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Table Of Contents:

Index Of Authors:

ASEAN AND THE 'PEACEFUL USE' OF OUTER SPACE: MAPPING THE LEGAL CONTOURS OF FUTURE CONFLICT IN OUTER SPACE

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Abstract

Inter-state conflicts in outer space are likely to become a reality in the not-so-distant future. Members of the Association of Southeast Asian Nations (ASEAN), some of whom have space programs that cater to socio-economic development needs, must prepare for this impending reality, which is likely to impact their access and free use of outer space environment. In preparing, it is important to keep in view elements of the outer-space legal regime that may enable or facilitate inter-state conflicts outer space. This becomes imperative as space technologies and capacities of advanced space nations (USA, China, India, and Russia for example) and as private sector research and development evolve rapidly allowing faster and easier access to space. The legal regime, developed since the start of the space age in 1957, holds that space is the "province of mankind" (that all nations can access space, use it freely, use its resources), that territorial sovereignty (ownership of property) does not apply to outer space, and, crucially, **that space is to be used for peaceful purposes**. The interpretation of the latter is of particular concern here. What is the meaning of 'peaceful' use? What are the positions of ASEAN, if any? What are the positions, if any, of members with space programs (Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam, on this issue? There is to date no scholarly mapping of ASEAN positions on this topic. This paper will map the positions using primary documents from ASEAN, its member states space governments and space programs, as well as their submissions in various UN bodies, notably the UN General Assembly (fourth Committee), UN Committee on the peaceful uses of outer space, UN Disarmament. The paper's structure is as follows: 1) a brief background on the evolution of Southeast Asian outer space initiatives since the start of the space race, 2) the international regime for the peaceful use of outer space, 3) ASEAN positions on the peaceful use of outer space and 4) Dilemmas of interpretation of 'peaceful' use of outer space.

***Key words**: ASEAN and outer space; outer space law; conflict prevention in outer space; use of Force; UN Charter*

I. Introduction

Inter-state conflicts in outer space are likely to become a reality in the not-so-distant future. Members of the Association of Southeast Asian Nations (ASEAN), some of whom have space programs that cater to socio-economic development needs, must prepare for this impending reality, which is likely to impact their access and free use of outer space environment. In preparing, it is important to keep in view elements of the outer-space legal regime that may enable or facilitate inter-state conflicts outer space. This becomes imperative as space technologies and capacities of advanced space nations (USA, China, India, and Russia for example) and as private sector research and development evolve rapidly allowing faster and easier access to space.

The legal regime, developed since the start of the space age in 1957, holds that space is the "province of mankind" (that all nations can access space, use it freely, use its resources), that territorial sovereignty (ownership of property) does not apply to outer space, and, crucially, **that space is to be used for peaceful purposes**. The interpretation of the latter is of particular concern here. What is the meaning of 'peaceful' use? What are the positions of ASEAN, if any? What are the positions, if any, of members with space programs (Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam) on this issue?

There is to date no scholarly mapping of ASEAN positions on this topic and this paper seeks to fill that gap.

II. Southeast Asian Space Activities since the start of the space age.

Several members of ASEAN have active space programs (See Table 1). Sarma has noted that they States in the region have understood the early on, the important ways in which space technology is crucial in several areas including disaster management, agriculture, and tourism. Through the development of indigenous Earth observation satellites, they can better deal with disputed border areas and can manage conflicts by providing accurate mapping for use by the military. Self-reliance and security imperatives are key drivers of Space programs in the region, which also provide capacity development for the countries' research institutes and innovation departments. (Sarma, 2019; 2)

Table1: Space Activities of Southeast Asia & Year Established.	
Brunei	No space program. Its space needs are met through Intelsat earth stations for meteorological information through foreign contracts via the Brunei Meteorological Service (BMS), Department of Civil Aviation (DCA), and Ministry of Communications
Cambodia	No space agency. Signed a framework agreement in 2018 with China for a new 30 communications satellite, Techo1
Indonesia	National Institute of Aeronautics 38 Palapa-1A and Space (LAPAN), 1962
Laos	No Space agency. It launched a communications and also built a satellite control centre. LaoSat-1 was placed into geostationary transfer orbit in 2015.
Malaysia	ANGKASA, 2002
Myanmar	No space program. The Department of Meteorology & Hydrology introduced satellite meteorology in 1973. Space studies picked in 1997 through the Aerospace Engineering Department. Set to launch its own satellite system MyanmarSat-2 in 2019.
Philippines	Philippines Space Agency to be established. Thus far its space activities are handled by diverse agencies under the Department of Science and Technology (DOST): Philippine Atmospheric, Geophysical and Astronomical Services Administration (PAGASA), the National Mapping and Resource Information Authority (NAMRIA), the National Disaster Risk Reduction and Management Council (NDRRMC), Mines and Geosciences Bureau, and the Philippine Institute of Volcanology and Seismology, Department of National Defense The Philippine Space Development Act was passed on December 2018. It set in motion the creation of a Philippine Space Agency (PhilSA and a Philippine Space Development and Utilization Policy (PSDUP).

Singapore	Launched its first communication and Earth observation satellites called X-sat in 2011, built by the Nanyang Technological University (NTU) in collaboration with Defence Science Organisation of Singapore
Thailand	Geo-Informatics and Space 20 Thaicom-1 Technology Development launched in 1993 Agency (GISTDA), 2000
Vietnam.	Vietnam National Space Centre (VNSC) 2011 Space Technology Institute (STI)
Source:	

In terms of expenditures on space programs, Vietnam has been leading the pack. By 2012, Vietnam was the largest spender within the ASEAN group with US$93 million, followed by Laos (US$87 million), Indonesia (US$38 million), Thailand (US$20 million), and Malaysia (US$18 million). (Sarma)

It is noteworthy that the region's space programs have relied heavily on foreign collaborations with China (Cambodia, Indonesia, Laos, Myanmar, Vietnam, and Thailand), India (Brunei, Vietnam), Japan (Philippines), Russia (Vietnam) and the United States of America (Thailand). At the same time, these global space powers are competing for regional influence in this sector (Sharma, p. 14)

- India's Act East policy—originally conceived as an economic initiative—has gained political, strategic and cultural dimensions.
- Japan also follows a policy of "Free and Open Indo-Pacific Strategy" that aims to enhance regional connectivity through high-quality infrastructure development and maritime law enforcement. This is part of its soft foreign policy.
- China's BRI also has a space policy that is lesser known, namely the Space Information Corridor, which offers space information services to BRI states that includes position, navigation, broadcasting and other types of satellite-related development.

As ASEAN members collaborate with these space powers, they are likely to be increasingly caught up in the global rivalry between such powers, who are slowly re-defining the notion of peaceful uses of outer space.

III. The international regime for the peaceful use of outer space

The international legal regime for outer space provides for a set of principles across five interlocking treaties. These principles noted above, include the principle that space is the "province of mankind" (that all nations can access space, use it freely, use its resources), that territorial sovereignty (ownership of property) does not apply to outer space, and, crucially, **that space is to be used for peaceful purposes**. ASEAN states have subscribed to these treaties as outlined in Table 2. The treaties are listed in Table 2 below.

Table 2: ASEAN States Membership of core Space Treaties
(R = ratified / S = signed)

	Treaty 1*	Treaty 2*	Treaty 3	Treaty 4*	Treaty 5*	Other Treaties**
Brunei						R
Cambodia		R				
Indonesia	R	R	R			R
Malaysia	S	S				
Myanmar	R	S				R
Philippines	S	S	S		R	R
Singapore	R	R	R	S		R
Thailand	R	R				R
Vietnam	R	S				R

*Treaties:

1. Outer Space Treaty
2. Convention on International Liability for Damage Caused by Space Objects (Liability Convention) 1971.
3. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement) 1967
4. Convention on Registration of Objects Launched into Outer Space (Registration

Convention)
5. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement) 1979

**The Status ASEAN participation in other agreements is detailed in United Nations (2019) *Status of International Agreements relating to activities in outer space as at 1 January 2019*. Committee on the Peaceful Uses of Outer Space, A/AC.105/C.2/2019/CRP.3

1) Sources of Outer Space Law

The sources of outer space law emanate principally from treaties, customary law and general principles of law. Soft law instruments have also shaped OS law. Experts on space law hold that general international law serves as a backup to the space law, the latter being a *lex specialis* regime. (Ref) Pursuant to Art. 3 of the OST international space law consists of rules arising from all typical sources of international law, which are listed in Article 38, par. 1 of the Statute of the International Court of Justice. The emphasis is on the relevant rules of international law that will normally apply to outer space activities. While OS is *lex specialis*, public international law applies to overcome lacuna. For example, environmental law may complement it through incorporating concepts such as sustainability in to the space 'environment'.

i. Treaties Providing for Peaceful Uses

One may start with the UN Charter of 1945, which obliges states to refrain from using force except in self defence, to settle their disputes peacefully, and to cooperate with each other in pursuit of these objectives. The UN Charter, which provides a global constitutional framework (Ref), encompasses today the urgency of addressing human rights protection and development challenges inclusive of sustainable development to protect the environment.

As the space age emerged after 1957, when the Soviet Union launched its first satellite into orbit, the UN took the lead in regulating the use of outer space. The five treaties and their rules are as follows:

(a) Treaty on Outer Space (TOS) 1967. The TOS is the foundation of international space law, it forbids weapons of mass destruction in space and reserves the moon and other bodies for peaceful purposes.

(b) Convention on International Liability for Damage Caused by Space Objects (Liability Convention) 1971. I*t* established liability rules for space. The Soviet Union was

penalized under this convention when one of its nuclear-powered satellites crashed in Canada in 1978. This treaty was necessary to overcome the monumental difficulty of settling liability claims under national law.[1] The basic rules of the "Outer Space Treaty" connected with international responsibility and liability were enlarged in the "Liability Convention". The latter stipulates that the signatory States are responsible for all acts and omissions of their government agencies and of all their natural or juridical persons. The fundamental aim of the "Liability Convention" is rather narrow: liability for damage to "innocent" victims, victims not taking part in the activity.

(c) Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement) 1967. It outlines the obligations for any state party that becomes aware that the personnel of a spacecraft are in danger. States are obliged to assist with the rescue of each other's astronauts.

(d) Convention on Registration of Objects Launched into Outer Space (Registration Convention). This convention created a system to identify and register space objects, a task that has been rendered extremely difficult given the hundreds of thousands of space objects in orbit today. These are becoming smaller and harder to identify.

(e) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement) 1979. The agreement reaffirmed and elaborated on the Outer Space Treaty as it relates to the moon and other celestial bodies. The latter should be used exclusively for peaceful purposes, their environments should not be disrupted, and the United Nations should be informed about any stations built on those bodies.

A range of other agreements and related agreements also regulate the uses of outer space. These are summarized by the Committee on the Peaceful Uses of Outer Space in its report of 1 April 2019, titled "Status of International Agreements relating to activities in Outer Space as at 1 January 2019" (document A/AC.105/C.2/2019/CRP.3)

ii. Customary rules

Customary law relating to outer space has evolved since the OST was adopted in 1957. At that time no part or very little of the treaty was of a customary character. While borrowing from other areas of customary international law,[2] a few practices may have

[1] It was because of the event of 5th September 1962, when a 3-kilogram metal object landed on the street in Manitowoc, Wisconsin, and the Unites States believed it to have been from Sputnik 4, launched by the Russians in 1960.

[2] The OST makes international law applicable to the exploration and use of outer space, the moon and other celestial bodies. Concepts borrowed from the law of sea concepts such as free passage, innocent passage in

emerged in OS law, including those on the uses of outer space.[3] Some areas of customary international law related to OS law concern: (1) Maritime delineation in so far as it informs the delineation of outer space vs the atmosphere and (2) The Uses of OS, which should be for peaceful purposes. The situation today is summarised by Perry (2017):

> There was almost no state practice outside of earth orbit at the time the Outer Space Treaty was ratified. Despite important strides in space technology over the last five decades, there is still very little state practice outside of Earth orbit today. There was not sufficient state practice to make the entire Outer Space Treaty codify customary international law when it was ratified, and there still is not sufficient state practice to make all the rules in the Outer Space Treaty customary international law. It would be incorrect to claim that every country in the world is bound by every rule in the Outer Space Treaty in every space activity.

iii. Legal Principles in Soft Law instruments

Legal principles adopted by the United Nations General Assembly, enumerated below, provide for the application of international law and promotion of international cooperation and understanding in space activities, the dissemination and exchange of information through transnational direct television broadcasting via satellites and remote satellite observations of the Earth and general standards regulating the safe use of nuclear power sources necessary for exploration and use of outer space:

- The Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space (General Assembly resolution 1962 (XVIII) of 13 December 1963);
- The Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting (resolution 37/92 of 10 December 1982);
- The Principles Relating to Remote Sensing of the Earth from Outer Space (resolution 41/65 of 3 December 1986);
- The Principles Relevant to the Use of Nuclear Power Sources in Outer Space (resolution 47/68 of 14 December 1992);

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airspace, access, registration and use. The customary international law **principle of free pursuit of scientific inquiry** helped pave the way for the first Sputnik and Explorer satellites. So long as their objectives were scientific, the custom of nations required that their free passage go unchallenged. Their free passage went unchallenged.

[3] See generally, Scharf,

- The Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries (resolution 51/122 of 13 December 1996).
- UN Space Debris Mitigation Guidelines in 2007, on the basis of guidelines adopted earlier by the IADC. The UN General Assembly endorsed the UN Space Debris Mitigation Guidelines in January 2008. In Subcommittee deliberations on the Guidelines, it was agreed that "Member States, in particular space-faring countries, should pay more attention to the problem of collisions of space objects, including those with nuclear power sources (NPS) on board, with space debris and to other aspects of space debris, as well as its reentry into the atmosphere".[4]

IV. Challenges to the "Peaceful" uses of outer space Regime

The UN General Assembly *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space* of 1963, provided that the UN Charter applied to outer space, including limitations on the use of force, and that outer space and celestial bodies are not subject to national appropriation by claim of sovereignty.

The general principle is that the exploration and use of outer space is to be carried out for the benefit of all mankind, by States on the basis of equality, with free access to all areas of celestial bodies. (A.1) "Outer Space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.'" (Article II). However, various interpretations since have clouded this general framework.

1) Trend Towards Military Uses of Outer Space

Space has already featured in great power competition and has been weaponised to some degree. These include the Strategic Defense Initiative of the Reagan administration, SDI of Ronald Reagan; use of surveillance satellites, the use of space assets in the Gulf War

[4] Seven guidelines are provided, each of which has its own recommended practices and rationale/justification: (1) Limit debris released during normal operations; (2) Minimise potential for break-ups during operational phases, (3) Limit the probability of accidental collision in orbit, (4) Avoid intentional destruction and other harmful activities, (5) Minimize potential for post-mission break-ups resulting from stored energy, (6) Limit the long-term presence of spacecraft and launch vehicle orbital stages in LEO after the end of their mission, and (7) Limit the long-term interference of spacecraft and launch vehicle orbital stages with GEO region after the end of the mission.

of 1991 and subsequent wars, to create an 'integrated battle platform' to aid in the implementation of military strategies.

As new uses of space have emerged with new technologies – environmental monitoring, broadcast communications, delivering the internet, weather prediction, navigation, scientific exploration and monitoring the 'space weather (See World Economic Forum, 2019) - the rivaling space powers have been grappling with the emergence of **non-peaceful uses of outer space**. This is reflected in the USSPACECOM plans that seek "…the ability to ensure un-interrupted access to space for U.S. forces and our allies, freedom of operations within the space medium and an ability to deny others the use of space, if required." (US SPACECOM, insert). Discussion surrounds the deployment of Anti-Satellite weapons (ASATs), for example. Are they non-threatening? Is the deployment of blanking out of communications technology, non-threatening? As space is increasingly used for the operation of cyberspace, is a cyber-attack justifiable as self-defence?

It is noteworthy, the Liability Convention recognized the possibility that **States may engage in intentional damage to space objects.** Major Ramsey flags the possibility that, far from the Liability Convention[5] being simply a matter of claim and compensation in a classical tortuous scenario, one can read into the 'with intent to cause damage' phrase specified in article VI a tacit acknowledgment that in certain instances force may be used by third States (Ramsey).

Future scenarios since the dawn of the space age have envisioned that violent conflict between states will extend to the Space environment. In 1962, President Kennedy stated "Space can be explored and mastered without feeding the fires of war". By 2005, General Lance Lord, Commander of US Air Force Space Command stated that "Space superiority is the future of warfare." Control the high ground - space. The United States has recently created a Space Force under President Trump. A key objective is to achieve space superiority to deny others the same use of Space. (Cited in Magoto and Freeland)

Cyber-attacks in space and on the digital information are now common place. States rely on position, navigation and timing information such as from GPS or Galileo is not only vital for getting us safely from A to B, but also for fast-moving financial transactions that require accurate timing signals. Almost all of our electronic systems depend on those timing

[5] The Liability Convention takes as its goal an elaboration of 'effective international rules and procedures concerning liability for damage caused by space objects and to ensure, in particular, the prompt payment under the terms of this Convention of a full and equitable measure of compensation to victims of such damage; third party State's asset, article IX of the Liability Convention requires that the State must be consulted.

signals for synchronization and basic functioning. Cyber hacks, digital spoofing and 'fake' information are now a real possibility. There is no rules-based order in place that is fit to deal with these types of attacks. (WEF, 2019)

2) Changing Norms on Peaceful Uses of Outer space?

This occasions a probing of changing norms on the peaceful uses of outer space. The UN Charter stipulates that disputes have to be settled peacefully. It outlaws wars of aggression, and permits defensive war. Presumably this applies in space as well since the UN Charter has been made applicable to OS. Do Charter rules on SD apply to space? Does airspace law apply? Airspace law recognises the right of sovereignty over airspace. Where does OS begin? Which weapons can be used in Space and for what purpose?

Experts on international law note that if an act is not specifically prohibited, then international law permits it. (Bridge) Indeed, the space regime leaves considerable room for maneuver by States as very little is specifically prohibited in space. Existing prohibitions from international agreements, the United Nations Charter, and "a modicum of customary space law adopted in most instances from other international legal regimes. While space is dedicated to peaceful uses, it does not follow that military uses are forbidden." (Bridge)

3) Military Activity in Outer Space

Article IV of the TOS divides the extraterrestrial universe into three parts: the Earth's orbit, celestial bodies and outer space. The treaties create two separate legal regimes for military activity in outer space: (1) activity conducted on the moon and other celestial bodies; and (2) activity conducted in outer space itself. **The regime does not completely free all of outer space from military use.** Such military uses is subject to various agreements as follows.

(i) The Nuclear Test Ban Treaty (NTBT) (1963)

This treaty provides that no nuclear weapons testing may be carried out in outer space (bridge). However there are **no prohibition on Anti-Satellite weapons, which are in use in the China, USA, Russia and India. (Ref)**

(ii) **The Ant-Ballistic Missile (ABM) Treaty (**1972) \

In article V it prohibits, without qualification, the development, testing or deployment of space-based antiballistic missile systems or components by either country. It prohibits States parties from getting around strict limitations by giving other missiles, launchers or radars capabilities to counter strategic ballistic missiles or their elements in flight trajectory, or testing them in an ABM mode. However, In 1978 Secretary of State Vance indicated that the **treaty does not prohibit the development or deployment of ASAT systems**; it is only the actual use of ASAT against United States national technical means that is prohibited. (Reference)

(iii) **The SALT agreements (1972 & 1979)**

These agreements sought to limit the number of strategic launchers and the total numbers of modern ballistic missile submarines in the arms inventories of both countries

(iv) ***OST (1967).***

Prohibits placing nuclear or other kinds of weapons of mass destruction in earth orbit, the installation of such weapons on celestial bodies, or the stationing of such weapons in outer space in any other manner. These are found in Article IV of the OsT applying to military activities in space and Article III of the Moon treaty.

However, the provision is *not intended to outlaw the use of ICBM's with nuclear warheads, as a full orbit*, rather than a sub-orbit or fractional orbit, is implied. Consideration of have led to questions of interpretation: Does this bar parking weapons in space? What is the meaning of “any other kinds of weapons of mass destruction? An accepted view is that "weapons of mass destruction" include nuclear, chemical and biological weapons.

Military activity by its terms, including the deployment of Anti-Satellite weapons (‘ASATs’), is prohibited specifically on the moon and other celestial bodies. ***Outer space***, as such, remains open to military activity that is non–aggressive, in line with the United Nations Charter and international law, as long as such activity does not involve nuclear weapons or weapons of mass destruction (Maogoto and Freeland)

Outer Space Treaty does not explicitly prohibit the transiting, or even the orbiting, of conventional weaponry in space (Maogoto and Freeland)

Related provisions are to be noted: 1) A limited right of inspection of all stations, installations, equipment and space vehicles on celestial bodies belonging to one party by

representatives of another on the basis of reciprocity (Article XII); and 2) A basic principle to be noted is that ownership of space objects is retained by the launching State (article VIII)

(v) ***The Use of Force in Outer Space***

The OST makes international law applicable to the exploration and use of outer space, the moon and other celestial bodies and Article III of the OST notes that the UN Charter applies. Through the application of Article III of the Outer Space Treaty, the prohibition on the use of force contained in article 2(4) of the Charter, which represents a crucial element in the regulation of international relations, would be equally applicable to the use of outer space. Therefore, *jus ad bellum* and the *jus in bello* apply to outer space, which is increasingly populated by technologies that may have defensive and offensive military purposes. Article III provides a clear indication that the international law of war – *jus in bello* – will also apply to space warfare:

Threat or Use of Force

The UN Charter stipulates that members refrain from the threat or use of force in their international relations against the territorial integrity or political independence of any State (Article 2(4)). It has been noted that article 2 (4) may refer *not only to the land mass of a State, but also to its human and natural resources in space*. (Reference) Controversy has arisen over the use of surveillance satellites and interference with these by competing states. (Reference)

On the threat of force in outer space, Professor Ian Brownlie considered this in 1963 in relation to the types of weapons available at the time. He noted that while nuclear weapons were not permitted, he nevertheless proposed that weapons that do not employ the force of shock waves and heat associated with more orthodox weapons, may nevertheless be assimilated to the use of force on two grounds: *"In the first place the agencies concerned are commonly referred to as 'weapons' and forms of 'warfare… [and] the second consideration [is] the fact that these weapons are employed for the destruction of life and property*." (Brownlie, 1963, p. 167?)

Self Defense

The Charter provides for the right of individual or collective self-defence (2(4)) Traditionally a recognized right to act in self-defense was lawful if exercised in the face of

the threat of an armed attack (A.51) Projected into the context of outer space would mean that the perceived threat of attack may require decision-makers to negate the effectiveness of certain potential enemy space vehicles?

A number of experts have opined that that no provision of the Charter or rule of customary law imposes 'any upper limit above the surface of the Earth on the legitimate exercise of the right of self-defense, including Professor Fawcett in the late 1960s. (See Fawcett, 1968) In 1970, Professors S Houston Lay and Howard J Taubenfeld, strongly echoed the position by Fawcett namely that under then treaty rules and/or customary law, "as demonstrated in practice, national statements, and United Nations resolutions ... i]nternational law including the United Nations Charter where appropriate, applies to acts in outer space. This expressly includes the right of self defense." (Lay and Taubenfeld)

The Legal Sub-Committee of COPUOS, in 1986, rejected the view that the right of self-defence is not applicable in regards to outer space. This means that it is unlawful for a State to interfere in a hostile manner with the assets of another State in outer space, and that the exception to the bar on the use of force under article 51 of the United Nations Charter likewise applies in outer space.

The eminent international law expert, Professor Bin Cheng has noted that subject to the second paragraph of article IV, nothing in article IV(1) itself prohibits the stationing of any other type of weapons in outer space, including the moon and other celestial bodies, or in fact the use of outer space, including the moon and other celestial bodies, for military purposes in any other way. (Bin Cheng, 1998) In 1997, he noted that "the outer void space as such can be used for any military activity that is compatible with general international law and the Charter of the United Nations', so long as no 'nuclear weapons or any other kind of weapons of mass destruction are stationed there." (Bin Cheng, 1998)

Subsequently, an expert commentator, Major Douglas Anderson has noted, that '[a]rticle IV(1) is viewed by most commentators as only a limited disarmament provision'. (Anderson, 1995) He opined that the drafters only intended Article IV(1) to ban orbiting nuclear – type weapons is indicated by the fact that the treaty does not prohibit the stationing of land–based ICBMs, even though their flight trajectory would take them through outer space. This view is supported by contemporary scholarship (Maogoto and Freeland…; Silverberg, 2018)

Anticipatory Self Defense

With regard to anticipatory self defence the question arises: how long can a country afford to wait, when innovations in technology now point to a situation where a surprise attack may be preceded by an elaborate tactical scheme that jams military communications and blinds satellites, thus crippling the State's intelligence gathering, early warning and battlefield capability? As Professor Thomas Franck (2001) has noted

> …the transformation of weaponry to instruments of overwhelming and instant destruction … [brings] into question the conditionality of art 51, which limits states' exercise of the right of self–defence to the aftermath of an armed attack. Inevitably, first–strike capabilities begat a doctrine of 'anticipatory self–defence. (Franck, p.15)

Under the Outer Space Treaty, while the principle of self–defence remains intact, the method of that defence is regulated, however a wide range of military activity may still fit under the self–defence umbrella.

Non–aggressive military uses of **outer space** (as opposed to celestial bodies) are not prohibited and military equipment and personnel may be used for peaceful purposes even on the moon and other celestial bodies.

VI. **ASEAN positions on the peaceful use of outer space**

ASEAN States have been active members of the UN's Committee on the Peaceful Uses of Outer Space. At its 2019 meeting for example, the 92-memberCommittee included Indonesia, Malaysia, Philippines, Thailand, and Viet Nam.

The general position of ASEAN states was made in a joint statement to the 2016 COPUOS delivered by Singapore, which stated:

> First, ASEAN recognises that exploration and use of outer space for exclusively peaceful purposes is for the benefit for all humanity. The prevention of an arms race in outer space is of vital importance. In this regard, we should build consensus on norns that encourage the peaceful use of space as a global commons for the benefit of all States. (ASEAN 2016)

> Second, ASEAN welcomes activities and dialogue to deepen understanding on issues pertaining to space security.

This was the position reiterated by Indonesia at the 2017 meeting of COPUOS: “Republic of Indonesia delegates reiterated that space must be used only for peaceful purposes. In this regard, the Indonesian delegation underlined the importance of UN General Assembly Resolution No. 10/1999. 71/90 especially paragraphs 13 and 14.” (Spacetech, 2017)

Again in 2018, and ASEAN statement delivered by Indonesia stated:

> ASEAN recognizes the importance of the UN General Assembly Resolution 72/77 and previous resolutions **on international cooperation in the peaceful uses of outer space**, in urging all member states that the use and exploration of the outer space must be carried out for, inter-alia, the peaceful purposes exclusively, the benefit and interest of all countries irrespective of their degree of economic or scientific development, and in conformity with applicable international law and principle of non-appropriation of outer space.

In pursuit of the above, the ASEAN statement recommended:

- strengthen international cooperation in the exploration and peaceful uses of outer space activities through space, science, and their applications;
- strengthen the role of COPUOS as the right platform for promotion of international cooperation for technical assistance to developing countries in space related activities;
- strengthen the implementation of the UN Platform for Space-based Information for Disaster Management and Emergency Response (UN-SPIDER) and the enhancement of the regional centres for space science and technology, affiliated to the United Nations, particularly for developing countries;
- build stronger partnerships and international cooperation and coordination among Member States at all levels in the exploration and peaceful uses of outer space, to integrate space cooperation with the economic and development cooperation;
- reaffirm the important roles of the COPUOS and its subcommittees and the UNOOSA as the prime intergovernmental platform for the discussion of issues related to outer space activities, including promoting international space cooperation and space governance;

- recognizes the importance for the COPUOS and its subcommittees and the UNOOSA to be equipped with adequate resources in order to perform their respective functions effectively;
- bridge the technological space divide between the developing and developed countries;
- set the course for all economies towards the path of achieving global initiatives including: Sustainable Development Goals (SDGs), Sendai Framework for Disaster Risk Reduction and Paris Agreement on Climate Change. (ASEAN 2018)

Associating itself with the statement, Thailand's representative, as reported on the UN website,

> "said that his country was determined to ensure that outer space is utilized peacefully for the benefit of all, cautioning, however, that the growing challenge of space debris reinforces the need for "responsible, peaceful and safe" use of outer space. …As an emerging spacefaring nation, Thailand desires to use the benefits of space technology fully in contributing to sustainable development, he said, adding that space-based technology is already enhancing his country's disaster risk reduction activities." (UN 2018)

Conclusion

ASEAN states are part of the space race and must be aware of the clear trend towards the militarization of space in light of new technologies that allow ever greater use of Earth's orbit, celestial bodies and outer space. This trend is accompanied by potentially shifting norms and rules regarding military uses of outer space which threaten the principle of peaceful uses of outer space. The common positions articulated by ASEAN are important normative statements that seek to uphold this principle. However, advanced space nations, especially the big global powers, have sought to preserve their capacity for the exercise of force in space. The implication of this for ASEAN, is that great power conflict over the Southeast Asian geographic space will increasingly involve the military uses of outer space. As they advance economically and develop better space capabilities the ASEAN states themselves will need to respond in kind to this new reality.

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Communist Legitimacy in Xi Jinping's China: Implications for Regional Security

By Balazs Szanto, PhD (Webster University Thailand)

Abstract

In the absence of democratic consensus, the Chinese Communist Party (CCP) has primarily relied on two key sources of legitimacy since the 1989 Tiananmen Square protests: delivering economic development to increase standards of living and a nationalist narrative dispersed through the patriotic education system. China has been undeniably successful in pursuing rapid growth through its export oriented economic policy. However, as this mode of development reaches its logical limits, the CCP will need to shift its basis for legitimacy. This will likely mean an increased reliance on patriotism. An increase in the CCP's reliance on nationalism will have grave implications for regional security as the narrative disseminated through the patriotic education system is often suspicious of foreign influence, combative in its attitude towards major powers such as Japan, and steadfast in its objective of restoring China to a deserved position of regional leadership. This research proposes the following objectives: (1) To examine the sources of the CCP's legitimacy in China and to explore whether there is an observable shift in their relative importance. (2) If there is an observable shift, then to explore its implications for regional security. China's domestic politics and foreign policy are closely tied. As early as 2011 observers have noted the balancing act the CCP faces trying to pursue a good neighbourly foreign policy while maintaining nationalist credentials. Xi Jinping has pursued several changes to both China's domestic politics and foreign policy and it is important to put this into proper context to understand how the security of East Asia will be affected by these trends.

Introduction

The importance of the idea of democratic consensus and its effects on the legitimacy of the government cannot be overstated, especially in an era when enlightened or technocratic authoritarianism is increasingly viewed as an attractive alternative to the messy democratic process. The governing authority has to maintain legitimacy. This is a well-known maxim since the enlightenment and fundamental social contract theory. It was only reinforced by the fall of communist and other dictatorial regimes in the post-Cold War environment who tried to supplement their legitimacy deficit through repression and force. And it is a lesson the Chinese Communist Party's (CCP) leadership is keenly aware of. While the political doctrine of the CCP continues to view the one-party system as essential to the survival and development of the contemporary Chinese state, the senior leadership knows that the strategies employed by fellow communists states in the late 1980s and early 1990s to stave off their own demise are destined for failure. Hence when the CCP has been confronted with its own extinction event in the form of the 1989 Tiananmen Square protests, Deng Xiaoping and the senior leadership understood a critical principle: sending in the People's Liberation Army to suppress the pro-democracy movement can only be viewed as a short-term remedy. A long-term solution would mean addressing the legitimacy deficit of the CCP through means other than either seeking democratic consensus or employing ever more brutal repression.

The case study of the People's Republic of China (PRC), arguably the most successful contemporary authoritarian state, provides fertile ground to examine a number of questions: (1) How can legitimacy be maintained in the absence of democratic consensus? (2) Is the Chinese model of authoritarian legitimacy sustainable? (3) How do China's internal politics affect the larger international environment?

China by virtue of its size and geopolitics has often exerted significant influence on the international system, even when pursuing isolationism. China's internal weakness in the 18th and 19th Century fundamentally shaped colonial competition between major powers. Similarly, the outcome of the Chinese Civil War has critically determined the political future of Asia for the present and foreseeable future. Similarly, whether the CCP proves successful in preserving China in its current organization or whether significant political changes are on the horizon for the PRC will have long-stretching implications for Asia and the World. Simply put, China's potential instability is not a local problem, but a global issue.

