui generis* legal regimes. After reviewing the practices of various international tribunals, Bogdandy and Venzke concluded that "although the phenomenon of international judicial lawmaking is omnipresent, it is most visible in legal regimes where courts have [a treaty-based] compulsory jurisdiction."[7] However, since ICJ judgments are only binding on the parties involved in a particular dispute, their broader effectiveness depends on their ability to persuade the international community.[8] As a result, ICJ rulings are often described as persuasive precedents.[9] As Tams explains:

> *"[W]here the ICJ engages in legal development, it is part of a broader process.*

1 Ibid 4-5; Ginsburg argues that *"international judges play an important role in generating law in the course of dispute resolution. This role, however, is and should be constrained by the interests of states."*

2 Christian J. Tams, 'The Development of International Law by the International Court of Justice' in Sara Fattorini (ed), *Decisions of the ICJ as Sources of International Law?*, (International and European Papers Publishing, Gaetano Morelli Lectures Series, Vol. 2, 2018) 66.

3 Ibid.

4 Christopher Greenwood, 'The International Court of Justice and the Development of International Humanitarian Law' [2022] 104 (920-921), IRRC 1840, 1841; Shiv R.S. Bedi, 'The Development of Human Rights Law by the Judges of the International Court of Justice' (First edition, Bloomsbury Publishing, 2007) 29-32.

5 Haritini Dipla, 'Unresolved Issues and New Challenges to the Law of the Sea' (Brill Nijhoff, Publications on Ocean Development, Volume 54) ch 9 [235–50].

6 Jorge E. Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment', (2008) 32 FILJ 232, 232-33.

7 Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12(5) GLJ 979, 980.

8 Franklin Berman, 'The International Court of Justice as an 'Agent' of Legal Development?' in Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice* (First edition, Oxford University Press, 2013) 12.

9 Sara Fattorini (ed), *Decisions of the ICJ as Sources of International Law?* (International and European Papers Publishing, 2018) 38; James Gerard Devaney, 'The role of precedent in the jurisprudence of the International Court of Justice: A Constructive Interpretation' (2022) 35(3) LJIL 641, 649.

> *It is an agent of legal development, but one agent only, acting alongside others including the General Assembly, States and the ILC. These others will often gladly receive some normative guidance from the ICJ. But where they do not, nothing stops them from ignoring ICJ pronouncements."*[1]

This perspective suggests that the 'fate of the Court's decisions' hinges on whether the ICJ's involvement in lawmaking – despite not being part of its formal mandate – is accepted or rejected by the broader international community.[2] Judge Dire Tladi echoes the same argument. Judge Tladi asserted that 'international law remains State-made and State-developed law.'[3] Emphasizing on immense impact of the Court on the development of international law, Judge Tladi argued that:

> *"Without the formal mandate to develop the law, the Court's contribution to the development of international law is dependent on the respect it attracts from States and the esteem with which it is held."*[4]

In other words, this approach recognizes that the ICJ's contribution to the development of international law is, in essence, a form of lawmaking, even if it exceeds the Court's statutory limits. When the ICJ engages in legal development alongside other entities, such as the General Assembly, States, and the ILC, these entities must willingly embrace its guidance. Therefore, although the ICJ's involvement in legal development might overstep its formal mandate, it should be assessed by considering whether this lawmaking is welcomed by those entities primarily responsible for shaping international law.[5]

Accordingly, the question of the legality or legitimacy of the ICJ's role in lawmaking or legal development lacks a definitive answer, as the response is often *'it depends'*.[6] Tams explicitly stated that 'the Court's role in law-making is a question of degree'.[7] While the Court can make significant contributions to the development of international law, its influence is highly sector-specific and shaped by external factors beyond its control, such as the receptiveness of particular areas of law to judicial lawmaking and the influence of other agents involved in legal development.[8]

In sum, while existing literature acknowledges that the ICJ, as a judicial body, lacks formal legislative authority under its statute, it nonetheless plays an inevitable lawmaking role due to inherent weaknesses in the international legal system. As a result, the prevailing view is that such a lawmaking role unavoidably exceeds the Court's judicial mandate, yet is implicitly

1 Tams (n 23) 71.
2 Ibid.
3 Dire Tladi, 'The Role of the International Court of Justice in the Development of International Law' in Carlos Espósito and Kate Parlet, *The Cambridge Companion to the International Court of Justice* (Cambridge University Press, 2023) 84.
4 Ibid.
5 Some scholars believe that the ICJ will perfectly master this task *'by delivering specific answers to specific questions.'* Therefore, these answers to questions in a sector-based context must be accepted by audiences. *See:* Gyorgy Szenasi, 'The Role of the International Court of Justice in the Development of International Environmental Law' (1999) 40(1-2) AJH 43, 53.
6 Niels Petersen, 'Lawmaking by the International Court of Justice - Factors of Success' (2011) 12(5) GLJ 1295, 1316: *"Lawmaking by the ICJ is the exercise of public authority and, in principle, requires justification. However, the necessary degree of justification depends on the nature of public authority."*
7 Tams (n 23) 99.
8 Fattorini (n 30) 4.

accepted by States. However, this perspective in contemporary international legal scholarship is flawed.

As I will argue in the following sections, the Court does not overstep its mandate, as any judicial lawmaking it undertakes remains within the bounds of its statutory functions.

2. Gaps in International Law Where Judicial Legislation is Needed

Before its implementation, any rule or law must be interpreted[1] to clarify the content and scope of substantive rules of international law.[2] However, in every legal system, there are issues that have not been discussed or have remained unaddressed. This is partly because community in general, and legal relations therein, in particular, are in constant development and change.[3] Evolutions or political considerations of stakeholders in their relationships[4] and the advancement in technology create a situation where certain matters seem not to be regulated by the applicable legal system or are not addressed within the framework of that legal system.[5] More than domestic legal systems, however, this is particularly true for the international legal system, where existing legal frameworks do not provide explicit guidance to emerging issues. These situations highlight the notion of *non-liquet* or gaps in international law.[6]

It is self-evident that it may not be possible to specify all the desired legal relationships and legislate for all possible circumstances.[7] Rapid advancements in technologies often outpace the

1 Some scholars view [international] law as a communicative language where legislation serves as an interactive tool. They argue that many rules of interpretation are common-sense aids applicable to any document meant to convey a message. Therefore, understanding an Act starts with asking, *'what message is the legislature conveying?' See:* John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) MULR 627, 627. Some argue that there is a subtle distinction between treaty interpretation and application. Mitchell & Heaton suggest that it can be challenging to determine whether a WTO Tribunal is applying international law or interpreting WTO provisions using international law. They note that this distinction may not have significant practical implications. *See:* Andrew D. Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010) 31 *Michigan Journal of International Law* 561, 570. However, this approach has its critics. *"[T]reaty interpretation and application are distinct processes with independent functions. Treaty interpretation seeks to uncover the correct meaning of treaty terms ...; whereas treaty application involves identifying and applying the legal source." See:* Chang-fa Lo, 'The Difference Between Treaty Interpretation and Treaty Application and the Possibility to Account for Non-WTO Treaties During WTO Treaty Interpretation' (2012) 22(1) IICLR 1, 9; Gourgourinis (n 11) 31.

2 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) 6.

3 Stephen C. Neff, 'In Search of Clarity: Non Liquet and International Law' in Kaiyan Homi Kaikobad and Michael Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice* (Brill-Nijhoff, 2009) 64: *"It is obvious that a gap in the law can exist. That is to say, that a situation might arise for which a legal system (whether international or domestic) does not have a ready-made specific rule to apply."* Anatoliy Kostruba, Mykola Haliantych, Svitlana Iskra and Andrii Dryshliuk, 'Legal Gaps: Concept, Content, Problems of the Role of Legal Doctrine in Overcoming them' (2023) 44(2) SLR 1, 1: *"legal relations are constantly disappearing and new legal relations are emerging, ... Under such circumstances, it is not surprising and quite natural that so-called defects of the legal system' appear, which traditionally include gaps."*

4 An example of such evolution in international relations among states is seen in defining gender in the new Convention on Crimes Against Humanity. UN ILC's Special Rapporteur Sean D. Murphy has opted not to define gender, citing strong criticisms that the existing definition in the Rome Statute of the International Criminal Court is outdated and not widely accepted in contemporary international law. *See:* Sean D. Murphy, Special Rapporteur, *Fourth Report on Crimes Against Humanity*, UN Doc A/CN.4/725 (18 February 2019) 43 [101-2].

5 *"In contrast to this accelerating pace of technology, the legal frameworks that society relies on to regulate and manage emerging technologies have not evolved as rapidly." See:* Gary E. Marchant, 'The Growing Gap Between Emerging Technologies and the Law' in Gary E. Marchant, Braden R. Allenby and Joseph R. Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight* (Springer, 2011) 19, 19.

6 At some point, it should be considered that a gap does not exist based on only lagging of regulatory frameworks at the international level, but as the *"relevant actors utilize ... silence in their practices of negotiating and constructing legal concepts and norms in the international scenario."* See: Juliana Santos de Carvalho, 'The Powers of Silence: Making Sense of the Non-Definition of Gender in International Criminal Law' (2022) 35(4) LJIL 963, 964.

7 This is not a problem of international law only but domestic legal systems as well. For instance, in its 2002 report, the

ability of existing regulatory framework to adapt.[1] Innovation in certain scientific areas is far ahead of the policy and regulatory environment, which remains fragmented and incomplete both nationally and internationally.[2] International law, given the diversity of events, cultures, and the conflicting and inconsistent interests of its subjects – i.e. States, international organizations, non-governmental entities, incorporations and to some extent individuals[3] – is no exception to this proven rule in the science of probability. As Raz wrote:

> *"There is a gap in the law when a legal question has no complete answer. Understanding a question is knowing what counts as a correct answer. This does not mean knowing which is the correct answer. It means knowing which statements are possible answers, i.e. which statements would be, if true, the correct answer. A legal question is a question all the possible answers to which are legal statements. A legal gap exists if none of the possible complete answers to a legal question is true."*[4]

Since international law operates in the shadow of global politics within the framework of international diplomatic practices, it is impossible to legislate for application in all conceivable conditions[5] as sometimes there is no room to find a persuasive answer for a legal question.[6] Acknowledging gaps as a fact in all legal systems, scholars often raise immediately the issue of how a gap, or a legal lacuna, must be addressed. Gleider Hernández explained that gaps in international law reveal situations that the legislator did not anticipate. He pushed a step forward and stipulated that "the judicial function's role is then to assume an essentially suppletive role, applying principles rooted in the system itself so as to extend the law into that particular dispute."[7]

There is also an opinion on the division of gaps into 'full' or 'incomplete', depending on the non-existence of applicable rules or contradictions between existing rules and regulations. Although this perspective is primarily associated with domestic legal systems, it has been shared

Commonwealth Government of Australia stated that *"it may not be possible to specify all the desired relationships in terms of existing legal definitions and without resorting to an evaluative concept such as close relationship. Such evaluative concepts are 'undesirable' in this context because they necessitate the forensic examination and assessment of the nature and quality of intimate human relationships in a way that may bring the law into disrepute."* Commonwealth of Australia, *Review of the Law of Negligence* (Final Report, September 2002) 141-2; See also: [Name Redacted]. *Statutory Interpretation: General Principles and Recent Trends* (United States Congressional Research Service, 5 April 2018) 18.

1 Marchant (n 43) 26.

2 Kieran Tranter, 'The Laws of Technology and the Technology of Law' (2011) 20(4) *Griffith Law Review* 753, 753: *"Cultural anxieties surrounding certain technologies can be seen as being channelled into the legal domain through lawyer-scholars identifying gaps within jurisdictions. The task appears to be identification of what law there is and what law there should be."*; Rowena Rodrigues, 'Legal and Human Rights Issues of AI: Gaps, Challenges and Vulnerabilities' [2020] 4(100005) JRT 1, 3.

3 Davorin Lapaš, 'Climate Change and International Legal Personality: "Climate Deterritorialized Nations" as Emerging Subjects of International Law?' (2022) 59(1) Canadian YIL 1; Alexandra Porumbescu and Livia Dana Pogan, 'Transnational Corporations, as Subjects of International Law in the Globalization Context' (2019) 64 RSP 65; Davorin Lapaš, 'Inter-Regional Organisations – Contemporary Participants in International Legal Relations or New Subjects of International Law: Is There a Difference?' (2016) 53(2) ZRPFS 413; Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (Routledge; 2012).

4 Joseph Raz, 'Legal Reasons, Sources, and Gaps' in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) ch 4. Nicole Roughan, 'Mind the Gaps: Authority and Legality in International Law' (2016) 27(2) EJIL 329, 330.

5 Jan Klabbers, 'On Epistemic Universalism and the Melancholy of International Law (2018) 29(4) EJIL 1057, 1060; Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15(3) IJCL 671, 676.

6 Helen Quane, 'Silence in International Law' (2014) 84(1) BYIL 240, 240.

7 Ibid; see also: Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford Academic Press, 2014) 87.

by some legal scholars, such as S.I. Vilnyansky, who noted that gaps can occur both where current provisions are incomplete and where there are mutually contradictory provisions.[1] Such situations may arise from the novelty of a subject, sudden developments, or circumstances that were not anticipated at the time of drafting or adopting legal regulations,[2] or due to deficiencies in the international legal system.[3]

However, this is not the only reason cited by various schools of thought for the emergence of gaps in international law. Critical perspectives within legal scholarship, such as feminist and Third World Approaches to International Law, offer alternative interpretations of these gaps –as they term them, 'silence' – viewing them as a legal phenomenon intrinsic to the current dominant legal order.[4]

Apart from origin and explanatory theories, legal scholars have been developing potential responses to situations where there are gaps in the law. In general, international courts are expected to address gaps and resolve ambiguities, with their jurisprudence positively influencing international law by articulating rules, identifying potential issues, and highlighting gaps that prompt further legal developments.[5] Therefore, one of the initial responses to a gap in applicable law is often to refer the matter to a court, including the ICJ, that is:

> *"[E]ntitled to 'fill the gaps' in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purpose."*[6]

While an issue may not be explicitly addressed within the framework of existing international rules due to gaps, lacunae, or non liquet, it may still be examined by applying rules and principles commonly used in international judicial proceedings or arbitrations. However, the matter is not as simple as it may seem. Some argue that when faced with a legal lacuna, not all such gaps should necessarily be addressed.[7] In other words, given the absence of a pertinent rule in a specific situation, the nature of international law implies that the matter 'is neither prohibited, nor required, nor permitted' and 'is regarded as falling completely outside the remit of international law.'[8]

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1 Kostruba (n 41) 10.

2 Gaps mostly arise from the emergence of new circumstances; W. Michael Reisman, 'International Non-liquet: Recrudescence and Transformation' (1969) 3(4) IL 770, 770-74; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011) 60-61; Propser Weil, 'The Court Cannot Conclude Definitively…Non Liquet Revisited' [1998] 36 CJTIL 109.

3 This deficit, which is the lack of an authoritative and superior centric legislative organ in face of a lacuna, is a unique feature of international law compared to domestic legal systems. *See:* Hernández (n 52) 1: *"... a distinctive characteristic of international law remains the diffuse and multi-layered process through which it is developed. In no small part because it has no legislature."*; Mariano J. Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non-liquet in International Law' (2008) 48(1) ICLQ 3, 4-5.

4 Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) AJIL 379; Bhupinder S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8(1) ICLR 3.

5 Tim Stephens, 'The Role of International Courts and Tribunals in International Environmental Law' (PhD Thesis, University of Sydney, 2005) 11.

6 Bertrand Ramcharan, *Modernizing the Role of the International Court of Justice* (Asser Press, 2022) 6-7; Hernández (n 52) 240-80.

7 Scholars who support this idea, separate 'legal lacuna' from other so-called gaps, obscurities ('obscurités') and deficiencies ('carences'). *See:* Hernández (n 52) 247. Others provide different point of views and examined a legal gap with legal conflicts: *"A gap occurs when there is no regulation whatsoever. A gap is created where there is a radical contradiction of provisions of equal force, when one of them eliminates the other."*; Kostruba (n 41) 8-9.

8 Hernández (n 52) 255-56; Quane (n 51) 244.

The complexity of addressing gaps in international law highlights the inherent challenges in its application and interpretation. Navigating these gaps demands a nuanced understanding of both the limitations and the evolving nature of international legal frameworks. Although the ICJ does not have a formal lawmaking function, it plays a crucial role in addressing gaps and silent enigmas in international law through its interpretive competence. The key to understanding this role lies in differentiating between the *development* of international law and *lawmaking*. In this context, my argument is that the ICJ's role is to develop international law in times of ambiguity, rather than lawmaking, given its statutory limitations. Further analysis will be provided in the subsequent sections.

3. Development of International Law by the Court: Making Law Visible

Like almost all notions in international law, there are competing approaches to defining and specifying the concepts of lawmaking or the development of international law by courts.[1] The concept of progressive development has been crucial in shaping international legal relations from its inception to the present day. Progressive development in international law refers to the process of evolving and enhancing international legal norms and frameworks to address emerging issues, reflect contemporary values, and respond to changes in the global environment. It involves the continuous adaptation and expansion of international law to keep pace with new developments and challenges. This concept is crucial for ensuring that international law remains relevant and effective in a rapidly changing world. At first glance, this process involves 'international legislation' which is lawmaking driven by States within State-dominated forums through the establishment of treaties, conventions, or the formation of customary international law. However, what role do other entities, such as the ICJ, play in the development of international law?

According to Hersch Lauterpacht, the development of international law by international courts – what he terms *judicial legislation* – is an essential progressive feature of the international legal order, which would indispensably be materialized through a court with such a capacity.[2] Emphasizing judicial legislation as the 'permanent feature of administration of justice in every society',[3] Lauterpacht conceived it as a process of 'changing the existing law'.[4]

Building on this insight, Martti Koskenniemi underscores the paradox at the heart of judicial lawmaking: while legal systems formally deny the legitimacy of courts creating law – maintaining the 'fiction' that judges merely interpret existing norms – judicial legislation 'exists everywhere' and is in fact a structural necessity.[5] This paradox does not pose a problem for Lauterpacht, as he views all legal systems, including international law, as being grounded in certain foundational 'fictions'.[6]

1 Singh (n 7) 175; Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29(2) *Leiden Journal of International Law* 289, 291-92.

2 Hersch Lauterpacht, *The Development of International Law by International Court* (Cambridge University Press, 1958) 5; Ernest Nys, 'The Development and Formation of International Law' (1912) 6(1) AJIL 1; Van der Vyver, 'The Development of International Law through the Unauthorised Conduct of International Institutions' (2015) 18(5) PELJ 1301; Rosalyn Higgins, 'The Development of International Law by the Political Organs of the United Nations' (1965) 59(3) PASIL 116, 117.

3 Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12(5) GLJ 979, 993.

4 Lauterpacht (n 62) 258; In the following pages, I will explain Lauterpacht's theory on how judicial legislation operates.

5 Martti Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' (1997) 8(2) EJIL 215, 255.

6 Reut Yael Paz, 'Making it Whole: Hersch Lauterpacht's Rabbinical Approach to International Law' (2012) 4(2) GJIL 417, 435-436.

As Koskenniemi observes, this contradiction is managed through the *legal fiction* that the court's articulation of new rules is 'no more than an application of an existing legal principle or an interpretation of an existing text'.[1] In doing so, the judicial role in shaping the law is rendered both legitimate and concealed. This fiction, he argues, enables the ICJ to act creatively without openly departing from legal orthodoxy, allowing it to progressively develop international law while preserving the appearance of fidelity to existing sources. In this context, development and lawmaking are distinct. A quote by Judge José Maria Ruda, which delineates this distinction, helps to draw a clear line between these two concepts:

> *"[T]he word development stands for the Court's contribution to the interpretation and application of existing rules of international law and not to the establishment of new rules. The work of any court, be it national or international, consists of the interpretation and application of existing law and not the creation of new law."*[2]

The key concept I want to emphasize is the focus on *existing* law. This distinction clarifies that judicial legislation is not about creating new rules or overstepping the ICJ's functions. Instead, the Court's role is to develop international law through interpretive methods, extending the scope and applicability of existing rules and regulations to address the evolving needs of the international community.[3]

In the same vein, some judges of the ICJ have used the term *international legislation* to refer to the development of applicable law in response to the necessities of the international scene. Judge Alejandro Álvarez described international legislation as a framework within which States can find their consensual legal obligations. His wording suggests that legislation by the court is, in fact, a development of international law to adapt to the evolving international community:

> *"As a result of the great changes in international life that have taken place since the last social cataclysm, it is necessary that the Court should determine the present state of law in each case which is brought before it and, when needed, act constructively in this respect, all the more so because in virtue of Resolution 171 of the General Assembly of the United Nations of 1947, it is at liberty to develop international law, and indeed to create law, if that is necessary, for it is impossible to define exactly where the development of this law ends and its creation begins. To proceed otherwise would be to fail to understand the nature of international law, which must always reflect the international life of which it is born, if it is not to be discredited.*[4]

Judge Kotaro Tanaka also used the term to explain international legislation and the functions of the Court within the international legal system:

> *"[T]he Court cannot exceed the limitation incumbent upon it as a court of law.*

1 Koskenniemi (n 65) 255.
2 Jose Maria Ruda, 'Some of the Contributions of the International Court of Justice to the Development of International Law' (1991) 24(1) NYU JILP 35, 35.
3 This aligns with the Court's statutory limitations, which prevent it from creating new laws on its own.
4 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 50 (Judge Alvarez).

> *Undoubtedly a court of law declares what is the law, but does not legislate. In reality, however, where the borderline can be drawn is a very delicate and difficult matter. Of course, judges declare the law, but they do not function automatically. We cannot deny the possibility of some degree of creative element in their judicial activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred from the raison d'être of a legal system, legal institution or norm. In the latter case the lacuna in the intent of legislation or parties can be filled."*[1]

By acknowledging the limitations of the ICJ, Judge Tanaka implicitly highlights the distinction between 'judicial legislation' and legislation in a sense of lawmaking. He explains that while the Court can interpret and clarify legal relationships within the existing legal framework, it cannot independently create new laws. The ICJ's role is to define new legal relations based on established laws and to apply these laws to new contexts. Judges may use creative reasoning to address gaps or ambiguities. However, their role is confined to inferring the intent of existing laws rather than creating entirely new rules.

In the advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court used both terms, *lawmaking* and *legislation*, while indicating the limitation of the Court in this regard:

> *"[I]t has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a 'law-making' capacity. It is clear that the Court cannot 'legislate', and, in the circumstances of the present case, it is not called upon to do so."* [2]

The terminology used by the ICJ is significant. The Court refers to both 'lawmaking' and 'legislation' as synonyms. In this context, the ICJ explicitly states that it cannot legislate, meaning it cannot create entirely new laws or rules that did not previously exist. Despite this limitation, the Court is not precluded from engaging in what is known as 'judicial legislation' as described above. Therefore, the Court's assertion that it cannot legislate does not mean it is incapable of judicial interpretation or adaptation which called *judicial legislation*. This subtle distinction between *lawmaking*, *legislation*, and *judicial legislation* is crucial, as legal scholars and ICJ judges also use the term *international legislation* to refer to the process of lawmaking.[3]

Some may interchangeably consider the term *rulemaking* with the concept of lawmaking.[4] Sometimes scholars provide a broad definition such as 'the term international legislation is used to describe the process and the product of the conscious effort to make additions to, or changes in, the law of nations,' which encompasses international judicial legislation.[5] Nonetheless, it

1 *South West Africa* (Liberia/ South Africa) (Second Phase) (Judgment) ICJ Rep 6, 277.
2 *Nuclear Weapons* (n 2) 237 [18].
3 Arnold Duncan McNair, *The Law of Treaties* (Oxford University Press, 1986) 730; *see also:* Singh (n 7) 172; International Law Commission, Memorandum Submitted by the Secretary-General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission,* UN Doc A/GN.4/1/Rev.l (10 February 1949) 5.
4 Leo Park, 'The International Court and Rule-Making: Finding Effectiveness' (2018) 38(4) UPJIL 1065, 1084: *"the Court can develop laws in a way that is respected under various theories of the law's influence."*
5 Richard Reeve Baxter, 'Introduction to International Law' (1958) 11(7) NWCR 4, 12.

should be noted that the international community lacks any legislative body, in comparison to domestic legal systems, and the term 'legislation' can only be a figurative description of the legislative status quo of international law.[1]

Some traditional views consider lawmaking as the codification of unwritten laws and, in general, the expression of the will of States.[2] In this regard, the concept of lawmaking overlaps with the notion of codification. Alain Pellet, who served as a Special Rapporteur of the ILC, suggests that progressive development entails some measure of legislation.[3] The ILC has stipulated that 'primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.'[4] Dire Tladi accurately explained this State-centric approach taken by the ILC:

> *"The primarily in [the ILC's] statement is not meant to indicate that resolutions or decisions of non-State actors can constitute practice for the purposes of customary international law. Rather, it indicates that under limited circumstances, the conduct of international organisations may constitute practice and contribute to law-making."*[5]

To establish rulemaking, a rule should impose general obligations that endure beyond a specific timeframe.[6] Rulemaking processes often encompass efforts to create legally binding regulations,[7] taking on various forms including delegated lawmaking procedures within the international system[8] that encompass all relevant subjects,[9] regardless of whether all member States have explicitly consented to a rule before its inception.[10]

Emphasizing the ICJ's role in international rulemaking, some argue that judicial legislation relies on two key elements: First is the observation of a legal development, and second is recognizing that this development is caused by an ICJ judgment.[11] In essence, the legislative

1 Gennadiĭ Mikhaĭlovich Danilenko, *Law-making in the International Community* (Nijhoff, 1993) 7.

2 I.C. Van Der Vlies, 'Legislation in a Global Perspective' in Julia Arnscheidt and Jan Michiel Otto (eds), *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects* (Leiden University Press, 2008) 133, 133.

3 Nikolaos Voulgaris, 'The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development' (2022) 33(3) EJIL 761, 778.

4 International Law Commission, *Draft Conclusions on the Identification of Customary International Law*, UN Doc A/73/10 (2018) 130.

5 Dire Tladi, 'The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?' (2017) 16(3) CJIL 425, 444-445.

6 Klara Polackova Van der Ploeg, Luca Pasquet and León Castellanos-Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer International Publishing AG, 2022)

7 Hubert Mayer, 'Changes in International Lawmaking: Actors, Processes, Impact' (Conference Report, Annual Meeting of the European Society of International Law (ESIL), 9-11 September 2021) 98-99.

8 Andrew Guzman, 'The Consent Problem in International Law' (Berkeley Program in Law and Economics, 2011) 11: Guzman believes that delegated lawmaking is exceedingly rare. He cites the EU as the most obvious international entity with such authority. The Security Council also has the authority to create binding rules through a voting system, but this authority is highly constrained.

9 Alona Manyk, 'Participation of the Nonclassical Subjects of International Law in Law-Making and Law-Enforcement' (2018) 5(1) EJLPA 46, 52.

10 Alain Pellet observed that consensus is not needed in international lawmaking to codify a rule. In international law, the Assembly has become a key tool for States to articulate their national interests and garner general support. Assembly resolutions express common interests and the *'general will'* of the international community, often aimed at transforming this will into law. *See:* Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' [1989] 12 AYIL 22, 51; Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2017) 108(1) AJIL 1.

11 Niels Petersen, 'Lawmaking by the International Court of Justice: Factors of Success' (2011) 12(5) GLJ 1295, 1295.

actions of the Court influence State's obligations through legal discourse, and their effectiveness hinges on the degree of persuasion they achieve.[1] Put differently, they shape rulemaking through legal evolution, wherein the impact of ICJ judgments is contingent upon their reception within the legal discourse.[2]

However, the concept of development itself offers limited scope for equating codification with legislation, as the ILC, entrusted with the development of international law, is not inherently a legislative body.[3] Additionally, it poses a challenge to the notion that the Court can surpass established principles of international law to fill gaps, as this would imply an overreach of its judicial role.[4] Consequently, if codification is not synonymous with legislation in the progressive development of international law, as mandated by the ILC's statute, then what exactly constitutes this progressive development?[5]

Lauterpacht employs the terms *development* and *clarification* interchangeably, wherein development broadly entails *making law visible*.[6] This effort to elucidate the law aligns with the ILC's mandated task by the UN General Assembly:

> *"[P]rogressive development of international law is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression codification of international law is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine."*[7]

Determining the exact moment of law development and creation is challenging, if not outright impossible. In his individual opinion appended to the advisory opinion of April 11, 1949, on 'Reparation for Injuries Suffered in the Service of the United Nations', Judge Alejandro Álvarez stated:

> *"While recognizing that the United Nations has the capacity to bring an international claim in the case in point and for the purposes set forth in the Request for the Opinion, the Court has proclaimed a new precept of international law. To Say that, in so doing, it has developed that law, or that it has created a new precept, is a mere matter of words, for in many cases it is quite impossible to say where the development of law ends and where its creation begins."*[8]

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1 Ibid 1316.
2 Judgments of the ICJ are not transformed into constraining standards of behavior *per se*.
3 Voulgaris (n 78) 779.
4 Andrew Coleman, 'The International Court of Justice and Highly Political Matters' (2003) 4(1) MJIL 29, 56.
5 Teresa F. Mayr (n 6) 436: *"judicial legislation takes a different form than codification by a legislative body. Instead of giving detailed provisions as to definition and application of the new legal norm, judicial law-making focuses on laying down broad principles which are applied in the case at hand."*
6 Lauterpacht (n 62) 42-43; Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation', (2011) 34(1) LLA ILR 99, 101.
7 Patrícia Galvão Teles, 'The ILC's Past Practice on Progressive Development and Codification of International Law-An Empirical Analysis Focusing on the Law of the Sea, Law of Treaties and State Responsibility' (2019) 13(6) FIU LR 1027, 1028.
8 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 190 (Judge Alvarez).

Amidst this ambiguity, it has been asserted that the development of international law, serving as a mechanism for filling legal gaps, is not a novel concept in the jurisprudence of the Court.[1] Arguably, it stands as a valuable judicial tool for determining the rights and obligations of international law subjects, particularly in scenarios where the process of lawmaking is deemed necessary to prevent confusion and inconsistency in grey areas of international law.[2] Nevertheless, there exists significant opposition to the broad competence of the ICJ in lawmaking, as "adjudicative law-making may be barred or limited in some respect by the sources of law that are available or authorized to the dispute settler."[3] Judge Alvarez further elucidates why international adjudication's capacity to develop international law is constrained, noting that the trajectory of legal development through dispute settlement is often unpredictable and not fully foreseeable by those who establish such systems, thereby not wholly driven by the interests of domestic groups setting up these mechanisms.[4]

Judge Sir Robert Yewdall Jennings offers another perspective on this limitation which is in line with the distinction between *lawmaking* and *judicial legislation*:

> *"Where a court creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction, the decision must be seen to emanate reasonably and logically from existing and previously ascertainable law."*[5]

According to Judge Jennings, while the ICJ cannot create new laws *ex nihilo*, it can engage in judicial legislation by interpreting and applying *existing* legal principles to new contexts. This perspective supports the idea that although the Court is restricted from making entirely new laws, it can still develop international law by adapting the scope of established legal norms to address emerging legal issues. Thus, Judge Jennings' view underscores that the Court's role is not confined to mere interpretation but includes the ability to shape and clarify the application of existing rules in light of new circumstances.

Also, constraining interpretation to *existing* laws does not imply that these rules remain stagnant over time. On the contrary, international courts and tribunals interpret legal instruments not merely based on the historical intentions of States, but rather on their *objective will* as expressed by the provisions of conventions. This interpretation may also be influenced by the necessity to adapt conventions to inevitable societal changes.[6]

Drawing from the aforementioned opinions, which encompass a spectrum of interpretations for the concept of development ranging from clarification to transformation, it can be argued

1 Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15(3) IJCL 671, 672.

2 Fergus Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality' (2008) 9(1) MJIL 47, 58; Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57(1) HILJ 111.

3 José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005) 561.

4 Ibid 576.

5 Son Tan Nguyen, 'The Applicability of Res Judicata and Lis Pendens in World Trade Organisation Dispute Settlement' (2013) 25(2) BLR 123, 143; Son Tan Nguyen, 'The Applicability of Comity and Abuse of Rights in World Trade Organisation Dispute Settlement' (2016) 35(1) UTLR 95, 106 nn 61.

6 Daria Sartori, 'Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights' (2014) 29(2) *Tul. Eur. & Civ. L.F.* 46, 49.

that the dichotomy between development and lawmaking by the ICJ is a matter of distinct categories.[1] Interpretation serves as the preceding stage of judicial legislation, and as it approaches its highest degrees, it converges closer to the concept of development. At this juncture, we sometimes observe that the advancement of law development intertwines with rulemaking. The ICJ, in certain cases, interprets rules in a manner that not only unveils the meaning and purpose embedded in treaties and other sources of international law but also takes into account the evolving needs of the international community, thereby contributing to the development of international law based on the existing laws. Occasionally, this process extends to the point of implicitly crafting rules, where decisions of this international judicial body give rise to new applicable rules for governing new legal relations, without actually creating new laws.

4. Interpretation and its Significance

4.1. Interpretation as a tool of Development of International Law

Interpretation plays a crucial role in comprehending the content and ramifications of international acts and instruments, thus receiving extensive attention in both legal doctrine and jurisprudence.[2] It can be argued that interpreters often encounter an artificial dichotomy within traditional conceptions of legal interpretation: one that revolves around *discovering* the precise meaning or scope of a rule, and another that involves *creating* new horizons for the application of previously established *rules*.[3]

In the realm of discovery, interpretation, grounded in existing rules, aims to unveil, and elucidate a fact or a concept, essentially revealing what already exists; thus, the interpreter functions as a discoverer rather than a creator of the existing matter. However, can interpretation be stretched to the extent where it results in the formation of new rules and assumes a generative and constructive role? Within a dynamic theory of meaning, it is plausible to uphold the notion that legal interpretation embodies *a mixture of discovery and creation.*[4] To assess this, it is imperative to distinguish between interpretation and filling legal gaps.

As the international community evolves and the pace of change in pertinent issues accelerates, the sources of international law risk remaining static within their own temporal boundaries. Consequently, there may arise situations where international law fails to address evolving matters, leading to gaps and instances of *non liquet*. Hence, some contend that international law, and by extension its sources, possess a fluid content despite maintaining a static form and structure.[5] In essence, during the application of legal rules, scenarios such as legal gaps or the silence of laws may arise.[6]

Considerable debate surrounds the question of whether interpretation can effectively fill the gaps in international law, with various viewpoints being expressed. The first group, proponents

1 Robert Y. Jennings, 'General Course on Principles of International Law' in Recueil des Cours de l'Académie de La Haye (Brill-Nijhoff, 1967) 323, 341.
2 Orakhelashvili (n 40) 285; Venzke (n 92) 100.
3 Vittorio Villa, 'A Pragmatically Oriented Theory of Legal Interpretation' (2010) 12(2) JCTPL 89, 112-13.
4 Ibid 113.
5 Maurice Mendelson, 'Formation of International Law and the Observational Standpoint' in *International Law Association Report of the Sixty-Third Conference* (First Report of the Rapporteur, 1986, Anne 1) 9-11.
6 Stephen C. Neff (n 41) 65.

of the influential role of interpretation in gap-filling, argue that interpretation encompasses two dimensions: one involves identifying the pre-existing meaning, while the other pertains to the creative aspect of interpretation, which has the capacity to establish rules and address gaps.[1]

An example illustrating this is the UNIDROIT Principles of International Commercial Contracts (PICC). The PICC serves the primary purpose of facilitating negotiations and the formation of international commercial contracts by offering uniform rules, which notably include detailed regulations concerning contract interpretation. These norms pertaining to contract interpretation are encapsulated in Chapter 4 of the PICC, which consists of eight distinct provisions (Articles 4.1– 4.8). It is noteworthy that Chapter 4 also addresses an issue closely related to contract interpretation, albeit not strictly falling within its scope – namely, the matter of gap filling.[2]

Interpretation, *stricto sensu*, entails the extraction of 'pre-existing' meanings purportedly embedded within the forms of international legal discourse, thus encompassing the clarification and elucidation of existing text.[3] In a broader sense, interpretation is viewed as a mechanism to develop applicable laws and fill gaps. Within this context, the aim of interpretation is to arrive at a legal solution aligned with the needs and interests of society or the international legal system.[4]

Achieving this objective necessitates that an international judge be capable of assuming a constructive role, extracting legal obligations, and imposing them on parties involved in a dispute. Within this framework, interpretation not only elucidates *existing* laws but also uses them to contribute to the creation of new rules for governing new legal relations, thereby playing a pivotal role in shaping international law.[5]

4.2. Different Methods of Interpretation

In this regard, how a judge can create new rules through judicial legislation involves differentiating between interpretative methods in international law, which can be categorized into four main types: *textual*, *systematic* (or contextual), evolutive (in the literature, similar approaches are also referred to as purposive or teleological), and *historical*.[6]

Textual (or literal) interpretation involves utilizing the ordinary meaning of written acts to ascertain the law. It is evident that interpreters employing this approach do not intend to create law or exceed the current regulations.[7] According to certain perspectives, interpreters should refrain from supplementing the text with elements not explicitly included within it. In this regard, textual interpretation "helps respect the intentions of the lawmaking States, which the text is presumed to reflect."[8]

1 Cecilia Medina Quiroga, 'The Role of International Tribunals: Law-Making or Creative Interpretation?' in Dinah Shelton, (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 649, 650-52.
2 Alexander Komarov, 'Contract Interpretation and Gap Filling from the Prospect of the UNIDROIT Principles' (2017) 22(1) RDU 29, 31.
3 Jean d'Aspremont, 'Two Attitudes towards Textuality in International Law: The Battle for Dualism' (2022) 42(4) OJLS 963, 968.
4 Andraž Zidar, 'Interpretation and the International Legal Profession: Between Duty and Aspiration' in: Andrea Bianchi et al. (ed), *Interpretation in International Law* (Oxford Academic Press, 2015) ch 6, 133.
5 Jan Klabbers, 'How Interpretation Makes International Law: On Semantic Change and Normative Twists' (2013) 24(2) EJIL 718, 719-722.
6 Ammann (n 11) 195.
7 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) 106.
8 Ammann (n 11) 197, 199.

In other words, as Alexander Orakhelashvili articulated, interpretation is intricately tied to the structural framework of international law, which is grounded in consent and agreement. Consequently, the content and scope of rules must be determined through interpretation to elucidate the boundaries of the original consent.[1] According to the ICJ:

> *"If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words."*[2]

Therefore, while certain methods of interpretation are inherently limited and deemed unsuitable for judicial legislation or development of international law, a purposive or evolutive interpretation approach that considers the dynamic nature of circumstances proves to be an apt tool for law development through adjudicatory bodies.

4.3. Judicial Legislation and Relativity of Judgments

It is worth noting that the drafters of the Statute of the ICJ aimed to regard its judgments as relative, stating that "the decision of the Court has no binding force except between the parties and in respect of that particular case", thereby restricting the Court's capacity for lawmaking and gap filling.[3] Nevertheless, some scholars contend that at least certain aspects of certain types of judgments should be binding on third parties.[4]

Jörg Kammerhofer suggests that it may not always be feasible to limit the personal scope of ICJ judgments to the involved parties, especially when the judgments concern questions of status. He posits that such judgments – for instance on territorial status – form an exception to the relativity of *res judicata*, being opposable to all States, not just the parties to the case, because status-based issue is *une situation objective ayant effet erga omnes*.[5] Hence, the arguments and interpretations put forth by the Court in situations where adjudication is necessary to shape certain aspects of international law are pivotal in its judicial legislation process.

One prominent example is the evolutive interpretation adopted by the Court in its advisory opinion of 11 April 1949, on *Reparation for Injuries Suffered in the Service of the United Nations*, wherein the Court stated that:

> *"To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization. The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the 'development of international law has been influenced by the requirements of international life', and the progressive increase in the collective activities of States has already given rise to instances of action upon*

1 Orakhelashvili (n 17) 286.
2 *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 8.
3 Statute of the International Court of Justice art. 59.
4 Jörg Kammerhofer, 'Beyond the Res Judicata Doctrine: The Nomomechanics of ICJ Interpretation Judgments' (2024) 37(1) LJIL 206, 209.
5 Ibid.

> *the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable."*[1]

Another notable example that underscores the implicit rulemaking role of the Court through its purposive interpretation is the landmark 1970 *Barcelona Traction* case, where the Court's response shaped the modern framework of the hierarchy of norms and principles in international law. In its judgment of 5 February 1970, the ICJ introduced the concept of obligations *erga omnes* as a result of its interpretations.[2] It was the Court's interpretations that initially recognized and introduced obligations *erga omnes* as a legal concept, alongside addressing the legal personality and implied powers of international organizations. These interpretations were subsequently reaffirmed in related cases, influencing the practices of states, impacting the perspectives of legal scholars, and solidifying themselves as established international legal principles.

5. Judicial Legislation through Evolutive Interpretation

The law of international treaties establishes the general rule of interpretation by prioritizing the text of the treaty in the interpretative process. Additionally, *purposive* or *teleological* interpretation is recognized as the third method of treaty interpretation according to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT). Another provision related to teleology is Article 31(3)(b) of the VCLT, which permits recourse to subsequent treaty practice and thus considers changing circumstances.[3] In this method, purposive or teleological interpretation aims to ascertain the object and purpose of the treaty.[4]

In this context, treaties or applicable laws within different international legal regimes – such as those concerning human rights, environmental protection, territorial treaties, and humanitarian treaties pertaining to the safeguarding of civilians during armed conflicts[5] – require distinct approaches to interpretation due to the specific nature of the commitments therein. It is essential to consider the principles of international law relevant to interpreting treaties, given their nature as *lex specialis* or *lex generalis.* Therefore, the adoption of the interpretative method must account for the relevance of these principles.[6]

This becomes crucial as evolutive interpretation is employed to identify general principles of international law.[7] In essence, the nature of rules derived from the level of obligation in the hierarchy of norms and principles within the international legal system significantly influences the interpretative process of a treaty.[8] Interpretation of any legal relationship among States by international courts and tribunals, which may evolve into obligations *erga omnes* due to their

1 *Reparation for Injuries* (n 94) 178.
2 *Barcelona Traction* (Belgium v Spain) (Second Phase) (Judgment) [1970] ICJ Rep 3, 32 [33].
3 Ammann (n 11) 209.
4 James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, , 2012) 379.
5 Julian Arato, 'Accounting for Difference in Treaty Interpretation Over Time', in: Andrea Bianchi et al. (ed), *Interpretation in International Law* (Oxford Academic Press, 2015) ch 10, 205-206.
6 Orakhelashvili (n 40) 371.
7 Ammann (n 11) 210.
8 Ibid 218.

nature, permits dynamic interpretation. This dynamic interpretation results in quasi-rule making or, more accurately, the development of international law through interpretation.[1]

5.1. Evolutive Interpretation

Some regard evolutive interpretation as a form of dynamic interpretation that takes into account the *status quo* at the time of interpretation.[2] Similarly, like the ILC, the European Court of Human Rights has employed the term *evolutionary interpretation* to adapt the content of relevant conventions to ensure effective protection of the rights enshrined in them amidst changing circumstances within the international community.[3] This is because attaining a thorough understanding of the object and purpose of the treaty provides a basis for interpreting treaties in light of present conditions.[4]

Evolutionary interpretation stems from the intent of the parties and takes into account the meaning of the treaty at the time of its interpretation.[5] While Article 31 of the Vienna Convention does not explicitly mention the then-intent of the parties and underscores the primacy of the text over the discovery of intent, this has sparked some debates. According to Arbitrator Max Huber, the meaning of treaty provisions and the circumstances at the time of the conclusion of the treaty are preferable to be interpreted, referred to as static interpretation or the principle of contemporaneity, contrasting with dynamic interpretation.[6] Also, Judge Bedjaoui noted in his separate opinion in the case concerning the *Gabčíkovo-Nagymaros Project*:

> *"The intentions of the parties are presumed to have been influenced by the law in force at the time the Treaty was concluded, the law which they were supposed to know, and not by future law, as yet unknown ... as the law which did not yet exist at that time could not logically have any influence on this intention."*[7]

However, as the ILC has concluded, the idea of interpreting treaty terms *as capable of evolving over time* has received broad acceptance from States.[8] Additionally, various international courts and tribunals that have employed evolutive interpretation appear to have done so on a case-by-case basis. The ICJ, in particular, is perceived to have developed two branches of jurisprudence, one leaning towards a more *contemporaneous* interpretation and the other towards a more *evolutionary* one. In a case concerning the *Dispute regarding Navigational and Related Rights*, the Court considered that:

> *"[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and*

1 Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014) 10-13.
2 Shai Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights' (2019) 42(3) FILJ 765, 765; Tim Clark, 'The Teleological Turn in the Law of International Organisations' (2021) 70(3) ICLQ 533, 562.
3 *Tyrer v United Kingdom*, 26 Eur. Ct. H.R. (ser. A) 26 (1978); Dothan (n 129) 775-76.
4 Inagaki Osamu, 'Evolutionary Interpretation of Treaties Re-examined: the Two-Stage Reasoning' (2015) 22(2-3) JICS 127, 137.
5 'Report of the Commission to the General Assembly on the Work of its Sixty-Fifth Session' [2013] 2(I) Yearbook of the International Law Commission 1, 71 [98].
6 Georg Nolte, Special Rapporteur, *First Report on the Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, UN Doc A/CN.4/660 (19 March 2013) 24 [2-3]; Oliver Dorr, *Schmalenbach, Kirsten, Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 533-34; *Rights of United States Nationals in Morocco* (n 6) 189.
7 *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) (Judgment) [1997] ICJ Rep 7, 121-22 [7].
8 Georg Nolte, Special Rapporteur, *Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, UN Doc A/CN.4/715 (28 February 2018) 21-23 [71-79].

> *where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."*[1]

As evident, the Court's support for evolutive interpretation seems to pertain to general terms of international law. However, arguably, when the ICJ grapples with treaty-specific terms, it appears that the Court tends to decide based on a contemporaneous approach. In his Declaration in the case concerning the *Dispute regarding Navigational and Related Rights*, Judge *ad hoc* Guillaumem, citing various case laws, explains that in identifying and interpreting technical or treaty-specific terms – such as water-parting, centre of the main channel, thalweg, mouth of a lake – the Court 'must seek to ascertain the intention of the parties at the time'.[2] Therefore, *a contrario,* the *generic nature* of a particular term in a treaty and the treaty's designation as *of continuing duration* may give rise to an evolving meaning.[3]

5.2. Application of Evolutive Interpretation in Judicial Legislations of the ICJ

It is pertinent to acknowledge that evolutive interpretation has significantly contributed to aligning the international legal system with the needs of the global community. International courts and tribunals have consistently employed this method of interpretation, taking into account changes in circumstances. This assertion finds validation in the jurisprudence of various international adjudicatory bodies. In its advisory opinion of 21 June 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court's dictum serves as an example of evolutive interpretation:

> *"Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant - the strenuous conditions of the modern world and the well-being and development of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the sacred trust."*[4]

As the Court has elucidated, certain international legal terms are *by definition evolutionary*, and judges should attribute to these terms an evolving meaning by considering the evolution of the international community to address any potential gaps. Additional examples can be found in the jurisprudence of the ICJ. In its judgment of 19 December 1978 in the *Aegean Sea Continental Shelf*, the Court maintained that certain terms, by their very nature, are dynamic, and this dynamism should be reflected in their interpretation:

> *"It hardly seems conceivable that ... terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law."*[5]

1 *Navigational and Related Rights* (n 17) 243 [66].
2 Ibid, 295 [11] (Judge ad hoc Guillaume).
3 ILC (n 15) 25 [6].
4 *Namibia Case* (n 6) 31[53].
5 *Aegean Sea Continental Shelf* (Greece v Turkey) (Judgment) [1978] ICJ Rep 3, 32 [77].

Another instance of the application of such an evolutive method in interpretation by the ICJ is evident in the judgment of 13 July 2009, on the *Dispute regarding Navigational and Related Rights*, where the Court asserted that the content of an international rule is capable of evolving:

> *"[T]he subsequent practice of the parties, within the meaning of article 31, paragraph 3 (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was... to give the terms used... a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law."*[1]

The ICJ has clearly articulated that treaties should be interpreted in light of the common intent of the parties at the time of their conclusion. The intent of the parties may lend meaning or significance to treaty terms that have the potential for evolution and change. Such intent need not be explicitly stated; it may be presumed.[2] In its judgment of April 20, 2010, in the case concerning the *Pulp Mills on the River Uruguay*, the Court observed that 'neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment.'[3] The Court recalled its previous statement in the 2009 Dispute Regarding Navigational and Related Rights, affirming that there are situations in which terms used by States have *a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law*.[4] These cases demonstrate that, according to the Court's perspective, terms or phrases can be dynamically interpreted to develop international applicable law.[5]

Other international judicial bodies also occasionally employ an evolutive approach to interpretation, albeit with varying degrees of openness towards such interpretation.[6] On occasion, the ITLOS, for instance, has demonstrated its readiness to utilize a dynamic and evolutive method of interpretation. The ITLOS has regarded certain notions as variable concepts that "may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge."[7]

Thus, when deemed appropriate, the Tribunal interprets relevant international legal regimes in an evolutive and dynamic manner, presumably in line with the object and purpose of the provision, to address grey areas and potential gaps. In summary, this type of interpretation serves as a valuable tool for international judges to infuse dynamism into their judgments. One of the hallmarks of an effective legal system is its ability to adapt to the variable needs and demands of

1 *Navigational and Related Rights* (n 17) 242 [64].
2 Ibid 242 [63-64]; Nolte (n 133) 74-75 [118].
3 *Pulp Mills* (n 17) 73 [205].
4 Ibid 72-73 [204].
5 Martin Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v Nicaragua' (2011) 24(1) LJIL 201, 201.
6 Nolte (n 133) 66 [63].
7 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) (International Tribunal for the Law of the Sea, Case No. 17, 1 February 2011) [117]; Yoshifumi Tanaka, 'Reflections on Time Elements in the International Law of the Environment' (2013) 73(2) HJIL 139, 141-42.

the international community. International law is no exception to this principle; as a system with rules governing relations among members of the international community, it must reflect changes within this community. As the ICJ has emphasized, "throughout its history, the development of international law has been influenced by the requirements of international law."[1]

Therefore, a sustainable international legal system is one that considers methods of judicial legislation in accordance with its contemporary needs. In this regard, judges of international courts and tribunals, in particular the ICJ, serve as the dynamic architects of international law, playing a pivotal role in its evolution within the framework of the court. Even when engaged in interpreting legal texts, judges wield significant latitude to contribute to the development of the law.

Conclusion

The effectiveness and longevity of a legal system hinge on its ability to adapt with changes in community it governs.[2] This holds true for all legal systems, including international law in its entirety, as they inherently balance stability and flexibility. Stability fosters predictability and compliance, while flexibility allows legal systems to adapt to evolving needs and circumstances. As George Nolte, the Special Rapporteur of the ILC once remarked "legal systems must also leave room for the consideration of subsequent developments to ensure meaningful respect for the agreement of the parties and identification of its limits."[3]

Thus, change becomes inevitable. As the international community evolves, international legal norms must also adapt to reflect these changes within international community.[4] Sometimes, States themselves establish a framework to regulate new legal relations. Sometimes, this evolution has been manifested in judgments of international courts and tribunals, chiefly the ICJ.

While the ICJ asserts that it does not possess a lawmaking role, it undeniably plays a significant role in the development of international law. The boundaries between lawmaking and the development of international law, however, remains blurred. This ambiguity often invites criticism, with some arguing that the Court occasionally oversteps its adjudicatory mandate and intrudes the domain of legislation.

In my view, the extent to which the Court can contribute to the development of international law is inherently tied to its reliance on 'existing' law. This means that as long as the ICJ draws upon established laws, principles, concepts, rules, and regulations within the current framework of the international legal system, it remains within its adjudicatory mandate. By grounding its decisions in the existing legal corpus, the Court avoids the overreach of entering the realm of lawmaking. Thus, the ICJ's contribution to the development of international law is achieved through the careful interpretation and application of existing legal norms, rather than through the creation of new laws.

The Court advances this development of international law by employing a dynamic approach to interpretation, which showcases its capacity to evolve legal principles within the

1 *Reparation for Injuries* (n 94) 178.
2 Thomas F. McInerney, 'Factors Contributing to Treaty Effectiveness: Implications for a Possible Pandemic Treaty' (Global Health Centre Policy Brief, Graduate Institute of International and Development Studies, 2021) 7.
3 Kathryn Gordon and Joachim Pohl, 'Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World' (OECD Working Papers on International Investment, 2015/02, 2015) 6.
4 Nico Krisch, 'The Dynamics of International Law Redux' (2021) 74(1) CLP 269, 269-70.

existing framework. This dynamic interpretative method allows the ICJ to adapt and refine international law in response to contemporary challenges without overstepping its judicial role.

Although it is somewhat difficult to distinguish between lawmaking and judicial legislation in terms of terminology, I have continued to adhere to the term used by Lauterpacht, who referred to the ability of international courts and tribunals to influence the development of international law as 'judicial legislation'.[1] As argued in this article, these terms should be distinguished as 'lawmaking' involve creating new laws, whereas the 'judicial legislation' involves adapting existing laws and establishing new legal relations to address emerging legal requirements. This capacity for 'judicial legislation' underscores the ICJ's unique position in shaping international law while remaining anchored to its adjudicatory mandate.

In this sense, judicial legislation enables the Court to effectively fill gaps through interpretative method and advance the development of international law. At this point, it is important to note that methods of interpretation vary depending on the context, circumstances, and purpose of each case. Therefore, when engaging in 'judicial legislation', the Court must carefully select an interpretative method that considers the scope and the applicability of existing rules, as well as the evolutive nature of international law concepts. This approach ensures that the Court can effectively address the evolving needs of the international community while adapting established legal norms to meet contemporary challenges. By doing so, the ICJ not only applies the existing law as it stands but also contributes to its development in a manner that is both responsive to change and consistent with the overarching framework of international law.

In this context, the UN ILC, in its delineation of modes of interpretation, has recently outlined a method which may be the most suitable for the ICJ to employ when engaging in judicial legislation. As the ILC expressed, the evolutionary interpretation serves as a purpose-oriented approach guided by subsequent practice and other developments in international relations or society.[2] Judicial legislation provides a foundation that responds to the evolving needs of the international community, addressing social and legal developments and leading to contemporary and pragmatic outcomes. However, evolutive interpretation as a method of judicial legislation does not involve creating laws but rather rejuvenates *existing* rules to ensure they appropriately address the necessities of newly emerged situations.[3]

Through an evolutive interpretation, which considers the object and purpose of existing laws in light of changing circumstances and the needs of the international community, the ICJ can provide a judicial legislation. This approach allows the Court to clarify ambiguities, expand the scope of existing rules, and develop international law in areas where the law was previously silent or unclear.

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1 However, from my perspective, the term *'interpretive legislation'* more accurately conveys the role of the ICJ in the development of international law than judicial legislation. While Lauterpacht's terminology emphasizes the Court's influence, *interpretive legislation* underscores its essential function of clarifying and applying existing legal norms. This distinction is crucial; it highlights that the ICJ does not create new laws but interprets established legal frameworks to adapt to emerging needs and circumstances. By adopting this terminology, we acknowledge the ICJ's pivotal role in shaping international law while remaining firmly grounded in its adjudicatory mandate.

2 Helmersen (n 16) 166; Alice Lloyd, 'A Purposive Approach to Interpreting Australia's Complementary Protection Regime' (2020) 43(2) MULR 654.

3 Jeffrey Goldsworthy, 'Is Legislative Supremacy Under Threat?: Statutory Interpretation, Legislative Intention? And Common-Law Principles' [2016] (28) *Quadrant* 36, 57.

Recognizing the statutory limitations of the ICJ as a court of law that cannot engage in lawmaking, evolutive interpretation serves as an optimal tool for exercising the Court's judicial legislative capacities. It allows the Court to extend the application of existing laws beyond these limitations and address unregulated areas.[1] Various areas of international law, including the law of treaties, the law of international organizations, human rights law, foreign investment law, and international trade law, have been profoundly influenced by the case law established by diverse international tribunals. It is noteworthy, for example, that the emergence of the concept of *erga omnes* obligations, which has brought about fundamental changes in the understanding and conceptualization of modern international law, can be traced back to a mere *obiter dictum* contained in a judgment of the ICJ.[2]

As an authoritative voice in the international legal system, the ICJ can use dynamic interpretation to adapt rules to new contexts. This method implicitly fosters the emergence of new norms and practices while staying within its judicial boundaries and not encroaching on lawmaking. Judicial legislation allows the Court to navigate the balance between stability and flexibility in international law. It preserves the integrity of the existing legal framework while enabling principled adaptations to maintain its relevance amid the evolving landscape of global affairs. This interpretive approach reinforces the ICJ's crucial role as a steward of an international legal order that responds to the changing demands of the international community. Consequently, with all due respect, Judge *ad hoc* Skotnikov's criticism is not valid; the Court was engaged in *judicial legislation* rather than *lawmaking*.

1 Helmersen (n 16) 130.

2 Fuad Zarbiyev, 'Judicial Activism in International Law-A Conceptual Framework for Analysis' (2012) 3(2) JIDS 247, 247-8. A judge is not a mere follower. The grandeur and majesty of their position are based on the creative power they possess. For reasonings in this regard, *see:* Ronald Sackville, 'Courts and Social Change' (2005) 33(3) FLR 373; Lara M. Pair (n 5) 181.

References

Books

Alvarez J.E, *International Organizations as Law-Makers* (Oxford University Press, 2005)

Barak A, *Purposive Interpretation in Law* (Princeton University Press, 2005)

Bedi S.R.S, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Bloomsbury Publishing, 2007)

Crawford J, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012)

Dorr O and Schmalenbach K, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012)

Duncan McNair A, *The Law of Treaties* (Oxford University Press, 1986)

Fattorini S (ed), *Decisions of the ICJ as Sources of International Law?* (International and European Papers Publishing, 2018)

Fuentes I.C, *Normative Plurality in International Law: A Theory of the Determination of Applicable Rules* (Springer, 2016)

Jennings R.Y, 'General Course on Principles of International Law' in *Recueil des Cours de l'Académie de La Haye* (Brill-Nijhoff, 1967)

Neff S.C, 'In Search of Clarity: Non Liquet and International Law' in Kaikobad K.H and Bohlander M (eds), *International Law and Power: Perspectives on Legal Order and Justice* (Brill-Nijhoff, 2009).

Odile Ammann, *Domestic Courts and the Interpretation of International Law* (Brill, 2021)

Orakhelashvili A, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008)

Pellet A, 'Decisions of the ICJ as Sources of International Law?' in Cannizzaro E et al (eds), *Decisions of the ICJ as Sources of International Law* (International and European Papers Publishing, 2018)

Ramcharan B, *Modernizing the Role of the International Court of Justice* (Asser Press, 2022)

Raz J, 'Legal Reasons, Sources, and Gaps' in Raz J (ed), *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979)

Tams C.J, 'The Development of International Law by the International Court of Justice' in Fattorini S (ed), *Decisions of the ICJ as Sources of International Law?* (International and European Papers Publishing, 2018)

Van der Ploeg K.P, Pasquet L and Castellanos-Jankiewicz L (eds), *International Law and Time: Narratives and Techniques* (Springer, 2022)

Watson I (ed), *Indigenous Peoples as Subjects of International Law* (Routledge, 2012)

Zidar A, 'Interpretation and the International Legal Profession: Between Duty and Aspiration' in Bianchi A et al. (ed), *Interpretation in International Law* (Oxford Academic Press, 2015)

Articles

Acikgonul Y.M, 'Today's Notion of International Case Law: From a Subsidiary Source to a Binding Authority' (2019) 5(8) McGill Journal of Dispute Resolution 188.

Aznar-Gomez M.J, 'The 1996 Nuclear Weapons Advisory Opinion and Non-liquet in International Law' (2008) 48(1) International and Comparative Law Quarterly 3.

Besson S, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29(2) Leiden Journal of International Law 289.

Bogdandy A.V and Venzke I, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12(5) German Law Journal 979.

Carvalho J.S.D, 'The Powers of Silence: Making Sense of the Non-Definition of Gender in International Criminal Law' (2022) 35(4) Leiden Journal of International Law 963.

Chimni B.S, 'Third World Approaches to International Law: A Manifesto' (2006) 8(1) International Community Law Review 3.

Clark T, 'The Teleological Turn in the Law of International Organisations' (2021) 70(3) International & Comparative Law Quarterly 533.

Coleman A, 'The International Court of Justice and Highly Political Matters' (2003) 4(1) Melbourne Journal of International Law 29.

D'Aspremont J, 'Two Attitudes towards Textuality in International Law: The Battle for Dualism' (2022) 42(4) Oxford Journal of Legal Studies 963.

Dawidowicz M, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v Nicaragua' (2011) 24(1) Leiden Journal of International Law 201.

Devaney J.G, 'The role of precedent in the jurisprudence of the International Court of Justice: A Constructive Interpretation' (2022) 35(3) Leiden Journal of International Law 641.

Dothan S, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights' (2019) 42(3) Fordham International Law Journal 765.

Goldsworthy J, 'Is Legislative Supremacy Under Threat?: Statutory Interpretation, Legislative Intention? And Common-Law Principles' [2016] (28) Quadrant 36.

Gordon K and Pohl J, 'Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World' (OECD Working Papers on International Investment, 2015/02, 2015).

Gourgourinis A, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) Journal of International Dispute Settlement 31.

Greenwood C, 'The International Court of Justice and the Development of International Humanitarian Law' [2022] 104 (920-921), International Review of the Red Cross 1840.

Helmersen S.T, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6(1) European Journal of Legal Studies 161.

Higgins R, 'The Development of International Law by the Political Organs of the United Nations' (1965) 59(3) Proceedings of the American Society of International Law 116.

Hosseinnejad K, 'Critical Evaluation of the ICJ Approach in Evolutionary Interpretation' (2018) 1(1) Iranian Review for UN Studies 119.

Jain N, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57(1) Harvard International Law Journal 111.

Kammerhofer J, 'Beyond the Res Judicata Doctrine: The Nomomechanics of ICJ Interpretation Judgments' (2024) 37(1) Leiden Journal of International Law 206.

Klabbers J, 'How Interpretation Makes International Law: On Semantic Change and Normative Twists' (2013) 24(2) European Journal of International Law 718.

Klabbers J, 'On Epistemic Universalism and the Melancholy of International Law' (2018) 29(4) European Journal of International Law 1057.

Komarov A, 'Contract Interpretation and Gap Filling from the Prospect of the UNIDROIT Principles' (2017) 22(1) Revue de Droit Uniforme 29.

Koskenniemi M, 'Lauterpacht: The Victorian Tradition in International Law' (1997) 8(2) European Journal of International Law 215.

Kostruba A, Haliantych M, Iskra M and Dryshliuk A, 'Legal Gaps: Concept, Content, Problems of the Role of Legal Doctrine in Overcoming them' (2023) 44(2) Statute Law Review 1.

Krisch N, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2017) 108(1) American Journal of International Law 1.

Krisch N, 'The Dynamics of International Law Redux' (2021) 74(1) Current Legal Problems 269.

Lloyd A, 'A Purposive Approach to Interpreting Australia's Complementary Protection Regime' (2020) 43(2) Melbourne University Law Review 654.

Lo C, 'The Difference Between Treaty Interpretation and Treaty Application and the Possibility to Account for Non-WTO Treaties During WTO Treaty Interpretation' (2012) 22(1) Indiana International & Comparative Law Review 1.

Manyk A, 'Participation of the Nonclassical Subjects of International Law in Law-Making and Law-Enforcement' (2018) 5(1) European Journal of Law and Public Administration 46.

Mayr T.F and Mayr-Singer J, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law' (2015) 76(1) Heidelberg Journal of International Law 425.

Middleton J, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) Melbourne University Law Review 627.

Mitchell A.D and Heaton D, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010) 31 Michigan Journal of International Law 561.

Nguyen S.T, 'The Applicability of Comity and Abuse of Rights in World Trade Organisation Dispute Settlement' (2016) 35(1) University of Tasmania Law Review 95.

Novy Z, 'Evolutionary Interpretation of International Treaties' [2017] 3 Czech Yearbook of International Law 205.

Pair L.M, 'Judicial Activism in the ICJ Charter Interpretation' (2001) 8(1) ILSA Journal of International & Comparative Law 181.

Park L, 'The International Court and Rule-Making: Finding Effectiveness' (2018) 38(4) University of Pennsylvania Journal of International Law 1065.

Paz R.Y, 'Making it Whole: Hersch Lauterpacht's Rabbinical Approach to International Law' (2012) 4(2) Goettingen Journal of International Law 417.

Pellet A, 'The Normative Dilemma: Will and Consent in International Law-Making' [1989] 12 Australian Yearbook of International Law 22.

Peters A, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15(3) International Journal of Constitutional Law 671.

Petersen N, 'Lawmaking by the International Court of Justice: Factors of Success' (2011) 12(5) German Law Journal 1295.

Porumbescu A and Pogan L.D, 'Transnational Corporations, as Subjects of International Law in the Globalization Context' (2019) 64 Revista de Stiinte Politice 65.

Quane H, 'Silence in International Law' (2014) 84(1) British Yearbook of International Law 240.

Quiroga C.M, 'The Role of International Tribunals: Law-Making or Creative Interpretation?' in Dinah Shelton, (ed), The Oxford Handbook of International Human Rights Law (Oxford University Press, 2013) 649.

Reisman W.M, 'International Non-liquet: Recrudescence and Transformation' (1969) 3(4) International Lawyer 770.

Report of the Commission to the General Assembly on the Work of its Sixty-Fifth Session [2013] 2(II) Yearbook of the International Law Commission 11.

Roughan N, 'Mind the Gaps: Authority and Legality in International Law' (2016) 27(2) European Journal of International Law 329.

Ruda J.M, 'Some of the Contributions of the International Court of Justice to the Development of International Law' (1991) 24(1) New York University Journal of International Law and Politics 35.

Sackville R, 'Courts and Social Change' (2005) 33(3) Federal Law Review 373.

Sartori D, 'Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights' (2014) 29(2) Tulane European & Civil Law Forum 46.

Singh N.N, 'The Legislative Process in International Law: A General Comment' (1990) 2(2) Bond Law Review 172.

Tanaka Y, 'Reflections on Time Elements in the International Law of the Environment' (2013) 73(2) *Heidelberg Journal of International Law* 139.

Teles P.T, 'The ILC's Past Practice on Progressive Development and Codification of International Law-An Empirical Analysis Focusing on the Law of the Sea, Law of Treaties and State Responsibility' (2019) 13(6) FIU Law Review 1027.

Tranter K, 'The Laws of Technology and the Technology of Law' (2011) 20(4) Griffith Law Review 753.

Villa V, 'A Pragmatically Oriented Theory of Legal Interpretation' (2010) 12(2) Journal for Constitutional Theory and Philosophy of Law 89.

Viñuales J.E, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) 32(1) Fordham International Law Journal 232.

Voulgaris N, 'The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development' (2022) 33(3) European Journal of International Law 761.

Vyver V.D, 'The Development of International Law through the Unauthorised Conduct of International Institutions' (2015) 18(5) Potchefstroom Electronic Law Journal 1301.

Weil P, 'The Court Cannot Conclude Definitively…Non Liquet Revisited' [1998] 36 Columbia Journal of Transnational Law 109.

Reports

[Name Redacted]. *Statutory Interpretation: General Principles and Recent Trends* (United States Congressional Research Service, 5 April 2018).

Commonwealth of Australia, *Review of the Law of Negligence* (Final Report, September 2002).

Gordon K and Pohl J, *Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World* (OECD Working Papers on International Investment, 2015/02, 2015).

Guzman A, *The Consent Problem in International Law* (Berkeley Program in Law and Economics, 2011).

International Law Commission, *Memorandum Submitted by the Secretary-General, Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission*, UN Doc A/GN.4/1/Rev.l (10 February 1949).

Liu Y, 'The Judicial Construction of Gaps at the International Court of Justice' (2016) 110 *Proceedings of the ASIL Annual Meeting* 209.

McInerney T.F, 'Factors Contributing to Treaty Effectiveness: Implications for a Possible Pandemic Treaty' (Global Health Centre Policy Brief, Graduate Institute of International and Development Studies, 2021).

Mendelson M, *Formation of International Law and the Observational Standpoint* (International Law Association Report of the Sixty-Third Conference, First Report of the Rapporteur, 1986, Anne 1).

Murphy S.D, Special Rapporteur, *Fourth Report on Crimes Against Humanity*, UN Doc A/CN.4/725 (18 February 2019).

Case Law

Aegean Sea Continental Shelf (Greece v Turkey) (Judgment) [1978] ICJ Rep 3.

Barcelona Traction (Belgium v Spain) (Second Phase) (Judgment) [1970] ICJ Rep 3.

Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion) [1950] ICJ Rep 4.

Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (Advisory Opinion) [1971] ICJ Rep 16.

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.

Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 13.

Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174.

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15.

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) (International Tribunal for the Law of the Sea, Case No. 17, 1 February 2011).

Rights of United States Nationals in Morocco (France v United States of America) (Judgment) [1952] ICJ Rep 176.

South West Africa (Liberia/ South Africa) (Second Phase) (Judgment) ICJ Rep 6.

Tyrer v United Kingdom, 26 Eur. Ct. H.R. (ser. A) 26 (1978).

Thesis and Dissertation

Stephens T, 'The Role of International Courts and Tribunals in International Environmental Law' (PhD Thesis, University of Sydney, 2005).

Ginsburg T, 'International Judicial Lawmaking' (Illinois Law and Economics Working Papers Series, Research Paper No. LE05-006, University of Illinois, 2005).

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

The Grey Areas of Self-Determination: Double Standard of Recognition in International Law

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Article Info

Article type:
Research Article

Article history:
Received
27 December 2025

Received in revised form
8 April 2025

Accepted
13 June 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3788.html

Keywords:
International law, Self-Determination, Montevideo Convention, State, Sovereignty, Geopolitical Hegemony.

ABSTRACT

This paper critically examines the international legal and political precedents surrounding the principle of self-determination, beginning with the dissolution of Yugoslavia, particularly the Kosovo War, and juxtaposes it with the global responses to analogous separatist claims in Abkhazia, South Ossetia, Crimea, Luhansk, Donetsk, as well as the ongoing situations in Palestine and Somaliland. Through a comparative analysis of these cases, the paper exposes the international community's selective recognition of independence movements, where similar claims are met with divergent responses based not on consistent legal standards but on geopolitical interests and strategic alignments. The study argues that the recognition of Kosovo as an independent state, despite bypassing the UN Security Council, has created a precedent that is now invoked selectively to either support or delegitimize other secessionist claims. This inconsistency reveals an underlying double standard in the application of international law, wherein the principles of territorial integrity and self-determination are instrumentalized to serve the hegemonic objectives of powerful states, thereby eroding the normative coherence and credibility of the United Nations Charter and the international legal order it was designed to uphold.

Cite this article: Das, P.K., (2025). The Grey Areas of Self-Determination: Double Standard of Recognition in International La, *Iranian Journal of International and Comparative Law*, 3(1), pp: 33-47.

10.22091/ijicl.2025.12843.1155
Publisher: University of Qom

Table of Contents

Introduction

The concept of self-determination is enshrined in international law as a fundamental right, empowering peoples to freely choose their political status and to pursue their economic, social, and cultural development. Emerging in the aftermath World War I and subsequently codified in foundational documents such as the United Nations Charter (1945) and the International Covenant on Civil and Political Rights (1966), the principle was conceived primarily to facilitate decolonization and to dismantle imperial dominance. However, in the post-colonial and post-Cold War periods, the application of self-determination has grown increasingly complex and legally ambiguous, raising significant concerns about its selective enforcement and political manipulation.[1]

At the core of this debate is the Montevideo Convention on the Rights and Duties of States (1933), which lays out the traditional criteria for statehood: a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states.[2] Although intended to bring legal clarity and consistency to the process of state recognition, the Convention has proven inadequate when confronted with contemporary claims involving unrecognized nations, separatist movements, and overlapping sovereignty claims. Its state-centric model does not adequately address the legal, historical, and political dimensions of self-determination claims in the modern international system.[3]

This article argues that the Montevideo Convention's rigid interpretation has not only failed to accommodate contemporary challenges in the application of self-determination but has also enabled dominant global actors to manipulate legal norms to serve strategic objectives. The result is a pattern of highly selective recognition, where the legitimacy of a statehood claim hinges less on legal compliance than on geopolitical alignment. Consequently, the notion of self-determination is no longer applied as a consistent legal standard but rather functions as a discretionary instrument wielded by powerful states.[4]

1 Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).
2 Montevideo Convention on the Rights and Duties of States (1933), art 1.
3 James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 415–425.
4 Anne Peters, 'The Principle of Democratic Teleology in International Law' in Tomuschat and Thouvenin (eds),

The criteria outlined in the Montevideo Convention were designed to offer an objective benchmark for statehood; yet, the framework is frequently overridden or selectively enforced. For example, the 2008 recognition of Kosovo's independence by many Western states was justified as a necessary response to human rights abuses under Serbian governance. Yet comparable claims made by regions such as Abkhazia and South Ossetia, which also declared independence following conflict, were categorically rejected by those same actors. This stark inconsistency reveals how legal arguments around self-determination are often subordinated to political interests.

A similar dynamic can be observed in the case of Crimea, annexed by Russia in 2014 following a disputed referendum. Russia defended its actions by invoking the rhetoric of self-determination, while the majority of the international community denounced the annexation as a clear violation of Ukraine's territorial integrity and a breach of fundamental norms of international law. Meanwhile, pro-Russian separatist entities in Luhansk and Donetsk were recognized by Russia but dismissed by Western states as illegitimate instruments of Russian influence. These examples illustrate how the practice of self-determination in international law lacks coherent legal enforcement and is heavily shaped by realpolitik.

The Kosovo precedent further complicates this legal landscape. The North Atlantic Treaty Organization's (NATO) military intervention in 1999 and its subsequent political support for Kosovo's independence set a significant, albeit controversial, precedent. Russia has since relied on this example to legitimize its own interventions, including in Georgia and Ukraine. The result is a cycle of legal mimicry, where self-determination claims are adopted or rejected depending on the geopolitical agenda of the states involved.

Perhaps nowhere is this pattern more evident than in the protracted cases of Palestine and Somaliland. Despite having viable claims to statehood under the Montevideo framework, both entities remain in diplomatic limbo. Palestine, which enjoys broad international recognition and possesses a permanent population, continues to be denied full membership and statehood status [due to persistent occupation and the exercise of veto power by the United States in the UN Security Council]. Somaliland, a de facto stable and democratic region with historical sovereignty, has been similarly excluded from recognition, not on legal grounds but due to political inertia and regional sensitivities.[1]

In each of these cases, the failure to apply a consistent legal standard has left affected populations exposed to protracted instability, political marginalization, and external manipulation. In the absence of a robust legal framework capable of meaningfully addressing these asymmetries, international law cannot fulfill its role in promoting justice, sovereignty, and peace. As such, this paper calls for a reevaluation of the Montevideo Convention and the development of a more equitable and transparent system for evaluating self-determination claims.

The Fundamental Rules of the International Legal Order (Martinus Nijhoff 2006) 94.

1 Suhaib Mahmoud, 'Understanding the Secession of Somaliland' (2023) 6(1) *AlMuntaqa* 8.

1. The Montevideo Convention and the Legal Criteria for Statehood: An Examination of Article 1 and Its Contemporary Challenges

The Montevideo Convention on the Rights and Duties of States, adopted in 1933 during a period of hemispheric diplomatic engagement in the Americas, sought to codify the essential criteria for statehood under international law.[1] Article 1 of the Convention articulates four constitutive requirements: a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states.

Despite the clarity the Convention intended to provide, it is rooted in a Eurocentric legal and political paradigm that prioritizes territorial sovereignty over the evolving realities of identity, autonomy, and self-governance. At the time of its drafting, the drafters did not anticipate a post-colonial international system characterized by ethno-nationalist demands, failed states, or the proliferation of unrecognized but functioning polities. This has led to a significant disjunction between legal formalism and geopolitical practice.[2]

Although the criteria appear objective, they frequently produce contradictions when applied to real-world disputes. For instance, the case of Kosovo demonstrates how boundaries inherited from imperial or communist cartographies often provoke new contestations when subjected to ethnic, cultural, or political realignment. The Convention's fourth criterion- the capacity to enter into relations with other states- introduces a circular logic. In many cases, an entity's capacity for international engagement is contingent on recognition itself. This creates a paradox: states must be recognized to have international legal standing, yet must demonstrate legal standing to be recognized.[3]

Scholarly commentary has emphasized that this capacity is often a consequence rather than a prerequisite of recognition, further complicating its legal relevance. Moreover, legal scholarship has questioned the utility of "capacity for relations" as a standalone criterion, since many unrecognized entities conduct international negotiations or sign agreements unofficially.