'Two-Pronged' Legitimacy of the Chinese Communist Party (CCP)

The CCP's legitimacy originally rests on its revolutionary Marxist ideology that envisions the communist party as the vanguard of the workers' movement to demolish the exploitative bourgeoise capitalist system. A central component of this ideology is a forcibly egalitarian society accomplished by a distinctly non-capitalist economic system. This ideological foundation was challenged by Deng Xiaoping's economic reforms in the 1970s and 1980s that sought to establish a quasi-capitalist market economy in China, ushering in many social ills typical to such systems such as income inequality. While Deng's economic reforms are the cornerstones of modern China's meteoric economic rise and growing influence in the international system, they also dealt a fatal blow to the legitimacy of the CCP's legitimacy by raising an inevitable question: if China is adopting a Western economic model, why not a Western-style democratic political system? By diminishing the CCP's class-warfare roots, the

Party has entered a period of legitimacy deficit, culminating in the 1989 Tiananmen Square protests.

In the absence of a democratic consensus, and confronting a diminishing Marxist ideological foundation, the CCP has identified two potential sources of legitimacy: economic development and nationalism/patriotism. Under a post-Mao CCP, these two will become the foundation of communist legitimacy and the backbone of political stability in China.

The economic achievements of the PRC cannot be denied. Following Deng's economic opening policies China has experienced rapid development that has benefitted ordinary Chinese throughout the mainland. While rural per-capita disposable income has been hundred thirty-four (134) Yuens in 1978, by 2017 it has risen to thirteen thousand four hundred and twenty-three (13 423) Yuens. Similarly, urban per capita income has risen from three hundred forty-three (343) Yuens to thirty-six thousand three hundred ninety-six Yuens (36 396). Rural poverty has declined from ninety-seven point five percent (97.5%) to three point one percent (3.1%). (National Bureau of Statistics of China, 2018). The numbers speak for themselves: the PRC has lifted millions of ordinary Chinese out of the abject poverty of the Mao period. This economic performance has been instrumental on creating a foundation for communist legitimacy in the post-Deng period by constituting a new class of citizens directly benefiting from the economic policies of the CCP, and thus indirectly from their continued leadership. The CCP's proposal was simple: support the existing authoritarian system to ensure access to the benefits of continued economic growth that would be undermined by the disorderly democratic politics observed in Western nations. The CCP's goal was to create a largely apolitical professional class that can propel China's economic development while also supporting the status quo as direct beneficiaries of the system.

However, the senior CCP leadership also recognized that, while economic development will be the bedrock of CCP legitimacy, it is not necessarily compelling enough to bind ordinary Chinese to the state. Just as it inserted itself into the Marxist class struggle as the vanguard of the worker's movement, the CCP needed a narrative that established the political domination of the CCP as fundamental to the continued success of the PRC in a manner that can capture the imagination of ordinary Chinese. As an answer the patriotic education campaign was created after 1989, offering a history-centric narrative on the role of the CCP in protecting China. Focusing on history as a foundation was a major departure from Mao's communist party that reserved nothing but scorn for the past, seeking to wipe away much of what is to become the new foundation of communist legitimacy.

Callahan describes the Chinese patriotic narrative as 'pessoptimist': it emphasizes national achievement and humiliation in equal measure. (Callahan, 2010) Its two main components are (a) the Middle Kingdom Syndrome and (b) the Century of Humiliation. The Middle Kingdom Syndrome is based on Imperial China's view of the geopolitical organization of the word, envisioning China as the centre of civilization. This spatial political view is expressed by concentric circles denoting China at the centre as the middle kingdom, surrounded by various tributary states that have received the benefits of Chinese civilization, and finally barbarians who have not been exposed to Chinese civilization. Chinese political thought has always emphasized the centrality of its civilization in shaping the world. As Kissinger (2011, pp. 10) argues

> China's splendid isolation nurtured a particular Chinese self-perception. Chinese elites grew accustomed to the notion that China was unique – not just "*great civilization*" among others, but civilization itself.
>
> As the Chinese saw it, a host of lesser states that imbibed Chinese culture and paid tribute to China's greatness constituted the natural order of the universe.

This translates into modern Chinese political discourse as a desire to occupy a similarly influential position in the international system. Callahan (2012) explains this in the context of the idea of Chinese exceptionalism, while Newman (Scott, 2007) views it in the context of China's desire to reclaim past glory unjustly denied. Ultimately, a strong component of contemporary Chinese political thought focuses on China's re-emergence as a great power on the international stage. The CCP inserts itself in this narrative by claiming a vanguard position in furthering this goal, just as it has traditionally claimed to adopt a vanguard position for the workers' revolution. The patriotic narrative emphasizes the important role communist leadership has played in China's quest to restore its global status.

But one cannot have a great story of triumph without the protagonist having to overcome difficult odds, at times facing almost insurmountable challenges. Thus, the aspirations of the Middle Kingdom are accompanied by the Century of Humiliation. The Century of Humiliation denotes the roughly hundred-year time between the 1st Opium War in 1842 – marking the beginning of China's imperial subjugation – and the formation of the PRC in 1949. This period is denoted as the downfall of the Middle Kingdom and a period of weakness and invasion. Signature events include the burning of the Summer Palace and the Japanese invasion of China, including the brutality of the Japanese army. The Century of Humiliation is a period of great national trauma and imbues Chinese with a profound sense of shame and humiliation. (Callahan, 2010) Once again, the CCP inserts itself into this narrative: the communists' victory over the nationalists in the Chinese Civil War is viewed as instrumental in ending the Century of Humiliation and China's foreign domination. Prior to that, the narrative mythologizes the role of the CCP and then Chinese Red Army in the country's resistance against Japanese aggression. The CCP's message is clear: the Party is the bulwark that protects the PRC in a hostile international system. The CCP has protected China and foreign talks of political evolution or reforms are merely a ploy to undermine the Chinese state and humiliate the country once again. The general preoccupation with national humiliation in the Chinese patriotic narrative explains why Beijing tends to react strongly even insignificant slights in day-to-day international relations. It envisions malice – or the very least promotes this view domestically – behind all foreign actions, especially if it involves major powers.

Traditionally economic development has been the predominant component of the legitimacy of the CCP, the patriotic narrative being used to support it and to galvanize support amongst groups left behind China's economic rise. As long as Beijing could deliver rising living standards and ward off talks of political reform through a patriotic narrative, the CCP's position in the political landscape appeared unshakeable.

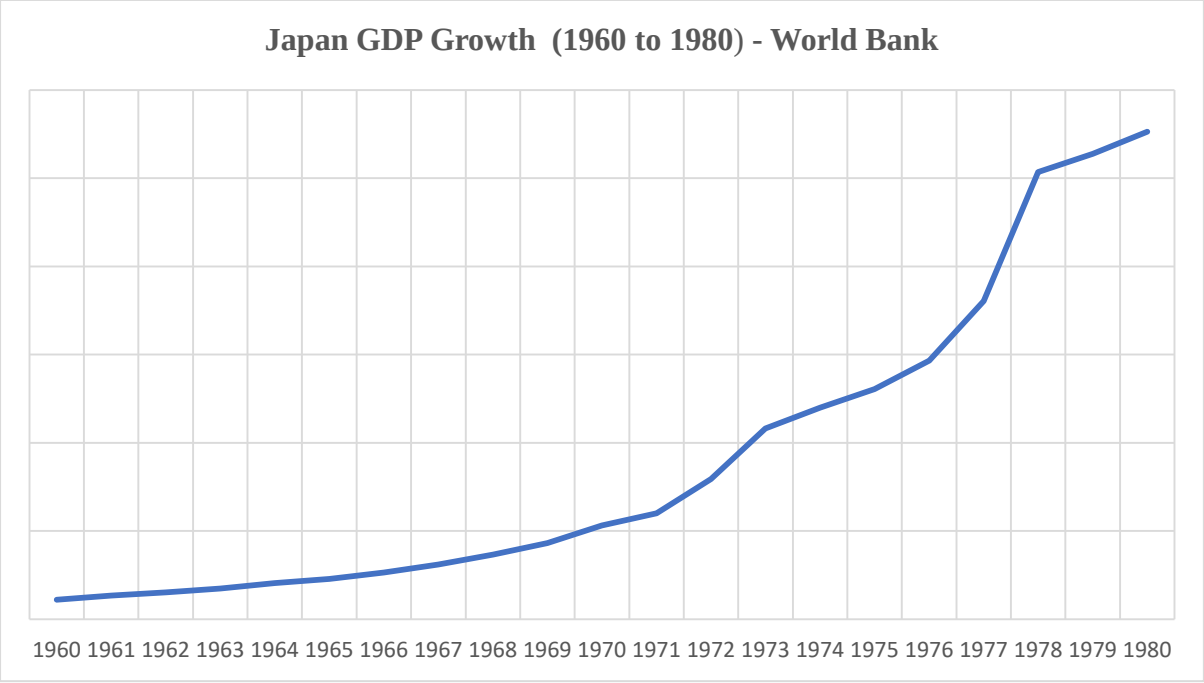
Shift in the Balance of Legitimacy

Now a clear problem should be emerging plaguing the sustainability of Chinese communist legitimacy: rapid economic growth, as seen in the case of the PRC, is not sustainable

indefinitely. The structure of the contemporary capitalist economic system puts a diminishing return on economic development, seeing rapid economic development in underdeveloped countries while only affording moderate economic growth to developed countries. The very nature of the capitalist world-economy will throttle China's economic growth. And a slowing economy will constrain Beijing's ability to deliver ever-better living standards to ever-larger groups.

China's economic development has been primarily fuelled by its quest to become the manufacturing hub of the world. China's primary competitive advantage has been the availability of a large cheap labour force that could operate the myriad of factories that emerged as a result of Deng's economic opening policies. However, there is an inherent contradiction between China's export oriented economic model and the CCP's quest to deliver rising living standards to maintain legitimacy. China's continued economic attractiveness is based on keeping the labour force cheap, which would result in low living standards, contrary to the CCP's efforts to improve legitimacy. Beyond the inherent contradiction between these two goals, the very nature of economic processes is detrimental to this pursuit. As the economy develops, labour costs rise as the available workforce shrinks, increasing the value of each worker. This is especially so in a country that artificially restricts population growth, such as China. An export oriented economic model, especially one based on cheap labour, is inherently a temporary success. One can observe this already as some labour-intensive industries, such as textile production, are already fleeing China for greener pastures in new underdeveloped nations such as Cambodia or Laos. While economic growth has increased the living standards of ordinary Chinese considerably, it is also undermining China's competitive advantage and Beijing's ability to pursue ever new heights of economic rise.

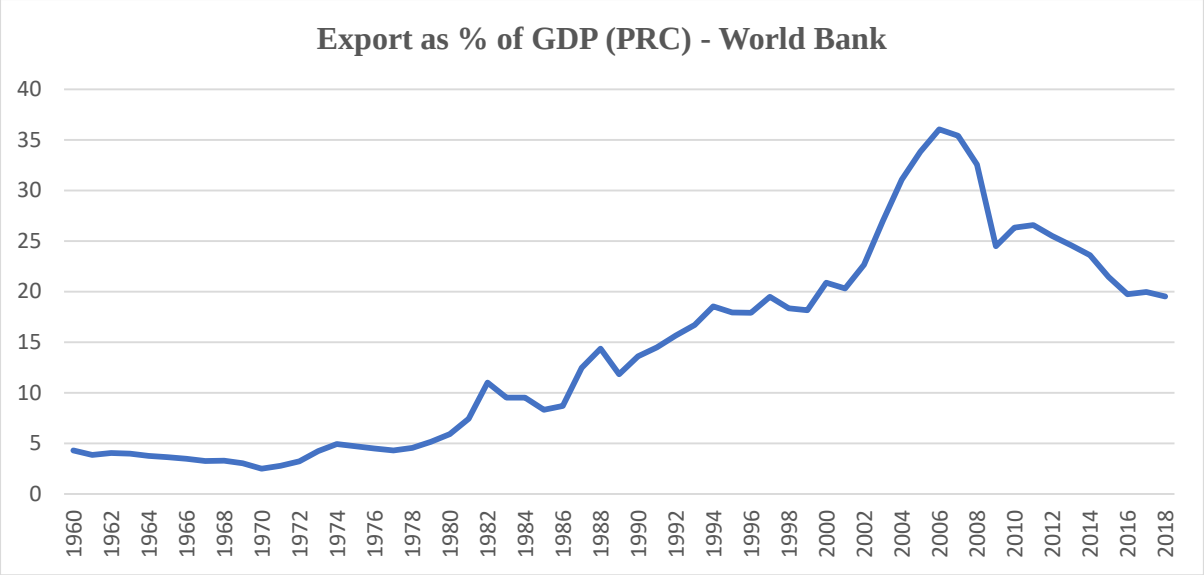
In many aspects China's trajectory follows that of Japan. In the post-war period, Japan has experienced meteoric economic rise through export-oriented manufacturing.



Japan managed to avoid the middle-income trap by shifting from labour-intensive production to high-tech manufacturing, outsourcing support activities to Southeast Asia. However, Japan has failed to avoid the eventual overheating of its economy and a painful economic crash in the late 1980s, leading to wiping out significant economic potential and diminishing living standards, collectively referred to as the Lost Decades. Economic stagnation has become the hallmark of contemporary Japanese economy.

The signals of economic recession for Japan are eerily similar to that of China: an undervalued currency accompanied by international pressure to revalue it, escalating wages and an economy fuelled by debt, and rampant real estate speculation and a construction bubble.

Beijing is obviously fighting these trends, but these efforts create new problems. The PRC is attempting to pivot away from an export-oriented economic model to emphasize domestic consumption as a basis of the economy. Exports as % of gross domestic products (GDP) have been on the decline since the mid-2000s. However, these require painful economic reforms, as well as they expose new vulnerabilities. China could leapfrog technical development by relying on foreign technology acquired through mandatory partnerships between Chinese and foreign firms. And supplying the global markets with consumer goods was a good deterrent from other powers targeting the Chinese economy as they would inflict significant damage to themselves. But as the Chinese economy shifts to emphasize local consumption, these protections are fading. The recent conflict over the use of Google's technologies by Huawei has highlighted China's growing vulnerability due to reliance on foreign intellectual properties and the costly route to relative independence. The timing of the emerging trade war between China and the US is hardly a coincidence.



Similarly, China has attempted to keep labour costs down through repressive means. However, these efforts are leading to growing social instability as labour protests spread in the wake of unfair compensation practices.

And this does not take into account the larger structural context. Collier (2004) has identified a positive correlation between authoritarian governance and political stability in low-income countries. However, as the economy develops this trend reverses. In mid- and high-income states there is an inverse relationship between autocratic governance and political stability. While China's one-party system was beneficial for its economic growth in the 1970s and 1980s when the country first pursued economic opening, it is expected to act as increasingly destabilizing force, especially as the CCP reaches the logical limits of its ability to deliver ever-increasing standards of living.

As economic development becomes ever harder to achieve, and as its benefits become ever more unequal between various social groups, its ability to prop up the CCP's legitimacy will naturally diminish. This disturbance in the equilibrium will necessitate corrective action from the CCP, most obviously by putting ever growing emphasis on other sources of legitimacy, most importantly on its patriotic credentials and China's quest for political influence beyond economic and military power.

An emblematic representation of this trend is the difference between the international politics of Hu Jintao and Xi Jinping. The mid 2000s to early 2010s was dominate by China's policy of being a 'good neighbour'. (Chien-Peng, 2009) The goal has been to counter various 'China threat' theories that begun to negatively affect China's ability to maintain positive economic relationships. Hu Jintao's primary concern was to maintain an international environment favourable to trading and economic integration. In contrast the Xi Jinping era is characterized by a more assertive China, flexing its military muscles all around the region. If Hu Jintao's message has been that China's is a good neighbour seeking to integrate into the regional environment, Xi Jinping's message is that China is a great power here to shape the international environment and to ascend to its rightful position of regional, if not global, leadership. Patriotism and China's political ambitions have clearly been given a more prominent role in contemporary Chinese foreign policy compared to its economic interests. Deng Xiaoping cautioned China to keep a low profile and bide its time to prevent a hostile

reaction to its economic rise. Xi Jinping is proclaiming that the time has come to break with that approach.

An additional component to shift is the growing importance of the personality of Xi Jinping in underpinning the political status quo relative to the CCP. Post-Mao communist leaders have governed through a consensus driven technocratic CCP. Orderly leadership transition has been devised to prevent the emergence of a new political leader who could inflict destruction comparable to Mao through his own cult of personality. Xi Jinping is challenging this order by emphasizing his own importance relative to the party. This can be viewed as an additional effort to reverse the current political order's diminishing legitimacy by supplementing a fading CCP through Xi's own cult of personality as a new additional source of legitimacy.

The overall trend cannot be denied: the CCP is increasingly facing a new legitimacy crisis as economic development is weakened. Beijing seeks to increase repression as a response, but the lessons of the 1980s remain strong about it only being a temporary solution. This loss of legitimacy is forcing the CCP to rely more heavily on its patriotic credentials to preserve domestic stability. This is a contributing factor to China's harsh reaction to the political crisis in Hongkong. The protests are coming at a time of a legitimacy deficit for the CCP that heightened the threat perceptions of the senior leadership, necessitating a strong response to contain any perceived challenge to continued communist rule. The existence of an alternate political model with China itself, especially a successful one, is a major source of concern for the CCP.

Implications for Regional Security

While the aforementioned shift in legitimacy may appear to be a domestic issue, it will have significant implications for regional security. In the Chinese political system foreign policy is inherently tied to domestic politics, and thus a shift in the politics of the CCP will affect how China acts within the international arena.

The primary concern for regional security is the sometimes hostile nature of China's patriotic narrative towards foreign powers and the assertive actions in Chinese foreign policy it fuels. As discussed above, the central element of China's nationalist aspirations is the restoration of China into a position of influence. This inherently runs into problems as China is seeking to carve out a sphere of influence in a political space dominated by the U.S.-led alliance system. While China was the preeminent power in Asia prior to the 18th Century, now it faces several major powers such as Japan and South Korea, as well as the sole remaining superpower as an offshore balancer, all bound together by Cold War alliances.

A good example of the effect a pivot towards patriotism can exert on Chinese foreign policy is the worsening state of Sino-Japanese relations. China and Japan have a difficult shared history. Competition between the two countries has shaped much of the 19th and 20th Century history of Asia, as the Chinese Empire has faded from prominence the Japanese Empire has emerged as the pre-eminent Asian power, eventually seeking to dominate China itself. However, China's break with the Soviet Union and re-emergence as part of the Western international order offered a promise of reconciliation. Japan has became an important trading partner of China, as well as a prime source of foreign direct investment (FDI) and official development assistance (ODA). This economic relationship has helped constrain

Sino-Japanese competition, including on issues such as the sovereignty of the Senkaku/Diaoyu Islands. Japanese trade, FDI and ODA has benefitted the CCP greatly in delivering the economic development that has underpinned their legitimacy at home. While the fact that Japan is the primary antagonist of the Chinese patriotic narrative remained an irritant in Sino-Japanese relations, the competitive dynamics remained largely constrained. However, as China reaches the logical limits of its export oriented economic growth, prompting its economy to decouple from Japans and act more as a competitor rather than a complementary economy, and as the CCP shifts its reliance towards patriotism, Sino-Japanese relations have taken a definite turn towards the worse. The Senkaku/Diaoyu Islands dispute is a good expression of this. While once upon a time Deng Xiaoping argued that the issue should be shelved in favour of developing cooperative relationships with Japan, contemporary China has grown increasingly assertive in pursuing its territorial claims on the East China Sea, including a heightened reliance on coercive tactics such as grey zone challenges and naval intrusions.

Assuming that the CCP continues to pivot towards patriotism to supplement its legitimacy crisis, one should expect Chinese foreign policy to become increasingly assertive and hostile to foreign major powers. Objectives such as pushing the U.S. out of the Western Pacific or direct military competition with Japan will become more prominent as China seeks to translate its economic and military power into actual political influence in the Asia-Pacific. The combination of exceptionalism and suspicion that underpins Chinese patriotism cannot be ignored.

The legitimacy deficit suffered from the diminishing utility of economic development will force the CCP to react to real or perceived slights more actively to maintain the Party's image as the vanguard of China's rise. It will also mean that the CCP is incentivized to 'play up' threat perceptions for domestic consumption. One example of this is China's criticism of Japan's defence reforms as 'war preparations' despite the fact that (a) the reforms are motivated by China's own assertive actions and (b) they do not represent a significant departure from Japan's traditionally defensive security posture or enable Japan to project significant power into the maritime realm. However, the CCP needs an imminent significant threat to the security of China to head off aspirations for political reform. Japan represents an obvious candidate for this role due to its status within the patriotic narrative and the Democratic Party of Japan's (DPJ) efforts to adopt a more deterrence-based security posture.

Overall, the growing prominence of patriotism relative to economic growth will negatively impact the regional security environment in the Asia-Pacific. Incidents observed over the South and East China Seas – whether its coercive naval incidents or China's construction of its Great Wall of Sand – are only expected to escalate as the CCP seeks to deliver on patriotic promises to restore China to regional influence, unilaterally if necessary. This will be an especially perilous time as shifts in China coincide with Japan's turn towards more hard-line nationalist politics and periods of political uncertainty in the U.S. including the unstable foreign policy of the Trump administration and a policy-wise bankrupt Republican Party. Careful management of regional security and heightened caution will be needed if the Asia-Pacific is to avoid a major regional crisis. And the process has to start with the recognition that China's domestic politics have long-reaching regional implications.

Conclusion

China's domestic politics are changing. While the CCP has found an effective way to maintain legitimacy without democratic consensus post-1989, the system they devised is entering into a period of instability. CCP legitimacy is dependent on two prongs: economic development and patriotism. Unfortunately for the CCP economic development's utility as a source of legitimacy is in decline as China is reaching the logical limits of its economic model and starts to push against the inherent structural constraints of the capitalist world-economy. This represents a significant concern for regional security due to the intertwined nature of Chinese foreign policy and domestic politics. A higher emphasis on patriotic credentials is expected to incentivize the CCP to pursue a more assertive foreign policy, including a more substantial challenge to the U.S.-led regional order. As these development occur parallel to political shifts both in Japan and the U.S. – both contributing to further regional security instability – the Asia-Pacific is definitely entering into a perilous period that will require careful management, including policies that mitigate the issues caused by the growing legitimacy deficit of the CCP.

Ultimately the case of the CCP demonstrates that, while it is possible to delay a political collapse due to lack of legitimacy in the absence of democratic consensus, it is inherently a vulnerable state with questionable long-term survival. While the senior communist leadership has proved successful in preserving the one-party system, it remains to be seen whether Xi Jinping will be able to rise to the challenge to find a new solution to the CCP's legitimacy problem.

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Conflict resolution in the Age of AI

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Abstract

The changed lifestyle resulting from the wide spread use of Internet has been transformed by the smart devices even more rapidly in our lives. The acceleration of technological development, the born of the digital culture, the expansion and attainment of atheism, knowledge in the 21st century increases uncertainty about the systems that were previously believed to be stable, the concept of life, value judgment, social organization and legal system as well as our environment itself, which basically undermines the safety of normal life, transforming the sci-fi of the last decades into reality. Possible prospects for the future will only increase this. The multithreading processes, the possible evolution of cyborgs, or genetic manipulation challenges not only legislation, but also human existence, probably changing it in the near future. In solving problems and disputes, communication plays an increasingly important role in finding alternatives to settle disputes as the accelerating changes create gaps before the responses that aim to correct the existing disadvantages of the legal system and legal institutions. The exponential growth of knowledge leads to the creation of a strong artificial intelligence. Former dimensions can transform into a weirdly post-sci-fi world that is overwhelming in today's thinking, within only a human lifespan. Against this background, new directions of conflict resolution need to be developed. Fast solutions to peace have greater value. Relying on IT-base more and more.

keywords: conflict resolution, artificial intelligence, digital court, mediation, ADR, lawyer

1. Introduction – fast-changing world, digitalization

"Tempora mutantur, et nos mutamur in illis"

(Times are changed, we also are changed with them).

The modernization changes are displayed in the social, economic and political subsystems, leading to the appearance of a new modern mentality[1], which we must adapt to. In recent years, this new mentality has played an increasing role in the rapid resolution of conflicts in a changed world. Whether in small cases, in conflicts between individuals, companies, or large, interstate disputes, there is a much greater economic interest in finding a quick solution than persistent hostility or litigation.

As routine lawyers' work is increasingly being replaced by IT-based applications, technology is also helping to solve problems and finding the most mutually beneficial solution.[2]

Susskind's ideas for lawyers' substitutability may not have appeared so strongly in everyday life but the roads and directions are definitely leading to new technology solutions: "*We predict that the legal world will change 'more radically over the next two decades' than 'over the last two centuries'*[3]". Computers can automate routine work phases.

As it has already played a role in analyzing judgments for judicial prediction, like predicting the European Court of Human Rights' decision (79% efficiency on average)[4], it becomes applicable to peace processes and settlement. Similar attempts have been made in the Supreme Court of the United States reaching efficiency above 70% in forecasting[5].

More and more legal tools are appearing, and applications fall into several categories: due diligence, prediction technology, legal analytics, document automation, intellectual property, electronic billing[6].

The electronization of court processes and remote hearings by videoconferencing are becoming more common in the lives of courts and lawyers.

Successes and chances can be predicted through case law analysis by legal softwares[7].

2. Spread of mediation

2.1 ADR with a brief historical outlook from a Central European perspective

Alternative Dispute Resolution (ADR) in Central and Eastern Europe has spread very slowly since its officially released to initiate legal proceedings in these countries in the 2000s. The courts, with all their mistakes, are more respected and better known. In Hungary, regulation has favored the development of court-based mediation in the last years. It is contrary of the original idea of mediation that a judge can be both a mediator and an arbitrator too. However, an experienced judge can be much better prepared and respected than an independent mediator who became graduate after completing a short course.

Respect has been an important factor in the decision-making process. The controversial parties have asked a more respectable outsider to judge for thousands of years.

While in Indian Hindu villages the panchayat system was mediated by a panel of five, in China, the Confucian approach was the main means of resolving the dispute, but was probably known in Ancient Babylon and Phoenician commerce, Proxenos in the Ancient Greeks, while Justitian's Digesta mentions it in many names; it's a tradition of resolving conflicts by involving older members of the wider community from Islamic cultures till nomadic societies throughout the world[8]. In Hungary, King Saint Stephen's (ruled in Hungary in 997-1038) Code, Book II. required:

> "*The killer pays one hundred and ten gold, of which fifty is given to the royal treasury, fifty to the relatives, and ten to the judges or mediators.*[9]"

At that time, there was a "mediator" in the criminal justice system that acted as a kind of conciliator, mediating between the parties, the mediator and judge were then closer to each other. The original Latin "arbitris et mediatoribus" in today's translation is arbitrators and mediators. Highlighted, that even the most severe, death penalty could be avoided, redeemed, and mediated in the laws of Saint Stephen and Saint Ladislaus (King of Hungary in 1077-1095).

Avoiding countless other examples, based on the current directive of the European Parliament and Council, somewhat similar to the Hungarian regulations[10] but a bit wider, applicable in the EU (except Denmark):

> "'*Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.*[11]"

It defines mediator impartiality in another paragraph:

> "'*Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.*[12]"

The definition includes court-based mediation too:

> "*It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.*[11]"

2.2. Conflict perception in the Far East

Although we can look for the spread of modern mediation in the Western world, especially in the US and UK, we cannot fail to mention that there is a very broad tradition of conflict management in China, but it is up to its true acquaintances to analyze it and that would go beyond the scope of this essay. Here I illustrate only the differences between individualist and collectivist cultures:

> *"A dispute, in the Western sense, is often characterized as personal to the disputants concerned. This feature is again reflective of individualism. ... In contrast, ... Chinese*

> *collectivist culture, nothing is really personal, and everything seems to be communal, disputes included. Even though a dispute may essentially affect the immediate parties concerned, the collectivistic Chinese would tend to view it as affecting the group rather than being confined to the particular disputants. By this is meant that a dispute may have started between the immediate relevant parties, but it, just as quickly, can escalate to communal proportions.*[13]".

2.3. E-mediation, ODR

Online dispute resolution (ODR), changed lifestyle oriented electronic communication channels and interfaces are playing an increasingly important role. In our spare minutes, through countless impulses through mobile applications, we can create international e-commerce with a few clicks, overshadowing traditional shopping.

Interactions also give rise to controversy, so that instead of the cumbersome workflow of ancient court corridors, in the interconnected channels of commerce and communications a platform for e-communication can be used to resolve conflicts.

Many ODR-based third-party companies (eg. SquareTrade, CyberSettle, Modria) resolve disputes on electronic platforms such as Amazon or eBay. "*E-commerce disputes are non-personal, so ODR techniques free from direct interactions are tools that allow effective dispute resolution*[14]". Online mediation between the parties, in the lack of personal interaction, ensures fast and efficient results. Virtual chat bridges distance, is quick and effective, simple, stress-free, and it is possible to engage professionals in the process and there is no need to schedule time and place between the parties and the conflict assistant[15].

The difference in speed is not only significant in traditional litigation, but also in traditional mediation.

There have also been many examples of lawsuits lasting decades in Hungary in the past centuries from the literature or even from the attorneys' magazine in the 19th century, with a slight exaggeration an observer in the Hungarian courts:

> "*could have seen a district court where terms were set for the middle of the next century; could have seen a judge giving thick harshness to the parties instead of truth*[16]"

But years of litigation are still commonplace despite the introduction of electronic interfaces. E-mediation may only take days.

3. From digital courts to courts of AI

Court digitization is already ongoing. Day by day, we see new areas becoming involved in the digitalisation of justice. Hungary is at the frontline of judicial digitization in the EU: starting July 1, 2008 Court of Company Registration until such time that civil courts also no longer accept paper-based submissions in general case from January 1 2018[17], and electronic forms must be used; but similar implementations are in progress in many other countries e.g. Germany entered into force the same time in 2018, but only for digitization of insolvency proceedings[18]. "E-folder" was also introduced, for clients to be able to access information about their pending court cases online, 24

hours a day, free of charge; setting up a long-distance video hearing system (Via Video project) in criminal justice is also a contributing factor in accelerating procedures.

At the same time the dangers of digitization in court proceedings can also be highlighted:

> *"... the use of a virtual court would change in some fundamental aspects the traditional civil procedure based on face-to-face relationships in civil litigation. Surely, it must be necessary to introduce ET* (Electronic Technology) *into civil procedure to some extent, but it must be questioned whether it would be welcomed by litigants, and it must be considered whether the use of monitor technology, eliminating the human element from litigation, is a necessary development. Its introduction must be, on one hand, … but the factors of personal contact civil procedure would not be ignored. We are now standing at a significant crossroads for considering the future of civil procedure!*[19]"

The next step for the digitalization of court processes is to turn artificial intelligence into a real solution to the decisions. The first digital court was set up already in January 2010 in the Netherlands, offering completely digitalized proceedings.

> *"Since early 2011, one specific type of verdicts – the e-Court judgments by default in debt collection proceedings – are no longer the product of any human reasoning; … Although we may have in mind that the so-called 'robotic' or 'digital' judge has been in office for a number of years whilst going unnoticed, its appearance in an actual court can be considered a silent revolution in the legal court system.* [20]"

The Abu Dhabi Global Market Courts' court room presented as the world first fully digitalized courtroom in December 2018 by Ahmad Al Sayegh, Minister of State and Chairman of the ADGM Courts:

> *"Technology and innovation have been disrupting every aspect of our lives and the judiciary sector is no exception. The best innovations to come out of this sector are those that allow us to creatively manage the growing demand for transparency, information, speed and effectiveness, ... The presence of the digital courtroom will pave the way for many business opportunities...* [21]".

It may seem unbelievable for AI to make a decision and settle our conflicts. But if the judge requires digital submission and explanation of all the circumstances of the case, it can be done in the same way for an AI-judge. As technology progresses, decisions can be improved and may be taken by AI on a wider a nd wider scale from the small affairs of individuals to the centurial border disputes between countries at war.

4. Psychological and philosophical factors

4.1. Subjective factors in the acceptance of judgment and deal

Consideration of decisions or deals depend on their fairness. It is no coincidence that even in the above-mentioned historical ages, people who had great respect were asked to make decisions. Respectful people were generally wiser, relying on scientific knowledge.