This ambiguity opens the door to strategic manipulation. Some states are denied recognition not for failing to meet the Montevideo criteria but due to broader geopolitical calculations. Examples include Western Sahara and Somaliland, both of which possess functioning governments, defined territories, and stable populations but are denied recognition due to regional opposition or the interests of influential states. Conversely, Taiwan has been extended de facto recognition by numerous actors, despite widespread non-recognition by the international community.[4]

Furthermore, the Convention is silent on the right to self-determination, creating an asymmetry between the law's technical criteria and the ethical principles embedded in the UN Charter (1945) and customary international law.[5] While UN bodies and International Court of

1 Montevideo Convention, *Encyclopaedia Britannica* (Mar. 5, 2024), https://www.britannica.com/event/Montevideo-Convention.
2 Crawford (n 2)415–425
3 D P O'Connell, 'Criteria of Statehood in International Law' (1998) 10 *Temporis Law Journal* 261.
4 Suhaib Mahmoud, 'Understanding the Secession of Somaliland' (2023) 6(1) *AlMuntaqa* 8; Temesgen Sisay Beyene, 'Declaration of Statehood by Somaliland and the Effects of Non-Recognition under International Law' (2019) 10(1) *Beijing Law Review* 196.
5 UN Charter 1945, art 1(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1.

Justice's (ICJ) advisory opinions have acknowledged the moral and political relevance of self-determination, the Montevideo framework does not integrate this norm as a legal threshold for statehood. As a result, claims such as that of Catalonia- which involves a functioning regional government and a distinct population- are dismissed on the basis of territorial integrity, despite arguably meeting many of the Convention's standards.[1]

The Convention's rigidity has therefore left international law ill-equipped to handle modern self-determination conflicts. It fails to differentiate between secessionist movements born of legitimate grievances and those orchestrated by external actors for strategic purposes. Without reform, this legal vacuum will continue to be filled by power politics and selective recognition.

2. Case Studies in Selective Recognition: The Application of Montevideo Criteria in Kosovo, Abkhazia, and South Ossetia

Kosovo, recognized by over 100 states but denied UN membership due to Russian and Chinese vetoes, exemplifies how great-power politics override legal criteria. Western support for its independence contrasted sharply with their reluctance in Crimea, exposing double standards.[2]

In Crimea, Russia invoked the principle of self-determination to justify its 2014 annexation following a disputed referendum.[3] However, the vote occurred under conditions that did not meet international standards: the presence of Russian military forces, exclusion of international observers, and widespread reports of voter coercion undermined the legitimacy of the process.[4] The majority of the international community condemned the move as a violation of Ukrainian sovereignty, reflecting a geopolitical rather than a legal response.

State recognition has increasingly functioned as a geopolitical tool. China's refusal to recognize Taiwan, despite its de facto statehood, highlights how political strategy often trumps legal criteria. Conversely, the rapid recognition of former Yugoslav republics in the 1990s by Western states demonstrates the use of recognition to reshape regional dynamics.[5]

Legal scholars like James Crawford and Anne Peters argue that the Montevideo criteria are inadequate for modern challenges. Crawford notes the Convention's failure to address "failed states" (e.g., Somalia)[6]. The ICJ's Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* further revealed that international law neither prohibits nor endorses secession, leaving a vacuum filled invariably by political expediency.

In the case of Kosovo, the Western argument for recognition focused principally on remedial secession, justified by grave humanitarian concerns, particularly Serbia's systematic suppression of the Kosovo Albanians in the 1990s.[7] Yet the concomitant claim that Kosovo

1 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 403, paras 79–84.*(July 22),* https://www.icj-cij.org/case/141.
2 UNGA Res 1244 (1999) UN Doc S/RES/1244; UN SC, 'Kosovo's Independence Not Endorsed by United Nations' (18 February 2008).
3 Russian Federation, Statement on Crimea Referendum, Ministry of Foreign Affairs (17 March 2014).
4 Organization for Security and Co-operation in Europe (OSCE), *Report on Absence of International Observers in Crimea Referendum* (2014).
5 Steven Pifer, 'Five Years After Crimea's Illegal Annexation' (Brookings Institution, 2019) https://www.brookings.edu/articles/five-years-after-crimeas-illegal-annexation.
6 James Crawford, *The Creation of States in International Law* 70 (2d ed. 2006).
7 NATO, 'Kosovo Air Campaign: Operation Allied Force' (1999); see also UNSC meetings March–June 1999.

represented a "unique case" was strategically used to preempt the establishment of a broader legal precedent, thereby protecting Western recognition policies from being invoked by other separatist groups.[1]

By contrast, Abkhazia and South Ossetia, two breakaway regions from Georgia also declared independence following armed conflict. Despite meeting several of the Montevideo criteria, they were dismissed by Western powers as illegitimate entities, in part due to their dependence on Russian military and economic support.[2]

This inconsistency reveals the selective invocation of the Convention's standards. In the case of Kosovo, the absence of full UN membership and continued Serbian objections were overlooked. In Georgia, similar deficits were deemed disqualifying.

The legal argument of "capacity for relations" was applied flexibly: Kosovo's partial diplomatic engagement was deemed sufficient, while Abkhazia's and South Ossetia's limited autonomy from Russia was portrayed as disqualifying. This selective legal interpretation served to protect geopolitical interests rather than enforce uniform standards.

Recognition has thus become a strategic act. In Yugoslavia, it served to disempower a non-aligned regional power and extend Western influence. In Georgia, restraint reflected a desire to avoid open conflict with Russia and to protect vital energy corridors such as the Baku-Tbilisi-Ceyhan pipeline.

In both cases, legal norms were subordinated to broader strategic aims. Kosovo was recognized despite unresolved territorial disputes, such as in the Serb-majority North. Abkhazia and South Ossetia, while functionally autonomous, were dismissed as "puppet states" of Russia.

These examples demonstrate that statehood in the current international system is not a neutral legal status but a potent tool of power projection. Russia's use of recognition in Georgia mirrors the tactics used by Western states in the Balkans; yet the former is widely deemed illegitimate while the latter is legitimized under exceptionalist narratives.

The Kosovo precedent established a loophole: powerful states may invoke humanitarian crises to override sovereignty but ignore the same principle when it becomes politically inconvenient. This form of legal exceptionalism erodes the universality of international law.

While some scholars propose "democratic governance" as a basis for recognition, such criteria remain susceptible to politicization and selective application. In the absence of a consistent and transparent legal framework, recognition remains arbitrary, reinforcing global power hierarchies at the expense of equitable legal standards.[3]

1 Marc Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?' (2011) 10 *Chinese J Intl L* 31.
2 Stephen Jones, *Georgia: The Conflict with Russia and the Crisis in South Ossetia*, House of Commons Library Research Paper (2008).
3 Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46.

3. Comparative Analysis of State Disintegration and Secessionist Conflicts: The Cases of Yugoslavia and Georgia

The breakup of Yugoslavia in the 1990s and the 2008 Russia-Georgia conflict present contrasting illustrations of how the Montevideo criteria and the right to self-determination have been applied or disregarded depending on the prevailing political context.

During Yugoslavia's dissolution, Western states rapidly recognized Slovenia, Croatia, Bosnia-Herzegovina, and later Kosovo, despite contested borders and ongoing violence.[1] The Badinter Arbitration Committee, established by the European Community, endorsed this recognition based on principles such as respect for human rights and democratic governance, extending beyond strict Montevideo criteria. This approach incentivized secessionist momentum and enabled Western powers to shape the post-Yugoslav order.

By contrast, when Georgia turned to self-determination claims for Abkhazia and South Ossetia following the brief Russo-Georgian war in 2008, Western states rejected these claims, invoking the countervailing principle of territorial integrity. Despite those regions having devolved administrative structures and distinct ethnic populations, their declarations of independence were dismissed as illegitimate, highlighting the selective and politically contingent enforcement of legal norms.

Furthermore, recognition of Abkhazia and South Ossetia by Russia, following military action in August 2008, drew criticism for violating international law, including the UN Charter's prohibition on the unilateral use of force.[2] The responses to these crises demonstrate how power dynamics shape legal interpretations: when Western states sought to reshape a region for strategic ends, recognition was swift; when Russia attempted the same, the response was denial and condemnation.

This tale of two crises underscores a systemic problem: international legal standards like the Montevideo criteria or the principle of self-determination are subject to political discretion. Depending on whether great powers back or oppose a claim, the same legal tools are interpreted in dramatically opposite ways.

4. The Russian Federation's Invocation of Self-Determination in Crimea and Donbas: Legal Assessment and Geopolitical Implications

The annexation of Crimea by the Russian Federation in 2014 and its subsequent recognition of the so-called Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) have intensified debates around the selective application of self-determination. Russia justified its actions by referencing the 2014 Crimean referendum, arguing that the majority of Crimean residents had voted to join the Russian Federation, thereby exercising their right to self-determination.[3]

However, the referendum occurred under the effective occupation and presence of Russian military forces, lacked transparency, and was conducted without the presence of international

1 Council of the European Union, 'Brussels European Council 15 and 16 December 1991, Conclusions' (1991).
2 UN Charter 1945, art 2(4); see also UNGA Res ES-11/4 (12 October 2022) condemning unilateral annexations.
3 Russian Federation, 'Address by President of the Russian Federation on the Accession of Crimea' (18 March 2014).

observers. It was condemned by the UN General Assembly, which subsequently affirmed Ukraine's territorial integrity.[1] International observers, including the Organization for Security and Co-operation in Europe (OSCE), were barred from monitoring, and reports emerged detailing voter intimidation, restricted media access, and ballot-stuffing[2]. The UN High Commissioner for Human Rights noted that Crimean Tatars, constituting approximately 12% of the population, faced systemic exclusion, with their leaders arrested or silenced.[3] By 2025, Russia's claims of a "free expression of will" remain contested, as no independent verification of the process has ever been permitted.[4] Unlike the case of Kosovo, where NATO intervened after a prolonged humanitarian crisis, the international community rejected Russia's use of similar reasoning in Crimea. This suggests that the validity of self-determination claims is assessed not through consistent, objective criteria but through the perceived legitimacy of the actor invoking them.

In 2022, the Russian government formally recognized the DPR and LPR and used their alleged right to self-determination as a primary legal justification for its full-scale invasion of Ukraine.[5] The legal justification was widely dismissed as pretextual. These declarations of independence occurred in the absence of free and fair referenda, amid active armed conflict, and in regions that had been under de facto Russian military and political control for years.[6]

Although both entities proclaimed independence, created governing institutions, and claimed to represent distinct populations, their heavy and overt dependence on external military and financial support undermines the criteria outlined in the Montevideo Convention. In particular, their "government" lacks independent functionality, and their capacity to engage in international relations is inseparable from and contingent on Russian involvement.

In contrast to Kosovo, which has received recognition from over 100 sovereign states, the DPR and LPR have only been recognized by a small group of Russian-aligned states. This disparity reinforces the view that recognition remains an intrinsically political, rather than a purely legal, process, reinforcing the asymmetry of power in the application of international norms.

Additionally, the attempted annexation of the DPR, LPR, Kherson, and Zaporizhzhia regions following referendums in September 2022 raises further serious legal concerns. These referenda, overwhelmingly rejected by the international community as illegitimate, having been conducted under conditions of military occupation and during active warfare, violating standards of self-determination that require a free expression of will.

The 2014-2015 Minsk Agreements,[7] brokered by France and Germany, aimed to reintegrate

1 UNGA Res. 68/262, *Territorial Integrity of Ukraine*, 1, U.N. Doc. A/RES/68/262 (Mar. 27, 2014), https://press.un.org/en/2014/ga11493.doc.htm.

2 Harriet Salem, *Ukraine and Russia Call Truce before Crimea Referendum*, *The Guardian* (Mar. 16, 2014), https://www.theguardian.com/world/2014/mar/16/ukraine-russia-truce-crimea-referendum.

3 Human Rights Watch, 'Crimean Tatars Face Unfounded Terrorism Charges' (12 July 2019) https://www.hrw.org/news/2019/07/12/crimean-tatars-face-unfounded-terrorism-charges accessed 7 June 2025

4 Steven Pifer, *Five Years after Crimea's Illegal Annexation, the Issue Is No Closer to Resolution*, Brookings Institution (Mar. 18, 2019), https://www.brookings.edu/articles/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/.

5 Ministry of Foreign Affairs of the Russian Federation, 'Recognition of Donetsk and Luhansk' (21 February 2022).

6 UN Human Rights Council, *Report on the Human Rights Situation in Ukraine* (2022) paras 33–40.

7 *What Are the Minsk Agreements on the Ukraine Conflict?*, Reuters (Feb. 21, 2022), https://www.reuters.com/world/europe/what-are-minsk-agreements-ukraine-conflict-2022-02-21/.

Donbas into Ukraine with autonomy. However, Russia and the separatist forces it backed are widely considered to have sabotaged their implementation, using the accords to entrench de facto control over the territory. By 2025, the DPR and LPR remain unrecognized by all states except Russia, Syria, and North Korea, with their governance sustained almost entirely by Russian subsidies and military aid.

The war has reduced cities like Mariupol and Sievierodonetsk to rubble. A 2024 UN report documented 28,000 civilian deaths, 12,000 kidnapped or forcibly displaced, and 90% of infrastructure destroyed.[1] The Montevideo Convention's sterile criteria ignore such realities, reducing human suffering to abstract legal debates.

The Convention's criteria assume a static and consensual process of statehood, ignoring modern hybrid warfare tactics like cyberattacks, disinformation, and "little green men"[2] (a reference to unmarked Russian troops in Crimea). Russia's policy of "passportization"- the mass issuance of Russian passports to Donbas residents since 2019-[3] to justify intervention mirrors tactics used in Georgia's Abkhazia and South Ossetia.

Ukraine's own independence in 1991, recognized under the Montevideo framework, now clashes with localized identities in Crimea and Donbas. The Convention offers no guidance on reconciling historical grievances (e.g., Soviet-era deportations of Tatars) with the imperatives of contemporary sovereignty. This indicates that the principle of self-determination must evolve beyond 20th-century decolonization paradigms to adequately address substate nationalism.

Most importantly, the West's refusal to recognize the Russian annexation of Crimea and the independence of the Donbas contrasts sharply with its support for Kosovo's independence, revealing a double standard rooted in realpolitik. While the U.S. and EU imposed severe sanctions on Russia and provided substantial military assistance to Ukraine, their insistence on Ukrainian territorial integrity ignores parallels to Serbia's loss of Kosovo. This hypocrisy erodes the credibility of international law.

The international legal community largely views Russia's actions as violations of Article 2(4) of the UN Charter, which prohibits the threat or use of force against the territorial integrity or political independence of any state. The invocation of self-determination in this context has been characterized not as a legal claim, but as a strategic instrument used to retroactively justify territorial aggression.

These cases illustrate that when self-determination is invoked without credible procedures, external actors can exploit the concept to pursue expansionist aims. The failure to hold all actors to a consistent and impartial legal standard not only weakens the legitimacy of international law but also perpetuates instability and conflict. The inconsistency in responses to Russia's claims versus those of Kosovo, Palestine, or Somaliland underscores the instrumentalization of self-determination for strategic advantage.

1 Int'l Org. for Migration, *Ukraine Crisis Response*, IOM (2024), https://www.iom.int/crisis-ukraine.
2 "Little Green Men" or "Russian Invaders"?, *BBC News* (Mar. 11, 2014), https://www.bbc.com/news/world-europe-26532154.
3 Fabian Burkhardt, *Russia's "Passportisation" of the Donbas*, SWP Comment No. 41, SWP Berlin (Sept. 2020), https://www.swp-berlin.org/10.18449/2020C41/.

5. Palestine's Pursuit of Sovereignty Under International Law: Legal Merit and Political Obstruction

The Palestinian claim to statehood remains one of the most contested and politically obstructed applications of self-determination in modern international law. Unlike the cases of Kosovo or Abkhazia, which have been selectively championed or rejected by external powers, Palestine's bid for recognition has been systematically impeded by entrenched geopolitical interests, notably those of the United States and Israel. This resistance persists despite the fact that Palestine fulfills the criteria for statehood under the Montevideo Convention. The selective application of international law and the politicization of UN mechanisms have entrenched a legal vacuum, allowing occupation to persist under the guise of contested sovereignty.[1]

The legal foundations of the Palestinian claim stretch back to the British Mandate, established in 1922 following the dissolution of the Ottoman Empire. The 1947 UN Partition Plan, which recommended the creation of separate Jewish and Arab states, was followed by the establishment of Israel and the fragmentation of Palestinian territories during the 1948 Arab-Israeli war. By 1967, Israel had assumed military control over the West Bank, Gaza, and East Jerusalem- territories designated for a Palestinian state under various international proposals. Despite the Palestine Liberation Organization's (PLO) declaration of independence in 1988, formal recognition remained limited, and the 1993 Oslo Accords merely established an interim self-governing body without resolving final status issues.[2]

Under the Montevideo Convention, Palestine meets the four key statehood criteria. It possesses a permanent population of approximately 5.3 million people in the West Bank and Gaza, in addition to over six million refugees abroad. However, this demographic continuity has been undermined by Israeli measures including settlement expansions, population displacement, and restrictions on freedom of movement.[3] Palestine's claim to a defined territory is internationally recognized in the form of the 1967 borders, including East Jerusalem. Nonetheless, the expansion of Israeli settlements and land appropriation has fragmented this territory, obstructing the possibility of a contiguous sovereign entity.[4]

The Palestinian Authority exercises governance over parts of the West Bank, while the Gaza Strip is under the administration of Hamas. Although Israel retains control over borders, resources, and movement, Palestinian institutions manage civil affairs and have conducted elections, issued laws, and engaged in international diplomacy.[5] Palestine maintains diplomatic relations with 139 UN member States and has held non-member observer state status at the United Nations since 2012.[6] However, it is blocked from full UN membership due to repeated U.S. vetoes in the Security Council.[7]

1 UN Charter 1945, art 1(2)
2 UNGA Res 181 (II) (29 November 1947) UN Doc A/RES/181(II); Oslo I Accord (1993).
3 Human Rights Watch, 'A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution' (2021) https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution accessed 10 July 2025.
4 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 118.
5 UNHRC, 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967' (2022) UN Doc A/77/356.
6 UNGA Res 67/19 (29 November 2012) UN Doc A/RES/67/19.
7 UNSC, 'Security Council Fails to Recommend Full United Nations Membership for State of Palestine, Owing

Western objections to Palestinian recognition cite the absence of a negotiated peace agreement, concerns over internal political fragmentation, and the characterization of armed resistance as terrorism. These arguments, however, are inconsistently applied. Kosovo's statehood was endorsed by many Western states despite Serbia's vehement objections and ongoing post-conflict instability.[1] Moreover, Palestine's extensive diplomatic recognition by a significant majority of states far exceeds that of many newly created entities.[2] This differential treatment underscores how recognition, rather than being based on legal consistency, is contingent on alignment with the preferences of dominant geopolitical actors.

International legal institutions have also failed to remedy the impasse. The International Criminal Court has accepted Palestine's accession and asserted jurisdiction, yet investigations into alleged war crimes are dismissed as illegitimate by Israel and the United States.[3] The humanitarian crisis in Gaza, where over two million people live under blockade with limited access to essential services, and the ongoing occupation in the West Bank underscore the costs of this legal and diplomatic paralysis.[4] While the Kosovo case was framed as a humanitarian imperative necessitating intervention, Palestine's protracted circumstances have elicited rhetorical support but little enforceable international action.[5]

6. Somaliland and the limits of Recognition: A Functional State without Legal Status

Somaliland presents a compelling example of a functioning political entity that satisfies the Montevideo Convention's criteria for statehood but remains unrecognized due to regional and international political dynamics. Since its declaration of independence from Somalia in 1991, Somaliland has operated as a de facto state, maintaining internal stability, functioning democratic institutions, and effective control over its territory.[6] Despite these attributes, it has not been recognized by a single UN member State, illustrating how recognition is shaped more by geopolitical concerns than by legal standards.

Somaliland's historical identity as a separate colonial entity under British rule forms a central pillar of its legal claim. It was administered as the British Somaliland Protectorate from 1884 until it gained independence in June 1960.[7] It briefly existed as the State of Somaliland before voluntarily uniting with the former Italian-administered Trust Territory of Somalia to form the Somali Republic. This union, however, was not ratified by referendum and soon proved dysfunctional, with power centralized in Mogadishu and the northern region (Somaliland) becoming increasingly marginalized.[8] Widespread repression under Siad Barre's regime culminated in the Hargeisa genocide of 1988, in which tens of thousands of civilians were

to Veto Cast by United States' (18 April 2024) UN Doc SC/15670.

1 Marc Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?' (2011) 10(1) *Chinese J Intl L* 31.

2 Jure Vidmar, 'Explaining the Legal Effects of Recognition' (2012) 61 *ICLQ* 361.

3 ICC, 'State of Palestine Accedes to the Rome Statute' (2015) https://www.icc-cpi.int accessed 10 July 2025.

4 UNHCR, 'Occupied Palestinian Territory Emergency' (2024) https://data.unhcr.org accessed 10 July 2025.

5 NATO, 'Operation Allied Force and Humanitarian Concerns in Kosovo' (1999).

6 Temesgen Sisay Beyene, 'Declaration of Statehood by Somaliland and the Effects of Non-Recognition under International Law' (2019) 10(1) *Beijing Law Review* 196.

7 Suhaib Mahmoud, 'Understanding the Secession of Somaliland' (2023) 6(1) *AlMuntaqa* 8.

8 Ibid.

killed. Following the collapse of the Somali state in 1991, Somaliland reasserted its sovereignty, citing both the failure of the union and its inherent right to self-determination.[1]

According to the Montevideo Convention, Somaliland satisfies the criteria for statehood. It has a permanent population of approximately 5.7 million people. Its borders are clearly defined and correspond to those of the former British protectorate, as documented in colonial-era treaties.[2] The region is governed by a stable and functional political system, including an elected president, a bicameral legislature, an independent judiciary, and security forces. Since 2003, it has held regular multi-party elections and maintained a peaceful transfer of power, a rarity in the region.[3] Unlike many other unrecognized entities, Somaliland does not rely on a patron state for its political, economic, or military sustenance.

Somaliland also demonstrates a capacity to engage in foreign relations. It has signed bilateral agreements with Ethiopia, the United Arab Emirates, and Djibouti, and cooperates with international organizations such as the United Nations and African Union in an unofficial capacity.[4] However, formal recognition is obstructed by the African Union's adherence to the principle of *uti possidetis juris*, which aims to preserve colonial-era boundaries to prevent regional fragmentation. Somalia's federal government continues to claim sovereignty over Somaliland despite lacking any effective administrative control on the ground. Regional actors, including Ethiopia and members of the Arab League, fear that recognizing Somaliland would set a precedent for other secessionist movements.[5]

Western states that supported Kosovo's independence have avoided applying similar reasoning to Somaliland, even though the latter's legal and historical claims to statehood are arguably stronger. The refusal to recognize Somaliland deprives it of access to international funding, arms trade, and legal trade agreements. It also prevents citizens from travelling internationally, as Somaliland-issued passports are not recognized. The region remains vulnerable to external threats from extremist groups such as Al-Shabaab and to internal disputes with the neighboring Puntland over territorial boundaries.

Somaliland's situation demonstrates that compliance with international legal standards is insufficient in the absence of political will. Despite fulfilling the Montevideo Convention's criteria more robustly than many recognized states, it remains in legal limbo because recognition is treated as a strategic concession rather than a legal entitlement. Like Palestine, Somaliland exists in a space where sovereignty is contingent upon external validation- an outcome that undermines the rule-based structure of international law.

1 UNHCR, 'Somaliland: Background Note' (2019).
2 OAU, Cairo Resolution on Border Disputes (1964); African Union Peace and Security Department, *Somaliland: Legal History and Territorial Basis* (2005).
3 Mark Bradbury and Sally Healy, *Whose Peace is it Anyway? Connecting Somali and International Peacemaking* (Accord, Conciliation Resources 2010) 25.
4 Somaliland Ministry of Foreign Affairs, 'Bilateral Cooperation' (2024) https://somalilandmfa.gov accessed 10 July 2025.
5 Institute for Security Studies (ISS), 'Recognition and Regional Stability in the Horn of Africa' (2021).

Conclusion: Rethinking the Legal Framework for Self-Determination and Statehood in the 21st Century

The principle of self-determination has become one of the most inconsistently applied and politicized norms in international law. While it originated as a tool to facilitate decolonization and affirm the inherent sovereignty of peoples, its contemporary application reveals a deep disconnect between legal theory and political practice. The Montevideo Convention, which offers a seemingly objective framework for determining statehood, has proven inadequate in addressing the complex realities of modern conflicts, hybrid warfare, and politically driven recognition.

As demonstrated in the cases of Kosovo, Crimea, Donbas, Palestine, and Somaliland, the Convention's criteria are neither applied uniformly nor interpreted neutrally. Entities that clearly satisfy the requirements of a permanent population, defined territory, functioning government, and capacity for international relations are often denied recognition due to strategic considerations. Conversely, other entities with comparatively weaker legal claims have received swift recognition because they serve the interests of dominant powers.

Palestine remains a clear example of a people systematically denied statehood not due to a lack of legal standing, but because its recognition is obstructed through political mechanisms, most notably the exercise of the veto power within the UN Security Council. Somaliland, despite its internal stability and democratic governance, remains trapped in diplomatic limbo due to regional fears of secessionist contagion. These examples reveal that the threshold for statehood is not legal compliance but political acceptability.

The Montevideo Convention also fails to engage with emerging challenges to sovereignty, including foreign intervention, digital disinformation campaigns, and proxy governance. Its silence on the principle of self-determination, democratic legitimacy, and human rights further limits its utility as a definitive legal standard for statehood. In the absence of meaningful reform or reinterpretation, the Convention will continue to function as a static relic ill-suited to a dynamic geopolitical environment.

Recognition, which should reflect objective legal standards, remains a product of political discretion. The result is a fragmented legal order in which sovereignty is treated as a privilege selectively granted, rather than a right derived from and conferred by established international norms. Until international law reconciles its foundational principles with their real-world implementation, self-determination will remain subject to selective enforcement, and the grey zones of statehood will persist- unresolved, unstable, and unjust.

References

Books

Crawford J, *The Creation of States in International Law* (2nd edn, OUP 2006)

Journal Articles

Beyene TS, 'Declaration of Statehood by Somaliland and the Effects of Non-Recognition under International Law' (2019) 10 Beijing Law Review 196 https://www.scirp.org/journal/paperinformation?paperid=91206

Cotran E, 'Legal Problems Arising out of the Formation of the Somali Republic' (1963) 12 ICLQ 1010 http://www.jstor.org/stable/756301

Franck TM, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46 https://doi.org/10.2307/2203138

Hansen SJ and Bradbury M, 'Somaliland: A New Democracy in the Horn of Africa?' (2007) 34 Review of African Political Economy 461 https://doi.org/10.1080/03056240701672585

Mahmoud S, 'Understanding the Secession of Somaliland - فهم انفصال صوماليلاند: History of the Formation and Failure of the Somali State (1960–1991)' (2023) 6 AlMuntaqa 8 https://www.jstor.org/stable/48718092

OeterS,'TheKosovoCase–AnUnfortunatePrecedent'(2015)75ZaöRV51 https://www.zaoerv.de/75_2015/75_2015_1_a_51_74.pdf

Cases and Advisory Opinions

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 403 https://www.icj-cij.org/case/141

UN Documents and Resolutions

UNGA Res 68/262 (27 March 2014) UN Doc A/RES/68/262 https://press.un.org/en/2014/ga11493.doc.htm

United Nations, 'Palestinian President Urges International Community to Hold Israel Accountable for "Full-Scale War of Genocide", on Day Three of Annual General Debate' (Press Release GA/12635, 26 September 2024) https://press.un.org/en/2024/ga12635.doc.htm

United Nations Conference on Trade and Development (UNCTAD), *Economic costs of the Israeli occupation for the Palestinian people* (18 September 2024) https://unctad.org/publication/economic-costs-israeli-occupation-palestinian-people

United Nations Division for Palestinian Rights, *The Origins and Evolution of the Palestine Problem: 1917–1947 (Part I)* (UN 1978) https://digitallibrary.un.org/record/77013

United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), 'Palestine Refugees' (2025) https://www.unrwa.org/palestine-refugees

United Nations Security Council, 'Security Council Fails to Recommend Full United Nations Membership for State of Palestine, Owing to Veto Cast by United States' (Press Release SC/15670, 18 April 2024) https://press.un.org/en/2024/sc15670.doc.htm

News Articles

Buchholz K, 'These Countries Have Recognized Breakaway States' (*Statista*, 29 February 2024) https://www.statista.com/chart/29371/un-partial-recognitions/

Ferragamo M and Klobucista C, 'Somaliland: The Horn of Africa's Breakaway State' (Council on Foreign Relations, 21 January 2025) https://www.cfr.org/backgrounder/somaliland-horn-africas-breakaway-state

Gritten D and Knell Y, 'Israel announces major expansion of settlements in occupied West Bank' (*BBC News*, 29 May 2025) https://www.bbc.com/news/articles/c1j5954edlno

'Little Green Men" or "Russian Invaders"?' (*BBC News*, 11 March 2014) https://www.bbc.com/news/world-europe-26532154

Newton C, 'A history of the US blocking UN resolutions against Israel' (*Al Jazeera*, 19 May 2021) https://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel

Salem H, 'Ukraine and Russia Call Truce before Crimea Referendum' (*The Guardian*, 16 March 2014) https://www.theguardian.com/world/2014/mar/16/ukraine-russia-truce-crimea-referendum

'Ukraine Crisis: Crimea Accuses Kiev of "Lawlessness"' (*BBC News*, 17 March 2014) https://www.bbc.com/news/world-europe-26606097

NGO/Think Tank/Research Reports

Atlantic Council, 'Seven questions (and answers) if the ICC issues arrest warrants for Israeli officials' (21 May 2024) https://www.atlanticcouncil.org/blogs/new-atlanticist/seven-questions-and-answers-if-the-icc-issues-arrest-warrants-for-israeli-officials/

Burkhardt F, 'Russia's "Passportisation" of the Donbas' (SWP Comment No 41, September 2020) https://www.swp-berlin.org/10.18449/2020C41/

Canadians for Justice and Peace in the Middle East (CJPME), *The Case for Recognizing Palestinian Statehood* (Factsheet No 246, July 2024) https://www.cjpme.org/fs_246

Government of Somaliland and United Nations Population Fund (UNFPA), *Somaliland Health and Demographic Survey 2020* (UNFPA 2020) https://somalia.unfpa.org/sites/default/files/pub-pdf/slhds2020_report_2020.pdf

Jones S, *Georgia: The Conflict with Russia and the Crisis in South Ossetia* (House of Commons Library Research Paper, 18 August 2008) https://researchbriefings.files.parliament.uk/documents/SN04819/SN04819.pdf

Kennard M and Einashe I, 'In the Valley of Death: Somaliland's Forgotten Genocide' (Pulitzer Center, 22 October 2018) https://pulitzercenter.org/stories/valley-death-somalilands-forgotten-genocide

Orion Policy, 'Djibouti and Ethiopia: Somaliland's Memorandum of Understanding' (2024) https://orionpolicy.org/djibouti-and-ethiopia-somalilands-memorandum-of-under...

Pifer S, 'Five Years after Crimea's Illegal Annexation, the Issue Is No Closer to Resolution' (Brookings Institution, 18 March 2019) https://www.brookings.edu/articles/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/

Wolff S, *Kosovo's Unilateral Declaration of Independence* (PESD, Princeton University, 17 February 2008) https://pesd.princeton.edu/node/706

Human Rights Reports

Gorbunova Y, 'Dispatches: Crimean Tatar TV Station Forced to Close' (Human Rights Watch, 1 April 2015) https://www.hrw.org/news/2015/04/01/dispatches-crimean-tatar-tv-station-forced-close

Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (27 April 2021) https://www.hrw.org/report/202127/04//threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution

Human Rights Watch, 'Crimean Tatars Face Unfounded Terrorism Charges' (12 July 2019) https://www.hrw.org/news/2019/07/12/crimean-tatars-face-unfounded-terrorism-charges accessed 7 June 2025

Human Rights Watch, *Crimean Tatar Elected Body Banned in Russia* (29 September 2016) https://www.hrw.org/news/201629/09//crimean-tatar-elected-body-banned-russia

Human Rights Watch, 'Submission to the Universal Periodic Review of Israel' (11 October 2022) https://www.hrw.org/news/2022/10/11/submission-universal-periodic-review-israel

Other Online Sources

Encyclopaedia Britannica, 'Montevideo Convention' (5 March 2024) https://www.britannica.com/event/Montevideo-Convention

International Organization for Migration, *Ukraine Crisis Response* (2024) https://www.iom.int/crisis-ukraine

RFE/RL's Crimea.Realities and Kian Sharifi, 'RFE/RL Contributor Vladyslav Yesypenko Marks 4 Years In Russian Jail' (9 March 2025) https://www.rferl.org/a/vladyslav-yesypenko-jailed-russia-crimea/33339971.html accessed 5 June 2025

UNHCR, *Ukraine Emergency* (2024) https://www.unrefugees.org/emergencies/ukraine/

United Nations, 'History of the Question of Palestine' https://www.un.org/unispal/history/

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

All of Palestine for the Inhabitants of Palestine: The Legal Consequences of the Internationally Wrongful Act in the Establishment of Israel

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Article Info

Article type:
Research Article

Article history:
Received
1 June 2025

Received in revised form
25 June 2025

Accepted
25 June 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3790.html

Keywords:
Palestine, Israel, Indigenous Inhabitants, Legal Consequences, Partition Resolution, International Responsibility, International Law.

ABSTRACT

For thousands of years after the settlement of the Israelites in Canaan, the region hosted a small Jewish population by the twentieth century. Claims of persecution, displacement, and historical ties to the land gave rise to the formation of a movement termed "World Zionism," aimed at establishing a Jewish State in Palestine. The Balfour Declaration, issued by Britain in 1917, emphasized the necessity of creating a "Jewish National Home," and the League of Nations Mandate Agreement was subsequently concluded on this basis in 1922. Britain's contradictory promises to Jews and Arabs led it to refer the Palestine question to the United Nations. Negotiations in the UN General Assembly resulted in the adoption of Resolution 181, known as the Partition Resolution, and the establishment of two States, Jewish and Arab, in 1948. However, the creation of these two States appeared to violate the rights of the Palestinian inhabitants. Thus, in addressing the question of the legal consequences arising from the establishment of Israel on land belonging to the Palestinian inhabitants, this study scrutinizes the hypothesis that the formation of Israel involved violations of certain rules of international law, rendering the United Nations and complicit states internationally responsible for this wrongful act. To substantiate this hypothesis, a descriptive-analytical methodology was recruited. The legal framework applicable to Palestine included the Mandate system, the Mandate Agreement, and norms of international law, such as the UN Charter and human rights law. An interpretation of Article 22 of the Covenant of the League of Nations and Article 76 of the UN Charter indicates that sovereignty over mandated/trust territories must be vested in the "indigenous inhabitants" of those territories. Such sovereignty must be exercised over the entire territory. Moreover, the creation of religious or racial states in the region constitutes a breach of the obligation of non-discrimination. Consequently, the establishment of Israel entails the international responsibility of the UN and complicit states in the UN General Assembly. The legal consequences of this responsibility would include restitution in integrum, reparations, non-recognition, and non-cooperation to ensure the return of "the entirety of Palestine's sovereignty to its Palestinian inhabitants."

Cite this article: Ziaee, S.Y. (2025). All of Palestine for the Inhabitants of Palestine: The Legal Consequences of the Internationally Wrongful Act in the Establishment of Israel, *Iranian Journal of International and Comparative Law*, 3(1), pp: 48-71.

doi 10.22091/ijicl.2025.13618.1175 Publisher: University of Qom

Table of Contents

Introduction

The world hosts diverse nations within defined political boundaries. The new global order established after World War II, coinciding with the founding of the United Nations, classified the world's territories into existing States, trust territories, non-self-governing territories, and other colonial lands. The UN trusteeship system was created to facilitate the independence of trust territories, with their administration entrusted by the UN to designated States. Palestine, previously placed under British Mandate through a League of Nations Agreement, remained under British Trusteeship within the UN framework.

The organized migration of Jews to Palestine, driven by Zionist lobbying, altered the demographic balance from 7% Jewish and approximately 90% Muslim at the outset of the League of Nations Mandate in 1922, to 33% Jewish and 65% Muslim by 1947.[1] That year, Britain referred the "Palestine Question" to the UN General Assembly. The core issue was determining sovereignty: Zionists demanded sovereignty over the land as a "Jewish State," while Palestinians and some Arab states asserted that, under international law, sovereignty belonged solely to the "Palestinians Indigenous Inhabitants." Article 76 of the UN Charter explicitly vests sovereignty in the "inhabitants of trust territories." Conversely, the British Mandate, influenced by the Balfour Declaration, emphasized the necessity of a "Jewish National Home."

To resolve this dilemma, the UN General Assembly delegated the matter to its First Committee. Draft Resolution 181 was put to a vote and adopted on 29 November 1947. Under this plan, despite Jews constituting one-third of the population, approximately 56% of the land was allocated to a Jewish State, 43% to an Arab State, and 1% (Jerusalem) was placed under UN supervision. During the 1948 Arab-Israeli War, Israel gained control over roughly 80% of Palestinian territory; a de facto expansion implicitly recognized by the UN Security Council after the 1967 Six-Day War.

Now, we confront a paradox: while the UN General Assembly recognizes Israel within about 60% of Palestinian land, and the Security Council tacitly acknowledges its control over nearly 80%, these actions violate international obligations, particularly *the grant of sovereignty*

1 Agent of Lebanon, 'Meeting of Ad Hoc Committee on the Palestine' (29 September 1947) A/AC.14/XX, p. 20.

to indigenous inhabitants and *the prohibition of religious and racial discrimination* under applicable international law. This raises the central question: What are the legal consequences of the internationally wrongful act arising from (1) the violation of the obligation to vest sovereignty in the indigenous inhabitants, and (2) the breach of the duty to prohibit religious-racial discrimination in Israel's establishment?

To demonstrate that the UN and assistant States (notably Britain) bear proportional international responsibility, including *restitution*, *reparations*, and *non-recognition*, this study will:

1. Examine the historical context of Israel's establishment;
2. Analyze breaches of obligations regarding sovereignty of *Palestinian inhabitants* over the *entirety* of Palestine and the prohibition of religious-racial discrimination; and
3. Assess the legal consequences of these violations.

1. Political-Legal Background of Israel's Establishment

With the outbreak of World War I, Britain entered into an agreement with Sharif Hussein of Hejaz in 1915, pledging Arab independence in exchange for their support against the Ottomans and facilitation of Jewish migration, known as the Sir Henry McMahon's Pledge. Subsequent correspondence which passed between Sir Henry McMahon and the Sharif of Mecca revealed that Palestine (west of the Jordan River) was excluded from McMahon's Pledge.

During the war, Britain and France signed the *Sykes-Picot Agreement (1916)*, partitioning the Arab world: Britain gained control over Iraq, Kuwait, and Jordan, while France secured Lebanon, Syria, and southern Turkey.[1] At this time, Herbert Samuel, the only Zionist Jew in the British Cabinet, proposed establishing a Jewish community in Palestine to Chaim Weizmann, a founder of the Zionist Movement. Weizmann's 1916 communications with the British government suggested that a *Jewish Chartered Company* could safeguard Britain's strategic interests (pre-emption) in the region.[2] In return for promises of a Jewish State, Britain secured Jewish support against the Ottomans.[3] Other British motivations included diverting Jewish emigration from Europe[4] and shifting the financial burden of Palestine's development away from British taxpayers.[5]

On 2 November 1917, British Foreign Secretary Arthur James Balfour issued the Balfour Declaration, endorsing a "Jewish National Home" in Palestine. Britain's Mandate over Palestine and Mesopotamia was formalized at the San Remo Conference (25 April 1920), and since then, Britain exercised de facto sovereignty over Palestine.[6] The League of Nations ratified the British Mandate for Palestine on 24 July 1922.[7]

Post-World War II, various trusteeship agreements were proposed. Britain advanced

1 Daniel Mandel, *H.V. Evatt and the Establishment of Israel the Undercover Zionist* (PhD thesis, University of Melbourne 2004) 22.
2 Karl Sabbagh, *Palestine: History of a Lost Nation* (Grove Press 2008) 157.
3 David Fromkin, *A Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Middle East* (Holt Paperbacks 2001) 43.
4 Sabbagh (n 3) 163.
5 Gideon Biger, *The Boundaries of Modern Palestine 1840-1947* (Routledge 2004) 69.
6 Sabbagh (n 3) 158-226.
7 The League of Nations mandate system comprised three categories of agreements: First category - former Ottoman territories; Second category - former German territories in Central Africa; Third category - former German territories in Southern Africa and the Pacific. Norman Bentwich and Andrew Martin, *A Commentary on the Charter of the United Nations* (Routledge & Kegan Paul Ltd 1950) 149-150.

the *Morrison-Grady Plan* (Plan for Provincial Autonomy) and the *Bevin Cantonization Plan*, both rejected by Jewish and Arab parties.[1] On 3 April 1947, Britain formally referred the Palestine Question to the UN,[2] requesting a special committee for its resolution.[3] The UN General Assembly's First Committee established a Special Committee (UNSCOP), which submitted two reports: Majority Report Recommending partition into Jewish/Arab States with an economic union; Minority Report Proposing a single Palestinian State. An *Ad Hoc Committee* reviewed these reports, ultimately endorsing the Majority Report's partition plan and two-state solution. After extensive deliberation in committees, the UN General Assembly adopted Resolution 181 (29 November 1947) by 33 votes in favor, 13 against, and 10 abstentions. The plan allocated 56% of land to a Jewish State, 43% to an Arab State, and 1% (Jerusalem) under UN trusteeship.

2. Legal Rules Governing Palestine After the Mandate

Following the establishment of the United Nations, no new trusteeship agreement was concluded for Palestine, unlike other former mandate territories under the League of Nations. This raised a pivotal question: whether Palestine, upon the UN's creation, became subject to the trusteeship system. An analogous issue arose regarding the applicability of trusteeship to South West Africa (Namibia).

In the case of South West Africa, *UN General Assembly Resolution 449* explicitly states:

> *"The UN trusteeship system applies to all mandate territories that have not attained independence," and "It is evident from the UN Charter's terms that the international trusteeship system replaced the former League of Nations mandate system, with no provision allowing their coexistence."*[4]

The General Assembly reaffirmed this in Resolutions 65, 141, and 227, emphasizing that South West Africa continued to be administered under the trusteeship framework. Resolution 88 further clarified that Chapters XI, XII, and XIII of the UN Charter embody the principles of Article 22 of the League Covenant (on mandates). Resolution 2145 identified three international obligations governing South Africa's administration: i) The Mandate Agreement, ii) The UN Charter, and iii) The Universal Declaration of Human Rights.[5]

In the *1950 Advisory Opinion on International Status of South West Africa (South West Africa Case)*, the ICJ ruled that "the provisions of Chapter XII of the Charter are applicable to the Territory," though it did not obligate South Africa to place it under formal trusteeship.[6] This apparent contradiction was resolved in the *1971 Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*Namibia Case*). The ICJ held the "sacred trust" expanded to all mandate territories and those that had not acquired

1 United Nations Special Committee on Palestine, 'Report to the General Assembly' (3 September 1947) UN Doc A/AC.13/XX, p. 36.
2 UNGA, 'Question of Palestine: Termination of the Mandate over Palestine and Recognition of its Independence as a Jewish State' (3 April 1947) UN Doc A/286.
3 Thomas A Green and Hendrik Hartog, 'Law and Identifying Mandate Palestine' in Thomas A Green and Hendrik Hartog (eds), *Law in the Liberal Arts* (Cornell University Press 2006) 23.
4 UNGA Res 449 (V) (13 December 1950).
5 UNGA Res 2145 (XXI) (27 October 1966) GAOR 21st Session Supp 16, 2.
6 *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 144.

independence were placed under the Trusteeship System.[1] The ICJ emphasized that all such territories not yet ready for independence would be converted into trust territories under the United Nations International Trusteeship System;[2] coexistence of the two systems (the mandate and trusteeship) was legally untenable and in otherwise it would lead to colonization or annexation.[3] The Court underscored that Mandatory Powers remained bound by Charter obligations,[4] and no provision of Chapter XII could diminish the rights of peoples under mandates.[5] In essence, former mandate territories had only two lawful paths: *independence* or *trusteeship*.[6] The ICJ explicitly cited South Africa's breaches of UN Charter and human rights law.[7] These facts demonstrate that mandate territories became subject to UN Charter provisions prior to the conclusion of new trusteeship agreements.[8]

For Palestine, these precedents established that after Britain's termination of the mandate and referral to the UN, the territory became subject to: the League Covenant, the UN Charter, the right to self-determination,[9] and other international norms. Britain's declaration referring the decision-making to the UN General Assembly did not extinguish the international obligations of the administering power (whether Britain or the UN General Assembly)[10] under international law.

3. Violation of International Obligations in the Establishment of Israel

The establishment of Israel occurred at a time when "the sovereignty right of inhabitants" of non-self-governing territories had been recognized in international instruments, including paragraphs 1 and 6 of Article 22 of the League Covenant and paragraph (b) of Article 76 of the UN Charter, while "religious and racial discrimination" had been prohibited under international documents, including paragraph 3 of Article 1 and paragraph 3 of Article 76 of the UN Charter. The breach of these international obligations in Israel's establishment will be examined.

3.1. The Right to Sovereignty of "*Palestinian Inhabitants*"

Sovereignty over mandated and trust territories belongs to their indigenous populations. This refers specifically to native inhabitants residing in these territories at the commencement of the

1 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 52.

2 ibid para 56.

3 ibid para 57.

4 The mandatory Powers also bound themselves to exercise their functions of administration in conformity with the relevant obligations emanating from the United Nations Charter, which member States have undertaken to fulfil in good faith in a11 their international relations. ibid para 90.

5 ibid para 66.

6 Dissenting Opinion of Judge Álvarez, *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 174.; Judge Álvarez, in his separate opinion, considered this decision to be in accordance with the spirit of the Charter.
Dissenting Opinion of Mr. Alvarez, ICJ Rep. 1950, p. 60.

7 *Namibia* (Advisory Opinion) (n 15) para 69.

8 The concept of "no-automatic transfer" from the mandate system to trusteeship refers to the discretionary nature of territorial administration under UN Charter obligations, requiring formal conclusion of an international agreement.

9 For instance, the Indian representative during UN General Assembly debates stated that the Arab request [for establishing a unified Palestinian state] was grounded in the same principle of self-determination.
Victor Kattan, 'The Empire Departs: The Partitions of British India, Mandate Palestine, and the Dawn of Self-Determination in the Third World' (2018) 12(3) Asian J Middle E & Islamic Stud 21, 21; JF Etiger, 'From Sacred Trust to Self-Determination' (1977) 24 Netherlands Intl L Rev 85, 85.

10 For reference to various perspectives regarding sovereignty over mandate territories, see: Donald S Leeper, 'International Law-Trusteeship Compared with Mandate' (1951) 49 Mich L Rev 1199, 1207.

mandate or trusteeship system. The exercise of sovereignty must occur through consultation and elections involving these inhabitants. The following analysis addresses these points.

3.1.1. The Rights of Indigenous Inhabitants at the Commencement of the Administration

Article 22(1) of the League Covenant refers to territories detached from state sovereignty after World War I that are "inhabited by peoples." Similarly, Article 76 of the UN Charter states that one objective of administering authorities is to promote "the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples." The core dispute in Israel's establishment concerns the interpretation of "inhabitants" in these provisions.

During debates in the Special Committee and Ad Hoc Committee, some members interpreted "inhabitants" to include all residents present during negotiations (both migrants and natives), while others restricted it to "indigenous inhabitants" residing prior to the trusteeship system. The objectives of relevant instruments and state practice demonstrate that the Charter's intended meaning of "inhabitants" unequivocally refers to "indigenous inhabitants" - those native to the territory before the mandate/trusteeship's administration.

The relevant documents of the League Covenant and UN Charter, along with subsequent practice, clarify the intended meaning of this concept.[1] Article 22(1) of the Covenant explicitly references "peoples inhabiting [the territories] at the time of the mandate system's establishment," while paragraph 6 refers to the interests of "native populations." Article 23 further mandates equitable treatment for "local populations" in controlled territories.

Significantly, Article 9 of the British Mandate for Palestine distinguishes between "foreigners" (applied to Jews) and "locals," confirming that the term "inhabitants" in its ordinary meaning excludes foreign settlers. Some Members of the *Permanent Mandates Commission (PMC)*[2] maintained that the Mandate was conditional upon preserving "the rights of Palestine's native inhabitants."[3]

The British representative affirmed that UK policy granted sovereignty to indigenous populations in all African Mandates. Switzerland's delegate noted the Mandate's drafters intended a *Jewish National Home* only if it did not prejudice *existing inhabitants'* political/social rights, stating Palestine could not become a homeland for others without violating locals' freedoms. Portugal's representative deemed the Jewish National Home politically untenable absent consent from *Palestine's prior inhabitants*. The Dutch delegate emphasized that political rights belonged solely to each mandate's *local populations*, arguing a Jewish State would exempt Palestine from this foundational trusteeship principle.[4]

According to the 1924 Treaty of Lausanne, persons who were Turkish nationals at the time

1 The trusteeship system was established based on two core principles: first, the "sacred trust" to protect indigenous populations, and second, the concept of "international accountability" to ensure this protection was effectively implemented. Bruno Simma, Hermann Mosler, Andreas Paulus and Eleni Chaitidou, *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 1100.

2 This Commission, a League of Nations body, comprised 12 members representing Mandate Powers, other States, and the International Labour Organization.

3 Permanent Mandates Commission, *Minutes of the Thirty-Sixth Session* (829- June 1939) League of Nations Doc C.250.M.150.1939.VI.

4 ibid.

of the treaty's implementation and were "*habitually resident*" in Palestine were considered Palestinians. This territorial connection at that specific time served as the sole criterion, while other connections such as *jus sanguinis* were disregarded. Subsequent documents from UN organs have significantly contributed to interpreting the concept of "inhabitants." For instance, the General Assembly in Resolution 229 recognized the right to self-determination of "*indigenous peoples*" in Spanish Sahara and emphasized measures to ensure participation exclusively by "*indigenous peoples*" in referendums. Resolution 459 maintained that *in pursuance of the objectives of the Trusteeship System as set forth in the Charter, it is indispensable that Trust Territories be developed in the interests of the indigenous inhabitants*. Resolution 522 affirmed *the principle that the interests of the indigenous inhabitants must be paramount in all economic plans or policies*. Resolution 55/80, referencing Article 76 of the Charter, highlighted the necessity of *the progress of the indigenous inhabitants... towards a position of equality with Member States of the United Nations*. Resolution 1412 stressed the need for training "*indigenous civil cadres*" in trust territories. Resolution 2145 *declared that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa* (Namibia) *and has, in fact, disavowed the Mandate*. Resolution 2590 called on administering authorities to provide administrative training to "*indigenous peoples*" of the territory.[1]

Numerous reports from the Trusteeship Council regarding the liberation of trust territories further corroborate this interpretation of "inhabitants" as meaning "indigenous and native inhabitants" as opposed to immigrants and non-indigenous.[2]

The ICJ, in the *Namibia Case* interpreting the term "peoples" in Article 80(1) of the UN Charter concerning trust territories, clarified that "peoples" specifically refers to "indigenous populations."[3] In another opinion, the Court required Morocco to consider the wishes of "indigenous populations" in decolonization processes and mandated administering authorities to "consult" with "indigenous peoples" regarding referendums, enabling free exercise of self-determination.[4]

During General Assembly debates on the Palestine issue, various terms were used to describe pre-1922 inhabitants of Palestine: "*indigenous population*," "*native inhabitants*," "*original inhabitants*," "*loyal inhabitants*," "*existing inhabitants*," "*rightful inhabitants*," "*local population*," "*dependent peoples*," "*descendants of local and regional peoples*," "*legitimate inhabitants*," and "*legal inhabitants*." In contrast, post-1922 Jewish immigrants were described as: "*immigrants*," "*somebody else from outside*," "*alien minority*," "*homeless Jews*," "*company of colonization*," "*stranger*," "*newcomers*" "*foreign power*," "*Jewish communities*," and "*non-indigenous workers*."

For instance, the Iraqi representative stated that Palestinian Arabs were the "*legal/rightful inhabitants of Palestine*."[5] Egypt's delegate asserted Palestine belonged to "*original inhabitants*

1 'Repertory of Practice of United Nations Organs, Art 76' (1966-1969) vol IV Suppl No 4, 216.

2 Trusteeship Council, 'Report of the Trusteeship Council Covering the Period from 23 July 1955 to 14 August 1956' (14 August 1956) UN Doc A/3170, 4.

3 *Namibia* (Advisory Opinion) (n 15) para 59.

4 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 62.

5 Agent of Iraq, 'Forty Fifth Meeting to Thirty-Fourth Meeting in First Committee' (1947) UN Doc A/C.1/XX, p. 28.

of Palestine" not to "*an invading foreign racial group*."[1] Syria's representative considered Palestine the right of Palestinians as "*loyal citizens*" and their "*ancestral homeland*."[2] Even the Jewish representative himself stated that Jewish presence would not create problems for "*the existing inhabitants"*[3] and acknowledged their immigrant status, citing Torah passages referring to themselves as "*stranger*".[4]

As confirmed by the UN Secretariat's compilation of practices regarding the interpretation of Article 76, there remains no doubt that "inhabitants" in this context typifies "indigenous inhabitants."[5] Legal scholars have unanimously endorsed this interpretation.[6]

Having established that "peoples inhabiting" in Article 22 of the Covenant and "inhabitants" in Article 76 of the Charter refer to "indigenous inhabitants," a precise definition is required.[7] ILO Convention 169 defines "indigenous peoples" as "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

The UN Special Rapporteur identifies these key elements of indigeneity: i) historical continuity with pre-invasion/colonial societies, ii) lack of dominance over social sectors (absence of sovereignty), iii) will to transmit ancestral territories and ethnic identity to future generations,[8] iv) occupation of at least part of ancestral lands, and v) residence in specific territories or regions.[9]

The most objective criterion remains the special spiritual connection to ancestral lands.[10] Thus, indigenous peoples are "resident populations" with "geographical ties" to specific territories predating colonization or trusteeship. Evidently, Palestine's indigenous inhabitants were Arabs and Jews residing there prior to the mandate/trusteeship, distinct from later immigrants.[11]

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1 Agent of Egypt, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.13/XX, p. 186.

2 Agent of Syria, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.13/XX, p. 220.

3 Agent of Jewish Agency, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.13/XX, p. 252.

4 "*But the stranger* that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself, and shall not vex him" (Leviticus 19,34). Agent of Jewish Agency, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.13/XX, p. 129.

5 It may be noted that although Article 76(b) refers simply to "the inhabitants" of the Trust Territories, there has been a tendency on the part of United Nations organs to refer specifically to "the indigenous inhabitants" in the course of resolutions and recommendations. 'Repertory of Practice of United Nations Organs, Art 76' (1945–1954) vol IV, para 107.

6 Simma and others (n 25) 1109.

7 See Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge 2015) 9; United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61295/.

8 José Martínez Cobo, 'Study of the Problem of Discrimination against Indigenous Populations' (5 December 1986) UN Doc E/CN.4/Sub.2/1986/7/Add.4, para 379.

9 ibid para 380.

10 Katja Göcke, *Indigenous Peoples in International Law* (Göttingen University Press 2013) 19.

11 At the trusteeship system's establishment, Palestine's population was approximately 1,900,000, including about 500,000 Jews (two-thirds being immigrants). Thus, even using the trusteeship's commencement as reference, the indigenous inhabitants comprised roughly 200,000 Jews and 1,200,000 Arabs. See Justin McCarthy, *The Population of Palestine: Population History and Statistics of the Late Ottoman Period and the Mandate* (Columbia University Press 1990) 171; 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.13/XX, p. 37; Agent of Iraq, 'Forty Fifth Meeting to Thirty-Fourth Meeting in First Committee' (1947) UN Doc A/C.1/XX, p. 28; Agent of Jewish Agency, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.13/XX, pp. 1-3.

3.1.2. The Model of Indigenous Inhabitants' Participation in Sovereignty

The manner of participation by Palestine's indigenous inhabitants requires careful examination. The British representative to the PMC maintained that disregarding the "strongly expressed will" of Palestine's population violated the spirit of the League Covenant. Political and territorial changes should not be imposed by force but rather achieved through "consultation, negotiation, and consent" among the people.[1] Article 76 of the UN Charter expressly stipulates that the realization of self-determination for inhabitants of trust territories must be "in conformity with the freely expressed wishes of the peoples concerned and as may be provided by the terms of each trusteeship agreement."

The *1960 Declaration on the Granting of Independence to Colonial Countries* similarly emphasizes that power transfer must respect "the freely expressed will and desire" of trust territory populations. The Security Council has insisted on "plebiscite" to determine the status of non-self-governing territories like Jammu and Kashmir.[2] The General Assembly conditions the choice between independence or autonomy[3] on "consultation" with inhabitants. While advocating universal adult suffrage, the Trusteeship Council acknowledged that voting modalities should respect indigenous traditions, even if limited to traditional heads of families.[4]

International instruments' emphasis on elections demonstrates that decisions must reflect the majority will of indigenous inhabitants. In the *Southern Rhodesia Case*, when Britain departed in 1962 leaving *European Settlers* in control, the General Assembly declared permanent minority rule incompatible with political equality and self-determination principles for the African majority.[5] The ICJ has repeatedly referenced "expression of the free and genuine will of the peoples" as essential to self-determination.[6] The *South Cameroons Case* established that extending voting rights to immigrants depends on the indigenous population's consent.[7]

Nevertheless, UN jurisprudence contains instances of sovereignty changes without popular consultation. Bangladesh and Kosovo gained independence without plebiscites, later becoming UN membership. Essentially, unlike Palestine, these cases did not possess peoples who could constitute a "*people*" entitled to self-determination, but they were secession cases.[8]

Therefore, sovereignty exercise by Palestine's indigenous inhabitants should have occurred through "consultation and elections" respecting their cultural traditions to achieve "independence or self-governance." Not only had Britain failed to conduct such consultation, but it also facilitated the establishment of a Jewish State contrary to Palestinian inhabitants' consent.[9]

1 Permanent Mandates Commission (n 27).
2 UNSC Res 47 (1948) (21 April 1948) UN Doc S/RES/47; UNSC Res 51 (1948) (3 June 1948) UN Doc S/RES/51.
3 The term "autonomy" in this context refers to self-governing powers exercised under the sovereignty of the administering authority, not under a foreign state's sovereignty.
4 'Repertory of Practice of United Nations Organs, Art 77' (1954–1955) vol IV Suppl No 2, para 15.
5 UNGA Res 1747 (XVI) (28 June 1962) GAOR 16th Session Supp 17, 65.
6 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 157.
7 Trusteeship Council (n 30).
8 *Western Sahara* (Advisory Opinion) (n 32) para 59.
9 Permanent Mandates Commission (n 27).

3.2. Right to Sovereignty Over "*the Entire Territory of Palestine*"

The indigenous inhabitants' sovereignty extends to the entirety of Palestine. Counterclaims requiring examination include: (1) alleged Jewish majority in certain regions, (2) the 1922 Mandate's provision for a Jewish National Home, (3) Jewish land ownership claims, and (4) the Oslo Accords effects on the issue.

3.2.1. Jewish Majority in Certain Areas and the Right to Establish a Jewish State?

Some argue that the Jews constituted the majority in the proposed Jewish State area while Arabs dominated the Arab State area.[1] This argument is flawed for three reasons. First, it erroneously included both indigenous inhabitants and immigrants in demographic calculations. Second, had Bedouin and nomadic Palestinian populations been properly counted in the "Jewish State" area, the Jewish immigrants and Arab populations would have been numerically equal.[2] Third, all Palestinian inhabitants collectively held sovereignty over undivided Palestine, as Palestine existed as a whole under both British Mandate and prior Ottoman rule, without internal colonial borders.

The principle of "respect for colonial boundaries" (*uti possidetis juris*) prohibits divisions beyond established colonial administrative boundaries.[3] Palestine never had formal Arab/Jewish administrative units, functioning as a unified single territory.[4] The ICJ in the *1986 Frontier Dispute Case* affirmed that new states inherit pre-existing international frontiers in the event of a State succession.[5] Palestine's temporary division into six districts and eighteen subdistricts (by 1939) served tax and census purposes without creating genuine administrative units.[6] International law does not recognize unilateral territorial modifications by colonial powers; instead, evaluating the "colonial heritage" through multiple factual lenses.[7] Palestine maintained singular administration throughout.[8]

Security Council Resolution 264 (1969) declared that "the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the United Nations Charter." Similarly, General Assembly Resolution 1514(VI) states:

> *"Any attempt aimed at the partial or total disruption of the national unity and*

1 The proposed Jewish state territory contained 498,000 Jews and 497,000 Arabs.

2 Agent of Pakistan, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 38; Agent of Syria, Ibid, p. 195.

3 It has been argued that the colonial borders principle was not limited to colonized territories, having been applied to new states like the Soviet Union, Czechoslovakia, and Yugoslavia. Both Kosovo's separation from Serbia and Crimea's separation from Ukraine invoked this principle. However, the Badinter Commission maintained that self-determination implementation should not alter existing borders at independence. Abraham Bell and Eugene Kontorovich, 'Palestine, Uti Possidetis Juris and the Borders of Israel' (2016) 58 Ariz L Rev 633, 642.

4 Bell and Kontorovich, Ibid, 685.

5 *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554, para 24; In the *Chamizal Arbitration* (1911) concerning U.S. claims over the Chamizal tract, the arbitral tribunal ruled the alleged possession failed to meet the requirements of being "undisturbed, uninterrupted and unchallenged." Reports Of International Arbitral Awards, *The Chamizal Case (Mexico v United States)* (1911) 11 RIAA 309. Malcolm Shaw maintains the critical date for determining rights is when they crystallize. Just as treaty formation dates matter for treaties, colonial borders unquestionably reference independence dates. The Badinter Commission used Yugoslavia's dissolution date as the potential independence benchmark - the last moment of exercised administrative jurisdiction by the prior sovereign. Bell and Kontorovich (n 56) 645.

6 Despite various partition proposals like cantonization, Britain never implemented territorial divisions during the Palestine Mandate. Biger (n 6) 191.

7 *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554, 30.

8 The British initially established the Administration of the Palestine Mandate, later forming an Advisory Council and then a Legislative Council including Palestinian Arabs and Jews. Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (Pluto Press 2009) 13.

the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

The ICJ's *Chagos Opinion* confirmed that non-self-governing territories' integrity constitutes customary international law alongside self-determination, with no UN precedent legitimizing colonial power-imposed partitions. Territorial integrity stands as a key element of the exercise of the right to self-determination and any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to this right.[1]

The Rwanda-Urundi's partition under Belgian trusteeship or the British Cameroon's division are different from the Palestine situation legally. First, both territories had distinct pre-existing administrative systems. Second, their indigenous populations differed demographically. Third, inhabitants participated in subsequent state formation;[2] conditions never met in Palestine. The India-Pakistan partition also differs substantively, as it reflected pre-existing demographic majorities and resulted from inter-communal agreements absent in Palestine.[3]

Moreover, Palestine's partition violated Article 5 of the Mandate prohibiting territorial fragmentation. This explains Egypt's subsequent proclamation of the "All-Palestine Government" post-1948.[4] Even assuming that internal colonial borders existed, the UN's obligation remained transferring sovereignty to indigenous inhabitants, not immigrants, in respective areas.[5] Thus, Palestine's partition breached international law.

3.2.2. The "Jewish National Home" and the Right to Establish a Jewish State?

The reference to a "Jewish National Home" in the Mandate cannot serve as legal justification for partitioning Palestine's territorial integrity. The chairman of the UN Special Committee made clear that the Mandate specifically refers to a "Jewish Home" rather than a "Jewish State," while consistently describing Palestine itself as a single State.[6] This distinction was reinforced by India's representative, who emphasized the fundamental difference between a "Jewish Home" as a cultural concept and a "Jewish State" as a political entity.[7] Yemen's delegate further noted that creating a Jewish State would directly violate Article 5 of the Mandate, which prohibited placing the territory under foreign power.[8]

The most authoritative interpretation comes from the British government's own 1939 White Paper,[9] which stated:

"His Majesty's Government believe that the framers of the Mandate in which the

1 *Chagos* (Advisory Opinion) (n 50) para 160.
2 UNGA Res 1608 (XV) (21 April 1961) GAOR 15th Session Supp 16, 44, para 6.
3 Agent of Pakistan, Meeting of Ad Hoc Committee on the Palestine', A/AC.14/XX, p. 38.
4 Issam Mohammad Ali Adwan, 'The Palestinian Right to Self-Determination' (PhD thesis, University of Durham 1983).
5 Plebiscites may provide a preferable alternative to border demarcation based solely on ethnicity, as demonstrated in the Nagorno-Karabakh referendum case and the Jura region elections in Switzerland. Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov, *Self-Determination and Secession in International Law* (OUP 2014) 135.
6 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.14/XX, p. 53.
7 Agent of India, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.14/XX, p. 199.
8 Agent of Yemen, 'Ad Hoc Committee on the Palestinian Question' (15 October 1947) A/AC.14/XX, p. 91.
9 Agent of Lebanon, 'Ad Hoc Committee on the Palestinian Question' A/AC.14/XX, p. 22.

Balfour Declaration was embodied could not have intended that Palestine should be converted into a Jewish State against the will of the Arab population of the country."[1]

This official position confirms that interpreting "national home" as referring to "cultural or spiritual" connections would be consistent with international law, while equating it with sovereign statehood violates several fundamental principles.

First, the concept contains an inherent contradiction by attempting to merge religious identity (a subjective matter of belief) with national identity (an objective historical and cultural reality). Second, such interpretation conflicts with Article 80 of the UN Charter, which explicitly prohibits construing mandate provisions in ways that would infringe upon the rights of peoples.[2] Third, it violates the indigenous population's inalienable right to self-determination.

3.2.3. Jewish Land Ownership and the Right to Establish a Jewish State?

Jewish land ownership in Palestine did not constitute legal grounds for establishing a Jewish State. Documented ownership ranged between 6-10% of territories, with discrepancies arising from disputed classifications of uninhabitable and state-owned lands.[3] At Israel's founding, 65% of lands were public or state-owned and thus excluded from Jewish ownership calculations. This limited ownership fails to establish territorial rights for three legal reasons: First, many transactions violated Ottoman land laws then in force and potentially contravened Article 46 of the 1907 Hague Regulations prohibiting property transfers in occupied territories.[4] Second, Articles 7-8 of Model UN Trusteeship Agreements, reflecting Article 22 of the League Covenant, prohibited transfers of land without indigenous consent and interest. Third, what is essentially transferrable in such sale transaction is proprietary right, but not sovereignty by no account. Recognizing proprietary claims as sovereign would enable individual-level secession claims globally.

3.2.4. The Oslo Accords and the Right to Establish a Jewish State?

The Oslo Accords between the Palestinian Authority (PA) and Israel cannot be construed as Palestinian inhabitants relinquishing sovereignty over any part of Palestinian territory for three fundamental reasons: First, irrespective of the PA's representative[5] validity for all Palestinians,[6] the agreement may be considered void ab initio under Articles 51 and 52 of the 1969 Vienna Convention on the Law of Treaties due to duress during its conclusion. Second, when a treaty is concluded to regulate the legal consequences of violating a peremptory norm like self-determination, rather than accepting those consequences, this not only invalidates the agreement but renders the act itself unlawful.[7] Third, the Oslo Accords constituted primarily a five-year interim Ceasefire agreement rather than Cession treaty. It terminated prematurely due to fundamental change of

1 Great Britain, Parliament, *Palestine: A Statement of Policy* (Cmd 6019, 1939) (White Paper 1939).
2 Bentwich and Martin (n 8) 152.
3 Tom Segev, *One Palestine, Complete: Jews and Arabs under the Mandate* (Metropolitan Books 2000) 502.
4 Dov Gavish, *A Survey of Palestine under the British Mandate, 1920–1948* (RoutledgeCurzon 2005) 24.
5 Golamali Ghasemi, 'The Palestinian People's Right to Armed Resistance from the Perspective of International Law' (2024) 2(1) Iranian J Intl & Comparative L 1, 11.
6 For instance, the Palestinian Arab representative in both the Special Committee and Ad Hoc Committee negotiations came from a body known as the Arab Higher Committee.
7 Enzo Cannizzaro (ed), *The Present and Future of Jus Cogens* (Sapienza Università Editrice 2015) 142.

circumstances. Some legal scholars contend it merely created an obligation to negotiate internal self-determination (*pacta de contrahendo*).[1]

3.3. Prohibition of Religious and Racial Discrimination

The United Nations' establishment of a Jewish State violated fundamental principles of international law, particularly the prohibition against religious and racial discrimination. Article 1(3) and Article 76(c) of the UN Charter explicitly endorse "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"[2] This non-discrimination obligation was further enshrined in Article 15 of the Palestine Mandate, which prohibited religious or racial discrimination among Palestine's inhabitants. The creation of a religious Jewish State and an ethnic Arab State in Palestine constituted a flagrant violation of these anti-discrimination principles. The following section examines claims regarding the establishment of a state based on the Jewish religion.

3.3.1. Statelessness and Claim to a Jewish State?

Jewish representative argued that establishing a state for the historically persecuted Jewish people constituted a unique exception, as Arabs and Romans allegedly already possessed their own states.[3] This argument fails on multiple grounds. First, Jewish communities have historically existed in various regions worldwide, including Birobidzhan in Russia and Venetian ghettos.[4] Second, should religious affiliation justify statehood, then all religious groups - including Druze Muslims in Syria, Maronite Christians in Lebanon, or various Jewish denominations - would equally qualify for sovereign states.[5] What emerged in Israel constitutes not a Jewish state per se, but rather a Zionist state predicated on a particularist interpretation of Jewish identity.[6] Third, there is no logical basis for privileging religion over ethnicity as a criterion for sovereignty; a standard that would require returning America to American Indians and Canada to the Inuit. Fourth, as noted by several delegates during Special Committee and Ad Hoc Committee debates, Zionism represents a political movement rather than a religious denomination.

3.3.2. Displacement and Claim to a Jewish State?

The historical displacement of Jewish populations[7] cannot justify exceptional treatment in territorial claims. The primary responsibility for Jewish refugees fell to the International Organization for Migration (IOM) and secondarily to all UN member States collectively; not exclusively to Palestine's inhabitants.[8] UN General Assembly Resolution 62 expressly prohibited refugee resettlement in non-self-governing territories without indigenous consent.[9] Moreover, homelessness is not exclusive to Jews.[10] Ironically, Palestinians now constitute the world's largest

1 See Antonio Cassese, 'The Israel-PLO Agreement and Self-Determination' (1993) 4 EJIL 564, 564-581.
2 Ad Hoc Committee on the Palestinian Question, 'Summary Report of the Thirty-Fourth Meeting' (1947) UN Doc A/AC.14/XX, p. 7.
3 Agent of Jewish Agency, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.14/XX, p. 57.
4 Walter Laqueur, *A History of Zionism* (Tauris Parke Paperbacks 2003) 4648-.
5 See Agent of Saudi Arabia, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 94.
6 Derek J Penslar, *Israel in History: The Jewish State in Comparative Perspective* (Routledge 2007) 67.
7 Diaspora/ Exile / Golah
8 The Annex to the Statute of IOM provides that refugees or displaced persons may be transferred to: (1) Neighboring states of their country of origin, or (2) Non-self-governing territories; contingent upon consent from the indigenous population of such territories.
9 Agent of Syria, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 129.
10 Agent of Iraq, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 30.

and most protracted refugee population, projected to reach 8 million by 2025; [1] that necessitate to attract undivided attention of IOM to this reality.

3.3.3. Persecution and Claim to a Jewish State?

The argument that historical persecution justifies Jewish settlement anywhere fundamentally misrepresents both history and law.[2] Jewish communities in Europe (Ashkenazim or German Jews) largely descend from Khazar Origin who migrated to Poland and Russia, facing antisemitism with the rise of Western nationalism. By contrast, Sephardic Jews in Iberia (including Andalusia) comprised part of Palestine's indigenous Jewish community (Old Yishuv). These groups shared neither ethnic nor historical ties with the Ashkenazi and European Jews who formed Zionism's core after 1920.[3] Moreover, persecution often targeted individuals rather than collective Jewish identity.[4]

3.3.4. Historical Connection and Claim to a Jewish State?

The historical argument regarding Jewish ties to this territory collapses under scrutiny. The Jewish representative at UN General Assembly negotiations first declared representation of all Jews globally,[5] then reframed this as representing "oppressed Jews."[6] This position asserted that historical claims justifying border changes apply exclusively to Jews, citing a 2000-year history while ignoring that almost all nations possess territorial claims, with none making comparable demands.[7]

This argument contains inherent contradictions: the Jewish arrival 3500 years ago displaced existing inhabitants whose descendants hold prior historical rights.[8] Moreover, historical claims require proof of forced displacement, whereas most Jews left voluntarily over centuries. Notably, Jews demonstrated no sustained effort to return until the Zionist movement,[9] with under 50% of world Jewry migrating to Israel despite post-Holocaust claims[10].

In conclusion, five substantive rebuttals exist: First, historical connections based on religious affiliation are meaningless, as conversion permits anyone globally to become Jewish. Second, while Jewish history was highlighted, Palestinian history was disregarded. Archaeological evidence confirms 3000 years of continuous Palestinian habitation.[11] Third, diverse populations inhabited the region pre-Islam - Seljuks, Kurds, Crusaders, Egyptians, and

1 UNHCR, 'The UN Refugee Agency' https://www.unhcr.org/ accessed 1 May 2025.

2 Agent of Poland, 'Forty Fifth Meeting to Thirty-Fourth Meeting in First Committee' (1947) UN Doc A/C.1/XX, p. 245.

3 Agent of Arab Higher Committee, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 116.

4 Laqueur (n 81) 468.

5 Agent of Jewish Agency, 'Forty Fifth Meeting to Thirty-Fourth Meeting in First Committee' (1947) UN Doc A/C.1/XX, 109; Agent of Jewish Agency, 'Forty Fifth Meeting to Thirty-Fourth Meeting in First Committee' (1947) UN Doc A/C.1/XX, p. 179.

6 Agent of Jewish Agency, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.14/XX, p. 85.

7 ibid 57.

8 Historical Jewish sources reference an ethnic group called the Amalekites (or 'Amāliq) inhabiting this territory, who may share ethnic connections with contemporary Palestinian people.

9 Abraham B Yehoshua, *Between Right and Right* (Doubleday 1981) 9196-.

10 'Jewish Population by Country 2024' (*World Population Review*) https://worldpopulationreview.com/country-rankings/number-of-jews-in-the-world accessed 1 May 2025.

11 Nur Masalha, *Palestine: A Four Thousand Year History* (Zed Books 2018) 3035-.

Turks -[1,2] whose descendants could equally claim statehood.[3] Fourth, extending this logic[4] would legitimize Zionist territorial ambitions[5] in Jordan, Syria, and Lebanon,[6] as evidenced by the representative's claim to "all Palestine and Trans-Jordan"[7] and the biblical slogan "From Dan to Beersheba."[8] Fifth, genetic studies (e.g., 23andMe's 7 million samples) indicate that only 10% of Jews and 8% of Ashkenazim have Levantine ancestry,[9] undermining "birthright" claims.[10] Historically, many considered Germany the Jewish homeland,[11] making preference for Israel illogical.[12]

3.3.5. Jewish Nationhood and Claim to a Jewish State?

The Guatemalan representative's assertion that Jews constitute a nation more than Arabs reflects a fundamental misunderstanding of international law.[13] Judaism represents a religious affiliation, not a national identity in the legal sense. The nation-state relationship operates in one direction only: statehood may create national identity, but national identity cannot create statehood. This principle was confirmed by the Special Rapporteur of the African Commission on Human and Peoples' Rights.[14] The Israeli Supreme Court defines Jewishness solely as being born to a Jewish mother; for instance, it rejected the citizenship application of someone who was Jewish but had converted to Catholicism. Israel's Knesset, in its Law of Return, defines a Jew as "one born to a Jewish mother or who has converted to Judaism and not converted to another religion."[15] This view has been endorsed by the U.S. government.[16] Moreover, many Ashkenazi Jews in Europe were Europeans who had converted to Judaism, while conversely many original Jewish inhabitants of Palestine had converted to Islam or Christianity.[17] Therefore, the nation claimed by Israel derives

1 Agent of Jewish Agency, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 12.

2 Palestinians are descendants of an extensive mixing of local and regional peoples, including the Canaanites, Philistines, Hebrews, Samaritans, Hellenic Greeks, Romans, Nabatean Arabs, tribal nomadic Arabs, some Europeans from the Crusades, some Turks, and other minorities; after the Islamic conquests of the seventh century, however, they became overwhelmingly Arabs. Samih K Farsoun, *Culture and Customs of the Palestinians* (Greenwood Press 2004) 4.

3 This raises the question of why Kurdish peoples were unable to establish a state in the Mesopotamian mandate territory. Bell and Kontorovich (n 56) 684.

4 Bernard Reich, *A Brief History of Israel* (2nd edn, Facts on File 2008) 1.

5 Laqueur (n 81) 463.

6 Agent of Iraq, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 27.

7 Agent of Jewish Agency, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 16.

8 The ancient city of Dan is located in southern Lebanon (the northernmost point of present-day Israel), while Beersheba lies in southern Israel. The territory between these two points encompasses significant portions of contemporary Palestine.

9 https://www.palestineremembered.com/Articles/General3/Story38728.html

10 Agent of Arab Higher Committee, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 6.

11 German fatherland, Germany our mother, Native Town

12 Laqueur (n 81) 51-55.

13 Agent of Guatemala, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 56.

14 African Commission on Human and Peoples' Rights, 'The Right to Nationality in Africa' (Study by Maya Sahli Fadel) (2015) ACHPR/Draft/Study/4, 13.

15 Laura Robson, *Colonialism and Christianity in Mandate Palestine* (University of Texas Press 2011) 162.

16 In *Shalit v. Minister of the Interior* (1968), the Israeli Supreme Court denied citizenship under the Law of Return to a Jewish convert to Christianity, a decision later upheld by Israel's High Court of Justice. The Jewish representative to UN negotiations similarly stated that religious conversion nullifies Jewish identity. Subsequently, the Knesset amended the Law of Return accordingly. In diplomatic correspondence with the Jewish Representative Rabbi Elmer Berger, the U.S. government clarified: *"No legal or political relationship exists with American citizens' religious identities. Accordingly, the Department of State does not regard the Jewish People concept as a concept of international law."* John Quigley, *Palestine and Israel: A Challenge to Justice* (Duke University Press 1990) 128129-.

17 Masalha (n 98).

neither from bloodline (*jus sanguinis*) nor from birth in the territory (*jus soli*).[1] Some argue that the Jewish people as a nation ceased to exist 2,000 years ago.[2]

3.3.6. Colonial Development and Claim to a Jewish State?

In the General Assembly's First Committee, the Jewish representative gave two reasons for creating a Jewish state: the large number of homeless Jews and the existence of unused land in Palestine.[3] As the Iraqi representative noted, Zionism sought to create political rights from economic development through dollar diplomacy and extraterritorial claims, whereas economic development by foreigners in another country does not create political rights for them.[4] The Palestinian representative pointed out that this would allow any developed nation to invade less developed nations worldwide.[5]

Therefore, Israel's establishment based on religious and racial discrimination[6] violated several provisions of international instruments, and the defenses presented to justify exceptional treatment for a Jewish State are untenable.

4. Legal Consequences

The legal consequences of an internationally wrongful act arise following the breach of an international obligation attributable to an international actor. International organizations, as active subjects of international law, may commit internationally wrongful acts, in which case both the international organization and its member States may bear legal responsibility. Regarding member State responsibility for wrongful acts of international organizations, several theories exist.

Draft Articles on the Responsibility of International Organizations (Draft 2011) while recognizing the separate legal personality of international organizations, acknowledges derivative responsibility for member States under certain circumstances, including: (a) circumvention by the organization, (b) aid or assistance, (c) direction and control, and (d) circumvention by States.[7]

Article 17 of Draft 2011 addresses responsibility arising from "circumvention through decisions of international organizations." Paragraph 1 establishes that when an organization with binding decision-making authority pushes a member State or organization to commit a wrongful act violating the organization's obligations, the decision-making organization bears responsibility.[8] Such decisions create standing for third parties to claim reparations even before the wrongful act occurs. Paragraph 2 provides that when an organization authorizes member States to act in ways that circumvent its obligations through non-binding decisions, it incurs international responsibility if member States subsequently act accordingly; No direct causal link between decision and wrongful act need be established.[9] The *Youssef Nada v. Switzerland*

1 Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 25.
2 Laqueur (n 81) 51-55.
3 Agent of Jewish Agency, Forty Fifth Meeting to Thirty-Fourth Meeting in First Committee, p. 274.
4 Agent of Iraq, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 29.
5 Agent of Arab Higher Committee, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 196.
6 Agent of Lebanon, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 22.
7 Seyyed Ghasem Zamani, 'A Reflection on the International Responsibility of International Organizations' [1997] Law J 236 [In Persian].
8 *Yassin Abdullah Kadi v European Commission* (Joined Cases C-58410/ P, C-59310/ P and C-59510/ P) EU:C:2013:518, para 128.
9 Natasa Nedeski and Andre Nollkaemper, 'Responsibility of International Organizations "in Connection with Acts of States"' (2012) 9 Intl Orgs L Rev 33, 13.

Case before the European Court of Human Rights confirmed that States cannot evade their international obligations by resorting to UN Security Council resolutions.[1]

Article 58 of Draft 2011 covers "aid or assistance" by States enabling organizational wrongdoing. When a state votes for organizational measures violating international law (e.g., human rights), both organization and State bear responsibility. Article 59 addresses "direction and control" constituting effective dominance over wrongful acts; established when the act would not have occurred without State action. Some scholars even extend responsibility to States capable of preventing organizational violations.[2]

Article 61 of Draft 2011 concerns "circumvention by states," applying when Members delegate to organizations the competence to act in ways that would constitute violations if committed directly by States. This requires demonstrating definite intent to circumvent obligations through deception of the organization.[3]

Under Article 8 of Draft 2011, organizational conduct is attributable when performed by organs acting officially, even if ultra vires. The ICJ's *Certain Expenses* and *Namibia opinions* confirm that acts reasonably serving organizational purposes remain attributable.[4] Thus, decisions violating express or implied organizational powers still constitute attributable wrongful acts if adopted through proper internal procedures.

The Palestine Mandate violated provisions protecting the "sovereign rights of inhabitants," constituting the first internationally wrongful act attributable to both the League of Nations and Britain as parties to this agreement. If evidence established Britain's deliberate referral of the Palestine Question to the UN to facilitate Jewish statehood, this would additionally qualify as "state circumvention" under Article 61 of the Draft.

Following referral to UN committees, the majority proposals in both the Special Committee and Ad Hoc Committee became the basis for General Assembly Resolution 181 (Partition Plan) and Security Council Resolution 242. The General Assembly committed an internationally wrongful act through three principal violations: first, by distorting the concept of "inhabitants" - replacing the requirement of indigenous status with mere "Palestinian citizenship"; second, by partitioning Palestinian territory contrary to its territorial integrity; and third, by implementation of religious and racial discrimination.

Member States supporting partition through their votes in the Special Committee (7 States)[5], Ad Hoc Committee's Sub-Committee I (25 States),[6] and General Assembly Resolution 181 (33

1 *Nada v Switzerland* App no 1059308/ (ECtHR [GC], 12 September 2012).

2 I Seidl-Hohenveldern, 'Responsibility of Member States of an International Organization for Acts of that Organization' in *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago* (Giuffrè 1987) vol 3, 420.

3 S F Moosavi and N Khodaparast, 'Responsibility of Member States of International Organizations In light of International Law Commission Draft Articles on the Responsibility of International Organizations' (2023) 18(64) Q J Judicial L Views 159 [In Persian].

4 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 168; *Namibia* (Advisory Opinion) (n 15) 22.

5 Seven members (the representatives of Canada, Czechoslovakia, Guatemala, the Netherlands, Peru, Sweden, and Uruguay), while reserving their positions on boundaries and on the status of Jerusalem, voted in favor of the principle of partition with economic union. United Nations Special Committee on Palestine Report to the General Assembly, UNSCOP Majority Plan, 1947, para. 75.

6 Australia., Bolivia., Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, Costa Rica, Czechoslovakia., Denmark, Dominican Republic, Ecuador, Guatemala, Iceland, Nicaragua, Norway, Panama, Peru, Poland, Sweden, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United States of America, Uruguay and Venezuela.

States)[1] and all supporting and recognizing States[2] incurred responsibility under international law. Consequently, the said States and the UN (itself and as successor to the League), bear international responsibility for two fundamental breaches: the violation of Palestinian self-determination rights over the entirety of their territory, and the breach of non-discrimination obligations through the creation and recognition of Israel. This responsibility is based on the Articles 17, 58 and 62 of the Draft 2011.

The legal consequences flowing from these wrongful acts include six specific obligations: first, the immediate cessation of ongoing violations; second, full restitution through re-establishment of the pre-mandate status; third, comprehensive reparations for material and moral damages; fourth, satisfaction through formal acknowledgment of the violations; fifth, the duty of non-recognition of the illegal situation; and sixth, the duty of non-assistance in maintaining this illegality.

The ICJ in its 2004 and 2024 Advisory Opinions established relevant precedents by: declaring Israel an occupying power in territories taken after 1967;[3] ordering restitution and compensation; and imposing non-recognition obligations. This legal framework applies with equal force to all Palestinian territory since 1948.

Two critical factors negate any temporal defenses: first, the principle that prescription (laps of time) cannot legitimize violations of international obligations;[4] and second, consistent international practice maintaining non-recognition of illegal situations over extended periods, including Rhodesia/Zimbabwe (15 years), Northern Cyprus (20 years), the Golan Heights (25 years), and the Baltic States (51 years).[5]

The first legal consequence of the internationally wrongful act in Palestine is the *restitution of sovereignty* to the indigenous inhabitants at the time the Mandate began. However, the political, social, and humanitarian implications of this transfer of sovereignty must be carefully studied by the United Nations.[6] Resorting *full sovereignty over all of Palestine to its indigenous inhabitants* could involve granting decision-making authority to them over the status of Jewish

1 Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Ecuador, France, Guatemala, Haiti, Iceland, Liberia, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Sweden, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United States of America, Uruguay, Venezuela.

2 The UN Secretariat characterized General Assembly Resolution 181 (II) of 29 November 1947 as *recommendatory* under Article 10 of the UN Charter, thereby affirming its non-binding nature for Member States. UN Palestine Commission, 'Relations between the UN Commission and the Security Council' (Working Paper, 9 February 1948) UN Doc A/AC.21/13, s 3, para 4.

3 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 159; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) [2024] ICJ Rep, para 278.

4 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10, 122-123; Henry Cattan, *The Palestine Question* (Croom Helm 1988) 33.

5 Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff 2005) 122.

6 An analogous situation occurred regarding South West Africa (Namibia). Following the UN General Assembly's declaration of South Africa's presence as illegal (GA Res 2145 (XXI)), the Assembly established its subsidiary organ - the UN Council for Namibia (GA Res 2248 (S-V)). Concurrently, the Security Council formed a Contact Group (SC Res 385 (1976)) to mediate between South Africa and the South West Africa People's Organization (SWAPO). The process culminated in the UN Transition Assistance Group (UNTAG), established under SC Res 435 (1978), which supervised Namibia's Constituent Assembly elections. Namibia achieved independence on 21 March 1990 after adopting its Constitution. Nele Matz, 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' (2005) 9 Max Planck UNYB 47, 82-84.

immigrants, or relocating of Jewish settlers, as implied by the ICJ's 2024 advisory opinion which suggested the evacuation of Israeli settlers from occupied Palestinian lands.[1]

In the relocating assumption, the *fairest option*, as proposed by the Indian government, would be *Germany*.[2] Unlike alternative proposals such as Uganda or Soviet Birobidzhan, Germany, as the state primarily responsible for the persecution of Jews, would be the most appropriate choice.[3] Jewish representative, when asked why Germany would not be a better option, dismissed it as the worst possible solution, citing historical German treatment of Jews.[4] However, their objection was based on the assumption of Jews remaining a minority in Germany, whereas India's proposal envisioned an *independent Jewish State within German territory*. Moreover, the post-WW1 transfer of German territories to League of Nations administration under the Treaty of Versailles provides historical precedent.[5] Why, then, should refugees not resettle in their "natural homeland" of Germany - where they speak the language and feel greater cultural affinity - rather than in Palestine?[6]

Full restitution must also include reparations for damages incurred. Given the UN's role in these violations, the *primary responsibility for compensation* lies with the UN and the States that directed and supported its decisions regarding Palestine. As the Permanent Court of International Justice stated in the *Chorzów Factory Case*,

> *"[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."*[7]

The ICJ's 2024 opinion affirmed that Israel must compensate all natural and legal persons harmed in occupied Palestinian territory.[8] This principle would apply equally to *all of historic Palestine* if the illegality of its partition is recognized.

The ILC has recognized self-determination as a peremptory norm (*jus cogens*),[9] and the ICJ has frequently affirmed it as an *erga omnes*.[10] According to the Court, the UN, States, and all international actors are obligated not to recognize situations arising from violations of erga omnes. In the ICJ's precedent in cases of illegal situations resulting from breaches of self-determination, States must refrain from transactions or practices legitimizing the unlawful territorial status, avoid establishing diplomatic or consular relations, withdrawing

1 *Legal Consequences* (2024) (n 133) para 285.
2 Agent of India, 'Forty Fifth Meeting to Thirty-Fourth Meeting in First Committee' (1947) UN Doc A/C.1/XX, p. 117.
3 Agent of United Kingdom, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 10; Agent of Saudi Arabia 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 10; Other territories including Morocco, Libya, and Argentina were similarly proposed for Jewish statehood. Notably, Jewish-American jurist Manuel Noah advanced a proposal in 1825 to establish a Jewish polity on Grand Island, New York (*Proclamation to the Jews*, 10 September 1825). Laqueur (n 81) 115.
4 Agent of Jewish Agency, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.14/XX, p. 79.
5 William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (OUP 2003) 146.
6 Agent of India, Forty Fifth Meeting to Thirty-Fourth Meeting in First Committee, p. 117.
7 *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration)* (Advisory Opinion) PCIJ Rep Series B No 15, 47.
8 *Legal Consequences* (2024) (n 133) para 285.
9 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10, 283-284, paras 4-5.
10 *Chagos* (Advisory Opinion) (n 50) para 180.

existing representatives if necessary,[1] and cooperate with the UN to realize the right to self-determination.[2]

The UN Human Rights Council, in Resolution 49/28 (2022), reaffirmed the Palestinian peoples' right to self-determination and obligated States to ensure non-recognition and non-assistance in Israel's serious breaches of peremptory norms. It further emphasized the duty to cooperate in ending violations and reversing Israel's unlawful policies.[3] If implemented universally and comprehensively, these measures could restore the lost rights of Palestine's indigenous inhabitants.

Conclusion

States, after a prolonged period of war, joined the United Nations with aspirations for a world free from war and violence. Among the issues concerning international peace and security was the question of trust territories. Chapter XII of the UN Charter addressed this matter, with perhaps the most significant obligation of the trusteeship system being the granting of self-governance or independence to the inhabitants of these territories, as reflected in Article 76 and before that in Article 22 of the League Covenant. The practice of the United Nations, along with various reports and resolutions, substantiated that the term "inhabitants" in this Article referred to the *indigenous inhabitants*; those who had a territorial connection to the land prior to the establishment of the International Administration. All trust territories were eventually returned to their indigenous inhabitants - *except Palestine*.

The British Mandate over Palestine rooted in the Balfour Declaration which envisioned the creation of a *Jewish National Home.* This Mandate was later approved by the UN Trusteeship Council. Contrary to the interpretation provided in Britain's diplomatic declaration (the White Paper), the UN General Assembly resolved to establish a *Jewish State alongside an Arab State*; a decision that contravened the explicit wording of Article 22 of the Covenant and Article 76 of the Charter. Subsequent recognitions by the Security Council, Israel's UN membership, and widespread international recognition of Israel led to neglected scrutiny of the *legitimacy of Israel's establishment in 1948*.

Rather than following the will of the indigenous inhabitants, the General Assembly *imposed partition*, ordering the creation of two States.[4] The exercise of sovereignty by the *indigenous Palestinian inhabitants* should have been achieved through *consultation and elections* within their own cultural framework, leading to *independence or self-governance*. Thus, the Partition Resolution, which violated both the League of Nations Covenant and the UN Charter, is not only *invalid* but it also entails *international responsibility* for the UN and *derivative responsibility* for member States that directed, controlled, aided, or circumvented obligations.

The right to self-determination applies to peoples under colonial rule, foreign domination, racist regimes, and indigenous inhabitants of trust territories - *not* to religious groups, refugees, persecuted communities, political parties, or other collectives. While Jewish representatives

1 *Namibia* (Advisory Opinion) (n 15) paras 122123-.
2 *Chagos* (Advisory Opinion) (n 50) para 182.
3 UNHRC Res 49/28 (11 April 2022) UN Doc A/HRC/RES/49/28, para 7.
4 UNGA Res 181 (II) (29 November 1947) GAOR 2nd Session Resolutions, 131.

presented arguments for the necessity of a Jewish State, none of these justifications could prevail over the *established rights* under Article 22 of the League Covenant, Article 76 of the UN Charter, or the *customary right to self-determination*. The UN's one-sided focus on the Jewish displacement (*Jewish diaspora*) after half a century reveals that it carried within itself the Palestinian displacement (*Palestinian diaspora*). Similarly, the one-sided focus on the persecution of non-Palestinian Jews (*the Holocaust*) after half a century reveals that it carried within itself the oppression of Palestinians (*the Palocaust*). Even voicing objection to German racism (*the German Gene*) after half a century reveals that it carried within itself Jewish Supremacism (*Chosen People*).

This *exceptionalism* in Israel's creation has, over half a century, exempted Israel from accountability under international law. A re-examination of this historical event, grounded in the obligations of the Mandate and Trusteeship System, reveals that the United Nations itself *stands the primary and principal culprit*. Alongside the UN, Britain and other States that supported the two-state proposal, bear responsibility for the consequences of this wrongfulness, proportionately. The UN must now take steps toward *restitution*; restoring the *inherent sovereignty of Palestine's indigenous inhabitants* through democratic processes. Reparations for material and moral damages must also be provided, by the UN and the concerned States.

Under international law, all actors are obligated to *neither recognize nor cooperate with* an illegal situation. Decades ago, the ICJ, the judicial arm of the UN, condemned South Africa's discriminatory regime in South West Africa (Namibia). The parallels between South West Africa and Palestine are striking: both were former mandates without new trusteeship agreements and both witnessed the emergence of discriminatory regimes: in the former by the administering power and in the latter by the UN General Assembly, *and* in the former through a racial discrimination and in the latter through a religious discrimination. Same storylines, differing courses of action; while one was condemned, the other was not. It is not too late to correct this injustice.

After nearly eight decades, the warnings voiced during the Palestine negotiations have proven prescient. The Palestinian representative cautioned that *"with a view to continuing this injustice, it is argued that the cessation of the mandate might lead to bloodshed between Arabs and Jews."*[1] Lebanon's delegate warned that *"the situation in Palestine is very unstable and contains within it the seeds of possible conflicts which may spread throughout the Middle East."*[2] Syria's representative added that *"the only trouble partition would cause them would be that of raising their hands, whereas the blood of the Arabs would flow and peace would be disturbed in that part of the world."*[3] Today, Israel's aggressions on Gaza, Lebanon, Syria, Yemen, and Iran have tragically validated these predictions.

As Henry Cattan aptly noted, *"Putting a lid on a boiling kettle will not stop it from boiling."*[4]*;* The Palestine issue must be resolved at its root: *the entirety of Palestine must be returned to its indigenous people*.

1 Agent of Arab Higher Committee, 'Forty Fifth Meeting to Thirty-Fourth Meeting in First Committee' (1947) UN Doc A/C.1/XX, p. 195.
2 Agent of Lebanon, 'United Nations Special Committee on Palestine' (1947) UN Doc A/AC.14/XX, p. 244.
3 Agent of Syria, 'Ad Hoc Committee on the Palestinian Question' (1947) UN Doc A/AC.14/XX, p. 176.
4 Henry Cattan, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* (Longman 1973) 174.

References

A) Books, Articles, and Theses

Adwan IMA, 'All-Palestine Government Founding and Falling Prelimination and Factors' (2022) 8(1) Intl J History & Cultural Stud 1

Akram SM, 'Palestinian Nationality and "Jewish" Nationality from the Lausanne Treaty to Today' in Leila H Farsakh (ed), *Rethinking Statehood in Palestine: Self-Determination and Decolonization Beyond Partition* (University of California Press 2021)

Bain W, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (OUP 2003)

Bell A and Kontorovich E, 'Palestine, Uti Possidetis Juris and the Borders of Israel' (2016) 58 Ariz L Rev 633

Bentwich, N, *The Mandates System* (Longmans, Green 1930)

Bentwich, Norman and Martin, Andrew, *A Commentary on the Charter of the United Nations* (Routledge & Kegan Paul Ltd 1950)

Biger G, *The Boundaries of Modern Palestine 1840-1947* (Routledge 2004)

Cannizzaro E (ed), *The Present and Future of Jus Cogens* (Sapienza Università Editrice 2015)

Cassese A, 'The Israel-PLO Agreement and Self-Determination' (1993) 4 EJIL 564

Cattan H, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* (Longman 1973)

Crawford J, *The Creation of States in International Law* (2nd edn, OUP 2006)

Etiger JF, 'From Sacred Trust to Self-Determination' (1977) 24 Netherlands Intl L Rev 85

Farsoun SK, *Culture and Customs of the Palestinians* (Greenwood Press 2004)

Fromkin D, *A Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Middle East* (Holt Paperbacks 2001)

Fripp E, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016)

Gadkowski T, 'The Principle of Self-Determination in the Context of Human Rights' (2017) 7 Adam Mickiewicz U L Rev 45

Gavish D, *A Survey of Palestine under the British Mandate, 1920–1948* (RoutledgeCurzon 2005)

Ghasemi G, 'The Palestinian People's Right to Armed Resistance from the Perspective of International Law' (2024) 2(1) Iranian J Intl & Comparative L 1

Göcke K, *Indigenous Peoples in International Law* (Göttingen University Press 2013)

Green TA and Hartog H, 'Law and Identifying Mandate Palestine' in Thomas A Green and Hendrik Hartog (eds), *Law in the Liberal Arts* (Cornell University Press 2006)

———, *Law and Identity in Mandate Palestine* (University of North Carolina Press 2006)

Kattan V, 'The Empire Departs: The Partitions of British India, Mandate Palestine, and the Dawn of Self-Determination in the Third World' (2018) 12(3) Asian J Middle E & Islamic Stud 1

Laqueur W, *A History of Zionism: From the French Revolution to the Establishment of the State of Israel*(Schocken Books 2003)

Leeper DS, 'International Law-Trusteeship Compared with Mandate' (1951) 49 Mich L Rev 1199

Mandel D, *H.V. Evatt and the Establishment of Israel the Undercover Zionist* (PhD thesis, University of Melbourne 2004)

Masalha N, *Palestine: A Four Thousand Year History* (Zed Books 2018)

Masri M, 'Constitutional Frameworks for a One-State Option in Palestine: An Assessment' in Leila H Farsakh (ed), *Rethinking Statehood in Palestine: Self-Determination and Decolonization Beyond Partition* (University of California Press 2021)

Matz N, 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' (2005) 9 Max Planck UNYB 47

McCarthy J, *The Population of Palestine: Population History and Statistics of the Late Ottoman Period and the Mandate* (Columbia University Press 1990)

Moosavi SF and Khodaparast N, 'Responsibility of Member States of International Organizations In light of International Law Commission Draft Articles on the Responsibility of International Organizations' (2023) 18(64) Q J Judicial L Views 159 [In Persian]

Nedeski N and Nollkaemper A, 'Responsibility of International Organizations "in Connection with Acts of States"' (2012) 9 Intl Orgs L Rev 33

Pappe I, 'Indigeneity as Resistance' in Leila H Farsakh (ed), *Rethinking Statehood in Palestine: Self-Determination and Decolonization Beyond Partition* (University of California Press 2021)

Penslar DJ, *Israel in History: The Jewish State in Comparative Perspective* (Routledge 2007)

Quigley J, *Palestine and Israel: A Challenge to Justice* (Duke University Press 1990)

Rabee N and Hammash A, 'Palestinian Self-Determination: Land, People, and Practicality' (Working Paper No 28, BADIL Resource Center for Palestinian Residency and Refugee Rights 2021)

Reich B, *A Brief History of Israel* (2nd edn, Facts on File 2008)
Reynold N, *Britain's Unfulfilled Mandate for Palestine* (Lexington Books 2014)
Robson L, *Colonialism and Christianity in Mandate Palestine* (University of Texas Press 2011)
Sabbagh K, *Palestine: History of a Lost Nation* (Grove Press 2008)
Saleh MM, *History of Palestine: A Methodological Study of a Critical Issue* (Al-Falah Foundation 2005)
Segev T, *One Palestine, Complete: Jews and Arabs under the Mandate* (Metropolitan Books 2000)
Seidl-Hohenveldern I, 'Responsibility of Member States of an International Organization for Acts of that Organization' in *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago*(Giuffrè 1987) vol 3
Shaw MN, 'The Heritage of States: The Principle of Uti Possidetis Today' (1996) 67 BYBIL 75
Simma B, Mosler H, Paulus A and Chaitidou E, *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) vol II
Talmon S, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff 2005)
Walter C, Von Ungern-Sternberg A and Abushov K, *Self-Determination and Secession in International Law* (OUP 2014)
Watson I, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge 2015)
Yehoshua AB, *Between Right and Right* (Doubleday 1981)
Zamani SG, 'A Reflection on the International Responsibility of International Organizations' [1997] Law J 236 [In Persian]

B) International Cases

Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali) (Judgment) [1986] ICJ Rep 554
Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion) [1962] ICJ Rep 151
Factory at Chorzów (Germany v Poland) (Jurisdiction) PCIJ Rep Series A No 9
International Status of South-West Africa (Advisory Opinion) [1950] ICJ Rep 128
Jurisdiction of the Courts of Danzig (Advisory Opinion) PCIJ Rep Series B No 15
Kadi v European Commission (Joined Cases C-58410/ P, C-59310/ P and C-59510/ P) EU:C:2013:518
Katkova v Canada (Minister of Citizenship and Immigration) (1997) 130 FTR 192 (Fed TD)
Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion) [2024] ICJ Rep
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136
Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ Rep 95
MZXLT v Minister for Immigration [2007] FMCA 799
NAGV v Minister for Immigration [2005] HCA 6
Nada v Switzerland App no 1059308/ (ECtHR [GC], 12 September 2012)
Ruzhdi Saramati v France, Germany and Norway App no 7141201/78166 & 01/ (ECtHR, 2 May 2007)
Western Sahara (Advisory Opinion) [1975] ICJ Rep 12
Westland Helicopters Ltd v Arab Organisation for Industrialisation [1995] QB 282
The Chamizal Case (Mexico v United States) (1911) 11 RIAA 309

C) UN and League of Nations Documents

i) Resolutions

UNGA Res 1747 (XVI) (28 June 1962) GAOR 16th Session Supp 17, 65
UNGA Res 181 (II) (29 November 1947) GAOR 2nd Session Resolutions, 131
UNGA Res 1608 (XV) (21 April 1961) GAOR 15th Session Supp 16, 44
UNGA Res 2504 (XXIV) (19 November 1969) GAOR 24th Session Supp 30, 2
UNGA Res 752 (VIII) (9 December 1953) GAOR 8th Session Supp 17, 19
UNGA Res 2200 A (XXI) (16 December 1966) GAOR 21st Session Supp 16, 49
UNSC Res 47 (1948) (21 April 1948) UN Doc S/RES/47
UNSC Res 51 (1948) (3 June 1948) UN Doc S/RES/51
UNSC Res 242 (1967) (22 November 1967) UN Doc S/RES/242
UNSC Res 278 (1970) (11 May 1970) UN Doc S/RES/278

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

Towards the Human Rights of Future Generations and the Role of International Criminal Court

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Article Info

Article type:
Research Article

Article history:
Received
22 August 2024

Received in revised form
11 January 2025

Accepted
13 January 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3780.html

Keywords:
Crime Against Humanity, War Crime, Genocide, Crimes Against the Rights of Future Generations, ICC.

ABSTRACT

The challenges of the past century—such as terrorism, nuclear threats, population growth, and drug trafficking—have significantly impacted global security and human rights. Among these, the "Environmental Crisis" stands out as one of the most pressing issues facing the international community and the rights of future generations. These rights are increasingly threatened not only by terrorism and nuclear risks but also by the alarming proliferation of the COVID-19 pandemic, which has emerged as a formidable challenge in the 21st century. It is essential to recognize that these challenges constitute a substantial part of criminal conduct at various national, regional, and international levels. To effectively address the myriad forms of crimes against the rights of future generations, the adoption of a robust and effective criminal policy is imperative. However, the Rome Statute of the International Criminal Court (ICC) has not sufficiently criminalized or addressed crimes specifically targeting future generations. Nonetheless, the Statute's provisions concerning recognized international crimes—such as war crimes, crimes against humanity, and genocide—may offer a framework for addressing offenses that infringe upon the rights of future generations. Thus, it is conceivable to pursue accountability for such crimes within the jurisdiction of the ICC.

Cite this article: Namamian, P., (2025). Towards the Human Rights of Future Generations and the Role of Interantional Criminal Court, *Iranian Journal of International and Comparative Law*, 3(1), pp: 72-82.

10.22091/ijicl.2025.11230.1102 Publisher: University of Qom

Table of Contents

Introduction

Today, the challenges and crises stemming from conflicts—particularly terrorist actions and their destructive impacts on various aspects of human life—pose a profound threat to the rights of future generations. It is therefore an undeniable necessity to address crimes that violate human activities across political, military, economic, cultural, and scientific domains, especially when these violations jeopardize the health, well-being, or long-term survival of any group or community.[1]

Creating a new international crime that aligns with the rights of future generations is undoubtedly fraught with challenges and criticisms. Nonetheless, crimes against these rights, particularly those involving serious violations of economic, social, and cultural rights, present a clear and detrimental perspective on these fundamental entitlements. This emerging category of crime—termed "crimes against the rights of future generations"—can be defined as actions and behaviors that have destructive effects on the health, well-being, and survival of identifiable groups or populations, as well as their living environments, which are integral to their livelihoods. Given their scale and magnitude, these actions should be recognized as international crimes.

Moreover, the concept of crimes against the rights of future generations underscores that gross violations of economic, social, and cultural rights, along with significant environmental degradation, are not solely the result of resource scarcity or structural factors. In many instances, they arise from conscious and morally reprehensible actions.[2]

This article seeks to investigate the crimes committed against the rights of future generations and assess how these crimes align with the framework and structure of offenses under the jurisdiction of the Rome Statute of the International Criminal Court (ICC). It evaluates the potential for confronting and suppressing such crimes in light of the regulations contained within the Statute. Notably, this research addresses a significant gap, as no prior studies in Iran have focused on this issue. This article represents a pioneering effort to examine and identify the mechanisms for addressing violations of the rights of future generations.

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1 Humphreys, *Against Future Generation* (2023) *1073*.

2 Palarczyk, *Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment* (2023) 189-191.

1. From the Human Rights of Future Generations to the Maastricht Principles

The rights of future generations have historically been neglected in the analysis and implementation of human rights law. However, international human rights law is not confined to the present generation. Foundations for addressing the rights of future generations have been established in various international instruments over the past century. The future of humanity on Earth appears increasingly precarious as we confront threats such as human-induced climate change, biodiversity loss, geopolitical conflicts, the erosion of democratic institutions, and the unpredictable consequences of rapid advancements in artificial intelligence. In this context, the obligations of current generations towards future generations have garnered growing attention.[1]

The Maastricht Principles on the Human Rights of Future Generations aim to clarify the current state of international law as it pertains to the rights of future generations.[2] These principles consolidate the evolving legal framework and reaffirm the binding obligations of states and other actors as outlined in international and human rights law. The principles emerged from a nearly six-year process of research, dialogue, and analysis, incorporating the expertise and perspectives of current and former national and regional human rights scholars and experts. They were formally adopted in Maastricht on February 3, 2023.

This initiative builds upon earlier expert legal opinions established in Maastricht, including the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), and the Maastricht Principles on Extraterritorial Obligations of States in the Field of Economic, Social and Cultural Rights (2011), along with their accompanying interpretations.

The Maastricht Principles represent a significant advancement in promoting a more sustainable future. By establishing a legal foundation for attributing human rights to future generations, these principles clarify and contribute to the development of international human rights law, outlining the obligations imposed on states, intergovernmental organizations, and businesses.[3]

To date, these principles have received endorsement from a diverse array of global experts and current and former UN mandate holders. A key contribution of the Maastricht Principles is their recognition of future generations as holders of internationally recognized human rights, contrasting sharply with recent UN instruments that merely refer to the "interests" of future generations. This recognition underscores that the actions of present generations have profound implications for the human rights of those born today and those who will be born in the future, potentially affecting their ability to enjoy a wide range of rights, including the right to a clean, healthy, and sustainable environment.[4]

This framework also entails ensuring that future generations are empowered to protect

1 **Center for International Environmental Law**, *The Maastricht Principles on the Rights of Future Generations* https://www.ciel.org/issue/the-maastricht-principles-on-the-rights-of-future-generations/ accessed January 20, 2025.

2 **Rights of Future Generations** https://www.rightsoffuturegenerations.org/ accessed January 20, 2025.

3 Coomans, *Towards 2122 and Beyond: Developing the Human Rights of Future Generations* (2023) 58

4 **United Nations Digital Library**, *The Human Right to a Clean, Healthy and Sustainable Environment* https://digitallibrary.un.org/record/3982508?ln=en&v=pdf accessed January 20, 2025.

their human rights through national, regional, and international legal systems, and that effective remedies are available for human rights violations. To this end, it is crucial to ensure the legal standing of representatives of future generations before international human rights courts and institutions when their fundamental rights are threatened or violated.[1]

The acknowledgment of the human rights of future generations is supported by fundamental principles such as the universality of human rights norms, which apply equally to all individuals, irrespective of when or where they were born. Numerous international legal instruments explicitly or implicitly recognize obligations towards future generations, including the duty to ensure intergenerational justice. Additionally, the Maastricht Principles draw upon the laws, customs, and values of states and peoples across all global regions and belief systems that recognize obligations to future generations.[2] They are inspired by the worldview and way of life of many indigenous peoples, which emphasize the continuity of obligations across past, present, and future generations.

The Maastricht Principles further recognize the inherent connections between past, present, and future patterns of human rights violations. They emphasize that states must impose reasonable limits on activities that threaten the enjoyment of human rights by future generations, including the unsustainable exploitation of natural resources and environmental degradation, in order to fulfill their obligations to future generations.[3]

At the global level, numerous political[4] and legal[5] initiatives are underway with significant implications for future generations. The Maastricht Principles seek to ensure that these initiatives are recognized within the framework of human rights. Such formal recognition can play a vital role in accelerating the development of laws, policies, and institutions necessary to guarantee that future generations can enjoy universal human rights.[6]

2. International Challenges and Developments

Crimes committed against the rights of future generations are not directly perpetrated against those generations, much like crimes against humanity are not directly committed against humanity as a whole. The term "humanity" in the context of crimes against humanity implies that such offenses evoke concern for all of humanity; the severity of these crimes is so profound that they wound and offend the collective conscience of humanity. In this regard, crimes against the rights of future generations are perpetrated against specific individuals, provided that the principal acts and behaviors constitute part of a widespread or organized attack against a civilian population.[7]

For a violation of international law to be recognized as an international crime under customary international law, the violated rule must not only be recognized as part of customary law, but

1 Wewerinke-Singh, Garg, and Agarwalla, 2023, p. 653

2 Humphreys, *ibid*. 1078

3 Weiss, *Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions* (2021) 14-16.

4 United Nations General Assembly, *A/RES/79/1, 22 September 2024* https://documents.un.org/doc/undoc/gen/n24/272/22/pdf/n2427222.pdf accessed January 20, 2025.

5 United Nations General Assembly, *A/77/L.58, 1 March 2023* https://www.icj-cij.org/sites/default/files/case-related/187/187-20230630-req-03-00-en.pdf accessed

6 **OpenGlobalRights**, *The Maastricht Principles: Safeguarding Human Rights of Future Generations* https://www.openglobalrights.org/maastricht-principles-safeguarding-human-rights-future-generations/ accessed January 20, 25.

7 Mavrommati et al., *Representing Future Generations in the Deliberative Valuation of Ecosystem Services* (2020) 12.

the breach must also result in individual criminal responsibility. To satisfy this latter condition, there must exist a stable and integrated governmental system that demonstrates a commitment to the criminalization of prohibited behaviors and has established clear and consistent examples of punishment for such violations through national and international courts and tribunals.[1] While actions against future generations may pertain to behaviors currently prohibited by international law, there remains a significant challenge in rendering these behaviors punishable under customary law.[2]

Recent developments in the international criminal law system, particularly concerning the evolution of crimes against humanity, illustrate that the application of international criminal law cannot be expanded without the establishment of judicial precedents. Crimes against humanity emerged in international law in the aftermath of World War II, particularly during the drafting of the Charter of the International Military Tribunal at Nuremberg.[3] During the negotiations leading to the Nuremberg Charter, it became apparent that certain crimes committed by the Nazis could not be addressed within the existing legal framework, particularly the atrocities inflicted by German forces against their own citizens. To rectify this gap, the Allies introduced a third category of crimes known as crimes against humanity, which filled the void left by the regulations governing crimes against peace and war crimes.[4]

The proposal to establish a crime against the rights of future generations, akin to crimes against humanity, would address existing gaps in both rights and prohibitions against unacceptable human behavior. This could include criminalizing actions in peacetime that would otherwise be classified as war crimes, thereby enhancing the legal framework for accountability.[5]

The process of developing such a declaration must be open, transparent, and inclusive, involving consultations with member states as well as relevant stakeholders.[6]

Moreover, there are significant advancements in international environmental law that bolster the case for recognizing crimes against the rights of future generations. Increasing acknowledgment of individual responsibility for environmental damage[7] or protection,[8] often articulated in relation to the rights of future generations, is particularly relevant.[9] As noted by the International Law Commission in its resolution on responsibility and response under international law for environmental damage, international environmental law is forging new

1 *Prosecutor v Tadić* (1995) 84.

2 The concept of crimes against the rights of future generations is based on several principles of international criminal law, international human rights law and international environmental law. Paragraphs 1(a), (b), (d), (f), (g) and (i) will criminalize behavior that is currently prohibited as a violation of international economic, social, cultural or other international conventions. However, sub-paragraph 1(a) would criminalize conduct already prohibited as a crime against humanity without the need to prove an attack on any civilian population, and sub-paragraphs 1(c), (e), (h) consider behavior in peacetime as a crime, which is currently prohibited as a war crime. There is clear support in various fields of international law for the request to prohibit criminal behavior that equates to a crime against the rights of future generations.

3 Cassese, *International Criminal Law* (2003) 70. & Cassese, *Violence and Law in the Modern Age* (1988) 109.

4 Bassiouni, *Crimes against Humanity in International Criminal Law* (1992) 24

5 Many international crimes are directed towards gross and serious violations of human rights. International criminal law has so far focused on behavior that violates civil and political rights, such as the right to life, personal liberty, and freedom from quasi-crime. In light of the principle of equal respect for all human rights, there is limited authority to restrict the scope of international criminal law to only one category of rights. Considering that crimes against the rights of future generations focus on gross violations of economic, social, and cultural rights, the lack of international criminal responsibility attached to such violations is generally unjustified.

6 **United Nations**, *Declaration on Future Generations* https://www.un.org/en/summit-of-the-future/declaration-on-future-generations accessed January 20, 2025.

7 United Nations, *Rio Declaration on Environment and Development* (1992).

8 United Nations, *New Delhi Declaration* (1998).

9 United Nations, *Stockholm Declaration on the Human Environment* (1972).

connections with the concept of intergenerational equity, affecting issues of responsibility and accountability.[1]

Consequently, the aforementioned concepts, along with the principles of international criminal law, international law, human rights, and international environmental law, provide a robust foundation for imposing individual criminal responsibility for behaviors that constitute crimes against the rights of future generations. Such behaviors should be subject to punitive measures.

3. Understanding the Concept

Efforts to address crimes against the rights of future generations aim to facilitate the effective development of the international community and the international criminal justice system, particularly in declaring individual criminal responsibility for violations of international law that evoke concern for the global populace.[2] From the mid-1990s to the early 2000s, the international community established several international or mixed (dual) criminal courts in response to crimes committed during armed conflicts.[3] This evolution culminated in the establishment of the ICC, driven by a concerted and organized effort led by civil society actors worldwide.

The creation of a new category of international crimes presents considerable challenges, marked by various obstacles and shortcomings. The concept of crimes against the rights of future generations is grounded in a combination of rights and principles derived from international criminal law, international human rights law, and international environmental law. While this concept seeks to advance international law, it does so through the principle of imposing appropriate criminal penalties for behaviors deemed prosecutable and intolerable by the international community.[4] Consequently, the notion of establishing a new international crime against the rights of future generations is intrinsically linked to both reinforcing existing prohibitions on acceptable behavior and to the punishment and prevention of immoral actions.[5]

Crimes against the rights of future generations can be defined as any of the following acts occurring within the context of human activities—whether political, military, economic, cultural, or scientific—when there is a clear awareness of the high probability of harmful effects on the health or long-term survival of any group or community:[6]

1. **Coercive Labor and Living Conditions:** Forcing members of any definable group or population to work or reside in conditions that jeopardize their health and safety, including forced labor, forced prostitution, and human trafficking.
2. **Exploitation of Resources:** Illegally appropriating or exploiting public or private resources and properties belonging to members of any definable group or population,

1 Vicuna, *Eighth Commission Rapporteur: Responsibility and Liability Under International Law for Environmental Damage Resolution* (1997) 34

2 Jagger, *Crimes Against Present and Future Generations* (2014) 45

3 Moazzami and Namamian, *The Third Generation of International Criminal Courts: Achievements, Norms and Challenges* (2014) 114.

4 **Conseil Constitutionnel**, *Generations Futures Programme* https://www.conseil-constitutionnel.fr/sites/default/files/2024-02/generations-futures-programme-en.pdf accessed January 20, 25.

5 Kumar, *Future Generations* (2018) 63

6 Jodoin and Saito, *Crimes Against Future Generations: Harnessing the Potential of Individual Criminal Accountability for Global Sustainability* (2017) 121.

including grand embezzlement or the improper allocation of such resources by public authorities.

3. **Deprivation of Basic Necessities:** Deliberately depriving members of any definable group or community of essential resources for survival, such as preventing access to water and food sources, or contaminating these resources through harmful organisms or pollution.
4. **Forcible Displacement:** Forcibly expelling members of any definable group or community in a systematic or organized manner from their place of residence.
5. **Endangerment of Health Services:** Imposing measures that threaten the health of members of any definable group or community, such as obstructing access to health services, failing to provide necessary medical information, or conducting unjustified medical or scientific tests.
6. **Cultural Suppression:** Preventing members of any definable group or community from exercising their cultural rights, including religious practices, language use, and the preservation of cultural customs and institutions.
7. **Barriers to Education:** Denying access to primary, secondary, technical, vocational, and higher education for members of any definable group or population.
8. **Ecosystem Destruction:** Causing extensive, long-term damage to the natural environment, including the destruction of entire species, subspecies, or ecosystems.
9. **Illegal Pollution:** Polluting air, water, or soil through the release of substances or organisms that threaten the health or survival of members of any identifiable group or population.
10. **Similar Endangering Actions:** Committing other acts that grossly endanger the health, safety, or means of survival of members of any definable group or population.
11. **Widespread Harm:** Any of the aforementioned actions that result in serious, widespread, and long-term damage to human health and the rights of future generations, characterized by indiscriminate and uncontrollable effects.

By framing these actions within the context of international law, we can better understand the imperative to protect the rights of future generations against a range of threats that compromise their health, safety, and well-being.

4. International Legal Standards and Criminal Proceedings

The standards and legal norms established in the Rome Statute encompass various articles related to crimes such as war crimes, genocide, and crimes against humanity. As such, the ICC holds a significant position regarding the investigation and exercise of jurisdiction over these crimes. While the provisions of the Rome Statute have not extensively addressed the rights of future generations, it is still possible to assess the court's jurisdiction concerning crimes that infringe upon these rights.

War crimes are defined as gross violations of customary rules or conventions that are part of international humanitarian law, primarily codified in the 1907 Hague Conventions, the 1949

Geneva Conventions, and the 1977 Additional Protocols. Certain war crimes can be applied to prosecute behaviors that may also be classified as crimes against the rights of future generations.[1]

The primary distinction between these war crimes and similar offenses against the rights of future generations lies in the limited scope of the former. The Rome Statute specifies that war crimes listed in Article 8, paragraphs (a) and (b), pertain only to armed conflicts that do not have an international character. Situations characterized by internal chaos, such as rebellion or sporadic acts of violence, fall outside this scope. The Appellate Division of the International Criminal Tribunal for Yugoslavia defined armed conflict in the *Tadić case*[2] as the resort to armed forces between governments or ongoing violence between organized armed groups within a country. Additionally, the ICC's elements of crimes stipulate that actions must occur within the framework of an armed conflict and be related to it, along with the perpetrator's awareness of the conditions indicating the existence of such conflict.[3]

The Rome Statute defines crimes against humanity as actions directed at any definable group or population based on political, racial, national, ethnic, cultural, religious, gender, or other internationally recognized contexts. These acts fall within the jurisdiction of the ICC, which prohibits inhumane actions that cause pain, suffering, severe physical injury, or damage to mental or physical health. Whether a specific act qualifies as an inhumane act requires a case-by-case examination[4] of factors such as intensity, character, inflicted harm, intent, and the connection between the act and the resultant harm.[5]

Article II of the Convention on the Prevention of Genocide and its Punishment defines genocide as acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. These acts include:

A. Killing members of the group.
B. Inflicting severe physical or mental harm on members of the group.
C. Deliberately imposing living conditions calculated to destroy the group's physical existence.
D. Actions aimed at preventing births within the group.
E. Forcibly transferring children from one group to another.

To utilize these definitions in prosecuting behaviors that could be categorized as crimes against the rights of future generations, it is essential to expand the material elements of these crimes to encompass violations of economic, social, and cultural rights, similar to the framework for crimes against humanity.

Acts falling within this framework may include rape, non-lethal violence causing severe

1 Sub-paragraphs (c), (e), (h) in the draft definition of crimes against the rights of future generations, relate to existing war crimes, including the killing of civilians due to starvation (Rome Statute ICC, Article 25(5)(2)(8)), subjecting people to medical or scientific experiments (Rome Statute ICC, Article 10(b)(2)(8)), and causing severe and long-term damage to the natural environment (Rome Statute ICC, Article 4(b) and 2-8).

2 **International Committee of the Red Cross**, *ICTY: Prosecutor v Tadić* https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic accessed January 20, 2025.

3 *Report of the Preparatory Commission for the International Criminal Court* (2000).

4 *Prosecutor v Kordić and Čerkez* (2001).

5 *Prosecutor v Kayishema* (1999) 7.

injury, and actions designed to instill terror or intimidation.[1] The ICC has acknowledged the intentional creation of living conditions calculated to physically destroy a group, which encompasses conditions leading to death from neglect, including lack of housing, clothing, health care, or excessive labor. It is also pertinent to note that actions such as rape, starvation, and the systematic reduction of essential medical services can be included in this category.

In summary, the elements of crimes defined by the ICC largely reiterate that living conditions can involve intentional deprivation of essential survival resources, such as food or medical care, as well as organized forced evictions. Additionally, the imposition of measures intended to prevent reproduction within a group—including sterilization, forced birth control, and prohibiting marriage—aligns with the crimes outlined in international law.[3] [2,]

Overall, the prosecution of acts equivalent to crimes against the rights of future generations as established international crimes necessitates the presence of elements primarily associated with direct physical violence. War crimes must occur in the context of an armed conflict, crimes against humanity must be part of a widespread or organized attack against civilian populations, and genocide must be committed with the intent to destroy a national, ethnic, racial, or religious group, in whole or in part.[4]

Conclusion

While there are various avenues to declare crimes against the rights of future generations within the framework of international law, the most effective approach would likely involve amending or supplementing the Rome Statute of the International Criminal Court (ICC). The Rome Statute explicitly allows for the possibility of amending its provisions concerning criminal proceedings.

Currently, the ICC is well-positioned to consider these cases for inclusion within its jurisdiction. However, there are two significant reasons that suggest a long-term effort to create crimes against the rights of future generations is vital. First, within international criminal law, these crimes can be distinguished from other unique cases, such as drug trafficking and terrorism, that may also warrant inclusion in the Rome Statute. Second, while the idea of establishing a new crime to protect future generations is essential for the advancement of international law, it is equally important to ensure that such actions align with the criminal consequences recognized by the international community.

Moreover, creating crimes against the rights of future generations addresses two persistent concerns within international law: 1) the undue prioritization of civil and political rights over economic, social, cultural, and environmental rights, and 2) the need to end impunity for violations of international law that pose serious threats to the life, dignity, and well-being of individuals.

To facilitate these changes, the following recommendations are proposed to amend the provisions related to crimes under the jurisdiction of the ICC:

1. **Inclusion Proposal:** During future review conferences, governments should propose

1 *Prosecutor v Seromba* (2008) 46.
2 Dangor, *Amending the Rome Statute and Peoples: Crimes Against Present and Future Generations (CPFG)* (2021) 73.
3 *Prosecutor v Kunarac* (2002) 86.
4 *Prosecutor v Kordić and Čerkez* (2004) 87.

the addition of at least one regulation to the Rome Statute to incorporate an addendum specifically addressing crimes against the rights of future generations, in accordance with Article 121 of the Statute.

2. **Domestic Legislation:** Governments should enact domestic regulations that comprehensively support and protect the rights of future generations. These regulations should aim to create a legal framework for international exposure and collaboration, ultimately fostering a global consensus on the recognition and prosecution of crimes against the rights of future generations, with the backing of relevant United Nations institutions.

By taking these steps, the international community can move towards more robust protections for future generations, ensuring that their rights are recognized and upheld in the face of emerging global challenges.

Reference

Bassiouni, M. Cherif, *Crimes against Humanity in International Criminal Law* (Martinus Nijhoff Publishers 1992).

Cassese, A., *International Criminal Law* (Oxford University Press 2003).

Cassese, A., *Violence and Law in the Modern Age* (Princeton University Press 1988).

Coomans, F, 'Towards 2122 and Beyond: Developing the Human Rights of Future Generations' (2023) 41 Netherlands Quarterly of Human Rights 53-60.

Dangor, Z., 'Amending the Rome Statute and Peoples: Crimes Against Present and Future Generations (CPFG)' (2021) 20(2) Fourth World Journal 66-81.

Humphreys, S., 'Against Future Generations' (2023) 33(4) European Journal of International Law 1061–1092.

Jagger, B., 'Crimes Against Present and Future Generations' (2014) 57 Journal Challenge 1.

Jodoin, S. and Saito Y., 'Crimes Against Future Generations: Harnessing the Potential of Individual Criminal Accountability for Global Sustainability' (2017) 7(2) McGill International Journal of Sustainable Development Law and Policy 146-121.

Kumar, R., 'Future Generations' in *The Oxford Handbook of Distributive Justice* https://www.oxfordhandbooks.com accessed [date].

Mavrommati, G.; Shannon R.; Howarth R. B.; Borsuk M. E., 'Representing Future Generations in the Deliberative Valuation of Ecosystem Services' (2020) 8 Elementa: Science of the Anthropocene 22.

Moazzami, S. and Namamian P., 'The Third Generation of International Criminal Courts: Achievements, Norms and Challenges' (2014) 11 Criminal Law Research.

Palarczyk, D., 'Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment' (2023) 34 Criminal Law Forum 147–207.

Porhashemi, S. A. et al., 'Formation and Development of the Concept of the Rights of Future Generations in International Environmental Law' (2015) 3 Environmental Science and Technology (In Persian).

Vicuna, F. O., 'Eighth Commission Rapporteur: Responsibility and Liability Under International Law for Environmental Damage Resolution' (1997) 10(3) Georgetown International Environmental Law Review 39-27.

Wewerinke-Singh, M.; Garg A.; Agarwalla Sh., 'In Defence of Future Generations: A Reply to Stephen Humphreys' (2023) 34(3) European Journal of International Law 651–668.

Weiss, B., 'Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions' in *The Theoretical Framework for International Legal Principles of Intergenerational Equity and Implementation through National Institutions* (Cambridge University Press 2021).

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

Sending Weapons to Ukraine under the Prohibition of the Use of Force and the Law of Neutrality

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Article Info

Article type:
Research Article

Article history:
Received
22 August 2024

Received in revised form
11 January 2025

Accepted
13 January 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3780.html

Keywords:
International Armed Conflict, Use of Force, International Humanitarian Law, Principle of Neutrality, Military Target.

ABSTRACT

The claim of Russia's humanitarian intervention in Ukraine serves as a legal justification for the use of force. However, there is no evidence supporting allegations of genocide in the Donetsk or Luhansk regions. While the majority of states oppose Russia's invasion, this does not justify overlooking the rule of law, particularly the law of neutrality. In Ukraine's struggle against Russian aggression, the United States and its allies have provided weapons and military training to Ukrainian forces. This unprecedented support violates the prohibition of the use of force and the law of neutrality. According to the Thirteenth Hague Convention of 1907, neutral countries cannot supply "war material of any kind" to belligerent powers. Consequently, Russia holds the right to take countermeasures against governments violating neutrality. Furthermore, under Article 52 of the First Protocol to the Geneva Convention of 1949, Russia may target weapons in Ukraine's possession. However, if Russia targets these weapons before they are actively used by Ukraine, such an attack could violate jus ad bellum, as the transfer of weapons alone cannot be classified as an armed attack against Russia.

Cite this article: Ghasemi, G., & Mojarrad Aylar, B., (2025). Sending Weapons to Ukraine under the Prohibition of the Use of Force and the Law of Neutrality, *Iranian Journal of International and Comparative Law*, 3(1), pp: 83-98.

doi 10.22091/ijicl.2025.12449.1140 Publisher: University of Qom

Table of Contents

Introduction

In 2022, following the military attack on Ukraine, Russian President Vladimir Putin signed the annexation documents for four partially occupied provinces: Luhansk, Donetsk, Kherson, and Zaporizhia. This act, which disregards the prohibition against the use of force, undermines the foundation of international law and the principles established by the United Nations Charter. UN Secretary-General António Guterres, during an emergency meeting of the UN Security Council, urged: "President Putin, stop your troops from attacking Ukraine; give peace a chance."[1] From February 24, 2022, the date of Russia's armed aggression against Ukraine, until May 1, 2022, the Office of the UN High Commissioner for Human Rights (OHCHR) recorded 6,469 civilian casualties, including 3,153 killed and 3,316 injured.[2]

In response, Western countries have taken unprecedented measures to support Ukraine's defense against Russian aggression. The United States, the European Union, and its member states have provided substantial military, financial, and humanitarian aid. In February 2022, President Joe Biden authorized the release of additional weapons from US stocks to Ukraine, including anti-armour weapons, small arms, body armor, and munitions. For the first time in its history, the European Union also financed the purchase and delivery of arms to Ukraine. Other countries, such as the United Kingdom, Canada, France, the Netherlands, Germany, Sweden, Norway, and Denmark, have similarly contributed military aid.[3]

While the West opposes the Russian invasion, its involvement in Ukraine has escalated tensions. The EU's efforts to forge closer ties with Ukraine, particularly through the Association Agreement, were perceived by Russia as an encroachment on its sphere of influence, leading to increased unrest and the subsequent annexation of Crimea. Western support for pro-European movements in Ukraine, without fully grasping the region's historical and geopolitical

1 UN Security Council, 'Security Council Holds Late Night Emergency Meeting on Ukraine' (24 February 2022) https://news.un.org/en/story/2022/02/1112592.

2 Office of the High Commissioner for Human Rights, 'Ukraine: Civilian Casualty Update' (2 May 2022) https://www.ohchr.org/en/documents/country-reports/ukraine-civilian-casualty-update-2-may-2022.

3 Al Jazeera, 'Which Countries Are Sending Military Aid to Ukraine?' (28 February 2022) https://www.aljazeera.com/news/2022/2/28/which-countries-are-sending-military-aid-to-ukraine.

complexities, has further intensified tensions. Additionally, NATO's expansion towards Russia's borders is viewed by some as a provocative action exacerbating the situation.

It is crucial to recognize that the conflicts in Ukraine involve a multitude of factors, and while the West's role is significant, it should not be seen as the sole cause of the tensions. Historical, cultural, geopolitical, and internal dynamics within Ukraine also play vital roles. To achieve lasting peace and stability, all parties must engage in open dialogue, address historical grievances, and pursue equitable solutions. A comprehensive approach that considers the perspectives of all stakeholders will be essential in resolving these longstanding conflicts.

Despite the West's significant military support for Ukraine, there has been a lack of clear legal justification for sending weapons. In the absence of explicit explanations from involved states, legal scholars and commentators have sought to clarify how these actions may align with the law of neutrality. Their justifications can be categorized into four groups:

1. **Qualified Neutrality**: The first group argues that supplying weapons to Ukraine is consistent with the principle of qualified neutrality, asserting that neutral states may favor victims of aggression without breaching international obligations.[1]
2. **Collective Self-Defense**: The second group contends that the supply of arms is justified as a form of collective self-defense for Ukraine against Russian aggression.[2]
3. **Lawful Countermeasures**: The third group posits that the supply of arms constitutes lawful countermeasures in response to Russia's clear violations of international law.[3]
4. **Obligatory Cooperation**: The fourth group believes that sending weapons is not only permitted under Article 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) but may also be obligatory to cooperate in addressing serious breaches of peremptory norms of international law, specifically Russia's aggression against Ukraine.[4]

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1 See Heinegg, *Neutrality in the War Against Ukraine* (2022) https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/.; Michel N Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (Articles of War, 7 March 2022) https://lieber.westpoint.edu/ukraine-neutrality-cobelligerency-use-of-force/.; Oona A Hathaway and Scott Shapiro, 'Supplying Arms to Ukraine is Not an Act of War' (Just Security, 12 March 2022) https://www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war/.; Michel N Schmitt, 'A No-Fly Zone over Ukraine and International Law' (Articles of War, 18 March 2022) https://lieber.westpoint.edu/no-fly-zone-ukraine-international-law/.; Brian Finucane, 'Ukraine and War Powers: A Legal Explainer' (Just Security, 3 March 2022) https://www.justsecurity.org/80438/ukraine-and-war-powers-a-legal-explainer/.; Terry D Gill, 'A Ukraine No-Fly Zone: Further Thoughts on Law and Policy' (Articles of War, 23 March 2022) https://lieber.westpoint.edu/a-ukraine-no-fly-zone-further-thoughts-on-law-and-policy/.; Eyal Benvenisti and Amichai Cohen, 'Bargaining About War in the Shadow of International Law' (Just Security, 28 March 2022) https://www.justsecurity.org/80853/bargaining-about-war-in-the-shadow-of-international-law/.; Adil Ahmad Haque, 'An Unlawful War' (2022) 116 American Journal of International Law Unbound 155.; Stefan A G Talmon, 'The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine' (2022) Bonn Research Papers on Public International Law, Paper No 20/2022.

2 Kai Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus be Exposed to Countermeasures?' (EJIL:Talk!, 2 March 2022) ; Schmitt, 'Providing Arms and Materiel to Ukraine', ibid; Andrew Clapham, 'On War' (Articles of War, 5 March 2022) <https://lieber.westpoint.edu/on-war. ; Markus Krajewski, 'Neither Neutral nor Party to the Conflict?: On the Legal Assessment of Arms Supplies to Ukraine' (Völkerrechtsblog, 9 March 2022) https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/.

3 Raul (Pete) Pedrozo, 'Ukraine Symposium – Is the Law of Neutrality Dead?' (Articles of War, 31 May 2022) <https://lieber.westpoint.edu/is-law-of-neutrality-dead/>; Andrew Clapham, ibid; Eyal Benvenisti and Amichai Cohen, 'Bargaining About War in the Shadow of International Law' (Just Security, 28 March 2022).

4 Stefan A. G. Talmon, 'The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine' (2022) Bonn Research Papers on Public International Law, Paper No 20/2022. ; Adil Ahmad Haque, 'An Unlawful War' (2022) 116 American Journal of International Law Unbound 158; Eyal Benvenisti and Amichai Cohen, 'Bargaining About War in the Shadow of International Law' (Just Security, 28 March 2022).; Kai Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus be Exposed to Countermeasures?' (EJIL:Talk!, 2 March 2022) <https://www.ejiltalk.org/willa-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-tocountermeasures/>

While acknowledging the legal arguments that Western countries may use to justify sending weapons to Ukraine, the first group's perspective will be explored in Part 3 of this article. Regarding the second group's argument for collective self-defense, Article 51 of the UN Charter affirms Ukraine's inherent right to self-defense. Additionally, countries supporting Ukraine against Russian aggression can invoke their right to self-defense if Ukraine requests assistance. However, Article 51 mandates that member states report any measures taken under the right of self-defense to the Security Council. To date, no state providing arms to Ukraine has reported these deliveries to the Security Council.

Regarding the third group's claim of countermeasures, Article 49 of the ARSIWA stipulates that only the injured state can enact such measures. An injury may be defined as a violation specifically affecting a state or, if part of a broader group, impacting the international community. In this context, Ukraine is the injured party; thus, it is not the responsibility of the West or other arms-sending states to claim countermeasures. Consequently, while other states may demand that Russia cease its illegal aggression and provide compensation for damages, only Ukraine can invoke responsibility for Russia's actions.

The fourth group's claim raises controversial questions regarding whether cooperation under Article 41 of the ARSIWA includes sending weapons and whether these states can still benefit from neutral status. There is concern that such cooperation might escalate the conflict, which could explain why no state has invoked Article 41 to date. Although ARSIWA does not explicitly clarify this, if we consider Russia's invasion of Ukraine a serious breach of a peremptory norm of international law, it may grant other countries the right to cooperate in lawful means to end the aggression. However, sending weapons could violate the neutrality laws established by the Fifth and Thirteenth Hague Conventions of 1907. Nonetheless, this violation may not constitute an offense under international law, and Russia cannot legally classify the states sending weapons to Ukraine as co-belligerents.

1. Russia's Humanitarian Intervention in Ukraine

Humanitarian intervention refers to military intervention in a state that either violates human rights or is unable to prevent such violations. To prevent misuse of this concept, any humanitarian intervention must occur within the framework of Article 42 of the UN Charter and require Security Council (UNSC) authorization. Thus, it cannot be viewed as an exception to the prohibition on the use of force, and its legitimacy hinges on UNSC approval. The Russian government did not secure this approval for its attack on Ukraine; the UNSC even passed a resolution demanding an immediate cessation of hostilities, which Russia vetoed.[1]

In the past forty years, several governments have attempted to justify unilateral military actions under the guise of humanitarian intervention. However, the international community has consistently rejected these actions as legitimate.[2] Humanitarian intervention aims to prevent or stop gross human rights violations in states that are either unable or unwilling to protect their citizens or are actively persecuting them. The 1990s are often referred to as the

1 United Nations, 'Russia blocks Security Council action on Ukraine' (26 February 2022) https://news.un.org/en/story/2022/02/1112802.

2 Alex de Waal and Rakiya Omaar, 'Can Military Intervention be "Humanitarian"?' (Middle East Research and Information Project, n.d.) http://www.merip.org/mer/mer187/can-military-invention-be-humanitarian.

"decade of humanitarian intervention," during which the UN authorized several interventions on humanitarian grounds.[1]

The collapse of the Soviet Union in 1991, prompted by various factors including economic difficulties stemming from communist policies, led to the emergence of 15 independent states. This period was marked by a series of conflicts in Central Asia, Eastern Europe, and particularly the Caucasus region. Following this collapse, independent countries faced not only economic challenges but also worsening conditions. Russia, the largest successor state, struggled with numerous issues until Vladimir Putin's rise to power in 2000, which marked a significant shift in governance. Putin has described the USSR's collapse as the "greatest geopolitical catastrophe of the century"[2] and has initiated policies that suggest a desire to restore a federal state akin to the former Soviet Union.

Vladimir Putin's speech on February 24 included claims that millions of people in the Ukrainian territories of Donetsk and Luhansk were suffering genocide at the hands of Ukraine, thus justifying Russia's intervention. He stated: "Meanwhile, the so-called civilized world, which our Western colleagues proclaim as the only representatives, prefers not to see this, as if this horror and genocide, faced by nearly 4 million people, do not exist. But they do exist, and only because these people did not agree with the West-supported coup in Ukraine in 2014 and opposed the aggressive nationalism and neo-Nazism that have become national policy. They are fighting for their fundamental right to live on their own land, to speak their own language, and to preserve their culture and traditions. How long can this tragedy continue? How much longer can one tolerate this?"[3]

These words can be interpreted as a form of humanitarian intervention,[4] as Putin asserts the use of force to protect non-nationals from widespread and systematic human rights violations occurring in another country. In its Application to the International Court of Justice (ICJ), Ukraine "respectfully requests the Court to: Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine."[5]

The ICJ stated, "The Court can only take a decision on the Applicant's claims if the case proceeds to the merits. At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide."[6] Here, the Court implicitly questions Russia's genocide allegations, even while refraining from directly addressing them. By highlighting the lack of evidence, the Court suggests that such evidence does not exist.

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1 Kaldor, *Human Security: Reflections on Globalization and Intervention* (2007) 16.

2 NBC News, 'Putin: Soviet collapse a "genuine tragedy"' (25 April 2005) https://www.nbcnews.com/id/wbna7632057.

3 President of the Russian Federation, 'Address by the President of the Russian Federation' (n.d.) http://en.kremlin.ru/events/president/transcripts/67828.

4 Marko Milanovic, 'What is Russia's Legal Justification for Using Force Against Ukraine?' *EJIL:Talk!* (24 February 2022) <www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/>.

5 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Order of 16 March 2022, Request for the Indication of Provisional Measures, ICJ Rep (16 March 2022) <www.icj-cij.org/public/files/case-related/182/182-20220316-ORD01-00-EN.pdf>, para 2.

6 Ibid, para 59

2. Sending Weapons to Ukraine under the Prohibition of the Use of Force

The inviolability of the territorial sovereignty of states is a fundamental principle in international law. The principle of respect for the territorial integrity of states is a cornerstone of the international system, as is the norm prohibiting interference in the internal affairs of other states. Article 2(4) of the UN Charter preserves the territorial integrity and political independence of states by forbidding any use of force or threat thereof against either. The Charter's general prohibition against resorting to force encompasses all coercive actions in international relations, including war, threats of war, armed countermeasures, and naval blockades. However, two exceptions allow for the use of force in international relations:

1. **The Right of Self-Defense:** Article 51 of the Charter states that in the event of an armed attack against a UN member, the right of self-defense remains intact until the Security Council takes necessary measures to maintain international peace and security. This right applies to individuals or groups.
2. **Actions of the UNSC:** Based on the delegated authority in Articles 24 and 25 and Chapter VII of the UN Charter, the UNSC can take measures to maintain and restore international peace and security.

The prohibition of the use of force is emphasized in a decision by the ICJ, where the Court referred to it as a "cornerstone of the UN Charter."[1] To determine whether sending weapons violates this prohibition, we can refer to the Nicaragua case, where the ICJ stated that the "arming and training" of the Contras by the United States "can certainly be said to involve the threat or use of force against Nicaragua."[2] While this case involved a non-international armed conflict, ICJ judgments serve as persuasive authority for states not party to the case (ICJ Statute, Art. 59). Thus, the Court's reasoning may apply equally to International Armed Conflicts (IAC). If arming and training a non-State group opposing a State constitutes a use of force, it stands to reason that providing arms to another State engaged in hostilities against that State would also be a use of force. The potential harm to the State could be more severe, warranting equal protection under international law.[3]

On the other hand, Ukraine has the right to self-defense against Russian aggression. Therefore, providing weapons to Ukraine cannot be considered an internationally wrongful act. Article 21 of the ARSIWA recognizes self-defense as a circumstance precluding wrongfulness. Article 21 states: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations."

3. Sending Weapons to Ukraine under the Law of Neutrality

Generally, states that are not parties to an IAC are considered neutral states. The law of neutrality is a longstanding body of international law that seeks to regulate the relationship between states engaged in international armed conflicts (belligerents) and those at peace (neutrals), with the aim

1 ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 December 2005, I.C.J. Reports 2005, para 148.

2 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v U.S.)* (Merits Judgment) [1986], para 228.

3 Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force* (2022) https://www.articlesofwar.org.

of localizing the conflict and preventing its spread. This is achieved by assigning certain rights and duties to both belligerents and neutrals, including the neutral duty to refrain from providing belligerents with "warships, ammunition, or war material of any kind whatsoever."[1]

The United States and its allies have not claimed neutrality in this context; rather, their involvement in Ukraine has exacerbated tensions. They have provided various forms of military assistance to Ukraine, including weapons, equipment, and training for the Ukrainian armed forces. The U.S. has supplied a range of defensive weapons, such as antitank missiles, armored vehicles, and small arms. Additionally, NATO countries have provided non-lethal aid, including medical supplies, communications equipment, and intelligence sharing. The U.S. and its allies have also conducted joint military exercises with Ukraine to enhance its capabilities and readiness. Furthermore, they have imposed economic sanctions on Russia, targeting key sectors of the Russian economy—energy, finance, and defense—with the goal of pressuring Russia to end its aggression and respect Ukraine's sovereignty.

However, while the U.S. and its allies have provided military assistance to Ukraine, they have not directly engaged in combat operations against Russia. This raises the question: do these actions violate the law of neutrality?

The laws of neutrality are mentioned across several domains of legal jurisprudence. The most literal interpretation is captured in the Max Planck Encyclopedias of International Law, which defines neutral "as a state not a party to an armed conflict." The law of neutrality only applies in situations of IAC.

The roots of the law of neutrality can be traced back to the practices of 17th and 18th century governments, which established a system of reciprocal rights and obligations for neutral and belligerent states. Neutral countries are obligated not to participate in hostilities and to maintain a neutral stance toward belligerents. Conversely, belligerents are required to respect the territory of neutral countries, and neutrals are permitted to trade with all parties to the conflict, provided they do so impartially. Over time, some principles of neutrality have been accepted as part of customary international law—a body of rules derived from state practice that conveys a sense of legal obligation.[2]

In essence, when an armed conflict occurs or is declared between two or more states, third countries must make a political decision to either participate in that conflict or remain neutral. If a third country chooses to participate, it is considered hostile towards one or more of the conflicting states and is subject to the rights and duties of a conflict party. In contrast, if states opt to stay out of the conflict, they enjoy neutral status. The most significant right of a neutral government is that no restrictions should be placed upon it due to the conflict, except for those restrictions that stem from prescribed rights.

The law of neutrality is regulated by two treaties adopted at the Second Hague Peace Conference on October 18, 1907, to which both Russia and Ukraine are parties. The treaties are:

- Convention (V) Respecting the Rights and Duties of Neutral Powers in Case of War on Land.

1 Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (The Hague, adopted 18 October 1907, entered into force 26 January 1910) art 6.

2 Mulligan, *International Neutrality Law and U.S. Military Assistance to Ukraine* (2022) 2.

- Convention (XIII) on the Rights and Duties of Neutral Powers in Naval War.

In addition to these legally binding instruments, the law of neutrality is addressed in Articles 39 to 48 of the 1923 Hague Rules of Air Warfare, the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, and the 2009 Manual on International Law Applicable to Air and Missile Warfare.

The law of neutrality, as established in the ICJ's 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,[1] is a key component of customary international law. This issue is significant because some countries supporting Ukraine, such as the United Kingdom, are not parties to the relevant conventions.

Article 9 of the Fifth Hague Convention of 1907 stipulates: "Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7[2] and 8[3] must be impartially applied by it to both belligerents." Additionally, the Thirteenth Hague Convention of 1907 prohibits neutral countries from providing "war material of any kind whatever" to belligerents. Humanitarian aid is exempt from this ban, and neutral governments are not required to prevent private companies from selling ammunition or war material.

Neutral countries are obligated to prevent hostile acts on their territory. Providing material aid to the Ukrainian military contravenes the duty of neutrality. Article 6 of the Thirteenth Hague Convention states: "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden."

It suffices for a government to refrain from supplying items with exclusively or primarily military purposes. This view is supported by government practices; for instance, Switzerland defines an instrument of war to include not only "weapons, weapon systems, munitions, and military explosives" but also "equipment specifically conceived or modified for use in combat."[4]

Article 6 of the Fifth Hague Convention clarifies: "The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents." Thus, the duty of neutrality does not prohibit all forms of assistance to a belligerent. States are not obligated to prevent their nationals from fighting alongside one of the belligerents, which has occurred in the Ukraine conflict.

A more complex issue arises regarding whether a government should prevent private companies from supplying weapons or military equipment to a belligerent. For example, Elon Musk's SpaceX has provided Starlink satellites to Ukrainians, enabling coordination of drone attacks on Russian positions.

Some scholars argue that, under customary international law, the distinction between states and private enterprises regarding the prohibition of arms supply does not apply.[5] If this view is

1 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [88].

2 Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (The Hague, adopted 18 October 1907, entered into force 26 January 1910) art 7.

3 *Ibid* art 8: A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.

4 Switzerland, Federal Act on War Materiel of 13 December 1996 § 5(b).

5 Bothe, *The Law of Neutrality' in Dieter Fleck (ed), The Handbook of International Humanitarian Law* (2008) 585-586.

accurate, then a government allowing the export of military items would violate its neutrality; this includes cases like Starlink.

The Fifth and Thirteenth Hague Conventions do not specify remedies for violations of neutrality, but there is consensus on certain principles. A breach of neutrality does not itself constitute an "act of war" justifying another state's use of force in response. The UN Charter permits force only in two scenarios: with Security Council approval or in self-defense under Article 51.

An action may violate the duty of impartiality and justify the use of force only if it independently satisfies an exception in the UN Charter. For example, if a state breaches neutrality by launching an armed attack during an ongoing war, Article 51 might permit the attacked state to use force in self-defense. However, less severe infractions, such as failing to seize a hostile vessel, do not authorize force in response.[1]

Therefore, if a neutral state engages in conduct breaching its neutral status, the aggrieved belligerent may (but is not required to) undertake proportionate self-help actions, including countermeasures, to ensure compliance with neutrality obligations. Consequently, Russia may take proportionate countermeasures against any government violating neutrality principles, provided that these violators cease their support. For instance, in 1973, OPEC justified an oil embargo on Western countries by arguing that their support for Israel during a conflict violated neutrality obligations.

These arms transfers and sanctions, which are clearly inconsistent with the traditional law of neutrality, have been justified by several scholars and governments under the concept of qualified neutrality. The United States has adopted the "Doctrine of Qualified Neutrality," also referred to as benevolent neutrality or non-belligerency.[2] Under this doctrine, states can engage in non-neutral acts when supporting the victim of an unlawful war of aggression. Qualified neutrality clearly applies when the UNSC, under its Chapter VII authority, has expressly deemed one party to the conflict an aggressor.

For example, in June 1950, the Security Council determined that North Korea's armed attack on the Republic of Korea constituted a breach of the peace[3] and recommended that UN member states furnish necessary assistance to repel the attack and restore international peace and security.[4] Similarly, when Iraq invaded Kuwait in August 1990, the Security Council condemned the invasion and imposed sanctions on Iraq to induce its withdrawal.[5] Importantly, the Council clarified that its decisions did not prohibit assistance to the legitimate government of Kuwait. In these instances, there was no room for impartiality toward the conflicting parties, and thus the law of neutrality was not applicable.

1 Mulligan, *International Neutrality Law and U.S. Military Assistance to Ukraine* (2022) 3.

2 United States Department of Defense, US Law of War Manual (2016) § 15.2.2: Qualified Neutrality. The United States has taken the position that certain duties of neutral States may be inapplicable under the doctrine of qualified neutrality. The law of neutrality has traditionally required neutral States to observe a strict impartiality between parties to a conflict, regardless of which State was viewed as the aggressor in the armed conflict. However, after treaties outlawed war as a matter of national policy, it was argued that neutral States could discriminate in favor of States that were victims of wars of aggression. Thus, before its entry into World War II, the United States adopted a position of "qualified neutrality" in which neutral States had the right to support belligerent States that had been the victim of flagrant and illegal wars of aggression. This position was controversial.

3 UN Security Council, *Resolution 82* (25 June 1950) UN Doc S/1501.

4 UN Security Council, *Resolution 83* (27 June 1950) UN Doc S/1511.

5 UN Security Council, *Resolution 661* (6 August 1990) UN Doc S/RES/661 (1990), paras 2-4.

In fact, Article 2(5) of the United Nations Charter abrogates neutrality rules in such circumstances, stipulating: "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." However, in the case of Ukraine, the Security Council did not designate Russia as the aggressor, effectively precluding any action against it. As a permanent member of the Council, Russia can and will veto any resolution that seeks to impose preventive or enforcement actions regarding its unlawful invasion of Ukraine.

If one of the five permanent members of the Security Council commits an act of aggression or wishes to block action, perhaps due to sympathy with the aggressor, it can use its veto power to prevent the Council from designating the aggressor or taking measures to restore international peace and security. As early as 1948, Philip C. Jessup identified a "gap" in the United Nations' collective security system, noting that if the veto is exercised and UN action is blocked, fighting may continue indefinitely. This raises the question of what the legal position of third states and their nationals should be in such scenarios.[1]

The permissibility of Western governments providing arms to Ukraine under neutrality law hinges on whether the concept of qualified neutrality can be extended to situations like Ukraine's, where it may be viewed as an overt aggressor. Many scholars reject the expansion of qualified neutrality. Von Heing argues that allowing neutral states to determine the aggressor unilaterally would undermine the law of neutrality's ability to prevent escalation of an IAC.[2]

Nonetheless, the law on qualified neutrality may evolve due to the situation in Ukraine. Von Heing himself contends that qualified neutrality should apply to arms supplies to Ukraine because "the aggressor state itself prevented the enforcement mechanism under Chapter VII of the UN Charter from functioning," despite a potential majority in the Security Council. With or without an authoritative classification by the UN, Russia's military operations against Ukraine are evident acts of aggression, lacking any legitimate justification under international law. The overwhelming number of states condemning these actions as violations of international law cannot be ignored. Therefore, the many states supplying military equipment to Ukraine—whether defensive or offensive—are not acting contrary to the law of neutrality, nor are they committing internationally wrongful acts or aiding and assisting such acts.[3]

The United States Congressional Research Service has justified U.S. intervention in Ukraine using the concept of Qualified Neutrality. Specifically, in the report titled "International Neutrality Law and U.S. Military Assistance to Ukraine,"[4] published in April 2022, it states that "binary systems of neutrals and belligerents are no longer available as modern international law allows for countries to take an active role in assisting the victims of unlawful wars." It further posits that "states can take non-neutral acts when supporting the victim of an unlawful war of aggression."[5] Therefore, military aid to Ukraine is considered lawful as long as Ukraine adheres

1 Jessup, *A Modern Law of Nations* (1948) 203.
2 Heinegg, op.cit, (2022).
3 Ibid.
4 *International Neutrality Law and U.S. Military Assistance to Ukraine* (2022) https://crsreports.congress.gov/product/pdf/LSB/LSB10735/3 accessed 8 January 2024.
5 Ibid, 1.

to the legal framework governing the conduct of hostilities under the Geneva Convention. However, it is important to note that the Congressional Research Service has not explicitly defined the meaning of Qualified Neutrality.