The faith in the justice of judgment depends on the best, widest and impartial consideration of the circumstances and if it's science-based.

People are able to litigate, appeal, non-execute for years, perhaps attack in other ways if they feel they have the truth and the victims of the circumstances or the law is unfair in the situation. Injuries to the sense of justice sometimes lead to further aggression. Otherwise, even someone knows that they are wrong in a particular issue: nevertheless, they may obstruct completion with attorneys using procedural tactics if that is beneficial. There are also people who are looking for a lawyer for some psychological reassurance, it is questionable whether AI provides them similar consolation.

In parallel with this, in most cases, the choice of mediation is driven by its speed and lower cost, not to mention certain confidentiality needs: while the judge belongs to the state power, in mediation, it may even be possible to share crime property. However, the search for a solution acceptable to both parties and the search for justice are also there.

But if the machine knowledge is superior to humanity in every area, and can make a fairer decision, it can also be used to help with conflict resolution.

The courts have so far used experts to answer specific or scientific questions to discover the facts. But the legal classification and assessment of the facts are the judge’s job. Meanwhile it's the attorneys' job that the relations between facts and law set it up in their own interest or just blur the judge's vision above the facts. The role of politicians is limited to the latter.

There are several benefits of a digital judge: fast, objective, impartial and works without miscalculations and any subjective influences[22].

If the AI can evaluate legal conclusions from the facts, with infinite knowledge of previous case law and at the same time with scientific knowledge, why not trust it more than a human judge?

If we entrust our lives to autopilot, we can also leave life-determining decisions to the AI if the technical level allows it.

Would we this way only avoid human work, or indeed the product, the judgment, would be better? Or no matter how well-founded a decision is, one or both party still feels bad; there is not always a win-win solution. Whether objective truth can exist or not? Kant examined it much more deeply:

> *“What is truth? The nominal definition of truth, namely that it is the agreement of cognition with its object, is here granted and presupposed; but one demands to know what is the general and certain criterion of the truth of any cognition. … since the mere form of cognition, however well it may agree with logical laws, is far from sufficing to constitute the material (objective) truth of the cognition nobody can dare to judge of objects and to assert anything about them merely with logic without having drawn on antecedently well-founded information about them from outside of logic…*[23]*”.*

4.2. Ethical statements about AI in the judicial systems

Nothing demonstrates the spread of AI in the judiciary and its environment more clearly, than the fact that in December 2018 the European Commission has discussed its role and adopted five fundamental principles for its use entitled “European Ethical Charter on the use of AI in the judicial systems and their environment”:

> *“1. Principle of respect for fundamental rights: ensure that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights*

2. Principle of non-discrimination: Specifically prevent the development or intensification of any discrimination between individuals or groups of individuals

3. Principle of quality and security: With regard to the processing of judicial decisions and data, use certified sources and intangible data with models conceived in a multi-disciplinary manner, in a secure technological environment

4. Principle of transparency, impartiality and fairness: Make data processing methods accessible and understandable, authorise external audits

5. Principle "under user control": Preclude a prescriptive approach and ensure that users are informed actors and in control of their choices[24]".

5. The future of conflict resolution

In mediation parties shape the decision together with the help of the mediator. To help or avoid this, artificial intelligence could be relied on in the future in order to make a joint decision. The litigants could use the technique to settle the dispute without a court or mediator.

If we think about it, we are already in this age: if two people have different memories, the google search engine will respond instantly solving the problem, avoiding potential conflict.

Pre-litigation conciliation, however, contradicts centuries of attorneys' practice: all cards must be shown at the very beginning. E.g. in Hungary, pre-litigation reconciliation was made compulsory in a couple of cases (e.g. inter-company litigation, labor dispute[25]) or during the trial (e.g. special family law, parental guidance dispute[26]).

Full exploration of the circumstances at the start of the litigation[27] also helps resolve disputes quickly, without letting lawyers dispense information.

In addition, technology providers are assisting with legal work with newer and more AI-based systems. Contract risk due diligence software already provides a solution to avoid potential conflicts. Legal Tech can also be used in conflict resolution without a court or mediator like due diligence, prediction technology and legal analytics' softwares:

"*Litigators perform due diligence with the help of AI tools to uncover background information. ... Prediction technology – An AI software generates results that forecast litigation outcome. Legal analytics – Lawyers can use data points from past case law, win/loss rates and a judge's history to be used for trends and patterns.*[5]"

Successful attempts have already been made in Estonia, a leader in digitalization (e-residency, e-voting, etc.): an AI-judge was created for small cases[28].

In many cases, the mediator can bridge over the personal hate, and that's exactly why it's needed.

In my opinion, the future is not about (digitalized) litigation, arbitration or mediation, but an AI-assisted conflict resolution process directly between the parties, where no judge or mediator is needed. It is scary to think about the increasing power of computers in every area, but neither law or politics can turn its back on technical progress.

All the knowledge of the internet is available for everyone. Both the mediator or the judge may be eliminated in the future if artificial intelligence offers the best possible problem solving based on

existing knowledge. Or they will remain to play a sort of controller role, like the drivers of self-driving cars.

Our computer first sat on the desk at our school or workplace, later moved into our living room, our notebook came with us to the sofa, today, our smartphone will accompany on the road, and soon the smart glasses may be followed by the smart contact lens until the human brain gets somehow directly connected to the internet.

The „brain-computer interface" is just one of the possible paths to superintelligence[29]. It must be left to philosophers to see to what extent it is possible to combine man and machine. The dangers are perceptible:

> "*The rate of technological change will not be limited to human mental speeds. Machine intelligence will improve its own abilities in a feedback cycle that unaided human intelligence will not be able to follow.*[30]"

We have already seen the abilities of self-taught artificial intelligence such as AlphaGo[31] and AlphaZero. 250 years have passed from The Turk, Automaton Chess Player was introduced to Empress Maria Theresa[32] by Farkas Kempelen, Hungarian inventor to the reality of AI in chess. Such a transformative shift will come soon in conflict resolution too.

Can the most perfect AI-based judgment or deal be able to filter out all the contingencies that result from imperfection in human execution?

6. Conclusion

Digitization opportunities are within reach. We may not realize it right away, but new technologies have become commonplace, generalized and accepted at an accelerating pace in all areas of life, including the courts and in conflict resolution. We need to follow the changes and think about the potential dangers and try to prevent them.

Electronization is getting closer and closer to us, providing relief, but only the normality of the traditional work provides security against the already existing technical reality and the startling, frightening, unimaginable possibilities of the future: „Travaillons ... c' est le seul moyen de rendre la vie supportable ... il faut cultiver notre jardin[33]".

But we can't stop the technical development, and if we will not take advantage of it, we fall behind those who do.

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From Affected People to Transformative Leader: The Benefits of Brain Science Activities on Healing of Affected People by Unsettling Events in the Southern Border Thailand

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Research project of the community healing for victims and people affected by unsettling event with applied brain science process had been conducted with the aimed to develop the healing community model. Participatory action research was implemented in Pattani province, Thailand during October 2018 to September 2019. Brain science healing activities to promote deep relaxation and positive attitude, such as Reiki healing, group dialogue, reflection etc. were used by participants. The standard psychometric instruments were implemented including Stress Test, Depressive and Suicide Screening, and Posttraumatic Stress Test. Also the Aura Video Station 7 Basic was monitored the state of mind-body balance. The initial finding shows that activities related to brain science healing could improve the stress and depressive level, as well as human aura became more balance. The new state of mind-body balance and self-reflection brought about new attitude and mind set to live and dream for better life of oneself and others.

Keywords: healing community, affected people, unsettling events in Southern border province, brain science

Harnessing Positive Psychology's Potential for Improving and Creating More Peaceful Individuals and Societies

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Abstract

How can we utilize the current research to improve and create more peaceful individuals and societies? Positive psychology has already contributed some important potential answers to this critical and urgent question. With the current state of the world, this seems to be absolutely essential for humanity's survival, or at very least so that people can live peacefully in a just world without atrocious human rights violations. Some researchers point out that peace psychology already contains aspects of positive psychology while others emphasize that working towards peace is a good match with positive psychology's main aim of building thriving individuals and communities. Another author suggests that peace has the same qualities as positive psychology's signature strengths and therefore recommends adding it to the list. Peace is a necessary first step since it is a contributing factor to life-satisfaction and well-being. Furthermore, we already have a substantive amount of empirical knowledge, techniques, and solutions to effect lasting change that could incentivize such peaceful flourishing. This paper furthers previous calls for research on psychology's added value to the transdisciplinary field of peace building by encouraging positive psychologists to collaborate with researchers from other diverse fields to gather the current information, begin filling in the gaps, and utilize the results to be peace activists and implement evidence-based paths to more peaceful individuals and societies. Our own futures and the futures of the seventh generation to come depend on such cross-disciplinary work. Limitations, future directions, and implications for peace practitioners are explored.

Keywords: positive psychology, peace psychology, flourishing, emotional intelligence

Harnessing Positive Psychology's Potential for Improving and Creating More Peaceful Individuals and Societies

Most people are optimistic about our ability to end war (Carr, 2011), yet we know that the absence of violence does not necessarily mean peace (Ginwright, 2018). There is no denying, though, it would be a good start. I was honored with the name Amoneeta which, I have been told, is an *Anniyunwiya* (Cherokee) word that is somewhat equivalent to the English word Peacemaker. I had always had a calling for healing and been told by my elders that I would follow my namesake and great-great grandfather's footsteps to become a traditional medicine man. Instead, life led me to be another type of healer: I ended up becoming a positive counseling psychologist whereby I help people make inner peace through psychological healing. This role seems to be the perfect fit for my name and my role in society. Furthermore, having grown up hearing stories of the intergenerational trauma that have been passed down for generations from both sides of my family (Native American and Jewish Israeli), it makes sense that I would want to work towards healing traumas and building a more peaceful world. Hence, all of this leads to this paper where I begin to address the question of how we might go beyond individual healing that leads to inner peace to a greater societal healing and towards a healthier and more peaceful world. Positive psychology certainly seems to contribute to the former (Floody, 2011). Granted, the latter is no small task. So this paper attempts to pull together some of the extant research to answer the following question: How can positive psychology be used for healing and building more peaceful individuals and societies?

Positive Psychology and Peace

Psychology in general has already contributed and likely will continue to be essential in this formidable task of building peaceful individuals and societies. Here I argue that positive psychology brings even more to the conversation about peace building than general psychology and even peace psychology (addressed below) have. Positive psychology is the "scientific study of optimal human functioning [that] aims to discover and promote the factors that allow individuals and communities to thrive" (Seligman, 2012), all seemingly important to the goal of creating more peace. Positive psychology has already contributed some important potential answers to this critical and urgent topic.

We live in an increasingly complex world that is rife with conflict on almost every level, starting in our homes where children witness domestic violence, verbal and physical abuse, and more, then out to their playgrounds and on and on all the way up to the broadest systems where powerful leaders threaten whole nations by wielding fists of nuclear weapons. An interest in reducing the conflict and violence appears to be relevant or possibly even more so today than ever before. Looking to the future, we want to ensure the peaceful existence of our own offspring and that of their children, on and on and on. Taking an extreme stand, this could be extended out even to a fear for the future of humanity. Native Americans emphasize living in ways that consider the seventh generation to come (Indigenous Corporate Training, 2012). When looking at some current practices, it would seem that we sometimes are being shortsighted, sometimes only considering our own selfish needs (De Dominicis, Schultz, & Bonaiuto, 2017) of our almost immediate future. Let's look at ways that positive psychology can help build a more peaceful and hopeful future.

A big part of positive psychology is the scientific study of human strengths (Carr, 2011). Hall (2008) argues that peace qualifies as one of positive psychology's character

strengths because it has the same characteristics as Seligman's 24 strengths (VIA). He explains that peace is both an internal strength of individuals and external one between individuals and groups. Yet, it is not currently listed as a strength. Even more concerning, in *Positive Psychology: The Science of Happiness and Human Strengths* (Carr, 2011), a textbook often used to teach the subject, peace is not listed in the index nor in the table of contents as a main topic. It is only mentioned briefly to explain other related concepts a few times (Carr, 2011). I support Hall's position that there is an important relationship between peace and positive psychology and further Hall's argument by positing that together the two can achieve more than they can alone.

Peace Psychology and Positive Psychology

One branch of psychology, peace psychology, has a main focus, most certainly, on peace. For example, the largest psychology organization in the world, the American Psychological Association (APA), has had Division 48, The Society for the Study of Peace, Conflict, and Violence, since 1990 (APA, n.d*).* APA also has a section on Positive Psychology housed under Division 17 (Counseling Psychology). There seems to be logical and symbiotic connections between peace psychology and positive psychology, particularly how social justice is important for both (Cohrs, Christie, White, & Das, 2013). In fact, Cohrs et al. believe positive psychology can contribute to peace from personal to global levels. Others have advocated that peace psychology and positive psychology can be combined for improving societies (Cairns & Lewis, 2003). Besides a few exceptions, little has been written about this specific topic. Thus far, there does not seem to have been any formal organization nor research collaborations that focus on the relationship that positive and peace psychology have with each other and how that relationship could be maximized.

Besides having the common thread of psychology, peace psychology seems to be closely aligned with positive psychology in other ways. This important relationship is seen in the previous work by Cohrs et al. (2013) and Neto and Marujo (2017). Neto and Marujo point out that the word "peace" is actually derived from an old English word that means "happiness" (one of the main topics of positive psychology) and argue that there is a definitive relationship between the two disciplines, particularly positive peace since both look at the optimal strengths of individuals and communities. Neto and Marujo see that achieving peace aligns perfectly well with positive psychology's goal of helping people and communities flourish. Achieving peace should come first since it appears to be an important factor to achieving better quality of life and more. Greater peace equals greater life satisfaction and well-being (Hall 2008), which are two of the main focuses of positive psychology, and hence has great contributions to both individuals and society.

Division 48's mission statement clearly shows how positive psychology and peace psychology align: "As peace psychologists, our vision is the development of sustainable societies through the prevention of destructive conflict and violence, the amelioration of its consequences, the empowerment of individuals, and the building of cultures of peace and global community" (APA, 2011). Positive psychology is also all about empowerment and building on human strengths and virtuous communities and cultures (Carr, 2011). Furthermore, it would seem that positive psychology can contribute to peace psychology's agenda by offering very practical solutions, practices, skills, techniques, assessments, strategies, etc. in order to create sustainable peace. This paper makes the recommendation that APA and other influential organizations in their respective fields formalize this connection between peace psychology and positive psychology in order to have a home for active discussion, research, and action for interested parties. Division 48 already seems to be on board with "cross-pollination among scientists and practitioners" for the development of

"better models, methodologies, and perspectives" (APA, 2011). The above shows the connection between the two branches of psychology and demonstrate that there is potential for the two to work together towards peace. Next, I will explore how emotional intelligence is one of the tools that can be used to move towards that goal.

Emotional Intelligence and Cultural Intelligence and Peace

Emotional intelligence (EI) is a construct that positive psychologists study. It is so important for positive psychology that the aforementioned positive psychology textbook dedicates an entire chapter to just this topic (Carr, 2011). Emotional intelligence seems to have plenty of potential for increasing both intra- and interpersonal peace for individuals, couples, families and other relationships. EI likely can also be applied to institutions, businesses, governments, cultures, and society in general.

While there is evidence of general IQ increasing over the past decade or so, Golman (2012) is not so sure if the same holds true when it comes to EI; as evidence of this, he points out the proliferation of conflict and violence in the world from micro (in homes) to macro (inter-societal wars) levels. There seems to be a place to use EI to reduce conflict and violence and promote peace. In fact, there is evidence of positive improvements of about 10% more prosocial behaviors and an equal amount of reduction in behavioral issues in schools that have implemented EI programs as part of their curriculum (Carr, 2011; Golman, 2012). Skills that EI teaches such as communication, assertiveness, perspective-taking, empathy, problem solving, and conflict resolution skills (Carr, 2011) all would seem relevant for improving peace.

With all of the intercultural conflict happening on both micro and macro levels in the world, we also want to look at the related topics of cultural intelligence and multicultural competence which appear to have an established link to EI (Barile, 2018, Vveinhardt, Bendaraviciene & Vinickyte, 2019; Guntersdorfer & Golubeva, 2018; Saberi, 2012). Barile emphasizes that both are skills and therefore can be taught and learned. EI can be used to enhance intercultural competency (Saberi, 2012). EI is an important component of intercultural communication (Jansen & Riemer, 2002) and intercultural intelligence, which seem to be logical necessities for empathic understanding in order to achieve peace between two conflicting parties. And yet, there does not seem to be any author who has directly written on the potential of this relationship in regard to peace. There is, however, a book (*Cultural Intelligence for Winning the Peace*) on how cultural intelligence on its own can contribute to peace (Pilon, 2009). To summarize, emotional intelligence, as studied by positive psychologists, offers both theoretical groundings and practical applications for understanding and creating peace.

Limitations, implications, and future directions

This paper has a number of limitations. First, it is based on a limited literature review which only included readily accessible online sources in English, most of which come from Western cultures. It is recommended to conduct a more exhaustive review including both online and offline sources and even expanding the search to sources in other languages and from more diverse cultures. Next, this is a theoretical paper that does not include any primary data. I encourage others to collect data to either support or contradict the ideas set forth here. I also acknowledge my inherent bias whereby I believe in both peace and positive psychology. Someone looking at this from a more objective lens may possibly come to alternative conclusions.

There are certainly many possible implications for the ideas set forth here. Educators and practitioners have helped heal traumas (Ginwright, 2018). Counselors and Counseling psychologists have used peace and positive psychology concepts to improve individual and group clients' inter- and intrapersonal peace. Although important concepts from positive psychology have potential to achieve personal and interpersonal peace for an individual, Cohrs et al. (2013) do warn that it could also potentially be harmful for others. Ginwright suggests healing centered engagement which "is holistic involving culture, spirituality, civic action and collective healing". These practices could be proliferated throughout society. Combining forces between peace and positive psychologies in efforts to better society could be implemented at every level of society from the individual all the way to global level. Leaders and others in positions of power at every level could learn from the research on how to encourage and implement peaceful flourishing for those under them.

While there are many directions that research on this topic could go, here are a few specific suggestions for future research: Positive psychology interventions could be implemented and the level of peace could be assessed before and after such interventions. Researchers could explore how teaching intercultural intelligence and emotional intelligence might be able to instill peace at all levels of society. They could examine how combining peace and positive psychology organizations might significantly contribute to a more peaceful society.

In conclusion, there appears to be solid evidence of both the similarity between peace psychology and positive psychology and that these two disciplines can work hand-in-hand for the betterment of society. In support of Cohrs et al. (2013) who used the term "positive peace psychology," I think a new field can emerge that can contribute to "overcom[ing] oppression and work[ing] towards global peace." In a special issue of the *Psychologist* (Sutton, 2016), the editor calls for evidence based paths to a more peaceful world. It would appear that we already have some research that points to solutions and suggestions. For example, there is already evidence on how we can leverage psychology research to not react out of the desire for revenge after being victimized (Noor, 2016) and use positive psychology research on forgiveness (Carr, 2016) to restore peace. A number of years before Sutton's call, Galtung (2010) put out a call for more trans-disciplinary work to advance peace and reduce conflict. These authors show that psychology does have an important place at the peace-building table. This current paper specifically encourages positive psychologists to collaborate with researchers from such diverse fields as international relations, political science, sociology, anthropology, and peace and conflict studies, among others, to gather the current information, begin filling in the gaps, and utilize the results to be peace activists and implement evidence-based paths to more peaceful cultures and societies. Our own futures and the futures of the seventh generation to come depend on such cross-disciplinary work.

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Justice for the Rohingya: The steep path ahead of the ICC

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Abstract
The Rohingya crisis has proven to be one of the worst humanitarian crisis ever witnessed. The exodus of over 700.000 Rohingya from Myanmar's Rakhine state towards the bordering Bangladesh can only be regarded as inevitable in light of the heinous atrocities suffered by the Burmese Muslim minority. Indeed, the crimes perpetrated by Myanmar's military apparatus are of such a grave and widespread nature to require an appropriate international response. Thus, faced with the UN Security Council's inaction, the ICC Office of the Prosecutor, creatively working around Myanmar's non-ratification of the Rome Statute, decided to embark on a steep and long road towards prosecution by opening a preliminary examination on the situation.
Yet, despite the Pre-Trial Chamber's positive judgement and the eagerness of the Prosecutor, it is certainly too early for any sort of celebration. In fact, the enlargement of the Court's jurisdiction carries with it at least two main problematics. First, the scope of jurisdiction is inevitably limited to the crimes that, at least partially, occurred on the territory of Bangladesh; second, the Court's cooperation regime renders virtually impossible for the Prosecutor to conduct an effective investigation without the support of the Burmese authorities.

Keywords: international criminal justice, Rohingya crisis, ICC, cooperation

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Section 1: Introduction

In August 2017, following attacks to the police and army posts by the Arakan Rohingya Salvation Army (ARSA) in the Rakhine region of Myanmar, the Burmese government initiated a heinous campaign that led to the destruction of hundreds of Rohingya villages and obliged about 700.000 Rohingya people, who had already been subjected to institutionalised discrimination since the 1970s, to flee Myanmar and seek protection in Bangladesh.[1] One year after the beginning of this exodus, a Fact-Finding Mission mandated by the Human Rights Council (Council[2]) reported that the abuses committed by the Burmese military "amount to the gravest crimes under international law", and called for the senior generals to be investigated and prosecuted for genocide, crimes against humanity, and war crimes.[3] In light of increasing evidence of the commission of atrocity crimes by Myanmar's authorities, and considering the apathy of the United Nations Security Council (UNSC or Council[4]) on the matter, the International Criminal Court (ICC or Court) Prosecutor, Fatou Bensouda, decided to do what until then was thought impossible and requested a ruling on jurisdiction to the Pre-Trial Chamber (PTC), with the aim of opening a preliminary examination.[5] The scepticism of such possibility derived from the fact that, being an independent judicial institution stemming from a treaty, the ICC's territorial jurisdiction is limited to State Parties, with the exception of situations referred by the UNSC or 'ad hoc' acceptance of jurisdiction, and Myanmar has not ratified the Rome Statute.

As a consequence, the international community was caught by surprise when the PTC ruled that the Court has jurisdiction over the crime against humanity of deportation, and possibly other crimes, considering that an element of it, the crossing of a border, takes place on the territory of Bangladesh, a party to the Rome Statute. Aside from being controversial, the decision of enlarging the ICC's jurisdiction carries with it a series of issues arising from the cooperation regime on which the Court relies. In fact, if the Court was to find that there is a reasonable basis to proceed with a formal investigation, its power to access evidence, witnesses and defendants, and thus, its ability to meet the threshold to charge the alleged perpetrators, would largely be limited by its necessity to rely on Myanmar's uncooperative national authorities. In addition, the obliged reliance on the use of intermediaries would only lead to the gathering of indirect evidence, which is regarded by the Court as having low probative value, and could only be used for the purpose of corroborating other evidence.[6] Although, from a merely theoretical perspective, a referral by the UNSC, despite being a very remote possibility, would solve the issue of cooperation, the failure of the two past referrals proves just the opposite; it is unlikely that the Council will take measures against uncooperative states. It is important to note that the enlargement of the Court's jurisdiction, in the absence of a practical possibility of bringing the perpetrators to justice, risks damaging the legitimacy of the ICC and failing to deliver any justice to the victims.

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[1] Eleanor Albert and Andrew Chatzky, 'The Rohinga Crisis' (*Council on Foreign Relations*, 5 December 2018) <www.cfr.org/backgrounder/rohingya-crisis?fbclid=IwAR10AhQvpSm2rprdu9M89AOCWHY2n1bsHFkTJONKNoZvOdN7B76-bBxwUmM> accessed 4 March 2019.

[2] Note that 'Council' is sometimes used to refer to the UNSC, other times to the Human Rights Council. The correct interpretation can be inferred from the context.

[3] Human Rights Council, 'Report of the Independent International Fact-finding Mission on Myanmar' (10–28 September 2018) UN Doc A/HRC/39/64, 1 (FFM Report).

[4] See n 2.

[5] ICC, Situation in Bangladesh/Myanmar, ICC-RoC46(3)-01/18-1, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, OTP, 9 April 2018 (OTP Request).

[6] ICC, Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para 78.

This research paper seeks to answer the question of whether the ICC can be successful in ensuring that the perpetrators are held to account and, consequently, delivering justice to the Rohingya victims. The relevance of the question is based on the necessity to ensure that such atrocity crimes are not left unpunished; indeed, if a negative answer was to be proved, as it is hypothesised, the international community should focus its efforts and resources in finding an alternative path that could lead to accountability. In order to answer the said question, the author relies on a qualitative method of research and focuses on the analysis of the procedural framework laid out in the Rome Statute and the jurisprudence of the Court. In particular, the limits dictated by its cooperation regime are investigated and a comparison between a *proprio motu* investigation and a UNSC referral is provided. Finally, their effectiveness is evaluated with respect to the factual circumstances.
The paper is structured as follows: Section 2 provides an overview of the Rohingya crisis and analyses the response of the ICC, with particular attention to the OTP's request and the scope of the Court's jurisdiction defined in the PTC's revolutionary judgement. Section 3, after briefly outlining the Court's cooperation regime, evidences the limits that the latter poses on the investigative powers of the OTP; ultimately, it argues that, despite alternative ways of gathering evidence may aid the investigation, the Prosecutor will likely be unable to reach the evidentiary threshold required to charge the perpetrators. Section 4 proves that, even in the case of a UNSC referral, the Prosecutor would not be able to overcome the obstacles imposed by the necessary reliance on Myanmar's cooperation, which, aside from not delivering justice to the victims, may even negatively impact the perceived legitimacy of the ICC; this argument is based on the analysis of the Council's attitude following the referrals of the situations in Darfur and Libya.

Section 2: The Rohingya crisis and the enlargement of the Court's jurisdiction

2.1. Introduction

The Rohingya crisis takes place in the context of a history of discriminatory policies to the detriment of the Rohingya ethnic minority that have been enacted and enforced by the Burmese government and security forces for half a century. The situation escalated in August 2017 when the Tatmadaw's (Myanmar's military) violent attacks to the Rohingya villages in the Rakhine state resulted in a severe humanitarian and refugee crisis. Facing the inability, or unwillingness, of the UNSC to refer the situation to the ICC, the latter decided to act independently and assessed its own jurisdiction over some of the crimes perpetrated by the military.
This section, therefore, intends to (2.2) provide an overview of the Rohingya crisis and the crimes that have been perpetrated by the Burmese Tatmadaw, and (2.3) to describe and elaborate on the response of the ICC to the crisis by (a) analysing the request of the Prosecutor and (b) the subsequent judgment delivered by the Pre-Trial Chamber. Accordingly, this section contributes to answering the main research question by contextualising the crimes committed and providing an analysis of the limitations faced by the Court in the establishment of its jurisdiction.

2.2. The Rohingya Crisis and the allegedly committed crimes

Since obtaining its independence from the British rule in 1948, the Burmese government has refused to recognise the Rohingya people as one of the 135 official ethnic groups.[7] Moreover, after the seizing of power by the military junta in 1962, new laws which deprived the Muslim

[7] Albert and Chatzky (n 1).

minority of their citizenship rights were enacted and, despite minor amendments, they are currently in force, making almost all of the the Rohingya people coming from Myanmar stateless.[8] Their legal status is worsened by policies which regulate and restrict their basic freedoms with regards to family planning, marriage, religion and movement, and which have been enforced by the government through abusive methods.[9] As a result, these discriminatory policies have fuelled numerous violence outbreaks between the Buddhist population, often supported by the government, and the Muslim minority.[10] Accordingly, the attacks on a military base and security force outposts committed by the Arakan Rohingya Salvation Army (ARSA), a poorly-armed militant group, on 25 August 2017,[11] can be understood as a reaction to the decades of structural discrimination. Yet, the response of Myanmar's government, the so-called 'clearance operation', undoubtedly lacks any proportionality and can only be explained as a product of the racist anti-Muslim country-wide sentiment;[12] it can be said to represent for the Buddhist majority the last step in achieving their long pursued goal of removing the Rohingya people from the territory of Myanmar.[13] In fact, the ARSA attacks, labelled by the government as 'terrorist', were used by the Burmese security forces as a pretext to respond with a heinous and unjustified use of force against the minority, which caused the death of at least 6,700 Rohingya in the Rakhine state within the first month after the 'clearance operation' had begun,[14] and obliged about 911,000 Rohingya refugees[15] to flee their burning villages, often after being subjected to rape or other forms of violence, towards Cox's Bazar, in the bordering Bangladesh.[16]

Already in March 2017, before the recent outbreak, the United Nations Human Rights Council had authorised an International and Independent Fact-Finding Mission "to establish

[8] Advisory Commission on Rakhine State, 'Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State' (August 2017), 26-32 <www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf> accessed 29 May 2019.

[9] In the townships of Maungdaw and Buthidaung in the Rakhine State a strict two-child policy is enforced for Rohingya, which leads either to unsafe and potentially deadly abortions or illegal children lacking any rights. In addition, extensive requirements need to be satisfied by Rohingya couples in the state of Rakhine in order to receive permission to marry. Furthermore, Rohingya people in the Rakhine State cannot travel within or outside townships without authorisation. All of these restriction amount to human rights violations. See, Fortify Rights, 'Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar' (February 2014), 22-33 <www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf> accessed 2 April 2019.

[10] Human Right Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar' (10–28 September 2018) UN Doc A/HRC/39/CRP.2, paras 733-738 (FFM Detailed Report).

[11] ibid, paras 55, 750.

[12] It is interesting to note that Myanmar has faced insurgency form several ethnic groups, especially within the Rakhine state (for instance, from the ethnic Rakhine Arakan Army), but the Tatmadaw's response has never been as ruthless as in the case of ARSA. Muhammad Abdul Bari, *The Rohingya Crisis: A People Facing Extinction* (Kube Publishing Limited 2018) 15.

[13] This thesis is confirmed by the words of the Tatmadaw's Commander-in-Chief, Senior General Min Aung Hlaing, whom stated in a Facebook post on 2 September 2018 that "the Bengali problem was a longstanding one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem.". These remarks provide additional evidence that the 'clearance operations' were not intended to fight the ARSA threat, rather, eliminating the Rohingya from the Burmese territory. See, FFM Report (n 3) paras 35, 86.

[14] 'MSF surveys estimate that at least 6,700 Rohingya were killed during the attacks in Myanmar' *(Medecins Sans Frontieres,* 12 December 2017) <www.msf.org/myanmarbangladesh-msf-surveys-estimate-least-6700-rohingya-were-killed-during-attacks-myanmar> accessed 3 April 2019.

[15] Inter Sector Coordination Group, 'Situation Report Rohingya Refugee Crisis' (January 2019) <www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/iscg_situation_report_january_2019.pdf> accessed 3 April 2019.

[16] FFM Detailed Report (n 10) paras 750, 751, 883.

the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar"[17], particularly in the Kachin, Rakhine and Shan States. In its report published in September 2018, despite Myanmar's refusal of cooperation, it found striking evidence of gross breach of human rights and commission of international crimes by the Tatmadaw, which had intensified during the 'clearance operation'. In particular, the numerous victims' testimonies reported brutal mass killings carried out through indiscriminate shootings at Rohingya villages, at civilians while attempting to flee or take shelter, and at boats carrying Rohingya refugees to Bangladesh;[18] others tragically died from the beatings or burned with their houses.[19] Rapes and other forms of sexual violence were also perpetrated by the Tatmadaw, other security forces, and sometimes ethnic Rakhine men on a dramatically wide scale, including mass gang rapes, sexually humiliating acts, sexual slavery and sexual mutilations.[20] The most targeted were young women and girls, which were at times abducted, detained, raped and killed in military compounds.[21] Moreover, shocking satellite images reveal the colossal amount of villages that have been burnt to the ground;[22] 392 villages in the Maungdaw, Buthidaung and Rathedaung Townships (northern Rakhine) were either partially (214 villages) or totally (178 villages) destroyed from August 2017 to March 2018.[23]

The Tatmadaw's actions undoubtedly fall under the core international crimes of crimes against humanity, war crimes and genocide. Firstly, the characterisation as crimes against humanity necessitates the conduct in question to be part of a 'widespread and systematic attack against a civilian population'[24] With respect to this, the facts mentioned above clearly indicate that this requirement is satisfied. Secondly, an offence must have a link to an armed conflict in order to qualify as a war crime.[25] The present case, indeed, represents a non-international armed conflict by reasons of the intensity of the violence and the level of organisation of the armed groups involved.[26] Lastly, the requirement of 'genocidal intent' can be inferred from the exclusionary policies aimed at altering the demographic composition of

[17] Human Rights Council, 'Resolution adopted by the Human Rights Council on 24 March 2017' (27 February–24 March 2017) UN Doc A/HRC/RES/34/22, para 11.