The validity of Qualified Neutrality is questionable for several reasons:

- Although General Assembly resolutions can influence customary international law, the "Union for Peace" resolution is silent on both neutrality law and arms supply to Ukraine.
- The application of Qualified Neutrality may be seen as political expediency, allowing states to justify violations of neutrality on moral grounds to contain Russian expansionism.
- To date, no government has explicitly argued that Qualified Neutrality applies to Ukraine or a similar situation.

4. Sending Weapons to Ukraine and Co-belligerency

According to the Max Planck Encyclopedias of International Law, belligerency is the condition of being engaged in war, applicable to both international and non-international armed conflicts. The Geneva Conventions outline specific obligations for each belligerent but do not detail how a state or group becomes a belligerent.[1] Certain actions can clearly qualify a state as a co-belligerent, particularly direct participation in hostilities on the side of another state, defined as engaging in actions that directly harm the adversary.[2] This direct-participation standard influenced the U.S. designation of some states as co-belligerents during the Iraq conflict in 2003.[3]

To date, no Western country has directly participated in the war against Russia. While it is possible for a country to be considered hostile by providing information that aids Ukraine in targeting Russian assets, this has not occurred. Providing weapons and war-related materials to Ukraine does not automatically classify these states as parties to the armed conflict with Russia. In short, simply transferring weapons does not make these countries co-belligerents; more active involvement, such as direct participation in hostilities or providing critical targeting information, is required.

5. Military Targets of Weapons in Ukraine's Possession

Article 52, Paragraph 2 of the First Protocol of the Geneva Convention of 1949 states: "Attacks shall be limited strictly to military objectives." Military objectives are defined as objects that make an effective contribution to military action, and whose destruction offers a definite military advantage. While the First Protocol acknowledges that civilian casualties may be inevitable during armed conflict, it imposes a duty on parties to distinguish between combatants and civilians, targeting only military objectives.

1 Mulligan, Op. Cit. (2022) 4.

2 Alexander Wentker, 'At War: When Do States Supporting Ukraine or Russia Become Parties to the Conflict and What Would That Mean?' *EJIL:Talk!* (14 March 2022) <www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/>.

3 'Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention'

Once weapons enter Ukrainian territory, they may be considered military targets by Russia, as per Article 52. However, the question arises: are these weapons considered military targets before entering Ukraine? If the country sending weapons is a co-belligerent, then yes, they could be considered military targets. If the country is not a co-belligerent, the situation is less clear. The term "purpose" in Article 52 suggests that if the Russian government has reasonable grounds to believe that these weapons are destined for Ukraine, it may treat them as military targets.

In this scenario, if Russia attacks the weapons being sent to Ukraine, it might be lawful under international humanitarian law. However, such an attack would violate *jus ad bellum*, as the transfer of weapons cannot be classified as an armed attack against Russia.

Conclusion

From the perspective of international law, Russia's aggression against Ukraine constitutes a clear violation of the prohibition on the use of force and is regarded as an international crime. The ongoing war in Ukraine, occurring 77 years after World War II, underscores the potential for another extensive conflict in Europe. In the case of *Ukraine v. Russian Federation* (2022), the International Court of Justice noted that there is insufficient evidence to substantiate Russia's claim of genocide occurring in Ukraine.

Under contemporary international law, the use of force to fulfill the obligation to prevent and punish genocide is impermissible. Therefore, while Russia's assertion of humanitarian intervention is questionable, it is evident that most states oppose the Russian invasion of Ukraine. However, this opposition does not justify overlooking the rule of law, particularly the law of neutrality.

The provision of military aid to Ukraine by Western states raises serious concerns regarding compliance with the prohibition of the use of force and the principles of neutrality. The law of neutrality, as established in the ICJ's 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, is also a part of customary international law. This is significant because some countries supporting Ukraine, such as the United Kingdom, are not parties to the relevant conventions. A failure to adhere to the principle of neutrality may prolong the conflict.

Russia retains the right to undertake proportionate countermeasures against states that violate neutrality principles until these states cease their support for Ukraine. Historical precedents, such as OPEC's oil embargo on Western nations in 1973, illustrate how violations of neutrality can lead to retaliatory actions.

While UN General Assembly resolutions can influence customary international law, the "Union for Peace" resolution remains silent on both the law of neutrality and arms supplies to Ukraine. After World War II, the international community sought to redefine neutrality to avert a third world war, delegating intervention authority to the UN Security Council in situations threatening international peace and security. However, the evolving global order has rendered the structure of the UNSC somewhat outdated, particularly in light of the U.S. intervention in the Russia-Ukraine conflict without the Council's approval.

These developments highlight the urgent need to redefine neutrality in a modern context

and update norms regarding co-belligerency. Despite extensive support for Ukraine, NATO allies remain cautious about being drawn into the conflict as co-belligerents. No Western nation has yet directly engaged in hostilities against Russia. However, providing intelligence to assist Ukraine in targeting Russian forces could lead to a state being perceived as hostile.

Historically, the U.S. was not recognized as a party to World War II until its direct involvement against Germany and Japan. The countries supplying arms to Ukraine clearly intend for these weapons to be used against Russian forces, thus providing a military advantage to Ukraine. Consequently, according to Article 52 of the First Protocol of the Geneva Convention (1949), Russia may view these weapons as military targets. If Russia targets these weapons before they enter Ukraine's possession, such an attack may violate *jus ad bellum*, as the transfer of weapons does not constitute an armed attack on Russia.

References

A) Books

Mary Kaldor, *Human Security: Reflections on Globalization and Intervention* (Polity Press 2007).

Michael Barnett, *The International Humanitarian Order* (Routledge 2008).

Dieter Fleck (ed), *The Law of Neutrality* in *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008).

Philip C. Jessup, *A Modern Law of Nations* (Macmillan 1948).

B) Articles

Stephen P. Mulligan, 'International Neutrality Law and U.S. Military Assistance to Ukraine' (2022) 10735LSB VERSION 3.

Dino Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention' (1998) 19 *Michigan Journal of International Law*.

Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (2016) Chatham House Research Paper 27.

Tess Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda' (2010) 85 *NYU Law Review* 1186, 1208.

James Farrant, 'Modern Maritime Neutrality Law' (2014) 90 *International Law Studies* 198, 222.

James A Green et al, 'Russia's attack on Ukraine and the jus ad bellum' (2022) 9 *Journal on the Use of Force and International Law* 1–28.

Adil Ahmad Haque, 'An Unlawful War' (2022) 116 *American Journal of International Law Unbound*.

Stefan A. G. Talmon, 'The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine' (2022) Bonn Research Papers on Public International Law, Paper No 20/2022.

Michael N Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the Use of Force' (Articles of War, 7 March 2022).

Michel N Schmitt, 'A No-Fly Zone over Ukraine and International Law' (Articles of War, 18 March 2022) https://lieber.westpoint.edu/no-fly-zone-ukraine-international-law accessed 19 March 2023.

Michel N. Schmitt, 'Are We at War?' (Articles of War, 9 May 2022) <www.lieber.westpoint.edu/are-we-at-war/> accessed 19 March 2023.

Alexander Wentker, 'At war? Party status and the war in Ukraine' (2023) *Leiden Journal of International Law*.

Paul McLeary and Lara Seligman, 'Russia targeting Western weapons shipments in Ukraine as Donbas assault begins' (Politico, 25 April 2022) https://www.politico.com/news/2022/04/25/russia-western-weapons-shipments-ukraine-donbas-00027663/ accessed 19 March 2023.

'Which countries are sending military aid to Ukraine?' https://www.aljazeera.com/news/2022/2/28/which-countries-are-sending-military-aid-to-ukraine/ accessed 19 March 2023.

Kai Ambos, 'Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and thus be Exposed to Countermeasures?' (EJIL:Talk!, 2 March 2022) https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures/ accessed 19 March 2023.

Markus Krajewski, 'Neither Neutral nor Party to the Conflict?: On the Legal Assessment of Arms Supplies to Ukraine' (Völkerrechtsblog, 9 March 2022) https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/ accessed 19 March 2023.

Oona A. Hathaway and Scott Shapiro, 'Supplying Arms to Ukraine is Not an Act of War' (Just Security, 12 March 2022) https://www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war/ accessed 19 March 2023.

Raul (Pete) Pedrozo, 'Ukraine Symposium – Is the Law of Neutrality Dead?' (Articles of War, 31 May 2022) https://lieber.westpoint.edu/is-law-of-neutrality-dead/ accessed 19 March 2023.

Brian Finucane, 'Ukraine and War Powers: A Legal Explainer' (Just Security, 3 March 2022) https://www.justsecurity.org/80438/ukraine-and-war-powers-a-legal-explainer/ accessed 19 March 2023.

Terry D. Gill, 'A Ukraine No-Fly Zone: Further Thoughts on Law and Policy' (Articles of War, 23 March 2022) https://lieber.westpoint.edu/a-ukraine-no-fly-zone-further-thoughts-on-law-and-policy/ accessed 19 March 2023.

Eyal Benvenisti and Amichai Cohen, 'Bargaining About War in the Shadow of International Law' (Just Security, 28 March 2022) https://www.justsecurity.org/80853/bargaining-about-war-in-the-shadow-of-international-law/ accessed 19 March 2023.

Marko Milanovic, 'What is Russia's legal justification for using force against Ukraine?' (EJIL:Talk!, 24 February 2022) <www.

ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/>accessed 19 March 2023.

Wolff Heintschel Von Heinegg, 'Neutrality in the War Against Ukraine' (Articles of War, 1 March 2022) https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/ accessed 19 March 2023.

Alexander Wentker, 'At War: When Do States Supporting Ukraine or Russia Become Parties to the Conflict and What Would that Mean?' (EJIL:Talk!, 14 March 2022) <www.ejiltalk.org/at-war-when-do-states-supporting-ukraine-or-russia-become-parties-to-the-conflict-and-what-would-that-mean/> accessed 19 March 2023.

Paul McLeary and Lara Seligman, 'Russia targeting Western weapons shipments in Ukraine as Donbas assault begins' https://www.politico.com/news/2022/04/25/russia-western-weapons-shipments-ukraine-donbas-00027663/ accessed 19 March 2023.

Clara Portela, 'Humanitarian Intervention, NATO and International Law: Can the Institution of Humanitarian Intervention Justify Unauthorized Action?' http://www.bits.de/public/researchreport/rr00-4-1.htm/ accessed 19 March 2023.

David de Groot & Micaela Del Monte, *Russia's War on Ukraine: The Situation of LGBTI People*, European Parliamentary Research Service (2 May 2022) https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729412/EPRS_ATA(2022)729412_EN.pdf/ accessed 19 March 2023.

M. Halpert, 'Russia Committed 'Clear' Violations Of Humanitarian Law And War Crimes, OSCE Says' https://www.forbes.com/sites/madelinehalpert/2022/04/13/russia-committed-clear-violations-of-humanitarian-law-and-war-crimes-osce-says/?sh=67aa9d39686a accessed 22 May 2022.

Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have been closely following recent developments in and around Ukraine with increasing concern" https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following/ accessed 9 March 2023.

'More Than Rhetoric? International Criminal Justice, Crime Semantics and the Role of the ICC in the Ukraine Conflict' http://opiniojuris.org/2022/02/25/more-than-rhetoric-international-criminal-justice-crime-semantics-and-the-role-of-the-icc-in-the-ukraine-conflict/ accessed 19 March 2023.

'Ukraine: UN Secretary-General condemns Russia annexation plan' https://news.un.org/en/story/2022/09/1129047/ accessed 9 March 2023.

'Russia vetoes Security Council resolution condemning attempted annexation of Ukraine regions' https://news.un.org/en/story/2022/09/1129102/ accessed 9 March 2023.

'In Hindsight: The Security Council, One Year after Russia's Invasion of Ukraine' https://www.securitycouncilreport.org/monthly-forecast/2023-02/in-hindsight-the-security-council-one-year-after-russias-invasion-of-ukraine.php posted 31 January 2023, accessed 9 March 2023.

Human Rights Watch, 'Ukraine: Executions, Torture During Russian Occupation' https://www.hrw.org/news/2022/05/18/ukraine-executions-torture-during-russian-occupation accessed 9 March 2023.

'Address by the President of the Russian Federation' http://en.kremlin.ru/events/president/transcripts/67828/ accessed 9 March 2023.

'Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto' https://press.un.org/en/2022/sc14808.doc.htm/ accessed 9 March 2023.

'Full text: Putin's declaration of war on Ukraine' https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine/ accessed 9 March 2023.

'Ukraine: civilian casualty update 19 May 2022' https://www.ohchr.org/en/news/2022/05/ukraine-civilian-casualty-update-19-may-2022 accessed 9 March 2023.

C) International Law Documents

Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Order of 16 March 2022, Request for the indication of provisional measures, ICJ Rep (16 March 2022).

International Court of Justice, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), 19 December 2005, I.C.J. Reports 2005.

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.

United Nations Security Council Resolution 82 (25 June 1950), UN Doc S/RES/82.

United Nations Security Council Resolution 660 (2 August 1990), UN Doc S/RES/660.

International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Judgment, ICJ Reports 1986.

Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, opened for signature 12 August 1949, 75

UNTS 135 (entered into force 21 October 1950).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001).

Switzerland, Federal Act on War Materiel of 13 December 1996.

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

The Legality and Effect of Western Sanctions on Russia Under International Law

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Article Info

Article type:
Research Article

Article history:
Received
24 December 2025

Received in revised form
8 April 2025

Accepted
9 June 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3784.html

Keywords:
Sanctions, Legality, Sovereignty, Russia-Ukraine Conflict, International Law.

ABSTRACT

This study examines the legal foundations, legitimacy, and effectiveness of Western sanctions imposed on Russia in response to its actions in Ukraine. It assesses these measures under international law, evaluating their compliance with principles governing economic coercion, state sovereignty, and lawful enforcement. Through doctrinal analysis, the study explores the sanctions' influence on Russia's foreign policy and military strategy. Findings suggest that while early sanctions induced considerable economic strain, Russia has adapted by diversifying its economy and deepening trade relations with non-sanctioning states. Though often framed as lawful countermeasures under international law, the actual effectiveness of these sanctions in constraining Russia's military ambitions remains contested. The study identifies key legal and policy considerations affecting the impact of sanctions, including proportionality, global economic interdependence, and the mitigating role of major powers such as China. Ultimately, this inquiry calls into question the long-term viability of both unilateral and multilateral sanctions as reliable instruments of coercive diplomacy within the framework of international law.

Cite this article: Chegwe, E.N., & Edewor, O.T., (2025). The Legality and Effect of Western Sanctions on Russia Under International Law, *Iranian Journal of International and Comparative Law*, 3(1), pp: 99-116.

Publisher: University of Qom

Table of Contents

Introduction

A sanction may be defined as a measure imposed to enforce compliance with laws or rules, which may be punitive (penalizing non-compliance) or incentivizing (rewarding compliance). One authoritative definition is provided by H.L.A. Hart, who describes sanctions as "the coercive measures that back up the rules of a legal system, typically in the form of punishments or penalties for violations."[1] From an international law perspective, **sanctions** are measures imposed by states or international organizations to enforce compliance with legal norms, deter wrongful conduct, or influence the behavior of a target state without resorting to armed force. In this vein, Malcolm N. Shaw defines sanctions as "coercive measures, short of military force, imposed by states or international bodies, such as the United Nations, to ensure compliance with international law and maintain or restore international peace and security."[2]

Sanctions manifest in various forms, including economic, diplomatic, military, and financial measures.[3] Economic sanctions, such as trade restrictions and asset freezes, are the most commonly employed.[4] Diplomatic sanctions, including the expulsion of diplomats and severance of diplomatic ties, are also frequently used.[5] Military sanctions, such as arms embargoes, are less common due to their potential to escalate conflict.[6] Economic sanctions, specifically, may be defined as deliberate restrictions on economic activity imposed by one international actor on another with a specified objective. Sanctions may be deployed to accomplish a variety of objectives, such as signalling disapproval to a target or third states, limiting specific conduct, coercing behavioral change,[7] or pursuing a combination of these

1 H L A Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994).

2 Malcolm N Shaw, *International Law* (9th edn, Cambridge University Press 2021).

3 Thomas J Biersteker, 'Targeted Sanctions and Individual Human Rights' (2010) 65 International Journal 99 https://doi.org/10.1177/002070201006500107 accessed 21 February 2025.

4 Gary Hufbauer and others, *Economic Sanctions Reconsidered* (3rd edn, Columbia University Press 2009) 248.

5 Elena K Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2011) 360.

6 Clifton T Morgan and others, 'Economic Sanctions: Evolution, Consequences, and Challenges' (2023) 37 Journal of Economic Perspectives 1, 30.

7 Francesco Giumelli, *Coercing, Constraining and Signalling: Explaining United Nations and European Union Sanctions after the Cold War* (ECPR Press 2011).

goals simultaneously.[1] Studies have shown that the negative economic effects of sanctions are not uniformly distributed; certain actors are more or less susceptible to their impact. While some sanctions may inadvertently strengthen target regimes (e.g., through a 'rally-around-the-flag' effect), others may inflict consequences ranging from minimal economic cost to severe economic collapse.[2] On the other hand, relatively modest effects are often observed at the systemic level, and sender states alongside third-party nations typically incur economic repercussions that range from low to medium severity.[3]

The imposition of economic sanctions by Western states against Russia in response to its actions in Ukraine has sparked a complex legal and geopolitical debate. Sanctions are widely regarded as instruments of coercive diplomacy, intended to deter aggressive behavior and compel compliance with international legal norms. However, their effectiveness in influencing state conduct remains contested. Russia's annexation of Crimea in 2014 and its continued involvement in eastern Ukraine have severely strained relations with Western states, leading to a coordinated sanctions regime from the United States, the European Union, and their allies. These measures targeted key sectors of the Russian economy, including finance, energy, and defense, in an effort to curb Moscow's capacity to sustain its military operations and assert regional dominance.[4] Subsequently, Russia's military intervention in Syria since 2015 further escalated tensions, resulting in additional economic restrictions.[5]

From an international legal perspective, sanctions exist within a complex framework governed by customary international law, treaty obligations, and the principle of state sovereignty. While proponents argue that unilateral sanctions may serve as legitimate countermeasures in response to states' internationally wrongful acts,[6] critics question their legality, particularly in light of principles enshrined in the United Nations Charter, including the prohibition on the threat or use of force (Article 2(4)) and respect for state sovereignty (Article 2(1).[7] The imposition of unilateral sanctions, particularly outside the scope of a UN Security Council resolution, raises concerns about their legal justification and their potential conflict with economic rights under international law.[8]

Furthermore, historical precedent suggests that sanctions regimes often fail to achieve their primary objectives and can generate unintended consequences, such as worsening humanitarian crises and escalating conflicts. The case of the Islamic Republic of Iran serves as a key example. The Trump administration's decision to unilaterally withdraw from the Joint Comprehensive Plan of Action (JCPOA) in 2018 and re-impose strict sanctions on Iran's financial and energy sectors was intended to curtail its nuclear program and force political concessions.[9] However,

1 Omer Özgür and S Evgeniia, 'Consequences of Economic Sanctions: The State of the Art and Paths Forward' (2021) 23 International Studies Review 1646, 1649.

2 John S Park, 'The Key to the North Korean Targeted Sanctions Puzzle' (2014) 37 Washington Quarterly 199, 206.

3 Peter Egger and others, 'Analysing the Effects of Economic Sanctions: Recent Theory, Data, and Quantification' (2024) 32 Review of International Economics 1, 11.

4 Richard Nephew, *The Art of Sanctions: A View from the Field* (Columbia University Press 2018) 45.

5 Daniel Drezner, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (Princeton University Press 2023) 120.

6 Nigel D White, 'The Legality of Economic Sanctions Under International Law' (2020) 24 Journal of Conflict & Security Law 15.

7 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI arts 2(1), 2(4).

8 Thomas Biersteker and others, *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press 2016) 79.

9 Suzanne Maloney, 'Trump's Iran Sanctions Are Failing' (Brookings Institution, 15 July 2019) https://www.brookings.edu/articles/trumps-

instead of deterrence, these measures prompted Tehran to increase its uranium enrichment activities, heighten regional tensions, and inflict further economic hardship on ordinary Iranian citizens.[1] Similarly, the case of North Korea demonstrates how prolonged sanctions have failed to dismantle its nuclear weapons program, while concurrently exacerbating severe poverty and food insecurity within the country.[2]

The economic sanctions imposed against Iraq throughout the 1990s, following its invasion of Kuwait, resulted in devastating humanitarian consequences, particularly widespread malnutrition and a public health crisis.[3] In Venezuela, U.S. sanctions targeting the state-owned oil industry have contributed to economic collapse, hyperinflation, and worsening living conditions, disproportionately affecting civilians while failing to achieve the stated objective of removing the Maduro regime.[4] This study critically examines the impact of Western sanctions on Russia's foreign policy, assessing whether these measures have successfully influenced Moscow's strategic decisions and whether they conform to international legal standards. Central to this analysis is the question of intent versus outcome: Are these sanctions designed merely to constrain Russia's military and economic capacity, or are they meant to force substantive policy reversals? To what extent have they influenced Russia's engagements in Ukraine and Syria, and how has Moscow adapted its economic and diplomatic strategies to mitigate their effects? Furthermore, do these sanctions adhere to international legal norms, particularly the principles of necessity and proportionality, or do they raise broader legal and ethical concerns?

This research provides valuable perspectives on the wider discussion around the efficacy and legality of sanctions within international law and foreign policy. It questions the efficiency of both unilateral and multilateral sanctions as primary instruments of global governance as it examines the long-term effects of economic coercion. In order to shape future international legal frameworks and diplomatic tactics, it is imperative to comprehend the legal aspects and practical realities of sanctions, particularly as governments increasingly resort to economic measures in reaction to geopolitical crises.

1. Legal Framework for Sanction

The legality of sanctions under international law remains a highly contentious issue.[5] This study investigates the legal framework governing sanctions, delving into their foundations in international law, various types of sanctions, and the procedural prerequisites for their lawful implementation. The UN Charter[6] provides the primary legal basis for the imposition of sanctions.

Pursuant to Article 39, the Security Council is empowered to determine whether a threat to peace, a breach of peace, or an act of aggression exist; and recommend or decide what measures shall be taken in line with Articles 41 and 42 to preserve or restore international peace

iran-sanctions-are-failing accessed 31 March 2025.

1 Dina Esfandiary, 'The Failure of US Sanctions on Iran' (2021) 97 International Affairs 77.

2 Stephan Haggard and Marcus Noland, *Hard Target: Sanctions, Inducements, and the Case of North Korea* (Stanford University Press 2017) 133.

3 Joy Gordon, 'The UN Sanctions Regime and Its Impact on Iraq' (2004) 56 Middle East Journal 611.

4 Francisco Rodríguez, 'The Humanitarian Consequences of Economic Sanctions on Venezuela' (2020) 98 Foreign Affairs 32.

5 Julia Schmidt, 'The Legality of Unilateral Extra-territorial Sanctions under International Law' (2022) 27 Journal of Conflict and Security Law 53, 81.

6 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI http://www.unwebsite.com/charter accessed 20 September 2024.

and security. The authority for implementing collective sanctions by the UN Member States is thus established through these provisions of the UN Charter. Article 103 of the UN Charter, in particular, stipulates that in the event of a conflict between the obligations of Members under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. Reflecting this hierarchy of norms, several international trade agreements explicitly provide that nothing in the agreement shall be hindering any Member from fulfilling its obligations under the United Nations Charter in preserving international peace and security.[1]

The legal basis for enforcing UN-mandated economic sanctions is generally uncontroversial in international law, even where these sanctions seem to conflict with a state's pre-existing international obligations. The primary international body vested with the competence to impose such sanctions is the Security Council;[2] however, other international organizations, such as the International Monetary Fund[3] and the World Trade Organisation,[4] also possess the authority to impose certain sanctions or authorize suspensions of obligations under specific circumstances. For sanctions to be considered lawful, certain procedural requirements must be met. The affected state must be notified and provided with a public justification for their imposition.[5] The sanctions must also be periodically reviewed and renewed to ensure their continued necessity and proportionality in light of evolving circumstances.[6]

Despite potential compliance with these procedural obligations, substantive disputes regarding sanctions persist. The issues of unilateralism versus multilateralism, effectiveness, humanitarian impact, sovereignty, and jurisdictional disputes continue to be persistent sources of concern and friction.[7] The International Court of Justice's (ICJ) decision in *Military and Paramilitary Activities in and against Nicaragua* illustrates the contentious nature of unilateral measures, [8] while the application of provisional measures in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* exemplifies the specific legal difficulties associated with implementing sanctions. In conclusion, the international sanctions regime is governed by a complicated and diverse set of legal rules. While the UN Charter and international human rights instruments offer a framework, the specifics of the types of sanctions and the procedural steps that must be taken are crucial in determining their legitimacy.[9]

1.1. Sanctions and the Principle of Non-Intervention

The principle of non-intervention is a fundamental tenet of international law, firmly enshrined in customary international law and Article 2(7) of the 1945 UN Charter, which explicitly prohibits

1 General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187 art 21.
2 Ibid, art 39.
3 Articles of Agreement of the International Monetary Fund (adopted 22 July 1944, entered into force 27 December 1945) 2 UNTS 39 art I.
4 Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 art 12.
5 Elena Katselli, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2011) 360.
6 *Nada v Switzerland* App no 1059308/ (ECtHR, 12 September 2012) para 117.
7 Larissa van den Herik, *International Sanctions: Between Law and Politics* (Oxford University Press 2017) 304.
8 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*(Merits) [1986] ICJ Rep 14.
9 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Judgment) [2019] ICJ Rep 1.

any form of direct or indirect interference by one state or a coalition of states in the internal or external affairs of another sovereign state. Closely linked to the principles of state sovereignty and the prohibition on the use of force, this principle has been a focal point of extensive legal scholarship and diplomatic discourse. However, the application of economic sanctions within this framework has sparked considerable debate, particularly regarding their legality and effectiveness as instruments of coercive diplomacy.

Jamnejad and Wood argue that unilateral intervention, including the imposition of economic sanctions, contravenes the *jus cogens* status of non-interference, highlighting that state sovereignty and the prohibition of force are peremptory norms in customary international law.[1] Their position finds considerable support in the jurisprudence of the ICJ, particularly in the *Nicaragua v. United States of America* case, where the Court ruled that U.S. economic and military interventions violated the principle of non-intervention.[2] The judgment emphasized that economic pressure, when applied to coerce a state's political choices, may constitute an unlawful form of intervention.

The debate extends to the legitimacy of unilateral sanctions within the broader framework of international law. While economic sanctions are often justified as countermeasures under the law of state responsibility, their unilateral imposition raises concerns regarding their compatibility with international legal norms. This position is reaffirmed in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, in which the ICJ confirmed that economic coercion, like military force, could violate a state's sovereignty.[3]

Despite its general prohibition, international law does recognize exceptions to the principle of non-intervention. As alluded to in article 2(7), collective intervention in permitted under Chapter VII of the UN Charter when the Security Council determines that a situation threatens international peace and security.[4] In such cases, the Council may impose sanctions, authorize military action, or mandate diplomatic measures. Historical precedents for this include the imposition of sanctions on Iraq after its invasion of Kuwait in 1990 and the ongoing sanctions on North Korea due to its nuclear weapons program.[5] Additionally, the Security Council has authorized military interventions by regional organizations, such as NATO's 2011 intervention in Libya under Resolution 1973 (2011). The Council also frequently mandates UN Peacekeeping Operations and Special Political Missions as non-coercive means of conflict resolution.[6]

The evolving interpretation of sovereignty further complicates the legal debate surrounding sanctions. Traditionally defined as the absolute authority a state exercises within its territory, sovereignty has been increasingly viewed through the lens of global interdependence and a state's international obligations. This view aligns with the *Responsibility to Protect* (R2P) doctrine, which posits that sovereignty entails a responsibility to protect citizens from mass atrocities and that, in cases of manifest failure, this responsibility may shift to the international community, justifying international intervention. However, the selective and politicized application of R2P

1 Maziar Jamnejad and Michael Wood, 'The Principle of Non Intervention' (2009) 22 Leiden Journal of International Law 345, 248.
2 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*[1986] ICJ Rep 14.
3 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168.
4 UN Charter, 1 UNTS XVI art 2(7).
5 UNSC Res 661 (6 August 1990) UN Doc S/RES/661.
6 UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

has fuelled widespread scepticism, with critics arguing that it is often invoked as a pretext for politically motivated interventions.[1]Economic sanctions, in particular, exist in a legal gray area. Proponents argue that they serve as lawful countermeasures designed to uphold international legal order, while critics contend that they amount to economic coercion, disproportionately affecting civilian populations.[2] The unilateral sanctions imposed by the Trump administration on Iran following its withdrawal from the JCPOA in 2018 illustrate this dilemma.[3] These sanctions devastated Iran's economy but failed to achieve their stated objective of halting Iran's nuclear program. Instead, Iran escalated its nuclear activities, underscoring the limitations of economic sanctions as a foreign policy tool. Similarly, Western sanctions on Venezuela have contributed to severe economic hardships and a humanitarian crisis without effecting a political transition.[4] These cases raise pressing questions about the ethical and legal ramifications of sanctions, particularly their adverse impact on human rights and global economic stability.

In conclusion, while the principle of non-intervention remains a foundational element of the international law, the legal status of unilateral economic sanctions remains contested. As the international system evolves, so too must the legal frameworks governing sanctions. A more coherent and legally consistent approach is necessary- one that balances state sovereignty with accountability, ensures that any sanctions imposed comply with the principles of international law, and mitigates unintended humanitarian consequences. Addressing these challenges will require greater reliance on multilateral mechanisms and adherence to established legal norms to prevent sanctions from devolving into instruments of economic warfare rather than tools of lawful enforcement.

1.2. Sovereignty and the Principle of Non-Intervention

The principles of sovereignty and non-intervention are fundamental tenets of international law, enshrined in the UN Charter and customary international law. However, the increasing recourse to unilateral economic sanctions, particularly outside the framework of the UNSC, has provoked intense legal debates regarding their compatibility with these core principles. This analysis critically examines these tensions, exploring the legal basis for sovereignty, the principle of non-intervention, and the legitimacy of unilateral sanctions through authoritative academic discourse and relevant international jurisprudence.

1.2.1. The Legal Foundations of Sovereignty and Non-Intervention

The modern concept of state sovereignty is rooted in classical international law, first formally articulated in the Peace of Westphalia (1648). Sovereignty is conventionally divided into internal sovereignty, which pertains to a state's supreme authority within its borders, and external sovereignty, which safeguards a state's independence from foreign interference. The Permanent Court of International Justice (PCIJ) in the *S.S. Lotus Case* reaffirmed that "restrictions upon the

1 Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011).

2 Georges Abi-Saab, 'Economic Sanctions in International Law' (2001) 20 Leiden Journal of International Law 111.

3 Jahangir Amuzegar, 'Iran's Economy and the US Sanctions' (1997) 51 Middle East Journal 185 http://www.jstor.org/stable/4329052 accessed 31 March 2025.

4 On humanitarian consequences of sanctions, see generally: V Yazdi-Feyzabadi and others, 'Direct and Indirect Effects of Economic Sanctions on Health: a Systematic Narrative Literature Review' (2024) 24 BMC Public Health 2242; F Rodríguez, 'The human consequences of economic sanctions' (2024) 51 Journal of Economic Studies 942.

independence of states cannot be presumed".[1] This principle was later codified in Article 2(1) and implied in Article 2(7) of the UN Charter, affirming both the sovereign equality and the prohibition of interference in matters within a state's domestic jurisdiction.[2] The ICJ has consistently upheld the principle of non-intervention. In the *Nicaragua v United States* case, the ICJ ruled that economic coercion, like military intervention, can violate state sovereignty when aimed at determining a state's political choices.[3] Similarly, in the *Democratic Republic of the Congo v. Uganda* case, the ICJ found Uganda's involvement in Congolese affairs, including economic interference, to constitute a breach of the principles of sovereignty and non-intervention.[4]

1.2.2. Unilateral Sanctions and the Erosion of Sovereignty

The imposition of economic sanctions outside the UNSC framework presents a critical challenge to the principle of non-intervention. Unilateral sanctions- such as those imposed by the US or the EU without multilateral authorization- are often justified as lawful countermeasures under the Articles on State Responsibility.[5]However, several legal scholars argue that such measures violate international law unless they conform to strict customary law requirements of proportionality and necessity.[6] The effectiveness of such sanctions is also questioned, as empirical studies suggest that they often fail to achieve their intended political objectives while disproportionately harming civilian populations.[7]

1.2.3. The Responsibility to Protect (R2P) and the Sovereignty Debate

The evolution of sovereignty in modern international law has helped the emergence of the R2P doctrine, which asserts that state sovereignty entails concomitant obligations towards a state's own population. According to this framework, when a state fails to prevent mass atrocities, the international community may assume a responsibility to intervene, including through the imposition of economic measures.[8] However, scholars such as Anne Orford critique R2P as a doctrine that is often selectively applied to justify intervention in weaker states while simultaneously preserving the sovereignty of more powerful states.[9] One of the major criticisms of R2P is its inconsistent and selective application. The interplay between sanctions regimes and the selective application of the R2P doctrine highlights significant challenges in international efforts to prevent mass atrocities. While R2P aims to ensure timely and decisive responses to humanitarian crises, its inconsistent application, which is often influenced by geopolitical interests, frequently undermines its legitimacy and effectiveness. Recent cases concerning *Sudan* and *Niger* exemplify these complexities.

1.3. When and How Sanctions can be used as an Exception in International Law

The principle of non-intervention, a fundamental tenet of international law, prohibits states from interfering in the internal affairs of other sovereign states. This principle is enshrined in Article

1 *The Case of the S.S. "Lotus" (France v Turkey)* (Judgment) PCIJ Rep Series A No 10, 18.
2 UN Charter, 1 UNTS XVI arts 2(1), 2(7).
3 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*[1986] ICJ Rep 14, 108.
4 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, 200.
5 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/10 art 49.
6 Marco Bronkers and Jan Wouters, 'Unilateral Sanctions in International Law' (2017) 114 American Journal of International Law 48, 50.
7 Daniel Drezner, *The Sanctions Paradox: Economic Statecraft and International Relations* (Cambridge University Press 1999) 145.
8 ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001) 12.
9 Orford (n 38) 78.

2(4) of the UN Charter, which prohibits the threat or use of force against the territorial integrity or political independence of any state.[1] However, despite this foundational rule, there are recognized exceptions, particularly under Chapter VII of the UN Charter, which grants the UNSC the authority to impose mandatory measures, including sanctions, to maintain or restore international peace and security.[2]Sanctions, as a form of coercive but non-military intervention, have become a crucial tool of international governance, especially when diplomatic negotiations fail and military intervention is deemed untenable or unjustifiable. While Article 41 of the UN Charter explicitly authorizes non-military measures such as economic embargoes, asset freezes, and travel restrictions, the effectiveness and fairness of sanctions regimes remain highly contested.[3] The Security Council has frequently invoked its authority to impose economic and political restrictions on states that violate international peace and security, as exemplified in cases of Iraq, Libya, North Korea, and Iran.[4] The use of sanctions as an exception to the principle of non-intervention is best illustrated through historical precedents where economic and diplomatic restrictions were employed in response to acts of aggression or breaches of international law

A contrasting case is Libya, which faced targeted sanctions under UNSC Resolution 748 in response to its involvement in the Lockerbie bombing in 1988.[5] Unlike Iraq, Libya eventually complied with international demands, handing over the suspects for trial and resulting in the lifting of sanctions in 2003.[6] These cases demonstrate the varying effectiveness of sanctions; while they succeeded in coercing Libya into compliance, the Iraq sanctions failed to achieve their intended political objectives and instead resulted in prolonged human suffering.[7]Despite being legally justified under Article 41 of the UN Charter, the practical implementation of sanctions is often marred by accusations of selective application, unintended humanitarian consequences, and the influence of the political agendas of dominant global powers.[8] For instance, while Iran has been subjected to extensive sanctions due to its nuclear program, other states with alleged human rights violations, such as Saudi Arabia in Yemen, have largely avoided similar UN-mandated restrictions arguably due to strategic alliances with Western members of the Security Council.[9] The effectiveness of sanctions also depends on the resilience of the targeted state and the ability of its leadership to shift the economic burden onto its civilian population.[10] In Venezuela, US-led sanctions have further exacerbated economic collapse and humanitarian distress, yet they have thus far proven ineffective in compelling meaningful political change or democraticreform.[11]

These examples highlight the ethical dilemma of using economic coercion as a primary means of enforcing international law. The selective application of sanctions further undermines their legitimacy, raising the question of whether they serve as impartial mechanisms for

1 UN Charter, 1 UNTS XVI art 2(4).
2 UN Charter, 1 UNTS XVI ch VII.
3 UN Charter, 1 UNTS XVI art 41.
4 Christine Chinkin, 'The Legitimacy of Economic Sanctions as a Tool for Peace Enforcement' (2001) 10 European Journal of International Law 75.
5 UNSC Res 748 (31 March 1992) UN Doc S/RES/748.
6 UNSC Res 1506 (12 September 2003) UN Doc S/RES/1506.
7 David Cortright and George Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*(Lynne Rienner 2000).
8 Adam Roberts, 'Economic Sanctions and International Law' (2001) 13 Ethics & International Affairs 45.
9 Kenneth Katzman, *Iran Sanctions* (Congressional Research Service 2021).
10 Stephan Haggard and Marcus Noland, *Hard Target: Sanctions, Inducements, and the Case of North Korea* (Stanford University Press 2017).
11 Francisco Rodríguez, 'The Human Cost of Economic Sanctions' (2019) 5 Journal of Economic Policy 112.

maintaining global stability or as malleable instruments for enforcing the political will of powerful states.[1] One potential solution is the adoption of "smart sanctions," which target specific political and military leaders rather than entire populations, thereby reducing collateral damage.[2]Additionally, some scholars and states advocate for the limitation of the veto power exercised by the Permanent Five (P5) members of the UNSC when proposed sanctions pertain to mass atrocities, arguing that the R2P doctrine should override narrow political considerations in cases of genocide, war crimes, ethnic cleansing, or crimes against humanity.[3]

1.4. International Cases Law and other Legal Developments

The UN and the ICJ have frequently emphasized the necessity of multilateral cooperation in the imposition of sanctions to avoid exacerbating humanitarian crises and undermining international law. UNSC Resolutions, such as Resolution 2526 (2020), have specifically called for a halt to the use of unilateral sanctions, particularly in light of their harmful effects during the COVID-19 pandemic.[4] These sanctions, while often purportedly intended to enforce international law, have been critiqued for potentially impeding humanitarian aid and worsening conditions for vulnerable populations. Similarly, UNGA Resolution 75/233 (2020) reaffirmed the importance of multilateralism, condemning sanctions imposed by individual states without the authorization of the international community, especially when they conflict with the principles of sovereignty and collective security.[5]In addition to the UN's stance on sanctions, the ICJ has adjudicated with several critical cases that address the legality and ethical concerns surrounding unilateral sanctions. Notably, in the *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, the ICJ ruled against the unilateral freezing of Iranian assets by the United States, deeming it a violation of international law, though this case was more focused on diplomatic and consular rights than sanctions *per se*.[6] Another significant, albeit indirect, contribution arises from *The Nuclear Tests (Australia v. France)*, wherein the ICJ touched upon the concept of state sovereignty and the legality of unilateral actions. While the case did not directly concern sanctions, it highlighted the tension between national sovereignty and binding international obligations- a tension that is fundamental to the broader discourse on the permissibility of unilateral sanctions.[7] These rulings reflect an evolving body of international legal thought that questions the legitimacy of unilateral actions that circumvent established multilateral frameworks.

The Court of Justice of the European Union (CJEU) has also played a pivotal role in interpreting the legality of unilateral sanctions imposed by the European Union. In the landmark case *Kadi and Al Barakaat International Foundation v. Council of the European Union*, the CJEU underscored that even sanctions imposed under the auspices of the UNSC mandate must respect fundamental European human rights standards.[8] This seminal decision illustrated the

1 Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2011).
2 Richard Nephew, *The Art of Sanctions: A View from the Field* (Columbia University Press 2017).
3 Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press 2008).
4 UNSC Res 2526 (5 June 2020) UN Doc S/RES/2526; UNGA Res 75/233 (21 December 2020) UN Doc A/RES/75/233.
5 UNGA Res 75/233 (21 December 2020) UN Doc A/RES/75/233.
6 *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3.
7 *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253.
8 *Kadi and Al Barakaat International Foundation v Council of the European Union* (C-40205/ P) EU:C:2008:461.

inherent tension between international obligations and domestic legal systems, particularly when sanctions affect individual rights and freedoms. Similarly, in *Greece v. Council*, the CJEU ruled that EU sanctions must comply with international law, specifically prohibiting actions that harm civilian populations or violate the principles of sovereignty and non-intervention.

The legal status of unilateral economic sanctions remains contested within international law. While the principles of sovereignty and non-intervention remain two cornerstones of the international legal order, the evolving landscape of global governance- marked by doctrines such as R2P- has challenged traditional conceptions of non-interference. However, in the absence of UNSC authorization under Chapter VII, unilateral sanctions often risk violating the very principles they claim to uphold. Consequently, a more coherent legal framework is necessary to ensure that restrictive economic measures do not devolve into instruments of economic warfare but rather function as tools of lawful enforcement that align with international legal norms.

2. Western Sanctions over Russia's Foreign Policy in Ukraine

The annexation of Crimea by Russia in 2014 and its ongoing involvement in eastern Ukraine have led to significant tensions between Russia and the West.[1] In response, The EU and the United States imposed sanctions targeting Russia's financial, energy, and defence sectors.[2] This section examines the impact of Western sanctions on Russian foreign policy towards Ukraine. The impact of sanctions on the Russian economy is controversial. According to Kholodilin & Netšunajev,[3] Western sanctions have had a significant impact on Russia's economy, whereas Noah contends that two years of sanctions have only produced an insignificant effect.[4] To Milov, sanctions restricted Russia's access to Western capital markets and limited the exports of sensitive technologies.[5] The sanctions also froze the assets of Russian individuals and companies.[6] According to the Centre for Economic Policy Research, sanctions reduced Russia's GDP by 1.5% in 2014 and 2.5% in 2015.[7] Additionally, sanctions led to a decline in foreign investments,[8] depreciation of rouble,[9] and increased inflation.[10] Notwithstanding these initial impacts, the Russian economy has shown resilience, with trade volume returning to pre-war levels,[11] and the country's current account surplus reaching all-time highs.[12]

1 John J Mearsheimer, 'Why the Ukraine Crisis Is the West's Fault: The Liberal Delusions That Provoked Putin' (2014) 93 Foreign Affairs 77, 85.
2 Paul J Cardwell and Erica Moret, 'The European Union, Sanctions, and Regional Leadership' (2022) 32 European Security 1, 21.
3 Anna Borozna and Veronika Kochtcheeva, 'Annexation of Crimea: Western Sanctions and Russia's Response (2014–2021)' in *War by Other Means* (Palgrave Macmillan 2024) 41, 57.
4 Noah Berman, 'Two Years of War in Ukraine: Are Sanctions Against Russia Making a Difference?' (Council on Foreign Relations, 23 February 2024) https://www.cfr.org/ accessed 25 September 2024.
5 Vladimir Milov, 'Beyond the Headlines: The Real Impact of Western Sanctions on Russia' (2023) 22 European View 1 https://doi.org/10.1177/17816858231162460 accessed 25 September 2024.
6 Evsey Gurvich and Ilya Prilepskiy, 'The Impact of Financial Sanctions on the Russian Economy' (2015) 1 Russian Journal of Economics 359, 380.
7 Centre for Economic Policy Research, 'The Impact of Sanctions on the Russian Economy' (CEPR Discussion Paper No DP10571, 2015).
8 Shin-ichi Fukuda, 'Spillover Effects of Ruble's Turmoil on Foreign Exchange Markets after the Invasion of Ukraine' (2024) 57 Applied Economics 1, 5.
9 Ibid.
10 Emily Kilcrease, Jason Bartlett and Andrew Wong, 'Sanctions by the Numbers: Economic Measures against Russia Following Its 2022 Invasion of Ukraine' (Center for a New American Security, 16 June 2022) https://www.cnas.org/publications/reports/sanctions-by-the-numbers-economic-measures-against-russia-following-its-2022-invasion-of-ukraine accessed 25 September 2024.
11 World Trade Organisation, *World Trade Statistic Review: Russia Merchandise Trade Volume Increased by 22% in 2021* (2022) https://doi.org/10.30875/489e720b-en accessed 25 September 2024.
12 Bank of Russia, *Annual Report* (2015) <www.worldbank.org> accessed 25 September 2024.

2.1. Factors Affecting the Limited Success of Western Sanctions

The Western response to Russia's full-scale invasion of Ukraine in February 2022 was unprecedented. The EU, G7, and NATO imposed sanctions, diplomatically isolated Russia, and provided substantial military aid to Ukraine, helping sustain the Zelensky government. Despite these efforts, Russia has maintained control over occupied Ukrainian regions, showing that these measures have not been sufficient to compel a withdrawal. This analysis identifies and examines three principal factors in this regard: domestic support, adaptation strategies and strategic hesitancy within Western capitals. We examine each perspective in the given sequence to evaluate their explanatory strength. While each viewpoint provides useful insights, none is entirely convincing on its own, and all three face challenges related to analysis and supporting evidence.

2.1.1. Public Support for Putin's Foreign Policy

A major impetus for the continued invasion of Ukraine appears to be domestic support in Russia. President Putin has framed sanctions as an attempt to undermine Russian sovereignty[1] and has used this rhetoric to rally domestic support. Recent surveys suggest that public support for Russia's foreign policy, particularly regarding Ukraine remains considerable. A significant majority of Russians, around 76%, reportedly continue to support the military operation in Ukraine, with 43% expressing strong support and 33% somewhat supporting it.[2] However, a significant proportion, around 41%, believe that the war has brought more harm than benefit to Russia, citing civilian and military casualties, economic deterioration, and international isolation as major concerns.[3] Moreover, significant demographic differences in attitudes towards the war are evident. Younger Russians, particularly those under 25, are more sceptical about the war, with only 30% expressing unconditional support, compared to 56% of those aged 65 and above.[4] It is also worth noting that support for the war is not necessarily synonymous with support for President Putin's leadership.

2.1.2. Russia's Adaptation Strategies to Sanctions

To mitigate the impact of sanctions, Russia has diversified its economy, reducing its dependence on Western markets. The World Bank notes that Russia has increased its trade volume with non-Western countries, including China and Turkey.[5] Russia has also developed alternative financial systems, such as the Mir payment system.[6] Enhanced cooperation with non-Western countries has also helped Russia adapt to the sanctions. Russia has mitigated the impact of Western sanctions on its foreign policy in Syria and Ukraine through strategic agreements with China. In the energy sector, a 30-year, $400 billion gas supply deal signed in 2014 secured a major export route for Russian gas to China.[7] The Eastern Siberia-Pacific Ocean (ESPO) Pipeline transports Russian oil to China at a capacity of 300,000 barrels per day.[8] Financial cooperation has also been strengthened

1 'Foreign Minister Sergey Lavrov's Interview with RIA 24 TV on Current Foreign Policy Issues, Moscow' (28 December 2023).

2 Denis Volkov and Andrei Kolesnikov, 'The War in Ukraine: Russian Public Opinion' (Levada Center, 2022) https://www.levada.ru/en/2022/06/28/the-war-in-ukraine-russian-public-opinion/ accessed 26 September 2024.

3 Robin Wollast and others, 'Russians' Attitudes towards the War in Ukraine' (2025) 55 European Journal of Social Psychology 119, 122.

4 Sarah W, 'Illiberalism and Public Opinion Junctures in Russia's War on Ukraine' (PONARS Eurasia, 21 June 2022) https://www.ponarseurasia.org/illiberalism-and-public-opinion-junctures-in-russias-war-on-ukraine/ accessed 26 September 2024.

5 World Bank Group, *Russia Economic Report: Trade Strengthens Ahead of Ukraine Conflict* (March 2022).

6 Alexandra Prokopenko, 'Can the Digital Ruble Shield Russia from Western Sanctions?' (Carnegie Russia Eurasia Centre, 17 October 2024).

7 Jamie Robertson, 'Russia's President Vladimir Putin has signed a multi-billion dollar, 30-year gas deal with China' (*BBC News*, 21 May 2014) https://www.bbc.com/news/world-asia-china-27498549accessed 21 February 2025.

8 'ESPO Pipeline Transports over 73 Million Tonnes of Oil to China' (*TASS Russian News Agency*, 1 April 2022).

through the Russia-China Bilateral Currency Swap Agreement signed in 2020, which enables bilateral trade to be settled in local currencies (rubles and yuan), reducing dependence on the US dollar.[1] Russia's access to China's Cross-Border Interbank Payment System (CIPS) has also enabled Russian banks to conduct international transactions in yuan.[2] Russia's membership in the Asian Infrastructure Investment Bank (AIIB) provides alternative funding sources for Russian infrastructure projects. Joint military exercises, such as the 'Vostok-2018', demonstrate Russia and China's military cooperation and interoperability.[3] Furthermore, Russia's sales of military equipment to China, including the S-400 air defence system, have helped maintain Russia's defence industry.[4] Another specific action that helped Russia mitigate the effects of Western sanctions was the signing of a 150 billion yuan (approximately $25 billion) currency swap agreement with China in 2014.[5] This agreement allowed Russia to access Chinese yuan for international transactions. Additionally, major Chinese state-owned banks, such as the Bank of China and the Industrial and Commercial Bank of China, have provided significant financial support to Russian companies, helping them to bypass Western sanctions.[6]

2.1.3. Strategic Hesitancy in the Western Response

Rita and Mark argue that Western indecision in decisively countering Russia's invasion of Ukraine is deeply rooted in a sense of guilt and shame over past miscalculations regarding Russia's security concerns.[7] The West's push for NATO expansion after the Cold War, particularly its overtures regarding Ukraine's membership, left Moscow feeling encircled. While Western leaders publicly dismiss claims that NATO provoked Russia, internal admissions suggest otherwise. Former US Defense Secretary Robert Gates, for instance, criticized the reckless approach of supporting Ukraine's NATO aspirations, describing it as an unnecessary provocation.[8] Similarly, former US ambassador to Russia William J. Burns warned that encouraging Ukraine's NATO hopes would inevitably trigger Russian interference that subsequently materialized.[9] This lingering guilt over NATO's missteps has fostered a half-hearted Western response to Russia's aggression. Despite repeatedly affirming Ukraine's sovereign right to join NATO, Western powers never fully committed to the process. Instead, they provided limited security assurances aid packages, defense partnerships, and vague promises without offering a concrete pathway to NATO membership.[10] France, Germany, and even the US wavered in their stance, hesitant to directly challenge Russia. This inconsistency sent mixed signals to both Ukraine and Moscow, emboldening Putin while frustrating Kyiv.[11]

1 'China's State Banks to Extend Billions in Loans to Sanctions-Hit Russian Firms' (*Reuters*, 12 March 2020).
2 Teddy Ng, 'Russia's Access to China's CIPS to Reduce Dependence on US Dollar' (*Sputnik News*, 16 December 2021).
3 'China's Defence Ministry hails Vostok-2022 military drills' (*TASS Russian News Agency*, 27 September 2022).
4 Franz-Stefan Gady, 'Second S-400 Regiment to China' (*The Diplomat*, 23 February 2020).
5 Ibid.
6 'China's State Banks Support Russian Companies in Bypassing Sanctions' (*Reuters*, 2020) https://www.reuters.com/article/us-russia-china-sanctions-idUSKBN23Q2K5 accessed 21 February 2025.
7 Rita Floyd and Mark Webber, 'Making Amends: Emotions and the Western Response to Russia's Invasion of Ukraine' (2024) 100 International Affairs 1149 https://doi.org/10.1093/ia/iiae074 accessed 1 April 2025.
8 Robert Gates, *Duty: Memoirs of a Secretary at War* (Knopf 2014) 286–290 https://archive.org/details/dutymemoirsofsec0000gate accessed 1 April 2025.
9 William J Burns, *The Back Channel: A Memoir of American Diplomacy and the Case for Its Renewal* (Random House 2019) 212.
10 NATO, 'Comprehensive Assistance Package for Ukraine' (NATO Official Documents, 2016).
11 US Department of State, 'Responses to Russia's Proposals on European Security' (January 2022).

Conclusion

The imposition of Western sanctions on Russia following its actions in Ukraine represents one of the most complex intersections of international law, geopolitics, and economic statecraft in recent history. This paper has examined the legitimacy and effectiveness of such sanctions within the framework of international legal principles, particularly focusing on the principle of state sovereignty, the prohibition on economic coercion, and lawful enforcement. Through doctrinal analysis, the study has highlighted both the legal ambiguities and the strategic considerations that have shaped the design and implementation of these sanctions regimes.

The findings suggest that while Western sanctions have been presented as lawful countermeasures intended to respond to a breach of international peace and Ukraine's territorial integrity, their legal foundation is not universally accepted. The recourse to unilateral sanctions, especially those enacted without the authorization of a United Nations Security Council resolution, raises questions concerning their conformity with the Charter-based principles of collective security and non-intervention. In international legal discourse, sanctions are generally considered lawful when they are proportionate, reversible, and aimed at restoring compliance with international obligations. However, unilateral sanctions frequently straddle a fine line between legal enforcement and power-based coercion, especially when enacted by major powers outside of a multilateral process.

Moreover, the analysis indicates that legitimacy in international law is not determined solely by formal legal authority but also by broader considerations of fairness, proportionality, and consistency. While many Western states have invoked international norms to justify punitive measures against Russia, critics argue that similar breaches by other states have not attracted comparable responses. This inconsistency may erode the normative authority of international law over time, suggesting that sanctions, to be truly effective, must not only be lawful but perceived as impartial and universally applicable.

On the matter of effectiveness, the study finds that sanctions have had measurable economic effects in the short term, particularly in the immediate aftermath of their imposition. These included capital outflows, currency depreciation, a decline in foreign direct investment, and significant disruption in key sectors such as finance, energy, and defense. However, over time, Russia has developed countermeasures that have reduced the effectiveness of these sanctions. These responses include diversification of trade partnerships, particularly with non-Western states such as China, India, and several states in the Global South; the development of alternative payment systems; and a degree of import substitution in critical industries.

The study also underscores the role of geopolitical alignment and strategic interests in shaping the impact of sanctions. While sanctions are theoretically designed to compel behavioral change through economic pressure, in practice they often consolidate political unity within the targeted state, especially when framed as manifestations of external aggression. In Russia's case, sanctions have arguably strengthened domestic narratives of resistance and sovereignty. An important insight from this study concerns the double-edged nature of sanctions in an interconnected global economy. While intended to harm the target state, sanctions often produce significant collateral consequences for third-party states, multinational corporations, and the

broader international economic system. The exclusion of Russia from global markets has, for example, contributed to energy market volatility, inflationary pressures, and supply chain disruptions that affect countries far beyond the immediate conflict zone. These unintended effects call for a more careful calibration of sanctions policies, balancing the imperative of international accountability with the economic welfare of the international community.

From a legal standpoint, the ongoing debate over the legitimacy of unilateral sanctions points to a need for clearer international norms and frameworks. The lack of a binding, universally accepted legal regime governing the use of sanctions contributes to divergent interpretations and practices, weakening the predictability and coherence of international law. Moving forward, there is an urgent need to refine the legal criteria for imposing sanctions, particularly those that bypass multilateral institutions, so as to enhance legal clarity and reinforce the legitimacy of enforcement measures.

Finally, while sanctions remain a vital instrument of international law and diplomacy, their long-term success hinges on several interrelated factors. These include the strength of their legal basis, the extent of international cooperation and legitimacy, their capacity to produce intended behavioral outcomes, and their ability to avoid disproportionate harm to civilian populations and global markets. The case of Western sanctions on Russia illustrates both the potential and the limitations of sanctions in an evolving global order. It reveals that sanctions, to be effective and lawful, must be more than expressions of geopolitical rivalry; they must be rooted in principles of justice, proportionality, and the collective interest of the international community.

Recommendations

The preceding analysis of Western sanctions against Russia highlights the limitations of coercive statecraft when deployed without parallel diplomatic, economic, and institutional strategies. The following recommendations offer a multidimensional framework to address current tensions and pave the way for more effective long-term strategies rooted in the principles of international law and geopolitical realism.

• Reinvigorating Diplomatic Engagement

Open and sustained diplomatic dialogue is essential for de-escalating geopolitical tensions and fostering cooperative security arrangements. Western governments should consider reactivating bilateral and multilateral negotiation platforms, such as the Normandy Format and the Astana Process. These forums can serve as conduits for dialogue, trust-building, and compromise. Historical examples, such as the United States' diplomatic "reset" initiative with Russia under President Obama, underscore the potential value of proactive diplomacy in reshaping adversarial relationships and preventing conflict escalation.

• Promoting Economic Cooperation and Interdependence

Rather than isolating Russia entirely, economic strategies should also explore avenues for constructive engagement. Building trade partnerships, joint infrastructure projects, and energy cooperation can cultivate shared interests and mutual dependence. Although controversial, infrastructure initiatives like Nord Stream 2 pipeline demonstrate the potential for economic collaboration.

- **Enhancing People-to-People Diplomacy through Cultural Exchange**

Soft power tools, such as educational exchanges, tourism initiatives, and cultural programs, can play a transformative role in rebuilding mutual understanding between Russian and Western societies.

- **Developing Strategic Security Partnerships in Areas of Mutual Concern**

Selective security cooperation on issues of common interest can yield tangible benefits even amidst broader geopolitical discord. Russia and the West share concerns about global terrorism, nuclear proliferation, and cyber-security. Reengaging in areas of mutual interest, such as arms control agreements and counter-cyber operations, can reinforce shared security goals and reduce the potential for miscalculation.

- **Strengthening International Institutions and Governance Mechanisms**

International organizations remain pivotal in preserving legal norms, democratic values, and regional stability. Enhancing the roles of institutions such as the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe is imperative.

- **Sustaining Defensive Military Deterrence and Resilience**

The forward deployment of NATO forces in Eastern Europe and initiatives like the U.S. European Deterrence Initiative serve to reassure allies and deter potential aggression. These efforts should be complemented by cyber defense coordination and counter-disinformation strategies to confront emerging threats in hybrid warfare environments.

- **Prioritizing Humanitarian Response and Supporting Long-Term Recovery**

Addressing the human cost of conflict is essential to any comprehensive foreign policy approach. Ongoing humanitarian assistance for conflict-affected populations in Ukraine and Syria must remain a priority, with greater coordination through international bodies such as the United Nations High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC), ensuring that aid is delivered based on need alone and is insulated from geopolitical manipulation.

References

Books

Biersteker TJ, Eckert SE and Tourinho M (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (CUP 2016)

Burns WJ, *The Back Channel: A Memoir of American Diplomacy and the Case for Its Renewal* (Random House 2019)

Cortright D and Lopez G, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner 2000)

Drezner DW, *The Sanctions Paradox: Economic Statecraft and International Relations* (CUP 1999)

———, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (Princeton University Press 2023)

Giumelli F, *Coercing, Constraining and Signalling: Explaining United Nations and European Union Sanctions after the Cold War* (ECPR Press 2011)

Haggard S and Noland M, *Hard Target: Sanctions, Inducements, and the Case of North Korea* (Stanford University Press 2017)

Hart HLA, *The Concept of Law* (2nd edn, Clarendon Press 1994)

Nephew R, *The Art of Sanctions: A View from the Field* (Columbia University Press 2018)

Orford A, *International Authority and the Responsibility to Protect* (CUP 2011)

Proukaki EK, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2011)

Shaw MN, *International Law* (9th edn, CUP 2021)

Van den Herik L, *International Sanctions: Between Law and Politics* (OUP 2017)

Chapters in Edited Books

Borozna A and Kochtcheeva V, 'Annexation of Crimea: Western Sanctions and Russia's Response (2014–2021)' in *War by Other Means* (Palgrave Macmillan 2024)

Journal Articles

Amuzegar J, 'Iran's Economy and the US Sanctions' (1997) 51 Middle East Journal 185

Biersteker TJ, 'Targeted Sanctions and Individual Human Rights' (2010) 65 International Journal 99

Bronckers M and Wouters J, 'Unilateral Sanctions in International Law' (2017) 114 American Journal of International Law 48

Chinkin C, 'The Legitimacy of Economic Sanctions as a Tool for Peace Enforcement' (2001) 10 European Journal of International Law 75

Egger P and others, 'Analysing the Effects of Economic Sanctions: Recent Theory, Data, and Quantification' (2024) 32 Review of International Economics 1

Esfandiary D, 'The Failure of US Sanctions on Iran' (2021) 97 International Affairs 77

Floyd R and Webber M, 'Making Amends: Emotions and the Western Response to Russia's Invasion of Ukraine' (2024) 100 International Affairs 1149

Fukuda S, 'Spillover Effects of Ruble's Turmoil on Foreign Exchange Markets after the Invasion of Ukraine' (2024) 57 Applied Economics 1

Gordon J, 'The UN Sanctions Regime and Its Impact on Iraq' (2004) 56 Middle East Journal 611

Gurvich E and Prilepskiy I, 'The Impact of Financial Sanctions on the Russian Economy' (2015) 1 Russian Journal of Economics 359

Jamnejad M and Wood M, 'The Principle of Non-Intervention' (2009) 22 Leiden Journal of International Law 345

Mearsheimer JJ, 'Why the Ukraine Crisis Is the West's Fault: The Liberal Delusions That Provoked Putin' (2014) 93 Foreign Affairs 77

Milov V, 'Beyond the Headlines: The Real Impact of Western Sanctions on Russia' (2023) 22 European View 1

Morgan TC and others, 'Economic Sanctions: Evolution, Consequences, and Challenges' (2023) 37 Journal of Economic Perspectives 1

Özgür O and Evgeniia S, 'Consequences of Economic Sanctions: The State of the Art and Paths Forward' (2021) 23 International Studies Review 1646

Park JS, 'The Key to the North Korean Targeted Sanctions Puzzle' (2014) 37 Washington Quarterly 199

Roberts A, 'Economic Sanctions and International Law' (2001) 13 Ethics & International Affairs 45

Rodríguez F, 'The Humanitarian Consequences of Economic Sanctions on Venezuela' (2020) 98 Foreign Affairs 32

Schmidt J, 'The Legality of Unilateral Extra-territorial Sanctions under International Law' (2022) 27 Journal of Conflict and Security Law 53

White ND, 'The Legality of Economic Sanctions Under International Law' (2020) 24 Journal of Conflict & Security Law 15
Wollast R and others, 'Russians' Attitudes towards the War in Ukraine' (2025) 55 European Journal of Social Psychology 119
Yazdi-Feyzabadi V and others, 'Direct and Indirect Effects of Economic Sanctions on Health: a Systematic Narrative Literature Review' (2024) 24 BMC Public Health 2242

Newspaper Articles and Online News Sources

Berman N, 'Two Years of War in Ukraine: Are Sanctions Against Russia Making a Difference?' (Council on Foreign Relations, 23 February 2024)
Maloney S, 'Trump's Iran Sanctions Are Failing' (Brookings Institution, 15 July 2019)
Prokopenko A, 'Can the Digital Ruble Shield Russia from Western Sanctions?' (Carnegie Russia Eurasia Centre, 17 October 2024)
Salem H, 'Ukraine and Russia Call Truce before Crimea Referendum' *The Guardian* (16 March 2014)

Reports and Institutional Publications

Bank of Russia, *Annual Report* (2015)
Centre for Economic Policy Research, 'The Impact of Sanctions on the Russian Economy' (CEPR Discussion Paper No DP10571, 2015)
Human Rights Watch, 'Crimean Tatars Face Unfounded Terrorism Charges' (12 July 2019)
———, 'A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution' (2021)
ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001)
Kilcrease E, Bartlett J and Wong A, 'Sanctions by the Numbers: Economic Measures against Russia Following Its 2022 Invasion of Ukraine' (Center for a New American Security, 16 June 2022)
Levada Center, 'The War in Ukraine: Russian Public Opinion' (2022)
Volkov D and Kolesnikov A, 'The War in Ukraine: Russian Public Opinion' (Levada Center, 2022)
World Bank Group, *Russia Economic Report: Trade Strengthens Ahead of Ukraine Conflict* (March 2022)
World Trade Organisation, *World Trade Statistic Review: Russia Merchandise Trade Volume Increased by 22% in 2021* (2022)

International Treaties and Agreements

Articles of Agreement of the International Monetary Fund (adopted 22 July 1944, entered into force 27 December 1945) 2 UNTS 39
Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI
General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187
Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154
Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19

UN Documents

ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/10
UNGA Res 75/233 (21 December 2020) UN Doc A/RES/75/233
UNSC Res 661 (6 August 1990) UN Doc S/RES/661
UNSC Res 748 (31 March 1992) UN Doc S/RES/748
UNSC Res 1506 (12 September 2003) UN Doc S/RES/1506
UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973

Cases

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates) (Judgment) [2019] ICJ Rep 1
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)(Judgment) [2005] ICJ Rep 168
Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3

Kadi and Al Barakaat International Foundation v Council of the European Union (C-402/05 P) EU:C:2008:461

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14

Nada v Switzerland App no 10593/08 (ECtHR, 12 September 2012)

Nuclear Tests (Australia v France) (Judgment) [1974] ICJ Rep 253

The Case of the S.S. "Lotus" (France v Turkey) (Judgment) PCIJ Rep Series A No 10

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

Approaches to the Protection of Wildlife in the Ramsar, CITES and Bonn Conventions: A Comparative and Analytical Study

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Article Info

Article type:
Research Article

Article history:
Received
11 December 2021

Received in revised form
24 July 2022

Accepted
3 December 2024

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3776.html

Keywords:
Sanctions, Legality, The Ramsar Convention, The Bonn Convention, CITES, International Wildlife Law (IWL), Comparative Study.

ABSTRACT

Wild animals need special attention because of their significance from the environmental, ecological, genetic, scientific, recreational, cultural, educational, social and economic points of view. There are numerous international instruments and documents in the field of international wildlife law (IWL). Among them, there are three well-known instruments namely the Ramsar, Bonn, and CITES Conventions. In the present piece, these Conventions are studied comparatively in order to find out their approaches toward the protection of wildlife. In doing so, the author, first and foremost, provides a brief overview of these Conventions. Thereafter, their approaches toward wildlife protection would be analyzed. The methodological approach of this research includes analysis of wildlife protection through descriptive and normative explanation of the Ramsar, Bonn, and CITES Conventions. According to the findings of this study, reasonable and wise use of wetlands (the approach of the Ramsar Convention), special attention to migratory birds (the approach of the Bonn Convention), and the regulation of international wildlife trade (the approach of CITES) are three main and prevalent approaches in these instruments. Furthermore, it appears that CITES has played a more important and effective role in IWL and protection of wildlife. It is due to the fact that this Convention has more operative tools and its State Parties have undertaken more extensive and practical obligations.

Cite this article: Mashhadi, A., (2025). Approaches to the Protection of Wildlife in the Ramsar, CITES and Bonn Conventions: A Comparative and Analytical Study, *Iranian Journal of International and Comparative Law*, 3(1), pp: 118-129.

doi 10.22091/ijicl.2022.7675.1007
Publisher: University of Qom

Table of Contents

Introduction

In the UN document collection, there are three important conventions in the field of wildlife protection. In fact, an adequate number of sub-regional, regional and international conventions have been developed and adopted by states to protect wildlife habitat and endangered species of flora and fauna in the international wildlife law (IWL).[1] Numerous bilateral and multilateral agreements between governments have provided the basis for the development of international wildlife law.[2] Nowadays, several international conventions and national laws attempt to protect different species of animals and plants, but the degree of protection varies in them.[3] Among them, in international environmental law, the Ramsar, Bonn, and CITES Conventions are three traditional and well-known international instruments aimed at protecting and regulating the wildlife all around the world.

The Convention on Wetlands of International Importance called also the Ramsar Convention (February 2, 1971) is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise utilization of wetlands and their resources.4 The objective of the 1971 Bonn convention (Convention on Migratory Species or UN Convention on the Conservation of Migratory Species of Wild Animals) is the conservation of terrestrial, marine, and arena migratory species worldwide.5 The Bonn Convention provides the principal global framework for intergovernmental cooperation in the conservation of migratory species.6

1. Arie Trouwborst and others, 'International Wildlife Law: Understanding and Enhancing Its Role in Conservation' (2017) 67 BioScience 784, 784; Michael Bowman, Peter Davies and Catherine Redgwell, Lyster's International Wildlife Law (CUP 2010) 26.
2. James G Njogu, 'Wildlife Management and Conservation in View of International Conventions' (2012) 29 The George Wright Forum 109, 109.
3. See Simon Lyster, International Wildlife Law: An Analysis of International Treaties concerned with the Conservation of Wildlife (Grotius Publications Ltd 1985).
4. Janet Elizabeth Blake, 'Protection of Wildlife under International Law' (Course for Master's Degree in Environmental Law, Shahid Beheshti University 2006) 1.
5. David QC Woolley and others, Environmental Law (OUP 2000) 508.
6. Melissa Lewis and Arie Trouwborst, 'Bonn Convention on the Conservation of Migratory Species of Wild Animals 1979', in Malgosia Fitzmaurice, Attila Tanzi and Angeliki Papantoniou (eds), Elgar Encyclopedia of Environmental Law, Vol. V: Multilateral Environmental Treaties (Edward Elgar Publishing 2017) 25.

Wild animals require special attention because of their importance from the environmental, ecological, genetic, scientific, recreational, cultural, educational, social and economic points of view. Unregulated trade in wildlife has become a major factor in the decline of many species of animals and plants. In 1975, an international convention was concluded to prevent international trade from threatening species with extinction. This treaty is known as the Convention on International Trade in Endangered Species of the Wild Fauna and Flora [hereinafter CITES]. The main question of this article is what approach do these three Conventions have toward the protection of wildlife species in international law? Hereunder it is attempted to compare the protective approaches of these three important international wildlife instruments.

This study is carried out by comparing the environmental approaches of three international conventions. The methodological approach of this research includes analysis of wildlife protection through descriptive and normative explanation of the Ramsar (section 1), Bonn (section 2), and CITES (section 3) Conventions respectively.

1. Conservation and Wise Use of Wetlands (The Ramsar Convention Approach)

This Convention was negotiated through the 1960s by states and non-governmental organizations that were concerned about the increasing loss and degradation of wetland habitat for migratory water birds. The Convention was adopted in the Iranian city of Ramsar in 1971 and entered into force in 1975.[1] More than 150 states, including the United States, are Parties to this treaty. It is the only global environmental convention that deals with a particular ecosystem and the Convention's member states cover all geographic regions of the planet.[2]

In its preamble,[3] this instrument emphasizes the ecological importance of wetlands and recognizes the interdependence of human being and his/her environment in following terms: "Considering the fundamental ecological functions of wetlands as regulators of water and habitats supporting a characteristic flora and fauna, especially waterfowl; …being convinced that wetlands constitute a resource of great economic, cultural, scientific and recreational value, the loss of which would be irreparable; desiring to stem the progressive encroachment on and loss of wetlands now and in the future; recognizing that waterfowl in their seasonal migrations may transcend frontiers and so should be regarded as an international resource; being confident that the conservation of wetlands and their flora and fauna can be ensured by combining farsighted national policies with coordinated international action…".

The Convention uses a broad definition of the types of water lands covered in its mission, including lakes and rivers, swamps and marches, wet grasslands and peat lands, oases, estuaries, deltas and tidal flats, near-shore marine areas, mangroves and coral reefs, and human-made sites such as fish ponds, rice paddies, and pans (art. 1).

The Ramsar Convention's contracting parties or member states have committed themselves

1. Bridgewater, Peter and Rakhyun E Kim, 'The Ramsar Convention on Wetlands at 50' (2021) 5 Nature Ecology & Evolution 268, 268.
2. Royal C Gardner and Nick C Davidson, 'The Ramsar Convention', in Ben A LePage (ed), Wetlands: Integrating Multidisciplinary Concepts (Springer 2011) 189-203.
3. For the text of this Convention see https://www.ramsar.org/sites/default/files/documents/library/current_convention_text_e.pdf

to implementing the "three pillars" of the Convention:[1] first, to designate suitable wetlands for the list of wetlands of international importance (Ramsar List") and to ensure their effective management (art. 2); second, the wise use of all their wetlands through national land-use planning, appropriate policies and legislation, management actions, and public education (art. 3); and third, international cooperation by virtue of development of joint programs to protect shared wetland systems (and water catchments), shared species and to promote flyway approaches (art. 5). The application of the Ramsar principles of listed sites and wise use (as the means of controlling exploitation of these natural resources so that their use is sustainable) could serve as an example and a test case for conservation and wise use of natural resources in other biomes and ecosystems. To achieve this aim, the Ramsar Bureau and the Secretariat of the Convention on Biological Diversity have signed a Memorandum of Cooperation, and the Third Conference of the Contracting Parties to the CBD has included wetlands on its agenda, using a specially commissioned report.[2]

Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance referred to as "the List" which is maintained by the bureau established under art. 8. The boundaries of each wetland shall be precisely described and also delimited on a map and they may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six meters at low tide lying within the wetlands, especially where these have importance as waterfowl habitat (art. 2).

This instrument provides a useful framework for cooperative efforts to protect wetlands and the benefits that people derive from these areas and cooperative, non regulatory means of wetland protection. The obligations imposed on the Ramsar Convention's Parties are general and permit a large degree of flexibility in their implementation.[3] Generally speaking, one can find three general obligations: first, to designate sites[4] as wetlands of international importance; second, to apply a "wise use" concept to all wetlands within a Party's territory; finally, to engage in international cooperation. Wise use, therefore, has at its heart the conservation and sustainable use of wetlands and their resources for the benefit of humankind. Wetlands constitute a resource of great economic, scientific, cultural, and recreational value for the community. In 1987, the Parties to the Convention adopted a definition of "wise use" which emphasized maintaining "the natural properties of ecosystems", but this conservation-based approach sits ill at ease with human interventions which are inherent in the concept of wise management.[5] It seems anyway that effectiveness of this agreement depends on how countries implement such recommendations and commitments as effective conservation tools.[6]

1. Cathrine Roche, Droit de l'environnement (Guelino editeur 2006) 58.
2. A J Hails, Wetlands, Biodiversity and the Ramsar Convention: The Role of the Convention on Wetlands in the Conservation and Wise Use of Biodiversity (Ramsar Convention Bureau 1997) 164.
3. Royal C Gardner and Kim Diana Connolly, 'The Ramsar Convention on Wetlands: Assessment of International Designations within the United States' (2007) 37 Environmental Law Review 36, 90.
4. See Erin Okuno and others, 'Bibliography of 2016 Scientific Publications on the Ramsar Convention or Ramsar Sites' (2017) SSRN Electronic Journal, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063547, accessed May 20, 2022; Finlayson, Max and others, 'The Ramsar Convention and Ecosystem-Based Approaches to the Wise Use and Sustainable Development of Wetlands' (2011) 14 Journal of International Wildlife Law & Policy 176, 176.
5. David Farrier and Linda Tucker, 'Wise Use of Wetlands under the Ramsar Convention: A Challenge for Meaningful Implementation of International Law' (2000) 12 Journal of Environmental Law 21, 21.
6. Elie Gaget and others, 'Assessing the Effectiveness of the Ramsar Convention in Preserving Wintering Waterbirds in the

The most important obligations related to the protectionist approach of states in the Ramsar Convention include the following:

1. Information on the ecological changes of wetlands: According to paragraph 2 of Article 3: "Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8".
2. Article 8(2) of the Convention stipulates that the International Bureau shall perform the most important tasks related to the registration of wetland information, including: "a)-to assist in the convening and organizing of Conferences specified in Article 6; (b) to maintain the List of Wetlands of international importance and to be in formed by the contracting parties of any additions, extensions, deletions or restrictions concerning wetlands included in the List provided in accordance with paragraph 5 of Article 2; (c) to be informed by the contracting parties of any changes in the ecological character of wetlands included in the List provided in accordance with paragraph 2 of Article 3; (d) to forward notification of any alterations to the List, or changes in character of wetlands included therein, to all contracting parties and to arrange for these matters to be discussed at the next conference; (e) to make known to the contracting party concerned, the recommendations of the conferences in respect of such alterations to the List or of changes in the character of wetlands included therein".
3. Establishing nature reserves on wetlands: Since migratory species move across international borders, achieving their protection is a shared responsibility. Some countries (such as France and Venezuela) meet targets for protected area coverage for more than 80% of their migratory bird species.[1] According to Article 4(1) of the Ramsar Convention, "each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their widening".
4. International responsibility of States for the protection of migratory birds: The Ramsar Convention also addresses the international responsibility of States for the protection of migratory birds. According to 2(6), "each Contracting Party shall consider its international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl, both when designating entries for the List and when exercising its right to change entries in the List relating to wetlands within its territory".

2. Bonn Convention and Protection of Migratory Species

The Bonn Convention or Convention on the Conservation of Migratory Species of Wild Animals (CMS) was signed in 1979 and entered into force on November 1983. The Parties

Mediterranean' (2020) 243 Biological Conservation 1, 3.

1. Claire A Runge and others, 'Protected Areas and Global Conservation of Migratory Birds' (2015) 350 Science 1255, 1256.

acknowledge the importance of migratory species being conserved, and the need to pay special attention to species the conservation status of which is unfavorable. CMS is a member of a suite of about a half-dozen global conventions concerned with the conservation and management of biological diversity. Each of these conventions serves a particular purpose and they are largely complementary to one another in terms of their stated aims. The taxonomic coverage of the Convention on Migratory Species is diverse, encompassing not only marine turtles, but also a wide variety of birds, terrestrial mammals and marine mammals, as well as fish and insects that migrate across international borders.[1]

In the preamble of this Convention,[2] the importance of the protection approach is discussed from different aspects. It has been emphasized that "wild animals in their innumerable forms are an irreplaceable part of the Earth's natural system which must be conserved for the good of mankind" with particular concern with "those species of wild animals that migrate across or outside national jurisdictional boundaries" and "the States are and must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries".

Therefore, in terms of conceptual scope, this instrument is limited to the protection of wild migratory species. According to the definition provided by art. I of this Convention, "Migratory species" means the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries.[3]

According to art. II(1), "the Parties acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever possible and appropriate, paying special attention to migratory species the conservation status of which is unfavorable, and taking individually or in co-operation appropriate and necessary steps to conserve such species and their habitat". In addition, pursuant to art. II(2) & II(3)(a), (b) and (c), in order to avoid any migratory species becoming endangered, the parties must endeavor to promote, cooperate in or support research relating to migratory species, provide immediate protection for migratory species included in Appendix I and conclude agreements covering the conservation and management of migratory species listed in Appendix II".

Furthermore, based on art. III(4), to protect endangered migratory species, the Parties to the Convention will endeavor to conserve or restore the habitats of endangered species, prevent, remove, and compensate for or minimize the adverse effects of activities or obstacles that impede the migration of the species; and to the extent feasible and appropriate, prevent, reduce or control factors that are endangering or are likely to further endanger the species.

The conservation and management of the species listed in Appendix II may require the conclusion of international agreements.[4] In this context, art. V(4) provides that each agreement should: "a) identify the migratory species covered; b) describe the range and migration route

1. Douglas Hykle, 'The Convention on Migratory Species and Other International Instruments Relevant to Marine Turtle Conservation: Pros and Cons' (2002) 5 Journal of International Wildlife Law and Policy 105, 105.
2. For the text of the Bonn Convention see https://www.cms.int/sites/default/files/instrument/CMS-text.en_.PDF
3. For a detailed analysis of the Bonn Covnention see Caddell, Richard, 'International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention' (2005) 16 Colo J Int'l Envtl L & Pol'y 113, 113.
4. Phlippe Sands and Paolo Galizzi, Documents in International Environmental Law (second edition, CUP 2004) 141.

of the migratory species; c) provide for each Party to designate its national authority concerned with the implementation of the Agreement; d) establish, if necessary, appropriate machinery to assist in carrying out the aims of the Agreement, to monitor its effectiveness, and to prepare reports for the Conference of the Parties; e) provide for procedures for the settlement of disputes between Parties to the Agreement; and f) at a minimum, prohibit, in relation to a migratory species of the Order Cetacea, any taking that is not permitted for that migratory species under any other multilateral agreement and provide for accession to the Agreement by States that are not Range States of that migratory species".

In addition, art. V(5) states that, "where appropriate and feasible, agreements should provide for, but not limited to a) periodic review of the conservation status of the migratory species concerned and the identification of the factors which may be harmful to that status; b) coordinated conservation and management plans; c) research into the ecology and population dynamics of the migratory species concerned, with special regard to migration; d) the exchange of information on the migratory species concerned, special regard being paid to the exchange of the results of research and of relevant statistics; e) conservation and, where required and feasible, restoration of the habitats of importance in maintaining a favorable conservation status, and protection of such habitats from disturbances, including strict control of the introduction of, or control of already introduced, exotic species detrimental to the migratory species; f) maintenance of a network of suitable habitats appropriately disposed in relation to the migration routes; g) where it appears desirable, the provision of new habitats favorable to the migratory species or reintroduction of the migratory species into favorable habitats; h) elimination of, to the maximum extent possible, or compensation for activities and obstacles which hinder or impede migration…". The following table includes some of these agreements:

CMS Instruments – Agreements

Title	Adopted	Entry into Force	Participants
Agreement on the Conservation of Seals in the Wadden Sea (WSSA)	1990	1991	3 P
Agreement on the Conservation of Small Cetaceans in the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS)	1991	1994	10 P
Agreement on the Conservation of Populations of European Bats (EUROBATS)	1991	1994	36 P
Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA)	1995	1999	76 P
Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS)	1996	2001	23 P
Agreement on the Conservation of Albatrosses and Petrels (ACAP)	2001	2004	13 P
Agreement on the Conservation of Gorillas and Their Habitats	2007	2008	7 P

It seems to be noteworthy that the Conference of the Parties is the decision-making organ of the Convention. According to art. VII5), "at each of its meetings the Conference of the Parties shall review the implementation of this Convention and may in particular: a) review and assess the conservation status of migratory species; b) review the progress made towards the conservation of migratory species, especially those listed in Appendices

I and II; c) make such provision and provide such guidance as may be necessary to enable the Scientific Council and the Secretariat to carry out their duties; d) receive and consider any reports presented by the Scientific Council, the Secretariat, any Party or any standing body established pursuant to an Agreement; e) make recommendations to the Parties for improving the conservation status of migratory species and review the progress being made under Agreements; f) in those cases where an Agreement has not been concluded, make recommendations for the convening of meetings of the Parties that are Range States of a migratory species or group of migratory species to discuss measures to improve the conservation status of the species; g) make recommendations to the Parties for improving the effectiveness of this Convention; and h) decide on any additional measure that should be taken to implement the objectives of this Convention…".

Moreover, art. VIII of the Bonn Convention (Settlement of Disputes) provides that: "1) Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of this Convention shall be subject to negotiation between the Parties involved in the dispute; 2) If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision". Although there are similarities between the Ramsar Convention and the Bonn Convention on the issue of wetlands, compared with the former Convention, the latter one identifies far more precise protections. Furthermore, conservation approaches are more in line with countries' commitments in the Bonn Convention.[1]

3. Preventing International Trade from Threatening Species with Extinction (CITES Approach)

This treaty is known as the Convention on International Trade in Endangered Species of the Wild Fauna and Flora (CITES).[2] CITES has established a worldwide system of controls on international trade in threatening wildlife and wildlife products by stipulating that government permits are required for such trade. It divides species into three categories based on their conservation status and the risk posed on them from trade. Lists of species in each category are compiled as three separate appendices to the Convention.[3]

In terms of conceptual scope, this Convention is much broader than the Ramsar and Bonn Conventions. In the preamble it is mentioned that "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come" and "the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view" is emphasized. In addition, it is recognized "that peoples and States are and should be the best protectors of their own wild fauna and flora" and "international co-operation is essential for the protection of certain species of wild fauna and flora against over exploitation through international trade".

1. Robert J McInnes and Nick C. Davidson, 'Convention of Migratory Species (CMS) and Wetland Management', in C Max Finlayson, The Wetland Book (Springer 2016) 481.
2. For the text of this Convention see https://cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf
3. See David S Favre, International Trade in Endangered Species: A Guide to CITES (Brill 1989).

CITES Appendix I includes species that are threatened with extinction and are or may be affected by trade. CITES Appendix II includes species that although not necessarily now threatened with extinction, may become so unless trade in them is strictly controlled and monitored. It also includes some non-threatened species in order to prevent threatened species from being traded under the guise of non-threatened species that are similar in appearance. CITES Appendix III includes species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation and as requiring the cooperation of other countries in the control of trade.[1] It is necessary to keep in mind that after the outbreak of the Covid-19, compliance with trade commitments of this Convention became more important. So, it can be argued that CITES is the most appropriate tool to include norms for the protection of public health from the potential dangers of the international trade in protected species.[2]

Each Party or member state of CITES is obliged to designate Management and Scientific Authorities. Management Authorities are responsible for authorizing and issuing permits and certificates of approval, communicating information to other parties and the secretariat, reporting on compliance matters and contributing to CITES annual Reports Scientific Authorities are responsible for providing scientific advice and recommendations to the Management Authorities. All trade in specimens of species included in Appendix I shall be in accordance with the provisions of art. III of the Convention. According to art. III (2), The export of any specimen of a species included in Appendix I shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met: (a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species; (b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; (c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and (d) a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen".

The import or export of CITES specimens may be permitted if it is for an eligible non-commercial purpose. Eligible non-commercial purposes include research, education, exhibition, conservation breeding or propagation, a travelling exhibition or as a household pet or personal item. Strict criteria apply to recognition of these eligible purposes. Regulated commercial trade in CITES listed species may occur subject to specific conditions related to the particular appendix on which the species is listed and whether the specimen is being imported or exported. It is noteworthy that Australia does not permit the export of live native mammals, amphibians, reptiles or birds for commercial purposes.[3]

Pursuant to art. VIII(1) of the Convention, "the Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens

1. Ibid 38.
2. Josep Maria de Dios Marcer, 'Is Everything Marketable in International Trade? Public Health Issues in International Trade of Wildlife', in Mar Campins Eritja and Teresa Fajardo del Castillo (eds), Biological Diversity and International Law: Challenges for the Post 2020 Scenario (Springer 2021) 101.
3. Maurizio Sajeva and others, 'Regulating Internet Trade in CITES Species' (2013) 27 Conservation Biology 429, 429.

in violation thereof. These shall include measures: (a) to penalize trade in, or possession of, such specimens, or both; and (b) to provide for the confiscation or return to the State of export of such specimens". Furthermore, art. VIII(2) provides that in addition to the measures taken under paragraph 1 of art. VIII, "a Party may, when it deems it necessary, provide for any method of internal reimbursement for expenses incurred as a result of the confiscation of a specimen traded in violation of the measures taken in the application of the provisions of the present Convention". Also, art. VIII(3) reads as follows: "As far as possible, the Parties shall ensure that specimens shall pass through any formalities required for trade with a minimum of delay. To facilitate such passage, a Party may designate ports of exit and ports of entry at which specimens must be presented for clearance. The Parties shall ensure further that all living specimens, during any period of transit, holding or shipment, are properly cared for so as to minimize the risk of injury, damage to health or cruel treatment".

Enforcement of CITES is the responsibility of member states. In most countries, customs officers are given the task of enforcing CITES regulations. Governments also are required to submit reports, including trade records, to the CITES Secretariat in Switzerland. To ensure effective enforcement at the international level, the CITES Secretariat in Switzerland acts as a clearinghouse for the exchange of information and liaison between the parties and with other authorities and organization. In accordance with art. XXII(2), "the functions of the Secretariat shall be: (a) to arrange for and service meetings of the Parties; (b) to perform the functions entrusted to it under the provisions of Articles XV and XVI of the present Convention; (c) to undertake scientific and technical studies in accordance with programmes authorized by the Conference of the Parties as will contribute to the implementation of the present Convention, including studies concerning standards for appropriate preparation and shipment of living specimens and the means of identifying specimens; (d) to study the reports of Parties and to request from Parties such further information with respect thereto as it deems necessary to ensure implementation of the present Convention; (e) to invite the attention of the Parties to any matter pertaining to the aims of the present Convention; (f) to publish periodically and distribute to the Parties current editions of Appendices I, II and III together with any information which will facilitate identification of specimens of species included in those Appendices; (g) to prepare annual reports to the Parties on its work and on the implementation of the present Convention and such other reports as meetings of the Parties may request; (h) to make recommendations for the implementation of the aims and provisions of the present Convention, including the exchange of information of a scientific or technical nature; (i) to perform any other function as may be entrusted to it by the Parties".

CITES is one of the oldest international environmental agreements and has been responsible for some striking conservation successes. But, given the way it has evolved, there are also some critical weaknesses that unscrupulous countries and commercial interests can exploit, especially regarding information, institutions and enforcement.[1] Moreover, along with the fact that there are no actual enforcement provisions included in CITES, perhaps the most criticized aspect of the Convention is the vagueness of its language. This not only makes it difficult

1. Reeve, Rosalind, Policing International Trade in Endangered Species: The CITES Treaty and Compliance (Routledge 2014).

to interpret on an international plane, but also causes problems with its implementation and enforcement domestically. Another area of controversy has been the criteria used to determine the appropriate appendix of CITES in which to list a species, and the proper method to use for changing the status of a species by either upgrading or downgrading it. One of the most contested provisions has been whether to allow a species to be split-listed.[1]

Conclusion

As was explained in the above lines, three important instruments in the field of IWL namely the Ramsar, Bonn and CITES Conventions each has its own approach concerning the protection of wildlife. Reasonable and wise use of wetlands (the approach of the Ramsar Convention), special attention to migratory birds (the approach of the Bonn Convention), and the regulation of international wildlife trade (the approach of the CITES) are three main and prevalent approaches in these instruments. Put in another way, the Ramsar Convention on Wetlands, Convention on Migratory Species and Convention on International Trade in Endangered Species have dealt with the protection of wildlife in an international scale through their specific approach.

According to what was already discussed in this piece, the following conclusions can be reached. First, peoples and states recognize that wildlife in its many beautiful and varied forms is an irreplaceable part of the natural systems of the earth which must be protected for this and generations to come (as intergenerational justice in wildlife protection). Second, they are conscious of the ever-growing value of wildlife form aesthetic, scientific, cultural, recreational and economic points of view. Third, they recognize that international co-operation is essential for the protection of certain species of wild Fauna and Flora against over-exploitation through international trade.

All three instruments have provided special tools to protect endangered wildlife and species. In this regard, the Ramsar Convention has paid special attention to the protection of wetlands and waterfowl through the establishment of a special office (art. 8) Furthermore, the Bonn and CITES Conventions have designed a protection system through their appendices. However, if these three Conventions are compared to each other, it appears that CITES has played a more important and effective role in IWL and protection of wildlife. It is due to the fact that this Convention has more operative tools and its State Parties have undertaken more extensive and practical obligations. Finally, the Parties to these Conventions are convinced of the urgency of taking appropriate measures and predicting more innovative and modern methods such digital surveillance of the illegal wildlife trade in order to achieve their aims and objectives.

1. Elisabeth M McOmber, 'Problems in Enforcement of the Convention on International Trade in Endangered Species' (2002) 27 Brooklyn Journal of International Law 673, 690-695.

References

Blake J E, 'Protection of Wildlife under International Law' (Course for Master's Degree in Environmental Law, Shahid Beheshti University 2006)

Bowman M, Peter D and Redgwell C, Lyster's International Wildlife Law (CUP 2010)

Bridgewater P and Kim R E, 'The Ramsar Convention on Wetlands at 50' (2021) 5 Nature Ecology & Evolution 268

Caddell R, 'International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention' (2005) 16 Colo J Int'l Envtl L & Pol'y 113

de Dios Marcer J M, 'Is Everything Marketable in International Trade? Public Health Issues in International Trade of Wildlife', in M C Eritja and T F del Castillo (eds), Biological Diversity and International Law: Challenges for the Post 2020 Scenario (Springer 2021)

Farrier D and Tucker L, 'Wise Use of Wetlands under the Ramsar Convention: A Challenge for Meaningful Implementation of International Law' (2000) 12 Journal of Environmental Law 21

Favre D S, International Trade in Endangered Species: A Guide to CITES (Brill 1989)

Finlayson M and others, 'The Ramsar Convention and Ecosystem-Based Approaches to the Wise Use and Sustainable Development of Wetlands' (2011) 14 Journal of International Wildlife Law & Policy 176

Gaget E and others, 'Assessing the Effectiveness of the Ramsar Convention in Preserving Wintering Waterbirds in the Mediterranean' (2020) 243 Biological Conservation 1

Gardner R C and Connolly K D, 'The Ramsar Convention on Wetlands: Assessment of International Designations within the United States' (2007) 37 Environmental Law Review 36

Gardner R C and Davidson N C, 'The Ramsar Convention', in B A LePage (ed), Wetlands: Integrating Multidisciplinary Concepts (Springer 2011)

Hails, A J, Wetlands, Biodiversity and the Ramsar Convention: The Role of the Convention on Wetlands in the Conservation and Wise Use of Biodiversity (Ramsar Convention Bureau 1997)

Hykle D, 'The Convention on Migratory Species and Other International Instruments Relevant to Marine Turtle Conservation: Pros and Cons' (2002) 5 Journal of International Wildlife Law and Policy 105

Lewis M and Trouwborst A, 'Bonn Convention on the Conservation of Migratory Species of Wild Animals 1979', in M Fitzmaurice, A Tanzi and A Papantoniou (eds), Elgar Encyclopedia of Environmental Law, Vol. V: Multilateral Environmental Treaties (Edward Elgar Publishing 2017)

Lyster S, International Wildlife Law: An Analysis of International Treaties concerned with the Conservation of Wildlife (Grotius Publications Ltd 1985)

McInnes R J and Davidson N C, 'Convention of Migratory Species (CMS) and Wetland Management', in C Max Finlayson, The Wetland Book (Springer 2016)

McOmber E M 'Problems in Enforcement of the Convention on International Trade in Endangered Species' (2002) 27 Brooklyn Journal of International Law 673

Njogu J G, 'Wildlife Management and Conservation in View of International Conventions' (2012) 29 The George Wright Forum 109

Okuno E and others, 'Bibliography of 2016 Scientific Publications on the Ramsar Convention or Ramsar Sites' (2017) SSRN Electronic Journal, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063547, accessed May 20, 2022

Reeve R, Policing International Trade in Endangered Species: The CITES Treaty and Compliance (Routledge 2014)

Roche C, Droit de l'environnement (Guelino editeur 2006)

Runge C A and others, 'Protected Areas and Global Conservation of Migratory Birds' (2015) 350 Science 1255

Sajeva M and others, 'Regulating Internet Trade in CITES Species' (2013) 27 Conservation Biology 429

Sands P and Galizzi P, Documents in International Environmental Law (second edition, CUP 2004)

Trouwborst A and others, 'International Wildlife Law: Understanding and Enhancing Its Role in Conservation' (2017) 67 BioScience 784

Woolley D QC and others, Environmental Law (OUP 2000)

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

The Authority of Arbitration in Determining the Liability of Multiple Actors in Foreign Investment Corruption

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Article Info

Article type:
Research Article

Article history:
Received
13 December 2024

Received in revised form
8 February 2025

Accepted
15 February 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3781.html

Keywords:
Investment Contract, Corruption, Host State, Corruption Intervention, Balance of Probabilities, Red Flags.

ABSTRACT

The importance of investment and the necessity for its legality, alongside the occurrence of corruption due to the involvement of multiple actors in the investment process, render its examination - especially in arbitration - unavoidable. Corruption may manifest through foreign investors and pressures from their home states or affiliated intermediaries, taking the form of bribery and collusion with domestic officials of the host state or through threats against them. Furthermore, the emergence of corruption may stem from structural weaknesses or corruption-laden processes within the host state's system. At times, a combination of all the aforementioned factors, alongside the involvement of third parties, can create a corrupt and illegal investment process. Given the private nature of arbitration, the primary question arises: does an arbitral tribunal possess the jurisdiction and authority to examine and determine the liability of each of the aforementioned actors? Through an analytical and documentary investigation, this article establishes that, firstly, arbitral tribunals generally do not have the power to investigate criminal behavior and related inquiries; secondly, due to secrecy and threats against witnesses, collecting and maintaining the security of evidence within the sovereign territory of the host state is challenging; thirdly, ICSID tribunals often rely on the "balance of probabilities" and significantly on "red flags" and reports from anti-corruption organizations. Fourthly, the consideration of the initiating factor of corruption, the degree of influence of participating actors (the prevalence of corruption in the host state and the level of the host state's involvement in the occurrence of corruption), as well as the circumstances of "duress" and "hostage" situations and the nature of the bribe (transactional / variance), may lead, depending on the case, to the complete condemnation of the investor (and a finding that the investment is unjust) or a reduction of liability or immunity for the host state.

Cite this article: Javar, H., Tahmasebi, M.R. (2025). The Authority of Arbitration in Determining the Liability of Multiple Actors in Foreign Investment Corruption, *Iranian Journal of International and Comparative Law*, 3(1), pp: 130-146.

10.22091/ijicl.2025.11771.1110
Publisher: University of Qom

Table of Contents

Introduction

The proliferation of corruption negatively impacts international trade. Foreign investment contracts are often established by developing countries to extract underground resources for domestic expenditures and costs, frequently accompanied by various crimes. In some countries, governance structures are so weak that conducting trade and economic activities without bribery is nearly impossible. Certain cases from the ICSID[1] suggest that corruption has become so pervasive that it has transformed into a local culture.

Furthermore, if an arbitration tribunal seeks to address any of these factors, it will face numerous limitations. For instance, in situations where the host state has played an active role in facilitating corruption, it may seek to use the foreign investor as a hostage. Additionally, the host state, given its sovereign powers, can destroy or conceal evidence of corruption from the tribunal. Thus, examining the tribunal's capacity to confront this phenomenon is of significant importance.

Although the payment of bribes in securing a contract stems from various motivations, the extent of each factor has not yet been thoroughly analyzed. Therefore, the primary questions are: what is the role of various factors in the formation of corruption, and how do they impact the liability of the parties involved? What powers does the tribunal possess to combat the abuses of the parties? How will the tribunal address evidence of corruption, given its concealed nature? This paper posits that the tribunal must ascertain the occurrence of corruption based on circumstantial and inconclusive evidence. In this regard, it will first address the contexts in which corruption exists in foreign investment and the contributing factors. Subsequently, it will outline the limitations and powers that the arbitral tribunal faces in uncovering and, if necessary, combating corruption.

1. Contexts of Corruption in Foreign Investment

Corruption typically arises from multiple underlying factors, an understanding of which can assist arbitration tribunals in uncovering the truth. Some documented scenarios that may reveal

1 International Centre for Settlement of Investment Disputes

corruption include the following: First, consider a construction contract where costs escalate. In such cases, the employer may neglect to pay amounts needed by the contractor for project advancement. Faced with this loss, the contractor may also refrain from paying the "representation fee" to an intermediary who secured the contract through bribery. Second, in some instances, after a foreign investment contract is formed, the government or certain political officials may change. The previous officials played a critical role in establishing the investment contract with their preferred contractors. Consequently, the contractor may decide to cease bribing an intermediary involved in financing the contracts due to the loss of personal relationships and influence with those previous officials. This situation can lead to increased disputes between the parties in court or arbitration. For these reasons, arbitration tribunals may regard these instances as strong evidence of corruption.[1]

Most cases involving corruption are associated with infrastructure projects such as power plants, telecommunications systems, and dam construction. The next group includes arms procurement, and the construction of educational and military facilities, as well as projects exploiting natural resources. Contracts unrelated to the financing aspects of public projects are relatively rare. Geographically, while corruption occurs globally and spans oil and gas-producing countries to others, the majority of arbitration cases related to corruption in foreign investment arise from South Asia and the Middle East. Quantitatively, investors rarely engage in illegal activities directly. In most cases, they enter into contracts with intermediaries (agents or consultants) to act on their behalf. This arrangement offers several advantages to investors, including the fact that they do not need to disclose their identities to others. In such cases, the secretive relationships between the parties remain concealed. Furthermore, representatives or consultants are often based in the host country and frequently possess the nationality of that country. Therefore, they are culturally and geographically closer to the host country officials and have greater awareness of the local culture, including the customs and practices governing corrupt behaviors.[2] The closer intermediaries are to corrupt structural processes within various governments, the greater their potential for influence within political structures and decision-making in those countries.

Cases related to corruption in foreign investment indicate that in most instances, the involved parties (the investor and the host state) initially enter into investment contracts, such as joint ventures or Build-Operate-Transfer (BOT) contracts. During or after the investment occurs, disputes may arise concerning certain terms of the contract. Typically, the host state fails to fulfill its contractual obligations, compelling the investor to initiate arbitration against the host state. In many cases, political disputes within the host country lead to conflicts, as a newly ascendant government critically reviews the actions of the previous administration, claiming that the investment contract was improperly established. For example, it may be alleged that the prior government's consent was obtained through bribery, and thus, with the change of government, the new administration may refuse to honor its obligations under the contract.

1 M D Valle and P S de Carvalho, 'Corruption Allegations in Arbitration: Burden and Standard of Proof, Red Flags, and a Proposal for Systematization' (2022) 39(6) Journal of International Arbitration 817, 484.

2 H Raeschke-Kessler and D Gottwald, 'Corruption in Foreign Investment-Contracts and Dispute Settlement between Investors, States, and Agents' (2008) 9(1) The Journal of World Investment & Trade 1, 8.

Some researchers have claimed that out of 36 cases concerning allegations of corruption, 11 relate to claims initiated by the new government. The remaining cases are also facilitated by intermediaries (legal and financial advisors).[1]

As noted above, the contexts in which corruption exists can vary based on the specific circumstances of each case. Nevertheless, the constituent factors of corruption can be examined within a limited set of frameworks. These factors can be assessed based on which party initiated the corruption, including the role of the investor's home state, which is often overlooked.

2. Constituent Factors of Corruption

The division of culpability in corruption cases can be relative, depending on which party initiates the corrupt activities. An examination of cases related to corruption in foreign investment indicates that corruption does not solely originate from foreign investors; in some instances, although foreign investors play a significant role in the occurrence and proliferation of corruption, requests for bribes may also arise from the host state. Such requests aim to position the foreign investor in a situation where they are compelled to pay substantial amounts to political officials or intermediaries within the host state to continue their economic activities. Additionally, when the investor's home state wields considerable political and economic power, it can exert pressure on the host state to support its investors. While this behavior may initially appear as "support for the foreign investor," it also represents one of the roots of corruption stemming from improper relations and political pressures exerted by home states on host states. The following sections will explore various instances and differences in the conditions under which corruption occurs.

2.1. Initiation of Corruption by Foreign Investors

In this scenario, corrupt actions are initiated by the foreign investor. Here, the foreign investor bribes government officials to create an incentive for them to award contracts and facilitate opportunities for the investor. In this case, the payment of bribes is not made under duress or at the request of government officials; rather, it is a proactive measure taken by the foreign investor to advance their commercial interests and secure greater profits.

In the case of *Lao Holdings v. Lao People's Democratic Republic*,[2] an American entrepreneur filed a complaint against Laos based on a bilateral investment treaty between the Netherlands and Laos. In this case, the claimant had established an entity to attract investment in the casino industry in Laos in 2007. When the claimant encountered a dispute with one of their local partners, they accused that partner of conspiring with the host state to expel the entity from Laos. In response to this allegation, the host state accused the claimant of various offenses related to the investment. The respondent claimed that the claimant had paid $500,000 in bribes to a Lao government official to halt the casino's audit. In this context, the claimant had utilized a private consultant named "Ms. Sangkeo" to transfer the funds to senior officials in the Lao government. The tribunal concluded that "it is likely that Ms. Sangkeo acted as a conduit for bribing government officials to stop the audit of the casino; however, this conclusion was not proven to a higher standard known as 'clear and convincing evidence.'" Furthermore, the

1 Raeschke-Kessler and Gottwald (n 3) 9.

2 *Lao Holdings N.V. v Lao People's Democratic Republic* ICSID Case No ARB(AF)/12/6.

tribunal noted that the Lao government had not held any recipients of the bribes among its officials accountable or pursued legal action against them.[1]

2.2. Initiation of Corruption by the Host State

Similar to the previous case, in this scenario, the foreign investor is involved in the corruption related to the execution of the investment; however, the corruption does not originate from them. In this context, establishing fault is particularly challenging, as the investor may not be entirely culpable. It could even be argued that in this scenario, no fault can be attributed to the investor. In fact, the investor may be regarded as being in a "hostage" situation, as the host state threatens to destroy their investments and obstruct stable economic activities, demanding bribes from them. In some cases, if foreign investors refuse to comply with bribery demands, the host state may detain individuals involved in the investment operations. Essentially, the stronger the host state's influence, the less freedom of choice the investor has.

Moreover, the host state may initiate "criminal activities" in which the investor voluntarily participates; this means that although the illegal actions are initiated by the host state, the investor subsequently joins these activities. This complicates the attribution of corrupt behaviors to the foreign investor. Under these conditions, given that the investor is not compelled to participate in these actions, fault can be distributed more or less equally between the investor and the host state.

A prominent example of this scenario is the case of *EDF Services Ltd. v. Republic of Romania*.[2] In this case, the arbitration tribunal was tasked with answering the question: Does a governmental demand for a bribe violate its obligations under international investment treaties? The subject of this case involved a joint investment with state-owned enterprises in Romania. The claimant argued that following the election of a new government in Romania, government officials requested a bribe of $2.5 million. This request was made by two senior government officials (the Prime Minister and the then Minister of Foreign Affairs of Romania). The claimant asserted that by demanding a bribe, the respondent violated the obligation of fair and equitable treatment under the bilateral treaty. In contrast, the respondent denied all allegations and referred to a final ruling from the Romanian courts regarding the case previously initiated by the claimant. In that proceeding, the Romanian National Court had definitively rejected the claim of bribery.[3]

This case illustrates that the practice of arbitration tribunals typically requires a high standard of proof to establish corruption. In many instances, corruption initiated by the host state is not substantiated because such claims demand clear and convincing evidence. Although the investor claims to be in a hostage situation, they did not pay the requested bribe. Consequently, there is insufficient evidence to assess how the arbitration authority should impose liability on the parties fairly.[4]

If the investor asserts that they were threatened by an internal official of the host state, placing them in a "hostage" position, the following conditions must be proven to the arbitration tribunal: 1. The host state must make an unlawful threat against the investor that compels them

1 M D A Reisman, 'Apportioning Fault for Performance Corruption in Investment Arbitration' (2021) 37(1) Arbitration International 1, 8.
2 *EDF (Services) Ltd v Republic of Romania* (Procedural Order No 3) ICSID Case No ARB/05/13 (29 August 2008).
3 Adilbek Tussupov, *Corruption and Fraud in Investment Arbitration* (Springer International Publishing 2022) 102.
4 Reisman (n 6) 9.

to pay a bribe. 2. The investor must have no reasonable alternative other than to engage in such an act (paying a bribe). Among these two conditions, proving the first is practically impossible; as it assumes that government agencies are systematically involved in corruption. Furthermore, government officials are not compelled to demand bribes openly. Thus, it can be said that the host state does not necessarily need to directly threaten foreign investors. Regarding the second condition, the investor must demonstrate that they do not willingly wish to participate in systemic corruption. This condition is generally provable, as investors typically only resort to bribery when coerced. Therefore, establishing this condition is relatively easier for the arbitration tribunal compared to the first condition.

Ultimately, various factors such as the value of potential loss, the extent of threats against investors, and the amount of the requested bribe play a role in determining the extent of the threat. The value of potential loss primarily depends on the amount of capital invested in the host country. In other words, the greater the investment, the more pressing the threat from the host country. Furthermore, the context of bribery for obtaining permits differs from that of bribery for "facilitating the investment process." It should also be examined whether the investor could successfully hold the host state accountable in the courts of that country; however, given the existence of systemic corruption, domestic courts are likely considered lacking in independence.[1]

2.3. Initiation of Corruption through Collaboration between the Host State and the Investor's Home State

In certain infrastructure-related projects, the home state of the investor may play a role in fostering corruption by exerting political or economic pressure on the host country to award contracts to its citizens rather than others. Several European countries, along with Japan and South Korea, have long been scrutinized for lobbying host states to secure contracts for their nationals. Recently, the United States has joined this type of lobbying. In this scenario, home states attempt to leverage their influence in the global economic and political landscape to sway weaker countries, particularly in regions like the Middle East.

In these cases, the occurrence of corruption can lead not only to the signing of agreements that experts deem suboptimal in terms of volume and price, but also to situations where the host country may have no actual need for these contracts. Any contract, in addition to the primary payments, typically involves ancillary payments as well. For instance, the former head of Indonesia's electricity distribution company publicly stated that he was told to sign electricity contracts with German companies, even if the total electricity specified in the investment contract exceeded the predictable capacity relative to demand and distribution in the country.[2]

In this context, U.S. government pressure often has a political nature, and despite the Foreign Corrupt Practices Act (FCPA), the U.S. judiciary tends to overlook instances of corruption involving American companies, consistently seeking to assist them. In 1994, U.S. officials made several visits to Indonesia to negotiate deals for consortia led by American companies. The

1 Nobumichi Teramura, Luke Nottage, and Bruno Jetin, *Corruption and Illegality in Asian Investment Arbitration* (Springer Nature 2024) 195.
2 K Mills, 'Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto' (2006) 3 TDM 1, 4.

U.S. Secretary of Commerce, Ron Brown, traveled to Indonesia while several contracts in the private sector for electricity generation with American companies were being negotiated. Due to political pressure from the United States, the head of Indonesia's electricity authority was compelled to sign five contracts at a ceremony honoring Brown, accepting conditions imposed by foreign investors without regard to their fairness or the internal needs of the host country. This action was contrary to Indonesian law and ultimately contributed to rising inflation in the country.[1]

In this instance, foreign investment not only failed to contribute to growth and development in the host country but also led to outcomes contrary to its intended purpose. As such, the corrupting influence of investment must be considered in arbitration proceedings, particularly concerning the establishment of fault.

2.4. Corruption Arising from Actions of Individuals and Factors Unrelated to the Parties

In this scenario, there is strong evidence of investor corruption, but no causal relationship exists between the corrupt act and the subject of the current investment dispute. The alleged behaviors may pertain to investments separate from the disputed investment. In other words, while there may be a history of corruption between the parties, the bribery has no connection to the investment contract in question. For instance, an investor may have three mining projects in the host country, but bribery could have been paid concerning the execution of mining project "A," while the arbitration pertains to mining project "B." In this case, the primary motivation for the corruption may have been to gain an advantage regarding a different investment, thus lacking the necessary causal link to the disputed contract. Consequently, arbitration tribunals typically tend to reject claims of corruption in such cases.In the case of *Tethyan Copper Company Pty Ltd v. Islamic Republic of Pakistan*,[2] the claimant (an Australian mining company) filed a complaint under the Australia-Pakistan bilateral investment treaty after its mining lease application was rejected in 2011. Pakistan informed the tribunal that it had obtained "substantial and new evidence" of investor corruption. This claim included invitations extended to Pakistani government officials to Chile and Toronto, as well as bribery related to airport land leases in 2007, the extension of exploration licenses in 2007 and 2008, and the procurement of visas for the investor's employees. The tribunal dismissed the bribery allegations, citing insufficient evidence. However, regarding the trips to Chile and Toronto by government officials, the tribunal stated, "In this case, it is not sufficient to establish that inappropriate behavior is attributed to the claimant; rather, a causal relationship must be established with the investment made by the claimant, meaning that such inappropriate behavior must have aided in obtaining a right or benefit related to the claimant's investment." Based on the evidence in the case, the tribunal determined that while the claimant may have organized the trips to "establish a close relationship with government officials," given that the parties had signed another contract concerning the mine, and the previous contract between them had not been enforced, the necessary causal link

1 Mills (n 11) 5.

2 *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan* ICSID Case No ARB/12/1.

between the inappropriate conduct and the investment in question was absent. Accordingly, the tribunal rejected the corruption claim.[1]

This case illustrates that while bribery and corruption may be present in the context of the investment relationship, the payment of bribes served solely to incentivize officials of the host state. This situation suggests that bribery could influence long-term relationships between the parties, potentially providing greater motivation to form new contracts.

Nonetheless, while the arbitration tribunal must identify the initiation of corruption and the role of each party in its occurrence and proliferation, these factors should be considered alongside aspects such as the nature of the bribery and its prevalence in the host state, especially in accordance with metrics from reputable global institutions regarding economic integrity.

3. Participation of the Host State and Investors in Fault

Article 39 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA, 2001) addresses situations where the harm caused results from a state's international wrongdoing, but the injured party has contributed to the harm through their own actions or omissions (intentional or negligent). According to this article, the arbitration tribunal must apportion compensation between the parties based on each party's role in the existence and proliferation of corruption. The tribunal can determine each party's share in compensation by considering three factors: 1. The nature of the corruption; 2. The prevalence of corruption in the host state; 3. The level of participation of the host state in the occurrence of corruption. These factors are elaborated upon below.

3.1. The Nature of Corruption

Bribery can be divided into two categories: "transactional bribery" and "variance bribery." Transactional bribes, often referred to as "facilitation payments," are payments made to government officials in a routine and non-personal manner to ensure or expedite their official duties. Transactional bribery equally affects both the investor and the host state in terms of fault distribution. This implies that fault can be shared equally between the parties. Such bribery is considered permissible under the U.S. FCPA, indicating that the social losses incurred from these offenses are viewed as less significant than in other cases. For example, payments may be made to expedite customs clearance, as government employees, due to low wages, may cause delays in administrative processes.[2]

In many West African and East Asian countries, this type of bribery is widespread. In many cases, facilitation payments are not regarded as "corruption" by either sellers or buyers because "facilitation is where you maintain your performance." On the other hand, "corruption is where you try to gain a competitive advantage." Some traders believe that without making facilitation payments, "you cannot survive as a business in Asia and Africa." Facilitation payments are also observed in customs operations: some traders have empirically noted that in African countries, payment amounts are pre-determined for all business actors. These payments depend on who

1 Reisman (n 6) 10.

2 S W Schill, 'Illegal Investments in Investment Treaty Arbitration' (2012) 11(2) The Law & Practice of International Courts and Tribunals 281, 297.

the receiver or sender is. A multinational company dealing with soap, detergents, and other consumer products may have to pay a facilitation fee of $100 for each container (in 2011). Additionally, in African countries, a container shipped by a major oil company from one of the cities may be required to pay $10,000 per container.[1]

In contrast to transactional bribes, "variance bribes" assign greater fault to the investor compared to the host state. This type of bribery is defined as a payment made to achieve a desired result by deviating from the proper execution of formal norms. Examples of this type of bribery include "suspending the enforcement of laws or regulations in favor of the investor by government officials," "the personal discretion of a government official that ultimately benefits the investor," or even "changing laws and regulations in favor of the investor." In cases of this type of bribery, if the benefits obtained are legal but not accessible to all investors, the harm caused by the bribery is more severe. For instance, if economic governance in the host state allows for exploration and exploitation permits to be issued annually only to a limited number of individuals, the investor may pay a bribe to the issuing authority to ensure receiving one of these permits. The consequences of bribery in this case are quite severe, as bribery effectively guarantees the investor a competitive advantage at the expense of losing that advantage relative to other investors. Therefore, greater fault should be attributed to the investor.[2]

The most serious form of bribery can be described as a means of obtaining illegal advantages. For example, an investor may receive a permit by paying a bribe, despite not meeting the necessary legal conditions to obtain it. In this context, "evading labor law or environmental regulations" or "avoiding oversight or prosecution by judicial authorities" can be cited. This type of bribery is more severe than the previous cases because the actual profit sought is illegal under domestic laws. Consequently, the tribunal must also attribute greater fault to the investor.[3]

Conversely, "soft corruption," also referred to as "influence peddling," is essentially a diminished form of "hard corruption." It involves offering or promising an unfair advantage to someone claiming they can influence government decision-making. Influence peddling typically occurs with the aid of intermediaries. However, unlike hard corruption, the intermediary does not necessarily engage in bribery of government officials but rather uses their influence to achieve illegal objectives. The ICSID practice indicates that in several cases, allegations of corruption have been accepted as a defense in cases involving hard corruption, while to date, no host state has been allowed to raise a defense solely based on influence peddling.[4]

3.2. The Prevalence of Corruption in the Host State

Investors may adhere to illegal yet commonplace business practices in the host country. While this does not absolve the investor of all wrongdoing, the normality of corruption during the implementation phase of investment is an important factor that the tribunal must consider when apportioning fault between the investor and the host state.

1 Aloysius P Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press 2014) 66.

2 Reisman (n 6) 16.

3 P Busco, 'The Defense of Illegality in International Investment Arbitration: A Hybrid Model to Address Criminal Conduct by the Investor, at the Crossroads between the Culpability Standard of Criminal Law and the Separability Doctrine of International Commercial Arbitration' [2018] Austrian YB Intl Arb 389.

4 H Yin, 'The ICSID Tribunals in Deciding International Investment Corruption Cases: Possible Solutions' (2020) 6(2) China and WTO Review 351, 361.

For instance, suppose each year, 15 permits for exploration and exploitation of mines are issued by the host state. An investor submits their application for one of the 15 available quotas. In this situation, the desired benefits are legal, but acquiring this position comes with significant limitations that can be alleviated through bribery. The investor is aware that other interested parties are also attempting to obtain permits and are bribing the relevant government officials. While this bribery may fundamentally be classified as variance bribery, attributing fault to the investor should be reasonably adjusted to reflect the reality that, in this context, paying a bribe is a common and anticipated business practice in the host country.

Therefore, the prevalence of this type of corruption must be considered alongside its nature. In other words, while the motivations of the parties involved in the bribery should be taken into account, this analysis must be conducted in conjunction with other factors such as the type and nature of the bribery.[1]

4. Options for the Tribunal in Addressing Corruption

Corruption inherently possesses a hidden nature. Additionally, tribunals face multiple limitations when dealing with corruption; however, there are circumstances under which tribunals can mitigate these constraints.

4.1. Consideration on the Balance of Probabilities by the Tribunal

There are two general approaches in legal systems for proving any claim. Some legal systems consider the " balance of probabilities" in evaluating evidence. Under this approach, it suffices for the truth of a claim to be more probable than its falsehood. This approach is used in common law legal systems for proving civil/commercial claims. Historically, this mechanism has been adopted by arbitrators operating in jurisdictions influenced by this legal system. In this case, if the likelihood of a piece of evidence aligning with reality is greater than that of other evidence, the claim can be easily proven. This approach reflects a lower standard of proof, which is typically applied in cases where there is less concern and significance surrounding the issues to be proven.

The second approach involves "requiring clear and convincing evidence" in evaluating evidence. Given that this method entails a higher standard for proving a claim, it is used in common law legal systems when proving criminal claims. In this method, arbitrators are required to establish facts "beyond a reasonable doubt." This means they cannot make decisions solely based on the probability that a claim is true over its falsehood. Consequently, in cases where society places greater importance and sensitivity on a claim, the second standard is utilized as the evidentiary standard.[2]

This distinction is particularly significant in proving allegations of corruption, given the associated criminal regulations. Nevertheless, some ICSID cases have shown that the use of the *balance of probabilities* has been supported in recent arbitration awards concerning investor-state corruption claims. In the case of *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*,[3]

1 Reisman (n 6) 16.

2 R Dalir, E Delshad, and I Amini, 'Evaluation of Evidence and Standards of Proof in International Commercial Arbitration' (2023) 19(1) Comparative Law Quarterly 245, 254 [In Persian].

3 *Unión Fenosa Gas, S.A. v Arab Republic of Egypt* ICSID Case No ARB/14/4.

the tribunal decided to apply the "balance of probabilities" standard. The tribunal argued that although the corruption allegations related to factors that inherently possess criminal aspects, since this proceeding is not criminal in nature, there was no reason for the tribunal to impose a higher standard for proof, and the balance of probabilities standard sufficed.[1]

However, a significant number of International Chamber of Commerce (ICC) cases have indicated that a finding of corruption in arbitration should be based on a very high degree of probability. According to a report released by the ICC regarding arbitration proceedings, minimal evidentiary standards were utilized in only one case. According to this practice, proving corruption is often overlooked; the evidentiary criteria restrict the scope of proof to such an extent that it can be argued that, given the hidden nature of corruption, proving it becomes exceedingly difficult, if not impossible.

Consequently, three arguments have been made in favor of this higher standard. First, proponents argue that a higher standard of proof dissuades parties from making baseless allegations in arbitration proceedings. Second, it is essential to avoid baseless claims in any circumstance, rather than suggesting that if one party can prove corruption based on a more acceptable criterion, this should be disregarded. Finally, it is claimed that discovering corruption in contracts is inherently unlikely because there is an assumption that these contracts are valid. This assumption is supported by the assertion that senior officials generally do not violate enforceable laws in national jurisdictions. Yet, corruption occurs in every country and has become a systemic and widespread problem in many parts of the world. Furthermore, the presumption of the legality of legal contracts should not be a reason to increase the standard of proof; rather, it should be considered an element for evaluating corruption claims by the tribunal.[2]

4.2. Consideration of Red Flags by the Tribunal

Given the aforementioned points, many experts in investment law believe that when the tribunal addresses allegations of corruption, it should utilize what are known as "red flags" as evidentiary support. Red flags are indicators that, while independently insufficient to prove the existence of corruption, can collectively raise strong suspicions about the presence and prevalence of corruption in a contract.

Some prominent indicators for identifying contracts that may have been obtained through corruption include:

1. **Engagement with Countries with High Levels of Corruption Records**: Contracts executed with countries known for their involvement in corruption, as evidenced by their poor rankings in the Corruption Perceptions Index (CPI) published by Transparency International. This index ranks countries based on corruption levels using data from multiple independent surveys.
2. **Refusal to Accept Anti-Corruption Commitments**: A party or contractor's unwillingness to agree to commitments aimed at combating corruption.
3. **High Payments to Intermediaries**: Unusually large sums paid to third parties.

1 S S Ong, 'Dismantling the Safe Harbor: Solving the Evidentiary Problems in Corruption Allegations in Investor-State Arbitration' (2019) 20(1) Asian Intl Arb J 23.

2 Valle and de Carvalho (n 2) 483.

4. **Lack of Transparency in Accounting Records**: Obscured financial records that make it difficult to trace transactions.
5. **Unusual Payment Mechanisms**: Payment methods that deviate from standard practices.

The World Bank also provides potential indicators, such as:

- Contracts often signed for amounts below typical thresholds.
- Bids presented in an irregular manner, not adhering to established patterns.
- No exchange of proposals between the parties for obtaining a contract.
- The presence of suspicious bidders, such as shell companies or those acting as fronts for others during the bidding process.
- Repeated awarding of contracts to the same companies.
- Unjustified changes in the scope and value of contracts after they have been signed.
- Services rendered being less than expected or of inferior quality compared to contractual obligations.[1]

The use of red flags is based on several fundamental considerations. Firstly, proving corruption is particularly challenging due to its inherently secretive nature. Secondly, criminal acts are operationally complex. For instance, in the context of banks conducting suspicious transactions, addressing and uncovering corruption can be difficult due to the extensive nature of business operations. While there is a relative consensus regarding conventional international business practices, it is crucial to recognize that each country's cultural aspects directly impact its business practices and norms. This highlights the need for arbitrators to be well-informed not only about the characteristics of common crimes in international business but also about the local customs where the contract is executed.

Moreover, the sources that compile red flags should be critically examined. Arbitrators might be concerned that findings related to corruption could have severe consequences for those involved. In jurisdictions where the rule of law is not fully upheld, uncovering corruption may be misused to target individuals as political victims in criminal proceedings. Similarly, arbitrators should not hastily seek out evidence of corruption. In this regard, considering the aforementioned criteria as "red flags" is of great importance.[2]

As previously stated, there are significant disagreements regarding the evidentiary standards surrounding corruption allegations. Some authors propose a solution that involves a two-pronged criterion: First, after corruption allegations are raised against one party, the tribunal should determine whether sufficient evidence of corruption has been presented. If the tribunal is satisfied with the number and strength of the red flags initially provided by the claimant, it should explicitly place the burden of proof on the opposing party, requiring them to provide counter-evidence, such as documents and testimonies, to refute the allegations. If the opposing party fails to demonstrate the absence of corruption, the tribunal may adjust the evidentiary standards, allowing the accused party to defend themselves using the balance of probabilities standard.[3]

1 Valle and de Carvalho (n 2) 850.
2 A Menaker, *International Arbitration and the Rule of Law* (Kluwer Law International 2017) 247.
3 Valle and de Carvalho (n 2) 845.

4.3. Issuance of Interim Orders to Prevent Criminal Proceedings

Host states sometimes initiate criminal prosecutions with the intent to intimidate witnesses and threaten them, which can hinder their ability to safely express concerns about corruption in investment contracts. In such cases, the host state often attempts to influence evidence that could potentially be used against it in arbitration proceedings, utilizing its judicial and security powers.

Consequently, foreign investors need protection against such actions by host states. While tribunals are granted the authority to issue interim orders in many situations, requests to prevent host states from pursuing criminal proceedings within their jurisdiction are considered complex. On one hand, each sovereign state possesses the inherent power to enforce its criminal laws and prosecute individuals who violate those laws. On the other hand, it is the tribunal's duty to safeguard the integrity of the arbitration process. Parallel criminal proceedings may jeopardize this integrity and obstruct the effective pursuit of the claimant's claims against the host state.[1]

Thus, the issuance of interim orders to prevent domestic prosecutions requires the tribunal to balance these conflicting interests. This challenge underscores the delicate nature of ensuring that the arbitration process remains unimpeded while recognizing the sovereign rights of states to enforce their laws.

5. Limitations of the Tribunal in Addressing Corruption

Given that arbitration proceedings are inherently private, they face multiple limitations, including:

5.1. Limitations in Evidence Collection and Witness Protection

One significant issue in evidence collection involves the security of witnesses called to testify about corruption. Potential witnesses may refuse to testify, claiming that doing so puts them at risk. This claim may be valid. While national courts possess broad powers to uncover and neutralize threats and ensure witness security, arbitration tribunals have very limited capacities in this regard. However, international courts often take measures to guarantee necessary protections, especially for whistleblowers, including strict limitations on disclosing the identities of witnesses.

Another challenge arises when witnesses, under local law, have the right to refuse to testify. For example, in Switzerland, parties to a dispute and third parties can refuse to testify under certain conditions, such as when testifying could harm close relatives. In such cases, the tribunal cannot compel a reluctant witness to testify through a summons, nor can it treat a witness's absence as evidence against one of the parties. In Switzerland, arbitrators or courts inform witnesses of their rights to refuse to testify in such circumstances.[2]

5.2. Parallel Proceedings by the Host State as a Threat to Witnesses

Many arbitration tribunals recognize that criminal investigations or parallel proceedings can impact a witness's willingness to testify against the host state, threatening the integrity of the arbitration process. In the case of *Quiborax v. Bolivia*,[3] the host country brought criminal charges against several individuals involved in the claimant's investment operations in Bolivia. For instance, a

1 L Uilenbroek, 'The Power of Investment Tribunals to Enjoin Domestic Criminal Proceedings' (2020) 36(3) Arbitration International 323, 339.
2 Menaker (n 26) 258.
3 *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia* ICSID Case No ARB/06/2.

witness named David Muscuso was arrested by local authorities for alleged document forgery, leading him to refuse to testify in favor of the claimant. Based on these events, the tribunal found that Bolivia had exerted undue pressure on potential witnesses, likely reducing their willingness to testify. Consequently, the tribunal accepted the claimant's assertion regarding the criminal charges against the witness and concluded that access to witnesses would only be facilitated if the criminal proceedings in the host state were halted until the arbitration concluded. Similarly, in the case of *Lao Holdings v. Lao People's Democratic Republic*,[1] the tribunal agreed to issue an interim order to stop the criminal proceedings, as the simultaneous criminal investigations could serve as a strong deterrent for witnesses to provide evidence against the host state's position.[2]

5.3. Resource Limitations and Lack of Authority over Criminal Matters

Generally, arbitration tribunals lack the authority to investigate criminal conduct. Investigating corruption may require extensive powers and resources, including the ability to compel companies to produce records and documents, to mandate witness testimony, and to have sufficient human resources and expertise. For instance, in the United States, the Attorney General and the Department of Justice can collaborate with a grand jury to gather evidence and prosecute individuals for various crimes. They work together to compel witnesses to testify and to investigate documents, data, and other relevant materials. If witnesses do not comply with subpoenas to appear in court, the court can compel them.

In ICSID proceedings, procedural rules allow the tribunal to "request the parties to submit documents, witnesses, and expert opinions." However, if the parties do not comply with such requests, the tribunal lacks the authority to compel them to act or to impose civil or criminal penalties. Under this rule, the tribunal can only focus its attention on a party's failure to provide documents and evidence and notify the parties accordingly. If the parties do not comply with these notifications, it may affect the tribunal's ruling on costs and damages. However, the tribunal cannot investigate or make definitive findings on whether elements of corruption have occurred.[3]

Overall, the tribunal lacks the resources and expertise that a state possesses to investigate corruption. For example, the budget of the U.S. Department of Justice for fiscal year 2017 was over $29 billion, and as of 2015, it employed 114,408 staff members. The Department of Justice utilizes various specialized offices, including the Drug Enforcement Administration and the Federal Bureau of Investigation. In contrast, ICSID is funded by the World Bank, with total assets of approximately $52.4 million in 2016. The Administrative Council, the governing body of ICSID, is chaired by the President of the World Bank and comprises representatives elected from member states. The Administrative Council appoints the Secretary-General and Deputy Secretary-General, who jointly head the secretariat. The secretariat maintains a list of completed arbitrations, manages funds to cover arbitration costs, approves rules and regulations for arbitration, and drafts model arbitration clauses for investment agreements. All of these tasks are managed by a staff of about 70 employees. Consequently, compared to the U.S. Department

1 *Lao Holdings N.V. v Lao People's Democratic Republic* (n 5).

2 D Galagan, 'Provisional Measures in International Arbitration as a Response to Parallel Criminal Proceedings' (LLM thesis, University of Victoria 2019) 157.

3 Menaker (n 26) 10.

of Justice, ICSID lacks the financial, human, and specialized resources necessary for extensive investigations into corruption.

6. The Impact of Tribunal Limitations on Erroneous Conclusions in Arbitration

In the case of *Siemens A.G. v. Argentine Republic*,[1] a contract was established between the claimant (the German electronics company) and the Argentine government to replace existing identification documents with new national ID cards, with an estimated project value of nearly $1 billion. Following a financial crisis in the country, Argentina enacted an "Emergency Law" during the 2001-2002 financial turmoil, which the tribunal found might constitute a case of creeping expropriation (indirect expropriation). Consequently, the tribunal ordered Argentina to pay $217 million to Siemens.

Shortly after the ruling, German prosecutors discovered that Siemens had engaged in systematic bribery around the world. It was later revealed that between 1997 and 2007, Siemens paid over $105 million in bribes to Argentine officials to secure the contract. Aware of the corruption scandal faced by Siemens, the Argentine government requested a "review" from the ICSID tribunal under Article 51 of the ICSID Convention.[2]

Seven months after this request, Siemens reached an agreement with American and German authorities to pay a fine of $1.6 billion. Five months later, Siemens halted its arbitration proceedings against Argentina, waiving its right to enforce the $217 million award it had obtained. Some commentators believe this decision was made to prevent damage to the company's reputation due to the financial scandals. Nonetheless, this waiver of rights is normatively problematic.

This case illustrates that if the ICSID tribunal had been aware of Siemens' corruption from the outset, it likely would have accepted the defense of corruption in favor of Argentina. Conversely, had there been no investigation by German prosecutors, Siemens could have exploited the dispute resolution provisions of a treaty that, in reality, offered no protection for its corrupt actions. This scenario highlights the tribunal's reliance on anti-corruption organizations and state prosecutors when adjudicating corruption claims.[3]

Conclusion

Developing countries need underground resources for their economic growth. Consequently, they often seek to attract foreign investment to meet this need. In these countries, due to weak governance structures, foreign investment is frequently accompanied by bribery. The tribunal faces limited powers in addressing this issue, as it lacks the prosecutorial and police authority to handle criminal matters. Additionally, in many instances, witnesses have the right to refuse to testify under local laws, especially if their testimony regarding corruption could expose them to personal danger. This limitation was evident in the *Siemens* case, where the tribunal could not ascertain the existence of corruption until German prosecutors uncovered evidence.

1 *Siemens A.G. v Argentine Republic* (Award) ICSID Case No ARB/02/8 (6 February 2007).
2 R Torres-Fowler, 'Undermining ICSID: How the Global Antibribery Regime Impairs Investor State Arbitration' (2012) 52 Va J Intl L 1027.
3 Yin (n 19) 367.

The hidden nature of corroborative evidence presents another challenge for the tribunal in dealing with corruption. However, if there are indications of corruption, such as when a contracting party is from a country known for their active involvement in corruption cases, the tribunal may recognize corruption through these signs. Nonetheless, the tribunal must establish the point of origin for the corruption. Just as a foreign investor might bribe domestic officials to obtain permits, domestic authorities could also threaten investors with asset expropriation unless a bribe is paid. Moreover, home countries of investors, including the United States, often exert pressure on host states to secure investment contracts.

In cases where economic governance in the host state limits the issuance of mining permits to a select few annually, the investor may bear greater culpability for undermining competitive advantages of other investors. Additionally, bribery may be so entrenched in the host country's culture that it is perceived as a gift. If an investor pays money to expedite customs permits, they may feel compelled to do so.

In instances where corruption arises from the host state and the foreign investor is held hostage, the blame falls entirely on the host state. However, if bribery occurs solely to incentivize officials without directly impacting the investment contract's acquisition, the ICSID tribunal may not find evidence of corruption, as the necessary causal relationship would be absent. Ultimately, the tribunal must consider the nature of the bribery— whether it was paid to gain a competitive advantage or to disrupt the host country's laws. This assessment also requires attention to the host state's domestic laws, as in some jurisdictions, such as the United States, certain facilitation payments may be deemed acceptable under statutes like the Foreign Corrupt Practices Act.

References

Books

Llamzon AP, *Corruption in International Investment Arbitration* (Oxford University Press 2014) https://doi.org/10.1093/law/9780198714262.001.0001 accessed 20 November 2024.

Menaker A, *International Arbitration and the Rule of Law* (vol 19, Kluwer Law International 2017).

Rose-Ackerman S and Palifka BJ, *Corruption and Government* (2nd edn, Cambridge University Press 2016) https://doi.org/10.1017/cbo9781139962933 accessed 20 November 2024.

Teramura N, Nottage L and Jetin B, *Corruption and Illegality in Asian Investment Arbitration* (Springer Nature 2024) https://doi.org/10.1007/978-981-99-9303-1 accessed 20 November 2024.

Tussupov A, *Corruption and Fraud in Investment Arbitration* (Springer International Publishing 2022) https://doi.org/10.1007/978-3-030-90606-1 accessed 20 November 2024.

Articles

Busco P, 'The Defence of Illegality in International Investment Arbitration: A Hybrid Model to Address Criminal Conduct by the Investor, at the Crossroads between the Culpability Standard of Criminal Law and the Separability Doctrine of International Commercial Arbitration' (2018) https://theses.hal.science/tel-03494710 accessed 20 November 2024.

Dalir R, Delshad E and Amini I, 'Evaluation of Evidence and Standards of Proof in International Commercial Arbitration' [2023] 19 Comparative Law Quarterly 245 (In Persian).

Galagan D, 'Provisional Measures in International Arbitration as a Response to Parallel Criminal Proceedings' (University of Victoria 2019) http://hdl.handle.net/1828/10822 accessed 20 November 2024.

Mills K, 'Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto' (2006) 3 TDM 2.

Ong SS, 'Dismantling the Safe Harbour: Solving the Evidentiary Problems in Corruption Allegations in Investor-State Arbitration' (2019) SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.3708186accessed 20 November 2024.

Raeschke-Kessler H and Gottwald D, 'Corruption in Foreign Investment-Contracts and Dispute Settlement between Investors, States, and Agents' (2008) 9 Journal of World Investment & Trade 1.

Reisman DAA, 'Apportioning Fault for Performance Corruption in Investment Arbitration' (2021) 37 Arbitration International 1 https://doi.org/10.1093/arbint/aiaa044 accessed 20 November 2024.

Schill SW, 'Illegal Investments in Investment Treaty Arbitration' (2012) 11 Law & Practice of International Courts and Tribunals 281 https://doi.org/10.1163/157180312X640697 accessed 20 November 2024.

Torres-Fowler R, 'Undermining ICSID: How the Global Antibribery Regime Impairs Investor State Arbitration' (2012) Virginia Journal of International Law https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322129 accessed 20 November 2024.

Uilenbroek L, 'The Power of Investment Tribunals to Enjoin Domestic Criminal Proceedings' (2020) 36 Arbitration International 323 https://doi.org/10.1093/arbint/aiaa018 accessed 20 November 2024.

Valle MD and de Carvalho PS, 'Corruption Allegations in Arbitration: Burden and Standard of Proof, Red Flags, and a Proposal for Systematization' (2022) 39 Journal of International Arbitration 817.

Yan Y, 'Returning the Home State to the Global Anti-Corruption Campaign' (2023) 14 Journal of International Dispute Settlement 469 https://doi.org/10.1093/jnlids/idad016 accessed 20 November 2024.

Yin H, 'The ICSID Tribunals in Deciding International Investment Corruption Cases: Possible Solutions' (2020) 6 China and WTO Review 351 https://doi.org/10.14330/cwr.2020.6.2.05 accessed 20 November 2024.

Cases

EDF (Services) Ltd v Republic of Romania (ICSID Case No ARB/05/13, Procedural Order No 3, 29 August 2008)

Lao Holdings N.V. v Lao People's Democratic Republic (ICSID Case No ARB(AF)/12/6)

Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No ARB/06/2)

Siemens A.G. v. Argentine Republic (ICSID Case No ARB/02/8, Award, 6 February 2007)

Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan (ICSID Case No ARB/12/1)

Unión Fenosa Gas, S.A. v. Arab Republic of Egypt (ICSID Case No ARB/14/4)

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

A Comparative Study of the Burden of Proof in Claims Based on Scientific Evidence in Iranian and English Law

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Article Info

Article type:
Research Article

Article history:
Received
27 March 2025

Received in revised form
2 June 2025

Accepted
26 June 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3785.html

Keywords:
Burden of Proof, Criterion of Proof, Comparative Law, Scientific Evidence, Standard of Proof.

ABSTRACT

This study aims to identify the strengths and weaknesses of the Iranian and English legal systems regarding the use of scientific evidence and to propose solutions for overcoming obstacles to its acceptance. The results indicate that within Iranian law, the acceptance of scientific evidence is highly dependent on the judge's personal judgment and the principle of "the judge's personal knowledge," which can lead to contradictory opinions. By contrast, the English legal system employs stricter criteria, such as the Daubert principles, which have enhanced the accuracy of scientific evidence evaluation but have also resulted in more complex and costly processes. Both legal systems face challenges, including the potential misuse of scientific evidence and a lack of specialized training for judges and experts. The study concludes by suggesting that the Iranian legal system, drawing on the English experience, develop clear criteria for the acceptance of scientific evidence and standardize its evaluation process. Reforms have also been proposed for the English context to reduce costs and streamline procedures. The study highlights the importance of specialized judicial training and international cooperation for improving the efficiency of judicial systems.

Cite this article: Ghazanfari, A., & et al., (2025). A Comparative Study of the Burden of Proof in Claims Based on Scientific Evidence in Iranian and English Law, *Iranian Journal of International and Comparative Law*, 3(1), pp: 147-163.

10.22091/ijicl.2025.12647.1148
Publisher: University of Qom

Table of Contents

Introduction

Scientific evidence, as one of the most important means of proof in civil and criminal cases, plays a key role in ensuring a fair trial. Relying on modern technologies and specialized knowledge, this evidence helps improve the accuracy and credibility of the judicial process and can be a turning point in judges' decision-making, especially in complex cases such as those involving organized crime or medical issues.[1] However, the use of scientific evidence also presents several challenges. From a legal perspective, important questions arise regarding the validity, authenticity, and admissibility of this evidence. From an ethical perspective, issues related to privacy, the use of sensitive technologies, and the risk of misuse or abuse of scientific data require greater attention.[2]

Meanwhile, different legal systems, including Iranian and English law, have adopted different approaches to managing scientific evidence. In Iran, the strong reliance on the principle of "the judge's personal knowledge" and his decision-making role in the acceptance of scientific evidence allows for greater flexibility but also increases the risk of contradictory opinions. In England, by contrast, strict criteria such as the Daubert principles, which emphasize the reliability and dependability of scientific evidence, demonstrate a more systematic approach; however, this strictness may result in greater complexity and cost.

A comparative study of these two legal systems can help identify the strengths and weaknesses of each and propose solutions for improving judicial processes. Accordingly, the necessity for a comparative analysis in this study arises from the cultural, legal, and administrative differences between Iran and England. Examining these differences could lead to the development of more efficient approaches for the acceptance and use of scientific evidence.

This study attempts to examine the standards of proof in litigation based on scientific evidence from two perspectives: first, an analysis of the legal principles and standards in each legal system, and second, a practical assessment of the challenges in using this evidence. The research methodology is based on a comparative analysis of laws, a study of judicial procedures, and a review of relevant cases in both countries. The main research questions of this study are:

1 H Mohammadi, *Civil Procedure Code* (Danesh 2023) 34 [In Persian].

2 H Esmaili, *Civil Procedure: Merger and Separation of Claims* (Publishing Company 2022) 17 [In Persian].

What are the standards of proof for scientific evidence in civil and criminal litigation in Iran and the United Kingdom? What are the differences and similarities in the approaches of these two legal systems to scientific evidence? And how can the strengths of each system be utilized to improve judicial processes? By answering these questions, this study seeks to provide a foundation for effective changes in legal systems and to highlight the importance of scientific evidence in achieving judicial justice.

1. Review of Literature

1.1. Definition of Scientific Evidence

Scientific evidence is any information or data based on scientific principles, experimental tests, or expert analysis that can be used as a means of proof in civil and criminal cases.[1] This evidence includes various types of data, such as DNA tests, biometric analyses, digital data, forensic results, and expert technical analyses. What distinguishes scientific evidence from other forms of proof is its reliability, which is based on accepted and testable scientific principles. Due to its high accuracy and strong scientific support, scientific evidence plays a key role, especially in complex and specialized cases such as those involving organized crime, medical litigation, and cyber litigation.[2]

One of the most important characteristics of scientific evidence is its ability to be reviewed and verified by independent experts. This characteristic has led to the application of strict criteria for the acceptance and evaluation of this evidence in various legal systems. For example, in the English legal system, the Daubert principles establish a framework whereby scientific evidence is considered valid only if its testability, potential error rate, and general acceptance in the scientific community are confirmed.[3] In the Iranian legal system, scientific evidence is also used as a means of proof alongside conventional evidence such as confession, testimony, and oath; however, its position continues to face challenges due to the system's reliance on the principle of "the judge's personal knowledge" and the lack of clear acceptance criteria.[4]

1.2. Characteristics of Scientific Evidence: Accuracy, Reliability, and Expertise

Scientific evidence possesses unique characteristics that have made it a key tool in the litigation process. These characteristics include:

1.2.1. Accuracy

The accuracy of scientific evidence results from standardized processes and the use of advanced tools for data analysis. Scientific evidence, such as DNA testing or biometric data analysis, is designed based on scientific methodologies that minimize the possibility of error. For example, in criminal cases, DNA matching can determine the identity of the accused with a high degree of accuracy, which further emphasizes the role of scientific evidence in enhancing judicial justice.

1 J Levinson and others, 'Scientific Evidence in Courts of Law: An Overview' (2024) 22 Journal of Judicial Independence 140, 143.
2 T Albright, *A Scientist's Take on Scientific Evidence in the Courtroom* (University of St Louis 2023) 139.
3 D L Faigman, N Scurich and T D Albright, 'The need for anti-expert experts to rebut claims of junk forensic science' (2022) 46 Journal of Scientific American Law 37, 45.
4 M Haddadi, *International Arbitration in the Iranian Legal System* (Majd 2019) 78 [In Persian].

This high accuracy makes scientific evidence highly reliable in complex cases, particularly those where objective evidence is lacking.[1]

1.2.2. Reliability

The reliability of scientific evidence refers to the ability to obtain similar results under similar conditions upon repetition. In other words, if the scientific processes involved in producing the evidence are repeated, the results should be consistent and predictable. For example, in the English legal system, the Daubert principles emphasize that scientific evidence is considered valid only when its testability has been confirmed by the scientific community. This reliability allows judges and juries to place greater confidence in scientific evidence.[2]

1.2.3. Expertise

Scientific evidence is usually provided by professionals in various scientific fields. This characteristic indicates the direct dependence of scientific evidence on specialized knowledge and technical skills. For example, chemical tests or digital data analyses must be provided by experts who possess the necessary qualifications in that specific field. This expertise not only aids in the admissibility of scientific evidence in court but also plays an important role in the correct interpretation and effective use of this evidence during the trial process. The characteristics of accuracy, reliability, and expertise have made scientific evidence a powerful tool for discovering the truth.[3] However, these characteristics require careful management and clear criteria for acceptance and evaluation within legal systems. This issue becomes especially important in a comparative analysis of the legal systems of Iran and England, each of which has its own distinct criteria and challenges.

1.3. Definition of Burden of Proof and Related Standards

The burden of proof is the legal obligation of one party to a lawsuit to present sufficient evidence to the court to prove its claims. In civil and criminal litigation, the burden of proof determines which party is required to present evidence to establish liability or innocence.[4] This concept is divided into two parts:

- The burden of production (or going forward with the evidence): The duty to provide sufficient evidence to support the claim.
- The burden of persuasion: The duty to convince the judge or jury based on specified standards.[5]

In criminal litigation, the burden of proof rests primarily on the prosecution and must meet the "beyond a reasonable doubt" standard. In civil litigation, the burden of proof is usually on the claimant, and the common standard is the "balance of probabilities".[6]

1 R Shawa and others, 'A promising potential: Using the right to enjoy the benefits of scientific progress to advance public health in Africa' (2023) 23 African Human Rights Law Journal 30, 35.

2 E Cheng, *The Consensus Rule: A New Approach to Scientific Evidence* (Vanderbilt University Law School 2022) 415.

3 K Rao and others, 'Role of scientific evidence in the judiciary system: A Systematic Review' (2023) 17 Indian Journal of Forensic Medicine and Toxicology 79, 81.

4 N Scurich, D Faigman and T Albright, 'Scientific guidelines for evaluating the validity of forensic feature-comparison methods' (2023) 120 Journal of Law 112, 119.

5 G Eckhartt and G Ruxton, 'Investigating and preventing scientific misconduct using Benford's Law' (2023) 8 Journal of Research Integrity and Peer Review 68, 71.

6 M Zhu and L Fan, 'A comparative study of the judicial construction of scientific credibility in climate litigation' (2024) 33 Review of

Standards of proof refer to the degree of certainty and the quantum of evidence that must be presented to convince a judge or jury. The main standards include the following:

- **Beyond a reasonable doubt:** This standard represents the highest level of proof in criminal cases. Under this standard, the prosecution is required to present evidence that eliminates any reasonable doubt regarding the defendant's guilt. This standard is used to prevent wrongful convictions in criminal cases.[1]
- **Balance of probabilities (Preponderance of the evidence):** This standard is typically used in civil cases and requires a party to present evidence demonstrating that its claim is more likely true than not. In other words, the burden of proof is met if there is a greater than 50% chance that the claim is true.[2]
- **Clear and convincing evidence:** This standard is higher than the "balance of probabilities" but lower than "beyond a reasonable doubt." It is usually employed in specific civil cases, such as those involving family law or constitutional rights. It requires that the evidence presented provides a high degree of certainty to the judge.[3]
- **Judge's personal knowledge (Ilm-e Qazi):** In the Iranian legal system, particularly in criminal cases, the principle of "the judge's personal knowledge" plays an important role in determining the burden of proof. This principle allows the judge to reach a decision based on his or her personal knowledge or perception of the evidence.[4]

The burden of proof and its related standards are fundamental pillars of legal systems and play a crucial role in ensuring justice and preventing miscarriages of justice. The difference between the standards of proof in civil and criminal cases reflects a balance between protecting the rights of the claimant and those of the accused.[5] A comparative analysis of these standards in the legal systems of Iran and the United Kingdom provides valuable insights into the challenges and practical solutions related to this issue.

1.4. Difference Between the Standards of "Beyond a Reasonable Doubt" and "Balance of Probabilities"

1.4.1. Beyond a Reasonable Doubt

This standard represents the highest level of proof in criminal cases and protects the accused from unjust convictions. According to this standard, the prosecution must present evidence that eliminates any reasonable doubt in the mind of the judge or jury regarding the guilt of the accused. This doubt must be so insignificant that it cannot be considered reasonable. The purpose of this standard is to prevent wrongful convictions and to ensure the maximum protection of the rights

European, Comparative & International Environmental Law 250, 256.

1 K Ruggeri and others, 'A synthesis of evidence for policy from behavioural science during COVID-19' [2024] Journal of Private Law 134, 138.

2 H Keller and P Ganesan, 'The Use of Scientific Experts in Environmental Cases before the European Courts of Human Rights' (2024) 73 International and Comparative Law Quarterly 997, 1007-1008.

3 C Castelliano, P Grajzl and E Watanabe, 'Does electronic case-processing enhance court efficacy? New quantitative evidence' (2023) 40 Government Information Quarterly 276, 281.

4 B L Garrett, N Scurich and W E Crozier, 'Mock jurors' evaluation of firearm examiner testimony' (2020) 44 Journal of Law and Human Behavior 412, 416.

5 L Chauhan, 'Admissibility and Evidentiary Value of Scientific Evidence: Legislative and Judicial Approach in India' (2023) 8 International Journal for Research Trends and Innovation 145, 152.

of the accused.[1] Due to the high sensitivity of criminal cases and their grave consequences, this standard is used to ensure justice in criminal proceedings.[2]

1.4.2. Balance of Probabilities (Preponderance of the Evidence)

This standard is commonly used in civil cases and means proving that the probability of one party's claim being true is greater than the probability of the other party's claim being true. To meet this standard, it is sufficient for the claimant to present evidence that would convince the judge that his or her claim is even slightly (for example, 51 percent) more likely than the defendant's claim.[3] This lower level of certainty is appropriate for civil cases where the legal consequences are not as severe as in criminal cases.

The fundamental difference between the two standards is the level of certainty required to prove a claim. In criminal cases, the proof must reach a much higher level of certainty due to the serious risks associated with conviction. In contrast, in civil cases, which are more concerned with compensation, the "balance of probabilities" standard is deemed sufficient.

1.5. The Role of Scientific Evidence in Determining the Burden of Proof

Scientific evidence, especially in complex cases, can play a crucial role in meeting the standards of proof. Due to its high accuracy and reliability, this type of evidence can convince a judge or jury of the truth of a claim.

1.5.1. In Criminal Cases

Under the "beyond a reasonable doubt" standard, scientific evidence can play an important role in eliminating reasonable doubt. For example, DNA or fingerprint matching in criminal cases is commonly used as conclusive evidence to prove guilt or innocence.[4] This evidence can provide the necessary certainty for the conviction or acquittal of the accused, surpassing oral or non-scientific claims.

1.5.2. In Civil Cases

In civil cases where the "balance of probabilities" standard prevails, scientific evidence can play a decisive role in supporting the claimant's claim. For example, medical evidence in compensation cases or digital data in commercial litigation can elevate the probability of the claimant's claim to the level required to meet this standard.[5]

Despite its key role, the acceptance of scientific evidence also presents challenges. For example, in Iran, the role of "the judge's personal knowledge" as a primary criterion for decision-making can sometimes lead to a subjective assessment of scientific evidence. In the UK, stricter standards such as the Daubert principles are applied, which require the testability and confirmation of evidence by the scientific community.[6]

1 B Eze, 'An Overview of the Impact of the Evidence (Amendment)Act 2023 on Legal Proceedings in Nigeria' [2023] Journal of Law 1, 8.
2 O Khalifa, A Yaacob and I Masri, 'The Modern Scientific Proofs and their Authenticity in Criminal Evidence: Literature Review' (2023) 13 International Journal of Academic Research in Business and Social Sciences 970, 974.
3 P Roberts, 'Theorising Evidence Law' (2023) 43 Oxford Journal of Legal Studies 629, 635.
4 Ruggeri and others (n 13) 140.
5 Zhu & Faan (n 12) 258.
6 P Adams, *President of the Supreme Court of the United Kingdom; How do Judges Decide Cases in the Judicial Committee of the Privy Council?* (University of the West Indies 2024) 173.

1.6. The Role of Scientific Evidence in the Evolution of Standards of Proof

1.6.1. How Conventional Standards of Proof Changed with the Introduction of Scientific Evidence

The introduction of scientific evidence into legal processes has significantly affected conventional standards of proof, which were mainly based on evidence such as confessions, testimonies, and documents. In conventional legal systems, proving a case relied more heavily on non-scientific evidence such as eyewitness testimony or documentary evidence, which in some cases was erroneous or contradictory.[1] With the advent of advanced technologies and scientific evidence, standards of proof have moved towards accepting tools that are more accurate and reliable.

For example, in criminal cases, the use of DNA to identify a defendant or victim has created a significant evolution in the "beyond a reasonable doubt" standard. This evidence, due to its strong scientific support and testability, is more accurate than conventional evidence and reduces the possibility of judicial errors.[2] In civil litigation, the use of scientific analysis in fields such as medicine, the environment, or information technology has transformed the criteria for evaluating claims.[3] For instance, in lawsuits related to environmental damages, scientific data on pollution or environmental harm have played a decisive role in proving claims.