[18] FFM Detailed Report (n 10) paras 884-903. One young girl from the Maungdaw Township recounted: "When the soldiers came to my village, we all ran, and they shot at us. We were around 50 people, and maybe half of us were shot. The people shot fell down while they were running. Some died and some escaped. Somehow, I escaped." ibid, para 885.

[19] ibid, paras 904-905.

[20] ibid, paras 920-928.

[21] ibid, para 930.

[22] ibid, paras 959-977.

[23] ibid, para 959.

[24] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 37 ILM 1002 (1998) 2187 UNTS 90, art 7(1) (Rome Statute).

[25] ICTY, Prosecutor v. Duško Tadić, IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, para 573.

[26] A non-international armed conflict is present "whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". ICTY, Prosecutor v. Duško Tadić, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para 70. Ultimately, the test relies on two aspects: the intensity of the conflict and the organisation of the parties. See, Prosecutor v. Duško Tadić, Opinion and Judgement (n 25) para 562. This definition was also adopted by the ICC in ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, PTC I, 29 January 2007, para 233. For an analysis of the indicators for the assessment of the two criteria, see, Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 167-180. For an evaluation of the indicators with respect to the facts in the Kachin, Shan and Rakhine States, see, FFM Detailed Report (n 10) paras 52-59.

the Rakhine State, the drastic scale and brutality of the violence committed, and the level of organisation indicating a plan for destruction.[27]
The gravity and scale of these crimes demanded a concrete and prompt response by the international community. However, despite the general condemnation of the UN leadership[28] and the establishment of the Independent Mechanism for Myanmar by the Human Rights Council,[29] the efforts taken remained insufficient. Particularly problematic was the UNSC's inability to refer the situation to the ICC, blocked by the veto power of China, which seemed more concerned about its political and economic interests,[30] rather than complying with its moral and legal obligations arising from its permanent membership in the Council.

2.3. The progressive response of the ICC

Encouraged by the UNSC inaction and determined to bring an end to the impunity of these responsible for the crimes against the Rohingya people, the OTP requested the Pre-Trial Chamber (PTC) to rule on the possibility of exercising jurisdiction over one of the crimes perpetrated against the minority. It was followed by a revolutionary judgment by the PTC which established the jurisdiction of the Court not only over the crime of deportation, but possibly over any crime partially committed on the territory of Bangladesh.

a. The request of the OTP: an unreasonable demand?

On 9 April 2018, the OTP decided to file a 'Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', seeking a decision on the question whether the Court may exercise territorial jurisdiction pursuant to Article 12(2)(a) of the Statute over the alleged deportation of the Rohingya people from Myanmar, a state which is not a party to the Rome Statute, to Bangladesh, a State Party.[31] The Prosecutor affirmed that the reports of UN bodies and NGOs provide *prima facie* reliable sources alleging that the Tatmadaw and other security forces have deported ethnic Rohingya from Myanmar to Bangladesh since at least 2012, with a dramatic escalation after the events of 25 August 2017.[32]
In support of her thesis that the ICC should have jurisdiction over the said crime, the Prosecutor argued that Article 7(1)(d) of the Rome Statute distinguishes between two crimes, forcible transfer and deportation.[33] The second is differentiated from the first by its legal

[27] FFM Report (n 3) paras 84-87.
[28] In August 2018, António Guterres, the Secretary-General of the UN, has urged the UNSC to take action to end the crisis. See, 'Secretary-General's remarks to the Security Council on Myanmar [as delivered]' (UN, 28 August 2018) <www.un.org/sg/en/content/sg/statement/2018-08-28/secretary-generals-remarks-security-council-myanmar-delivered> accessed 7 April 2019. Moreover, the UN High Commissioner for Human Rights has described the Rohingya crisis as "a textbook example of ethnic cleansing". 'Darker and more dangerous: High Commissioner updates the Human Rights Council on human rights issues in 40 countries' (Human Rights Council,
36th Session, 11 September 2017) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E> accessed 7 April 2019.
[29] The role of the Independent Mechanism, complementary to that of the Fact Finding Mission, is "to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law". See, Human Rights Council, 'Situation of human rights of Rohingya Muslims and other minorities in Myanmar' (39th Session, 10–28 September 2018) Un Doc A/HRC/39/L.22, para 22.
[30] For an analysis of China's strategic interests in Myanmar, see generally, K Yhome, 'Understanding China's Response to Ethnic Conflicts in Myanmar' (April 2019) ORF Occasional Paper No. 188.
[31] OTP Request (n 5) para 1.
[32] ibid, paras 7-8.
[33] ibid, para 13.

requirement of international border crossing, *de jure* or *de facto*.[34] Accordingly, the Prosecutor maintained that when the Rohingya victims are forced directly into the territory of another State, a crucial element of the crime, the crossing of a border, occurs on the territory of Bangladesh.[35] Hence, it provides the Court with a basis for the exercise of jurisdiction which is consistent with the requirement of Article 12(2)(a) of the Rome Statute that at least one element of an Article 5 crime must have occurred on the territory of a State Party.[36] The Prosecutor further argued that her interpretation is in line with the general approach of States in exercising criminal jurisdiction,[37] where territorial jurisdiction is regarded as a 'permissive concept' allowing the exercise of subjective territoriality (in the case of a crime initiated on a State's territory, but completed in another) and objective territoriality (when crimes were completed on a State's territory, but commenced in another).[38] Further reference was made to the *Lotus case*,[39] where the Permanent Court of International Justice applied the latter concept of territorial jurisdiction in the dispute between France and Turkey.[40]

b. The revolutionary judgment of the Pre-Trial Chamber and the scope of the Court's jurisdiction

The judgment delivered on 6 September 2018 by the PTC was welcomed with surprise; until then it was not thought to be possible for the Court to exercise its jurisdiction outside the territory of State Parties, unless upon referral of the situation by the UNSC or *ad hoc* agreement of jurisdiction. Yet, the judgment, as the Prosecutor's request, appears well reasoned and within the legal boundaries imposed upon the Court by the Rome Statute.

First, the Court agreed with the Prosecutor's argument that Article 7(1)(d) of the Statute contains the two separate crimes of forcible transfer and deportation.[41] Second, it decided it may exercise its jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, but not limited to that. Notably, the Court held it may also have jurisdiction with respect to any other crime set out in Article 5 of the Statute which does not necessarily entail a cross-border element. In fact, the Chamber stated that it "considers it appropriate to emphasise that the rationale of its determination as to the Court's jurisdiction in relation to the crime of deportation may apply to other crimes within the jurisdiction of the Court as well. If it were established that at least one element of another crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to Article 12(2)(a) of the Statute."[42] Therefore, the approach of the PTC appears much broader than the one initially adopted by the Prosecutor in her request, and it entails that the Court *might* also have jurisdiction over crimes against humanity of persecution and other inhumane acts.[43] In fact, the first, according to its wording in Article 7(1)(h) of the Statute,[44] must be "committed in connection with any other

[34] ibid.
[35] ibid, paras 13, 28-31.
[36] ibid, paras 28-31.
[37] ibid, para 29.
[38] ibid, para 32. See also, Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court* (CUP 2014) 16-22.
[39] *The Case of the S.S. "Lotus" (France v. Turkey)* (Judgment) [1927] ICJ Rep Series A No 10.
[40] OTP Request (n 5) para 33.
[41] ICC, Situation in Bangladesh/Myanmar, ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", PTC I, 6 September 2018, paras 52-61 (PTC Decision).
[42] ibid, para 74.
[43] ibid, paras 74-77.
[44] Art 7(1)(h) recognises as crime against humanity "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are

crime under the jurisdiction of the Court",[45] which in this case would be the crime of deportation.[46] Thus, if the latter crime was proved, the Court would be able to extend its jurisdiction over Article 7(1)(h) claiming that one element of it, the cross-border transfer, takes place on the territory of Bangladesh.[47] Similarly, the jurisdiction of the Court may also encompass 'other inhumane acts' expressed in Article 7(1)(k) of the Statute, considering the poor conditions the Rohingya people are forced to live in following their deportation to Bangladesh and their practical impossibility of returning to Myanmar.[48]

The important question arising at this point is whether the fact that objective jurisdiction is recognised in a national system implies that it was also the intention of the State Parties to delegate to the Court the said form of jurisdiction. In fact, it has been argued that the State signatories intended to confer a narrow interpretation to the ICC jurisdiction which excludes the possibility of objective and subjective territoriality.[49] This conclusion was reached by making a parallel with the prevalence of the narrow view in the negotiations and final formulation of the crime of aggression which was activated by Resolution 5 of the 16th Assembly of State Parties.[50] The author of this paper, however, believes that this comparison is not entirely acceptable in light of the exceptionally complex circumstances under which the crime of aggression was agreed upon.[51] Hence, it may not be considered valuable evidence of the intention of the Parties in the context of the other crimes under the jurisdiction of the ICC. Furthermore, the interpretation adopted by the Court is consistent with the previous practice of the Prosecutor,[52] which has not been object of any dispute by State Parties.

Another interesting consideration is made by professor Kevin John Heller, who maintains that the Court might have jurisdiction over Article 6(c)[53] "Genocide by deliberately inflicting

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universally recognized as impermissible under international law, *in connection with any act referred to in this paragraph* […]" Rome Statute, art 7(1)(h) [emphasis added].

[45] ICC, Situation in the Republic of Burundi, ICC-01/17-9-Red, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi" (ICC-01/17-X-9-US-Exp, 25 October 2017), PTC III, 9 November 2017, para 131.

[46] PTC Decision (n 41) para 75.

[47] ibid, para 76.

[48] ibid, paras 77-78. The Chamber added that it is "mindful of the repatriation agreement concluded between Myanmar and Bangladesh and the Memoranda of Understanding concluded by both States with the UNDP and/or UNHCR and the existing difficulties in their implementation". Thus, the theoretical possibility hasn't been met by actual prospect of returning so far. See also, Nick Beake, 'What awaits any Rohingya refugees who return to Myanmar?' (*BBC News*, 28 December 2018) <www.bbc.co.uk/news/world-asia-46312889> accessed 3 April 2019.

[49] Douglas Guilfoyle, 'The ICC pre-trial chamber decision on jurisdiction over the situation in Myanmar' (2019) 73(1) *Australian Journal of International Affairs* 2, 4-5.

[50] ibid; ICC, Resolution ICC-ASP/16/Res.5, Activation of the jurisdiction of the Court over the crime of aggression, ASP, 14 December 2017.

[51] It took the ICC State Parties several years of negotiations to finally agree on the activation of the Court's jurisdiction over the crime of aggression. Particularly problematic was the question of whether the states that had not ratified the 2010 Kampala Amendments would still be subjected to the Court's jurisdiction with respect to this crime. Eventually, a compromise was reached. The Court can now exercise its jurisdiction on the individuals and territory of all the states parties and non-parties in the case of UNSC referrals; on the contrary, in the case of state referrals and investigations *proprio motu*, the Court's jurisdiction is limited to the territory of State Parties that have ratified the amendments, also including individuals of State Parties that have opted-out the amendments, but excluding in any circumstance individuals of non-party States. For an account of the long journey that led to the activation of this crime, see, generally, Klaus Kreß, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' (2018) 16(1) *Journal of International Criminal Justice* 1. See also, Dapo Akande and Antonios Tzanakopoulos, 'Treaty Law and ICC Jurisdiction over the Crime of Aggression' (2018) 29(3) EJIL 939.

[52] ICC, Situation in the Republic of North Korea, Article 5 Report, OTP, June 2014, para 39.

[53] Rome Statute, art 6(c).

conditions of life calculated to bring about physical destruction";[54] he argues that it would be the case if the elements of the crime[55] were to be satisfied not only in Myanmar, as it was suggested by the Fact-Finding Mission, but also in Bangladesh, which appears plausible given the appalling conditions in the refugee camps.[56] Thus, if these were to amount to "conditions of life (…) calculated to bring about the physical destruction" of the Rohingya, at least one of the elements of Article 6(c) would be occurring on the territory of a State Party, conferring jurisdiction to the Court.[57] This reasoning, however, seems to be limited to this Article and may not be applied to other genocidal acts; these are *a priori* excluded from the Court's jurisdiction as none of their elements can be placed on the territory of Bangladesh.[58]
Nevertheless, while this theoretical possibility constitutes a legal reflection worth mentioning, it unfortunately did not materialise in the OTP's recent request for judicial authorisation to commence an investigation.[59] In fact, while taking the PTC's broader approach including the crimes of persecution, other inhumane acts and deportation, the Prosecutor did not make any mention of bringing genocide under the Court's jurisdiction. It is left to see whether new evidence will allow the OTP to include the crime under Article 6(c) within its investigation, although being a remote possibility.

2.4. Conclusion

The 'clearance operation' undertaken by the Tatmadaw resulted in the commission of atrocity crimes to the damage of the already long-discriminated Rohingya minority and caused a humanitarian catastrophe in the neighbouring Bangladesh. Indeed, the remarkable judgment of the PTC represented an unexpected development and increased the possibility of bringing the perpetrators to justice by enlarging the Court's jurisdiction and allowing the OTP to open a preliminary examination.[60] While the OTP has now concluded the latter and it is awaiting the Court's decision on its request to open an investigation,[61] these developments should not be regarded with too much optimism. Indeed, the restriction of the Court's jurisdiction to the crimes partially committed in Bangladesh, which leaves out some of the worst crimes, represents the first significant limit the Court has to face in delivering justice to the Rohingya

[54] Kevin J Heller, 'The ICC has jurisdiction over one form of genocide in the Rohingya situation' (*OpinioJuris*, 7 September 2018) <http://opiniojuris.org/2018/09/07/33644/> accessed 5 April 2019.
[55] Elements of art 6(c): "1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."
International Criminal Court, *Elements of Crimes* (ICC 2011) art 6(c).
[56] Heller (n 54).
[57] ibid.
[58] As to Article 6(e) of the Rome Statute, genocide by forcibly transferring children of the group to another group, while potentially presenting a cross-border element (i.e. the transfer to Bangladesh), their transfer does not satisfy the fourth element of this crime which requires the transfer to happen form one group to another; in fact, the transfer of children took place together with that of the rest of the Rohingya ethnic minority, from which they were not separated.
[59] ICC, Situation in Bangladesh/Myanmar, ICC-01/19-7, Request for authorisation of an investigation pursuant to article 15, OTP, 4 July 2019.
[60] ICC, 'Statement of ICC Prosecutor, Mrs Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh', OTP, 18 September 2018 <www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya> accessed 8 April 2019.
[61] ICC, Situation in Bangladesh/Myanmar, ICC-01/19-7, Request for authorisation of an investigation pursuant to article 15, OTP, 4 July 2019.

victims. Further limitations to the Court's investigative powers are discussed in the following section.

Section 3: The limits of the cooperation regime in the case of enlarged jurisdiction

3.1. Introduction

The ICC cooperation regime is the result of years of complex negotiations and compromises which were concluded with the signing of the Rome Treaty in 1998. From the very beginning, it was clear that, given the absence of its own law enforcement agency, the ICC's ability to function effectively was largely dependent upon the assistance provided by States.[62] As a consequence, the Court must rely on the cooperation of State authorities for, among others, the entry and presence on the State's territory of members of the staff, the questioning of witnesses and victims, the access to official records, the preservation of evidence, the interception of communication, the preservation of the *locus delicti*, and the arrest and surrender of suspects.[63] This reliance on national authorities results particularly problematic in the current case of enlarged jurisdiction. In fact, the transboundary nature of the crimes entails the necessity to investigate and gather evidence both in the territory of Bangladesh, where many victims and witnesses are situated, and Myanmar, where some of the victims and all the perpetrators reside, as well as where most of the elements of the crimes that may be investigated took place. In this respect, Myanmar has repeatedly asserted that it disagrees with the exercise of jurisdiction by the Court and will not cooperate with the ICC, nor will it allow any investigator to enter its territory.[64] The consequences of such a refusal are multi-fold, including the inability of the Prosecutor to gather evidence in the territory of Myanmar.
This section, therefore, seeks to (2.2) delineate the characteristics of the cooperation regime of the ICC and (2.3) analyse the limitations to the investigative powers of the OTP that arise in the current case of enlarged jurisdiction. Its contribution to answering the main research question lies in the fact that in the absence of an effective investigation by the Prosecutor, and a subsequent charge of the defendants, the Court cannot possibly be successful in holding the perpetrators accountable, hence, it would fail to bring justice to the victims.

3.2. Legal Framework on Cooperation

The legal basis for the duty to cooperate with respect to State Parties is to be found in the Rome Statute.[65] In fact, according to the *pacta sunt servanda* principle, States that ratified a treaty are obliged to perform it in 'good faith'.[66] In the case of the ICC, this obligation entails

[62] Daryl A Mundis, 'State Cooperation with the ICC' in Rodrigo Yepes-Enríquez and Lisa Tabassi (eds), *Treaty Enforcement and International Cooperation in Criminal Matters* (Asser Press 2002) 127.
[63] Rod Rastan and Pascal Turlan, 'International Cooperation and Judicial Assistance' in Adejoké Babington-Ashaye, Aimée Comrie, Akingbolahan Adeniran (eds), *International Criminal Investigations: Law and Practice* (Eleven International Publishing 2018) 31.
[64] See, Government of the Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor, Press Release (9 August 2018) <www.statecounsellor.gov.mm/en/node/2084> accessed 11 April 2019; Simon Lewis, 'Myanmar says International Criminal Court has no jurisdiction in Rohingya crisis' *Reuters* (Yangon, 7 September 2018) <www.reuters.com/article/us-myanmar-rohingya-icc/myanmar-says-international-criminal-court-has-no-jurisdiction-in-rohingya-crisis-idUSKCN1LN22X> accessed 11 April 2019; Kyaw Thu, 'Myanmar Signals It Will Give Cold Shoulder to New UN Rights Investigator on Rohingya' *Radio Free Asia* (3 April 2019) <www.rfa.org/english/news/myanmar/myanmar-signals-it-will-give-cold-shoulder-04032019172944.html> accessed 11 April 2019.
[65] Mundis (n 62) 128.
[66] ibid. See, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 26.

a duty to cooperate in accordance with the provisions of the Statute. Having said that, a relevant question for the situation in Myanmar/Bangladesh is whether a legal basis for the duty of cooperation for non-parties can be discerned. In this respect, three possibilities can be identified. The first one is the acceptance of *ad hoc* jurisdiction for a certain case under Article 12(3) of the Statute, which implies a duty to cooperate according to the provisions of Part 9 of the Statute.[67] The second possibility is represented by Article 87(5), which allows the conclusion of *ad hoc* cooperation agreements between the Court and a non-party State. In this case, the extent of the duty to cooperate is dictated by the content of the agreement itself.[68] The third option arises in the event of a UNSC referral of a situation to the Court acting under Chapter VII of the UN Charter and in accordance with Article 13 of the Statute. In that instance, the duty of cooperation for non-parties derives from their membership in the UN and it is based on the Resolution triggering the jurisdiction.[69] It follows that the extent of this duty varies depending on the applicable legal basis.[70] It is clear that, in the absence of the latter, States are under no obligation to cooperate with the Court.

If the legal basis is identified in the founding treaty, the regime for international cooperation and judicial assistance is governed by Part 9 of the Statute. The application of these provisions is confined to investigations and prosecutions; thus, they are unavailable to the OTP in the preliminary examination stage.[71] These provisions regulate, *inter alia*, the forms of cooperation available to the Court. According to Article 89 of the Rome Statute, the Court may file a request for the arrest and surrender of a suspect 'to any State on the territory of which that person may be found',[72] keeping in mind the requirements set out in Article 91. Furthermore, other forms of cooperation available to the ICC are enumerated in Article 93(1)(a)-(k);[73] the list is non-exhaustive, as indicated by the 'catch-all provision' in Article 93(1)(1).[74]

Finally, the refusal of a State to comply with a request, unless based on justifiable grounds,[75] may lead to a finding of non-compliance by the Court, which will refer the matter to the Assembly of State Parties or, when the situation is referred under Article 13(b), to the Security Council.[76] However, both bodies have proven unable, up to date, to take any measures in response to non-cooperation.[77]

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[67] Mundis (n 62) 128.

[68] ibid.

[69] ibid 129.

[70] For instance, in the case of cooperation arising from a referral, the Council may decide on the non-applicability of certain grounds of refusal contained in the Statute. ibid 130.

[71] Rastan and Turlan (n 63) 32. The difference between the powers of the OTP during the preliminary examination and investigation stages are further discussed in the next section.

[72] Rome Statute, art 89.

[73] ibid, art 93(1)(a)-(k).

[74] ibid, art 93(1)(1).

[75] The grounds for refusal are limited to the 'execution of a particular measure of assistance detailed in a request presented under paragraph 1 [of art. 93], … prohibited in the requested State on the basis of an existing fundamental legal principle of general application' and cases in which 'the request concerns the production of any documents or disclosure of evidence which relates to its national security'. ibid, art 93(3), 93(4).

[76] Robert Cryer and others, *An introduction to international criminal law and procedure* (3rd edn, CUP 2014) 535.

[77] The failure of the UNSC in enforcing cooperation is shown by the failure of the past two referrals in Libya and Darfur, which is further discussed in the next section. The Assembly of the State Parties, on the other hand, has endorsed a series of proposals regarding measures that could be enforced against non-compliant Parties; however, it has not yet taken any concrete action in cases of non-cooperation that have been referred to it. Rastan and Turlan (n 63) 55. See, ICC, Resolution ICC-ASP/10/Res.5, Assembly procedures relating to non-cooperation, ASP, 21 December 2011, Annex as amended by ICC, Resolution ICC-ASP/11/Res.8, Strengthening

3.3. Limitations to the OTP's investigative powers and alternatives to Myanmar's cooperation

The question that arises at this point is whether the Prosecutor, based on the outlined cooperation regime, will be able to meet the evidentiary thresholds set by the Article 53 of the Rome Statute. In fact, an investigation *proprio motu* as triggering mechanism means that the duty to cooperate with the Court is limited to State Parties, unless *ad hoc* agreements have been concluded. Thus, it is clear that Myanmar, which has certainly not made any special accord with the Court, is not bound by any legal duty.

The limitations imposed by the necessary reliance on Myanmar's cooperation are not very relevant at the preliminary examination stage. In fact, owing to the non-application of Part 9 of the Statute, the OTP does not retain full investigative powers yet. Accordingly, it may only seek information from States, organs of the United Nations, intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate; in addition, it may receive written and oral testimony at the seat of the Court.[78] Hence, at this stage the OTP is not expected to provide an extensive analysis of the situation[79] and, considering the low 'reasonable basis' evidentiary threshold,[80] the Prosecutor can be expected to be successful in opening a full investigation. However, more problematic is the ability of the OTP to effectively carry out the investigation, as the evidentiary threshold required to charge the defendants is set higher, thus, it entails a more comprehensive analysis of the factual circumstances and more evidence corroborating it. In this phase, the powers of the Prosecutor, as mentioned above, are defined by Article 54 j. 93(1)(a)-(k) and include the taking and the production of evidence, the service of documents, the protection of witnesses and victims, the access to official records, the preservation of evidence, the interception of communication, the preservation of the *locus delicti*, and the arrest and surrender of suspects.[81] It is clear how these powers largely remain theoretical in the absence of cooperation by the Burmese authorities in executing the Court's requests. In fact, it must be taken into account that the majority of the physical evidence is situated in the *locus delicti*, on the territory of Myanmar; not only does this make it inaccessible to the OTP, but it also means that it may, in the meantime, be destroyed or tempered with. Problematic would also be the identification, communication with and protection of any of the victims and witnesses still residing on the territory of Myanmar. While large part of the Rohingya victims have fled to Bangladesh,[82] the others cannot be forgotten. Furthermore, knowledge of the hierarchical structure of the Tatmadaw and access to official records and documents is particularly

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the International Criminal Court and the Assembly of States Parties, ASP, 21 November 2012, Annex I. See also, ICC, ICC-ASP/15/31, Report of the Bureau on non-cooperation, ASP, 16-24 November 2016.

[78] ICC, *Rules of Procedure and Evidence* (2nd edn, ICC 2013) rule 104; Rome Statute, art 14; ICC, Policy Paper on Preliminary Examinations, OTP, November 2013, para 12.

[79] In accordance with the wording of Articles 15(2) and 53(1) of the Statute and rule 104(1) and 48 of the Rules, "the preliminary examination is the pre-investigative assessment through which the Prosecutor analyses the seriousness of the information 'received' or 'made available' to her against the factors set out in Article 53(1)(a)-(c) of the Statute". PTC Decision (n 41) para 82.

[80] Rome Statute, art 53(1).

[81] ibid, art 54 j 93(1)(a)-(k).

[82] The fact that the majority of the victims is in Bangladesh is particularly helpful to the investigation as it allows OTP to interview them and gather evidence of the crimes suffered, in addition to being able to grant them the necessary protection. In March 2019, ICC officials visited Bangladesh, although they did not interview any of the victims during their visit. Tom Miles, 'ICC officials visit Bangladesh to look into Myanmar case: U.N. investigator' *Reuters* (Geneva, 11 March 2019) <www.reuters.com/article/us-myanmar-rohingya-un-icct/icc-officials-visit-bangladesh-to-look-into-myanmar-case-u-n-investigator-idUSKBN1QS1R8> accessed 13 April 2019.

valuable in the identification of the perpetrators bearing the greatest responsibility.[83] Lastly, without the support of the Burmese authorities, the OTP would be unable to question any person being investigated, as well as it would limit the Prosecutor's ability to comply with its duty to collect exonerating evidence, in addition to incriminating one.[84]

Given the circumstances, it is essential for the Prosecutor to use means of gathering evidence which do not entail Myanmar's cooperation. Two main options can be identified. The first consists in making use of reports formulated by third states' embassies or intelligence services present in Myanmar, such as reports on the human rights situation.[85] However, it must be borne in mind that these reports may often not be specific enough to contribute with new evidence, or they may be declared inadmissible in front of the Court.[86] The second option sees the Court rely on the monitoring of international organisations[87] and NGOs;[88] it has already been discussed in the previous section the fundamental role of the reports drafted by the Human Rights Council-mandated Fact-Finding Mission and those of human rights NGOs in identifying the allegedly committed crimes and producing *prima facie* evidence of their perpetration.[89] Their work, in addition to that of the Independent Mechanism, may lead to the emergence of new evidence. However, it must be kept in mind that both the Mission and the Independent Mechanism, as well as many NGOs, have repeatedly been denied entrance in the country; in some instances, this results in the reliance on indirect evidence.[90] In the latter case, the evidence must be accorded a low probative value and used only for the purpose of corroborating other evidence. [91] Therefore, these reports may not always contribute significantly to the reaching of the evidentiary threshold necessary to charge the perpetrators, or may be challenged by the defence later in the proceedings.

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[83] In this respect the Fact-Finding Mission has drafted a non-exhaustive list of alleged perpetrators focusing on those exercising effective control over the direct perpetrators; it includes the Tatmadaw Commander-in-Chief Senior-General Min Aung Hlaing, the Deputy Commander-in-Chief Vice Senior-General Soe Win, the Commander of Bureau of Special Operations-3 Lieutenant-General Aung Kyaw Zaw, the Commander of Western Regional Military Command Major-General Maung Maung Soe, the Commander of the 33rd Light Infantry Division Brigadier-General Aung Aung, the Commander of 99th Light Infantry Division Brigadier-General Than Oo. The report indicated that the full list is in the custody of OHCHR, and may be shared with any competent and credible body which intend to prosecute the alleged perpetrators. FFM Report (n 3) para 92.

[84] Rome Statute, art 54(1)(a). However, it has been argued that the OTP hasn't been complying with this duty. See, generally, Caroline Buisman, 'The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?' (2014) 27(1) *Leiden Journal of International Law* 205.

[85] Robert Cryer, 'Means of Gathering Evidence and Arresting Suspects in Situations of States' Failure to Cooperate' in Cassese A (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 203.

[86] ibid.

[87] Rome Statute, art 87(6).

[88] Cryer (n 85) 204-206.

[89] OTP Request (n 5) para 7.

[90] It is to note that the Report of the Fact Finding Mission has been based mostly on primary sources of information, such as in-depth witnesses statements, satellite imagery, documentation, photos and videos, all of which were authenticated; secondary information was used by the Fact Finding Mission only for the purposes of corroborating other evidence. FFM Detailed Report (n 10) paras 19-25; 'The truth can be recovered - the methodology behind
fact-finding in Myanmar' (*OHCHR*, 12 September 2018)
<www.ohchr.org/EN/NewsEvents/Pages/MyanmarFFMReport.aspx?fbclid=IwAR2i_Hw7xYgA5EF-e3wD6JBO5GQOM04HEeEZJt2GaMNuS4uufbe6wyJGm0w> accessed 23 April 2019. The methodology behind NGOs reports of the situation in Myanmar, on the contrary, is at times less clear and more reliant on indirect evidence, especially given their inability to conduct research directly on the territory. 'Our Research Methodology' (*Human Rights Watch*) <www.hrw.org/our-research-methodology?fbclid=IwAR3Mcyec1JiRmVv8QVqr-6zwj1rFbf7R44LmwvP7kg2SqCO8LKDmefgoj3s>
accessed 23 April 2019.

[91] ICC, Prosecutor v. Mbarushimana (n 6) para 78.

Finally, even if the PTC was to confirm the charges against the perpetrators, the biggest obstacle to accountability would be the arrest and surrender of the defendants. In this respect, it must be noted that all the members of the Tatmadaw that could be found responsible for the crimes committed against the Rohingya people reside on the territory of Myanmar. Moreover, a challenge to the possibility of a third country arresting the defendants and surrendering them to the Court is the fact that many Southeast Asian countries are not parties to the Statute.[92] Thus, in the event of one of the perpetrators travelling to one of those countries, they would have no obligation to execute an arrest warrant.

3.4. Conclusion

Unable to operate without the assistance of state authorities, the Court can be described as a "giant without arms and legs".[93] Its potentially universal jurisdiction is reduced to a mere illusion in the absence of States' cooperation. This is the case in the situation under analysis. In fact, the limitations examined above point at a rather clear inability of the OTP to conduct an effective investigation. It must be kept in mind that, although it is undoubtable that atrocity crimes have been committed by the Tatmadaw, general proof of this does not suffice. Indeed, for the OTP to bring charges against the alleged perpetrators, and for them to be eventually convicted, specific evidence pointing at the fulfilment of each of the elements of the alleged crimes by a certain suspect is needed and, sadly, it is largely limited by the necessity to rely on the Burmese authorities. In light of the above considerations, it is unlikely for the OTP to be able to meet the 'sufficient basis' threshold and, even in the improbable event of a successful charge of the perpetrators, nothing suggests that the Court would be able to obtain the defendants. Therefore, given the constraint of cooperation, the investigation risks to fail to protect the interests of the Rohingya victims. First, the lack of access to the territory of Myanmar will cause the exclusion of the victims that haven't crossed the border from any protection, participation, and (unlikely) reparations. Second, the investigation will expose the already vulnerable victims to a lengthy process which, after raising their expectations of delivery of justice, will probably result inconclusive. Finally, in the absence of a conviction, whether because of lack of evidence or impossibility to obtain the suspect, the victims will be left without any reparation, let alone a sense of justice being done, knowing that the criminals that caused them much suffering are still at large. Given these considerations, the next section examines whether a UNSC referral would represent a more effective alternative.

Section 4: UNSC Referral - Legal possibility limited by political unwillingness?

4.1. Introduction

Since the beginning of the crisis, several voices, including those of the Fact-Finding Mission,[94] Human Rights Watch[95] and the Special Rapporteur on the situation of Human

[92] The only parties to the Statute are Bangladesh, Cambodia, and Maldives. 'State Parties to the Rome Statute' (*International Criminal Court*) <https://asp.icccpi.int/en_menus/asp/states%20parties/asian%20states/Pages/asian%20states.aspx> accessed 23 April 2019.