These changes, especially in the English legal system with the introduction of principles such as Daubert for evaluating scientific evidence, indicate a move towards accepting evidence that is scientifically testable, reliable, and relevant to the subject of the lawsuit.[4] In Iran, although the principle of "the judge's personal knowledge" remains central to decision-making, scientific evidence has gradually gained greater standing, and its impact on the evolution of the standards of proof is visible.[5]

1.6.2. Challenges to Accepting Scientific Evidence as a Tool of Conclusive Proof

Despite the undeniable advantages of scientific evidence, its acceptance as a tool of conclusive proof faces several challenges. These challenges are divided into two general categories: operational challenges and legal-philosophical challenges.

1.6.2.1. Operational challenges

One of the most important challenges is the technical and specialized complexity of scientific evidence, which may be difficult for judges and juries to understand. Insufficient familiarity with scientific principles or related technologies can lead to misunderstanding or incorrect evaluation of this evidence. For example, in DNA cases, errors in analysis or interpretation of results can lead to incorrect judicial conclusions.[6] Furthermore, the high cost of analyzing and presenting scientific evidence, especially in complex cases, is another challenge that may prevent its widespread use. For instance, in civil cases, the party with the greater financial ability to provide scientific evidence may gain an unfair advantage.[7]

1 R Shokri, *Privacy in Iranian and English Criminal Law* (Majd 2018) 13 [In Persian].
2 N Cross, *Criminal Law & Criminal Justice: An Introduction* (tr Amir Etemadi, Majd 2019) 231 [In Persian].
3 J Mansour, *Code of Procedure of General and Revolutionary Courts (in Civil Matters)* (Doran 2025) 106 [In Persian].
4 J Spark, *Sentencing in English Criminal Law* (tr Reza Ehsanpour, Mehrsa 2020) 57.
5 E Firuzian Haji, *Comparative Studies of the Prosecutor in the Iranian Legal System and the International Criminal Court* (Mahris 2023) 28 [In Persian].
6 E Sipiorski, *Scientific Knowledge: Its Impacts on Judicial Decision-Making and International Law in the Era of Sustainability* (Tilburg University 2023) 135.
7 C Dawson and others, 'Evidence-based scientific thinking and decision-making in everyday life' (2024) 9 Journal of Cognitive Research Principles and Implications 50, 54.

1.6.2.2. Legal and philosophical challenges

From a legal perspective, the main challenge to accepting scientific evidence as a definitive means of proof is establishing standards that can ensure the validity and relevance of the scientific evidence presented. For example, in the English legal system, challenges have been raised regarding the testability and relevance of scientific evidence to the subject of the dispute, which necessitates a review and updating of the laws.[1] In the Iranian legal system, reliance on the "judge's personal knowledge" may cause scientific evidence to be considered merely as one piece of evidence alongside other conventional evidence, which can diminish its value in some cases.[2] From a philosophical perspective, some critics argue that accepting scientific evidence as a definitive means of proof can jeopardize the principle of a fair trial, because in some cases scientific evidence may not fully clarify all aspects of a case.[3]

2. Scientific Evidence in the Iranian Legal System

2.1. Burden of Proof in Lawsuits Based on Imamiyyah Jurisprudence

2.1.1. Evidence to Prove a Claim in Civil Matters

Civil lawsuits are lawsuits that are filed in a public court and are mostly related to damages and compensation. In fact, crimes and punishments are not addressed in civil lawsuits. According to Article 1258 of the Iranian Code of Civil Procedure, evidence to prove a claim in civil matters includes the following:

- **Confession:** Confession is among the evidence to prove a claim in both civil and criminal matters. A confession in a civil lawsuit means that a person states a matter that is to his own detriment and to the benefit of another, provided that the confessor is of legal age, mature, and acting freely; an immature's confession is not admissible in financial affairs. If one of the litigants confesses to his own detriment, the other party is no longer required to provide evidence or proof.
- **Written documents:** The most important evidence to prove a claim in a civil lawsuit is a document. In evidence law, a document is any written instrument that can be relied upon and accepted by the court as evidence to prove a claim and establish a right.
- **Testimony:** Another form of evidence in both civil and criminal matters is testimony. If the claim cannot be proven by confession or the presentation of a document, witnesses can be summoned to testify. Testimony in civil matters means that a person who has heard or seen something related to the subject of the claim, whether by accident or design, is asked to state what he knows in court. The witness must be mature, sane, Muslim, believing, and just.
- **Oath:** An oath is the least used form of evidence in civil law to prove a claim and is mostly used to conclude a dispute. If the claimant does not have evidence to prove his claim and the other party denies it, the claimant can request that the denier take an oath.

1 M Medvedeva and P McBride, *Legal Judgment Prediction: If You Are Going to Do It, Do It Right*(Leiden University 2023) 77.
2 Firuzian (n 28) 83.
3 M Thomaidou and C Berryessa, 'Bio-behavioral scientific evidence alters judges' sentencing decision-making: A quantitative analysis' (2024) 95 International Journal of Law and Psychiatry 1, 8.

- **Judicial evidence (Persuasion of the judge - Qana'at-e Qazi):** This refers to circumstances and factors that, in the opinion of the judge or a judicial officer, constitute evidence of a matter. Although not listed as independent evidence to prove a claim, judicial evidence assists the judge in understanding the matter and influences his decision in issueing a verdict. Cases such as expert opinions, local investigations, and inspections are among judicial evidence.[1]

2.1.2. Evidence to Prove a Claim in Criminal Matters

Criminal claims are claims that are brought in the prosecutor's office or criminal court as a result of an alleged crime. The methods for proving a crime and defending against an allegation in criminal matters are specified in the Code of Criminal Procedure. According to this Code, the ways to prove a crime and the evidence to prove a claim in criminal matters are:

- **Confession:** Confession is one of the common forms of evidence to prove a claim in both civil and criminal matters. It is a method of proving a crime in which the accused or perpetrator declares that he committed the crime. The number of confessions required in criminal matters, unlike in civil matters, varies depending on the type of crime committed. Some crimes are proven with a single confession, others with two, and some require four confessions.
- **Testimony:** Testimony in a criminal case means that someone other than the two parties to the case states in court whether or not the crime was committed by the defendant or provides information on any other matter related to the crime.
- **Oath:** An oath in criminal matters means that the person swearing takes God as a witness that he is telling the truth. Taking an oath in criminal cases has specific conditions that must be observed. The oath must be taken in the name of God (Allah) or one of the specific attributes of God Almighty. It should be noted that, as in the principle "the burden of proof is upon the claimant and the oath is upon the denier," it is the claimant's responsibility to present evidence and the denier's responsibility to take an oath.
- **The personal knowledge of the judge (Ilm-e Qazi):** The knowledge of the judge means that the judge, based on a body of information, becomes certain about the case in question and can rule based on that certainty. Among the things that inform a judge are expert opinions, local investigations, statements from informed sources, and reports from judicial officers, such as the police and Basij forces.[2]

2.2. The Position of Scientific Evidence in Iranian Laws (such as the Islamic Penal Code and the Code of Criminal Procedure)

Scientific evidence is recognized in the Iranian legal system as one of the means of proof alongside other evidence such as confession, testimony, and oath. In the Islamic Penal Code (2013), Article 160 refers to the types of evidence in criminal cases and also introduces the "personal knowledge

1 M R Mousavifard, *Islamic Criminology* (Majd 2018) 107-110 [In Persian].
2 Mohammadi (n 1) 263-266.

of the judge" as a legal tool for decision-making. This knowledge can be based on scientific evidence. Specifically, Article 211 of the said law stipulates that the personal knowledge of the judge must be based on evidence and documents that are logically and rationally acceptable.[1]

In the Code of Criminal Procedure, various articles refer to the use of scientific evidence. For example, Article 194 addresses the manner in which evidence is presented and evaluated by the parties to the dispute and emphasizes the use of specialized expertise and scientific evidence. Also, Article 158 allows the judge to employ official experts to accurately evaluate scientific evidence.[2]

2.3. The Role of the Judge in Evaluating Scientific Evidence Based on the Principle of "Judge's Personal Knowledge"

In the Iranian legal system, the principle of "the judge's personal knowledge" holds a special place as one of the criteria for judicial decision-making. According to Article 211 of the Islamic Penal Code, a judge can issue a ruling based on knowledge derived from the available evidence and documents. This knowledge can also originate from scientific evidence, provided that this evidence is valid and logical.[3] However, the judge's role in evaluating scientific evidence, due to its dependence on judicial knowledge and experience, presents challenges. For example, the judge may lack the specialized knowledge necessary to analyze and interpret complex scientific evidence such as DNA analysis or digital data. In such cases, it is necessary to rely on the opinion of official judicial experts. This issue is also emphasized in Article 158 of the Code of Criminal Procedure, which states that the evaluation of scientific evidence should be carried out using expert opinions.[4]

2.4. Examples of Iranian Judicial Cases Using Scientific Evidence

Scientific evidence has played a key role in many Iranian judicial cases. One of the most prominent examples is cases related to identification based on DNA testing. This type of evidence has been widely used in family lawsuits, such as those involving the proof or denial of lineage. For example, in one lineage case, the court ruled to accept the claimant's claim based on DNA testing because the scientific results presented could definitively prove the biological relationship between the parties.[5] Also, in criminal cases, scientific evidence such as fingerprints, crime scene analysis in murder cases, and examination of digital data have played an important role in proving the guilt or innocence of the accused. For instance, in a cybercrime case, data collected from the defendant's mobile phone and its comparison with technical reports was the main factor in issuing a conviction.[6]

2.5. Challenges in Admitting Scientific Evidence in Iran

2.5.1. Legal and Procedural Limitations

One of the most important challenges regarding the admissibility of scientific evidence in the Iranian legal system is the lack of clear and comprehensive laws to regulate the admission and use

1 M Ashouri, *Criminal Procedure* (SAMT 2021) 71 [In Persian].
2 A Ghafouri, *Criminal Procedure Code* (Ariadad 2023) 62-63 [In Persian].
3 J Nikbakhti, *Code of Criminal Procedure* (Majd 2022) 142 [In Persian].
4 B Pourghahremani, *Restitution of Trial in Criminal Matters* (Khorsandi 2024) 85 [In Persian].
5 A Zeraat, *Principles of Iranian Criminal Procedure* (Majd 2021) 102 [In Persian].
6 M Abazari Fumshi, *Practical Method of Preparing and Writing Various Types of Defense Bills in Criminal Matters* (Khorsandi 2022) 27.

of this type of evidence. Existing laws, such as the Islamic Penal Code and the Code of Criminal Procedure, albeit refering to the admission of scientific evidence, do not provide clear and specific criteria for assessing its accuracy and reliability. For example, Article 211 of the Islamic Penal Code allows a judge to issue a verdict based on personal knowledge, but this knowledge can be based on a personal perception of scientific evidence, which increases the possibility of errors in its interpretation.[1] Furthermore, judicial procedures in many cases lack sufficient transparency, and the absence of standard guidelines for the use of scientific evidence causes courts to act in a discretionary and inconsistent manner. These limitations are particularly evident in complex cases, such as cyber litigation or forensic cases.[2]

2.5.2. The Role of Conflict Between Conventional Evidence (Testimony, Confession) and Scientific Evidence

Due to its jurisprudential and conventional roots, the Iranian legal system has always emphasized evidence such as confession, testimony, and oath. Although these forms of evidence have an important place in proceedings, they sometimes conflict with scientific evidence. For example, in cases related to proving lineage, scientific evidence such as DNA testing can reach conclusions contrary to the testimony of witnesses or oaths. In such cases, judges may be hesitant about which type of evidence to rely upon.[3] This conflict is particularly challenging in criminal cases, where the guilt or innocence of the accused depends heavily on the quality of the evidence. For instance, in murder cases, scientific evidence such as fingerprints or forensic analyses may conflict with witness testimony. The lack of a clear legal framework for prioritizing evidence can cause the judge to either lean toward conventional evidence or disregard scientific evidence.

2.5.3. Issues Related to Training Judges and Experts in Interpreting Scientific Evidence

One of the major challenges in accepting scientific evidence in Iran is the lack of specialized training for judges and judicial experts in analyzing and interpreting this evidence. Judges usually do not possess in-depth knowledge of empirical sciences or new technologies, and this can lead to the incorrect evaluation or rejection of scientific evidence. For example, in cybercrime cases, digital data presented as scientific evidence may not be used properly due to an inability to understand its nature. On the other hand, official judicial experts tasked with analyzing scientific evidence sometimes lack the necessary training to provide clear and understandable reports to the courts. This can confuse judges and ultimately reduce confidence in scientific evidence. Developing training courses for judges and experts and establishing clear standards for scientific reporting could help to reduce this challenge.

2.6. Scientific Evidence in the English Legal System

2.6.1. Accepted Principles for Evaluating Scientific Evidence in the English Legal System, such as the Frye and Daubert Standards

The English legal system employs specific principles and criteria for evaluating and accepting scientific evidence in court. Two important standards that have played a role in evaluating this evidence are the Frye Standard and the Daubert Standard.

1 Mohammadi (n 1) 241.
2 Pourghahremani (n 39) 174.
3 A Shakeri, *Criminal Procedure Code of Arrest in Iranian Criminal Procedure* (Majd 2018) 58 [In Persian].

- **Frye Standard:** This standard, first articulated in the case of *Frye v. United States*,[1] states that scientific evidence is only admissible if it is based on principles that are generally accepted within the relevant scientific community. This standard emphasizes scientific consensus and was influential for years in various legal systems, including England's.
- **Daubert Standard:** The Daubert standard, established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*,[2] emphasizes four main factors:
    - The testability of the theory or technique used;
    - The known or potential rate of error;
    - The peer review and publication status of the theory or technique;
    - The general acceptance of the theory or technique in the relevant scientific community.[3]

This standard, which remains influential in the UK today, emphasizes the quality and scientific validity of the evidence and represents a stricter approach than Frye. In the UK, the Daubert principles are utilized in a modified form within judicial procedures. Before admitting scientific evidence, the judge must consider whether this evidence is based on valid scientific methods and whether it is relevant to the case.[4]

2.6.2. The Role of the Jury and the Judge in Accepting and Evaluating Scientific Evidence

In the English legal system, the roles of the judge and the jury in evaluating scientific evidence are distinct:

- **The Role of the Judge:** The judge acts as a «gatekeeper» and has the duty to assess the validity, reliability, and relevance of scientific evidence *before* it is presented to the jury. The judge must ensure that the scientific evidence presented meets the required legal standards and will not unfairly influence the jury's decision.
- **The Role of the Jury:** The jury›s primary task is to determine the facts of the case. It receives and evaluates scientific evidence only after the judge›s approval for its admission. Since jurors typically lack scientific expertise, it is the judge›s responsibility to explain this evidence in comprehensible language. This is particularly challenging in complex cases, such as those involving forensic science or cybercrime.[5]

2.6.3. Examples of Court Cases in England Where Scientific Evidence Played a Key Role

- ***R v. Adams*:**[6] This case is one of the most famous early uses of DNA evidence in England. Scientific evidence was used as conclusive proof to connect the defendant

1 *Frye v United States 293 F 1013 (DC Cir 1923).*
2 *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 US 579 (1993).
3 K Lesciotto and A Christensen, 'The over-citation of Daubert in forensic anthropology' (2023) 69 Journal of Forensic Legal Science 19, 22.
4 C Leonhard, 'Through Smoke and Mirrors: Excluding Malingering Expert Testimony Under the Daubert Standard' (2024) 59 Georgia Law Review 1, 15.
5 M Behrens, *A Brief Guide to the 2023 Amendments to the Federal Rules of Evidence* (The Federalist Society 2024) 7-8.
6 *R v Adams (G W)* [1996] 3 SCR 101.

to the crime scene. The court stressed that scientific evidence must be considered alongside other evidence to avoid potential bias.

- ***R v. Clark*:**[1] In this case, flawed scientific evidence relating to statistical and forensic analysis concerning the deaths of two children led to the wrongful conviction of the accused. The case highlighted the critical importance of careful scrutiny and an understanding of the limitations of scientific evidence, leading to a revision of the criteria for its assessment in the UK.[2]
- ***R v. T*:**[3] This case concerned the use of shoeprint evidence at a crime scene. The court stressed that scientific evidence must not only be scientifically valid but also relevant and clearly understandable in relation to the facts of the case.[4]

2.6.4. Challenges in English Law

2.6.4.1. Complexity of Scientific Evidence and the Risk of Jury Misinterpretation

A fundamental challenge in the English legal system is the complexity of scientific evidence, which can lead to jury misinterpretation. Juries are usually composed of laypeople who lack specialist scientific or technical knowledge, whereas evidence such as DNA analysis, biometric data, or statistical studies often requires in-depth expertise. This lack of technical knowledge can result in juries either failing to understand the evidence properly or being overly influenced by it, potentially leading to unfair decisions. For example, in *R v. Adams*, the use of DNA evidence led to significant debate over its assessment, as the jury struggled to understand the associated statistical probabilities. This demonstrates that scientific evidence, while a powerful tool, can lead to unjust outcomes if not interpreted correctly.[5]

2.6.4.2. Costs and Time-Consuming Nature of Using Scientific Evidence

Scientific evidence often requires sophisticated equipment, complex analytical methods, and the expertise of professional specialists, which can make its use costly and time-consuming. In UK criminal and civil litigation, the expenses associated with analyzing scientific evidence, such as DNA testing, digital data analysis, or crime scene reconstruction, can prevent its widespread use. This challenge is particularly acute when the parties have unequal financial resources. In such instances, the party that cannot afford the costs of scientific analysis may be at a serious disadvantage, potentially jeopardizing the fairness of the proceedings.[6] The time-consuming nature of scientific processes can also cause significant delays in judicial proceedings. For example, conducting complex forensic tests or analyzing large volumes of digital data can take weeks or even months. These delays not only prolong the trial process but also impose additional costs on the judicial system.[7]

1 *R v Clark* [2003] EWCA Crim 1020.
2 M Dembour, 'The Evidentiary System of the European Court of Human Rights in Critical Perspective' (2023) 4 Journal of European Convention on Human Rights Law Review 363, 368.
3 *R v T* [2010] EWCA Crim 2439.
4 Lesciotto & Christensen (n 47) 27.
5 Sipiorski (n 29) 63.
6 L Bachmaier, 'Mutual Admissibility of Evidence and Electronic Evidence in the EU' (2023) 26 European Journal of Law 223, 227.
7 J Rwetembula, 'Legal and Practical Challenges for the Admissibility of Artificial Intelligence (AI) Evidence in Criminal Proceedings in Mainland Tanzania' (2024) 7 East African Journal of Law and Ethics 136, 139.

2.6.5. Legal Restrictions on the Admission of Certain Scientific Evidence

In English law, although principles such as Daubert and Frye are used to evaluate scientific evidence, legal restrictions on its admission remain. A primary restriction is the requirement that scientific evidence must be both relevant and reliable. If it fails to meet these criteria, the judge can exclude it from being presented to the jury.[1] Furthermore, new or novel scientific evidence may be rejected due to a lack of acceptance within the relevant scientific community or insufficient validation. For example, the use of some emerging biometric techniques or data from new technologies may not be admitted due to an absence of extensive scientific background and testing.[2] Additionally, existing UK laws sometimes fail to keep pace with rapid technological advancements. This creates difficulties for courts when assessing cutting-edge scientific evidence that has not yet been subjected to established standards. This challenge is particularly evident in cases involving cybercrime and complex digital data analysis.[3]

Discussion and Conclusion

In recent years, both the Iranian and English legal systems have recognized the growing importance of scientific evidence in civil and criminal proceedings and have attempted to utilize this tool to achieve justice. In both systems, scientific evidence has been employed to reduce judicial errors and increase the accuracy of judicial decisions. However, common challenges persist, including the difficulty judges and juries face in understanding complex scientific evidence and the need to establish appropriate structures for the admission and evaluation of this type of evidence.

One of the main differences between Iranian and English law is the central role of the judge's personal knowledge in Iran versus the role of the jury in England. In Iran, decision-making depends largely on the judge's personal judgment, while in England, the jury, guided by the judge, is responsible for evaluating scientific evidence. This difference in the decision-making structure significantly impacts the outcome of trials, especially in complex scientific cases. Furthermore, the standards for admitting evidence in the UK are stricter, with criteria such as those derived from Daubert being applied, whereas in Iran such explicit and strict standards are absent. The common law tradition in the UK, which is based on case law and flexibility, creates important distinctions in the application of scientific evidence compared to the Iranian legal system, which is based more on codified statutes. These differences significantly impact trial outcomes. The UK system, with its stricter approach and extensive use of scientific standards, offers greater precision in assessing scientific evidence but may render trial processes more complex and costly. In contrast, in Iran, greater flexibility in judicial decision-making can facilitate quicker case resolution but also carries a greater risk of bias and misuse of scientific evidence.

Common Challenges

Both the Iranian and UK legal systems face similar challenges:

- The analysis of scientific evidence is often costly and time-consuming, which can place a heavy financial burden on litigants and the judicial system.

1 T O'Brien, S Hawkins and A Loesch, 'Scientific Disciplines and the Admissibility of Expert Evidence in Courts' (2022) 14 Sage Law Journal 11, 19.
2 T Ward and A Ferguson, 'Proof of foreign law: a reduced role for expert evidence?' (2024) 20 Journal of Private International Law 95, 100.
3 D Brodowski, *Admissibility of Evidence in EPPO Proceedings* (SAGE 2023) 191-192.

- There is a risk of bias in interpreting scientific evidence, particularly in cases where judges or juries lack sufficient expertise.
- A shortage of trained professionals in areas related to scientific evidence can affect the accuracy and efficiency of the judicial system.

Suggestions for Improving Practices

To address these challenges and promote the effective use of scientific evidence, the following measures are suggested:

- **Reform Iranian law:** It is necessary to define clear and standardized criteria for the admission of scientific evidence to reduce ambiguity in judicial decision-making.
- **Specialized training:** Advanced training courses for judges and legal experts in both countries are essential. This training should focus on fostering a better understanding of scientific evidence and its evaluation.
- **Increasing international cooperation:** Establishing legal and scientific cooperation between Iran and the UK could facilitate the exchange of knowledge and experiences regarding scientific evidence. Furthermore, efforts to harmonize standards with international best practices could improve the quality and efficiency of judicial processes.

This research has shown that scientific evidence is recognized as a key tool for ensuring justice in both the Iranian and English legal systems. However, structural differences and practical challenges in admitting and evaluating this evidence persist. The Iranian legal system could operate more efficiently by leveraging the UK's experiences in standardizing scientific evidence and developing clearer legal frameworks. Conversely, the UK could consider incorporating greater flexibility in dealing with scientific evidence to simplify its judicial processes and reduce costs. Establishing a common framework and harmonized standards for evaluating scientific evidence could represent an important step towards enhancing judicial justice in both countries.

References

Books

Abazari Fumshi M, *Practical Method of Preparing and Writing Various Types of Defense Bills in Criminal Matters* (Khorsandi, Tehran 2022) [In Persian]

Adams P, *President of the Supreme Court of the United Kingdom; How do Judges Decide Cases in the Judicial Committee of the Privy Council?* (University of the West Indies, Mona 2024)

Albright T, *A Scientist's Take on Scientific Evidence in the Courtroom* (University of St. Louis, Washington 2023)

Ashouri M, *Criminal Procedure* (SAMT, Tehran 2021) [In Persian]

Behrens M, *A Brief Guide to the 2023 Amendments to the Federal Rules of Evidence* (The Federalist Society, New York 2024)

Brodowski D, *Admissibility of Evidence in EPPO Proceedings* (SAGE, London 2023)

Cheng E, *The Consensus Rule: A New Approach to Scientific Evidence* (Vanderbilt University Law School, Nashville 2022)

Cross N, *Criminal Law & Criminal Justice: An Introduction* (tr Amir Etemadi, Majd, Tehran 2019)

Esmaili H, *Civil Procedure: Merger and Separation of Claims* (Publishing Company, Tehran 2022) [In Persian]

Firuzian Haji E, *Comparative Studies of the Prosecutor in the Iranian Legal System and the International Criminal Court* (Mahris, Tehran 2023) [In Persian]

Ghafouri A, *Criminal Procedure Code* (Ariadad, Tehran 2023)

Haddadi M, *International Arbitration in the Iranian Legal System* (Majd, Tehran 2019) [In Persian]

Mansour J, *Code of Procedure of General and Revolutionary Courts (in Civil Matters)* (Doran, Tehran 2025)

Medvedeva M and McBride P, *Legal Judgment Prediction: If You Are Going to Do It, Do It Right*(Leiden University, Rapenburg 2023)

Mohammadi H, *Civil Procedure Code* (Danesh, Tehran 2023) [In Persian]

Mousavifard MR, *Islamic Criminology* (Majd, Tehran 2018) [In Persian]

Nikbakhti J, *Code of Criminal Procedure* (Majd, Tehran 2022) [In Persian]

Pourghahremani B, *Restitution of Trial in Criminal Matters* (Khorsandi, Tehran 2024) [In Persian]

Shakeri A, *Criminal Procedure Code of Arrest in Iranian Criminal Procedure* (Majd, Tehran 2018) [In Persian]

Sipiorski E, *Scientific Knowledge: Its Impacts on Judicial Decision-Making and International Law in the Era of Sustainability* (Tilburg University, Tilburg 2023)

Spark J, *Sentencing in English Criminal Law* (tr Reza Ehsanpour, Mehrsa, Tehran 2020)

Zeraat A, *Principles of Iranian Criminal Procedure* (Majd, Tehran 2021) [In Persian]

Articles

Bachmaier L, 'Mutual Admissibility of Evidence and Electronic Evidence in the EU' (2023) 26 European Journal of Law 223 https://doi.org/10.30709/eucrim-2023-019

Castelliano C, Grajzl P and Watanabe E, 'Does electronic case-processing enhance court efficacy? New quantitative evidence' (2023) 40 Government Information Quarterly 276 https://doi.org/10.1016/j.giq.2023.101861

Chauhan L, 'Admissibility and Evidentiary Value of Scientific Evidence: Legislative and Judicial Approach in India' (2023) 8 International Journal for Research Trends and Innovation 145

Dawson C and others, 'Evidence-based scientific thinking and decision-making in everyday life' (2024) 9 Journal of Cognitive Research Principles and Implications 50 https://doi.org/10.1017/S1930297500001455

Dembour M, 'The Evidentiary System of the European Court of Human Rights in Critical Perspective' (2023) 4 Journal of European Convention on Human Rights Law Review 363 https://doi.org/10.1017/9781780685175

Eckhartt G and Ruxton G, 'Investigating and preventing scientific misconduct using Benford's Law' (2023) 8 Journal of Research Integrity and Peer Review 68 https://doi.org/10.1016/j.respol.2020.104084

Eze B, 'An Overview of the Impact of the Evidence (Amendment)Act 2023 on Legal Proceedings in Nigeria' [2023] Journal of Law 1

Faigman DL, Scurich N and Albright TD, 'The need for anti-expert experts to rebut claims of junk forensic science' (2022) 46 Journal of Scientific American Law 37 https://doi.org/10.1073/pnas.2301839120

Garrett BL, Scurich N and Crozier WE, 'Mock jurors' evaluation of firearm examiner testimony' (2020) 44 Journal of Law and Human Behavior 412 https://doi.org/10.1037/lhb0000423

Keller H and Ganesan P, 'The Use of Scientific Experts in Environmental Cases before the European Courts of Human Rights' (2024) 73 International and Comparative Law Quarterly 997 https://doi.org/10.1017/S0020589324000356

Khalifa O, Yaacob A and Masri I, 'The Modern Scientific Proofs and their Authenticity in Criminal Evidence: Literature Review' (2023) 13 International Journal of Academic Research in Business and Social Sciences 970 https://doi.org/10.47667/ijppr.v4i1.188

Leonhard C, 'Through Smoke and Mirrors: Excluding Malingering Expert Testimony Under the Daubert Standard' (2024) 59 Georgia Law Review 1

Lesciotto K and Christensen A, 'The over-citation of Daubert in forensic anthropology' (2023) 69 Journal of Forensic Legal Science 19

Levinson J and others, 'Scientific Evidence in Courts of Law: An Overview' (2024) 22 Journal of Judicial Independence 140

O'Brien T, Hawkins S and Loesch A, 'Scientific Disciplines and the Admissibility of Expert Evidence in Courts' (2022) 14 Sage Law Journal 11

Rao K and others, 'Role of scientific evidence in the judiciary system: A Systematic Review' (2023) 17 Indian Journal of Forensic Medicine and Toxicology 79

Roberts P, 'Theorising Evidence Law' (2023) 43 Oxford Journal of Legal Studies 629

Ruggeri K and others, 'A synthesis of evidence for policy from behavioural science during COVID-19' [2024] Journal of Private Law 134

Rwetembula J, 'Legal and Practical Challenges for the Admissibility of Artificial Intelligence (AI) Evidence in Criminal Proceedings in Mainland Tanzania' (2024) 7 East African Journal of Law and Ethics 136 https://doi.org/10.37284/eajle.7.1.2431

Scurich N, Faigman D and Albright T, 'Scientific guidelines for evaluating the validity of forensic feature-comparison methods' (2023) 120 Journal of Law 112 https://doi.org/10.1073/pnas.2301843120

Shawa R and others, 'A promising potential: Using the right to enjoy the benefits of scientific progress to advance public health in Africa' (2023) 23 African Human Rights Law Journal 30 https://doi.org/10.17159/1996-2096/2023/v23n1a2

Thomaidou M and Berryessa C, 'Bio-behavioral scientific evidence alters judges' sentencing decision-making: A quantitative analysis' (2024) 95 International Journal of Law and Psychiatry 1 https://doi.org/10.1016/j.ijlp.2024.102007

Ward T and Ferguson A, 'Proof of foreign law: a reduced role for expert evidence?' (2024) 20 Journal of Private International Law 95 https://doi.org/10.1080/17441048.2024.2347720

Zhu M and Fan L, 'A comparative study of the judicial construction of scientific credibility in climate litigation' (2024) 33 Review of European, Comparative & International Environmental Law 250 https://doi.org/10.1111/reel.12542

Cases

R v Adams (G W) [1996] 3 SCR 101

R v Clark [2003] EWCA Crim 1020

R v T [2010] EWCA Crim 2439

Frye v United States 293 F 1013 (DC Cir 1923)

Daubert v Merrell Dow Pharmaceuticals, Inc 509 US 579 (1993)

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

The Arbitrator's Jurisdiction in Uncovering Fraudulent Evidence: In Light of the Practices of the International Chamber of Commerce

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Article Info

Article type:
Research Article

Article history:
Received
15 December 2024

Received in revised form
25 February 2025

Accepted
30 February 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3783.html

Keywords:
Arbitrator's Jurisdiction,
Fraudulent Evidence,
Uncovering Fraud,
Forged Documents,
ICC Practices.

ABSTRACT

When parties to a dispute select arbitration as their means of resolving the conflict, they rely on evidentiary materials to present claims or defenses. In this context, the likelihood of one party engaging in fraudulent practices in the presentation of evidence and utilizing fraudulent materials to influence the arbitration process is significant. According to the arbitration practices of the International Chamber of Commerce (ICC), it has been established that an arbitrator lacks independent and direct authority to uncover such fraudulent evidence. However, when the opposing party challenges the evidence as fraudulent and raises allegations of fraud in the arbitration, the arbitrator is obliged to address this objection and examine the validity of each piece of evidence according to its nature. Failure by the arbitrator to consider such evidence can undermine the credibility and value of the arbitral award. When the award issued by the arbitration authority is tainted by falsehood and fraud, it loses its enforceability. Therefore, delineating the scope of the arbitrator's authority in the face of fraudulent evidence is of paramount importance. Analyzing arbitration practices and the conduct of arbitrators, particularly within the framework of the ICC when confronted with fraudulent evidence, will ultimately contribute to the establishment of a unified procedure. This article employs a descriptive-analytical methodology, utilizing library resources to address the question of what the scope of the arbitrator's jurisdiction is in uncovering fraudulent evidence.

Cite this article: Tohidi, A.R., & Boroujerdi, M., (2025). The Arbitrator's Jurisdiction in Uncovering Fraudulent Evidence: In Light of the Practices of the International Chamber of Commerce, *Iranian Journal of International and Comparative Law*,3(1),pp:164-180.

10.22091/ijicl.2025.11824.1112 Publisher: University of Qom

Table of Contents

Introduction

Arbitration has gained significant attention as an alternative mechanism for resolving international disputes. When parties submit their dispute to an arbitrator based on a prior agreement—whether in the form of an arbitration clause or a separate arbitration agreement—they utilize evidence to substantiate their claims or refute those of the opposing party. Each party resorts to such evidence to persuade the arbitrator and establish the legitimacy of their assertions. In this context, one party may resort to fraudulent evidence. Fraud in the presentation of evidence in arbitration is intended to influence the arbitrator's final decision and the judgment of the arbitration tribunal.

The issue of the arbitrator's authority to discover fraudulent evidence arises at this stage of arbitration. If one party employs fraudulent evidence during the presentation phase, what authority does the arbitrator, as the adjudicative body, possess? Two types of authority can be considered for the arbitrator: first, the independent authority to discover fraudulent evidence, and second, the authority to address fraudulent evidence upon the opposing party's objection and the claim of fraud in the evidence presentation process.

Therefore, the primary question of this research is: how is the arbitrator's authority to discover fraudulent evidence defined? To answer this question, we must first examine the role of the arbitrator as the adjudicative body in the evidence presentation process to determine whether the arbitrator can independently discover fraudulent evidence or must wait until the opposing party requests an examination.

Regarding fraudulent evidence and the conduct of arbitration tribunals in dealing with such evidence, there are no codified rules in international arbitration. Therefore, we must investigate arbitration practices and the behavior of arbitrators in confronting this evidence. Despite the confidentiality of the arbitration process, this research aims to address the primary question by examining published cases and focusing on the practices of the International Chamber of Commerce.

The data collection for this study has been conducted through library research, employing descriptive and analytical methods to elucidate the concepts and subjects under investigation.

1. Fraud in the Presentation of Evidence in International Arbitration

Fraud is defined as the act of manipulating a situation for one's own benefit at the expense of another.[1] Synonyms for fraud include deception, forgery, misrepresentation, and trickery. In legal terms, fraud refers to actions intended to harm the rights or interests of others or to violate a law.[2] Another definition describes fraud as a misleading representation of reality, which can be expressed through words or actions, or by concealing a fact that should be disclosed.[3]

In international arbitration, a specific type of fraud occurs when the parties engage in actions intended to influence the final ruling of the arbitrator and the decision made by the arbitration tribunal. These actions pertain to the nature of the case and negatively affect the outcome of the dispute. Therefore, fraud can be defined as misconduct such as forgery and concealment of documents or the presentation of false information. The material element of substantive fraud involves false statements made to the arbitration tribunal the submission of false evidence (forged documents, perjury, false expert opinions), and other related behaviors (concealing or destroying evidence).

According to the aforementioned definition, one party's aim is to have the arbitration tribunal render a ruling based on the fraudulent maneuvers mentioned. The predominance of the mens rea in this type of fraud complicates the detection of fraud during the evidence presentation, particularly as the tribunal lacks adequate tools to identify the parties' intentions.

It is noteworthy that the methods of presenting evidence in international arbitration are similar to those in judicial proceedings. In Iranian law, the rules governing the evidence are detailed in Articles 248 to 269 of the Civil Procedure Code. Additionally, the Law on International Commercial Arbitration (LICA) references various forms of evidence, including documentation, testimony, expert opinion, and inspection of goods and other properties. Consequently, fraud in the presentation of evidence in international arbitration can be broadly categorized into three types.

1.1. Types of Fraud in the Presentation of Evidence in International Arbitration

1.1.1. Creation and Submission of Forged Documents

Documents are considered a means of evidence in international arbitration, and the parties submit relevant documents to substantiate their claims. Generally, international arbitration favors written evidence over oral testimony. In other words, written documents are regarded as more authoritative than oral evidence.[4] This underscores the significance of forged documents in international arbitration. A forged document is one that has been deceitfully created with the intent to commit fraud or deception, containing information that does not reflect the truth.[5] Such a document is distinct from the original but includes terms or phrases that are misrepresented.

When discussing fraud in international arbitration, it is essential to address the concepts of good faith and commitment to integrity. The parties must conduct themselves in good faith

1 Moein M, *Moein Dictionary* Vol 5 (Ney Publication 2012).
2 Jafari Langeroodi MJ, *Legal Terminology* (Ganje Danesh Publication 2017).
3 legal definition of fraud (thefreedictionary.com) last visited 15 August 2024.
4 Gary B Born, *International Commercial Arbitration*, 2nd edn (Kluwer Law International 2014) p 12.
5 Sezer ZD, 'The Impact of Fraud in International Arbitration: a Question of Admissibility, Jurisdiction or Merits?' (2019) LLM Paper, Faculty of Law and Criminology, Academic Year 2018-2019, Ghent University. P. 23.

regarding any actions necessary for the efficiency, fairness, promptness of the arbitration process, and enforcement of the arbitrator's award.[1] In other words, adherence to good faith in arbitration serves as a guarantee of the integrity of the arbitration process and prevents deceit and fraud by the parties. The submission of false or forged documents undermines the principle of equality and fairness in arbitration. Furthermore, presenting forged documents violates the principle of integrity, which itself is a manifestation of good faith in international arbitration. The goal of submitting forged documents is to create or deny factual claims in the arbitration process.

1.1.2. Fraud in Expert Opinion

Due to the specialized nature of disputes referred to arbitration, arbitrators often require expert opinions on various subjects to render a more accurate decision. Experts may be selected based on the parties' suggestions and agreements or as determined by the arbitration tribunal or arbitrator.[2] When one party introduces an expert, concerns arise because the selection or introduction of an expert is typically aimed at obtaining an opinion favorable to that party's interests. Consequently, there is a high likelihood that an expert may exploit their position and influence the case in a fraudulent manner.[3] This not only undermines the credibility of the arbitration award but may also cause difficulties in the award's enforcement and recognition by national courts. International documents, such as the guidelines for the use of party-appointed experts in international arbitration,[4] outline this issue in Article 4: "An expert's duty, in giving evidence in Arbitration, is to assist the arbitral tribunal to decide the issue or issues in respect of which expert evidence is adduced; An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party." Additionally, the protocol for training experts to provide evidence in civil disputes[5] states that the expert report must include statements indicating that the experts understand the duties assigned to them by the court and will act accordingly. Moreover, they are required to prepare a declaration affirming that the content of their report is clear, accurate, and reflects their true and professional opinion. This declaration is referred to as the "Statement of Truth" in paragraph 5 of Article 13 of the protocol.

1.1.3. Perjury by Witnesses

Witness testimony is another means by which parties seek to substantiate their claims; thus, witness testimony can play a crucial role in uncovering the truths of a case. The role of witnesses is to assist the arbitrator in revealing the facts in dispute. However, witnesses may have direct or indirect interests in the case, causing them to present the facts in a manner that favors their interests or those of the party who introduced them. Consequently, there are greater concerns regarding perjury by witnesses compared to expert opinion, as witnesses may be more susceptible

1 Boroumand B, Shahbazinia M and Arabiyaan A, 'Good Faith in Arbitration Procedures (A Comparative Study in Iranian and English Law)' (2020) 24 *Journal of Comparative Legal Studies* 1-24.

2 Article 25 of the International Chamber of Commerce Arbitration Rules states: "The arbitral tribunal may hear the oral statements of witnesses, experts appointed by the parties, or any other person, in the presence of the parties or in their absence, provided that such arrangements have been expressly communicated to them." The subsequent paragraph stipulates: "The arbitral tribunal may, after consulting with the parties, appoint one or more experts, define their mandate, and receive their reports. Upon the request of either party, the parties must be given the opportunity to question the tribunal's appointed expert during the hearing."

3 Uluc,*Corruption in international arbitration* (2016) 58

4 International Arbitration Practice Guideline About Using Party-appointed and Tribunal-appointed Expers, Chartered Institute of Arbitrators.

5 Protocol for the Instruction of Experts to give Evidence in Civil Claims, June 2005.

to corruption. It is important to consider that human errors may lead witnesses to make statements that only partially cover the truth due to memory lapses, which does not necessarily equate to perjury. For this reason, some argue that witness testimony should not be pursued as long as written documents or evidence are available.[1]

2. The Role of the Arbitral Authority in the Evidence Presentation Stage

The delineation of the arbitrator's role in the evidence presentation stage depends on the methods employed in various legal systems. Generally, *common law* and *civil law* legal systems utilize either an adversarial or inquisitorial approach.

In the adversarial method, given the preeminent role of the parties involved, judges or arbitrators do not possess the right to gather evidence. Essentially, the parties have the authority regarding the initiation, suspension, and termination of the dispute. Accordingly, the arbitrator's role is limited to resolving the dispute rather than uncovering the truth.[2] Thus, the arbitrator's intervention is warranted only when the parties violate the procedural rules governing the proceedings or request assistance from the arbitrator. From this perspective, the most effective means of establishing the truth is to allow the parties to take their best measures to substantiate their claims. The competitive nature of the parties in presenting factual matters leads to the exposure of falsehoods and the emergence of the truth. The passive role of the arbitrator in the adversarial method inherently contradicts the discovery of truth, which necessitates the active involvement of the arbitrator, whereas the arbitrator in this method relies on the parties' autonomy.[3]

Many existing viewpoints suggest that the nature and characteristics of arbitration align more closely with the adversarial method. The supporting arguments for this perspective can be articulated as follows:

1. One of the primary features of arbitration is its cost-effectiveness and expedited resolution. If arbitrators were granted extensive powers to gather evidence, it could lead to significant costs and prolonged proceedings.
2. Most parties seeking international arbitration are commercial actors in the global arena. These individuals typically engage experienced lawyers and advisors; therefore, the collection of evidence by these professionals may negate the need for the arbitral authority to conduct its own investigations.[4]
3. Granting extensive powers to the arbitrator may lead to biased behavior or violations of privacy, as the amalgamation of investigative and decision-making functions could enable the arbitrator to misuse their authority.[5]
4. Unlike the public role of courts, in arbitration as a private institution, arbitrators manage the proceedings to achieve an enforceable outcome for the parties. The only public

1 Uluc,*Corruption in international arbitration* (2016) 63

2 Mafi H, *Commentary on the International Commercial Arbitration Law* (1st edn, Judicial Sciences and Administrative Services University Press 2016).

3 Findley KA, *Adversarial Inquisitions: Rethinking the Search for the Truth* (2011) 914.

4 Mohebi M and Jafari Nadushan S, *Inquisitorial and Accusatorial Systems in International Commercial Arbitration* (2015) 27.

5 Samadi Maleh S and Mafi H, *Discovery of Truth in International Commercial Arbitration with Emphasis on the Prague Rules (2018)* (2021) 243.

interest in such proceedings is the necessity of resolving disputes fairly and efficiently; thus, the arbitrators do not bear the additional responsibility of uncovering the truth.[1]

Conversely, the inquisitorial method stands in contrast. In this method, the arbitrator assumes a central role in the proceedings to uncover the truth. This is achieved when the arbitrator is not solely bound by the evidence presented by the parties but also possesses the authority to compare the evidence submitted with the evidence independently discovered.[2] Consequently, in the inquisitorial method, the arbitrator must fulfill a dual role: seeking evidence and thereby uncovering the truth while also issuing an impartial decision as the adjudicator of the dispute.[3]

According to UNCITRAL arbitration rules and the International Bar Association's guidelines on evidence gathering in international arbitration, the adopted approach in international arbitration appears to be a hybrid method. This implies that the arbitrator can evaluate the parties' requests alongside the evidence they have collected, ultimately reaching a balanced decision that considers the characteristics of both methods. Many legal systems favor the use of a mixed method, as it allows them to simultaneously utilize investigative powers under the inquisitorial method and the parties' freedom to argue under the adversarial method.

However, it should be noted that employing a hybrid system is not always the optimal choice. Some scholars argue that there should be no definitive criterion for international arbitration concerning the use of adversarial or inquisitorial methods. Instead, each dispute and case presents unique needs that warrant its own procedural rules. Flexibility in selecting methods for dispute resolution enhances the efficiency of arbitration.[4]

3. Objections to Fraudulent Evidence

The practice of arbitral tribunals, particularly the ICC Arbitration Court, indicates that an arbitrator cannot independently discover and address fraudulent evidence. Instead, they must wait until such evidence is brought to the attention of the opposing party, who must then raise an objection.[5] This section examines the potential objections that may be raised by one of the parties involved in the dispute.

According to international arbitration rules, the tribunal is obligated to send all submissions and related documents from each party to every other party.[6] Thus, the parties have a reasonable period to review the opposing party's evidence. In this context, one party may express doubts regarding the authenticity and validity of the evidence submitted by the other. These doubts may pertain to documents, testimonies, or expert reports. Consequently, one party may object to the presented evidence to resolve their uncertainty—or, in cases where the opposing party has no doubts, to substantiate their claim of the other party's fraudulent or incorrect evidence.

1 Ibid, 246.

2 Justice, Adele "*Comparative Analysis between Adversarial and Inquisitorial Legal Systems*" (2017).Social Sience Research Network, p7-8. Available at SSRN: https://ssrn.com/abstract=3077365. Last check Aguest 21, 2024

3 Ibid.

4 Born, *International Commercial Arbitration* (2014) 209

5 In the practice of the International Chamber of Commerce, there are no instances where an arbitrator separately discovers and examines fraudulent evidence. Generally, in the process of evidence gathering in accordance with Article 25 of the ICC Arbitration Rules, the arbitral tribunal may summon either party to present additional evidence during the proceedings.

6 Article 3 of the International Chamber of Commerce Arbitration Rules and paragraph 4 of Article 17 of the UNCITRAL Arbitration Rules.

3.1. Claim of Fraudulent Document

One of the challenges in arbitration is addressing documents whose authenticity or content is disputed. These are referred to as challenged or disputed documents.[1] Objections regarding either the procedural or substantive authenticity of such documents can take the form of claims of fraud.

Allegations of fraud in a document may relate to its content, signature, or manner of execution. In international commercial and non-commercial arbitration cases, there are numerous instances where one party has raised claims of fraud regarding submitted documents. For example:

In the ICSID case of *Churchill Mining Plc and Planet Mining Pty Limited* v. *Indonesia*, Indonesia submitted a request to the tribunal to dismiss the claimant's case based on allegations that the mining permits for *Ridlatama mining* were fraudulent and fabricated.[2] Indonesia claimed that the exploration permits and related approvals were obtained through deceit and fraud. The Indonesian government characterized this behavior as a massive, systematic, and complex scheme to defraud them. They also asserted that discovering forgery and fraud in the evidence presented by the claimant would invalidate the entire case. The reason for this claim is that Indonesia argued the claimant's investment was entirely dependent on the rights transferred in the fraudulent permits; thus, fraudulence in the permits undermines the claimant's investment, which is the basis of the lawsuit.[3] Indonesia subsequently requested that the tribunal provide an opinion on the validity of the submitted evidence within three weeks. Ultimately, the tribunal accepted the claim of forgery after reviewing the authenticity of the evidence presented by the claimant, declaring that the fraud in the exploration and exploitation permits nullified the claimant's investment.

In the case of *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, the Egyptian government claimed that Mr. Siag submitted a fraudulent citizenship certificate to the Lebanese Embassy in Cairo as part of his request for the Egyptian government to recognize his Lebanese citizenship, asserting that the documents he provided to support his nationality were fraudulent.[4]

In the *Libananco Holdings Co Limited v. Republic of Turkey* case, Turkey claimed that the key judicial documents relied upon by the claimant were expired. Therefore, the documents provided by the claimant, including share purchase contracts and board meeting minutes claiming the acquisition of shares by the claimant in two Turkish water and electricity companies, were reproduced after their expiration dates and were thus fraudulent.[5]

In another case, *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*,[6] the claimant presented copies of share certificates and purported purchase agreements to substantiate their claim that they were shareholders of the two Turkish water and electricity companies at the relevant time. Turkey claimed that Europe Cement (the claimant) initiated the lawsuit based on

1 Simon Gabriel, *Dealing With Challenged Documents* (2011) 2.

2 *Churchill Mining Plc and Planet Mining Pty Limited v. Indonesia*, Procedural Order No 15: Claimants' Request for Reconsideration of Procedural Order No 13, 12 January 2015, ICSID Case No ARB/12/14, ICSID Case No ARB/12/40.Paras. 12-106.

3 Ibid, paras. 95-96.

4 *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, Award, 1 June 2009, ICSID Case No ARB/05/15. Para 231

5 *Libananco Holdings Co Limited v Republic of Turkey*, Award, 2 September 2011, ICSID Case No ARB/06/8. para150

6 *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2 (Award Date: August13,2009)

fraudulent documents that purported to demonstrate ownership in Turkish companies, generally alleging abuse of the arbitration process by the claimant.[1]

In the High Court of the Hong Kong Special Administrative Region, there is a case filed by *ACME TEL FZC* against *Alpha Enterprise* (Hong Kong). In this case, the claimant alleges that the respondent forged a banking information document related to payments.[2]

In ICC case number 17842,[3] the claimant asserted that a series of emails sent by the respondent to the tribunal were fabricated and forged.[4]

In the case of *Technoservice Limited v. NOKIA Corporation*, the claimant alleged that the respondent maliciously and intentionally filed a request for cost recovery to obstruct justice for the claimant. Furthermore, the document submitted to support this request was claimed to be fraudulent and did not comply with court orders regarding the production of documents.[5]

Regarding objections to the authenticity of the submitted documents, there may be apprehension on the part of the objector, who is essentially claiming fraud, which may sometimes deter them from filing an objection. This is because the allegation of fraudulent evidence increases the risk that the tribunal may choose to investigate the evidence submitted by the objector themselves. This implies that when one party alleges the other's evidence is fraudulent, the tribunal may decide to review the evidence from both sides, thereby increasing the likelihood that the authenticity of the objector's evidence will also be scrutinized. As a result, parties weigh whether the benefits of claiming fraud against the opposing party's evidence outweigh the risks of drawing attention to their own evidence (which may also be fraudulent).[6]

3.2. Claim of False Testimony (Allegation of Perjury)

One party may question the validity of the testimony provided by witnesses summoned by the opposing party before the tribunal. The validity of witness testimony refers to its truthfulness and factual accuracy. During the arbitration process, it may become evident that a witness has not told the truth or has provided misleading information to the court. The following cases illustrate instances where one party raises claims of false or misleading witness testimony.

In an ICSID arbitration case involving *Tradex Hellas SA* and *Republic of Albania*, the claimant asserted that the testimonies of two witnesses summoned by Albania were based on forged and fraudulent documents. Furthermore, the testimonies of these witnesses contradicted some documents submitted by the claimant. In return, the *Government of Albania* questioned the validity of the witnesses' testimony presented by Tradex, claiming that the testimony of some witnesses introduced by *Tradex* conflicted with their previous statements or the testimonies of other witnesses. Essentially, both parties believed that the witness testimonies in the case were biased and that the witnesses were affiliated with the party for whom they testified.[7]

1 Ibid. Para 147.

2 ACME Tel FZC vs. Alfa Enterprises (HK) Limited and the Hongkong and Shanghai Banking Corporation Limited, Decision of the Court of First Instance of the High Court of Hong Kong HCMP 3313/2014 - 2 July 2015, para. 33.

3 José Feris & Stephanie Torkomyan, Im*pact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration / Selected ICC Cases/ ICC Dispute Resolution* (2019) 60.

4 Due to the confidentiality and the non-public nature of arbitration, no further information is available regarding the details of this case.

5 *Technoservice Limited v. NOKIA Corporation*, Award on costs, june 2020, ICC Case No. 23513/FS, para. 199.

6 Cecily Rose, *Fraudulent evidence in international court of justice* (2016) 330.

7 Ibid.Para. 82.

In another case, the *Government of Ghana* objected to the witness testimony presented by the claimant, arguing that the testimony was tainted by falsehoods.[1]

The case of *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* also addresses the issue of claims of false witness testimony. In this case, allegations were made regarding the falsity of testimonies against witnesses introduced by Pakistan.[2] The claim involved a breach of a bilateral investment treaty between Australia and Pakistan, based on Pakistan's unlawful and arbitrary denial of a mining lease. The tribunal concurrently found that the testimonies of some witnesses regarding the bribery allegations presented by the respondent were false and misleading.

3.3. Allegation of Fraud in Expert Reports

Each party in a dispute may object to the expert report selected by the tribunal or by the opposing party. Such objections may include claims of conflicts of interest, the expert's qualifications, the method of selection, or any relationship between the expert and the party that appointed them. In cases of conflict of interest, the complainant may raise concerns about the expert's previous services or relationships with the party that appointed them.[3]

Objection to the reliability of an expert opinion does not, in itself, imply fraud in the expert's report. According to international arbitration practices, objections to expert opinions must be accompanied by claims of fraud in the expert's presentation.

For example, in case number 17818 at the ICC, the claimant deemed the expert report chosen by the respondent to be unreliable (the report involved evaluating the handwriting of the respondent compared to a guarantee signature presented by the claimant). The claimant argued that the expert had not reviewed the original guarantee document and had not compared the guarantee signature with the respondent's earlier signatures.[4] Furthermore, the claimant even questioned the reports of experts appointed by the tribunal, asserting that the report of the second expert should be rejected due to discrepancies and inaccuracies indicating a lack of impartiality. Additionally, the appointed expert had exceeded the scope of authority and limits set by the tribunal.[5]

In another ICC case concerning a hotel management and consultancy agreement, the claimant, the hotel owner, argued that the expert reports submitted by the respondent, which included financial forecasts related to the hotel's potential profitability, were fraudulent and requested the court to reject the expert opinion and appoint a new expert.[6]

In the case of *Stati v. the Republic of Kazakhstan*, the claimant submitted a request to annul the arbitration award to the Swedish court. The claimant's allegation was based on the discovery of evidence indicating the presence of fraudulent evidence in the arbitration process. One piece of this fraudulent evidence was expert reports concerning investment costs.[7]

1 *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and Government of Ghana*, Award on Damages and Costs, 30 June 1990, (1994) 95 ILR 211.Para. 58.

2 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, Decision on Respondent's Application to Dismiss the Claims (With Reasons), 10 November 2017, ICSID Case No ARB/12/1. para. 1821.

3 ICC Dispute Resolution Bulletin | 2021 Issue 2/ Issues for Arbitrators to Consider Regarding Experts An Updated Report of the ICC Commission on Arbitration and ADR. P. 67.

4 *National Bank of Xanadu v. Company ACME* (Turkey), ICC Final Award in case No 17818, Para. 147.

5 ICC Final Award in case No 17818, Ibid, Paras. 148-149

6 Feris & Torkomyan, Op. Cit. (2019) 60.

7 Decision of the Provisions Judge of the District Court of Amsterdam of 10 May 2012, *Kompas Overseas Inc. v. OAO Severnoe Rechnoe Parokhodstvo* (Northern River Shipping Company), No. 482043/KG RK 11-362.

4. Jurisdiction of the Arbitrator in the Face of Fraudulent Evidence

The issue of fraud in international arbitration is an inevitable concern. Disputes referred to arbitration tribunals arise from conflicts of interest between the parties involved. Consequently, there are always instances where one party may resort to fraudulent evidence to defend its position or obtain material and non-material benefits, ultimately tainting the arbitration process with corruption and fraud.

One of the primary responsibilities of arbitration tribunals is to maintain the integrity of the arbitration process and issue enforceable awards. On the other hand, the existence of fraud and fraudulent evidence can lead to the non-enforcement of awards in national courts.[1] Therefore, arbitrators must issue a fraud-free and enforceable award, which necessitates attention to all existing warnings.[2] Thus, it can be concluded that arbitrators must possess sufficient authority and jurisdiction to confront fraudulent evidence throughout the proceedings.[3] This is particularly important given that the public policies of many countries condemn corruption and fraud. In this context, the arbitrator must navigate a fine line between protecting the arbitration process and not exceeding their powers.[4]

Given the seriousness of fraud allegations, arbitration tribunals must employ more thorough investigations when faced with such claims. Consequently, if an arbitrator observes signs of fraud during the arbitration process, they may, at their discretion, initiate inquiries and even invite the parties to provide explanations if their doubts are serious and substantial.[5] If the objection to fraud is distinct from the substantive issues of the dispute or has the potential to conclude the dispute, the tribunal may divide the proceedings into two parts and address the objection as a preliminary matter.

We have examined how claims of fraudulent evidence can arise under various headings and topics, including claims of fraudulent documents, false witness testimony, and fraud in expert opinions. It should be noted that arbitration tribunals take appropriate actions in response to each of these situations.

4.1. Documents

The issue of the arbitrator's jurisdiction in examining the authenticity of documents in arbitration awards has been validated by various authors.[6] According to the practice of the ICC, all documents submitted by either party are deemed valid and complete, provided that their authenticity is not disputed by the other party. Some legal scholars believe that the objecting party in a dispute may sometimes seek to prove the authenticity of a piece of evidence, and since an arbitral award based on a forged document constitutes a violation of fair trial rights, arbitrators are required to take such allegations seriously.[7]

1 In the Iranian International Commercial Arbitration Rules, paragraph (h) of Article 33 enumerates one of the grounds for the annulment of an arbitral award as follows: "The arbitral award is based on a document whose fraudulent nature has been conclusively established by a final judgment."

2 "International Court of Arbitration Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process." ICC Dispute Resolution Bulletin | 2022 | Issue 2/ 59.

3 Margaret L Moses, *Inherent powers of Arbitration to Deal with Ethical Issues* (2014) 3.

4 Ibid, 9.

5 Lamm, Pham & Moloo, *Fraud and corruption in international arbitration* (2013) 10.

6 Preliminary Award in ICC arbitration dated 9 October 2008, ASA Bulletin 4/2011, sec. 87 et seqq.

7 Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (2012) 83.

The impact of claims regarding the fraudulent nature of documents on the arbitration process varies. The origin of this difference can be attributed to the circumstances of the dispute and the seriousness of the objections concerning the documents. When one party raises a claim of forgery regarding a document, the tribunal is not limited to the evidence presented by the parties and has the discretion to request document production, witness testimony, and expert opinions.[1] In some cases, the tribunal may itself appoint an expert to verify the authenticity of documents and materials; thus, the tribunal can utilize its investigative powers based on the parties' records to address allegations of forgery and gather further evidence.

When one party to a dispute challenges the authenticity of a document, the arbitrator must decide:

1. Whether the challenged document is significant and relevant to the outcome of the dispute and the final award.
2. Whether the objection to the document has been sufficiently substantiated.

If the arbitrator can affirmatively answer both questions, they are obliged to take steps regarding the authenticity of the contested document.[2] One such step is to examine the authenticity and validity of that document. The authenticity of documents can be confirmed both directly and indirectly.

Direct methods include:

- Admission of the existence of the document.
- Witness testimony from individuals who have knowledge of the document, affirming that it is indeed what it claims to be.
- An opinion from a non-expert regarding the signature and handwriting, based on prior familiarity with the handwriting in question.
- An expert opinion based on a comparison of the handwriting with a valid sample.[3]

Indirect methods include:

- Confirmation from the originator of a document containing distinctive oral statements or writings that only specific individuals would know the details of.[4]

According to arbitration practice, some documents do not require authentication and validate themselves. For example, sealed documents, certified copies of public records, signed commercial papers, and ancient documents are considered valid due to their physical condition, the time elapsed since their creation (usually over 20 years), and the fact that they have been properly maintained.[5]

In the case of *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*,[6] the respondent

1 Utku, *Fraudulent Evidence: Investment Arbitration* (2020) 7.
2 Gabriel ,*"Challenged Documents"* , 828
3 Federal Rules of Evidence, Article IX. Rule 901. Authenticating of Identifying Evidence.
4 Michelle L. Querijero, Esq.A Practical Guide to evidence in Connecticut, Chapter 9, "*Documentary evidence*" Shipman & Goodwin LLP, Hartford, P9.
5 Ibid.
6 *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2.

challenged the authenticity of documents presented by the claimant. During the proceedings, the tribunal identified certain potential evidences suggesting the document's lack of authenticity and stated: a) the claimant was not in a position to provide the original versions of the documents;[1] b) no work reports pertinent to the transaction were available to the tribunal;[2] c) throughout the proceedings, the claimant failed to adequately refute the respondent's arguments.[3] The arbitrator acknowledged that it was not their duty to guess the facts; rather, it was the claimant's responsibility to prove forgery and fraud. Ultimately, due to insufficient evidence of forgery, the tribunal decided based on the documents provided by the claimant.

In a preliminary ruling from the ICC dated October 9, 2008, the arbitration tribunal carefully examined the conditions and circumstances presented, including expert opinions regarding the claim of forgery of the arbitration agreement. Based on the evidence, which appeared to contradict each other (e.g., an expert report affirming the document's authenticity while the document itself had numerous alterations), the tribunal concluded that while there was no strong evidence of the document's authenticity, there was also no substantial evidence indicating its forgery. Consequently, due to the lack of sufficient evidence to prove the document was forged, the tribunal relied on it.[4]

In the case of *EDF Services v. Government of Romania*, the arbitration tribunal appointed experts to assess the authenticity of the challenged documents and requested them to conduct an examination. The experts reported that the recorded file was incomplete, edited, and reformatted, which is considered illegal under Romanian law.

In cases brought before arbitration tribunals, once the existence of fraudulent or forged documents is established, the tribunal may adopt various approaches. For example, it may disregard that evidence, remove it from the existing case materials, or dismiss the entire case for reasons such as lack of jurisdiction, admissibility, or relevance. The legal consequences depend on the facts and circumstances of each case, such as the enforceability of the relevant treaty, the significance of the alleged forgery, the roles of the parties and third persons in the fraud, the connection between the fraud and the claims raised, and the timing of the fraudulent acts.[5]

Where the tribunal determines that the forged documents submitted by the claimant were intended to support the court's jurisdiction, the outcome of proving the forgery will result in the dismissal of the claim due to the tribunal's lack of jurisdiction. For instance, in the case of *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*,[6] the tribunal rejected its jurisdiction over the dispute. The rationale for this decision was that the outcome of proving the alleged fraud demonstrated the claimant's inability to establish that they were a qualified investor at that time under the disputed treaty.

In case number 17842 of the International Chamber of Commerce, the claimant alleged that a series of emails sent by the respondent were fraudulent. Accordingly, the claimant sought

1 Ibid, Sec152.
2 Ibid, Para. 154.
3 Ibid, Para. 166.
4 See Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 178 and 181.
5 *Churchill Mining Plc and Planet Mining Pty Limited vs Indonesia*. ICSID Case No. ARB/12/14 and ARB/12/40 Annulment Proceedings, Decision on Annulmet. Para. 494.
6 *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2 (Award Date: August 13, 2009).

permission from the tribunal to appoint an expert to evaluate the authenticity of those documents and provide their opinion. The arbitration tribunal determined that the evidence presented by the claimant (including expert opinions and witness testimonies) raised a reasonable doubt regarding the authenticity of the emails. Consequently, the tribunal required the respondent to prove the validity of the new documents. Ultimately, the tribunal found that the respondent failed to establish the authenticity of the submitted documents and decided to exclude and eliminate the emails from the body of evidence in the dispute.[1]

The practices of international tribunals show that they act differently when confronted with fraudulent documents and evidence. In one arbitration conducted under Swiss law, when doubts arose regarding the authenticity of a document, the party presenting it failed to provide evidence supporting its authenticity. The tribunal ultimately disregarded the document entirely and issued a ruling based on other evidence.

Additionally, during the arbitration process of the ICC, it was claimed that a contract had expired, but no evidence was presented to substantiate that claim. As a result, the tribunal dismissed this objection.

Typically, copies of documents are presented instead of the original versions. The compliance of the copied documents with their originals is a significant issue concerning evidence. In legal systems, various methods are provided to verify the conformity of copies with originals. For instance, there are institutions in courts that certify the alignment of a copy with its original. The arbitration tribunal may offer such services to the parties when deemed appropriate.

Generally, the copies submitted must closely match the original document. The approach taken by arbitrators is that conformity refers to substantive compliance; therefore, minor or irrelevant discrepancies, such as marginal notes not present in the original document, should not impede the submission of a copied document as evidence. The Iran-United States Claims Tribunal (the IUSCT) in the case of *Gulf Associates Inc. v. The Islamic Republic of Iran* stated that errors and other discrepancies in document copies, indicating poor maintenance of the documents, do not prove the documents' invalidity or forgery.[2]

Forgery and fraud can be demonstrated by means other than the conformity of the original to the copy. For instance, contradictions in evidence can provide strong grounds for doubting the completeness or accuracy of a document, as this relates to the evidentiary value of the document rather than its appearance. Consequently, the tribunal may assign no evidentiary value to a document while also refraining from offering an opinion on its authenticity. As noted by the IUSCT in the case of *Reza Said Malek v. The Islamic Republic of Iran*, due to the ambiguities surrounding the true origin of the letter in question and the fact that even the claimant was unsure whether a genuine request for information had been sent to the notary public, the tribunal could not ascribe any evidentiary value to the document. Furthermore, in light of this decision, the tribunal found no need to address the arguments presented by the respondent in support of the letter's authenticity.[3]

Fraudulent documents can also affect the admissibility of a claim. For example, in the

1 Feris & Torkomyan, Op. Cit. (2019) 60.

2 *Gulf Associates Inc v. The Islamic Republic of Iran et al*. Award No. 594-385-2, para. 49.

3 *Reza Said Malek vs The Islamic Republic of Iran*, Final Award No. 534-193-3 of 11 August 1992, p 45.

Churchill case, all previous claims were deemed inadmissible on the grounds that widespread forgery and fraud had tainted the entire arbitration process.[1]

4.2. False Testimony and Expert Reports

Based on the practices of arbitration tribunals and international rules, it can be said that the conduct of arbitrators in addressing objections to witness testimony or expert reports is somewhat equivalent. This means that to assess the credibility and accuracy of the presented evidence, arbitrators hold a session to question witnesses and experts. Such sessions can be conducted independently for questioning either the witness or the expert, or both together.

For example, in the case of *Tradex Hellas SA v. Republic of Albania*, the tribunal held a hearing during which all witnesses and experts appointed by both parties were questioned.[2]

When assessing the credibility of witness statements, arbitrators must consider factors such as the character, independence, and interests of the witness. Witness testimony should be corroborated by additional evidence presented. To obtain truthful testimony, arbitrators may request witnesses to take an oath according to arbitration rules. According to Clause 5 of Article 38 of the English Arbitration Act (1996), the tribunal may ask the parties or their witnesses to take an oath or to be subjected to questioning; in this regard, the tribunal may enforce both the rules concerning oaths and the necessary questioning procedures. The reliability of witnesses can be easily established through direct examination by the tribunal or cross-examination by the opposing party.[3]

In the case of *Azpetrol International* against *the Republic of Azerbaijan*, registered companies from the Netherlands initiated arbitration, claiming expropriation by the host state (Azerbaijan) and violations of the Energy Charter Treaty. Witnesses in this case were summoned to the tribunal for questioning and were examined during hearings. Consequently, when the credibility of witness statements is challenged, courts possess the necessary tools to ascertain their accuracy. These tools include examination and questioning by both the tribunal and the opposing party.[4]

In the case of *EDF Services v. the Government of Romania*, the testimony of witnesses summoned by the claimant was deemed questionable, and for this reason, it was subjected to scrutiny and questioning by the tribunal.[5]

In international arbitration rules, such as those of the ICC, the right of parties to question experts is recognized. Clause 3 of Article 25 of the ICC rules states: "The arbitral tribunal may, after consulting the parties, appoint one or more experts, define their mission, and receive their reports. Upon the request of either party, the parties shall be given the opportunity to question such experts at a hearing."

Section 4 of Article 6 of the Prague Rules also states that experts may be summoned to a hearing at the request of one of the parties or at the discretion of the tribunal for examination.

1 *Churchill Mining Plc and Planet Mining Pty Limited v Indonesia*, Procedural Order No 15: Claimants' Request for Reconsideration of Procedural Order No 13, 12 January 2015, ICSID Case No ARB/12/14, ICSID Case No ARB/12/40.
2 Ibid, Para. 38.
3 Uluc,*Corruption in international arbitration* (2016) 218-219.
4 Ibid, 222.
5 *EDF (Services) Limited v. Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) 223.

Similarly, Clause 5 of Article 29 of the UNCITRAL Arbitration Rules specifies that, upon the request of either party or under circumstances deemed appropriate by the arbitrator, appointed experts may be called to a hearing attended by the parties after submitting their written report for questioning.

Conclusion

The use of fraudulent evidence by one party to a dispute and the deception involved in presenting evidence before an arbitration tribunal is inevitable, as evidence can significantly influence the outcome of the arbitration award. Consequently, it is always possible for one party to engage in misconduct, such as using forged documents or providing incorrect information through witness testimony and expert reports, in order to divert the course of the arbitration.

We have found that the arbitrator's jurisdiction in uncovering fraudulent evidence depends on whether the role of the arbitrator in the evidence presentation process is viewed in terms of adversarial or inquisitorial systems of law. If the arbitrator is merely seen as a forum for resolving disputes, they may operate independently regarding the discovery of fraudulent evidence. This seems to be reflected in the practices of the International Chamber of Commerce as well. Conversely, when one party raises concerns regarding the authenticity of the evidence presented by the opposing party, they may request the arbitrator's intervention and examination of that evidence.

According to international arbitration practices, including those of the International Chamber of Commerce, when one party challenges the validity of the opposing party's evidence or alleges that it is fraudulent, the arbitration tribunal will take action in this regard.

The arbitrator's examination of objections and claims of fraud in the evidence presentation may vary based on the type of evidence presented and the nature of the objection raised. For instance, concerning submitted documents, the arbitrator may utilize their appointed experts or an expert designated by the objecting party. Additionally, if the opinions of experts or the testimonies of witnesses are challenged, the arbitrator may convene a separate session to question and interrogate the experts and witnesses.

References

Books

Born GB, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014).

Cosar U, 'Fraudulent Evidence: Investment Arbitration' (Max Planck Encyclopedias of International Law 2020).

Jafari Langeroodi MJ, *Legal Terminology* (Ganje Danesh Publication 2017). [In Persian]

Mafi H, *Commentary on the International Commercial Arbitration Law* (1st edn, Judicial Sciences and Administrative Services University Press 2016). [In Persian]

Moein M, *Moein Dictionary* Vol 5 (Ney Publication 2012). [In Persian]

O'Malley ND, *Rules of Evidence in International Arbitration: An Annotated Guide* (1st edn, Informa Law 2012).

Querijero ML, 'A Practical Guide to Evidence in Connecticut' in *Documentary Evidence* (2013) ch 9.

Shiravi AH, *International Commercial Arbitration* (15th edn, SAMT Publication 2023). [In Persian]

Articles

Boroumand B, Shahbazinia M and Arabiyaan A, 'Good Faith in Arbitration Procedures (A Comparative Study in Iranian and English Law)' (2020) 24 *Journal of Comparative Legal Studies* 1-24. [In Persian]

Feris J and Torkomyan S, 'Impact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration' (2019) ICC Dispute Resolution Bulletin 3.

Findley KA, 'Adversarial Inquisitions: Rethinking the Search for the Truth' (2011) 56 *New York Law School Law Review* 911-941.

Finkelstein R, 'The Adversarial System and the Search for Truth' (2011) 37 *Monash University Law Review* 135-144.

Gabriel S, 'Dealing with "Challenged Documents"' (2011) 29 *ASA Bulletin* 823-837.

Justice A, 'Comparative Analysis between Adversarial and Inquisitorial Legal Systems' (2017) Social Science Research Network https://ssrn.com/abstract=3077365 7-8.

Lamm CB, Pham HT and Moloo R, 'Fraud and Corruption in International Arbitration' (2013) 10 *Transnational Dispute Management*.

Mohebi M and Jafari Nadushan S, 'Inquisitorial and Accusatorial Systems in International Commercial Arbitration' (2015) *International Law Journal* No 52. [In Persian]

Moses ML, 'Inherent Powers of Arbitration to Deal with Ethical Issues' (2014) Loyola University Chicago School of Law, Public Law and Legal Theory Research Paper No 2014-2016.

Rose C, 'Fraudulent Evidence in the International Court of Justice' (2016) Inaugural Detlev F Vagts Roundtable on Transnational Law, ASIL Proceedings.

Samadi Maleh S and Mafi H, 'Discovery of Truth in International Commercial Arbitration with Emphasis on the Prague Rules (2018)' (2021) 8 *Scientific Journal of Comparative Law* 237-285. [In Persian]

Scherer M, 'Inherent Powers of Arbitrators' (2019) LLC ch 4.

Sezer ZD, 'The Impact of Fraud in International Arbitration: a Question of Admissibility, Jurisdiction or Merits?' (2019) LLM Paper, Faculty of Law and Criminology, Academic Year 2018-2019, Ghent University.

Uluc I, 'Corruption in International Arbitration' (2016) Thesis, The Pennsylvania State University School of Law.

Theses

Asgharzadeh M, *Access of the Arbitration Tribunal to Evidence in International Commercial Arbitration* (Master's Thesis, University of Mazandaran 2015). [In Persian]

Documents

Law on *International Commercial Arbitration* (LICA, Enacted 1997).

Rules

"Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005).

Chartered Institute of Arbitrators, *International Arbitration Practice Guideline about Using Party-Appointed and Tribunal-Appointed Experts* (2015).

Chartered Institute of Arbitrators, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (September 2007).

Federal Rules of Evidence of the United States of America (2023).

ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (January 1, 2019).

International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010).

International Chamber of Commerce, *ICC Arbitration Rules* (2021).

Netherlands Arbitration Rules (in force as of March 1, 2024).

Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018).

United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* (2021).

United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* (1998).

Cases

Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and Government of Ghana, Ad Hoc Arbitration, Award on Damages and Costs (June 30, 1990).

ICC Final Award in case No 17818, *National Bank of Xanadu v Company ACME (Turkey)*.

ICC, *Technoservice Limited v NOKIA Corporation*, ICC Case No 23513/FS, Award on Costs (June 2020).

ICC, *The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic International Sales Corporation*, Case No 7365/FMS.

ICC, 'Preliminary Award in Arbitration dated October 9, 2008' (2011) ASA Bulletin (Swiss Arbitration Association) 4/2011, sec 87.

ICSID, *Churchill Mining Plc and Planet Mining Pty Limited v Indonesia*, Procedural Order No 15: Claimants' Request for Reconsideration of Procedural Order No 13 (January 12, 2015) Case No ARB/12/14 and Case No ARB/12/40.

ICSID, *EDF (Services) Limited v Romania*, Case No ARB/05/13, Award (October 8, 2009).

ICSID, *Europe Cement Investment & Trade S.A. v Republic of Turkey*, Case No ARB(AF)/07/2, Award Date (August 13, 2009).

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

Issues Covered by the Principle of Confidentiality and Persons Obligated to Adhere to It in the Arbitration Process

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Article Info

Article type:
Research Article

Article history:
Received
1 December 2024

Received in revised form
19 February 2025

Accepted
28 February 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3782.html

Keywords:
Arbitration Process, Principle of Confidentiality, Breach of Confidentiality, Issues Subject to Confidentiality, Persons Obligated to Maintain Confidentiality.

ABSTRACT

The principle of confidentiality is one of the most significant principles governing arbitration. In fact, the confidentiality of arbitration is a crucial positive attribute distinguishing it from judicial proceedings conducted in courts. According to this principle, access to documents and information generated during the arbitration process is limited exclusively to individuals who require such access for the purpose of arbitration, thereby preventing third parties from accessing this information. Furthermore, there are essential issues within an arbitration process that must fall under the provisions related to the principle of confidentiality. These issues include the arbitration agreement, witness testimony and expert opinions, trade secrets, minutes of meetings, consultations, and the arbitral award. On the other hand, a breach of the principle of confidentiality concerning any of these subjects may lead to the imposition of legal liabilities (both civil and criminal) on the violators of the principle, including arbitrators, parties to the arbitration, and third parties. This research examines the confidentiality of arbitration within international rules and Iranian law, the issues covered by the principle of confidentiality in arbitration, and the persons obligated to adhere to this principle during the arbitration process.

Cite this article: Heidar Pour, HA.R., & Mehrara, Z., (2025). Issues Covered by the Principle of Confidentiality and Persons Obligated to Adhere to It in the Arbitration Process, *Iranian Journal of International and Comparative Law*, 3(1), pp: 181-203.

10.22091/ijicl.2025.11788.1109
Publisher: University of Qom

Table of Contents

Introduction

The principle of confidentiality has traditionally been introduced as the foundation of arbitration proceedings and, along with the principle of privacy, is considered one of the main advantages of arbitration over judicial proceedings. Numerous cases exist where individuals and well-known companies have chosen arbitration to resolve their disputes, believing that confidentiality is a vital element in managing their business. This belief stems from the fact that confidentiality allows them to control the flow of information and protects them from the damages that may arise from the publication of an adverse award. The confidentiality of the arbitration process enables the parties to engage in discussions behind closed doors, preventing public discourse about their disputes, which could harm their interests and benefit their competitors. Additionally, confidentiality implies that the existence of the arbitration process itself should not be disclosed.

One of the key topics surrounding the principle of confidentiality, which must be examined thoroughly, is the scope of issues covered by this principle. Specifically, there is a need to address the question of what subjects fall under this principle and whether it pertains solely to arbitrators or also includes other parties involved. Furthermore, it is essential to investigate who is obligated to adhere to the principle of confidentiality during the arbitration process and whether this obligation extends beyond the arbitrators and parties to the dispute. This paper aims to explore the two aforementioned questions. To this end, after discussing the concept of arbitration confidentiality in international regulations and Iranian law in the first section, the second section will address the subjects encompassed by the principle of confidentiality, and the third section will examine the individuals obligated to uphold this principle in the arbitration process.

1. Confidentiality in Arbitration under UNCITRAL and Iranian Law

At the international level, one can specifically examine the approach of the rules established by the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Model Law on International Commercial Arbitration, which has inspired the national arbitration laws of

many countries either fully or partially, does not contain any provisions regarding the confidentiality of arbitration and does not explicitly foresee it. However, it appears that paragraph 5 of Article 34 of the UNCITRAL Rules somewhat acknowledges the issue of arbitration confidentiality, as this provision conditions the public disclosure of an arbitral award on the consent of both parties.

Since April 2014, UNCITRAL has effectively implemented transparency rules, which stipulate that transparency in arbitration (as opposed to its confidentiality) must be given due consideration. This includes various provisions for:

1. The publication of documents and records of the proceedings (Articles 2 and 3).
2. The submission of written statements by third parties with an interest in the dispute (Articles 4 and 5).
3. Conducting hearings in public (Article 6).

Currently, the transparency rules based on UNCITRAL's approach to the non-necessity of maintaining the principle of confidentiality in international commercial arbitration appear to have replaced the older rules of this body, which emphasized the necessity of upholding this principle.[1]

On the other hand, Iranian law does not explicitly state whether arbitration is confidential or public, and therefore, there is no requirement for arbitration sessions to be held publicly. Consequently, an explicit or implicit agreement by the parties regarding the confidentiality of arbitration will be valid. Additionally, if the parties have not made a specific agreement in this regard, the arbitration authority can, at its discretion, conduct the arbitration process confidentially. However, the presence of third parties complicates the confidentiality of arbitration.

It should also be noted that according to Article 26 of the Iranian Law on International Commercial Arbitration (LICA): "If a third party claims an independent right in the arbitration matter or considers itself to be entitled to one of the parties, it may enter the arbitration as long as the proceedings have not been concluded, provided it accepts the arbitration agreement, the arbitration rules, and the arbitrator, and its entry into the arbitration is not objected to by either party." It may be argued that the result of this article, which allows third-party entry into arbitration, undermines the confidentiality of the process. In response, it can be stated that the entry of a third party under the aforementioned article is conditional upon the consent of the parties, which necessitates their agreement to provide all existing documents and information to the third party. Furthermore, with the consent of the parties for the third party's entry, the third party also becomes one of the parties to the dispute and does not differ from the main parties.

Conversely, a third party entering the arbitration, by accepting the arbitration agreement, also accepts the terms contained therein (including the confidentiality of the arbitration). Therefore, it cannot be inferred that the entry of a third party into arbitration according to the above article contradicts the confidentiality of the process. Additionally, according to Article 648 of the Islamic Penal Code (enacted in 1996), which states: "Anyone who, by virtue of their profession or occupation, becomes privy to secrets, shall be punished if they disclose those

1 Q Khadem Razavi and P Rastgou, 'The Role of Confidentiality in Investment Dispute Cases' (2020) 107-127.; R Eskini and A Khakpour, 'The Conflict Between the Principle of Transparency and Confidentiality in International Arbitration' (2019) 45-64.

secrets outside of legal exceptions," arbitrators are custodians of the information and documents entrusted to them by the parties for the arbitration. Thus, based on the above article, it appears that there is a legal obligation for arbitrators to maintain the confidentiality of arbitration, with criminal liability as a consequence.

Despite the increasing emphasis on transparency in arbitration, particularly at the level of UNCITRAL rules, certain subjects and individuals remain obligated to adhere to the principle of confidentiality and fall within the scope of this principle, which should not be overlooked. Therefore, in the second section of this research, we will examine the issues regarding this principle, and in the third section, we will discuss the individuals bound by the principle of confidentiality in arbitration.

2. Issues Covered by Confidentiality

The issues encompassed by the principle of confidentiality in an arbitration process include the arbitration agreement, witness testimonies, expert opinions, trade secrets, minutes of meetings, consultations, and the arbitral award. Each of these issues and their relationship with the principle of confidentiality, as well as the status of this principle in each case, will be discussed in detail.

2.1. Arbitration Agreement

A fundamental and critical question is whether the existence of the arbitration process itself is protected under the obligation of confidentiality. In some instances, the mere existence of an arbitration agreement is considered a secret. Numerous examples can be cited in this regard; for instance, when an individual is involved in a professional negligence claim against a lawyer, or in resolving accounting disputes among members of a shipping club, or in disputes related to an unregistered patent. Nevertheless, courts have yet to recognize a general rule concerning this issue. One author explains the reluctance of courts to establish a general rule as follows: the arbitration clause is often included because the information involved is inherently confidential. Therefore, no party to arbitration should be granted the authority to disclose the existence of the arbitration process. The interests in maintaining the confidentiality of this information are so significant that the parties do not wish to attract the court's or the public's attention on a case-by-case basis.[1]

Another practical reason cited for the lack of a confidentiality obligation regarding the arbitration agreement is that if the court intervenes for any reason, including the enforcement of an arbitral award, the existence of the arbitration agreement becomes public. Moreover, the disclosure of the arbitration agreement may be justifiable based on other legal requirements and financial considerations. For example, a company may be obliged to provide this information to its insurers, clients, and shareholders. Additionally, due to the presence of third parties who cannot be compelled to maintain confidentiality, the existence of the arbitration agreement may be jeopardized. For instance, interpreters, translators, secretaries, and employees may not be bound by confidentiality agreements between the parties.

In addition to these reasons, two other practical considerations suggest that the confidentiality of the arbitration agreement cannot be preserved. First, there is the possibility that a member of

1 K Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer 2010) 73.

the arbitral tribunal may disclose to other tribunal members that a second arbitration involving one of the parties (A or B) is ongoing. This scenario is quite plausible because, before accepting a second arbitration, the question arises for the arbitrator. It is also common for an arbitrator to participate in two arbitrations involving the same party, as the world of international arbitration is relatively small and certain arbitrators are in high demand. Ethically, an arbitrator is required to disclose any awareness of potential conflicts of interest regarding one of the parties.

The second reason is that many business journals and arbitration periodicals publish recently concluded arbitrations. Although the names of the parties are usually omitted, the descriptions of significant arbitration issues typically make it possible to reveal the identities of the parties involved.

It should be added that sometimes the parties, particularly those concerned about the detrimental effects of publicity, seek to keep the existence of the arbitration agreement and the dispute between them confidential. Regarding whether this can realistically and practically remain confidential and whether the parties can be compelled to maintain such confidentiality, courts have not established any general rules to date, nor do they seem inclined to do so. There are many practical reasons suggesting that the existence of arbitration cannot and should not remain confidential. First, whenever courts intervene in an arbitration, for instance, to enforce an arbitral award, the existence of the arbitration will be made public. Consequently, efforts to maintain confidentiality will ultimately be rendered ineffective by a legal action from one of the parties.

Another practical consideration is whether a member of the arbitral tribunal addressing a dispute between parties A and B can disclose to other tribunal members the existence of another arbitration involving the same two individuals, especially if they have been invited to arbitrate on that matter as well. In the small arena of international arbitration, where the services of certain arbitrators are in high demand, this scenario does not seem far-fetched. Ethically, each arbitrator is obliged to disclose any information regarding one of the parties. Thus, in situations where the parties are repeatedly involved in arbitration, it is nearly impossible and ethically undesirable for the existence of this arbitration to remain confidential.

Another issue is that arbitrators and attorneys sometimes implicitly suggest that one of the parties is involved in another arbitration. For instance, although arbitration journals typically do not disclose the names of the parties in ongoing arbitrations or those recently concluded, the description of the subject matter may be such that it can be attributed to a specific individual.

The discussion regarding the confidentiality of arbitration agreements is also constrained by the inability to enforce third-party obligations through confidentiality agreements. While the parties may be bound by an agreement to keep the existence of the arbitration confidential, and while arbitrators are ethically committed to this obligation, the leakage of information regarding the existence of arbitration is often unavoidable. Typically, an international commercial arbitration involves dozens, if not hundreds, of participants, many of whom play ancillary roles. Numerous experts, law firm employees, party representatives, stenographers, process servers, caterers, and administrative staff do not have a duty to maintain confidentiality. Even if an arbitration is private and outsiders are prohibited from attending, there are still third parties

whose presence is essential for the proceedings. These individuals can disseminate information related to the arbitration agreement.[1]

Regarding the preservation of confidentiality in arbitration agreements, there is no consensus among national systems or court practices. Furthermore, the rules of arbitration organizations rarely mandate that parties maintain confidentiality concerning the details of the arbitration's existence. The WIPO[2] Arbitration Rules, for example, recognize this obligation for the parties.[3] Article 73 of these rules states: "a) Except to the extent that it is necessary for the purpose of a challenge to the arbitration in court or for the enforcement of the award, no information concerning the existence of the arbitration may be disclosed unilaterally by one party to third parties unless required by law or by a competent legal authority…"

Consequently, as noted, maintaining confidentiality regarding arbitration agreements is often impractical, and in many instances, the potential for information leakage exists. Although this issue can impact the financial or commercial interests of individuals and should ideally remain confidential, it is of lesser significance compared to other matters.

It should also be added that in some cases, the mere fact that an arbitration agreement has been executed and is pending in an arbitration tribunal may be considered confidential information. Many individuals, particularly those concerned about adverse public reactions, prefer to keep the fact that their disputes have been referred to arbitration confidential. Legal obligations may compel a party to disclose the existence of the arbitration process. These legal requirements and ethical commitments often result in the disregard of parties' agreements to keep all arbitration-related matters confidential. However, due to the presence of numerous skilled actors in international trade, there are principled debates against mandatory disclosure of arbitration.

Confidentiality in arbitration is limited by the inability to bind third parties. While the parties may have agreements regarding the confidentiality of the arbitration, and arbitrators may feel ethically and professionally obligated to such commitments, information leakage is unavoidable. In international commercial arbitrations, there may typically be dozens, if not hundreds, of individuals significantly involved. Most experts, specialists, institutional staff, party employees, secretaries, couriers, and managers are not bound by confidentiality agreements. While it is true that the nature of arbitration is private and this implies the possibility of excluding third parties, there are individuals who, although considered third parties, are essential for the arbitration process and must be present. It is through these individuals that arbitration information may be leaked.

It is also worth noting that in some cases, the mere fact that an arbitration agreement has been executed and is pending in an arbitration tribunal can be considered confidential information. Many individuals, particularly those concerned about adverse public reactions, prefer to keep the fact that their disputes have been referred to arbitration confidential. Legal obligations and ethical commitments often lead to the disregard of parties' agreements to maintain confidentiality regarding all matters related to arbitration. However, because many individuals are seasoned

1 A Marriott and J Tackaberry, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (vol 1, 4th edn, Sweet & Maxwell 2003) 1001.
2 World Intellectual Property Organization
3 I Thoma, 'Confidentiality in English Arbitration Law: Myths and Realities About Its Legal Nature' (2008) 128.

players in the international trade arena, there are principled discussions against mandatory disclosure of arbitration.

2.2. Witness Testimonies and Expert Opinions

Regarding witness testimonies and expert opinions, which can serve as evidentiary support in arbitration proceedings, these are generally considered to fall under the obligation of confidentiality. However, they are less protected from disclosure compared to other types of evidence. Particularly in cases where a witness or expert provides testimony that contradicts their previous statements in another arbitration concerning the same issue, their prior testimony may be disclosed. None of the organizational rules or national laws provide specific protection for maintaining the confidentiality of this category of evidence. Even English courts, which generally favor maintaining confidentiality, have identified various practical grounds for disclosing expert testimonies. For the sake of justice and public interest, expert statements may be subjected to disclosure, use, or scrutiny long after the conclusion of an arbitration.[1]

It should be noted that even if arbitrators and the parties encourage witnesses to keep information from the arbitration confidential, they cannot legally compel them to maintain confidentiality. Given the principle of relativity of contracts, neither arbitrators nor the parties can enforce confidentiality obligations on third parties who acquire information during the arbitration process. In rare cases, such as when a witness has a specific contractual relationship with one of the parties (for example, if the witness is an employee of one of the parties), this may be possible. However, generally speaking, it is very challenging, if not impossible, to ensure the confidentiality of witness testimonies.

2.3. Trade Secrets

For many individuals, the protection of trade secrets is the primary motivation for raising the issue of confidentiality. Consequently, confidentiality, if present, should initially focus on safeguarding these secrets. Common law, organizational rules, and statutes provide substantial support for this matter, particularly the rules of WIPO, which contain the most comprehensive provisions in this regard. Additionally, trade secrets may be protected through international conventions, national criminal laws, or domestic civil procedure laws concerning copyright and patents, many of which provide for the issuance of protective orders to safeguard trade secrets.[2] Furthermore, Article 39 of the TRIPS Agreement[3] is also noteworthy in this context: "1) In order to provide effective protection against unfair competition as referred to in Article 10 of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and information disclosed to governments or governmental bodies in accordance with paragraph 3. 2) Natural and legal persons shall have the means to prevent disclosure, acquisition, and use of information that is lawfully under their control by others without their consent in a manner contrary to honest commercial practices, provided that such information: a) is secret in the sense that...; b) has economic value because it is secret, and c) is subject to reasonable measures to keep it secret by

1 L E Trackman, *Confidentiality in International Commercial Arbitration* (2002) 1007.

2 T Weiler, *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 1009.

3 Agreement on Trade-Related Aspects of Intellectual Property Rights

the persons lawfully in control of it. 3) Members shall protect such information against unfair commercial use. Furthermore, Members shall protect such information from disclosure, except where necessary to protect the public interest or where measures are taken to ensure protection against unfair use."

Regarding trade secrets subject to confidentiality, it should be added that the primary motivation for many individuals resorting to arbitration is the protection of trade secrets through confidentiality obligations. It may be said that if confidentiality obligations exist, they should at least encompass the protection of trade secrets. However, if the confidentiality of trade secrets is not ensured by the confidentiality obligations that may exist in arbitration, a variety of national and international rules exist that protect the confidentiality of trade secrets.

Implicitly, it can be understood that neither arbitrators nor arbitration institutions can sell or exchange this confidential information. A pertinent question arises regarding whether the parties jointly own this confidential information or whether they can individually disclose it. In a case in England, the court stated that the parties to the arbitration have mutual obligations of confidentiality and privacy concerning the reasons for the dispute.[1]

Given the international support for trade secrets, it can be stated that the first instance of their protection as a regulation at the international level was in Article 39 of the TRIPS Agreement under the World Trade Organization (WTO). This provision stipulates that a person who legally controls confidential information must take reasonable steps to maintain its confidentiality under certain conditions. Furthermore, the WIPO has comprehensive regulations regarding the confidentiality of trade secrets. Even the United States, which has adopted an anti-confidentiality stance, recognizes that trade secrets should be protected from disclosure and is supported by the American Arbitration Association's patent arbitration rules.[2]

It appears that there is now an accepted understanding of a global legal framework concerning trade secrets, which the arbitration community must consider, particularly in financial sectors where transparency is predominantly promoted. Many national, organizational, and international regulations have provided protection for trade secrets. Such secrets may be safeguarded by patent laws, copyright, conventions, national criminal laws, or national procedural laws that permit the issuance of protective orders for trade secrets. For instance, in Switzerland, the following information is considered trade secrets and is regarded as fully confidential: pricing strategies, quotations and proposals, terms and conditions of goods and services offered, discounts, pre-launch advertising campaigns, statistical data regarding transaction flows and sustainability, loans and debts, balance sheet details, tax plans, employee remuneration, technical schedules, work and technical plans, drawings and designs, software, temporary employee lists, information collection from service providers and suppliers of semi-finished products, along with their pricing structures.[3]

It may be argued that the arbitration community should also pay attention to Article 39 of the TRIPS Agreement concerning trade secrets. This article states: "In order to ensure effective protection against unfair competition as provided in Article 10 of the Paris Convention,

1 E Brunet and R Speidel, *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 112.
2 MW Buehler and TH Webster, *Handbook of ICC Arbitration: Commentary, Precedents and Materials* (2nd edn, Sweet and Maxwell 2008) 139.
3 TE Carbonneau, *Cases and Materials on International Litigation and Arbitration* (Thomson West 2005) 177.

members shall protect undisclosed information as referred to in paragraph 2 and information that is registered with governments or governmental institutions as mentioned in paragraph 3. Natural and legal persons shall have the legal means to prevent disclosure of information that is under their control to third parties or for others' use, and to prevent others from acquiring this information without the consent of the person and contrary to honest commercial practices. This protection shall apply as long as the information remains confidential, meaning that it is not generally known to, or accessible by, persons who normally deal with such information, and has economic value because it is secret. Furthermore, reasonable and logical steps must be taken by the person who legally controls this information to keep it confidential. Members must protect this information against unfair commercial use. Members shall protect this information against disclosure unless such disclosure is necessary to protect the public interest or reasonable and logical steps have been taken to ensure protection against unfair commercial use."[1]

According to Article 39, "any method contrary to honest commercial practices" can include a breach of confidentiality.[2] Some authors consider this confidentiality rule to be specifically mandatory and obligatory since the structure of Article 39 was the result of a joint effort between the United States and Western European governments.[3] It should be noted that the United States is a proponent of the idea of de-secreting arbitration; however, despite this, it supports the confidentiality of trade secrets.[4]

In light of case law, organizational regulations, international conventions, and national procedural law in this context, trade secrets contain an informational element of the arbitration process that is clearly protected by the obligation of confidentiality. In a general conclusion, amidst customary law, organizational rules, national laws, international conventions, and procedural regulations, it can be said that trade secrets are among the information presented in arbitration that are necessarily and clearly subject to the rule of confidentiality.[5]

2.4. Minutes of Meetings

This issue is one of the clearest and most obvious examples of the application of the principle of confidentiality and its dominance over arbitration processes. Even Australian courts, which are typically strict in other matters, have recognized the confidential nature of hearings, meaning that outsiders are prohibited from attending these sessions. This issue is also addressed in many arbitration laws and rules.[6] However, it should be noted that this matter relates more to the privacy of arbitration than to confidentiality; nevertheless, it is included here to discuss the confidentiality of the minutes.

In the case of *Ali Shipping Corp v Shipyard Trogir*,[7] Judge Potter provided a broad interpretation of the confidentiality obligation, including the minutes of hearings within its

1 J Devolve, *French Arbitration Law and Practice* (Kluwer Law International 2003) 109.

2 J Heaps and C Taylor, 'Legal Privilege and Confidentiality in England and Wales' in M Koehnen et al (eds), *Privilege and Confidentiality: An International Handbook* (IBA 2006) 209.

3 Herbert Smith Newsletter, 'Confidentiality in Arbitration: An Update' (No 71, London 2008) 166.

4 M Henry, 'The Contribution of Arbitral Case Law and National Laws' in E Gaillard, AV Schlaepfer, P Pinsolle and L Degos (eds), *Towards a Uniform International Arbitration Law?* (International Arbitration Institute Series on International Arbitration No 3, Juris 2005) 292.

5 G H Addink, 'The Transparency Principle in the Framework of the WTO' (2009) 1010.

6 C Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders' (The Brookings Institution & Brandeis University, January 2005) 307.

7 *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 (CA) (19 December 1997).

scope. Although this interpretation has faced some opposition,[1] it can generally be stated that the overarching approach aligns with that mentioned in the case. All English courts have affirmed that the privacy of arbitration, which has even been considered axiomatic by Australian courts, would be meaningless without the preservation of its confidentiality. Ultimately, if the minutes of hearings are made public, the parties may also invite outsiders to attend the arbitration personally. Therefore, the theory of confidentiality concerning arbitration minutes is entirely justifiable.

The *Ali Shipping* case serves as a prominent example. The judge provided a broad interpretation of confidentiality and clearly stated that this obligation includes the minutes of hearings.[2] One researcher noted in 1996 that according to English case law, it seemed that the confidentiality obligation did not encompass the minutes of hearings.[3] However, recent case law indicates otherwise. Following the Dalling Baker case, where the court emphasized the privacy of arbitration, other courts, including Australian courts, accepted that this privacy would be meaningless if the confidentiality of arbitration were not upheld.[4] Furthermore, if the minutes of hearings become public and accessible to all, the parties to the arbitration may be able to invite third parties to directly observe the arbitration. For this reason, the assumption that the minutes of hearings are subject to the obligation of confidentiality is generally justifiable.

Additionally, it should be noted that documents created in the context of arbitration (whether during the arbitration process or afterward), such as requests for arbitration, copies of oral testimonies, written statements, hearing summaries, and written requests, are subject to confidentiality obligations.[5] In one case, the court established an interesting rule and differentiated between two categories of documents.[6] The first category consists of documents created solely for the purpose of arbitration, such as notices of submission to arbitration, copies, evidence-related writings, various reports, including witness testimonies and awards issued. The second category includes documents that existed prior to the arbitration process and were created during inquiries and investigations.

In comparison to documents in the first category, the mere existence of the second category in arbitration does not suffice to grant them immunity from disclosure. Moreover, these documents are not confidential by their nature.[7] However, the court suggests that to determine the confidential nature of a document, one should refer to the inherent confidentiality of arbitration and the implicit obligation of the party obtaining a document during inquiry not to use it for any purpose other than arbitration. Based on this reasoning, the court emphasizes that the nature of arbitration implies that parties should be bound by an implicit obligation not to disclose documents prepared for or created during arbitration. If we accept this argument, it becomes clear that any document used in arbitration does not escape the confidentiality obligations.

1 T Collins-Williams and R Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows' (2010) 1005.
2 Herbert Smith Newsletter, 'Confidentiality in Arbitration: An Update' (No 71, London 2008) 134.
3 D Hochstrasser, 'Public and Mandatory Law in International Arbitration' in E Gaillard, AV Schlaepfer, P Pinsolle and L Degos (eds), *Towards a Uniform International Arbitration Law?* (International Arbitration Institute Series on International Arbitration No 3, Juris 2005) 112.
4 S Kouris, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' (2005) 129.
5 J D M Lew and L Mistellis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (International Arbitration Law Library Series No 16, Kluwer Law International 2007) 182.
6 Lord Mance, 'Lecture on Confidentiality of Arbitrations' in *Proceedings of the 2nd Conference on Dispute Resolution, India* (13 Sept 2003) 58.
7 MJ Lord Mustill, 'The History of International Commercial Arbitration – A Sketch' in L Newman and RD Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (2nd edn, Juris 2008) 177.

When the question arises as to whether previous arbitration documents can be utilized, the court must consider the existence of this implicit obligation and possibly its limitations. If the disclosure of these documents and inquiries into them seem to be fair actions contrary to this implicit obligation, this perspective should be taken into account and acted upon. However, the court must also consider whether there are less costly ways for a person to access the requested information without violating the implicit confidentiality obligation.[1]

If the copies of testimonies and the minutes of hearings are not protected by confidentiality, the privacy of arbitration would be rendered meaningless. If these documents become public, the parties to the arbitration may invite third parties to assist them in the arbitration.[2] In the above-mentioned *Ali Shipping* case, the court stated that the obligation of confidentiality extends beyond the arbitral award and explicitly includes arbitral records as well.[3] However, the parties to the arbitration should be aware that under exceptional circumstances, disclosure of this information may be permitted.[4]

In general, documents created during or prior to arbitration with the intention of arbitration are protected by the obligation of confidentiality.[5] In the *Ali Shipping* case, the most recent ruling indicated that both the physical form of the documents and the information they contain are protected by confidentiality obligations, which encompass all parties involved in the arbitration, including the parties, arbitrators, witnesses, and third parties. Notably, the obligation for third parties does not arise from a contractual basis; rather, it is attributed to an implicit legal obligation, as this obligation is a necessary part of the private nature of arbitration.[6]

The rule established in the *Ali Shipping* case is in stark contrast to the rule derived from the *Esso* case in Australia.[7] In that case, the court stated that documents or other evidence presented during arbitration are very unlikely to be protected by confidentiality obligations unless the parties explicitly agree on the specific matter.[8] Possible exceptions that may be drawn from the *Ali Shipping* and *Esso* cases specifically pertain to documents and evidence. First, the parties may consent to the disclosure of certain documents or evidence.[9] Second, the court may issue an order allowing a party to obtain documents from a previous arbitration.[10] Third, a person may disclose a document when necessary for protecting that person's legal rights.[11]

2.5. Deliberations of Arbitrators

Some have argued that arbitrators are bound by four obligations: first, they must act fairly and impartially; second, they must act within the legal and contractual timeframes; third, they must pursue their actions until a decision is reached; and fourth, they must keep all arbitration matters

1 J Misra and R Jordans, 'Confidentiality in International Arbitration: An Introspection of the Public Interest Exception' (2006) 39.
2 L Newman and RD Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (2nd edn, Juris 2008) 177.
3 CYC Ong, 'Confidentiality of Arbitral Awards and the Advantage for Arbitral Institutions to Maintain a Repository of Awards' (2005) 169.
4 G Petrochilos, *Procedural Law in International Arbitration* (Oxford Private International Law Series, Oxford University Press 2005) 139.
5 M Pryles, 'Confidentiality' in L Newman and RD Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (2nd edn, Juris 2008) 147.
6 A Redfern and M Hunter, *International Commercial Arbitration* (4th edn, Oxford University Press 2004) 177.
7 *Shell Co of Australia Ltd v Esso Standard Oil (Australia) Ltd* [1963] HCA 66.
8 M Christ, 'Legal Privilege and Confidentiality in Germany' in M Koehnen, M Russenberger and E Cowling (eds), *Privilege and Confidentiality: An International Handbook* (International Bar Association 2006) 167.
9 QL Sze and EL Peng Khoon, 'Confidentiality in Arbitration: How Far Does It Extend?' (Academy, Singapore 2007) 281.
10 Thoma, *Confidentiality in English Arbitration Law: Myths and Realities About Its Legal Nature* (2008) 299.
11 Trackman, *Confidentiality in International Commercial Arbitration* (2002) 13.

confidential. Regarding the fourth obligation, it has been stated that regardless of how vague or cautious the organizational rules are, it is clear that this rule applies to arbitrators, who are merely service providers and have no personal interest in the matter. They must ensure that the dispute remains confidential as requested by the parties.[1] This confidentiality obligation protects not only the arbitrators but also their deliberations from disclosure, which cannot be revealed to anyone, including the parties themselves. However, it can be noted that the final outcome is reached either unanimously or by majority opinion.

2.6. Arbitral Award

In principle, the arbitral award as part of the arbitration process should not be disclosed. However, there is significant pressure on arbitration institutions to publish their awards in full or in a redacted form or to allow access to them. One author argues that the redaction of arbitral awards for publication guarantees the confidentiality of arbitration, but acknowledges that while establishing a legal framework arising from arbitration is commendable, there is no necessity to create a doctrine of arbitral precedent.[2] Some arbitration institutional rules state that the publication of arbitral awards is possible only with the consent of the parties involved.[3] Despite such prohibitions, arbitral awards are often published through media or third parties. As mentioned, although arbitration journals and publications often release awards without naming the parties, this method is ineffective in maintaining the confidentiality of the parties' identities. In fact, researchers interested in a specific arbitration may be able to identify the parties based on the details published. Often, it is the parties themselves who facilitate the disclosure of the arbitral award, for instance, when seeking enforcement of the award in national courts.[4]

In an English court, this issue was discussed and it appeared that the court was questioning the principle of confidentiality of arbitral awards. Specifically, the dispute revolved around whether it was permissible to use an arbitral award from a second arbitration between the same parties, despite a clear confidentiality agreement prohibiting the disclosure of the award. The confidentiality agreement stipulated that the results of the arbitration could not be disclosed at any time to any person or entity not involved in the arbitration, either in whole or in part. The English court concluded that this agreement could not create an absolute prohibition on the disclosure of the arbitral award, as this would result in an award that could not be enforced by the court. Overall, the legal use of a prior arbitral award in a subsequent arbitration involving the same parties does not constitute a breach of the confidentiality agreement.

Similarly, in the case of *the insurance dispute*, the judge opined that wherever it is reasonable to support one party's rights against third parties, disclosure of the award may be warranted, allowing the party to use the award as a defense to protect their rights. This disclosure can occur without court permission and without violating confidentiality. The judge provided three reasons for this conclusion: first, the award clarifies the rights of the parties concerning the issues decided and creates an independent contractual obligation regarding the enforcement

1 M Perez Esteve, 'WTO Rules and Practices for Transparency and Engagement with Civil Society Organizations' (2011) 155.
2 A Mourre and L Radicati Di Brozolo, 'Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back' (2006) 112.
3 M Margret Moses, 'Party Agreement to Expand Judicial Review of Arbitral Awards' (2003) 138.
4 F M Maniruzzaman, 'The Relevance of Public International Law in Arbitrations Concerning International Economic Development Agreements: An Appraisal of Some Fundamental Aspects' (2005) 209.

of the arbitral award. Second, the award is subject to judicial oversight by the court. Third, the award is enforceable in English courts, whether through summary proceedings or claims regarding the award. In all three instances, the award may be presented in court, thereby entering the realm of public ownership.[1]

The publication of arbitral awards undermines the parties' request for resolving disputes in a confidential environment. Some authors consider this characteristic to be one of the benefits of publishing arbitral awards.[2] In fact, a significant movement regarding the publication of arbitral awards has begun, particularly in France, where the International Chamber of Commerce decided to publish arbitral awards annually starting in 1974, and similarly, ICSID initiated this practice in 1986. A close examination of recent arbitral awards reveals that they are often based on prior awards, and the decisions taken generally align with one another. It may be agreeable to those who believe that publishing arbitral awards without disclosing the parties' names does not violate confidentiality. Such publication would serve the public interest in businesses and legal practices.[3]

However, it may not be entirely accurate to assert that arbitration participants and practitioners can legitimately and lawfully access the rules and decisions made by arbitrators. Nonetheless, it can be concluded that individuals opting for arbitration as a private and confidential means of dispute resolution, rather than litigation, should be aware that no rules or practices exist to ensure access to prior arbitrators' decisions. Nevertheless, it cannot be denied that disclosing arbitral awards positively and effectively contributes to the predictability of future decisions made by arbitrators and aids in the development of arbitration applications.

It is important to note that while arbitral awards may enter the public domain during the enforcement stage or in the event of an appeal, most arbitration organizations explicitly provide regulations regarding the confidentiality of awards, stating that arbitral awards may only be published with the consent of the parties. Article 28(2) of the ICC Rules clearly states that the copy of the award will be made available to the parties only, and no one else. Similarly, Article 48(5) of the ICSID Convention specifies that the center should not publish the award without the consent of the parties. Articles 30(3) of the London Court of International Arbitration Rules,[4] 27(4) of the American Arbitration Association Rules,[5] and 32(5) of the UNCITRAL Arbitration Rules[6] contain similar provisions.[7]

Despite these regulations, and while arbitral awards are generally considered confidential and cannot be published without the parties' consent, in practice, arbitral awards are often published in the media and before third parties. Commercial journals and arbitration reports usually publish awards without identifying the parties, but this approach is not very effective in maintaining the anonymity of the parties. Furthermore, the existence of arbitration itself does

1 P Muchlinski et al., *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 110.
2 E Gaillard, *Anti-Suit Injunctions in International Arbitration* (Juris Publishing, Inc. and International Arbitration Institute 2005) 108.
3 R Dolzer and Ch Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) 142.
4 Article 30(3): "The LCIA tribunal shall not publish any award or part of an award without the written consent of the parties and the arbitration tribunal."
5 Article 27(4): "An award shall be made public only with the consent of all parties or where required by law."
6 Article 32(5): "An award shall be made public only with the consent of both parties."
7 A Smunty and K Young, 'Confidentiality in Relation to States' (2009) 77.

not remain confidential, so when the public is aware of the arbitration between two parties, it becomes relatively easy to match the parties with the published award.[1]

It should be noted that the publication of the reasons for an award, without mentioning names, is not considered a breach of confidentiality. Such publication serves the public interest in business and legal practice, and it is appropriate for lawyers and users of arbitration to have access to applicable rules and decisions made. Additionally, there are many other reasons that have led to a significant limitation in the enforcement of confidentiality in practice. In many areas, arbitral awards are published without the parties' names, including in maritime arbitration, institutional arbitrations in formerly socialist Eastern European countries, and some commercial arbitrations. On a global scale, the disclosure of awards is regarded as a means of enhancing predictability of outcomes, and the regulation of procedures by specialized organizations often results from the publication of these decisions.

On the other hand, in the context of public contracts, ICSID arbitrations, case-by-case arbitrations arising from public contracts, and the awards issued in significant and renowned arbitrations are published along with commentary and are considered part of judicial practice. Generally, there is a public movement toward the publication of arbitral awards. In France, the "International Law Review" has provided an annual overview of ICC awards since 1974 and ICSID awards since 1986.[2] In practice, it has been observed that most ICSID tribunals consider the reasoning of previous tribunals in their decision-making. Although they are not obliged to adhere to these awards, the influence of prior awards on new decisions is undeniable. Not only do arbitral tribunals benefit from access to arbitral awards, but the parties themselves also gain from the ability to reference other parties' disputes and the conclusions reached by tribunals, thereby enhancing their chances of success by utilizing previous cases with similar conditions. Furthermore, access to arbitral awards and the review of previous decisions assist parties in selecting arbitrators.

Another positive aspect of the publication of awards is its contribution to scholarly discussions. Legal scholars' theories are often cited in the reasoning of many arbitral tribunals. Evaluating arbitral awards by these scholars is only possible through the publication of the awards. Consequently, the disclosure of awards significantly aids in the substantive development and progress of arbitration.

In English law, although an arbitral award is considered confidential, there is a possibility of disclosure if it is necessary to protect one party's legal rights against a third party. It should be noted that this criterion does not apply to individuals involved in the original arbitration (in which the award in question was issued). Two applicable criteria in this context are: first, relevance; and second, the necessity of disclosure for the fair conduct of the dispute. On the other hand, one of the parties might disclose the award in light of the supervisory role of the courts or for enforcement purposes. Additionally, disclosure of the award may occur by law, court order, or with the consent of the other party.[3]

1 A Spencer, 'Transparency Provisions in the TBT Agreement: Overview' (Canadian Enquiry Point, CATRTA Workshop, Rio de Janeiro, Brazil, 29 October 2012) 1013.

2 A Thorvaldson and R Wolfe, 'Improving Transparency as a Tool for the Implementation of the WTO Agreement on Agriculture' (September 2012) 188.

3 Marriott and Tackaberry, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (2003) 314.

In summary, although some arbitration rules prohibit the disclosure of awards, in practice, arbitral awards are disclosed and published in various ways. Sometimes, the parties themselves are responsible for this disclosure, as in cases where they seek to challenge or enforce the award in court, while other times, public interest issues serve as the basis for such actions.

At the conclusion of this discussion, it is worth noting that despite the existence of organizational regulations preventing the unauthorized publication of the final award[1] and the general presumption that the arbitral award is confidential,[2] in reality, the final award often makes its way to the media and third parties.[3] Although arbitration journals and reporters remove the names and identities of individuals before publication, this method is not effective in preserving the anonymity of the parties.[4] As mentioned earlier, the ability to keep the arbitration process confidential is weak. Therefore, when the public is aware of the existence of arbitration between parties and is awaiting the issuance and publication of the award, matching an award with the names of the parties becomes relatively easy.

In addition to the above discussions, the publication of arbitral awards disregards the parties' desire to choose arbitration for its confidentiality, even though there are public benefits to disclosing arbitral awards. Some researchers have commented on the strong tendency toward the publication of arbitral awards, particularly in public contracts, ICSID awards, awards related to disputes arising from public contracts, and awards in significant and recognized cases, which are often published with explanations and serve as usable precedents. Overall, there is a widespread movement toward the publication of arbitral awards. In France, ICC awards have been published annually since 1974, and ICSID awards since 1986. Additionally, various publications, including the annual "International Commercial Arbitration Yearbook," contribute to this effort.

A study of ICC awards and their explanations reveals a clear point: recent arbitral awards are issued based on prior awards, and the decisions taken are generally consistent with one another. Thus, the publication of awards has led to increased coherence among them. Whether in arbitration law or international commercial law, arbitral awards have become a significant private source, undoubtedly contributing to the establishment of an arbitration element in transnational commercial law.

Additionally, researchers argue how the publication of arbitral awards can be significant and beneficial. In every case, it is important to note that the publication of arbitral awards, based on the preservation of identity and the removal of the parties' names, does not violate confidentiality. This publication meets the public expectations of businesses and legal practices, as it is a legitimate expectation for users of arbitration and practitioners in the field to have access to the rules applied by arbitrators and the decisions they make.

Arbitral awards are published in many areas, and in most cases, the names of the parties are removed. On a global scale, it is accepted that the disclosure of arbitral awards enhances the predictability of arbitration outcomes, and the regulation of the use and applications of

1 C Ambrose, 'When Can a Third Party Enforce an Arbitration Clause?' (2001) 415.
2 P Fouchard et al., *Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 117.
3 G Kaufmann-Kohler et al., *International Arbitration: Law and Practice in Switzerland* (Oxford University Press 2013) 112.
4 A Karapanco, *Assignment of Arbitration Agreement: Perspectives of Leading Jurisdictions* (Central European University 2015) 145.

arbitration, by professional organizations, often occurs through the publication of arbitration results.[1]

In general, there are institutions and organizations whose rules prevent the publication of arbitral awards without the consent of the parties. However, even in these cases, arbitral awards become public through other means. Often, the parties themselves are responsible for this disclosure, particularly when they seek to challenge or enforce the award in national courts.[2]

Following the discussion of issues related to the principle of confidentiality in arbitration, we will address and examine in the next section the individuals who are obligated to adhere to this principle during the arbitration process.

3. Individuals Obligated to Maintain Confidentiality

After examining what may be considered confidential, it is time to identify the individuals who are likely bound by confidentiality obligations. Generally, the obligation to maintain confidentiality can be considered in relation to three groups of individuals associated with an arbitration. Due to ambiguities in this area, as in many other discussions about confidentiality, some believe that the scope of this obligation should not be determined solely based on the individuals who are parties to the arbitration, but also on the nature of the information in question and the circumstances under which the individual receives this information. Thus, a person who accidentally encounters a document labeled "confidential" on the street is never bound to maintain its confidentiality. However, a witness who becomes aware of confidential information during an arbitration, such as pleadings and statements from the parties, will be obligated to keep that information confidential. The individuals bound by the principle of confidentiality in the arbitration process can be identified as follows: arbitrators, parties to arbitration, and third parties. Each will be examined in turn.

3.1. Arbitrators

It is generally accepted that arbitrators have a moral obligation to maintain confidentiality. Few countries explicitly establish such an obligation for arbitrators in their national laws; however, many legal systems indirectly recognize the duty of arbitrators to maintain confidentiality based on the contractual relationship between the parties and the arbitrators. This issue is more systematically addressed in the regulations of arbitration organizations, the majority of which require arbitrators to maintain confidentiality.[3]

One country with relatively comprehensive regulations regarding the obligation of arbitrators to maintain confidentiality is Switzerland. In this country's laws, arbitrators have a strict obligation to confidentiality based on their contractual relationship with the parties. Accordingly, they are required to remain silent about all matters concerning the parties and the dispute. Additionally, due to the special relationship of trust and confidence between the parties and the arbitrators, many believe that arbitrators may refuse to testify concerning the arbitration. In cases of breach of this obligation, Swiss law generally holds arbitrators liable in

1 B Stucki and S Wittmer, 'Extension of Arbitration Agreements to Non-Signatories' (2006) 12.

2 E Ho Ming Tang, 'Methods to Extend the Scope of an Arbitration Agreement to Third Party Non-Signatories' (LW 4635, research paper 2009) 35.

3 A Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 126.

tort. It is believed that the liability of arbitrators is similar to that of agents. Thus, if arbitrators violate their obligations, they will face civil liability for failing to perform their duties with the necessary care and diligence, allowing the parties to sue them for damages. In cases with multiple arbitrators, they will be jointly liable.[1]

In the legal system of many countries (including China), the obligation of arbitrators to maintain confidentiality is complemented by ethical regulations for arbitrators. These regulations specify that arbitrators must strictly maintain the confidentiality of what they learn during the arbitration process. This information includes substantive information and proceedings related to the arbitration, such as details of the dispute, the conduct of hearings, information related to the tribunal's private meetings, and the personal opinions of the arbitrators.[2]

In Germany, it is generally accepted that arbitrators are obliged to maintain confidentiality, similar to judges, but the extent of this obligation is not clearly defined. The Federal Supreme Court of Germany considers this obligation to arise from the contract with the arbitrator. In cases of breach of this obligation, legal scholars in Germany do not envision criminal liability for arbitrators (unlike judges). Similar grounds exist in French law regarding the obligation of arbitrators to maintain confidentiality. French scholars believe this obligation stems from the contract between the parties and the arbitrator or from the confidentiality of the arbitrators' deliberations. In English law, such an obligation exists for arbitrators in relation to both the parties and even witnesses. In Sweden, although the obligation of confidentiality for parties is not recognized, there is consensus regarding the existence of such an obligation for arbitrators. However, the position in the United States differs. In the absence of organizational regulations, applicable law, or explicit agreement between the parties, U.S. courts do not recognize a general obligation for arbitrators not to disclose their deliberative processes or discussions. Nevertheless, it should be noted that arbitration organizations in the U.S., including the American Arbitration Association, require arbitrators to refrain from disclosing any information presented during the proceedings by the parties or witnesses.[3]

Most other organizational regulations also contain provisions related to the obligation of arbitrators to maintain confidentiality. The most significant include Article 76 of WIPO,[4] the ICSID regulations in Articles 6(2)[5] and 15(2), all of which require arbitrators to maintain confidentiality. Furthermore, Article 31(2)[6] of the London Court of International Arbitration Rules states that an arbitrator should not undertake any obligation to disclose what occurred in the arbitration to any person. Regarding arbitration organizations and their employees, national

1 G Kauffman-Kohler, *International Arbitration in Switzerland: A Handbook of Practitioners* (Kluwer Law International 2004) 196.

2 J Tao, *Arbitration Law and Practice in China* (2nd edn, Kluwer Law International 2008) 153.

3 C Buys, 'The Tensions Between Confidentiality and Transparency in International Arbitration' (2003) 468.

4 Article 76: "1. Unless otherwise agreed by the parties, the center and the arbitrators shall maintain the confidentiality of the arbitration, the award, and, to the extent that it pertains to information that is not in the public domain, any documents or evidence presented during the arbitration, except to the extent necessary for the court to act in relation to the award or for other legal obligations."

5 Article 6(2): "2. Before or at the first meeting of the tribunal, each arbitrator shall sign a declaration in the following form: ... I will keep confidential all information that I become aware of as a result of my participation in the arbitration, as well as the contents of the award issued by the tribunal..."

6 Article 31(2): "After the award has been issued and the time for its correction or completion under Article 27 has expired, neither the LCIA nor its tribunal (including the Chair, Vice-Chair, and the ordinary members), nor the Secretary, nor any arbitrators or experts of the tribunal shall assume any legal obligation to disclose any issues related to the arbitration, nor shall any party summon any of these individuals as witnesses in any judicial or other proceedings arising from the arbitration."

laws do not impose specific confidentiality obligations on them. However, these organizations have taken on such obligations in their regulations (as seen in Article 31 of the London Court of International Arbitration Rules and the rules of the American Arbitration Association).

3.2. Parties to Arbitration

The obligation of confidentiality for parties in arbitration presents a complex situation. In the absence of an explicit agreement regarding confidentiality, their duty to maintain confidentiality will vary depending on the tribunal, governing law, proceedings, the type of information in question, and how that information may be used. This is why most challenging discussions about confidentiality relate to the obligations of the parties.[1] Nonetheless, parties can establish such a duty by explicitly agreeing to confidentiality or by choosing organizational rules that recognize this obligation. In the absence of such agreements, the primary basis for confidentiality can be considered an implied condition, with confidentiality as a legally implied term appearing to be the most appropriate foundation. If the obligation to maintain confidentiality is recognized, certain exceptions may still exist, allowing parties to disclose confidential information when necessary.[2]

3.3. Third Parties

Generally, arbitration consists of two parties as the primary poles (sometimes with more than one person on one side) and a third party who is neutral and has no interest in the outcome of the case. Individuals who are not bound by an arbitration agreement and will not be affected by the arbitration are referred to as third parties. Regarding third parties who appear as witnesses in arbitration, except for those employed by one of the parties, other witnesses are generally not obligated to maintain confidentiality. Although the tribunal and the parties may encourage these witnesses to keep confidential what occurred during the arbitration, they cannot be legally bound to do so. Furthermore, if a witness provides testimony that contradicts previous statements made during the arbitration, their prior testimony may be disclosed in the current arbitration. Thus, the obligation for witnesses to maintain confidentiality is weak, as they are not bound by the arbitration agreement, and ensuring the confidentiality of their testimony is not very practical.[3]

A similar analysis can be applied to experts. The arbitration agreement is only binding on the signing parties; therefore, third parties, including witnesses and experts, cannot be bound by it, and thus no obligation can be imposed on them. It may be argued that experts should respect the confidentiality of the arbitration not only for the party that requested their presence but also for the benefit of the other party. However, if such an obligation exists, it cannot be derived from the terms of the arbitration agreement between the parties, which is only binding on them under legal principles. Consequently, any obligation for experts or other third parties to maintain confidentiality should be considered as arising from an implied legal duty, as a fundamental aspect of the arbitration process.[4]

On the other hand, since experts are typically engaged by one of the parties, there is an

1 P Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press, New York 2007, 6th printing) 151.
2 C Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies' (2009) 159.
3 H J Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, MIT Press 2010) 155.
4 H Nikbakht Fini, 'Identification and Enforcement of International Commercial Arbitration Awards in Iran' (Institute for Trade Studies and Research 2006) 85.

opportunity to require them to sign a confidentiality agreement on behalf of the parties. Thus, while an expert cannot be bound to maintain confidentiality through the arbitration agreement, they can be obligated to confidentiality through separate agreements involving at least one of the parties to the arbitration.[1]

A confidentiality agreement is indeed binding for the parties to the arbitration who sign it, but third parties, such as experts, are generally not obligated to maintain confidentiality. It could be argued that experts are obliged to maintain confidentiality not only to the party that engaged them but also to the other party to respect the confidentiality of the arbitration process. If we accept that such an obligation exists, it would not stem from a contractual basis because, under contract law, a third party cannot be bound by a contract made between two other persons. Therefore, any obligation we wish to impose on third parties, including experts, should be considered as arising from an implied legal duty, reflecting the essential characteristics of arbitration.

However, the parties to arbitration can require an expert to sign a confidentiality agreement before selecting them. For example, if Person A identifies potential engineers from whom they can choose an expert, Person A could make it a condition of the expert's engagement that they sign a confidentiality agreement. While a third party, including an expert, cannot be bound by the arbitration agreement between the parties, they can be required to maintain confidentiality through a separate agreement with at least one of the parties to the arbitration.

Another question that arises is whether the statements made by experts are protected under confidentiality. Experts are not bound by confidentiality agreements governing the arbitration process. For example, if an expert provides a favorable opinion for Party A in one arbitration and then offers a contradictory opinion for Party B in a subsequent arbitration, Party C, opposing Party B, can reference the expert's earlier opinion to challenge their stance in the second arbitration. In summary, the expert opinion expressed during an arbitration is not protected by confidentiality. No organizational or national law has provided such protection concerning experts.

Another important point concerns third parties other than witnesses and experts. It has been previously stated that based on the principle of confidentiality in arbitration, third parties are prohibited from attending arbitration sessions. However, regarding investment arbitration, there is considerable interest, particularly from non-governmental organizations, in increasing transparency in arbitration. These activities indicate their intent to participate in arbitration and potentially provide their opinions during the proceedings. If such participation (limited to investment arbitration) is accepted, the question arises as to whether these third parties can be considered experts. The primary difference between these third parties and experts is that the former are not neutral and may show bias toward one of the parties.[2]

The discussion regarding these third parties is quite complex, and since it pertains solely to investment arbitration, it is not suitable for this paper. Mentioning it serves merely to introduce the existence of such an issue, which could be explored and analyzed in further research.

1 A Brown, *Law of Arbitration* (Oxford University Press 2009) 1006.

2 A Mourre, 'Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?' (2006) 270.

Ultimately, it should be noted that legally, none of the third parties involved in arbitration can be considered obligated merely due to an explicit or implicit confidentiality obligation in the parties' arbitration agreement.

It is also worth adding that the opinions of experts or specialists made during the arbitration process are definitely not protected against disclosure and public exposure. This issue was raised in one case, where an English judge stated that one of the parties has the right to cite the expert's opinions from a previous arbitration as evidence, especially when those opinions differ from the expert's current testimony in the ongoing court proceedings.

Perhaps this is why some legal experts in the field of arbitration advise experts by stating: "… those of you who act as specialists or experts should know that you are always at risk of being challenged by the opposing or aggrieved party, particularly if you, your partner, or your colleague in your organization have expressed different opinions on a similar subject that may not seem consistent with your current opinion".

Conclusion

In this paper, we have examined two main topics. Firstly, we discussed the issues covered by the principle of confidentiality in arbitration. The aim was to identify the subjects and matters governed by confidentiality, which is one of the most important and fundamental principles of arbitration. These subjects include the arbitration agreement, witness testimonies and expert opinions, trade secrets, minutes of meetings, deliberations, and the arbitral award. The findings regarding the application of the confidentiality principle to each of these matters can be summarized as follows:

1. **Arbitration Agreement**: Although there is an emphasis on maintaining the confidentiality of arbitration agreements, in practice, the contents of these agreements are often disclosed, especially when their nature relates to public interests. Consequently, there is no common basis or position identifiable among national legal systems regarding the confidentiality of arbitration agreements, except in specific cases. However, the principle remains valid for other instances.
2. **Witness Testimonies and Expert Opinions**: These are generally considered to be subject to confidentiality obligations. However, they are less protected from disclosure than other evidentiary materials. Particularly in cases where a witness or expert provides contradictory testimony in different arbitrations, previous statements may be disclosed. There is no shared position among national laws on this matter.
3. **Trade Secrets**: Many individuals resort to arbitration primarily to protect trade secrets through confidentiality obligations. Among common law, organizational rules, national laws, international conventions, and procedural laws, trade secrets are clearly subject to the confidentiality rule in arbitration.
4. **Minutes of Meetings**: Generally, documents created in the context of arbitration (whether during or after the process) such as arbitration requests, transcripts of oral testimony, written testimonies, hearing summaries, and written requests are subject to confidentiality obligations. This is one of the clearest manifestations of the confidentiality principle in arbitration processes.

5. **Deliberations**: One of the primary responsibilities of arbitrators is to keep all arbitration matters confidential. This rule applies to arbitrators, who are service providers with no personal interests, and they must ensure that the disputes remain confidential as desired by the parties. Consequently, deliberations among arbitrators are protected from disclosure, and their content cannot be revealed to anyone, including the parties involved.
6. **Arbitral Award**: Although the general principle is that the arbitral award remains confidential and undisclosed, in practice, it has often been seen that awards are disclosed and published in media or by the parties themselves. Some advantages of this disclosure have been noted, with public scrutiny of an award being a significant benefit. However, in instances where awards are published against the wishes of the parties, it undermines their intent to resolve disputes in a confidential setting. It is important to note that the publication of the rationale for an award, without naming the parties, does not constitute a breach of confidentiality. Such publication serves the public interest in business and legal practices, and it is appropriate for lawyers and arbitration users to have access to applicable rules and decisions.

The second topic discussed in this paper concerns individuals who are obligated to adhere to the confidentiality principle during the arbitration process. Generally, the obligation to maintain confidentiality can be analyzed concerning three groups of individuals involved in an arbitration: arbitrators, parties to arbitration, and third parties.

Regarding arbitrators, it is widely accepted that there is an ethical obligation to maintain confidentiality. In many national legal systems, this obligation is recognized as a fundamental duty of arbitrators, and its breach may lead to civil, criminal, or disciplinary liability for the offending arbitrators.

However, the situation regarding the obligation of parties to arbitration to maintain confidentiality is complex. In the absence of an explicit agreement on confidentiality, their duty to maintain confidentiality varies depending on the tribunal, governing law, proceedings, and the nature of the information in question. This complexity is the reason most discussions about confidentiality issues center around the obligations of the parties. Nonetheless, parties can establish such duties through explicit agreements or by choosing organizational rules that recognize these obligations. If no such agreement exists, the primary basis for confidentiality can be considered an implied condition, indicating the parties' intent to keep disputes confidential merely by entering into arbitration, although parties may sometimes seek to disclose information, which does not negate their intent.

Finally, regarding third parties, it can be concluded that confidentiality agreements are indeed binding for the parties to the arbitration who sign them, but third parties, such as experts, are generally not obligated to maintain confidentiality. Any obligation imposed on third parties, including experts, should be considered as arising from an implied legal duty, reflecting the fundamental characteristics of arbitration. Nevertheless, the parties to arbitration can require an expert to sign a confidentiality agreement before selection. However, when the third parties in question are not arbitration experts, there is no doubt about the applicability of the confidentiality principle to them.

Reference

Books

A Brown, *Law of Arbitration* (Oxford University Press 2009).

A Karapanco, *Assignment of Arbitration Agreement: Perspectives of Leading Jurisdictions* (Central European University 2015).

A Redfern and M Hunter, *International Commercial Arbitration* (4th edn, Oxford University Press 2004).

C McLachlan et al., *International Investment Arbitration: Substantive Principles* (Oxford University Press 2008).

Ch Schreuer, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009).

E Brunet and R Speidel, *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006).

E Gaillard, *Anti-Suit Injunctions in International Arbitration* (Juris Publishing, Inc. and International Arbitration Institute 2005).

G Kauffman-Kohler, *International Arbitration in Switzerland: A Handbook of Practitioners* (Kluwer Law International 2004).

G Kaufmann-Kohler et al., *International Arbitration: Law and Practice in Switzerland* (Oxford University Press 2013).

G Petrochilos, *Procedural Law in International Arbitration* (Oxford Private International Law Series, Oxford University Press 2005).

H J Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, MIT Press 2010).

J D M Lew and L Mistellis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (International Arbitration Law Library Series No 16, Kluwer Law International 2007).

J Devolve, *French Arbitration Law and Practice* (Kluwer Law International 2003).

A Marriott and J Tackaberry, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (vol 1, 4th edn, Sweet & Maxwell 2003).

J Tao, *Arbitration Law and Practice in China* (2nd edn, Kluwer Law International 2008).

K Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer 2010).

L Newman and RD Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (2nd edn, Juris 2008).

L Reed et al., *Guide to ICSID Arbitration* (Kluwer Law International 2006).

MW Buehler and TH Webster, *Handbook of ICC Arbitration: Commentary, Precedents and Materials* (2nd edn, Sweet and Maxwell 2008).

P Fouchard et al., *Goldman on International Commercial Arbitration* (Kluwer Law International 1999).

P Muchlinski et al., *The Oxford Handbook of International Investment Law* (Oxford University Press 2008).

P Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press, New York 2007, 6th printing).

R Dolzer and Ch Schreuer, *Principles of International Investment Law* (Oxford University Press 2008).

T Weiler, *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005).

TE Carbonneau, *Cases and Materials on International Litigation and Arbitration* (Thomson West 2005).

Book Chapters

A Smunty and K Young, 'Confidentiality in Relation to States' (2009) ICC Bulletin: *Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice*.

A Spencer, 'Transparency Provisions in the TBT Agreement: Overview' (Canadian Enquiry Point, CATRTA Workshop, Rio de Janeiro, Brazil, 29 October 2012).

B Stucki and S Wittmer, 'Extension of Arbitration Agreements to Non-Signatories' (2006) *ASA Bulletin*.

D Hochstrasser, 'Public and Mandatory Law in International Arbitration' in E Gaillard, AV Schlaepfer, P Pinsolle and L Degos (eds), *Towards a Uniform International Arbitration Law?* (International Arbitration Institute Series on International Arbitration No 3, Juris 2005).

E Ho Ming Tang, 'Methods to Extend the Scope of an Arbitration Agreement to Third Party Non-Signatories' (LW 4635, research paper 2009).

J Heaps and C Taylor, 'Legal Privilege and Confidentiality in England and Wales' in M Koehnen et al (eds), *Privilege and Confidentiality: An International Handbook* (IBA 2006).

Lord Mance, 'Lecture on Confidentiality of Arbitrations' in *Proceedings of the 2nd Conference on Dispute Resolution, India* (13 Sept 2003).

M Christ, 'Legal Privilege and Confidentiality in Germany' in M Koehnen, M Russenberger and E Cowling (eds), *Privilege and Confidentiality: An International Handbook* (International Bar Association 2006).

M Henry, 'The Contribution of Arbitral Case Law and National Laws' in E Gaillard, AV Schlaepfer, P Pinsolle and L Degos (eds), *Towards a Uniform International Arbitration Law?* (International Arbitration Institute Series on International Arbitration No 3, Juris 2005).

M Pryles, 'Confidentiality' in L Newman and RD Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (2nd edn, Juris 2008).

MJ Lord Mustill, 'The History of International Commercial Arbitration – A Sketch' in L Newman and RD Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (2nd edn, Juris 2008).

Articles

A Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16 *American University International Law Review*.

A Mourre and L Radicati Di Brozolo, 'Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back' (2006) 32 *Journal of International Arbitration* 2.

A Mourre, 'Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?' (2006) 5 *The Law and Practice of International Courts and Tribunals* 2.

A Thorvaldson and R Wolfe, 'Improving Transparency as a Tool for the Implementation of the WTO Agreement on Agriculture' (September 2012).

C Ambrose, 'When Can a Third Party Enforce an Arbitration Clause?' (2001) *The Journal of Business Law* (Sweet & Maxwell).

C Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders' (The Brookings Institution & Brandeis University, January 2005).

C Buys, 'The Tensions Between Confidentiality and Transparency in International Arbitration' (2003) 14 *The American Review of International Arbitration*.

C Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies' (2009) No. 26.

CYC Ong, 'Confidentiality of Arbitral Awards and the Advantage for Arbitral Institutions to Maintain a Repository of Awards' (2005) 1(2) *Asian International Arbitration Journal*.

F M Maniruzzaman, 'The Relevance of Public International Law in Arbitrations Concerning International Economic Development Agreements: An Appraisal of Some Fundamental Aspects' (2005) 6 *The Journal of World Investment & Trade* 2.

G Cuniberti, 'Parallel Litigation and Foreign Investment Dispute Settlement' (2006) 21 *ICSID Review* 2.

G H Addink, 'The Transparency Principle in the Framework of the WTO' (2009) 6 *Journal Hukum International*.

H Nikbakht Fini, 'Identification and Enforcement of International Commercial Arbitration Awards in Iran' (Institute for Trade Studies and Research 2006). [In Persian]

I Thoma, 'Confidentiality in English Arbitration Law: Myths and Realities About Its Legal Nature' (2008) 25 *Journal of International Arbitration* 3.

J Misra and R Jordans, 'Confidentiality in International Arbitration: An Introspection of the Public Interest Exception' (2006) *Journal of International Arbitration* No 23.

LE Trackman, 'Confidentiality in International Commercial Arbitration' (2002) 18 *Journal of International Arbitration* 1.

M Bagheri, 'The Role of the Principle of Transparency in the World Trade Organization' (Master's Thesis, Shahid Beheshti University 2012). [In Persian]

M Margret Moses, 'Party Agreement to Expand Judicial Review of Arbitral Awards' (2003) 20 *Journal of International Arbitration* 3.

M Perez Esteve, 'WTO Rules and Practices for Transparency and Engagement with Civil Society Organizations' (2011).

Q Khadem Razavi and P Rastgou, 'The Role of Confidentiality in Investment Dispute Cases' (2020) 25 *Journal of Judicial Law Perspectives* 92. [In Persian]

QL Sze and EL Peng Khoon, 'Confidentiality in Arbitration: How Far Does It Extend?' (Academy, Singapore 2007).

R Eskini and A Khakpour, 'The Conflict Between the Principle of Transparency and Confidentiality in International Arbitration' (2019) 24 *Journal of Judicial Law Perspectives* 86. [In Persian]

R Moloo, 'Arbitrators Granting Anti-Suit Orders: When Should They and on What Authority?' (2009) 26 *Journal of International Arbitration* 2.

S D Frank, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 4.

S Kouris, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' (2005) 22 *Journal of International Arbitration* 127.

T Collins-Williams and R Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows' (2010) *World Trade Review*.

Reports and Newsletters

Herbert Smith Newsletter, 'Confidentiality in Arbitration: An Update' (No 71, London 2008).

Cases

Ali Shipping Corp v Shipyard Trogir [1999] 1 WLR 314 (CA) (19 December 1997).

Shell Co of Australia Ltd v Esso Standard Oil (Australia) Ltd [1963] HCA 66.

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

The Study of Economic Policies and Challenges inComposition Contracts: A Comparative Study of the Iranian, US, and UK Legal Systems

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Article Info

Article type:
Research Article

Article history:
Received
14 April 2025

Received in revised form
1 June 2025

Accepted
26 June 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3787.html

Keywords:
Bankruptcy, Composition Agreement, Iran, UK, USA.

ABSTRACT

Composition contracts are of great importance in international legal systems and are considered to be an important tool for solving financial problems, as they contribute significantly to economic prosperity by preventing the complete dissolution of economic units. Therefore, a comparative study of composition contracts in different legal systems such as Iran, the United States and the United Kingdom can contribute significantly to the reform of commercial laws and regulations in this field. Accordingly, the main purpose of the present study is to examine the economic policies and challenges in composition contracts and their application in the legal systems of Iran, the United States and the United Kingdom. The main question of the present study is: "What are the main challenges of composition contracts in the legal systems of Iran, the United States and the United Kingdom?" In response, it can be hypothesized that the major challenge in the US and Iranian systems seems to be debt security, while in the UK, credit restoration is considered a major challenge. The research findings indicate that in all three countries, from a policy perspective, composition agreements play a vital role in resolving debts and rebuilding the financial situation of debtors, but each of these countries faces its own challenges. In Iran, there are problems such as lack of transparency in assets and resistance from some creditors. In the US, challenges such as legal complexities and problems related to creditor cooperation are present. Despite having a modern legal framework, the UK also faces issues such as administrative complexities and the economic impacts of composition agreements. Given the problems in all three systems, it is suggested that policy and legal reforms be carried out to facilitate the process of composition agreements in all three countries. This study uses a descriptive-analytical method and a comparative approach. Legal documents from Iran, the US, and England have been analyzed using library resources.

Cite this article: Amirkhanloo, M.S., et al., (2025). The Study of Economic Policies and Challenges in Composition Contracts (A Comparative Study of the Iranian, US, and UK Legal Systems), *Iranian Journal of International and Comparative Law*,3(1),pp:204-221.

10.22091/ijicl.2025.12749.1152 Publisher: University of Qom

Table of Contents

Introduction

Bankruptcy generally refers to a situation in which a natural or legal person is placed under the protection and supervision of the legal system due to their inability to pay their debts. This situation has been defined in the legal codes of various countries as a solution for managing financial crises.[1] In Iran, Article 412 of the Commercial Code defines bankruptcy as a situation in which a businessperson is unable to pay their debts. In England, bankruptcy is defined for natural persons and for companies, the term "insolvency" is used, which means the inability to pay financial obligations. In the United States, bankruptcy includes processes governed by federal laws (such as Chapter 7 and Chapter 11), and its purpose is financial reorganization or liquidation of assets.[2]

Meanwhile, the composition agreement is one of the legal tools designed to protect the debtor and preserve the rights of creditors in the bankruptcy process. This agreement allows the debtor to pay part of their debts under certain conditions with the approval of the court and the consent of the majority of creditors and to prevent the complete liquidation of their assets. The composition agreement, as one of the bankruptcy management solutions, provides an opportunity for the debtor to prevent the complete collapse of assets with the cooperation of creditors and at the same time secure the rights of creditors to the greatest extent possible.[3] The composition agreement is important in the bankruptcy process for various reasons. Among these is helping to maintain a balance between the rights of the debtor and the creditors, which allows the debtor to pay part of their debts with the collective agreement of the creditors and, at the same time, preserve their business or assets. On the other hand, this agreement allows for transparent asset management for creditors. Another advantage of the composition agreement is that it helps to prevent liquidation and provide conditions for financial restructuring, so that the debtor can continue their economic activity with proper asset management and legal protection and ultimately settle their debts.[4] Also, in many cases, the composition agreement reduces legal

1 S Ghobadi, *A Comparative Study of the Effects of Bankruptcy on Arbitration in Iranian and American Law* (Majd 2021) 7 [In Persian].

2 M S Amirkhanloo, M Gholamalizadeh and A A Esmaili, 'Conditions and Effects of Issuing a Bankruptcy Order in the Commercial Law of Iran, England and the United States with a View to the New Commercial Law Bill' (2022) 12 Bioethics Journal 1 [In Persian].

3 H Mohammadi, *Commercial Law* (Danesh 2023) 43 [In Persian].

4 E Alemayehu, 'Contractual or Judgmental Approach: Unearthing the Legal Nature, Effect and Execution of Compromise Agreement under

costs for both the debtor and the creditors by preventing complex and costly liquidation or forced sale of assets.[1] From a macroeconomic perspective, the composition agreement also prevents the closure of companies and increases in unemployment, and as a result, has positive effects on the economies of countries.[2]

According to the above, different legal systems have adopted different approaches to the nature, conditions, and effects of these contracts. The purpose of this study is to conduct a comparative study of composition agreements in the bankruptcy laws of Iran, the United States, and the United Kingdom in order to identify the strengths and weaknesses of each legal system by analyzing the similarities, differences, and challenges. Also, this study seeks to improve the effectiveness of this legal tool in resolving financial crises by providing suggestions for improving the legal framework and implementing composition agreements in Iran and other countries.

Given the nature of the subject and objectives of the research, this article constitutes an applied research study that is based on a comparative analysis of composition agreements in the bankruptcy laws of Iran, the United States, and the United Kingdom. The research method is theoretical and focuses on studying and analyzing legal sources, specialized texts, and related research articles. The required information was collected through a library research method and includes an analysis of bankruptcy laws, legal interpretations, and related international reports. The main sources of this study are: official laws, judicial opinions, authoritative legal books, and scientific articles published in domestic and foreign databases. A descriptive and analytical method was used to analyze and summarize the data. First, the composition agreements in each of the legal systems were examined, and then the similarities, differences, strengths, and weaknesses of each system were identified. Also, based on the analysis conducted, suggestions were made for amending and improving the relevant laws. Finally, considering the existing challenges and opportunities, practical solutions based on legal principles were proposed to improve the implementation of composition agreements within the framework of bankruptcy laws.

1. Review of Literature

Many studies have been conducted on the subject of composition agreements, but no study has been found that comprehensively examines the policies and challenges of this issue with a comparative approach in the systems of Iran, the United States, and the United Kingdom, and this issue is considered the main innovative aspect of the present study. However, some studies that are somehow related to the title and main objective of the study will be briefly reviewed below:

Mousavi and Fazli Jomor[3] studied the procedure for issuing and executing bankruptcy orders in a study. The results of the study showed that, in accordance with the commercial regulations and the settlement of bankruptcy affairs in our country, efforts have been made to

Ethiopian Law' (2024) 8 Journal of Law 210, 219.

1 A Rich, *Scheme of arrangement reforms in Australia* (University of Sidney 2023) 19.

2 R Nathan, 'Developments in law relating to schemes of arrangement in Malaysia' (2024) 14 Journal of Global Restructuring Review 257, 261.

3 S A Mousavi and Y Fazli Jomor, 'The Procedure for Issuing and Enforcing a Bankruptcy Judgments' (2025) 1 Research and Development in Private Law 231 [In Persian].

manage and control the bankruptcy crisis in a way that includes the aforementioned goals. On this basis, specific features were selected for the execution and procedure for executing the stay order and bankruptcy orders. In this area, we can mention the execution of the judgment before it is final, the two-stage execution of the judgment (initial and final), the execution by rehabilitating the merchant through a compromise agreement, the management of the merchant's assets by the liquidation authority or the representative of the merchant during the liquidation, and the method of selling and dividing the assets of the merchant in crisis. Torfi Saeedavi and others[1] conducted a comparative study of the conditions for concluding a compromise and preventive agreement in Iranian and Egyptian law. The results of the study showed that issuing a bankruptcy judgment is one of the conditions for concluding a compromise agreement in Iran, while issuing a bankruptcy judgment is not necessary for concluding a compromise agreement in Egypt. The disruption in the merchant's business activities that leads to the conclusion of a preventive settlement agreement is at a lower level than the cessation of the merchant, and for this reason, the time for concluding a preventive settlement agreement is before the cessation and complete bankruptcy of the merchant, which has been taken into account in Egyptian law, and the Iranian Commercial Law Bill has also taken into account this concept of cessation as one of the conditions for concluding a preventive settlement agreement, and as a result, the preventive settlement agreement should be accepted in Iranian law as soon as possible. Rahimzadeh Meibodi & Mojahed[2] conducted a comparative study on composition agreements in Iranian, English and French law. The findings of the study showed that the Iranian composition provisions were derived from the provisions of the French commercial law. Considering that the French law in 2002 abolished the composition agreement based on economic considerations and commercial needs and instead established an amicable agreement that does not require court approval and confirmation, it is appropriate for our legislator to also pay attention to these needs and reduce the strictness of the law and unnecessary formalities to pave the way for the merchant to resume their activities. Kariminia and others[3] conducted a comparative study of the composition contract in the laws of Afghanistan and Iran as an exception to the principle of the relativity of the contract. The results of the study showed that the composition contract is made based on the legal principles of Afghanistan and Iran by agreement of the parties. This type of contract, as an exception to the principle of the relativity of the contract, also has an effect on third parties, or opposing creditors; This study explained that that the contract in question creates rights and obligations not only towards the parties but also towards third parties. The obligation arising from the composition contract towards opposing creditors is that the said contract is binding on them; meaning that they cannot oppose the contract concluded between the majority of creditors and the merchant. Therefore, the legislators of Afghanistan and Iran have declared the minority to be subject to the will of the majority within the framework of the law; in such a way that first: the merchant, without the consent of the minority, is released from the

1 Y Torfi Saeedavi, B Taghi Poor and A Salehifar, 'Comparative study of composition and preventive contract conditions in Iranian and Egyptian law' (2023) 1 Comparative Studies on Islamic Countries Law 1 [In Persian].

2 H Rahimzadeh Meibodi and A Mojahed, 'A Comparative Approach to Composition Contracts in Iranian, English and French Law' (2021) 4 Legal Civilization 249 [In Persian].

3 M M Kariminia, A Saberi and M Ansari Moghadam, 'A Comparative Study of the Composition Contract in the Laws of Afghanistan and Iran, as an Exception to the Principle of Contract Relativity' (2021) 23 Contemporary Research in Sciences 72 [In Persian].

restraint of suspension and returns to normal business life; and secondly: The signatories of the composition agreement have priority over others in the recovery of their remaining claims from the merchant's assets. However, the right that the composition agreement seems to create for the opposing creditors is that if the merchant refuses to implement the terms of the composition agreement or has committed fraud leading to bankruptcy, or if it is found that he did not declare the true amount of their assets and debts before the composition agreement, the opposing creditors, as third parties, will have the right to file a lawsuit against the merchant to declare the cancellation or invalidation of the composition agreement, because they are interested in this lawsuit and their interest is in the cancellation of the effects of the said agreement; this means that with the cancellation or invalidation of the said agreement, all its effects, including the priority of the approving creditors, are eliminated and as a result, all creditors, both approving and opposing, are placed on the same level and in the recovery of their remaining claims from the merchant's assets, which may be due to them in the future. In addition, the logic of law dictates that in addition to the obligation to respect the composition agreement, in the above cases, the right to request its termination or annulment should also be granted to opposing creditors, who are considered third parties.

2. Discussion and Review

2.1. History of the Composition Agreement in Iran, England and the United States

Composition agreements in the Iranian legal system have their roots in older commercial laws. The Commercial Code of 1311 addressed the subject of composition agreements for the first time in a coherent manner. These agreements in Iran are designed to protect the debtor and prevent their complete bankruptcy. According to Articles 479 to 484 of the Commercial Code, a composition agreement is a type of agreement between the debtor and creditors that requires court approval and aims to financially restructure the debtor and pay the debt based on new conditions.[1] In the new Commercial Code bill (2011), major changes have been proposed to improve the implementation of composition agreements, including greater transparency in the contract conclusion process and an emphasis on respecting the rights of creditors, although these agreements in Iran still face challenges such as the lack of transparency of the debtor's assets and the lack of adequate supervision over the implementation process.[2] The history of composition agreements in England dates back to the Bankruptcy Act of 1542, which first provided a framework for resolving disputes between debtors and creditors. Over time, English bankruptcy law has evolved towards financial restructuring and the protection of debtors. The Insolvency Act of 1986 introduced Individual Voluntary Arrangements and Company Voluntary Arrangements, which are among the most important forms of modern composition agreements. These agreements are based on an agreement between the debtor and a majority of creditors and become binding upon court approval.[3]

Finch and Milman, in their book "Corporate Insolvency Law", emphasize that composition agreements in England were designed as a tool to preserve businesses and prevent companies

1 E Abdipourfard, *Commercial Law* (Majd 2021) 23 [In Persian].

2 M Saghari, *Bankruptcy: Suspension, Cancellation of Transactions, Composition Contract, Liquidation and Restoration of Credit, Reconstruction of Crisis-Stricken Economic Enterprises, Cross-Border Bankruptcy* (Majd 2022) 48 [In Persian].

3 R Bork and R Mangano, *The Anatomy of Corporate Insolvency Law* (SAGE 2024).

from going bankrupt, but in practice, there are problems such as resistance from some creditors or a lack of transparency in the debtor's financial information.[1] In the American legal system, the composition agreement is an important part of the United States Bankruptcy Code. Chapter 11 of the Code, which is dedicated to the reorganization of companies, provides for the conclusion of composition agreements. These agreements allow the debtor to continue their economic activities by setting up an agreed repayment plan. The US Bankruptcy Code was enacted in 1898 and has undergone several amendments since then, including the 1978 amendments that strengthened the role of composition agreements. Thomas Jackson in his book "The Logic and Limits of Bankruptcy Law" analyzes composition agreements as one of the most important legal tools to maintain a balance between the rights of debtors and creditors. He also points out problems such as the complexity of the processes and high costs and offers suggestions for simplifying the procedures.[2]

2.2. Composition Agreement in Iran and the New Commercial Bill

A composition agreement in Iranian law is a legal instrument in bankruptcy law, drawn up after the issuance of a bankruptcy order and during the liquidation process (which includes the sale and distribution of property among creditors) in order to prevent the liquidation of the bankrupt businessperson and to enable them to return to business. This agreement is covered in Articles 426 to 484 of the Iranian Commercial Code (approved in 1311) under the title "Composition Agreement and Liquidation of the Account of the Bankrupt Businessperson". The main purpose of this agreement is that the bankrupt businessperson, by agreement between themselves and their creditors, under specific conditions and by providing the necessary guarantees, will be able to continue their business activities and gradually repay their debts.[3]

2.2.1. Definition of a Composition Agreement in Iranian Law

According to the Commercial Code, a composition agreement is an agreement concluded between a bankrupt debtor and their creditors to determine the method of paying the debt in the form of installments, a discount, or forgiveness. Its main purpose is to protect the bankrupt businessperson and maintain a balance between the rights of creditors.[4] The legal conditions for concluding a composition agreement are as follows:

- a) **Convening a creditors' meeting**: A meeting is held with the presence of all creditors and the conditions of the composition agreement are discussed. Article 478 of the Commercial Code requires that, in order to conclude a contract, the presence of a majority of creditors representing at least three-quarters of the claims is mandatory.
- b) **Consent of the majority of creditors**: Article 483 of the Commercial Code requires the written consent of the majority of creditors present at the meeting (representing at least three-quarters of the claims) for concluding a composition contract;
- c) **Court approval**: Article 484 of the Commercial Code states that after the conclusion

1 V Finch and D Milman, *Corporate Insolvency Law: Perspectives and Principles* (Routledge 2022) 51.
2 T Jackson, *Logic and the Limits of Bankruptcy Law* (Harvard University Press 2022) 87.
3 S Veisi, K Karamian and A Hamedinia, *Composition Agreement in Iranian Law* (Pol 2022) 25 [In Persian].
4 M Sharif Payami, *Composition Contract from the Perspective of Civil and Commercial Law* (Sanjeev and Danesh 2020) 6 [In Persian].

of the composition contract, court approval is necessary for it to become enforceable. The court is obliged to ensure that the contract complies with the legal regulations;

- d) **Compulsion of the minority to accept**: Article 485 of the Commercial Code states that the minority of creditors who have opposed the contract are obliged to comply with its terms. This indicates the binding nature of the contract after court approval;
- e) **Termination of the contract**: Article 486 of the Commercial Code provides that if the debtor does not fulfill their obligations, any of the creditors can submit a request to the court to terminate the contract.[1]

2.2.2. Legal Nature of the Composition Contract in Iran

In terms of its legal nature, a composition contract can be considered a mixed contract that incorporates elements of private law and public law. From the perspective of private law, a composition contract is based on an agreement between the debtor and creditors, and its terms and obligations are determined voluntarily. This private nature allows the debtor to gain the trust of creditors by proposing a debt repayment plan. From the perspective of public law, court approval is necessary for the contract to be enforceable, which indicates the government's supervisory role over the fair implementation of composition contracts.[2] In the Iranian Commercial Code (approved in 1311), Articles 479 to 484 are dedicated to composition contracts. These articles clearly determine the conditions for concluding, the effects, and the enforcement guarantees of composition contracts. The purpose of these articles is to prevent unnecessary liquidation of businesses and to help the debtor's economic rehabilitation. However, the new Iranian Commercial Code Bill (2011) has attempted to address the shortcomings of the old Commercial Code. In this bill, attention has been paid to issues such as increasing transparency in the composition agreement process, providing alternative solutions for resolving disputes, and strengthening the rights of creditors.[3] The composition agreement, as one of the special legal institutions in the bankruptcy process, has a multifaceted nature, the analysis of which requires examining the contractual and judicial aspects of this institution. According to some jurists, the nature of the composition agreement is considered to be a judicial decision; this means that despite the agreement between the bankrupt businessperson and a group of creditors, the agreement will not have any enforceable legal effects until it is approved by the court. In other words, what gives a composition agreement legal and binding force is the issuance of a court order of approval. However, another view believes that the main nature of a composition agreement is contractual, because its conclusion is based on an agreement between the bankrupt merchant and the majority of creditors.[4] Article 420 of the Commercial Code stipulates in this regard: "As soon as the court's decision regarding the approval of the agreement becomes final, the liquidator shall issue a complete statement to the bankrupt merchant in the presence of the supervising member, which shall be closed if there is no dispute." This article indicates that although court approval is necessary to grant legal validity to the agreement, the primary and fundamental nature of this institution remains contractual (Torfi Saeedavi, 2023: 1).