[93] The expression was first used by Cassese with respect to the ICTY, however, it can be said to apply to the ICC as well. Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 EJIL 2, 13.

[94] FFM Report (n 3) para 105.

[95] 'UN Security Council: Refer Myanmar to ICC' (*Human Rights Watch*, 8 May 2018) <www.hrw.org/news/2018/05/08/un-security-council-refer-myanmar-icc> accessed 18 April 2019.

Rights in Myanmar,[96] have called for the UNSC to make use of its powers under the UN Charter and the Rome Statute and refer the situation to the ICC. However, despite their insistence, the Council has taken a passive stance and has not even voted on the matter yet. In the meantime, the Court determined to have partial jurisdiction over the crimes perpetrated and the OTP concluded its preliminary examination; although this may suggest that the role of the UNSC in ensuring accountability in Myanmar has ended, it is not the case. In fact, it remains relevant to assess whether the Council, in case of a failure of the OTP to reach the evidentiary threshold to open an investigation or charge the suspects, could still refer the situation to the Court, and whether this referral would enable the ICC to overcome the limitations stemming from the cooperation regime. Indeed, while the enforcing mechanisms at disposal of the UNSC seem to indicate that the Court would not be faced with the same difficulties as in the case of an investigation *proprio motu*, the lessons taught by the referrals of Darfur and Libya point at the opposite direction and suggest that the politics surrounding this triggering mechanism may do more harm than good to the Court and the victims.
Therefore, this section seeks to (3.2) assess the political and legal possibility of such a referral, (3.3) analyse the Council's failure to enforce cooperation in the previous two situations, and (3.4) reflect on the politicisation of justice and loss of legitimacy of the Court which resulted from them. After having argued in the previous section that an investigation *proprio motu* would hardly be successful, it is important to assess whether a UNSC referral, given its different framework on enforcing cooperation, may be effective in leading to the accountability of the perpetrators. If it were proved that this is not the case, it may be concluded that there is no cruel prospect for the ICC to deliver justice to the victims. Finally, a brief reflection on the ICC legitimacy is added to further demonstrate the impact that a referral would have on the public perception of the Court.

4.2. The (im)possibility of the referral of the situation

It is undoubtable that, in respect to the Rohingya crisis, the UNSC has failed in its responsibility to maintain peace and security. Not only has the Council not referred the situation to the ICC, it also has also neglected the possibility of implementing any meaningful alternative solution to the crisis. In fact, its response has been limited to a presidential statement calling for accountability,[97] a brief visit by Council's senior diplomats to Bangladesh and Myanmar,[98] and a British-drafted resolution addressing the repatriation of Rohingya refugees, which, however, hasn't been voted upon yet.[99] The cause of this apathy can be identified in the disagreement among UNSC members as to the appropriate response; China, supported by Russia, has boycotted talks on the aforementioned draft,[100] as well as it attempted to block the UNSC briefing by Marzuki Darusman, chair of the U.N. Fact-Finding

[96] 'Oral statement by Ms Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 40th session of the Human Rights Council' (*OHCHR*, 11 March 2019) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24299&LangID=E> accessed 18 April 2019.
[97] UNSC Presidential Statement 22 (2017) S/PRST/2017/22.
[98] UNSC 'Security Council Press Statement on Security Council Visit to Bangladesh, Myanmar' (9 May 2018) Press Release SC/13331.
[99] Michelle Nichols, 'U.N. Security Council mulls Myanmar action; Russia, China boycott talks' *Reuters* (United Nations, 17 December 2018) <https://af.reuters.com/article/worldNews/idAFKBN1OG2CH> accessed 18 April 2019.
[100] ibid.

Mission on Myanmar.[101] Officially, the Chinese position is that the Council should allow for compromise and cooperation between Myanmar and Bangladesh and "it should not get involved with country specific human rights issues".[102] Truly, there are strategic economic and political interests at play; China needs to keep friendly relations with the government of Myanmar, first, to follow its ambition to become a global superpower by beginning with exerting influence in its region, second, to secure the Burmese support for its 'Belt and Road Initiative'.[103]

Despite the current inaction, it is important to note that a UNSC referral remains a political and legal possibility. On the one hand, from a political point of view, persistent international pressure demanding action and political compromises may contribute to a change of stance on the parts of Russia and China. On the other hand, it is relevant to point out that, despite the conclusion of a preliminary examination by the OTP, the procedural framework of the ICC leaves open the possibility of a future referral by the UNSC. Indeed, such opportunity would materialise in the case of the Prosecutor's inability to meet the requirements to open an investigation, or to charge the defendants. In fact, according to Article 53(4), "[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information".[104] In this case, if it were proven that the inability to enforce cooperation resulted in a lack of evidence which, in turn, caused the failure of the preliminary examination or investigation, it could be concluded that a referral by the UNSC would represent a new fact. Given that the latter fact could potentially lead to a positive investigative outcome, it is argued that the OTP would be allowed to re-open a preliminary examination or investigation on the crimes committed in Myanmar.[105]

4.3. Non-enforcement of cooperation orders: a brief analysis of two 'failed' referrals

From a theoretical point of view, a referral would seem to solve the problem of cooperation examined in the previous section, given that the UNSC retains the power to demand and enforce cooperation by States not parties to the Rome Statute. Furthermore, a referral would extend the jurisdiction of the ICC also to crimes fully committed on the territory of Myanmar, thus, allowing the Court to investigate and prosecute the perpetrators for all the atrocities suffered by the Rohingya, instead of being limited to cross-border crimes. However, it needs to be stressed that this possibility largely remains hypothetical in the absence of an actual enforcement of cooperation by the UNSC; in fact, the ICC has no power to enforce requests of assistance to non-parties under Part 9 of the Statute, thus, it remains largely dependent on the support and follow up actions of the Council. Indeed, the powers at disposal of the latter are more extensive than those of the ICC and include the possibility of imposing an obligation to cooperate with the Court on all States, of mandating additional responsibilities outside of

[101] Michelle Nichols, 'China fails to stop U.N. Security Council Myanmar briefing' *Reuters* (United Nations, 24 October 2018) <www.reuters.com/article/us-myanmar-rohingya-un/china-fails-to-stop-un-security-council-myanmar-briefing-idUSKCN1MY2QU> accessed 18 April 2019.

[102] Permanent Mission of the People's Republic of China to the UN, 'Statement by Ambassador Ma Zhaoxu before the Procedural Vote on the Briefing from the Human Rights Council Fact-finding Mission on Myanmar to the Security Council' (24 October 2018) <www.china-un.org/eng/hyyfy/t1607833.htm> accessed 25 May 2019.

[103] Amara Thiha, 'Myanmar Speeds up Progress on China's Belt and Road' *The Diplomat* (8 December 2018) <https://thediplomat.com/2018/12/myanmar-speeds-up-progress-on-chinas-belt-and-road/> accessed 19 April 2019.

[104] Rome Statute, art 53(4).

[105] In Iraq, preliminary investigation reopened following the submission to further evidence to the OTP; however, there is no precedent as to the re-opening of a previously unsuccessful investigation. OTP, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq' (13 May 2014) <www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014> accessed 21 April 2019.

the ones prescribed by the Rome Statute, and of using sanctions or other enforcement mechanisms provided in Chapter VII of the Charter, arguably including the use of military force.[106]

Having said that, it is clear that with respect to the two instances of Council's referrals, the situations in Darfur and in Libya, the UNSC proved to be unwilling to support the Court's investigations and to react to refusals of cooperation. First, in both cases, the resolution referring the situation to the ICC established an obligation to cooperate and provide legal assistance only on Sudan, in one case, and Libya, in the other.[107] Other States are merely 'urged' to cooperate fully, while it was recognised that non-parties are under no obligation to do so.[108] The non-extension of the duty to cooperate to all the UN members resulted particularly problematic in the case of Sudan; despite Al-Bashir's extensive travels across Africa, including State Parties, his arrest warrant notoriously remains unexecuted due to disagreements as to the scope of the immunity of heads of state and claims of applicability of Article 98(1) of the Statute.[109] Second, after referring the situations, the Council remained rather passive and did not provide the Court with any support.[110] In fact, despite being faced with instances of non-cooperation reported by the OTP, the UNSC did not take any meaningful measure to enforce it. Particularly, in relation to the investigations in Libya, the UNSC proved its reluctance in offering assistance to the ICC;[111] despite the Court's difficulties in collecting evidence, accessing crime scenes and interviewing those indicted, the Council did not make use of any of the enforcement mechanisms at its disposal, leaving the Court unable to ensure accountability.[112]

Therefore, both situations can be deemed a total failure. In fact, respectively 14 and 8 years after the referrals of Darfur and Libya, none of the indicted criminals has faced justice in front of the ICC.[113] While some cases were dropped due to the lack of evidence,[114] following the death of the suspect,[115] or because deferred to national proceedings,[116] the ICC is still

[106] Rosa Aloisi, 'A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court' (2013) 13(1) ICLR 147, 152.

[107] UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, para 2; UN Res 1970 (26 February 2011) UN Doc S/RES/1970, para 5.

[108] UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, para 6; UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, para 6.

[109] Article 98 states that "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.". It is argued that if the UNSC had imposed an obligation to cooperate on all states, it would have resulted in a waiver of Al-Bashir's immunity because, by virtue of Article 103 UN Charter, it would have prevailed over obligations arising from other international law treaties. See, Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315, 330.

[110] Cryer and others (n 76) 164.

[111] Rosa Aloisi, 'A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court' (2013) 13(1) ICLR 147, 155.

[112] ibid.

[113] Pietro Sullo, 'Justice for Darfur: the ICC and domestic justice initiatives eleven years after the UN Security Council referral' (2016) 16(5) ICLR 885, 888.

[114] Charges against Bahar Idriss Abu Garda (Darfur) were not confirmed by the PTC due to lack of sufficient evidence. ICC, Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09, Decision on the Confirmation of Charges, PTC I, 8 February 2010.

[115] The proceedings against Muammar Mohammed Abu Minyar Gaddafi (Libya) and Saleh Mohammed Jerbo Jamu (Darfur) were respectively terminated in 2011 and 2013 following evidence of their death. ICC, Prosecutor v. Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, PTC I, 22 November 2011; ICC, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, ICC-

awaiting on the execution of the arrest warrants against four Libyan and four Sudanese suspects.[117] With respect to Al-Bashir, it is interesting to note that his recent overthrown and imprisonment may lead to new developments, although it is not likely, and perhaps neither advisable, for Sudan to agree to his transfer to The Hague.[118]
Finally, regarding the situation in Myanmar, the dispute over Article 98 would not arise given that the alleged perpetrators do not enjoy any immunity; yet, considering that many countries in South-East Asia are not parties to the Rome Statute, in order to ensure the arrest of the suspects travelling to other countries, the UNSC would still need to create an obligation to cooperate for all States, not just Myanmar. However, given the lack of such a duty in both the past resolutions and the political compromises which are naturally attached to Council's referrals, it is improbable that such a duty would be extended outside of Myanmar. Therefore, considering the past unwillingness to enforce cooperation and the disastrous results it led to, it is argued that a referral by the UNSC would either not produce any positive investigative outcome or result in the inability to enforce the arrest warrants. In any case, it would lead to yet another instance of impunity and failure to bring justice to the victims of atrocity crimes, which would cause further damage the Court's legitimacy and undermine its work.

4.4. Politicisation of justice and loss of legitimacy

The UNSC referrals of the Libyan and Sudanese situations, and the non-referral of situations such as Syria, drew fierce criticism towards the Court. Particularly targeted is the politicisation of justice which, combined with the inability to prosecute the perpetrators, results in a perceived loss of legitimacy by the ICC. In fact, it is a shared belief that independence from political consideration is a fundamental requirement in order for international criminal justice to be regarded as legitimate.[119] Naturally, the possibility of a political body to refer a situation to the Court does not seem to conform to the said requirement. However, if the members of the UNSC were to comply with their duties and set aside political interests when deciding to refer a situation to the Court, the benefits of such a capacity would overcome the disadvantages, particularly considering the contribution it would bring to the achievement of universal justice. Nevertheless, this was certainly not the case in the two past referrals, as well as in the missed opportunities. First, the decision to exclude from the Court's jurisdiction the nationals of non-parties results particularly problematic with regards to the principles of impartiality and equality, thus, compromises the Court's independence and legitimacy.[120] Second, the above analysed lack of support to the Court in enforcing cooperation of non-parties following the referrals and its subsequent inability to bring the perpetrators to justice has frustrated the public's perception of the Court

02/05-03/09, Public redacted Decision terminating the proceedings against Mr Jerbo, Trial Chamber IV, 4 October 2013.

[116] The case against Abdullah al-Senussi was concluded following a successful challenge of admissibility after its trial by a Libyan Court in Tripoli. ICC, Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11, Public redacted Decision on the admissibility of the case against Abdullah Al-Senussi, PTC I, 11 October 2013.

[117] Saif al-Islam Gaddafi (Libya), Mahmoud Mustafa Busayf Al-Werfalli (Libya), Al-Tuhamy Mohamed Khaled (Libya), Abdallah Banda Abakaer Nourain (Sudan), Ahmad Harun (Sudan), Ali Kushayb (Sudan), Abdel Raheem Muhammad Hussein (Sudan) and Omar AL-Bashir (Sudan).

[118] Patryk I Labuda, 'Smart Justice in Sudan: For Bashir's Crimes, Is the ICC Still the Best Route?' (*Just Security*, 24 April 2019) <www.justsecurity.org/63736/smart-justice-in-sudan-for-bashirs-crimes-is-the-icc-still-the-best-route/?fbclid=IwAR0cW0kzUJ1jtdb7iQY5icE0LpNir0PSxh3JYHsIX1-CEE0qH5_ZnIPzDkc> accessed 24 April 2019.

[119] Aloisi (n 111) 159.

[120] Aloisi (n 111) 160-61.

as an efficient and powerful institution.[121] These factors, in addition to the unjustified selectivity of the Council's referrals, have resulted in the mobilisation of critics of the Court which has led to a diminishing international support of its work and, more generally, the wider project of international criminal justice.[122] Thus, it can be concluded that a UNSC referral, which would likely present similar characteristics as the ones for Libya and Sudan, would not only be targeted with the same criticisms of politicisation of justice, but it would also result in a second defeat for the OTP, which would further damage the image of the Court and place the victims' justice on an indefinite stand-by.

4.5. Conclusion

In case the constraints on the OTP's power were to result in the failure to meet the required thresholds to open an investigation or to prosecute, a UNSC referral does not appear to represent a viable alternative. Although the powers at its disposal would hint at its ability to enforce cooperation, the referrals of Darfur and Libya prove just the opposite. Indeed, it would already be very difficult for China and Russia to allow the resolution to pass; thus, even if they were to abstain from using their veto power, they would probably not go as far as enforcing cooperation. One may even go as far as arguing that the only way for the two veto-powers to allow a referral is knowing that it would not lead to any significant result unless further action is taken. In such a case, a second investigation by the Court would only result in criticisms as to the politicisation of the process. This, in addition to the impossibility to succeed in holding the perpetrators accountable, would contribute to reinforcing the perceived loss of legitimacy by the Court. Furthermore, it would worsen the position of the victims which, after being given a new expectation of justice being done, they would see it vanish once again. Therefore, those advocating for a Council's referral should be careful in making their assertions and cautiously consider whether it would be of any benefit in achieving the aim of ending impunity in Myanmar and bringing justice to the victims.

[121] Louise Harbour, 'The Relationship Between the ICC and the UN Security Council' (2014) 20(2) *Global Governance* 195, 200.
[122] ibid.

Section 5: Concluding remarks

The Rohingya crisis resulted in one the worst humanitarian crisis ever witnessed; hundreds of thousands of people belonging to the Muslim ethnic minority, after being subjected to decades of abuses and infringements of human rights, were forced to leave Myanmar via a heinous campaign carried out by the Tatmadaw's officials. The latter, dubbed 'clearance operation', consisted in the commission of some of the worst atrocity crimes, including indiscriminate shootings directed at the population, burning of villages, rapes and other forms of sexual abuses. It has been argued that the military's actions amount to crimes against humanity, war crimes and genocide which, by virtue of their scale and gravity, and, in the absence of any chance of prosecution at the domestic level, demand a prompt international response. However, despite the findings of the Fact-Finding Mission in Myanmar and the persistent calls for action, the UNSC failed to refer the situation to the ICC, blocked by disagreements among its permanent members. Thus, the request of the OTP as to the possibility of bringing the matter under the Court's jurisdiction, and the subsequent positive decision of the PTC, raised new hopes of accountability and justice to the victims. However, one should not be too optimistic about the ability of the ICC to live up to these expectations.

This research posed the question of whether the ICC can be successful in holding to account the perpetrators of the atrocity crimes suffered by the Rohingya minority and, consequently, deliver justice to the hundreds of thousands of victims. The analysis presented in the above sections suggests that the question is to be answered in the negative. Section 2, after a brief introduction to the crisis and the crimes perpetrated, focused on the analysis of the response of the Prosecutor and the progressive judgement of the PTC, which certainly represented a positive legal development. Nevertheless, it argued that an investigation *proprio motu*, being limited to the crimes partially committed on the territory of Bangladesh, thus, excluding some of the gravest crimes committed, fails *a priori* to deliver a sense of justice being done to the victims. Section 3 proved that the cooperation regime of the Court, being based on the assistance of States, imposes significant limits on the investigative powers of the OTP; these constraints will likely lead to the impossibility to conduct an effective investigation, thus, to reach the 'sufficient basis' evidentiary threshold for prosecution. Moreover, even if the perpetrators were to be charged, due to the non-cooperation of Myanmar, the warrants of arrest would probably remain unexecuted. Thus, in the absence of a conviction, the victims will be left without reparations and a void resulting from the crushed expectations. Given these limitations and the probable failure of an OTP investigation, Section 4 assessed whether there would still be room for a referral by the UNSC and whether it would produce any positive result. With respect to this, it was concluded that, although the Statute's legal framework does not prohibit it, it is not advisable to undertake this path. In fact, it was asserted that the Council's passivity following the referrals of Libya and Darfur demonstrated its unwillingness to make use of any enforcement mechanism as a response to refusals of cooperation, leading to largely the same problems of lack of access to evidence and suspects that has been examined in the context of the investigation *proprio motu*. Thus, a UNSC referral does not solve the problematics related to the enforcement of cooperation, which may result in the decision of the victims to leave the proceedings or, alternatively, to remain in the purgatory of the Pre-Trial stage.

These factors prove the thesis that the ICC may not be the best tool to bring justice to the Rohingya victims, due to the inability of the Court to resolve the insurmountable obstacle of cooperation and hold the perpetrators accountable. However, the negative answer certainly cannot be of a definitive character and attention should be paid to the imminent legal and political developments. It is also relevant to briefly point out that an ad hoc tribunal would not represent an effective alternative to the ICC. In fact, as seen in the case of the International Criminal Tribunal for the former Yugoslavia, no meaningful result was reached until the

former Yugoslavian states decided to cooperate with the prosecutor in The Hague. On the other hand, although unable to directly lead to accountability, the imposition of financial sanctions targeting the companies controlled by the military and an arms embargo could at least be effective in reducing the Tatmadaw's human rights violations. This is in accordance with the recommendations made in the most recent report by the UN Fact-Finding Mission, which found that the military has used its own businesses, foreign companies and arms deals to support their operations against the Rohingya minority.[123] The author believes that focusing on attacking the economic interest of Myanmar's military may, at least for now, produce the most effective results in bringing an end to the abuses. Yet, as the future of the Rohingya minority remains uncertain, it is a duty of the international community to carefully consider more effective roads to prosecution, in order to end impunity and deliver the well-deserved justice to the Rohingya victims.

[123] Human Rights Council, 'The economic interests of the Myanmar military' (42nd Session, 9–27 September 2019) UN Doc A/HRC/42/CRP.3.

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Myanmar's Religious and Ethnic Conflict: A Case Study

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Abstract:

This case study analyzes the Rohingya ethnic cleansing and investigates the current conflict while explaining more complex questions involving the crisis; this is done by describing and addressing its escalation. The framework used to support this analysis is Christopher Mitchell's SPITCEROW. By using this framework as a guide to analysis, it is conclusive that the Rohingya are being systematically abused as a result of historical oppression and European imperialism. Additionally, multiple intervention strategies are introduced.

Keywords: Rohingya, Myanmar, conflict, SPITCEROW

Myanmar is a hot bed for human rights activism and conflict analysis, with more than 900,000 Rohingya refugees fleeing Myanmar since March 2019 (United Nations Office for the Coordination of Humanitarian Affairs, 2019). Since 2012, systematic religious persecution has been exacted on the minority Muslims by a majority Buddhist government, which will be analyzed in this case study.

To understand any conflict, one must first go to the source. In the case of Myanmar, the conflict can be traced as far back as 1784 (Ullah, 2011). In the article titled, "Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization", Akm Ahsan Ullah explains that the Rohingyas, who originate from the Muslim Kingdom of Arakan, were conquered and absorbed by the Buddhist Kingdom of Burma. Burma was then colonized by Great Britain in 1824 and stayed under colonial rule until 1937 (Smith, 1996, p. 5). During nearly a century of colonial rule, there was massive immigration of different people with different cultural and religious identities. This mass flux of people intensified the pre-existing tension between the indigenous religious groups because of the pressure to conform to Western ideals and customs (Smith, 1996).

Japan retained control of Burma during World War II, which drove many Rohingya out of the Rakhine territory. However, in 1984 Burma became independent and the tensions between the two groups increased exponentially. A few years later, in 1963, the Burma Socialist Party seized power and disassembled the Rakhine State (Ullah, 2011). In 1977 a National Census, later used as the foundational claim for the exclusion of the Rohingyas, was distributed. Drawing from this data, Citizen Scrutiny Cards were introduced to display racial purification (Ullah, 2012). These policies are similar to the policies in place during the Apartheid in South Africa and in Nazi-era Germany, including sanctioned racial segregation and political and economic discrimination against the minority (Szep, 2013).

Although history explains the origins of the conflict, is does not fully address the source of the conflict. Of the many theories that can be applied, the most relevant is the Social Identity Theory. Social Identity Theory was developed by Henri Tajfel to explain the relationship between in-groups and out-groups. The theory states that "in order for the members of an in-group to be able to hate or dislike an outgroup, or to discriminate against it, they must first have acquired a sense of belonging to a group which is clearly distinct from the one they hate, dislike or discriminate against" (Tajfel, 1974, p. 66). In this case, the in-group, the Buddhists, are discriminating against the outgroup, the Muslims, and more specifically the Rohingya. This dynamic has created a power imbalance imposed through religious identity and consequently, has created a means for justification of persecution.

Since 2012, which is considered to be the beginning of the systematic cleansings, the conflict has evolved; the Rohingyas have been more aggressively targeted, this conflict has been taken to the international stage, and political and religious figures have begun to comment on it. In 2016, there was a shooting where nine border police killed and the Rohingya people were blamed by the government ("Myanmar", 2017), and the severity of the situation in Myanmar came to the attention of the international community. As the conflict escalated the more extreme tactics (i.e. rape, arson, murder) began to happen more frequently. These have all been excused as they are under the guise of military crackdown.

This conflict is multi-partied, involving institutions and organizations as well as government bodies. The United Nations is embroiled in this conflict as they have a responsibility to protect all human rights and aid in the defense of those being persecuted per the United Nations Human Rights doctrine. Consequently, all member states of the United Nations also bear part of the responsibility for this conflict. Additionally, Myanmar's government officials have failed the Rohingya people and have been instrumental in the structural and direct violence the Rohingya have endured. This began with the 1982 Citizenship Law of Myanmar, which was the first legal document that rendered the Rohingya stateless, and has served as a precedent defending discriminatory policies.

The International Criminal Court (ICC) is the leading court system for prosecuting atrocities and genocide, acting under the Rome Statute of 1998 (United Nations, 2012). This statute outlines the elements of genocide, crimes against humanity, aggression, and war crimes, of which there is enough evidence to prosecute the Myanmar's government for. However, valid arguments raising the question of the legality of court intervention have been made by the Myanmar government. The main problem is that Myanmar is not a party of the ICC. This means that they cannot be held accountable on this platform without the referral of UN member states, which is unlikely as Russia or China will likely veto all votes against Myanmar. Regardless, the cross-state nature of this conflict has allowed for a legal foothold. Since Bangladesh is a member of the ICC, they technically have the jurisdiction to prosecute under Article 5. By classifying the violence as crimes against humanity, the ICC can act.

Additionally, the Responsibility to Protect (R2P), first introduced in the Report of the International Commission on Intervention and State Sovereignty of 2001, created the first international protocol to protect victims of the four mass atrocity crimes under jurisdiction of the International Criminal Court (ICC); genocide, war crimes, crimes against humanity and ethnic cleansing. The legislation has three pillars, the responsibility to protect, to prevent, and to react. The Rohingyan people have been failed in all approaches, as the UN Security Council has yet to hold perpetrators accountable for the atrocities committed.

Morality, ethics, and awareness come head to head when weighing the option of prosecution as it has the potential to create negative externalities. The office of Aung San Suu Kyi said this ruling could "set a dangerous precedent whereby future populistic causes and complaints against non-State Parties ... may be litigated." (Sterling, 2018). This is a valid concern, however, it would only become a threat to general international security if the ICC became corrupt or lost sight of its mission.

One of the main arguments against classifying this violence as genocide is that the Rohingya are not an ethnic group. The official spokesperson of the Rakhine State Government, Mr. Win Myaing said this very thing in May of 2013: "How can it be ethnic cleansing? They are not an ethnic group." (Szep, 2013). This statement is true, as Rohingyas have not been classified ethnicity in Myanmar since the 1982 Burma Citizenship Law (Human Rights Watch, n.d), and the President of Myanmar, Thein Sein, affirmed this stating that, "We do not have the term 'Rohingya." (Szep, 2013). This statement exposes the impact of socially constructed labels and how they are being abused to oppress a minority.

As discussed in the beginning of the paper, the people of Myanmar have the same ancestors, and with the pressure of colonization, branched out into different religions. The basic ideology that "separates" these groups is constructed, negating the very foundation of this conflict and maintaining the controversial stance that this should not be considered a genocide. But by the same logic, the idea that this conflict is a social construct emphasizes the severity of the conflict as the perpetrators of the violence have reemphasized the Social Identity Theory.

Social Identity Theory is a core component of most conflicts, including the Rwandan Genocide, The Holocaust, and the Bosnian Genocide. That is why this can be argued to be a genocide, it parallels many of the hallmark features of previous Genocides. The matter is being debated in the United Nations with the United Nations Special Rapporteur for Human Rights, Tomds Ojda Quintana, stating that, "There are elements of genocide in Rakhine with respect to Rohingya . . . . The possibility of a genocide needs to be discussed..." at the London Conference on Decades of State-Sponsored Destruction of Myanmar's Rohingya, April 28, 2014 (Zarni & Cowley, 2014). Since then, an Independent Fact-Finding Mission in Myanmar, conducted by the United Nations Human Rights Council, has reported that:

> "Some 600,000 Rohingya are estimated to remain in Rakhine State. They continue to be subjected to discriminatory policies and practices, including segregation and severe

> restrictions on their movements; deprivation of citizenship; denial of economic, social and cultural rights; physical assaults constituting torture or other cruel, inhuman or degrading treatment or punishment; arbitrary arrest; and, in some areas, hostility from members of ethnic Rakhine communities that the mission found also to constitute persecution and other prohibited crimes against humanity." (p. 12-13)

Other developments of the case have seen Yanghee Lee, the UN special rapporteur on human rights in Myanmar, pushing the classification of genocide. In a recent statement she said, "Min Aung Hlaing and others should be held accountable for genocide in Rakhine and for crimes against humanity and war crimes in other parts of Myanmar" (Al Jazeer, 2019). This statement is momentous as it is the first definitive step towards justice for the marginalized and oppressed Rohingya.

Up to this point, the people in power have not been held accountable on an international platform. The matter of whether or not this is a case of genocide lies in the interpretation of the documents from the Convention on the Prevention and Punishment of the Crime of Genocide, but whether or not the basic human rights of the Rohingyas is being violated is determined by the Universal Declaration of Human Rights. The systematic persecution of Rohingyas is in direct violation of multiple articles in the declaration, but the most glaring is the complete disregard for Article 5, which will be analyzed in the following section (United Nations, n.d.). It is a valuable lens because it is the cornerstone of human rights and is upheld by the world's superpowers.

Article 5 of the Universal Declaration of Human Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (United Nations, n.d). Despite this, the Myanmar government has limited access to basic needs; medicine, housing, and food. They have also forced the Rohingya to live at gunpoint, murdering and raping them. Additionally they have burned Rohingyas villages, houses, and marketplaces, taken away most viable options for income ("Myanmar", 2017).

This conflict has existed since the late 20th century and only has come to the attention of the general public in the last five to ten years. This much press has generated a lot of conversation with the hope of trickle-up effect. As indicated earlier, this population has been more aggressively persecuted and the population of Muslims in Myanmar has reduced significantly.

The proposed intervention model for the Rohingya crisis involves "conceptualizing, planning and monitoring how a value based and principled conflict sensitive approach to humanitarian assistance could contribute to longer-term social transformation goals" (Irenees, n.d.). By focusing on needs assessments and practical planning, including existing intervention proposals, and integrating all levels of actors into the model, an effective intervention model can be created.

The first step in any intervention model is needs assessment. Not only does it aid in program planning and monitoring, it also benefits program accountability. Effective assessments allow for clear and successful decision making, which is very important in a crisis. However, it is useful in all stages of intervention not just the initial assessment of the crisis, as will be visited later in the paper.

The Rohingyas most pressing needs are that of safety, food, shelter, sanitation, health care and water, as mentioned earlier in the paper. These are all basic needs that are inherent and should not be threatened, much less withheld on the basis of discrimination, oppression, and marginalization.

In order to transform this situation and make aid accessible to all who need it in Myanmar, the government will need to be willing to engage in negotiations and mediation. This involves raising awareness, in order to pressure positive change, and opening dialogue for all parties in the conflict, most notably China and Bangladesh.

China has recently proposed a three phase plan of intervention in Myanmar; "ceasefire and restoration of social order", encourage talks between Myanmar and Bangladesh in order to find a solution, and promoting the development of the Rohingya people (Hongliang, 2017). This

intervention draws on Marie Dugan's Nested Theory of Conflict, addressing "issue-specific, relational, and structural subsystem" (Dugan, 1996).

The specific issue of this conflict is the direct violence against the Rohingya. In order to begin a "ceasefire and restoration of social order" the basic needs of the Rohingya should be addressed and transformed. This ties into the needs evaluation portion of the essay and re-emphasizes how important it is to the intervention process.

The relational conflict is "one which emerges from problems having to do with the interaction patterns of the parties and their feelings toward each other" (Dugan, 1996). The goal of encouraging talks between Myanmar and Bangladesh is to move towards a solution for each party. The Rohingya people need somewhere to go and Bangladesh is the closest option, but it also brings to question why they need to leave in the first place. The Rohingya have just as much a claim to the Rakhine state as any other citizen of Myanmar, but it is being denied. So implementing talks will be a positive step in the right direction, but it doesn't address the underlying, or substructural, conflict.

This structural conflict involves inequities that are standardized into the social system of a society (Dugan, 1996). This stage of Dugan's theory summarizes the conflict between the Rohingya and the Myanmar's government; Myanmar is oppressing the Rohingyas based on religious discrimination, which is being disguised as ethnic intolerance. This systemized abuse is the result of historical ostracization and European imperialism, reinforcing the substructure of the conflict.

One thing that the Chinese intervention proposal lacks is attention to the types of actors. Their model focuses, almost exclusively, on the top leadership. In *Building Peace: Sustainable Reconciliation in Divided Societies* John Paul Lederach writes about the different types of intervention based on the actors: The top leadership "focus on high-level negotiations, emphasizes cease-fire led by highly visible single mediator" (Lederach, 1997, pg. 39), which is exactly what the Chinese plan proposes. While this approach is comprehensive for the type of crisis that is occurring in Myanmar, utilizing middle range and grassroots leadership will facilitate a more successful conflict transforming intervention.

When thinking about how to integrate middle-range leadership into a crisis of this extent, one must consider that they have the most influence over the affected populations. Lederach suggests bringing together "leaders respected in sectors, ethnic and religious leaders, academics and intellectuals, and humanitarian leaders" (1997, pg. 39). Not only are these actors equipped to analyze the conflict, they have sufficient knowledge and experience in administering effective peacebuilding. Mid-range actors have legitimacy in the communities affected and can influence more peaceful practices.

Grassroots leadership is important but does not necessarily high impact at this stage of the conflict. Grassroots leaders include "local leaders, leaders of indigenous non-governmental organizations (NGOs), community developers, local health officials, and refugee camp leaders" (Lederach, 1997, pg. 39), which should be integrated into phase three of the Chinese proposal. As the Rohingya are in a state of crisis, the first step is meeting their immediate needs, and after this has been accomplished, grassroots leadership will be able to effectively participate in peacebuilding. As long as there are heightened tensions and immediate violence, the most logical approach is to use top leadership, but middle-range leadership can be effective as well.

In simplest terms, successful intervention will include ending all active military operations in Myanmar, committing to needs assessment, encouraging negotiation of ceasefire and peace agreements, empowering the Rohingya people and providing means for their return to Rakhine State, and granting the Rohingya full citizenship. This will allow for the methodical confrontation of ethnic cleansing and the transformation and prevention of future occurrences

Although there is no end in sight, there is still hope for the dwindling Rohingya population and justice for the Buddhist government. This guided analysis opens the door for deeper investigation of conflict and explains some of the more complex questions involving the Rohingya crisis. Consequently, one can recognize that Myanmar, as a state, is oppressing and manufacturing

maltreatment against a targeted population based on religious discrimination disguised as ethnic intolerance. This systemized abuse is the result of historical ostracization and European imperialism, as proven in the source portion of the analysis. By denying this religious minority basic human rights, an issue that has been mishandled internally, Myanmar is being judged on an international stage. There is still time for this conflict case to evolve but the root problem will not change, religious intolerance and superiority will breed ethnic cleansing and genocidal tendencies. By performing needs assessments, practical planning can take place. Drawing from the Chinese proposal is beneficial to this intervention and is supported by multiple frameworks of evaluation. However, including all levels of actors in the conflict will create sustainable peacebuilding and conflict transformation.

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Open World Empire: Rethinking Law, Culture, and Rights

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Abstract:
The overall goal of this paper is to attempt to forge a connection among cultural studies, human rights discourse, and international law, in order to understand better the changing and complex political context that continuously reshapes social and political lives. At a time of enormous uncertainties and egregious erosion of liberties, and given that the three fields above share a common commitment to social justice theory and practice, this conceptual paper aims at constructing a new integrated framework of analysis underscored by the notion that human rights are "a site of legal-cultural struggles." By this, we mean to focus on two critical dimensions. First, there is the dimension of human rights as transnational social movements of cultural politics. Human rights constitute an axis in a transnational range of social movements. The mass organizing today are more likely than their predecessors in the Cold War era to form an intricate collectivity capable of transforming the traditional fixed positions, whether it is the position of the peasant, the unionist, the migrant, the woman, the ethnic minority, or even the intellectual. With "horizontal networking" as it modus operanti, this collectivity strives to link up various scales of social movements from different locales and regions, generating both planned and impromptu events to lend support to people and groups that have been unjustly treated by the state, raise popular consciousness, oppose repressive policies, and stage direct actions. Second, there is the dimension of human rights as a global legal apparatus. Social movements politicize and humanize the discourse of rights by paying attention to the life spaces of peoples and their everyday struggles. However, this does not erase the importance of the institution of law that impacts upon those very life spaces, nor does it suggest that social movements are always and everywhere opposed to the tools of law to create change. This conceptual paper's ultimate aim is to mutually reframe human rights and cultural studies, rearticulating them as symbiotic political and intellectual practices. On the one hand, it seeks to move human rights discourse beyond narrow normative and doctrinal practices, as well as contest its narrow definitions of culture and power. On the other hand, it hopes to take cultural studies somewhere it has largely stayed away from – the domain of formalized institutional rules of engagement in general, and international human rights law in particular – and in so doing, open a door for critical scholarship to flow.

Reframing Cultural Studies

This paper attempts to forge a linkage between cultural studies of law and critical human rights politics. It is argued that this linkage is important for overcoming the respective blind spots in the analysis of the cultural politics of law, rights, and social justice within the context of an escalating crisis of modern sovereignty. It is committed to forging an articulation between cultural studies and public law in order to better understand the changing and complex political context that continuously shapes contemporary ethical debates. More specifically, in this paper, I endeavour to build a closer relation between cultural studies (especially the social movement bend of the field) and human rights (especially critical legal theory as well as the pragmatic practices of the field) — seeing that both share a broad commitment to progressive social justice work — at a time of enormous global uncertainties

and egregious erosion of liberties. In order to remap the ethico-political commitments of cultural studies from *within* a "rights imaginary," we need to embed the practice of cultural studies inside the legal space of, the institutions associated with, and social movements connected to human rights.

Cultural studies and human rights practices have considerably divergent genealogies. The former's grounding in anti-foundational philosophy is different from the latter's root in Kantian ethics; the former's proximity to critical sociology is contrasted with the latter's explicit devotion to social movement practice; and the former's adherence to critical theory in the humanities and interpretive social sciences diverges significantly from the latter's commitment the natural law and positivist law traditions. While there are philosophical incompatibilities between the two, there are also intellectual and political synergies. To date, however, interdisciplinary dialogue or institutional alliance, let alone partnering projects and teamwork, remains rare across the two domains.

In our world today, without having to enumerate wars, killings, brutalities, and all forms of social and economic exploitations that we see in national and international contexts, it is nonetheless possible to mark this current conjuncture as, in many have already suggested over the past few years, "the end of human rights." At the same time, however, it is equally possible for us to note a sense of ethico-political renewal of global human rights accountability that has been raised by the refugee problems, extreme environmental crises, the rise of ultra-right wing populism, deep ethnic and religious conflicts, to name just a few. This renewal has been marked most spectacularly in mass protests and occupy movements everywhere, and in less spectacular forms of mobilization (such as in the World Social Forum).

At the crossroads between human rights despair and human rights renewal, how should cultural studies respond, assuming that the latter is still a project committed to analyzing the changing contemporary conjuncture, and is still supposed to be self-reflexive about its vocational objectives? Political theorist Jean Cohen (2005) observes that as capitalist expansion becomes more and more globalized, she conceives of two choices we have in dealing with a possibly obsolete international human rights system. We could either work to strengthen human rights legal institutions and norms by updating them — that is, by cosmopolitanizing them — or seek to suspend consensually established global rule of law in the name of "saving" human rights from "rogue" nations and fringe groups with the underlying intent of restoring the neo-liberal order of "empire" (161).

In this paper, I am trying to think through how cultural studies can be *relocated* to meet the current challenges in social and political struggles worldwide, and thus to remap the context for the field itself.[1] My hope is to take cultural studies somewhere from which it has largely stayed away — the domain of formalized institutional rules of engagement in general, and international human rights law in particular — and in so doing, open a door for critical scholarship to flow. To this, Rosemary Coombe's reminder in her important essay entitled "Is There a Cultural Studies of Law?" seems useful: "Although legal texts, legal forums, and legal processes have been analyzed as cultural forms, no substantial body of work demonstrating the methodological commitments, theoretical premises, and political convictions that characterize the interdisciplinary field of cultural studies has yet appeared with respect to law" (36).

In the last chapter of his 1992 book, Lawrence Grossberg gave a biting critique of the American left's failure to mobilize an anti-war struggle in the wake of the first Iraq War. There is an interesting section of the chapter that reads, "Politics as the Art of the Possible" (385). Referring to the dramatic dismantling of Apartheid in South Africa, Grossberg argues that what the progressive movements did to help bring Apartheid to an end was to

"mobiliz[e] popular pressure on institutions and bureaucracies of economic and governmental institutions" (391). He addresses the American left:

> The Left too often thinks that it can end racism and sexism and classism by changing people's attitudes and everyday practices … Unfortunately, while such struggles may be extremely visible, they are often less effective than attempts to move the institutions … which have put the economic relations and Black and immigrant populations in place and which condition people's everyday practices. The Left needs institutions which can operate within the systems of governance, understanding that such institutions are the mediating structures by which power is actively realized … The Left does in fact need more visibility, but it also needs greater access to the entire range of apparatuses of decision making and power. Otherwise, the Left has nothing but its own self-righteousness. (391)

Grossberg's call for an increased institutional visibility of the left, which he made at that time in response to Reaganism, is entirely relevant — if not more so — today in an era shaped by a global regime of military and economic aggression bolstered by the "reactionary Right" in the U.S. and elsewhere (Trump being merely an inheritance of a long period of a radical Right-moving political landscape) (see Grossberg, 2018).

Cultural Studies and Ethics

In recent years, many have expressed dissatisfaction about the relevance of cultural studies. The myriad forms of intellectual and political interventions that have been made under the broad rubric of cultural studies, it has been said, have promulgated at best a discourse of general dissent, but at worst a space for self-reproduction.[2] Whatever "success" there is for cultural studies in engendering new intellectual formations in and outside of universities, it is generally tainted by a nagging lack of clarity or ethical force. Joanna Zylinski (2002) puts it this way some years ago:

> [W]hile the more overtly articulated political questions shape the cultural studies agenda, ethics seems to be its hidden, unrecognised and uncalled-for other. Whenever ethics does make an appearance in cultural studies, it risks being reduced — even if mainly by press commentators and supporters of the traditional model of "excellence" in education — to either moralism or "victim recognition" (n.p.; see also Zylinski, 2005).

In ethico-political debates today, is cultural studies that which one cannot not want? I think the problem is in part how to re-characterize cultural studies *after* the exuberant proliferation of its own spaces. In academic corridors at least, is cultural studies a newly remodeled humanities discipline, a consciousness-raising flagship operation on behalf of politics in the streets, or a new form of applied research? Or can it be a reformulated type of discipline built on the advancement of pragmatic justice through a tripartite investment in critique, professional training, and public participation? I am certainly not the first person to ask this kind of but I have in mind a specific way of (narrowly) posing the question, which is this: In the (re)turn to both distributive and recognition justice, how will cultural studies clear a space for a parallel intellectual and political engagement with human rights law as a global professional, interdisciplinary, and pragmatic humanitarian practice?

Long before I decided to undertake a formal study of international law, when I believed cultural studies provided me with the impetus for a broad practice for engendering progressive political hopes, I was in fact naïve about either politics "in the real" or about progressive hope. I first came into contact with human rights debates through an interdisciplinary program at Columbia University in 1999. In that year, I held a Rockefeller Fellowship that enabled me to participate in Carol Vance's then newly established Program on Gender, Sexuality, Health, and Human Rights (the Program discontinued after some

years). When I participated in the program, it was conceived as an intellectual enterprise established by Vance to engage with the multiple forms of social, political, cultural, and postcolonial wars against non-normative genders and sexualities. This enterprise culminated in the weekly seminars, which saw participation from feminists, representatives of community groups, critical-minded staff and graduate students, and human rights advocates, analysts, and practitioners. While very few of those participants directly allied themselves with cultural studies *per se*, the discussion in the weekly seminars intersected tacitly with it by means of a shared critical sensibility, a more or less common academic vocabulary drawn from a broad Marxist, feminist, subalternist, and postmodernist ethos, and finally, a crypto-critique of the relevance of cultural studies itself. As our discussion began to take shape around a complicated set of concerns brought about by theories of gender and sexuality, the various forms of public health practices that contoured international body politics, and the community-based activist-oriented critique, the discussion was also frequently dominated by a human rights legal perspective. A rights-based discourse in formal legalistic terms, as well as in the more informal terms of oppositional critique of law, was not only leading our discussion, it effectively colonized it. I mentioned earlier the presence of a crypto-critique of the relevance of cultural studies. The inadequacy of cultural studies, in using its analytical tools to speak about the problematics at hand, became a tacitly agreed-upon fact among the participants. The "shame," if you will, was subtly cast in the form of cultural studies' lack of institutional knowledge of, or strategic political capital in, either rights-based discourse or legal-based intervention. The tacit or hidden agreement about the seeming irrelevance of cultural studies, while not manifesting in any direct attack on cultural studies, nevertheless silenced it. To me, the experience was one of intellectual reinvigoration via a strange form of (self-)silencing. I found myself troubled by a certain kind of theoretical as well as political reductionism in an intellectual atmosphere dominated by human rights discourse and international law. In this particular context, are human rights discourses and international law that which one cannot not want?

Mostly, I remember feeling very uneasy about a certain kind of self-assurance of political certainty. I felt that human rights were too easily taken as a rallying point to validate multiple modes of injury, to rehash over and over again the various forms of nationalism that inflict those injuries, or even to self-servingly advance the professional field of human rights itself. In spite of the skepticism, I was however immensely seduced by the rights discourse and international law. I felt that those were clearly blind spots in cultural studies' whole theoretical apparatus for thinking through questions of power and politics. That a complicated engagement through an oscillation between skepticism and seduction was conducted via (self-)silencing, convinced me that cultural studies somehow must render itself more "relevant" without compromising on its anti-reductionist stance.

Facing the problem of cultural studies' apparent lack of relevance, we may be compelled to ask what is *after* cultural studies as we know it today, by abandoning those elements of the field that lead to mere self-reproduction, thus relinquishing a certain barrier to other critical impulses. Larry Grossberg (2006) has continuously called for a necessary "relocation" of cultural studies in relation to the pressing conjunctural struggles. To do so, he argues, would require us:

> not only doing cultural studies conjuncturally but also reinventing cultural studies itself — its theories and its questions — in response to conjunctural conditions and demand. It is for this reason, I think, that cultural studies (along with many other critical paradigms and practices) has had surprisingly little to contribute to the analysis of the very significant struggles and changes taking place within many national formations as well as on a transnational scale. Without an understanding of what is going on, cultural studies cannot contribute to

envisioning other scenarios and outcomes, and the strategies that might take us down alternative pathways. (8)

Refiguring Human Rights

Let me now briefly sketch an integrated framework of analysis that serves to redirect cultural studies toward a symbiotic convergence with human rights political and legal practices. This is a framework underscored by the notion that human rights is, simply put, *a site of "juris-cultural struggles."* I shall elaborate more on the notion of "the juris-cultural" in Chapter Three, but for now I designate it to mean three critical dimensions: (1) a conceptual reorientation of human rights as a political representation of modernities-in-struggle; (2) a perspective of human rights as a nodal point of transnational social movements; and (3) a utilization of human rights as a global legal apparatus with notable impact on the discourse of public social justice. In what follows, I introduce these three intertwining dimensions that, in many ways, represent what I propose to be the conceptual framework for refiguring human rights from a critical cultural studies perspective.

Human Rights as Modernities-in-struggle

The genealogy of the modern human rights regime suggests that not only were distinctive states engaged in a search for a common humanity, they were also in search of a common modernity. Those were at least the expressed motivations for constructing a new and peaceful international community in the early twentieth century. The price for peace and stability took the form of an enactment of a moral-juridical discourse of universal rights buttressed by the rational science of international relations.

Returning to the enactment of the moral-juridical discourse of universal rights, it is noted that in this embryonic stage of industrial modernity, there were already two signs that powerfully pointed to a fragility of that universalist project. First, the League of Nations formed at the end of World War I instituted a series of minorities treaties as soon as a remapping of territoriality was underway in Europe. It was realized that the redrawing of state borders and the creation of new states necessitated the creation of minorities treaties and declarations to protect displaced ethnic groups, especially those in Eastern Europe. This was the first sign of a nascent but localized particularism in the world conception of human rights. But a more serious threat to universal rights came in the contentious debate over the question of slavery. The reluctance of many members within the League to abolish slavery, needless to say, seriously called into question the moral foundation of the rights discourse. Despite efforts to address the question of slavery, such as the 1926 Slavery Convention, the notion of a unified modernity was breaking at the seams. With that, the property-based conception of human rights looked all too suspect, and the concern for the plight of workers felt all too phony. Yet at a deeper level, this second sign that punctured the universalism in human rights revealed a larger problem, which is the question about modernities-in-struggle.

What the modern system of human rights exposes is a competition of modernities, manifested through rivalry among immutable colonial powers as well as recognition of vestiges of cultural differences around the globe. Western nations formed their own power bloc in order to proffer Enlightenment ideals of human emancipation, while continuing to advance their imperial interests around the globe. Meanwhile, pre-industrialized African nations banded together to formulate what an appropriate rights regime might look like for their indigenes. The League of Nations was widely perceived as a failed revolutionary project, since it succeeded neither in banishing armed conflicts, nor in inaugurating a new modernity of equality and human emancipation (see Goodale, 2009; Ishay, 2007).

The history of human rights leading up to the current moment continues to annex a history of encounter between industrial and post-industrial modernity of the West and

alternative visions of modernity embodied chiefly by the colonized others. Agrarian modernity, Islamic modernity, socialist modernity, subaltern modernity: these are but provisional notations gesturing toward visions of humanity and of rights that are *excluded* from, or made *secondary* to, colonial modernity. It is therefore not by chance that the modern human rights structure under the United Nations saw a stratification of rights into primary and secondary rights, or successive "generations" of rights. The second and third generations of rights are those rights that are most closely relevant to non-Western nations, including development rights, cultural rights, indigenous rights, and various forms of social and economic rights. Meanwhile, the imagination of primary or first-generation rights coincides with the political imperative of protecting industrial interests, processes of marketization, Judeo-Christian rights, and the development of the legal architecture of modern neoliberal governance.

One of the most visible and controversial retort to the hegemonic discourse of primary rights linked to Western liberal models of democracy has to be the one that came from industrialized East Asia. With the 1993 Bangkok Declaration on Human Rights, an apparent consensus was reached to oppose the universalizing norms in the Western conception of human rights. The Bangkok Declaration attempted to reframe human rights as a question of sovereignty defense by Asian nations — a kind of putative regional rights platform to plan their own alternative future without interference from the West. Article 6 declares that "all countries, large and small, have the right to determine their political systems, control and freely utilize their resources, and freely pursue their economic, social and cultural development." Here, an ethno-national argument is clear, when elevated to the status of a political consensus for a regional right of self-determination, emboldening Asian governments to achieve hegemony over an ostensibly "alternative" polity. The consolidated tag of the "Asian values" debate in fact exposes the chauvinistic nationalisms of industrialized East Asia, which in many ways mirror the colonial nationalisms of the industrialized West. In fact, right after the Bangkok meetings, in barely three months' time, the Vienna Declaration in 1993 saw many NGOs from the developing world, including those from Asia, *reject* the "Asian values" push. Many of the groups still wanting to work toward establishing local human rights commissions in their countries nonetheless refused to let the ethno-nationalism of the Bangkok Declaration go unchallenged (see Durbach, 2009).[3] Pheng Cheah (2006) takes this kind of sentiment one step further by arguing that the polarization of modernities masks an underlying hegemonic order:

> [W]hat is at stake in the elaborately media-staged skirmishes between states over international human rights [at the Bangkok meetings] is not really Western or Northern imperializing universalism versus Eastern or Southern cultural difference. The two poles of that binary opposition are complicitous. The fight is between different globalizing models of capitalist accumulation attempting to assert economic hegemony. The coding of this fight in terms of cultural difference diverts our attention from the subtending line of force of global capital that brings the two antagonists into an aporetic embrace *against* the possibility of other alternatives of development, feminist or ecological-subalternist. (148; his emphasis)

Here, Cheah strikes a cautionary note on any sense of statist alterity that captures "culture" as simultaneously a defense and a mask. What is ultimately excluded is the possibility of an autonomous politics of human rights in the Global South, the site of a range of emergent modernities that have variously been called indigenous, post-developmental, or post-socialist. The human rights system as a whole has not adequately responded to these emergent modernities that, despite their marginality in the global geopolitical sphere, must struggle with all forms of political and economic violence brought about by global capitalist

expansion. We must ask: How does the modern human rights system move forward to address post-Enlightenment and post-capitalist rights by considering the rights discourse's own postcolonial condition? How do we reconceive of an outside to the modern human rights regime, by thinking from *within* the regime's configuration of modernities? These are important questions, to which I will provide a detailed discussion in Chapter Four.

Suffice it to say, to work through this conundrum, some international lawyers from the Global South have sought to reconceptualize a new, and perhaps more genuine, conception of universalism in human rights. They argue that international law must be "decolonized," without threatening the universal applicability of international law itself. They have called for a new international economic order and the establishment of the UN Conference on Trade and Development (Korner et al, 1986). They believe that colonial history has already enabled an exchange between the West and the colonized nations over the value of humanity, rights, and indeed universalism. Some human rights law scholars propose that human rights reform entails both an excavation of hidden sources of positive value in the occidental universal value system — a kind of appeal to Kantian peace (Wright, 2001) — and an injection of *multiple universalisms* drawn from different world traditions and epistemological systems into international law itself (Weeramantry, 2004). Both strategies involve only a partial repudiation of the universalism of international law because they maintain that the universal applicability of international law is essential for the human rights system as a whole. But more importantly, such approaches contend that subaltern cultures in emergent modernities are equally entitled to inform universal values, and even more interestingly, that the process by which cultures were subalternized already involved a colonial exchange that had historically shaped what we now take to be universal values (Pahuja, 2005).

What results from our discussion thus far is that human rights and international law together form a political representation of modernities-in-struggle. The articulation between a continuous analysis of the colonial origins of rights and the global applicability of international law ensures that no one modernity will forever dominate the rights discourse. At the heart of human rights and international law, there is thus a sense of a productive ontological instability. Among other things, this ontological instability means that we shall continue to have to struggle with universalism and its paradoxes in human rights, from within "legal modernities" (see Chapter Four).

Human Rights as Transnational Social Movements

Importantly, human rights constitute an axis in a transnational range of social movements. The mass organizations today are more likely than their predecessors in the Cold War era to form an intricate collectivity capable of transforming the traditional fixed positions, whether it is the position of the peasant, the unionist, the precariat, the woman, the black, or even the intellectual. With "horizontal networking" as its *modus operandi*, this collectivity strives to link up various scales of social movements from different locales and regions, generating both planned and impromptu events to lend support to people and groups that have been unjustly treated by the state, raise popular consciousness, oppose repressive policies, and stage direct actions.

Interestingly, in the horizontal networks of social movements, human rights occupy an ambivalent position. It is true that some social movements are organized to precisely oppose the liberal logic and a perceived vertical power structure that underpin human rights organizations. Indeed, we must not forget that tension often exists between the broad civil society sector and human rights groups over where to put the appropriate focus of their efforts (for instance, humanitarian, welfare-based, or treaty-based) (see Mertus, 1999) and what kind of relationship they should maintain with the state organs (that is, whether it is

more or less desirable to acquire legal recognition by the state). Moreover, for a long time, a vast part of Latin America saw no organic connection whatsoever between their struggles and human rights, seeing the complicity of, or at least an unfortunate connection between, human rights bureaucracies and state-based power (de Sousa Santos, 2007).

Yet, despite the ambivalence, social movements have never strayed far away from the political ethos of rights. The interconnection of rights as a fundamental principle can provide an important political strategy for articulating social movements as a differentiated but interrelated field. International human rights law provides a sufficiently decentered conception of the political sphere to imagine not only individual rights, but increasingly also collective rights. For instance, when rights are viewed as always already "inter-rights," a notion that demands a rigorous juxtaposition and balance among various forms of justice claims, they can become a productive locus for moving beyond individual rights to analyze how best to strategize collective claim-making. In the 1990s, a conception of inter-rights protection was in fact a basis for promulgating in international law a new principle of "legal intersectionality," which began to demand innovative combinations and realignments of rights claim-making in order to redress the blind spots inherent in any singular human rights instrument. Originally conceived on the basis of individual rights, the principle of intersectionality can nonetheless be conceived to refigure violence as violence against differentiated but connected groups. In other words, it is a principle that can be expanded to cover both *intrinsic intersectionality* (for example, in the case of a multiply positioned individual seeking rights) and *extrinsic intersectionality* (as in the case of a whole group seeking a multitude of interrelated rights) (see, e.g. Grabham, 2009).

There is thus an important realization behind the articulation of a technical legal intersectionalism and global social movements, which is the fact that human rights create interpretive communities. A majority of social movements — especially from the global South — emerged largely as a response to the new, harsh forms of global economy. Yet the same social movements are never contented with a mere economic analysis of their miseries. Social movement actors scrutinize the role that human rights play in people's everyday struggles and, in turn, the impact of those struggles on rights-based politics and law. A scrutiny of rights can indeed open up an analysis of the dynamics between institutional forms of power and "extra-institutional" aspects of resistance at the global and national levels (Rajagopal, 2003). Collective mobilization occurs at one level based on a reading of interconnected forms of everyday struggle and dissent to form what Rajagopal (2003) calls "texts of resistance" (402). Interpretive acts by individuals and groups in social movements can help to clarify issues of rights; they can also enact contestation to the legal language and practice of rights. To configure social movements as interpretive communities is, first, to repudiate any conception of unitary agency in movement struggles, given the plurality of subject positions and pragmatic motivations behind social movements and, second, to identify actors in non-state and extra-judicial spaces who are either the perpetrator or the recipient of all forms of violence. This radically contextual understanding of social movements has the potential to forge a new conception of human rights discourse that takes into account the complex relations between its institutional, legalistic, and even ostensibly elitist tendencies on the one hand, and its lived effects as an outcome of non-universalizing and even anti-rationalist consideration of everyday struggles on the other.

Human Rights as a Global Legal Apparatus

Social movements politicize and humanize the discourse of rights by paying attention to the life spaces of peoples and their everyday struggles. However, this does not erase the importance of the institutions of law that impact upon those very life spaces, nor does it suggest that social movements are always and everywhere opposed to the tools of law to

effect change. Before we consider the specificity of international human rights law, we need to first reconcile common assumptions, especially among left intellectuals, about law as the hegemonic center of modernity. No doubt it is important to keep a critical stance toward all restrictive forms of power that deny recognition of differences and promote an ideology of state neutrality. On this latter item, it is important to recognize that the kind of authority that can impose its own will on how social, economic, and cultural resources are distributed in society while claiming a transcendent position of neutrality is the kind of authority that must be demystified. Commonly, many of us share an understanding that law isn't the same as objectivity, objectivity isn't the same as neutrality, neutrality isn't the same as fairness, and fairness isn't the same as justice. Yet in liberal societies where many of us live, most people, as if in a permanent suspension of belief, accept the law as a more or less coherent process or protocol (Ross, 1998). Many of us are willing to risk our cultural security so as to trade for the possibility of justice and empowerment. And this applies to people of different ideological orientations. Sufficiently numerous liberals and conservatives, including the left and right intelligentsias, invest in the general idea of a judicial process that will produce "legally correct" results (Kennedy, 2002). As to whether this blanket investment in law will lead us to a strengthening of legal competence to effect social change or to a kind of political banality is an open question.

What is important, though, is for us to recognize the over-determined nature of legal reasoning and the legal process itself. This necessitates rethinking three problematics. First, we need to recognize that the question about the site of legal knowledge, or the assumption that the courts, law schools, and law societies as the singular formation or site of legal knowledge, needs to be replaced by a recognition of the multiplicity of legal consciousness and uses of that consciousness by people that form the social origin of law. It is here that the study of law connects strongly with cultural studies' commitment to the problem of the politics of "the popular." Second, the problem of doctrinalism — or the assumption that legal principles are the essence of law, or its only source of value — need to be replaced by an understanding of the radically contingent nature of legal interpretations in real litigation situations. This connects with the tradition within critical legal studies of "liberal constitutionalism" in which activist liberal law professors, judges, and public-interest lawyers argue that legal interpretivism is something *already* built into law itself, especially in the provisions guaranteeing rights of various kinds (Kennedy, 2002, 180). Third, the question of legal essentialism, or the assumption that there is stable and universal distinction between legal and non-legal practices and relations, needs to be replaced by the recognition that legal relations are always partly discursive or relationally produced. Here, the "non-legal" means at least two things. It means all aspects of life that neither express themselves through law nor embody law. But it also means that which is fundamentally important to human life, and therefore will be incorporated into law and policy. Both meanings of the term render any fixed distinction between law and non-law untenable, thereby returning us to the anti-reductionist ethos of cultural studies.

In short, the legal determination of the social totality is not any simpler or monolithic than any other levels of determination — be it economic, political, or cultural. The modernist roots of law do not and cannot negate the fact that law is radically contextual and historically contingent. The power exercised by law, it must therefore be insisted, is a matter of conjunctural struggle, whereby the admittedly absolute constituting power of law enters into an intricate negotiation with the site upon which it is supposed to constitute its own power. It bears reminding that, for instance in Foucault's theory of governmentality, the power of law is never conceived of as a total or totalizing sphere (Foucault's famous phrase about cutting off the king's head), but as a network implying an intricate interweaving of many micro-

events of power and counter-power. As Rosemary Coombe (1998) reminds us, “If law is central to hegemonic processes, it is also a key resource in counterhegemonic struggles” (35).

The international regime of human rights law exhibits exactly such a field or network of legal entities. Indeed, when we consider human rights law as consisting of a set of actions — fieldwork, consultation, diplomatic negotiation, drafting of covenants, monitoring, responding to violations, exerting pressure, prosecuting — then the whole *system* of human rights presents itself as a critical “apparatus” in the Gramscian sense. It is an apparatus that opens on to a multiplicity of overlapping and contradictory geographies, histories, institutions, and even cultural standards of morality. This global human rights legal apparatus embeds scales (domestic, regional, supranational, international), actors (states, individuals, groups, international civil society), processes (documentation, protocols, making of institutions, debating principles and values), and relations (legal, political, diplomatic, military). To quickly illustrate, take any legal provision in an international human rights treaty — say, Article 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women, which reads:

> State Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Putting aside the liberal bias of the provision (which arguably fails to enshrine any substantive form of resistance available to women), it is nonetheless important to note how the provision encodes an entire apparatus consisting of legal actors (including state parties and ordinary citizens in public and private domains), social institutions (including family and educational institutions), and policy processes (such as legal, educational, technical assistance, even reconciliation protocols) that together act to repudiate the nexus of customs and traditions that subjugate women. More importantly, this encoding of the apparatus sets in motion a whole range of processes for legal redress, processes that are built in through (1) the state parties’ self-ratification procedure, (2) the establishment of a specific treaty body within the United Nations to monitor the condition of women’s rights among the state parties, (3) a complaint mechanism, and (4) an investigative procedure. In other words, international law acts to dis-embed forms of prejudice and violence from the social, and re-embed it with a legal safeguard based on consensual agreement over common moral principles and appropriate forms of legal remedies. Of course, there is no fixed apparatus prescribed here. Any response from the apparatus would also require a rigorous contextual analysis. Yet one thing is clear from the provision: change is *mandated*.

A theory of apparatus is coextensive of a theory of articulation, both pointing to the complexity of a conjuncture. Lawrence Grossberg (2006) reminds us that a conjuncture is “always a social formation as more than a mere context — but as an articulation, accumulation, or condensation of contradictions” (5). Seen in this way, the international human rights regime, as epitomized by the UN structure (though it cannot be reduced to it),[4] exhibits precisely a contradiction of different mechanisms, procedures, and jurisdictions, each carrying different aims and a wide range of levels of enforceability of international norms. Nonetheless, a common unifying goal is to produce a shift in the conjuncture. Far from guaranteeing human rights as the achievable result, the UN regime in fact strives to create a contingent space for the multilateral geopolitical struggle for rights in a legal environment. Most importantly, it is an *actionable* space.

Conclusion

It is counter-productive to separate the intellectual political project of cultural studies from the institutional infrastructures of human rights. A separation would even be an epistemologically untenable assertion, given their shared political commitment to a critique of statism, nationalism, and colonialism, their iterations of identity-based cultural politics, and their shared vision of achieving some sort of social transformation. The task is not to imagine cultural studies and rights philosophy as external to each other, or to position the political project of the former and the legal project of the latter as if they were mutually antagonistic.

In this paper, I have suggested that I see law as the aspirational space opened up by the processes of human rights reasoning, legislation, and prosecution, which could be a space for cultural studies to theorize the questions of rights, intersubjective claim-making, the performativity of the legal subject in judicial processes, and most importantly to theorize the attainment of justice within a formalized institutional setting. My aim is to strengthen our conception of human rights and international law by making explicit the relations between rights and the questions of modernities, of social movements, and of legal cosmopolitanism. The integrated framework of analysis proposed above, I hope, will not only show us the axes around which human rights and cultural studies intersect, but also reinvigorate an engagement with a range of international debates about, and critiques of, human rights from a critical institutional perspective. It is time for us to consider the advantages, limitations, and paradoxes brought about by the theoretical and strategic possibilities of inserting human rights legal discourse into cultural studies.