1 M Saghari, *Commercial Law of Bankruptcy* (Majd 2021) 89 [In Persian].
2 R Moazzeni, *General Economic Law* (Majd 2020) 41 [In Persian].
3 M Erfani, *Commercial Law* (Mizan 2023) 85 [In Persian].
4 Moazzeni (n 19) 48.

2.2.3. Effects of a Composition Agreement on the Parties in Iran

In Iranian law, a composition agreement is provided for in Articles 477 to 489 of the Commercial Code. This agreement allows the debtor to settle part of their debts with the approval of the court and the agreement of the majority of creditors. Also, the composition agreement in the Iranian legal system is known as a tool to facilitate the financial restructuring of the debtor and protect the rights of creditors.[1] From a legal perspective, this agreement is a collective agreement that is concluded between the debtor and the majority of creditors and requires the approval of the court to become binding. This agreement is based on the principles of voluntary agreement, justice and public order and its goal is to create a balance between the rights of the debtor and creditors within the framework of the law.[2] The effects of a composition agreement on the parties in Iran can be analyzed in two main aspects: the effects on the bankrupt businessperson and the effects on creditors:

Effects on the bankrupt businessperson: Concluding a composition agreement removes the restrictions on the bankrupt businessperson and allows them to continue their business and management activities. This agreement is an opportunity for the businessperson to prevent the liquidation of assets and the cessation of economic activity by restructuring their finances and properly managing assets;

Effects on creditors: The composition agreement creates obligations for creditors that require them to comply with the agreed provisions. Among these obligations is accepting a delay in payment or a discount on part of the claims. Also, since the composition agreement requires the approval of the majority of creditors and the court, the rights of all creditors, both opposing and agreeing, are protected by this agreement.[3] Therefore, the composition agreement, as a legal instrument with a hybrid nature, helps to restore the economy and maintain the commercial system while creating a balance between the rights of the debtor and creditors.

2.2.4. Composition Agreement in the New Trade Bill

The new Iranian Commercial bill, which was presented in recent years, introduces some important changes regarding composition agreements. This bill aims to facilitate business processes and support bankrupt debtors, and aims to make judicial processes related to bankruptcy, especially in the field of composition agreements, faster and more efficient. One of the important changes in the new bill is to simplify the process of approving composition agreements and to consider the possibility of using different models of debt repayment with more suitable conditions. These measures are especially aimed at supporting small and medium-sized enterprises that face serious problems in the event of bankruptcy.[4] On the other hand, the new Iranian Commercial Code Bill, with the aim of improving bankruptcy laws and debtor financial restructuring, has made changes to the composition contract:

- **a) A more transparent process for concluding the contract:** The new bill, emphasizing transparency at various stages, has strengthened the role of the court and supervisory institutions, such as the formation of a creditors' committee in the new

1 A Rashedi Esfahani, *Applied Commercial Law* (Bazargani 2020) 17 [In Persian].
2 M Ashraghi, *Modern Commercial Law* (University of Tehran Press 2022) 37 [In Persian].
3 R Malakouti, *Merchant's Bankruptcy and Its Liquidation* (Soroush 2021) 94-96 [In Persian].
4 Moazzeni (19) 60.

bill, which is envisioned to supervise the implementation of the contract. In addition, more emphasis has been placed on respecting the rights of minority creditors and the possibility of objecting to the contract;

- **b) Increasing the role of the court:** The role of the court in supervising the proper implementation of the contract has become more prominent, and the court is required to review all details of the contract and assess its compliance with the public interest and the rights of creditors;
- **c) Stronger enforcement guarantee:** The new bill has established more precise enforcement guarantees for the failure to implement the debtor's obligations, including the right of creditors to object to the failure to implement the contract and the possibility of applying legal penalties in the event of the debtor's bad faith;
- **d) Encouraging financial restructuring instead of liquidation:** One of the key objectives of the new bill is to strengthen the approach of financial restructuring of the debtor instead of liquidation. In this regard, the debtor is given more opportunity to present repayment or restructuring plans.[1]

2.2.5. Strengths of the Composition Agreement Laws in Iran

- **a) Protection of debtors:** The Iranian Commercial Code has provided for the possibility of concluding a composition agreement, which can help debtors to prevent the complete closure of their economic activities;
- **b) Clarification of the principle of good faith:** Bankruptcy regulations clearly emphasize that the debtor must have acted in good faith. This principle prevents abuse by debtors;
- **c) A relatively comprehensive definition of bankruptcy:** The Commercial Code has provided a relatively clear definition of bankruptcy and explained the conditions for its occurrence;
- **d) Provision of criminal enforcement guarantees:** In cases where the debtor has committed fraud or acted with malicious intent, criminal enforcement guarantees have been provided, which protect the rights of creditors.[2]
- **3.2.6. Weaknesses of Bankruptcy Laws in Iran**
- **a) Aged and Outdated:** Iran's bankruptcy laws, being over 90 years old, do not meet modern economic and commercial needs. For example, e-commerce, multinational corporations, and issues related to new technologies are not addressed in these laws;
- **b) Lack of a clear framework for corporate restructuring:** Unlike advanced legal systems such as the UK and the US, Iran does not have a comprehensive and clear legal mechanism for restructuring companies on the verge of bankruptcy;
- **c) Lack of transparency in the debt settlement process:** The debt settlement process in Iran is complex and time-consuming, and usually leads to extensive legal disputes between debtors and creditors;

1 R Kharazmi, *A Comparative Study of Bankruptcy and Insolvency in Iranian Law* (Ayandeh 2024) 33 [In Persian].
2 R Eskini, *Commercial Law: Bankruptcy and Liquidation of Bankrupt Affairs* (Samt 2023) [In Persian].

- **d) Weakness in protecting minority creditors:** In cases where a majority of creditors make a decision, the rights of minority creditors may be ignored;
- **e) Lack of an efficient supervisory system:** Supervision of the behavior of managers and debtors during the bankruptcy process is weak, which increases the possibility of abuse.[1]

2.3. Composition Agreement in England

2.3.1. Definition of Composition Agreement in England

In England, composition agreements are divided into two general categories, each of which plays a specific role and position in the legal system related to bankruptcy. The first category is agreements that are concluded before the issuance of a bankruptcy order and the purpose of their conclusion is to prevent the issuance of a bankruptcy order and preserve the debtor's assets. These agreements, which are mainly defined under the framework of "Individual Voluntary Arrangements (IVAs)" for individuals or "Company Voluntary Arrangements (CVAs)" for companies, allow the debtor to present a plan for the repayment of their debts with the consent of the majority of creditors and the approval of the court.[2] In this case, the conclusion of a composition agreement stops the liquidation process of the assets and provides the debtor with the opportunity for economic rehabilitation. The second type of composition agreement is related to the post-bankruptcy order period. In these circumstances, the debtor or the liquidator can propose a plan through which the payment of debts will be made in an orderly manner and with the approval of the court and the majority of the creditors. These plans are usually drawn up to ensure the collective interests of the creditors and, if successful, the bankruptcy order may be annulled. In other words, these types of arrangements are proposed as a solution for optimal debt management and reducing the harmful effects of the bankruptcy order on the debtor's economic activity. In both types of arrangements, their conclusion requires the agreement of the majority of creditors and, in some cases, the approval of the court. This process not only protects the debtor's rights against economic pressures, but also guarantees the interests of the creditors, since the repayment plans are carried out under legal supervision and with administrative transparency.[3]

2.3.2. The Legal Nature of the Composition Agreement in England

The nature of the composition agreement in England, as a debt management and bankruptcy instrument, contains elements of private law and public law. From the perspective of private law, this agreement is based on an agreement between the debtor and the majority of creditors. Thus, the agreement of the creditors with the proposals made by the debtor forms the basis for the formation of the agreement. However, from the perspective of public law, this agreement alone is not sufficient and the court's approval is considered a necessary condition for the legal effect of the composition agreement.[4] In other words, until the court approves the said agreement, it will not have any legal effect. This court's approval acts as a validating factor for the agreement and thus, the nature of the composition agreement is a combination of contractual and judicial elements. Its

1 Eskini (n 27) 178-181.
2 C Cavallini and M Gaboardi, 'Towards a Transnational Model of Bankruptcy Law?' (2023) 23 Journal of Business Law 360, 367.
3 A Fagetan, 'Corporate Insolvency Laws in Selected Jurisdictions: US, England, France, and Germany—A Comparative Perspective' (2025) 14 Journal of Law and Economics 136, 147.
4 J Katz, 'The Coexistence Conundrum: Sub V and Small Business Cases' (2024) 43 American Bankruptcy Institute Journal 72, 78.

contractual aspect means that this instrument is concluded as a voluntary agreement between the debtor and the majority of creditors. The terms of the agreement include repayment of part of the debts or rearrangement of the repayment schedule. On the other hand, it is judicial because for the agreement to be enforceable, court approval is necessary. This makes the agreement binding on all creditors, even those who opposed it. The composition agreement is part of the legislator's efforts to provide alternatives to the full liquidation of companies. According to the Insolvency Act 1986, this legal instrument is designed to prevent the complete bankruptcy of companies and protect the economic interests of creditors and debtors. From a legal perspective, the composition agreement has an intermediate position; this agreement allows the debtor to continue economic activity while also securing the interests of creditors. This process is used with the aim of reducing the rate of bankruptcy and protecting businesses as vital components of the UK economy.[1]

2.3.3. Effects of a Composition Agreement on the Parties in the UK

Effect on the debtor: The approval of a composition agreement by the court allows the debtor to avoid liquidation and the compulsory sale of its assets. The debtor can also retain its business and settle its debts in installments or on agreed terms by implementing the provisions of the agreement; **Effect on creditors**: Creditors who have agreed to a composition agreement are obliged to adhere to its terms. These terms may include a postponement of the collection of claims, a reduction in the amount of the debt or a change in the method of payment. The agreement is binding on all creditors, including those who opposed it, from the date of court approval.[2]

2.3.4. Legal Conditions for Entering into a CVA

Company directors can submit an application for a CVA. To propose a CVA, an appointed insolvency practitioner (IP) (usually an accountant or insolvency lawyer) must be nominated. A meeting is then held at which creditors must vote in favor of the agreement by a majority representing at least 75% of the total debts by value. The court approves the CVA after reviewing whether it is in accordance with the law and the public interest. Once approved, all creditors (including opposing creditors) are obliged to comply with the terms of the CVA. The duration of the agreement is usually between 3 and 5 years, but can vary depending on the terms agreed. A key feature of the CVA in the UK is its high flexibility; it is a financial restructuring tool that allows debtors to propose a plan to pay their debts instead of going into liquidation. It is also less expensive than other methods, such as administration or compulsory liquidation, and the management of the company retains control of the company during the implementation of the CVA.[3]

2.3.5. Strengths of the Composition Agreement in the UK

- **a) Support for companies on the verge of bankruptcy:** CVA allows companies to manage their debts without closing down operations;
- **b) Flexibility for debtors and creditors:** CVA allows for a plan tailored to the needs of the company and creditors;

1 S D Parikh, 'Bankruptcy Tourism and the European Union's Corporate Restructuring Quandary: The Cathedral in Another Light' (2020) 42 Journal of International Law 201, 209.

2 T Mastrullo, 'Between modernity and prudence: The transposition into French law of Directive (EU) 2019/1023 of 20 June 2019 on restructuring and insolvency' (2022) 36 European Insolvency and Restructuring Journal 1, 7.

3 Katz (n 31) 88.

- **c) Prevention of liquidation:** Many companies have been able to avoid liquidation and return to economic productivity through CVA;
- d) Legal support for the majority decision: The decision of the majority is binding on all creditors, even if some creditors disagree with the agreement.[1]

2.3.6. Weaknesses of the Composition Agreement in the UK

- **a) Long-term failure:** Many companies that implement a CVA eventually go bankrupt. This is due to the lack of change in the company's structure or fundamental problems of the business;
- **b) Potential abuse by debtors:** Some debtors may manipulate the CVA to their advantage by providing false information;
- **c) Pressure on minority creditors:** Small creditors may be forced to accept agreements that are not in their interest;
- **d) Dependence on court decisions:** The court approval process is time-consuming and may lead to delays in implementing the agreement.[2]

2.4. Composition Agreement in the United States

2.4.1. Definition of Composition Agreement in the United States

The bankruptcy laws of the United States are governed by the Federal Bankruptcy Code, which was enacted in 1978 and amended in various years. This Code is a set of regulations that are used in the federal court system to manage bankruptcy and restructure debts. The US Bankruptcy Code generally consists of several different chapters, each designed for specific circumstances of debtors. The main chapters of the Bankruptcy Code are: Chapter 7 (Liquidation), Chapter 11 (Reorganization), Chapter 13 (Adjustment of Debts of an Individual with Regular Income), and other special chapters for specific types of debtors such as agricultural operations or small businesses. Chapter 7, which is known as liquidation, is a process in which the assets of a bankrupt individual or company are sold and the proceeds are used to pay off debts. In contrast, Chapter 11 is dedicated to debt restructuring and is for companies or individuals seeking to reorganize their debts and preserve their businesses or assets. Chapter 13 is designed for individual debtors with a fixed income and allows them to repay their debts through a regular payment plan. The Code also includes provisions for the use of composition agreements and out-of-court restructuring processes, which in many cases can be an option to avoid bankruptcy. In the United States, a composition agreement is a legal arrangement that aims to financially rehabilitate the debtor and avoid bankruptcy. This agreement allows the debtor to pay its debts without having to go through a formal bankruptcy process and with the consent of creditors. In the United States, such agreements are governed by federal bankruptcy law, specifically Chapter 11 of the United States Bankruptcy Code.[3]

1 I Mevorach and A Walters, 'The characterization of pre-insolvency proceedings in private international law' (2020) 21 European Business Organization Law Review 855, 864-866.

2 Mevorach and Walters (n 35) 871-873.

3 G Ritter, 'A principled examination of US bankruptcy law and the accounting for value in conversions between chapters 7 and 13' (2024) 33 International Insolvency Review 205, 212.

2.4.2. The Nature of a Composition Agreement in the United States

In American law, a composition agreement is a bankruptcy management tool for debtors and creditors, within the framework of federal laws, especially Chapters 11 and 13 of the Bankruptcy Code. This agreement is an agreement that allows the debtor to pay their debts under certain conditions and prevent the complete liquidation of their assets. According to § 1123 of the US Bankruptcy Code, the debtor can develop a debt repayment plan in the Chapter 11 process (which mostly concerns companies and businesses) and submit it to the court for approval. If this plan is approved by the court and a majority of creditors holding at least two-thirds in amount and more than one-half in number of the allowed claims agree, the plan is confirmed and can be enforced.[1] The nature of a composition agreement in the United States is primarily contractual, meaning that the agreement between the debtor and creditors must be approved by the court in order to be enforced. This contractual arrangement gives the debtor the opportunity to pay their debts under certain conditions and over a defined period. In other words, a composition agreement cannot be enforced by mere agreement between the debtor and the creditors unless the court approves it. This indicates the court's supervisory role in ensuring fairness and justice between the parties to the agreement.[2]

2.4.3. Effects of the Composition Agreement on the Parties Impacts on the Debtor

Instead of going bankrupt and liquidating its assets, the debtor has the opportunity to use a plan to repay debts and preserve its business or assets. This approach can significantly help the debtor in maintaining its financial stability and preventing business closure, and, as a result, preserve jobs and economic opportunities;

Impacts on creditors: For creditors, this agreement provides an opportunity to recover part of the debts regularly and over defined periods. In addition, the composition agreement can prevent additional costs that may arise from the liquidation of the company and the sale of assets.[3]

2.4.4. Strengths of the Composition Agreement in the US

- a) Opportunity for restructuring: One of the biggest advantages of composition agreements in the US is that they allow companies and debtors to restructure and continue their activities without having to liquidate. This is in the interests of both debtors and creditors;
- b) Preservation of creditors' rights: In most cases, composition agreements involve obtaining the approval of a majority of creditors for the restructuring plans, which means that they are actively involved in the decision-making process regarding the terms of payment and restructuring;
- c) Flexibility in agreements: Debtors and creditors can negotiate various conditions

1 M Walton, 'Corporate Insolvency and Governance Act 2020-Final evaluation report November 2023' (2024) 26 Journal of Law and Finance 453, 461.

2 W Norton and J Bailey, 'The pros and cons of the Small Business Reorganization Act of 2019' (2020) 36 Emory Bankruptcy Developments Journal 383, 387.

3 A Walters, 'United States' bankruptcy jurisdiction over foreign entities: Exorbitant or congruent?' (2017) 17 Journal of Corporate Law Studies 367, 375-377.

for reducing or modifying debts and repayment, which allows for various negotiations and agreements;

- d) Legal protection: Courts in the United States have extensive oversight of the composition agreement process, which prevents potential abuses and safeguards the rights of all parties.[1]

2.5. Challenges and Limitations of Composition Agreements in Iran, the United States, and the United Kingdom

The challenges and limitations of the Composition Agreement laws in Iran, the United States, the United Kingdom, and the United States were examined in three main areas: legal and practical challenges in implementation, problems related to the transparency of the debtor's assets, and other implementation issues. Among the most important legal and practical challenges in the implementation of Composition Agreements in Iran is the lack of cooperation of some creditors. Sometimes creditors may refuse to agree on the restructuring process for various reasons, such as protecting their own interests or lack of trust in the debtor. This can lead to delays in the restructuring process. Also, in many cases, creditors are in different groups and each may have different demands, which can complicate decision-making and implementation of the Composition Agreement.

In the United States, in the case of a Chapter 11 bankruptcy, some creditors may want to influence the restructuring plan based on their own interests. This may lead to litigation and increased legal costs. On the other hand, in some cases, the court-supervised restructuring process can be time-consuming and complicated, especially when creditors and debtors cannot reach an agreement. Another major challenge in the United Kingdom is the lack of cooperation of some creditors in negotiations and agreements. This can lead to the failure of the restructuring process or the failure to improve the debtor's financial situation. In some cases, the restructuring processes under the bankruptcy law in the United Kingdom face problems such as a lack of transparency in financial information, which can create complications for creditors and the courts. Another challenge is the problems related to the transparency of the debtor's assets. One of the main problems in Iran is the lack of complete transparency regarding the debtor's assets. This can complicate the proper assessment of the value of assets and the settlement of debts, especially in cases where debtors do not provide accurate and factual information about their assets. Sometimes, financial reviews by the courts are not precise enough, which can lead to incorrect decisions about the amount of debts and assets. In the United States, in some cases, especially in complex financial situations, it is also difficult to accurately assess the assets of debtors under Chapter 11. This can negatively affect the restructuring process. Some companies may also provide incomplete financial reports, which leads to reduced transparency and an incorrect assessment of the debtor's financial situation. Similar problems exist in the United Kingdom. Debtors may not provide sufficient and correct information about their assets, which increases the risk in the restructuring process. In some cases, the IP, who is responsible for assessing the debtor's assets, may have problems obtaining transparent information from the

1 S Janis, J Payne and S Madaus, 'The promise and perils of regulating ipso facto clauses' (2022) 31 International Insolvency Review 45, 56-60

debtors. Other legal challenges and limitations in implementing composition agreements in Iran include the fact that Iran's bankruptcy laws are not fully updated and some legal articles need to be revised. This can lead to implementation complications and difficulties in adapting to new economic and commercial developments. Bankruptcy law in the United States, especially in Chapter 11, is complex for companies, and processes such as determining creditor priorities and creating a restructuring plan require a lot of time and money. Also, the bankruptcy process and composition agreements in the United Kingdom may be costly for debtors and creditors. High litigation costs and legal advice can make this process difficult to implement.

In Iranian law, a "composition agreement," sometimes referred to as a "compromise agreement," refers to an agreement concluded between a bankrupt businessperson and a majority of creditors, under the supervision and approval of the court, in order to adjust financial obligations and prevent a complete liquidation of assets. This agreement is considered a key tool in the bankruptcy process and its purpose is to facilitate the financial restructuring of the debtor while simultaneously securing the rights of creditors. In terms of its function, this mechanism is similar to mechanisms such as the CVA in the United Kingdom and Chapter 11 (Reorganization Plan) in the United States, but it has fundamental differences in terms of its executive structure, judicial approval, and legal requirements. Specifically, in Iranian law, the implementation of the agreement is subject to the consent of the majority of creditors and then formal approval by the court, which gives it a hybrid nature of private and public law. It should also be noted that this article uses terms such as "settlement agreement" or in some cases "compromise agreement" that may have different meanings in different legal systems. In particular, the term Settlement Agreement in English and American law is usually used in the field of labor law and the resolution of employment disputes. However, in this article, the term "compromise agreement" is used in its specific meaning in Iranian law and as Composition Agreement in the field of bankruptcy. Therefore, the interpretation of terminology should be made within the framework of Iranian legal concepts.

Conclusion

This study has examined the challenges and limitations of bankruptcy laws in Iran, the United States of America, and the United Kingdom. It concludes that although each of these countries has different systems in this regard, there are many common points in the implementation problems and challenges. These problems, including the lack of cooperation of creditors, the complexities of asset valuation, the lack of transparency in financial information, and the high costs of litigation and legal advice, are among the issues that are common to all of these countries. For this reason, fundamental reforms in bankruptcy laws and composition agreements can greatly help improve processes. In most countries, especially in Iran, there is a need for reforms in bankruptcy laws and processes related to composition agreements.

The "New Commercial Code Bill" is a draft law in Iran that aims to amend and update existing commercial regulations, but has not yet been approved. However, the bill is of interest in academic and professional circles of Iranian law and, in some cases, is cited as the basis for comparative analyses. The bill is not binding law in other countries, such as the United

Kingdom or the United States, but it can be proposed in a comparative study to understand the reformist and modern perspectives of Iranian law.

These reforms can include various measures, such as simplifying processes. For composition agreements to be more successful, it is essential that bankruptcy laws reduce unnecessary complexities and simplify the debtors' restructuring processes. This can help speed up the restructuring process and, on the other hand, properly safeguard the interests of creditors. It is also suggested that creditor cooperation be strengthened and that bankruptcy laws provide effective incentives for creditor cooperation. These incentives could include facilitating the restructuring process, legal guarantees to safeguard creditors' interests, and creating transparency in the decision-making process. Also, to ensure the successful implementation of the composition agreement, the role of the courts should be strengthened. Closer supervision by the courts and a more accurate assessment of debtors' assets could help reduce disputes and challenges. On the other hand, to avoid legal complexities and implementation problems, bankruptcy laws need to be made clearer and more precise.

The laws should be designed in such a way that all stages of the composition agreement are explained in detail and without ambiguity from beginning to end. Creditors should also be made aware of their rights as well as the consequences of cooperation in the composition agreement process. Legal training can lead to increased cooperation among creditors and expedite the implementation of settlement agreements. It is suggested that new technologies be used to increase transparency and expedite processes. In today's world, new technologies can play a significant role in improving legal and business processes. In the field of bankruptcy and settlement agreements, the use of new technologies can provide effective solutions to many challenges. For example, one of the biggest problems in the bankruptcy process is the lack of transparency in debtors' assets. The use of new technologies can help create an immutable database for recording asset information. This system can allow creditors and courts to access accurate and transparent information easily and achieve greater transparency in the restructuring process. Another suggestion is to use advanced software to automate processes related to settlement agreements and bankruptcy. This software can speed up the various stages of restructuring and prevent human errors. In addition, these systems can aid in making complex decisions and prevent the process from being prolonged. The use of artificial intelligence can also help in the more accurate analysis of financial and economic data. These analyses can aid in faster and more effective decision-making in the field of asset and liability valuation. Another solution to speed up processes is to use online systems for rapid agreements, where online platforms can help creditors and debtors to reach agreements quickly without the need for face-to-face meetings. These systems can enable communication and exchange of information instantly and in a secure environment. Finally, different countries can share their experiences in the field of bankruptcy laws and composition agreements with each other, and this international cooperation can help improve bankruptcy systems in each country and provide best practices for reforming laws and improving processes.

References

Books

Abdipourfard E, *Commercial Law* (Majd, Tehran 2021) [In Persian].

Ashraghi M, *Modern Commercial Law* (University of Tehran Press, Tehran 2022) [In Persian].

Bork R and Mangano R, *The Anatomy of Corporate Insolvency Law* (SAGE, London 2024)

Erfani M, *Commercial Law* (Mizan, Tehran 2023) [In Persian].

Eskini R, *Commercial Law: Bankruptcy and Liquidation of Bankrupt Affairs* (Samt, Tehran 2023) [In Persian].

Finch V and Milman D, *Corporate Insolvency Law: Perspectives and Principles* (Routledge, London 2022)

Ghobadi S, *A Comparative Study of the Effects of Bankruptcy on Arbitration in Iranian and American Law* (Majd, Tehran 2021) [In Persian].

Jackson T, *Logic and the Limits of Bankruptcy Law* (Harvard University Press, Cambridge MA 2022)

Kharazmi R, *A Comparative Study of Bankruptcy and Insolvency in Iranian Law* (Ayandeh, Tehran 2024) [In Persian].

Malakouti R, *Merchant's Bankruptcy and Its Liquidation* (Soroush, Tehran 2021) [In Persian].

Mohammadi H, *Commercial Law* (Danesh, Tehran 2023) [In Persian].

Moazzeni R, *General Economic Law* (Majd, Tehran 2020) [In Persian].

Rashedi Esfahani A, *Applied Commercial Law* (Bazargani, Tehran 2020) [In Persian].

Rich A, *Scheme of arrangement reforms in Australia* (University of Sidney, Sidney 2023)

Saghari M, *Commercial Law of Bankruptcy* (Majd, Tehran 2021) [In Persian].

Saghari M, *Bankruptcy: Suspension, Cancellation of Transactions, Composition Contract, Liquidation and Restoration of Credit, Reconstruction of Crisis-Stricken Economic Enterprises, Cross-Border Bankruptcy* (Majd, Tehran 2022) [In Persian].

Sharif Payami M, *Composition Contract from the Perspective of Civil and Commercial Law* (Sanjeev and Danesh, Tehran 2020) [In Persian].

Veisi S, Karamian K and Hamedinia A, *Composition Agreement in Iranian Law* (Pol, Tehran 2022) [In Persian].

Articles

Alemayehu E, 'Contractual or Judgmental Approach: Unearthing the Legal Nature, Effect and Execution of Compromise Agreement under Ethiopian Law' (2024) 8 Journal of Law 210

Amirkhanloo MS, Gholamalizadeh M and Esmaili AA, 'Conditions and Effects of Issuing a Bankruptcy Order in the Commercial Law of Iran, England and the United States with a View to the New Commercial Law Bill' (2022) 12 Bioethics Journal 1[In Persian].

Cavallini C and Gaboardi M, 'Towards a Transnational Model of Bankruptcy Law?' (2023) 23 Journal of Business Law 360

Fagetan A, 'Corporate Insolvency Laws in Selected Jurisdictions: US, England, France, and Germany—A Comparative Perspective' (2025) 14 Journal of Law and Economics 136

Janis S, Payne J and Madaus S, 'The promise and perils of regulating ipso facto clauses' (2022) 31 International Insolvency Review 45

Kariminia MM, Saberi A and Ansari Moghadam M, 'A Comparative Study of the Composition Contract in the Laws of Afghanistan and Iran, as an Exception to the Principle of Contract Relativity' (2021) 23 Contemporary Research in Sciences 72[In Persian].

Katz J, 'The Coexistence Conundrum: Sub V and Small Business Cases' (2024) 43 American Bankruptcy Institute Journal 72

Mastrullo T, 'Between modernity and prudence: The transposition into French law of Directive (EU) 2019/1023 of 20 June 2019 on restructuring and insolvency' (2022) 36 European Insolvency and Restructuring Journal 1

Mevorach I and Walters A, 'The characterization of pre-insolvency proceedings in private international law' (2020) 21 European Business Organization Law Review 855

Mousavi SA and Fazli Jomor Y, 'The Procedure for Issuing and Enforcing a Bankruptcy Judgments' (2025) 1 Research and Development in Private Law 231[In Persian].

Nathan R, 'Developments in law relating to schemes of arrangement in Malaysia' (2024) 14 Journal of Global Restructuring Review 257

Norton W and Bailey J, 'The pros and cons of the Small Business Reorganization Act of 2019' (2020) 36 Emory Bankruptcy Developments Journal 383

Parikh SD, 'Bankruptcy Tourism and the European Union's Corporate Restructuring Quandary: The Cathedral in Another Light' (2020) 42 Journal of International Law 201

Rahimzadeh Meibodi H and Mojahed A, 'A Comparative Approach to Composition Contracts in Iranian, English and French Law' (2021) 4 Legal Civilization 249 [In Persian].

Ritter G, 'A principled examination of US bankruptcy law and the accounting for value in conversions between chapters 7 and 13' (2024) 33 International Insolvency Review 205

Torfi Saeedavi Y, Taghi Poor B and Salehifar A, 'Comparative study of composition and preventive contract conditions in Iranian and Egyptian law' (2023) 1 Comparative Studies on Islamic Countries Law 1 [In Persian].

Walters A, 'United States' bankruptcy jurisdiction over foreign entities: Exorbitant or congruent?' (2017) 17 Journal of Corporate Law Studies 367

Walton M, 'Corporate Insolvency and Governance Act 2020-Final evaluation report November 2023' (2024) 26 Journal of Law and Finance 453

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

Childbearing as a Public Good; Children as Public Goods: Iran's Legislative Approach

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Article Info

Article type:
State Practice

Article history:
Received
15 June 2024

Received in revised form
25 June 2024

Accepted
30 June 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3789.html

Keywords:
Child, Child-Rearing Costs, Socialized Goods, Childbearing, Public Good.

ABSTRACT

Although the era when children were primarily considered as a source of labor for the family has largely passed, the procreation of children remains indispensable for societal continuity. Views on children have shifted from characterizing them as the "private property of the family" to recognizing them as a "public good." While children may not satisfy all the criteria of a pure public good, it is widely acknowledged that society bears a significant role in the upbringing, education, and, ultimately, the costs associated with children. Nonetheless, although the conception of a child as a personal property of the family has changed, extensive governmental intrusion into family privacy is similarly not accepted. This article employs a descriptive-analytical approach to examine arguments for and against this perspective, drawing on theories of public and socialized goods, with a focus on Iranian legislation. Children, due to their potential benefits, such as their future roles as workforce and taxpayers, exhibit characteristics of a public good; however, philosophical, legal, economic, and cultural challenges limit this interpretation. Iranian laws, particularly the Family and Youthful Population Support Act (2021) and Article 3 of the Child and Adolescent Protection Act (2020), recognize government responsibility and mark a step toward conceptualizing children as public goods. This article posits that whether children are characterized as public goods or as socialized goods, an obligation is thereby created for non-parents and, consequently, for the state as the representative of the nation, to share in the costs associated with them.

Cite this article: Jafari. D., (2025). Childbearing as a Public Good; Children as Public Goods: Iran's Legislative Approach, *Iranian Journal of International and Comparative Law*,3(1),pp:222-233.

doi 10.22091/ijicl.2025.13297.1168 Publisher: University of Qom

Table of Contents

Introduction

Traditionally, children were considered as *private goods*, with their upbringing primarily the responsibility of parents, who were consequently the *sole beneficiaries* of their future advantages. However, the transition from agrarian and pastoral societies to modern states has fundamentally altered this perception; children are no longer viewed solely as the private property of their parents. Children generate extensive positive outcomes for society, including increased economic productivity, civil participation, and social cohesion.[1] By raising productive children, parents provide future labor force and taxpayers, rendering children long-term human capital with significant economic value for society.[2]

The concept of the child as a public good has been developed by economists and political philosophers, positing that society shares in the costs of child-rearing and, correspondingly, that parents' authority over children is not absolute. Critics, however, argue that societal cost-sharing is unjustified where the decision to procreate is a voluntary and discrete choice made by individuals, who should therefore accept full responsibility. As Rakowski[3] contends: "Children are not brought by storks with uncontrollable whims. Specific individuals are responsible for their existence. Therefore, it is unjust to claim that because two people decide to have a child or become parents through negligence, everyone else must share their resources with the newborn."

This public good perspective is grounded in theories of distributive justice, asserting that the costs of child-rearing should be distributed between parents and society due to the production of non-excludable benefits, such as a future labour and tax revenues.[4] This view finds support in principles of fair play and the concept of socialized goods,[5] yet it faces serious philosophical and practical challenges including the risks of commodification, potential legal conflicts with parental rights, and cultural resistance.

Modern socio-economic realities, such as women's widespread economic participation,

1 Nancy Folbre, *Who Pays for the Kids? Gender and the Structures of Constraint* (Routledge 1994) 45-47.
2 Gary S Becker, *A Treatise on the Family* (Enlarged edn, Harvard UP 1991) 209.
3 Eric Rakowski, *Equal Justice* (Clarendon Press 1993) 153.
4 Serena Olsaretti, 'Children as Public Goods?' (2013) 41(3) Philosophy & Public Affairs 19.
5 ibid, 25.

high opportunity costs of childbirth, and declining birth rates have made child-rearing a pressing global policy challenge. In this context, governmental policy-plannings directly influences fertility rates.[1] This article addresses two main questions: First, can children be considered public or socialized goods? Second, is there evidence of this conceptualization in Iranian legislation?

The topic remains scarcely addressed in Persian legal and economic literature. Bagheri and Mir Lavasani[2] discussed the "International Status of Public Goods in the Distributive Justice Approach," while Aghaei and others[3] examined "National Public Goods and Social Welfare in Iran with Reference to Amartya Sen's Definition." Relevant English-language scholarship include Olsaretti's "Children as Public Goods?,"[4] which explores whether children qualify as public goods and if this justifies societal cost-sharing. In a later work, Olsaretti[5] critiques liberal justice theories, arguing that assigning child-rearing costs solely to parents based on "personal choice" is unfair given that children produce public goods. Bou-Habib & Olsaretti[6] investigate the substitutability of native-born children with human migration in the context of taxpayers' financial commitments. Finally, Shields[7] assesses the social costs imposed by child-rearing and proposes the criterion of the "least necessary expense" as a limit on societal obligations.

This article synthesizes these sources to comprehensively elucidate the concept of the child as a public good, explores the alternative concept of the socialized good, discusses challenges, and finally examines the Iranian legal system's approach to this issue.

1. A Study on the Concept of Public Goods

Humans generally produce goods motivated by personal benefit; however, some goods and services are socially necessary irrespective of their source, and their benefits accrue universally.[8] A variant term, "common goods," was first introduced by David Hume in the eighteenth century in his work, *A Treatise of Human Nature* .[9] Samuelson formally introduced the concept of public goods into economics.[10] At its core, a public good is defined by two fundamental characteristics:

First, *non-rivalry*, meaning that one person's use of the good does not diminish its availability or utility for others; in other words, consumption is non-competitive.

Second, *non-excludability*, meaning that it is infeasible or prohibitively costly to exclude any individual from enjoying the benefits of the good once it is provided. This characteristic is also termed *non-appropriability*, implying that all members of society can simultaneously avail the good.[11]

1 Alyssa Di Nallo and Oliver Lipps, 'How Much His or Her Job Loss Influences Fertility: A Couple Approach' (2023) 85 J Marriage & Family 873, 401.

2 Mehdi Baqeri and Seyed Mohammad Mir Lavasani, 'The International Position of Public Goods in the Distributive Justice Approach' (2012) 1(2) Private L 1 [In Persian].

3 Gholamreza Aghaei, Gholamreza Memarzadeh and Karamollah Daneshfard, 'National Public Good: A Case Study of Social Welfare in Iran and the Alignment of Upstream National Documents with Amartya Sen's Definition of Social Welfare' (2024) 60 Legal Research 113 [In Persian].

4 Olsaretti (n 4).

5 Serena Olsaretti, 'Liberal Equality and the Costs of Children' (2017) 174(1) Philosophical Stud 155.

6 Paul Bou-Habib and Serena Olsaretti, 'Children or Migrants as Public Goods?' (2023) 72 Political Stud 1.

7 Liam Shields, *Fairness in Child Rearing: A Game Theoretic Approach* (OUP 2023).

8 Bagheri & Mir Lavasani (n 7) 3.

9 David Hume, *A Treatise of Human Nature* (L A Selby-Bigge and P H Nidditch eds, 2nd edn, OUP 1978).

10 Paul A Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36(4) Rev Econ & Stat 387, 388.

11 ibid.

Public goods is a key concept in economics and social sciences, referring to goods and services that are indispensable for social welfare and sustainable development.[1] The concept is intrinsically linked to the role of government in the economy. *Public Goods Theory* is, in essence, a theory of justice, specifically, a form of distributive justice aimed at enhancing the allocation of resources, opportunities, rights, and privileges within a society.[2]

However, the classical economic conceptualization of public goods warrants reconsideration; as in real economies, it is rare to find goods that fully satisfy both criteria of non-rivalry and non-excludability. Instead, most goods exist along a spectrum between "pure public goods" and "pure private goods." Pure public goods (e.g., national defense, a lighthouse) are completely *non-rivalrous* and *non-excludable*, whereas pure private goods are fully rivalrous and excludable. In between are quasi-public goods, which may exhibit partial rivalry or excludability; a public park, for instance, is non-excludable but can become rivalrous when congested.[3]

Moving beyond the classical binary, some economists[4] analyze public goods along three criteria: 1) the degree of rivalry, 2) the degree of excludability, and 3) the scope of benefits. This framework allows for the classification of goods at local, national, and global levels. For example, street lighting qualifies as a local public good, national defense a national public good, and climate stability a global public good. This approach provides a more nuanced analysis of the complexities in supplying public goods across different scales.

In the digital age, new forms of public goods have emerged which, while technically excludable, are normatively managed as public goods. This phenomenon blurs the traditional boundaries between public and private goods.[5]

Regardless of the definition, public goods are inherently prone to the *free-rider problem*, a main obstacle to their efficient provision.[6] The attributes of non-rivalry and non-excludability render their supply challenging for private markets.[7] Therefore, government intervention is typically deemed essential, and funding must be secured from public budgets. The free-rider problem manifests when individuals choose to benefit from a public good without contributing to its costs. Since these goods are available to all regardless of individual payment, their supply in free markets is typically insufficient. In the absence of collective action, the market mechanism of supply-demand fails due to the absence of a direct, exclusive profit incentive for private producers. Thus, governments and public institutions play a vital role in supplying and managing these goods. Policymakers must utilise instruments such as taxation, budget allocation, and facilitating civil society participation to ensure fair and sustainable provision of public goods.

This challenge becomes even more complex when children are considered public goods. Studies indicate that many individuals prefer to enjoy benefits of child-rearing by others without sharing the costs.[8] The f*air play theory* has been proposed as a viable solution. Developed by scholars such as

1 Aghaei and others (n 8) 128.
2 Bagheri & Mir Lavasani (n 7) 2.
3 Joseph E Stiglitz and Jay K Rosengard, *Economics of the Public Sector* (4th intl student edn, WW Norton & Company 2015) 102107-.
4 Inge Kaul, Isabelle Grunberg and Marc A Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (OUP 1999) 2.
5 Yochai Benkler, 'Power and Productivity: Institutions, Ideology, and Technology in Political Economy' in Danielle Allen, Yochai Benkler, Leah Downey, Rebecca Henderson and Josh Simons (eds), *A Political Economy of Justice* (U of Chicago Press 2022) 27.
6 Mancur Olson, *The Logic of Collective Action* (Harvard UP 1965) 36.
7 Bagheri & Mir Lavasani (n 7) 6.
8 Samuelson (n 15) 389.

Shields, this theory argues that when parents bear the costs of raising children whose benefits are non- excludably enjoyed by society, principles of fairness dictate that other members of society should share in those costs.[1] This approach has been implemented in some countries.

While fair play theory offers a robust theoretical framework to address the free-rider problem, its practical success is contingent on the specific social context and the careful design of enforcement mechanisms.[2]

Furthermore, given that the public good argument for children is often predicated on their role in providing future labor force, a counter-argument suggests that if labor supply can be alternatively met through replacement migration, children should not be considered as public goods. However, although migration can complement human capital, raising local children remains a significant public good that promises societal continuity and cultural reproduction, justifying collective financial participation.[3]

2. The Possibility of Considering the Child as a Public Good

In mainstream policy discourse, investment in children is widely regarded by states as an instrument for national development.The Heckman Equation posits that investment in early childhood yields a sixfold return for society, highlighting the significant long-term social and economic benefits.[4] Accordingly, procreation today transcends a merely personal act; it constitutes a social act. Moreover, the conditions and costs of child-rearing have made the maintenance of reproduction in many countries contingent on the provision of incentives and rewards in this area.

A public good, as defined above, is characterized by two main features: non-rivalry (one person's consumption does not preclude or diminish consumption by others) and non-excludability (no one can be excluded from enjoying the benefits of the good).[5] Proponents of the public goods theory argue that the benefits children confer upon society, such as the formation of human capital and the sustenance of democracy, exhibit these very characteristics.[6] Parenting generates both positive and negative externalities. On the one hand, raising law-abiding children provides future labor force and, consequently, taxpayers; on the other hand, a failure to raise children to be law-abiding citizens imposes significant costs on society.[7]

Parents who raise happy, healthy, and successful children generate an especially important public good. The children themselves are not the only beneficiaries. Employers benefit from access to productive workforce, the elderly benefit from social security taxes paid by the younger generation, and fellow citizens benefit from living among productive and law-abiding peoples. These represent positive spillover effects that economists term "positive externalities" because they are external to the private decision to procreate and provide care.[8]

According to the "fair play" theory, which provides the normative basis for the obligation

1 Shields (n 12) 118.
2 ibid, 125.
3 Bou-Habib & Olsaretti (n 11) 15-17.
4 James J Heckman, 'The Case for Investing in Disadvantaged Young Children' in *Big Ideas for Children: Investing in Our Nation's Future* (First Focus 2008) 49, 56.
5 Samuelson (n 15) 378-388.
6 Bou-Habib & Olsaretti (n 11) 15-17.; Shields (n 12) 7-8.
7 Olsaretti (n 9) 19.
8 Nancy Folbre, *The Invisible Heart: Economics and Family Values* (New Press 2001) 50.

of non-parents to share the costs of child-rearing,[1] when parents incur costs to produce benefits that are non-excludably enjoyed by non-parents, the latter are obliged to share these costs to preclude a "free-rider" problem. There is much debate about whether the mere act of giving birth constitutes a benefit, or whether raising a child as a law-abiding citizen and taxpayer yields the the requisite benefit. However, at minimum, the birth of children results in the creation of an economically active and potentially tax-paying agent.

The conclusion of the argument, consistent with conceptualizing the child as a public good under the fair play theory, is the necessity of non-parental contribution in bearing child-rearing expenses.[2] This principle provides a robust justification for public support mechanisms in areas such as education, healthcare, and childcare.

3. The Child as a Socialized Good

Some economists have raised substantive objections to the idea of characterising the child as a public good. Critics argue that the conditions necessary for the principle of fairness to generate enforceable obligations do not apply to parents. This principle creates such obligations only if producing benefits is costly and producers intend to benefit others. Critics argue that neither condition applies to parents, as they do not perceive child-rearing as a net cost and lack the intent to confer benefits upon non-parents, deriving instead significant personal enjoyment from parenthood.[3]

This objection, however, faces significant challenges. Even conceding that parents enjoy having children and consider it as integral to their life plan and identity, it is indisputable that parents incur substantial costs, including loss of freedom, time, and financial resources that could have been allocated elsewhere.[4] These costs have increased considerably due to broad socio-economic changes, such as the growing complexity of the economy and the demand for specialized skills. More importantly, this expenditure generates benefits for all citizens, including non-parents, by guaranteeing a future productive workforce.[5]

Furthermore, the fact that parents may enjoy parenting does not inherently negate a claim for compensation for their incurred losses. The principle of fairness does not require that producing benefits be entirely unpleasant or burdensome for the producer; it only requires that opportunity costs or resources, which could have been used elsewhere, are expended. For example, a gardener may enjoy tending their garden, but if the garden's products benefit neighbors, principles of fairness may oblige those neighbors to share maintenance costs, irrespective of the gardener's enjoyment. Similarly, parents may enjoy raising children, but the time, financial, and emotional costs they bear non-excludably benefit non-parents.[6]

A further criticism posits that parents lack the deliberate intent to benefit non-parents, which is a requisite element for generating a compensatory obligation under fairness-based theories.

1 H L A Hart, 'Are There Any Natural Rights?' in Jeremy Waldron (ed), *Theories of Rights* (OUP 1984) 77, 80.
2 Shields (n 12) 78.
3 Paula Casal and Andrew Williams, 'Equality of Resources and Procreative Justice' in *Justice, Equality, and Constructivism* (Blackwell 2004) 150, 152.
4 Olsaretti (n 9) 13.
5 Folbre (n 32) 15.
6 Olsaretti (n 9) 14.

Critics argue that parents raise children primarily for their own good or for personal reasons, such as fulfilling personal aspirations, rather than to produce public benefits.[1]

This point is responded to by stating that the principle of fairness does not require producers of benefits to have altruistic motives to benefit others; it only requires that they intentionally produce outcomes beneficial to others. Parents may have personal motivations for having and raising children (such as love for the children or self-realization), but they intentionally raise children to become productive and law-abiding members of society, and this outcome inevitably and foreseeably benefits non-parents. For example, parents send their children to school and teach them social values, aware that these actions contribute to their children's future economic and social productivity- an asset which benefits the entire society, including non-parents.[2]

Notwithstanding these rebuttals, the descriptions of public goods as presented earlier seem to undermine the argument that the child can be regarded as a public good. Pure public goods must be non-excludable and non-rivalrous, yet the benefits produced by parents often lack these characteristics. Benefits such as future tax contributions are distributed through socio-economic institutions, from which non-parents could potentially be excluded (for instance, through a two-tier welfare system that denies pension benefits to non-parents). Furthermore, consumption of benefits by some (e.g., receiving a pension) can be rivalrous, as it may reduce the amount available for others, contrary to true public goods like clean air or national defense. Additionally, non-parents can, in principle, refuse certain benefits (such as declining pensions), which is also inconsistent with the definition of public goods.[3]

Therefore, it has been suggested to reclassify children "socialized goods." This term reflects that their benefits are intentionally distributed to all members of society, including non-parents, through specific socio-economic institutions such as tax and welfare systems. are not public goods in the pure economic sense. Instead, they are goods whose distribution is mediated by deliberate institutional arrangements, and this distribution is designed to intentionally benefit non-parents. Hence, non-parents, benefiting from these advantages, are obligated to share in their production costs alongside parents.[4]

Accordingly, a distinction emerges between the two arguments. Unlike the public goods argument, where the obligation of non-parents arises to prevent free-riding on a non-excludable benefit, in the socialized goods argument, the obligation derives from participation in an institutional scheme that intentionally distributes benefits to non-parents. This argument emphasizes that non-parents' obligation stems not merely from the parents' decision to have children alone, but stems from their voluntary participation in a welfare system that deliberately distributes benefits produced by parents to them. By living in a society that accepts these benefits (such as receiving pensions), non-parents implicitly participate in this scheme.

The extent of non-parents' participation in this process remains contested. A compelling view suggests that liability should be limited to "essential costs," meaning the costs necessary to produce the socialized good rather than all child-related costs, which may include parents' private benefits.[5]

1 Casal and Williams (n 35) 153.
2 Olsaretti (n 9) 16.
3 ibid, 20.
4 ibid, 23.
5 Shields (n 12) 15.

4. Challenges of Considering the Child as a Public or Social Good

4.1. Philosophical and Ethical Challenges

Considering the child as a public good, predicated on their future role as a member of the workforce or a taxpayer, may lead to the objectification of children,[1] as it reduces them from individuals with inherent rights to mere resources for collective benefits, thus adopting a purely instrumental view of children. On the other hand, this perspective has also been subjected to feminist critique, arguing that such a framing reduces women to producers of the public good of children for society. This view implicitly involves the exploitation of women's caregiving labor,[2] as it ignores the existing gender inequalities and makes women responsible for bearing and raising this "public good," thereby exacerbating those inequalities.[3]

4.2. Legal Challenges

The conceptualisation of the child as a public good belonging to society carries significant legal risks. This viewpoint may subordinate the child's individual rights to perceived public interests, potentially undermining their legal protections. In instances of conflict between a child's individual rights and collective interests, the child's rights may be compromised. This perspective may conflict with fundamental principles of children's human rights, including the right to privacy enshrined in international instruments such as Article 16 of the Convention on the Rights of the Child. Furthermore, the governmentalisation of parental responsibilities can precipitate unjustified state interventions into family life and erode parental autonomy in upbringing decisions.[4] Child protection laws, at times invoking the nebulous concept of "public good," may disregard the fundamental rights of families. These tensions indicate that legislation in this domain requires a delicate balance between the collective protection of children and respect for their individual and familial rights. Specifically within the Iranian legal context, accepting the child as a public good, with consequent cost-sharing and state intervention in child-rearing, conflicts with the principle of parental guardianship (wilāyah) as established in Articles 1180 et seq. of the Iranian Civil Code.

4.3. Economic and Social Challenges

Viewing the child as a public good imposes significant costs on state welfare systems, necessitating higher public taxation, which presents its own particular challenges.[5] This approach can also, paradoxically, reduce the family's sense of responsibility and create excessive dependence on state support mechanisms,[6] while simultaneously affecting families' emotional and personal motivations for procreation.[7] On the social level, heightened government intervention in child upbringing, often described as "family governance," can generate social tensions. It is crucial to recognise that family conditions, forms, and structures vary worldwide, hence, prescribing a uniform model by governments poses major challenges in this regard.

1 Anca Gheaus, 'The Ethics of Parenting' (2022) 17 Philosophy Compass 45, 156.
2 Folbre (n 1) 90.
3 Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2021) 151.
4 Jennifer McKiernan, *State Intervention in Family Life: Balancing Child Protection and Parental Rights* (OUP 2012) 112.
5 Gary S.Becker, 'Fertility and the economy.' (1992) 5(3) Journal of Population Economics, 112.
6 Folbre (n 1) 56.
7 ibid, 28.

4.4. Cultural Challenges

Considering the child as a public good is accompanied by multiple cultural challenges that may affect the educational and identity structures of society. Transforming the child from a private family asset to a public good can generate tensions between traditional and modern value systems. This paradigm shift risked weakening the role of parents as the primary transmitters of culture and values.[1] It may also impact educational systems; systems that treat children as public investments tend to promote standardized upbringing patterns, which can stifle cultural diversity and the transmission of indigenous values.[2] This public perspective may ultimately foster a generation with fluid identities and shallow cultural affiliations, as children grow up in an environment potentially devoid of a clear cultural authority. There is a risk that this view may turn children into cultural consumers without authentic cultural heritage transmitted through the family, as their real developmental needs become subordinated to market logic and public policies.[3] These challenges may be particularly more acute in Iran, given its composition as a multi-ethnic and multicultural society where child-rearing is traditionally considered a private and religious domain.

5. The Approach of the Iranian Legislator in Considering the Child as a Public Good

Although the concept of the child as a "public good" is not explicitly mentioned in Iranian laws, an examination of the country's legal system reveals indications of an implicit acceptance of this underlying concept. Article 21 of the Iranian Constitution, which emphasises "protection of orphaned children," can be interpreted as establishing a public responsibility toward children.

In the Civil Code, despite the explicit recognition of parental custody rights and duties under Article 1168 and the prioritization of the guardian's authority (*wilāyah*) in provisions such as Article 1173, the Judiciary is authorized to make any decision serving the child's best interests, including the deprivation of custody from unfit parents. The Law on the Protection of Children and Adolescents (2020), stands as one of the most significant legislative measures in this regard, explicitly embodying the principle of collective responsibility toward children.

Article 3 of this law mandates governmental intervention to provide legal protection for a child or young adolescent when they are exposed to victimization or harm to their physical, psychological, social, moral, security, or educational well-being, constituting a hazardous condition. Furthermore, Article 17 imposes a mandatory duty on all members of society to report such hazardous conditions to competent authorities. Failure to report, or to take immediate and proportionate actions to prevent or mitigate harm when authorities are inaccessible or their intervention is ineffective, may result in liability under Article 6 of the Islamic Penal Code, provided such actions do not result in a greater harm. The establishment of offices for the protection of children and adolescents within the judiciary (Article 4) and other monitoring institutions (Article 5) are further legislative measures operationalising this collective duty.

The general family policies endorsed by the Supreme Leader affirm the dual responsibility of

1 Ruth Lister, 'Children (but not Women) First: New Labour, Child Welfare and Gender' (2006) 26(2) Critical Social Policy 315, 330.
2 Samuel Bowles and Herbert Gintis, 'Schooling in capitalist America' in (*New York* 1976) 129.
3 Daniel Thomas Cook, *The Commodification of Childhood* (Duke UP 2004) 158.

the family and society and emphasize governmental accountability, highlighting the imperative to promote childbearing.

Although the term "public good" is not explicitly used, the Iranian legal system acknowledges society's responsibility toward children through various mechanisms, fundamentally treating childbearing and upbringing as a collective responsibility, with related costs covered by public funds. These regulations implicitly acknowledge a public role in supporting children, without negating the primary and foundational responsibility of the family.

The Family Support and Youth Population Law of 2021 represents a substantial legislative stride toward institutionalising this concept. It provides a comprehensive suite of incentives, including:

- Housing allocation for parents following the birth of a third child (Article 4);
- Reductions in utility connection costs and construction fees (Article 5);
- Preferential housing loans to encourage childbearing (Article 9);
- Banking facilities for newborns (Articles 10 and 11);
- Increased subsidies for families with children (Article 13);
- Enhanced child allowance and family support (Article 16);
- Tax exemptions for families upon the birth of a third child (Article 18);
- Social insurance coverage for homemakers with three or more children (Article 21);
- Budget allocations for the development of science and technology related to fertility treatments and equipment (Article 40); and
- Insurance coverage for infertility treatment (Article 43).

Following the enactment of this law, an annual budget is specifically allocated for its implementation within each year's national budget legislation.[1]

Critically, this law and the subsequent annual budgetary acts allocate considerable public financial resources toward supporting childbearing and upbringing. The significant budgetary provisions aimed at assisting infertile families reflect the state's prioritization of encouraging fertility. It is evident that within this legislative scheme, the child is implicitly conceptualised as a public good, a view which rationalizes the shared societal cost burden manifest in these substantial annual budget allocations.

Conclusion

The recent decline in birth rates in various societies is a well-established reality, attributable to several socio-economic factors. The conceptualisation of children as public goods can furnish a normative foundation for distributing the costs of child-rearing equitably between parents and non-parents. This perspective offers a forward-looking incentive structure to encourage childbearing and to mitigate the threat of a future shortage in the supply of children, a risk that persists if costs remain disproportionately borne by parents.

However, this perspective is not without its detractors and faces significant philosophical, legal, economic, and cultural challenges. Governments' obligations toward children, as

1 https://www.tehrantimes.com/news/468040/Budget-bill-allocates-444m-to-childbearing-family-support-plans?, accesses 23 May 2025.

articulated in international human rights instruments, indicate responsibilities that extend beyond family capacities alone, implicitly confirming the public good status of children.[1]

Redefining the child as a public good requires legal reforms that balance parental rights and social obligations, while ensuring the child's best interests. This redefinition may lead to conflicts of interest between parents, the state, and the child. For example, a government may implement population growth policies that contradict the individual rights of the child or the privacy of the family.

Elements of this view are discernible within the Iranian legal framework, particularly in the 2020 Law on the Protection of Children and Adolescents and the Family Support and Youth Population Law. Children are valuable beings who constitute the future labor force, human capital, law-abiding citizens, and taxpayers; since society derives non-excludable benefits from them, the costs of raising children should be equitably shared among all societal members. This principle is partially realized in Iran's legal system through annual budgetary allocations and funding mechanisms.

Data from the Plan and Budget Organization and the National Population Headquarters Secretariat indicate the allocation of specific funds for implementing the Family Support and Youth Population Law in the fiscal years 2022 and 2023.[2]

The following topics are suggested for future interdisciplinary research:

- A comparative study of international legal frameworks addressing children as public goods;
- A cost-benefit analysis of governmental investment in childhood;
- The impact of economic and environmental crises on the child's status as a public good;
- Legal and social strategies for supporting refugee and orphaned children;
- The challenges and opportunities presented by cyberspace for children conceptualised as public goods;
- The role of government in regulating digital content for children; and
- Shifts in societal attitudes from viewing children as private family assets to recognising a collective responsibility for their well-being.

1 Martha C Nussbaum and Rosalind Dixon, 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (University of Chicago Public Law & Legal Theory Working Paper No 384, 2012) 10-12.

2 Islamic Consultative Assembly Research Center, 'Analysis of Allocated Credit Distribution for Implementing the "Family Support and Youth Population Law" in 2021-2022 Budget Laws' (2023) 32(8) Monthly Expert Reports, Serial No 20173 [In Persian].

References

A) Articles

Aghaei G, Memarzadeh G and Daneshfard K, 'National Public Good: A Case Study of Social Welfare in Iran and the Alignment of Upstream National Documents with Amartya Sen's Definition of Social Welfare' (2024) 60 Legal Research 113 [In Persian]

Baqeri M and Mir Lavasani SM, 'The International Position of Public Goods in the Distributive Justice Approach' (2012) 1(2) Private L 1 [In Persian]

Bou-Habib P and Olsaretti S, 'Children or Migrants as Public Goods?' (2023) 72 Political Stud 1

Di Nallo A and Lipps O, 'How Much His or Her Job Loss Influences Fertility: A Couple Approach' (2023) 85 J Marriage & Family 873

Folbre N, 'Who Pays for the Kids? Gender and the Structures of Constraint' (1994) 29(2) Signs 511

Gheaus A, 'The Ethics of Parenting' (2022) 17 Philosophy Compass 45

Lister R, 'Children (but not Women) First: New Labour, Child Welfare and Gender' (2006) 26(2) Critical Social Policy 315

Olsaretti S, 'Children as Public Goods?' (2013) 41(3) Philosophy & Public Affairs 19

Olsaretti S, 'Liberal Equality and the Costs of Children' (2017) 174(1) Philosophical Stud 155

Samuelson PA, 'The Pure Theory of Public Expenditure' (1954) 36(4) Rev Econ & Stat 387

B) Books

Becker GS, *A Treatise on the Family* (Enlarged edn, Harvard University Press 1991)

Cook DT, *The Commodification of Childhood* (Duke University Press 2004)

Ferguson S, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2021)

Folbre N, *The Invisible Heart: Economics and Family Values* (New Press 2001)

Hume D, *A Treatise of Human Nature* (LA Selby-Bigge and PH Nidditch eds, 2nd edn, OUP 1978)

Kaul I, Grunberg I and Stern MA (eds), *Global Public Goods: International Cooperation in the 21st Century* (OUP 1999)

McKiernan J, *State Intervention in Family Life: Balancing Child Protection and Parental Rights* (OUP 2012)

Olson M, *The Logic of Collective Action* (Harvard University Press 1965)

Rakowski E, *Equal Justice* (Clarendon Press 1993)

Shields L, *Fairness in Child Rearing: A Game Theoretic Approach* (OUP 2023)

Stiglitz JE and Rosengard JK, *Economics of the Public Sector* (4th intl student edn, WW Norton & Company 2015)

C) Chapters in Edited Books

Benkler Y, 'Power and Productivity: Institutions, Ideology, and Technology in Political Economy' in Danielle Allen, Yochai Benkler, Leah Downey, Rebecca Henderson and Josh Simons (eds), *A Political Economy of Justice* (University of Chicago Press 2022) 27

Casal P and Williams A, 'Equality of Resources and Procreative Justice' in *Justice, Equality, and Constructivism* (Blackwell 2004) 150

Hart HLA, 'Are There Any Natural Rights?' in Jeremy Waldron (ed), *Theories of Rights* (OUP 1984) 77

Heckman JJ, 'The Case for Investing in Disadvantaged Young Children' in *Big Ideas for Children: Investing in Our Nation's Future* (First Focus 2008) 49

D) Reports and Working Papers

Islamic Consultative Assembly Research Center, 'Analysis of Allocated Credit Distribution for Implementing the "Family Support and Youth Population Law" in 2021-2022 Budget Laws' (Monthly Expert Reports, Serial No 20173, 2023) [In Persian]

Nussbaum MC and Dixon R, 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (University of Chicago Public Law & Legal Theory Working Paper No 384, 2012)

Iranian Journal of International and Comparative Law
Volume 3, Issue 1, 2025

Book Review: Palestinian Refugees in International Law (2nd Edition) by Francesca P. Albanese and Lex Takkenberg; Redefining a Legal Paradigm for Palestinian Refugees

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Article Info

Article type:
Book Review

Article history:
Received
20 June 2025

Received in revised form
20 June 2025

Accepted
25 June 2025

Published online
31 June 2025

https://ijicl.qom.ac.ir/article_3795.html

Keywords:
Palestine, Refugees, International Law, Geneva Convention, UNRWA, UNHCR.

ABSTRACT

Francesca P. Albanese and Lex Takkenberg's Palestinian Refugees in International Law, the substantially expanded second edition of which was published in 2020 by Oxford University Press, is an exhaustive and meticulous work that can be considered the seminal legal text on the status of Palestinian refugees. This volume, which is fundamentally a new work built upon the foundation of the 1998 first edition, adopts a holistic and multidisciplinary approach to examine the historical, legal, and political dimensions of one of the world's most protracted refugee crises. The authors, both possessing extensive experience with the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), present a profound analysis of the distinctive legal regime governing this refugee population, arguing that any just and durable solution to their predicament must be firmly rooted in the principles of international law.

Cite this article: Fazaeli. M., (2025). Book Review: Palestinian Refugees in International Law (2nd Edition) by Francesca P. Albanese and Lex Takkenberg; Redefining a Legal Paradigm for Palestinian Refugees, *Iranian Journal of International and Comparative Law*, 3(1), pp: 234-240.

10.22091/ijicl.2025.13998.1184 Publisher: University of Qom

Table of Contents

Introduction

In her foreword to the book, Karen Abu Zayd observes that *Palestinian Refugees in International Law* paints an accurate and complete portrait of the history of Palestinian refugees and the oppression they have endured. She contends that, through its fair and impartial assessment, the book has largely stemmed the tide of misinformation on the subject. Abu Zayd reflects that reading this book evoked memories of her tenure at the UNRWA office in Gaza from 2000 to 2010, recounting the oppression she witnessed and describing how the text reawakened a profound sense of anger and long-standing resentment. The authors' comprehensive approach to the various dimensions of the issue, she suggests, succeeds in clarifying the legal basis of the violations perpetrated against Palestinian refugees over the past seventy years. This edition marks the first time that the situation of Palestinian refugees across all five continents has been subjected to a comprehensive legal examination.

The authors elucidate the capacity of international law to identify and redress the injustices suffered by refugees. While assessing the roles of the United Nations High Commissioner for Refugees (UNHCR) and UNRWA in the Near East, as well as the cooperation between the two agencies, they trace the evolution of international law and practice with a view to enhancing protection for refugees.

The research and evaluations presented in this study demonstrate that international law has, to date, failed to provide sustained support for Palestinian refugees. The book presents a coherent picture of a nation in exile, scattered in the wake of forced migration. This picture reveals a fragmented reality that constantly challenges all established legal categories, legal structures, and common perceptions. The authors show that the only common denominator among all generations and different strata of Palestinian refugees around the world is their Palestinian identity and the shared experience of displacement.

The authors vehemently contest the idea that the Palestinian Authority is content with receiving international aid and passively waiting for a solution in refugee camps, having no agency over their own destiny. Instead, they demonstrate how Palestinians have sought to shape

their future through the political and legal activities of popular organizations, highlighting in particular the role of the Palestine Liberation Organization in the United Nations.

By narrating the legal course of this issue within its historical context, the book depicts not only the countless oppressions inflicted on the Palestinians but also their resilience and steadfastness over decades of suffering from continuous displacement. The narrative illustrates their persistent demand for justice, their resistance to the resettlement of hundreds of thousands of Palestinians across the world, and the numerous challenges that arise from this diaspora.

One of the main features of the new edition is the complete rewriting of the final section on solutions. In presenting solutions to overcome the impasse on the question of Palestine, the authors argue that, despite the many missed opportunities, possibilities remain to be seized. They posit that a just and sustainable solution requires a fundamental change to existing paradigms and must be fully grounded in international law, necessitating the pursuit of multilateral efforts such as those emphasized in the 2016 New York Declaration for Refugees and Migrants and the 2018 Global Compact on Refugees.

Ms. Albanese asserts that even if Palestinian refugees agree to a compromise for whatever reasons, the international community must not forget that their return to their homeland is an inalienable legal right, a principle that constitutes the central mission of a legal text such as this. She interrogates why international law, particularly in the case of Palestine, is, as Victor Kattan notes, "closer to power than justice," and explores how its subordination to political considerations and geopolitical objectives might be countered.

While the first edition of the book was largely influenced by the optimism of the Oslo process and did not examine studies on the right of return as a legal right, the second edition presents a more realistic assessment, critiquing the hypocritical policies of Israel and the United States. The first edition was written in the wake of the Oslo Accords, which optimistically envisaged limited Palestinian autonomy in the Gaza Strip and the West Bank and the establishment of an independent Palestinian State after a five-year interim period. However, subsequent developments, including the collapse of the peace process, the gradual fragmentation of the Palestinian territory through intensified Israeli settlement expansion, widespread violence in the occupied territories (especially East Jerusalem and the Gaza Strip), the protracted siege of Gaza, the shift in the United States' policy from mediator to open supporter for Israel under the Trump administration, and the unprecedented actions of this administration in 2017 such as relocating the U.S. embassy to Jerusalem, reducing funding to UNRWA, and terminating U.S. aid to the agency, necessitated a comprehensive review of previous studies on the Palestinian issue.

Then, the second edition of *Palestinian Refugees in International Law* offers a comprehensive and rigorous legal analysis of the status, rights, and protection gaps affecting Palestinian refugees under international law. Drawing on historical, political, and legal perspectives, the book meticulously examines the unique legal regime applicable to Palestinian refugees, particularly under Article 1D of the 1951 Refugee Convention, and situates their plight within broader frameworks of international human rights law, the right to self-determination, and the law of state responsibility.

The work is structured into three main parts and eight chapters, providing a comprehensive analysis from the genesis of the refugee question to their current dispersal across five continents.

1. Part One: Historical and Legal Foundations (Chapters I–III)

The first part of the book is dedicated to tracing the historical origins and examining the legal foundations of the Palestinian refugee issue.

Chapter I provides a historical overview of the events that led to the mass displacement of a large part of the indigenous Arab population of Palestine in 1948. It begins by analyzing the developments from the final decades of Ottoman rule through the British occupation and its subsequent thirty-year administration of the Palestinian territory under the Mandate system. This chapter elucidates how the League of Nations Mandate, established by the victors of World War I, served to justify colonial rule over occupied territories and, in the case of Palestine, created the political and social conditions for the displacement and dispossession of its indigenous people. The authors carefully analyze the early United Nations efforts to resolve the issue, as well as subsequent so-called peace negotiations (from Madrid to Oslo and Camp David), concluding that these processes largely marginalized international law. They contend that this marginalization was a principal cause for the failure of these initiatives.

Chapter II is one of the most technical and crucial parts of the book, analyzing the "distinct normative and institutional regime" for Palestinian refugees. It delineates in detail the complementary roles of various UN agencies, such as the United Nations Conciliation Commission for Palestine (UNCCP), the UNRWA, and the UNHCR. The chapter's fulcrum is an in-depth analysis of Article 1D of the 1951 Geneva Convention relating to the Status of Refugees. Drawing on historical documents and state practice, the authors argue that this provision was conceived not as an "exception clause" but as a mechanism to ensure "continuity of protection." This interpretation posits that Palestinian refugees are automatically entitled to the Convention's protections, even while they are under the care of another agency, until a durable solution is achieved in accordance with relevant UN resolutions. This chapter also addresses the definition of "Palestinian refugee" in UNRWA's operational practice and rejects claims that this definition conflicts with international refugee law.

Chapter III completes the legal framework by examining the status of Palestinian refugees under various branches of international law. It shows that Palestinians hold rights not only as "refugees" but also as "protected persons" under international humanitarian law, as "stateless persons," and, in some cases, "internally displaced persons" (IDPs). The authors' main argument is that the "exceptionalist" approach adopted towards Palestinian refugees has, contrary to prevailing assumptions, resulted in less protection for Palestinian refugees in practice- a reality rooted in political considerations rather than legal necessity.

2. Part Two: Seventy Years of Exile Across the Globe (Chapters IV–V)

This section presents an unprecedented and comprehensive picture of the geographical dispersal of Palestinians worldwide.

Chapter IV addresses the situation of refugees in the Middle East and North Africa. It begins with an analysis of the role of the Arab League and the Casablanca Protocol, and then proceeds to a detailed examination of the legal and social status of refugees in UNRWA's areas of operation (Jordan, Lebanon, Syria, and the Occupied Palestinian Territory) and other Arab

host countries (such as Egypt and Iraq). This precise analysis reveals that the status of refugees in these states is highly varied and often precarious.

Chapter V expands the geographical scope of the Palestinian exile beyond the Arab world, examining their situation in Europe, the Americas, Asia-Pacific region, and Africa. Drawing on extensive field research and data, including from globally distributed questionnaires, this chapter highlights the challenges of the "statistical invisibility" of Palestinian refugees, a consequence of uncoordinated registration and identity verification procedures. This section is one of the most important contributions of the book, as it provides the first relatively comprehensive global mapping of the Palestinian diaspora and its statistical realities.

3. Part Three: Protection and Solutions (Chapters VI–VIII)

The final section of the book examines the specific rights of Palestinian refugees and displaced persons and the search for sustainable solutions. Part Three focuses on specific rights, including self-determination, return, compensation, and socio-economic rights.

Chapter VI focuses on the specific rights of Palestinian refugees, which are divided into two categories: collective rights, such as the right to self-determination, and individual rights, which include the right to return, restitution, and compensation (as "historical claims"), as well as other civil, economic, and social rights essential for a dignified life in prolonged exile.

3.1. Right to Self-Determination

The authors trace the evolution of the right to self-determination from its roots in the post-World War I era to its codification in the UN Charter and subsequent human rights covenants. They argue that the Palestinian people's right to self-determination was implicitly recognized even before the establishment of Israel, particularly under the League of Nations Mandate system, which provisionally acknowledged the independence of Class A mandates, including Palestine.

The book highlights how political realities, including the Oslo Accords and the establishment of the Palestinian Authority, have complicated the exercise of this right. Despite international recognition of Palestine as a non-member observer state in 2012, the ongoing Israeli occupation, settlement expansion, and fragmentation of Palestinian territory have severely undermined the realization of both external and internal self-determination. The authors emphasize that self-determination remains a collective right essential for the Palestinian people's political, economic, and cultural development, but its fulfillment is inextricably linked to the resolution of the refugee issue.

3.2. Right to Return and Compensation

The authors provide a detailed legal-historical analysis of the rights to return and compensation, anchored in UN General Assembly Resolution 194 (III). They argue that Resolution 194 did not create new rights but affirmed existing norms under international law, including the prohibition of mass displacement and the obligation to provide reparations for wrongful acts.

The book challenges arguments that deny the applicability of these rights to Palestinian refugees, such as claims that Resolution 194 is non-binding or that population exchanges were historically accepted. Instead, the authors demonstrate that the principles of return, restitution,

and compensation were well-established in international law by 1948, supported by precedents such as the Nuremberg Trials and the *Chorzów Factory* case.

The authors also discuss how subsequent developments in international human rights law, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), have strengthened these rights. They note that the right to return is not limited to formal nationals but extends to those with enduring ties to their country, an interpretation that clearly encompasses Palestinian refugees.

Chapter VII deals with the concept of "international protection." It traces the evolution of UNRWA's role from a mere relief agency to an institution with more explicit protection functions (such as the Operations Support Officer - OSO program). It also discusses the concept of the "protection gap" and the strategic partnership between UNRWA and UNHCR to ensure "continuity of protection."

3.3. Contemporary Challenges

The book addresses the ongoing failure to implement these rights, attributing it to a lack of political will and Israel's persistent refusal to comply with international law. The authors also examine how secondary displacements, such as those resulting from the 1967 war and subsequent conflicts in Lebanon, Syria, and Iraq, have compounded the vulnerability of Palestinian refugees.

The authors critique the uneven application of Article 1D across jurisdictions, noting that many states fail to recognize the distinct legal regime for Palestinian refugees and instead assess their claims under Article 1A(2) of the Refugee Convention. This practice often results in denied protection and increased invisibility in asylum statistics.

Chapter VIII examines fair and sustainable solutions to the challenges arising from the protracted issue of Palestinian refugees. It analyzes the role of the New York Declaration, which is often reflected in United Nations resolutions, including **General Assembly Resolutions 194 (1948)** and **2256 (1967)**, and proposes fundamental changes to existing theoretical models on three levels: first, that the United Nations should reassume direct responsibility for finding a solution; second, that the individual and social ethical aspects of the refugee problem should be addressed; and third, that an end to displacement should be sought within the framework of international law.

Thus, the final chapter, titled "The Quest for Durable Solutions," serves as the book's culmination. Here, the authors call for a "fundamental paradigm shift" in the approach to the Palestinian refugee issue. This paradigm shift entails three key elements:

1. The UN must reclaim its responsibility for finding a solution, moving the issue out of the bilateral negotiations' framework.
2. International law, particularly relevant UN resolutions, must serve as the primary framework and guide for resolving the refugee status and its material and moral dimensions.
3. The belief that securing refugees' rights (such as citizenship) in host countries undermines their historical claims against Israel must be abandoned.

The authors contend that the "New York Declaration for Refugees and Migrants" (2016) and the "Global Compact on Refugees" (2018) have the potential to inform a "Comprehensive Refugee Response Framework" (CRF-PR) tailored to the situation of Palestinian refugees.

4. Overall Assessment

Palestinian Refugees in International Law (2nd Edition) is a landmark, exhaustive, and thoroughly documented work. It not only provides a rigorous legal analysis but also enriches the understanding of this protracted crisis by situating this analysis within its historical and political context. As Karen Abu Zayd notes in the foreword, this book is "a masterful portrayal of the history of, and injustices visited upon, Palestinian refugees," which corrects the pervasive misinformation surrounding the subject.

The authors' extensive lived experience in the Middle East and their collaboration with the UNRWA, along with unique access to resources and a deeper understanding of the situation's complexity, have culminated in a unique, comprehensive, accurate, rigorous, and data-based research project. This was further enhanced by the insights of a global advisory group of experts in Palestine refugee affairs and international law.

Ms. Albanese participated in informal seminars and workshops in Amman, Beirut, Jerusalem, London, New York, Ramallah, Singapore, and Washington from 2016 to 2018, and published a number of research findings, exposing some of the results to criticism and review. The book was finally completed in the fall of 2019 and covers all developments up to that point. Therefore, it does not address subsequent events. It is evident that the significant developments of recent years, particularly those following October 2023, constitute a distinct narrative that warrants separate and new analysis.

Albanese and Takkenberg's work is a seminal contribution to the field of international refugee and human rights law. It provides a compelling legal argument for the rights of Palestinian refugees to self-determination, return, and compensation, while also highlighting the systemic failures in their protection. The book thus serves as both an indispensable scholarly reference and a clarion call to action for states, international organizations, and legal practitioners to uphold the rights of Palestinian refugees in accordance with international law.

The authors conclude that without a just and durable solution, one that addresses both collective and individual rights, the cycle of displacement and dispossession will persist. They advocate for a comprehensive approach that integrates legal, political, and humanitarian efforts to ensure justice for Palestinian refugees.

This book is an essential resource for academics, policymakers, diplomats, lawyers, and activists in the fields of international law, refugee law, and Middle East studies. With this work, Albanese and Takkenberg have not only filled a significant lacuna in the legal literature but have also established a coherent legal framework, paving the way for future efforts to find just and durable solutions to one of the most intractable issues of our time. by providing a coherent legal framework.

Praise to God, Iranian Journal of International and Comparative Law was founded at the initiative of the International Law Department of University of Qom. It officially started work as a bi-annual, open access, English language and peer- reviewed law journal. The Journal is indexed in Islamic World Science Citation center (ISC) and Ministry of Science, Research and Technology of Iran. This bi-quarterly is the leading comprehensive English language journal on international and comparative law published in Iran. The journal enjoys a great editorial team and advisory board of prominent professors from different countries. In the effort to advance the knowledge of International and comparative law, the journal is committed to obtain valid international indexes in the first issue and thus submission of high quality articles by distinguished professors, scholars, thinkers and researchers in the field of international and comparative law will be mostly welcomed.

978-600-8436-97-3
Online ISSN: 2980-9584
Print ISSN: 2980-9282