Notes

[1] Some notable works that attempt to think cultural analysis, critical theory, and law together include: Wendy Brown and Janet Halley, eds., *Left Legalism/Left Critique* (Durham, NC: Duke University Press, 2002); Austin Sarat and Jonathan Simon, eds., *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Durham, NC: Duke University Press, 2003); Kate Nash, *The Cultural Politics of Human Rights: Comparing the US and UK* (Cambridge: Cambridge University Press, 2009); Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham, NC: Duke University Press, 1998); Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (London: Routledge-Cavendish, 2007); John Nguyet Erni, "New Sovereignties and Neoliberal Ethics: Remapping the Human Rights Imaginary." *Cultural Studies* 23(3) (2009).

[2] Examples of the more recent critique of cultural studies' political relevance include: Jan Baetens, "Cultural Studies After the Cultural Studies Paradigm." *Cultural Studies* 19(1) (2005); Marcus Breen, "US Cultural Studies: Oxymoron?" *Cultural Studies Review* 11(1) (2005): 11–26. On the other hand, some have challenged the (unreflective) practicality of cultural studies. See Peter Osborne, "'Whoever Speaks of Culture Speaks of Administration as Well': Disputing Pragmatism in Cultural Studies." *Cultural Studies* 20(1) (2006).

[3] I thank Meaghan Morris for helping me to clarify this idea.

[4] For example, a critique of the United Nations appears in Frédéric Mégret and Florian Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the United Nations' Changing Human Rights Responsibilities." *Human Rights Quarterly* 25(2) (2003).

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Private Military and Security Companies: Efficiency versus Accountability

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Abstract

This paper explores the use of private military and security companies (PMSCs) by nation-states in the context of their effectiveness and accountability. It focuses on explaining the trade-off between benefits and consequences of contracting PMSCs. The study includes two incidents involving Blackwater PMSC – the Nisour Square shooting and the Fallujah ambush and the consequences that followed, both on and off the battlefield. Our analysis shows that the use of PMSCs, though practical and effective solutions, is questioned as an integral part of modern warfare because of the accountability gap that exists between PMSCs and their clients regarding human rights violations. Intergovernmental regulatory incentives such as *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* [the Montreux Document], *The Protect, Respect and Remedy: A Framework for Business and Human Rights* [the Ruggie Report], and *The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises* [the Norms], have been suggested as a solution to the problem, which, although still in early development, indicate a positive shift in bridging the accountability gap.

Keywords: private military and security companies (PMSCs); Montreux Document, Ruggie Report, Norms, human rights, accountability gap.

Introduction

History is riddled with wars, and with wars come warriors, typically being the states' standing army of individuals who swore loyalty, ready to fight to defend it. "Go tell the Spartans, stranger passing by, that here by Spartan law we lie" – these famous alleged last words of King Leonidas are now etched onto the memorial of where the final battle supposedly took place. Only the state could shape such an individual's loyalty to fight to the death. But what about those warriors who fight for no state, those who fight for fortune and not for glory? From the time of Greek city-states through the Roman world, the employment of hired soldiers was practiced by the most powerful. During the Renaissance, the employment of Swiss pikemen was one of the most in-demand, by far the richest cities in Europe, such as Florence or Venice (Russell, 1942). The prevailing scholarly opinion holds that the use of mercenaries is advantageous to the employer; however, there is a lack of literature discussing the effectiveness and accountability of private military and security companies (PMSCs) on the battlefield.

The concept of mercenary is hardly new; it has been around just as long as our understanding of the state itself. Throughout history, various scholars of statecraft have contributed to the utility of having an arm (state or hired), regarding its rationale and practicality. It was not until the mid-twentieth century, after the world's most devastating war, that standing armies were put under moral scrutiny for the protection of human rights. The United Nations Declaration of Human Rights is a by-product of the Second World War and so is Realism, a school of thought where nation-states are the most legitimate actor on the global stage. There is a clear link between the two in the context of a standing army – the state maintains its standing army for its own interests, but it acts within the bounds of human rights regulated by an external, international body. Just as these notions seemingly guaranteed that every warrior obeys the state law of the country to which he belongs, the world became polarized by communist and capitalist ideologies. It is in the latter that modern warriors will find the grounds to fight and die for their own fortune, bypassing the primacy of allegiance to the state and the international restrictions on warfare related to the protection of human rights.

Towards the end of the Cold War mercenary companies were brandished as a legitimate and corporative industry. As one of the oldest professions in human history, the scale to which contractors were employed during the Iraq War also revealed its lucrative and tactical advantages. However, given the extent of media coverage on the Iraq War, very little attention is paid to the activities of PMSCs. In fact, just about the only time media would give them any attention would be if and when their actions result in the deaths of civilians – that, too, only the ones that are reported. Mercenaries, soldiers of fortune, civilian warriors, private contractors, by whichever name, is a capitalist venture and it is little wonder then that the post-Cold War world saw a sharp rise in the private military sector, after "the end of history". Unfortunately for human rights under the UN, hired-soldiers do not answer to the state but to their clients or, with the corporatization of security companies, their shareholders. Therefore, when it comes to human rights violations, the obstacle of PMSCs lies in the name itself – private, not transparent to the public. Thus, what happens when a state hires a PMSC? Under which regulating body does accountability lie – the UN, the state, the PMSC, the personnel?

This paper aims to explore accountability in the face of human rights violations between different bodies that make up the structure and contracts of PMSCs, the result of which could transform military affairs in terms of accountability by non-state actors. Before examining the consequences of employing PMSCs, the difference between age-old mercenaries must be distinguished from modern corporative PMSCs as well as the distinction between PMSCs and the standing militaries of the states. This would mean a constructive approach towards what

qualifies as a PMSC and both a realist and liberalist look at their consequences in modern warfare, especially in terms of costs and risks, two key elements that makeup security. Finally, the study will try to identify and frame the accountability gap of human rights violations analyzed in the Blackwater case and suggest how the issue of accountability and efficiency of PMSCs can eventually be bridged.

Private Military and Security Companies: Basic Concept and Development

Mercenary is often considered to be the world's second-oldest profession (Spearin, 2017, p. 58). In the vast span of human history, the state is a relatively new concept and could be interpreted back to various forms, be it tribes, colonies, empires, cities or kingdoms. Prior, any soldier was, by definition, non-state soldiers, therefore, hired soldiers. As civilizations developed to be more sophisticated and stable, so was the need for enhancing their security and defense, the self-preservation in a realist sense. Hence, the first concepts of state-army emerged in time. The devastation caused by the Clausewitzian concept of war and victory brought about the end of a radical view in warfare – from absolute victory over the enemy to decisive victory in terms of accomplishing limited political objectives; from large scale bombing to precision bombing; from full deployment of state army to the covert operations of special forces; from state vs state warfare to state vs non-state warfare; from relying on state army to contracting private sectors. One example of such radical change can be seen during the Vietnam War, where the technologically superior U.S. military failed against the Viet Cong who employed guerrilla tactics and managed to repel the American invasion. However, the failure of the decade long Vietnam War was not a loss on the U.S., which saw themselves revolutionizing their military affairs against such non-state actors.

The use of hired-soldiers at the end of the twentieth and into the twenty-first century has gotten a whole new scope of such practices, arguing for and against the use of such methods under various circumstances. After the deadly attack on 9/11, the U.S.'s War on Terror was not directed at a state-actor but rather at the notion of terrorism. Saddam Hussein was often labeled as the 'sponsor of terror' and thus became America's target, yet not the sole objective. World War II ended with the surrender of the Axis powers after six years of total warfare whereas the War on Terror is still being waged. Without a state-army to fight against, the coalition forces were left to counter pocket-size insurgencies that employed suicide bombings and improvised explosive devices rather than a traditional battlefield assault tactics. Steven Brayton (2002) argues that since the majority of conflicts within the century have moved beyond the nation-state and participated by unofficial actors, the use of mercenaries is not only crucial but perhaps signals the end of nation-state especially in the face of globalization. Brayton went on accounting for the rise and revolution of mercenaries in the 1990s, particularly in Angola and Sierra Leone, and speculated as to whether PMSCs could replace the UN as peacekeepers and peacemakers. His rationale was that the UN could not always afford to intervene while sovereign states could. In Sierra Leone, he pointed out the irony that, wherever PMSCs went, civilians stopped dying, but they only go if and where they are paid to go. This notion alone points to the fact that PMSCs' first loyalty is to their shareholders, which brings their accountability into perspective.

To fully examine the frameworks of PMSCs engagement and accountability, several theories must be constructed to give them parameters. Realism is defined in the oldest sense of struggle for power and thus paves the construct of warfare. Structural realism breaks down into two concepts – offensive and defensive (Lobell, 2010; Dunne et al., 2016, pp. 52-89). The defensive realists look at states as key actors that maximizing security, whereas offensive realists consider states to be the power-maximizers. The key concepts of realism are security and power, both of which are fundamental for a state to survive and keep its enemies in

check. As Kevin O'Brien noted, "by privatizing security and the use of violence, removing it from the domain of the state and giving it to private interest, the state in these instances is both being strengthened and disassembled" (O'Brien, 1998, p. 78). Here, both the offensive and defensive realism are at play in terms of 'strengthening and dissembling' respectively.

PMSCs are non-state actors. Unlike the official state armies, PMCs are not obligated to the same standards of the state's foreign policy. To fully construct the pros and cons of employing PMSCs a clear contrast between liberalist and realistic approaches must be employed. However, there are key realist elements in the use of PMSCs in terms of proficiency; after all, whatever the state does, a private company can do better due to the profit incentives. Perhaps the best indicator of this is the Revolution in Military Affairs (RMA) where most of the technological innovations in terms of warfare are privately made even if they may have been government-funded, subsidized, or contracted. However, there is still a clear contrast between the state and private as to how elements of RMA are employed, how they are regulated, how they are held responsible and which actor (state or private) has the final say. The other realist perspective regarding PMSCs is the profitability vs ethics debate, where private companies are in favor of maximizing their profits and growth which could mean compromising on ethics of their operations.

Framing the Accountability Gap Between PMSCs and Their Clients

When it comes to accountability Amol Mehra (2009) associates PMSCs with three different actors – the contractor personnel, the corporations who employ them, and the state-level clients who hire them. Mehra examines *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* (International Committee of the Red Cross [ICRC], 2008) [Hereinafter the Montreux Document], *The Protect, Respect and Remedy: A Framework for Business and Human Rights* (UN Human Rights Council, 2008) [Hereinafter the Ruggie Report], and *The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises* (UN Sub-Commission on the Promotion and Protection of Human Rights, 2003) [Hereinafter the Norms], which account for the obligations of 'good practices' of PMSCs during armed conflict. He points out that the documents are specific towards the contractors, not the corporations who employ them or the clients who hire them. Mehra also stresses, citing E. L. Gaston, that the corporatization of mercenary forces reduces the control states have over their own warfare and the level of state-based control over the use of force (Gaston 2008, pp. 221, 235), and he lists incidents where PMSCs were allegedly conducting activities that violated human rights. Two of the most notorious examples are: The prisoner abuse of Abu Graib and Bagram detainees by PMSCs Titan and CACI (Stanger and Williams, 2006, 12), only to be referred to as a few rotten apples by then-Secretary of Defense Donald Rumsfeld (Smeulers and Niekerk, 2009), as a means of distancing the US government to which no personnel were prosecuted for human rights violations. The other case being when Blackwater personnel opening fire into a crowd in Nisour Square, Baghdad, resulting in the death of 17 civilians and injury of dozens more (Cotton et al., 2010, pp. 25-28; Mehra, 2009, p. 325). To date, its personnel has remained the only four to be tried for war crimes in the expanding U.S.-led war on terrorism ("Iraq Blackwater," 2014). The result of such lack of accountability on the part of states who opportunistically exploit PMSCs is due to their lack of transparency by having "no centralized database to account for all the security companies" (Mehra, 2009, p. 324).

In order to identify the accountability gap with regard to human rights violations that involve PMSCs, one should consider it either a political or corporate issue. The incidents are often framed by the bureaucracy and political structure that only marginalized the

accountability to the PMSCs personnel, thus leaving the gap wide open to other possible incidents. By looking at how in these cases both incidents are accounted for by the political bodies, the accountability gap could be better identified in terms of the actors, and how these violations are to be minimized and avoided. The limit of this research will be the nature of human rights violations formulated by the UN for the state actors, today considered as outdated. Another limitation is the notion that this gap will never be closed, but it can be examined either as a political or corporate landscape in order to bridge between those who outlined the human rights (the UN) and those who would violate (the PMSCs).

Blackwater Case

Blackwater is a PMSC founded in 1997 by Erik Prince, who was in the U.S. Navy SEALs. Blackwater has changed its name twice since its involvement in the Iraq War to Xe Services before finally settling for Academi. It is speculated that such changes are to improve the company's image due to its controversies in the Nisour Square incident. Blackwater has lent its services to both private parties and the U.S. government via Central Intelligence Agency all the way back to the invasion of Afghanistan after 9/11 where they were granted security clearance to protect the CIA headquarters in Afghanistan and allegedly operates as their assassins (Scahill, 2009). Blackwater was also hired as security personnel to protect government facilities after Hurricane Katrina struck New Orleans where, once again, they received notoriety for allegedly shooting civilians (Scahill, 2005).

By far, the most infamous incident regarding Blackwater is the ambush in Fallujah which left four-armed contractors dead ("Bodies mutilated in Iraq attack," 2004). The incident resulted in the U.S. Marines retaliating in the First Battle of Fallujah. It was later founded by the House Oversight Committee that Blackwater 'delayed and impeded' the investigation into the incident ("Report: Blackwater," 2007). In 2010, the Iraq War documents leak revealed that Blackwater contractors committed serious abuses in the country that lead to several civilian deaths ("Blackwater incident," 2008). Among such incidents is the Nisour Square shooting which left 17 dead and four contractors charged with murdering Iraqi civilians. These four contractors remain the only ones being charged with 14 counts of manslaughter since the Iraq War to date.

The Iraq War has seen the highest employment rate of PMSCs at a 1:1.5 ratio – 1 contractor employee for every 1.5 U.S. service members in theatre (The Industrial College of the Armed Forces [ICAF], 2007, p. 5). According to Singer, "these individuals are sometimes described as "security guards" … their jobs include protecting important installations… guarding key individuals… and escorting convoys" (Singer, 2005). By far, the most infamous of PMSCs actively employed in Iraq was Blackwater and not without controversy such as the 2004 Fallujah ambush which claimed the lives of these civilian soldiers, their bodies being burned and mutilated (Committee on Oversight and Government Reform, 2007, p. 4). The majority of the news media labeled them as 'civilian contractors' and exploited the nature of the ambush due to poor intelligence and co-operation with the local Iraqi forces, who lead them into a trap. The coalition responded to this incident by launching an assault on Fallujah to bring the mastermind of the incident to justice. This single incident pales in comparison to the number of alleged atrocities committed by Blackwater as well as other PMSCs. Additionally, these kinds of incidents raise questions as to the nature of the relationship between the state and their employed PMSCs. After all, PMSCs are non-state actors and therefore are not strictly bounded by their state's foreign policies.

Because of the complete surrender of the Iraqi Army during the invasion, almost all forms of counter-attacks were insurgencies conducted by armed militants using guerrilla tactics and suicide bombings. Would these insurgents distinguish the regular army from

PMSCs in terms of targeting? Behind the scenes, the coalition army's approach to situations, such as kidnapping for ransom, may differ from those of PMSCs, since they are private and may have a completely different standard when it comes to insurance or rescue operations if any. At the same time, when countering insurgencies (or, potential insurgencies) the army/PMSCs would decidedly shoot first either out of training or instinctive reasons. Yet, under circumstances where innocent civilians die, it is the PMSCs who bear sole responsibility while the regular troops tend to have the entire coalition to back up their actions. Case in point, the 2007 Nisour Square shooting, and, to date, is considered the only act of war crime on the coalition side on the frontline of the Iraq War.

Bridging the Gap

Ever since the end of the Cold War, the changing face of warfare has shifted from traditional state-state warfare to including non-state actors in various forms. Two of the most significant non-state actors are terrorist groups, who employ guerrilla tactics to commit insurgencies, and the other being the corporatization of military and security in form of Private Military and Security Companies (Brayton, 2002). PMSCs can be used either by private or public forces, neither of which is new to the post-Cold War world. Part of the sharp rise in PMSCs has to do with the end of the Cold War where smaller proxy-states with weak standing army sought out external help in form of PMSCs while the former Soviet bloc (as well as post-Apartheid South Africa) saw a massive shrink in standing armies, leaving skilled combatants to seek employment in the private sector. While privatization of military and security services is not a new phenomenon, corporatization is new and can be broken down into three levels – the contracting personnel, their corporate employers and the national governments who contract these firms. Although the structure of such a bureaucracy is seemingly it can muddle the issue of accountability when it comes to human rights violations.

At the beginning of the new millennium, major world powers entered the Global War on Terrorism (GWOT) with the United States leading the charge. Starting with Afghanistan and Iraq, the GWOT has spread into Pakistan, Syria, Yemen, Somalia, and Libya while terrorist groups have propagated their ideology online, inspiring lone-wolf attacks among civilian populations in the West. The Iraq War has witnessed over 300 PMSCs employed by the United States alone, while the United Kingdom, Canada, and Australia have privatized a major part of the military infrastructure (Mehra, 2009). This further complicates the question of accountability since PMSCs view conflict as a business opportunity and are often free of political restraints. The lack of transparency is another barrier to accountability. While soldiers take some form of an oath to their nations, PMSCs are accountable to their shareholders away from public and government scrutiny (Brayton, 2002, p. 318).

Aside from the bureaucratic structure of PMSCs and their liability to shareholders, the fact that national governments employ them, whether out of necessity or opportunity, further complicates the issue of accountability. Interestingly, the exploitation of PMSCs did not begin with the West after the Cold War, but in Africa – the most famous PMSC being Executive Outcomes, which could be considered the first fully equipped private army in the world (Brayton, 2002, pp. 312-315). Although Executive Outcomes rose out of post-Apartheid South Africa, their success stemmed from the United Nations' lack of incentive to step in and protect national governments. Consequently, a small country with weak military capabilities faces insurrections or insurgencies that threatens its sovereignty, would simply turn to PMSCs and employ them to protect its sovereignty. At the same time, if the UN itself shows the incentive but sometimes lacks the ability to deploy peacekeepers, it might as well resort to PMSCs to act as peacekeepers.

The more opportunistic employment of PMSCs by richer countries is both economically pragmatic and politically safe. It is much less expensive to hire a PMSC for the short-run than to mobilize a standing army which may see little to no major conflicts in the long-run (Renou, 2005). Australia, for instance, has privatized its entire military recruitment (Singer, 2003, p. 14) while Canada has privatized its electronic warfare sector (Mehra, 2009, p. 324). Peter Singer divided the economic use of PMSCs into categories of "military provider firms, military consulting firms, and military support firms" (Singer, 2003, p. 91). The political impetus for hiring PMSCs is even more enticing in terms of non-exposure to political risk. For example, the notion of soldiers getting killed in unnecessary wars is far more politically costly than mercenaries being killed (Stanger and Williams 2006). A major political benefit of employing PMSCs is the notion of plausible deniability where the contracting government can very easily distance themselves when their agenda may result in human rights violations (Renou, 2005).

When it comes to human rights violations, the lack of accountability is the dominating issue in employing PMSCs. As corporate enterprises, PMSCs not only have a right to privacy, but their priority towards profit to satisfy their shareholders easily overshadows their responsibility to avoid human rights violations, even if they are contracted by national governments. This brings into question as to how to tackle PMSCs accountability – as a political issue or as a corporate issue.

Intergovernmental Regulatory Incentives

In the years 2008 and 2009, two documents were created to raise the issue of PMSCs accountability – the Montreux Document outlining the viable behaviors of PMSCs and the other document being the Ruggie Report that raised the issue of responsibility to protect and respect on the part of both state and corporation in the face human rights violations. The United Nation's Declaration of Human Rights is clearly a socio-political position and therefore its violation is considered to be a political issue, whether such violations are committed by any party, government or private. And here is the distinction in terms of accountability, especially by the UN who has no direct influence over private firms – perhaps this accountability gap provides even more incentives for rich and powerful countries to outsource their military and security services despite the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989) which since 2001 has prohibited recruitment, use, financing, and training of mercenaries. As Mehra (2009) pointed out, simply outlawing mercenaries have little effect in abolishing the use of mercenaries especially when loopholes exist to allow contractors to be employed in various capacities, such as procurement or logistics which does not fit the UN's definition of a 'mercenary'.

The Montreux Document, drafted by the Red Cross, rather than condemning the states for employing PMSCs addresses such employment directly, addressing the states contracting the PMSCs and the personnel employed by PMSCs in Part One – "Pertinent international legal obligations relating to private military and security companies", while indirectly, addressing PMSCs 'good practices' in Part Two – "Good practices relating to private military and security companies". For all intense and purpose, the Montreux Document aims to establish the UN as the main international regulative body regarding PMSCs especially in the face of human rights violations. The Document clearly detailed the distinction of accountable states – Contracting State, Territorial States, and Home State – in order to lay down each "obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law" (International Committee of the Red Cross [ICRC], 2008, p. 12). However,

Mehra (2009) pointed out that despite the conditions set in the Document, the Document laid no framework in the face of human rights violations, and additionally listed two additional documents which addresses corporations and human rights: previously mentioned the Ruggie Report, and the Norms – which marks the first time the Commission on Human Rights took a direct position on business and human rights.

Unlike the Montreux Document, the Ruggie Report lays the framework for practical recommendations and concrete guidance to states, businesses, and other social actors on its implementations (Melish and Meidinger, 2012, p. 304). The Report distinguishes the characteristics of the state from the corporation in terms of human rights, starting with defining each actor in terms of limits of their role and obligations. By far, the Ruggie Report's most insightful three pillars framework that includes: "the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial" (Ruggie, 2008), defines access to remedy by both the state and the corporation in the face, and prior to, of human rights violations. Although far from perfect, the Ruggie Report outshines the Montreux Document in one crucial aspect – it identifies and addresses PMSCs as a business entity rather than just a proxy for state actors (Mehra, 2009).

Another problem would be the fact that the actor who employs PMSCs will be the exact same actor accountable for such violations which beg the question as to whether an external and arbitrary actor may be better suited for accountability. A thorough accountability framework could be put between the Montreux Document and the Ruggie Report, not only to avoid human rights violations but also to what should be done when all parties involved do so. Ever since the end of the Second World War, military and security firms have gone from privatization to corporatization, perhaps its next step would be to internationalize. What better way to account for human rights through the use of PMSCs than by those who drafted the Declaration of Human Rights themselves.

Discussion

Throughout history, every actor revolutionizes warfare by any means necessary. One of several things that Rome and the U.S. have in common when it comes to warfare, is hiring soldiers although the Roman Republic did that much more extensively to disastrous outcomes whereas the United States employs hired soldiers without heavily relying on them. Rome paid the highest possible price for such over-reliance under Julius Caesar and the republic collapsed into bloody civil wars. Could the U.S. face such an outcome? Highly unlikely, but not impossible, for several reasons, the main among them being that the U.S. has its own standing army with special forces at the ready. Also, the U.S. has strict policies and regulations when it comes to employing and operating PMSCs within the country itself as well as countries they are actively engaging in warfare. At the same time, the U.S. itself employs PMSCs for escorts of high-ranking personnel, the army employs them for training new recruits, and intelligence agencies hire them for interrogations where they employ enhances interrogation techniques. This raises the question as to who is responsible for the PMSCs' shortcomings if they are directly employed by the state, as in the case of the Nisour Square shooting. Given the trial of the contractors responsible, clearly, the U.S. view on the incident is as an exception and private matter, rather than the state.

Even though the contractors were hired and operated in a warzone occupied by the same state, they were tried as exempt from the state with only the contracted personnel being tried, neither their employer nor their contractor. Obviously, the most straightforward response

would be to try the armed personal as a case of ‘few bad apples’ and the entire incident as a one-off and not commonplace. Rare as they may be, such incidents raise more questions than answers, and are often downplayed so that the major actors, the state and the PMSCs, are beyond accountability and, overall, nothing really changes aside from the public perception of such incidents and those involved.

The employment of PMSCs to carry out certain operations should be much more proficient than if simply carried out by the state. By all accounts, private companies, driven by profit, are arguably much more responsible in terms of prestige, reputation, and efficiency for further investments. Singer has argued that the use of PMSCs has made the state stronger and less centralized, that is, so long as no such incidents as those of Nisour Square take place (“P.W. Singer on Holding Private Militaries Accountable,” 2012). Nevertheless, on the frontline, although PMSCs set their own policies in terms of their operations, they should operate within the framework of their country’s foreign policy and should be susceptible to war crimes as much as the state actors. Should there be any infraction on the frontline, especially one that results in deaths of civilians, liberal international institutions, or at least their pre-institutionalized forms similar to previous institutionalizations related to international security issues, should be prepared and established to limit the perception that PMSCs operate outside the rule of law.

Conclusion

The use of PMSCs throughout history has been always questioned. Niccolo Machiavelli (2005) also shared the same doubt against the use of mercenaries since their primary interest is their own benefit over that of the state. Then again, Machiavelli’s *Prince* is written in favor of political strategies rather than military strategies. Ultimately, for every benefit to the employment of PMSCs, there is a cost. According to Stranger and Williams (2006), the benefit could be policy flexibility, but the cost could be the reduction of both transparency and accountability. The use of state soldiers is not lessening and it can create a ‘loose cannon’ effect since hired soldiers do not comply with foreign policies. Private firms tend to be more lucrative in their investments and methods, but this could heavily impact the cost of governments who contract them. Politically speaking, over-reliance is ill-advised which is why PMSCs are often held solely accountable when their operations go awry.

In war, the use of whatever means necessary can be expected from the inferior side of the battle. Some of these are, as innovative as they are deadly, be it suicide pilots during the Second World War and the 9/11, the tactics of guerrilla warfare in Latin America or South-East Asia, the kidnapping and training of child soldiers across Africa, suicide bombers in Iraq and Afghanistan, to name a few, have proven effective and often decisive on the battlefields or as acts of insurgents. Then there are cases across the Western world where similar acts, such as suicide attacks or the vehicles ramming into a crowd, are used if not for victory then to spread terror among the masses. The majority of these are ‘home-grown terrors’ inspired by online exposure to the cause with either financial or spiritual reward. This begs the question as to whether the employment of PMSCs by the states is very different from these acts on the battlefield. Thus, behind the scenes, PMSCs could not be more different from the previously described insurgencies. Revolution in Military Affairs, nonetheless, as non-restricted to one side of the war, often time finds its way to the surface without the clearest indication of victory or defeat. Most of PMSCs, although hardly conduct full military-scale operations, may find themselves employing the very tactics of the ‘inferiors’ if not to achieve their objective then just to survive a dangerous situation.

By all accounts, the PMSCs are the forefront in terms of efficiency and should be allowed so by all actors. However, this assessment prevails as long as the problem does not

arise which would compromise the use of PMSCs by the state. Without some form of international regulative body to stand as a check and balance of PMSCs' activities, the perception of PMSCs operating above the law could go to such an extent that they may only be regarded as merely lucrative for exclusive parties. Taking this a step further outlines the scope of PMSCs ought to be held just as accountable for certain incidents, such as the Nisour Square shooting. The resulting criminal charges against four Blackwater contractors were overseen by the U.S. courts, whereas if such an incident occurred among coalition soldiers, they would most likely be tried by court-martial or trial for war crimes. So far, this is just the 'incident' that has hardly hindered the malpractice of PMSCs that could have easily gone unnoticed. Thus, when it comes to efficiency, PMSCs may present the forefront on the realists' terms, however, when it comes to accountability, liberal institutions must step in.

Between the Montreux Document and the Ruggie Report, perhaps a thorough framework for accountability could be laid, not just to avoid violation of human rights, but what is to be done when it occurs by all parties involved. Although far from perfect and thorough implementation, here a direct relationship between the UN and the PMSCs could lay the foundation of new RMA, not just by states out of necessity or opportunity, but by the UN itself when all else fails.

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Qat, War and the Political Economy of Aid in Yemen

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Abstract

For close to 5 years, Yemen has been experiencing one of the worst crises it ever had, threatening the foundation of the nation as well as the survival of its population. According to the UN, 3 in 4 Yemenis need assistance and 1 in 3 are in critical need of assistance. Having lost their sources of income and assets, most of Yemeni households resort to difficult choices to cope with the crisis. Coping measures include cutting down on meals and 'non-essential' expenditures to ensure the survival of the household. Chewing qat, however remains unchanged and takes between 10 and 28 percent of resources on the household budget. The author discusses the social, economic and environmental impact of qat chewing and attempts to disentangle complexities surrounding qat and examines the interplay between the qat sector, humanitarian response and the war economy in Yemen. Five aspects involving qat are of interest to the author: (i) the impact qat has on households economies as the result of compulsive addiction, (ii) the effects on productivity due to idleness and health-related immobilization of subjects, (iii) the environmental impact of qat and the potential for conflicts, especially around water resources, and (iv) the relationship between qat, aid and the war economy.

Introduction

It has been more than four years since the conflict in Yemen escalated into a full-blown war. With no end in sight despite tremendous efforts deployed by the UN to bring parties to agree to a cessation of hostilities and creating conditions for a peaceful resolution, the war has left millions of Yemenis scrambling to survive after having exhausted their coping measures. Families have lost their income sources and assets, businesses have closed, salaries have not been paid for years, especially for civil servants, the informal sector has been slumbering and social safety nets have almost totally collapsed due to the conflict, forcing them to rely heavily on family and social support as well as relief assistance for their survival. The UN describes Yemen as the worst humanitarian crisis in the world, with around 24 M people (more than 3 out of 4 Yemenis) requiring some form of assistance and 10 million (1 out of 3) in critical need of assistance (OCHA, 2019).

With the crisis deepening more and more, most of Yemeni families have been forced to change their habits to cope with the crisis. Some of these measures include reducing the frequency of meals and quantities of food per meal, cutting down "non-essential" financial expenditures, including not sending children to school, but instead using them to raise income for the household through child labor, begging, child marriage and even recruitment by armed, militant and extremist groups. Despite the deterioration of household economies, one habit that seem to have beaten the test of crisis is *qat* chewing.

Qat plays a predominant part in social, economic and political life in Yemen. In a context of conflict and economic decline, this role becomes even more important as the business of *qat* across the value chain is one of the only businesses that has not been affected by the war and continues to grow. To understand this growing trend, one must be able to comprehend what *qat* represents to the Yemeni society. *Qat* is not only a pastime or leisure habit for most Yemenis, it represents a social and cultural phenomenon. It has become a lifestyle or the 'fuel' of the Yemeni society, given its omnipresence in almost social, business, political and traditional gatherings. The present paper will attempt to disentangle complexities surrounding *qat* in a particular context of conflict and humanitarian crisis, which Yemen is currently experiencing since March 2015. To be able to do this, the paper will explore the social impact and economic significance of *qat* and the interplay between *qat*, relief assistance and war economy.

Qat and the Yemeni Society

Qat or Khat (*Catha Edulis*) is a flowering shrub belonging to the family of staff trees and shrubs (*Celastaceae* family) native from Northeast Africa and the Arabian Peninsula (US DoJ, 2003). Qat is often referred to in many countries as as 'Abyssinian tea', 'African salad',' bushman's tea', gat, kat, miraa, qat, chat, tohai, graba, and tschat (US DoJ, 2003). Chemically, *qat* leaves *qat* contain many different compounds and therefore qat chewing may have many different effects (WHO, 2006). Among these are two main psychoactive agents: *Cathinone* and *Cathine*. Fresh cat leaves contain cathinone, but when leaves lose their freshness, cathinone breaks down into cathine. The breakdown process starts from the harvest and continues all along until leaves decompose or dry. Cathinone is the main psychoactive component in *qat*, which justifies why leaves are wrapped in banana leaves to preserve their freshness and slow down the breakdown of cathinone into a less active components (Wulfsohn, 2013). Both cathinone and cathine are classified as controlled substances by the US Food and Drug Administration (FDA) and the World Health Organization. The US classifies cathinone and cathine respectively as schedule I and Schedule IV drugs. *Qat* has been classified as Class C drug in the UK, following suit of many EU countries, including France, Germany, the Netherlands and Ireland. Effects of cathinone is like those of *amphetamines* and *noradrenaline* and is categorized as stimulant drug (WHO, 2006). *Qat* is

also referred to as *natural amphetamine* and is considered addictive, i.e. can lead to dependence (WHO, 2006).

The use of *qat* has become intrinsic to the functioning of the Yemen society. Schedules and programs are made in consideration of *qat* chewing times. Social gathering, important business and political meetings are almost always infused with *qat*. Yemenis are known to chew *qat* in various occasions individually or collectively. *Qat* chewing sessions or *Majlis al-qat* (*qat* chewing gatherings) are often considered as (i) icebreaker for business meetings, dispute and conflict resolution gatherings and (ii) family or community-bonding mechanisms. Key informants' interviews conducted as part of this research indicated, for most Yemenis, that chewing *qat* makes social events more interesting. In a Dateline documentary titled *The Curse of Khat*, one of the interviewees stated, 'he wouldn't attend a wedding if there was no Khat' (Dateline, 2013). In some milieus in Yemen, *qat* is referred to as the "glue of the Yemeni society," keeping the society and family together. In fact, the *Majlis al-qat* represent an emblem of social interaction, a group communion and a manifestation of commitment and conformity to the Yemen society (Ward, 2000). They are also a venue for competition and slowly became part of the lifestyle in Yemen, leading to social migration from leisure and entertainment to becoming a venue for everyday use (Ward, 2000). *Qat* can be seen as social lubricant, a mark of hospitality as well as a display of socioeconomic status for a host as there are many *qat* grades, quality and prices.

Another fact to be noted about *qat* is that its amphetamine-like effects makes it the best study aid drug for kids from grade 9 onward. Students say it helps them concentrate and study longer hours than they would have, hadn't they taken it. This form of use is very common among the 15 – 25 years youth who are trying to find possible study aid drugs to help them cope with the pressure of deadlines, tests and exams. Respondents to this study almost unanimously agreed that the majority of students from 15 years of age and older resort to *qat* while preparing exams or important school assignments.

Qat has become a central part of social interactions in Yemen, there is no social function, meeting or social gathering without it. Gatherings that are not fueled by *qat* are considered boring, unwelcoming or '*unYemeni*'. In as much as it is dubbed the glue of the Yemeni society, several respondents in this study linked, to a certain degree, the use of *qat* to tensions, frictions and sometimes violence within the family. The fact that husbands spend more time with their friends in *Majlis al-qat*, reduces family interactions and family cohesion. This can lead to arguments and violence. Cases of domestic violence associated with *qat*-related expenses and debt in household budgets were also mentioned by some of the respondents especially with the erosion of households' purchasing power and economic statuses due to the current crisis. However, this was not supported by most of respondents, who argued that Yemeni men do respect women. The next section will discuss the relationship between *qat* and poverty in context of humanitarian crisis.

Humanitarian Crisis and Poverty

As per the 2011 data, around 44.5 per cent of the land in Yemen is labeled as agricultural land (CIA Factbook, 2019; WB, 2007)). Out of it, only 2.2 per cent is arable land, 0.6 per cent of permanent crops and 44.1 per cent permanent pastures. This means it is almost impossible for Yemen to achieve self-sufficiency for agricultural food production even under ideal conditions, let alone when it is confronted to a major political and security crisis. An estimated 38 per cent of arable land and 37 per cent of irrigation water are used for *qat* farming across the country (FAO, 2014; WB, 2018). The increase of arable land use for the cultivation of *qat* is threatening even the little agricultural food production and other cash crops such as coffee. It is to be noted that Yemen is an arid country with a complex

geography that includes mountainous areas in the north, the desert in the east and south, plateaus in the center and coastal plains in the south and west.

The *qat* sector is said to provide employment to around 17 per cent of active Yemenis across the value chain (Ward & Gatter, 2000). The *qat* value chain involves many actors. Image 1 visualizes actors across the value chain, which involves several actors, who all play an important role in the production and sale of qat. The *qat* sector provides direct and indirect income to around 1 in 7 Yemenis, mostly in rural areas (Ward & Gatter, 2000). As a cash crop, *qat* is much appreciated for its high profitability, its market readiness, its hardiness and drought resistance, and the few husbandry problems associated with it (WB, 2007). A 2000 study suggests that *qat* can be 10 – 20 times more profitable than other crops and can brought to harvest any time of the year, giving farmers access to income whenever needed (Ward, 2000). All it needs is water to produce fresh young leaves that can be sold throughout the year in the market. This profitability can be nuanced as some of the farmers do not earn as much as studies suggest, water becoming more and more expensive due to fuel price hike.

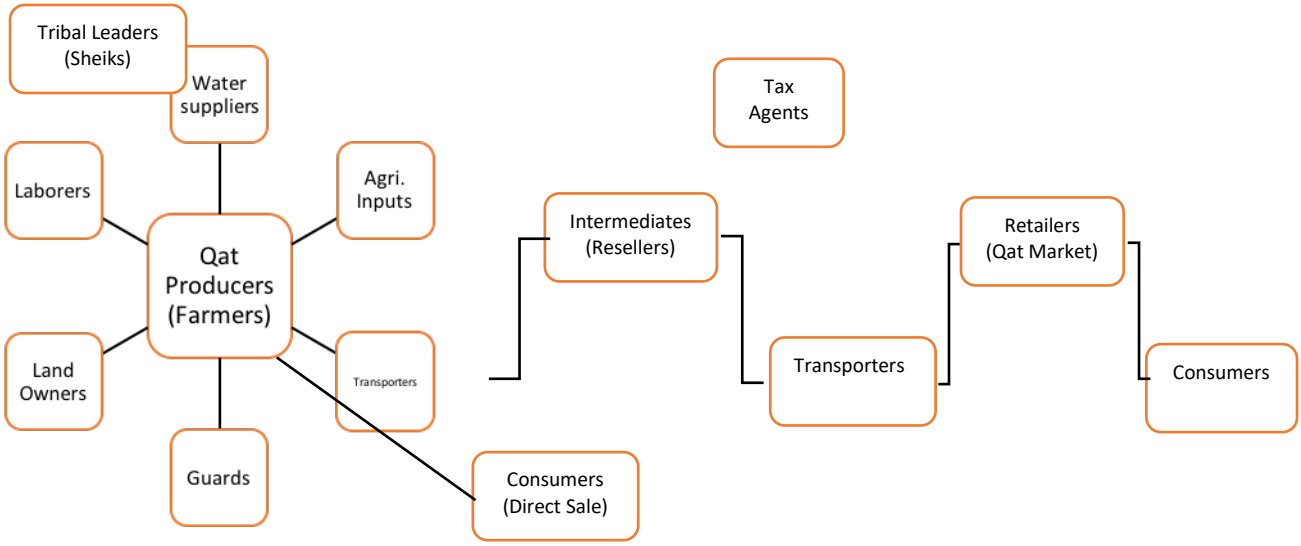

Image 1: Actors in the Value Chain of Qat

Although there is little evidence to suggest a direct correlation between *qat* farming and Yemen and the country's food crisis, *qat* chewing costs between 9.5 and 13.9 percent of household expenditure, which significantly impacts households' economies (UNDP, 2015). Vulnerable households have been found to spend up to 28 per cent of their budget on *qat* (Lenaers and Gatter, 2000 cited in WB, 2007).

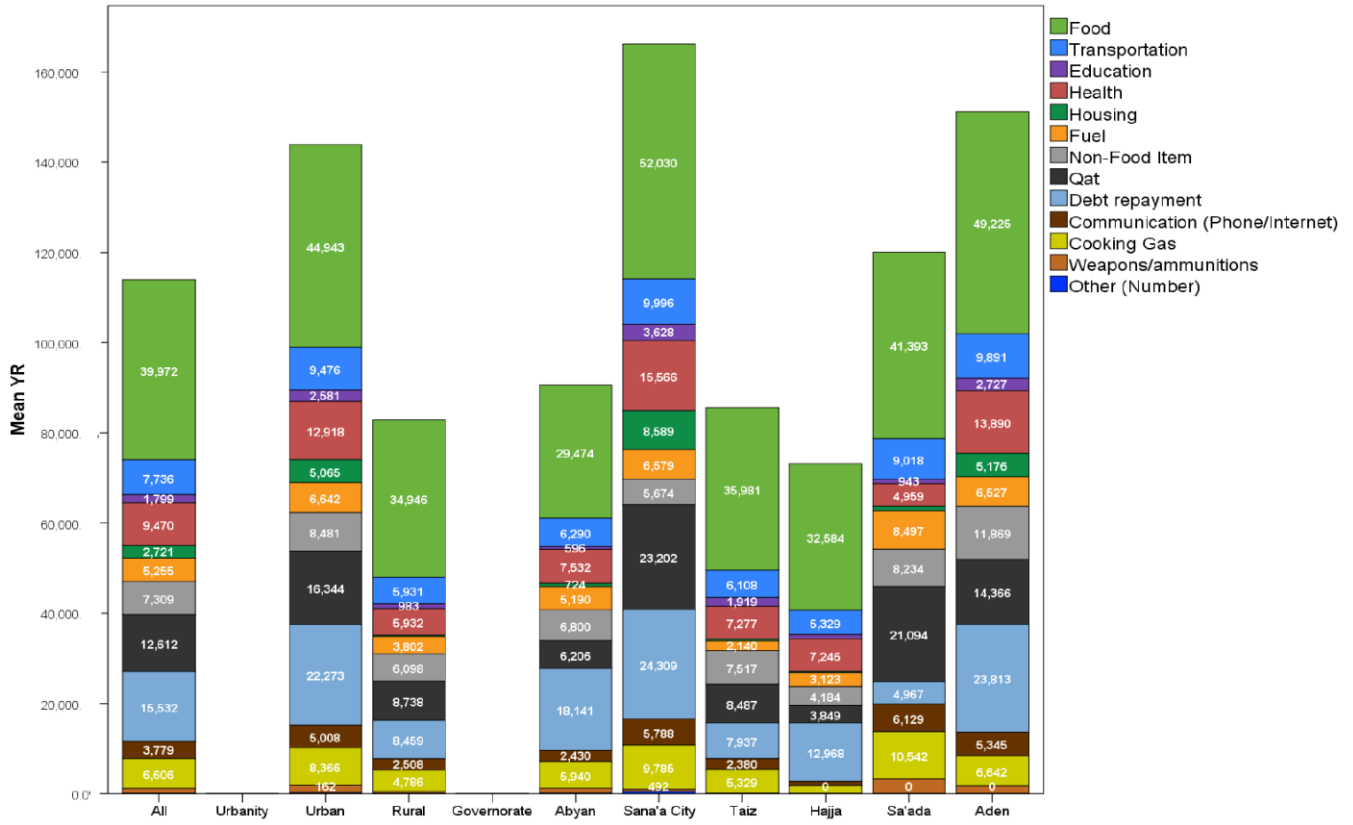

Image 2: Itemized Household Expenditure in Yemeni Rials (Source: UNDP 2015)

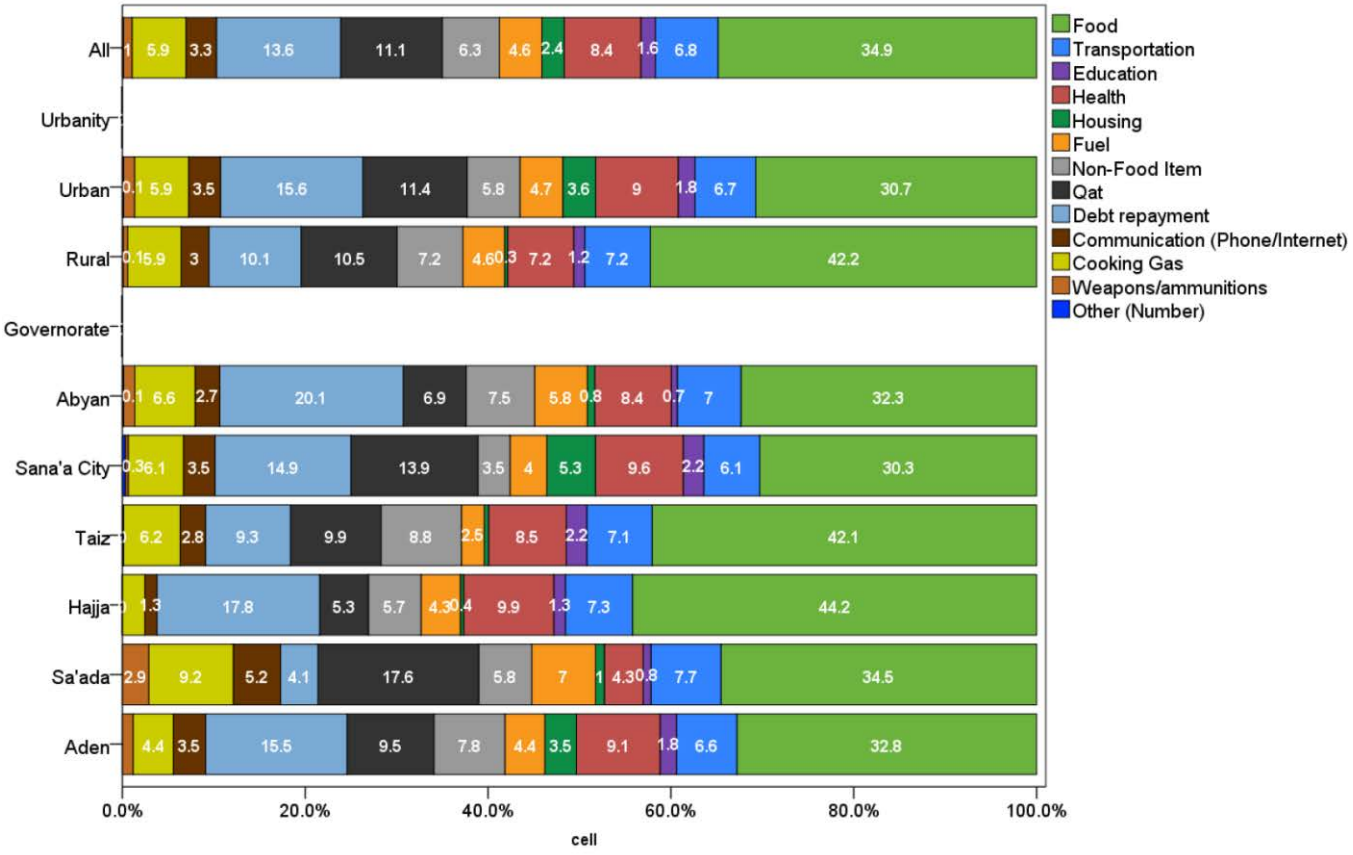

Image 3: Household Expenditure in Percentage (Source: UNDP, 2015)

The link between *qat* and precarity is not found on the supply side sector, but rather on the demand side. On the supply side, *qat* is a very lucrative industry. Although the country is in a political, security and economic crisis, the *qat* market continues to flourish steadily, creates rural and per urban employment and generates income for millions of Yemenis. In 2005, *qat* contributed with 6 per cent to the national GDP, almost two-third of what oils contributes to the economy (MOPIC, 2005 cited in WB: 2007).

The boom of the *qat* industry is the doom for users, who spend millions of Yemeni Rial per year to cater for their addiction to *qat*. *Qat* addiction diverts huge chunks of household resources to the detriment of useful basic commodities, food and basic services. In the 2005 Household Budget Survey cited in the 2007 World Bank's Study titled *Toward Qat Demand Reduction*, the budget allocated to *qat* chewing exceeded by far budget outlays for basic food, medicines and other necessities. With *qat* as top single item in household expenditures, it is not surprising that households will resort to negative coping strategies, nutritional habits and practices heavily contributing to deepening food insecurity and the increase in Global Acute Malnutrition (GAM) rates. Health risks posed by qat chewing habits are suspected to cause major health issues, putting further strains on family finances.

The sector is estimated to employ around 1 in 7 Yemenis and is the most lucrative agricultural sector (WB, 2007). However, the sector profits only to a few people and impoverishes the rest of the population through constant supply. In addition to diverting household resources to cater for their addiction, *qat* production has precluded the development of other more sustainable forms of rural economic activities (WB: 2007). *Qat* addiction also holds users and their households into cycles of poverty in reducing their ability to make savings and invest in more productive activities while trapping others into what is referred to as *qat debt*.
"The "*Qat* Debt Trap" leads many vulnerable households into a circle of debt that demands constant borrowing to purchase *qat* (Wulfsohn: 2013). Nearly 20 percent of all Yemeni families fall into debt in order to "finance their *qat* habit" (Wulfsohn: 2013). *Qat* creates not only a dependency, but a resistance, i.e. users will need to increase quantities to get the same 'high', which increases the need to have more and more *qat*, causing families resort to negative coping strategies to finance members' *qat* intake. Anecdotal evidence suggests that some parents send their children begging to shoulder the cost of *qat*.

Qat directly or indirectly contributes to poverty in many ways. Some of them include reducing the productivity due to idle time spent in the chewing, replacement of export goods production, immobilization due increased health risk, contribution to illiteracy:

- *Increased idle time spent chewing qat affecting productivity*: The 2006 survey found that 93 per cent of *qat* users spend at least 2 hours chewing, among them 58 per cent chew for 4 hours or more and 22 spend 6 hours or more chewing *qat* (WB: 2007). The same survey also found that 75 per cent of Yemenis *qat* users do not chew while working (WB: 2007).

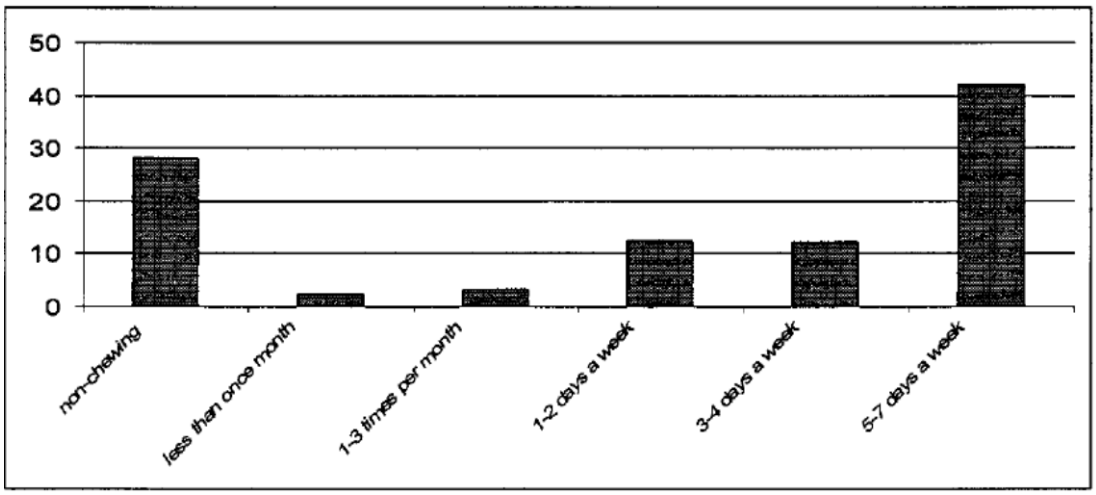

Image 4: Chewing Frequency of Yemeni Males (Source: World Bank Qat Cunsumption Survey, April-May 2006 – Gatter 2006)

The same trend was observed in a recent sample survey as part of this study, which involved 250 respondents, which indicates that 46 per cent of them spend between 3 and 5 hours chewing daily, 16 per cent of them spending 6 to 9 hours chewing, 3 per cent chewing for 10 hours or more and only 7 per cent spending only 1 to 2 hours chewing. Respondents include 90 per cent of males, 9 per cent of females and 1 per cent preferred not to say. The majority of those who took part in the survey are aged between 36 and 60 (47 %) followed by 26 – 35 (44 %). Most of them are employed or own business. Only 12 per cent of them were unemployed.

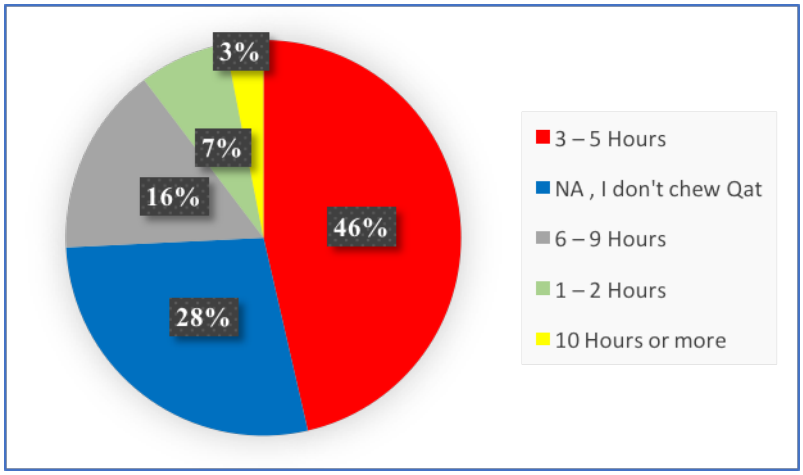

Image 5: Time Spent Chewing *Qat*

Interviews with key informants in this study suggest that many of those chewing *qat* prefer leisure-use. This reduces the national productivity as most of *qat* users prefer early afternoon to late night sessions. It is common knowledge in Yemen that a normal working day starts around 10.00 and ends between 1.30 and 3.00 in the afternoon. Late night sessions account for the endemic tardiness and late start of business in Yemen, especially in public administration between. It is not surprising to find Yemenis whose regular daily working hours start between 10.00 or 11.00 in the morning and end around 1.30 or 2.00pm, i.e. 3-4 hours only a day instead of regular 8 working hours. For self-employed and entrepreneurs, less working hours translate into loss of income.

- *Replacement of export goods production*: With the increasingly high demand of *qat* and its profitability compared to other crops, a shift from crops such as coffee to *qat* has been taking place in the past decades (Schmitz: 2013). With the quasi-absence of oil exports since the beginning of the crisis in 2015 and the progressive decline in coffee export, the trade deficit of Yemen continues to grow exponentially. Although *qat* is an important cash crop in rural economies and it only contributes to micro-level food security in rural area by providing income to those working in the sector, it does reduce domestic food supply as it consumes more and more water and land that could be used for the cultivation of local agricultural food crops and export commodities such as coffee (Schmitz: 2013).
- *Increased health risks and related health-related immobilization associated with qat chewing*: The causal relationship between *qat* and major health conditions does not need to be proven anymore. *Qat* has been associated with psychoses, cardiovascular, gastro-intestinal, periodontal, reproductive health problems. In some instances, even cancers have been reported. Although the causal relationship between *qat* and cancers has not been established, the massive use of fertilizers and pesticides in *qat* plantations is suspected to be the cause (WHO, 2006; Manghi et Al.: 2009). A recent article established the cytotoxic effect that *qat* has on the pancreas by destroying pancreatic β-cells leading to hyperglycemia, thus the increased possibility of developing diabetes mellitus (Alsalahi et al, 2018).

  Most of health issues associated with *qat* can evolve into chronic illnesses with the potential to immobilize users in one way or another and prevent them from engaging in productive activities. Moreover, families are forced to spend resources to seek costly treatment. *Qat* also acts as a hunger suppressant, thus deepens undernutrition and malnutrition directly and indirectly, especially for younger chewers.
- *Contribution to illiteracy resulting from the deprioritization of education in Yemeni households' budgets*: With 10 – 28 percent of household budget *qat* is the single the highest budget item in most of Yemeni households (HBS: 2005, cited in WB: 2007). To continue catering for *qat* needs, families end up deprioritizing many aspects of their needs. Unfortunately, children's education, especially that of girls after primary school is one of those that end at the bottom of the priority lists. Deprioritizing education, especially girls' education has many reasons in Yemen. Among them the belief that girls are more suitable for marriage than education and that educating girls about cooking matters is better than school (CSO, 2019).

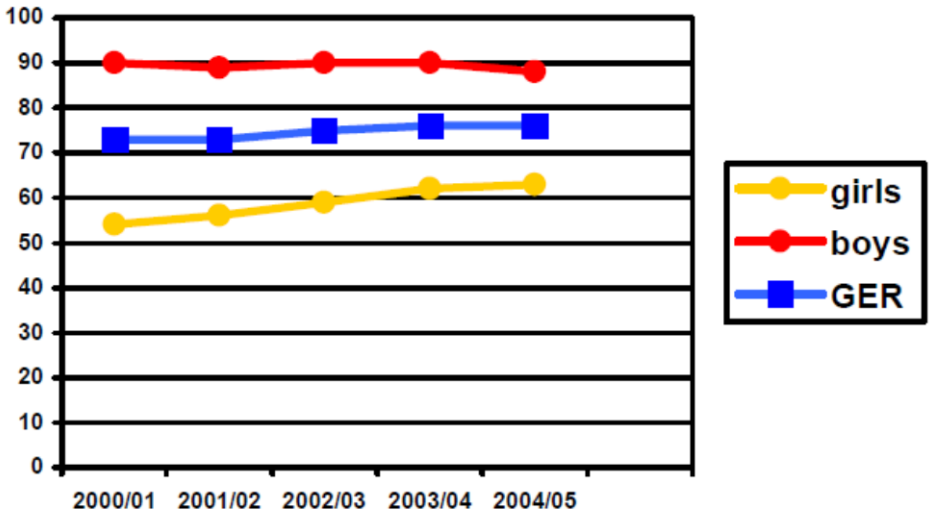

Image 6: Primary Education by Sex (Source: UNICEF, 2007)

Yemen is already in a very bad shape when it comes to equal access to education by sex, more particularly the post-primary education. There is a net decrease of enrollment of girls in post-primary education even before the current crisis. With the deterioration of households' economy due to the crisis, girls' education is even more at risk, increasing their future economic vulnerability.

Literacy Rate (%)	Total	Male	Female	Year
15 – 34 years	77	92.85	60.06	2004
15 years and older	54.1	73.16	35	2004
65 years and older	13.7	25.69	1.5	2004

Image 7: Literacy by sex and age category (Source: UNESCO 2004)

Although *qat* is not the main cause of reduced access to education and increased illiteracy for girls as shown in images 6 and 7, it can be a contributing factor when resources become scarce for the family. Image 7 visualizes the latest available statistics on literacy gap among males and females of different age categories in Yemen.

With the context in Yemen having settled into a protracted crisis and relief assistance being the only social safety net for millions of Yemenis, there is an increased risk of dependency on relief assistance. *Qat*-dependency represents a risk factor that increases the materialization aid-dependency. Relief assistance has progressively become the main source of basic food and services for around 1 in 2 Yemenis, in the absence of employment opportunities and pre-crisis social safety nets. The combination of the risk of dependency on relief assistance and *qat*-chewing addiction can destroy the traditional socio-economic resilience of Yemenis and deplete Yemen's development capital all together. This can lead to an entire generation of Yemenis waiting for assistance while chewing *qat*.

Water Resource Management, Environment, Social and Conflict Dynamics

Reports suggest that Yemen consumes 2.5 times water than its natural replenishment rate (wulfsohn, 2013). Experts estimate that Yemen's water tables are falling by 1.83 meters each year, leading to assumptions that part of the country will run out of water by 2030 (Wulfsohn, 2013; UNDP, 2019). The scarcity of water makes it one of the top conflict-generating resources along with land in Yemen. In 2010, the Government estimated that 4,000 people are killed every year in violence involving water and land in Yemen (YAVA, 2010).

The paradox about *qat* is that it is drought-resistant, but to be profitable, it consumes tons of water. Statistics show that *qat* accounts for 30 to 37 per cent of Yemen current water consumption, making it the largest water consuming crop in the agricultural sector (Wulfsohn, 2013; Douglas, 2016). For instance, a farmer with a 1,650 sq meter *qat* land contacted during this research reports that he uses 200 liters per minute to water his plantation for a minimum of 6 hours every day. This is equivalent to 72,000 liters per day. He mainly uses ground water, but also receives water supply from truck, which cost him 7,000 Yemeni Rials per truck. He has to water seedlings for at least 180 days before getting his first harvest. He has to continue the same ritual to harvest again after 30 days. He states that water is the most expensive input in his business. *Qat's* need for huge quantities of water contributes to the depletion of water table. Some respondents report that it has become more and more difficult to get groundwater in some locations around Sana'a. "Fifteen years ago", they said, "one had to dig 100 to 1000 meters to get water. But now, to get water, you need to dig as deep as 1000 to 2000 meters to get water. More and more *qat* farmers and water

suppliers dig deeper wells to ensure steady supply of water, which has negative impact on older less deeper wells, which end up drying, causing social tensions in communities.

As Yemen has a long history of water scarcity, the management of water resources has also been a key element of intra and inter-community dynamics and peaceful coexistence among communities (Huntjens, 2014: 1). In general, people especially those in tribal areas rely on *urf qabali*[1] to regulate the rights and restrictions with regard access, use and distribution of water within and among communities (Huntjens, 2014: 1). These unwritten rules, for most of them have generally been accepted everyone. Tribal leaders, more particularly Sheikhs, played a central role in enforcing them and resolving resulting disputes (YAVA, 2010: 6). With changes having taken place in Yemen, in terms of tribal and State governance systems in the last decade, tribal leaders began to progressively lose their legitimacy, as a part of direct interference of the State under former President Ali Abdallah Saleh's regime. The regime targeted and undermined tribal leaders who challenged government's policies, orchestrating intra-tribe delegitimization campaigns against the targeted Sheikh (YAVA, 2010, 6). Corruption and patronage are other factors that contributed to weakening traditional governance systems. It is to be noted that in some areas, tribal leaders continue to enjoy the same traditional legitimacy and loyalty among there tribesmen.

The erosion of the tribal leadership's ability to regulate of the access, use and distribution of water, the increasing market demand and profitability of *qat* and the proliferation of small and light weapons (SALW) are likely to increase the the incidence and prevalence of social violence, especially in the context of quasi-State failure, political turmoil and security vacuum.

Among actors in the *qat* value chain, water suppliers are key. They supply water either by truck, motorized groundwater irrigation or diversion of surface water. The *urf qabali*, decrees and laws regulating water dictate govern access to groundwater, surface water and floodwater. Rules for surface water require that upstream farms have a priority right to irrigate their land using surface flood water, while acknowledging the right of those situated downstream to access the surplus. This is what is called *al 'ala fa al' ala or Al'ala Bel Al'ala*. This rule is always applied in complementarity with the *Al Awal fa Al Awal*, which provides gives precedence to those who settled on the land first (Huntjens, 2014: 1). For instance, a new settler on the upstream does not have primacy in using floodwater compared to earlier downstream settlers. The *Alaqrab bel Aqrab*, gives those living or located close to a water source primacy to access it.
Rules governing groundwater regulate the distance between wells, depth, locations where wells can be dug and pumping of water. All these rules and the legal framework governing water in Yemen were meant to preserve water resources and avoid conflicts by regulating who uses first or whether water can be diverted or not. With the increasing land used for *qat* farming, the pressure on water resources is on an increasing trend. Respondents indicate that pressure on water resources, increasing disregard to established rules and laws governing access, use and distribution of water contribute to exacerbating social tensions in rural and peri-urban areas, especially when there are other underlying issues and grievances. The high demand of water for *qat* farming can be a trigger to these conflicts.

On another note, several experts interviewed for this study advanced that authorities do not often confront the *qat* problem as they estimate that *Majlis al-qat* are venues for social therapy and stress relief. As such they contribute to reducing social tensions and uprising.

[1] Traditional/customary, generally unwritten rules. They are mainly of pre-Islamic origin and include agreements and codes of conduct for the overall organization of tribal life in compliance with tribal customs (Huntjens, 2014: 28).

Some of them explained that normal working hours for Yemenis end around 1 or 1.30 in the afternoon. For those who still work, once they finish work, they join the *Majlis al-qat* where they chew *qat* for 6 hours. During those chewing sessions, they feel free to release everything they cannot say in public, including cursing rulers. In doing so, they said, they will not have time to join uprising and riots.

War Economy

Talking about war economy is a very sensitive matter, particularly when the war in question is ongoing. War economy often refers to the generation, mobilization and allocation of resources to sustain war efforts (Carbonnier, 2015: 68). Broadly speaking war economy is comprised of 4 interrelated elements, which Carbonnier (2015: 68) breaks into 4: (i) survival economy or coping economic strategies involving civilians, (ii) shadow networks, (iii) the business that directly supports and sustains pillars of war and (iv) the transnational and international trade and financial relations connecting the above three elements to regional and global markets (Carbonnier 2015: 68). This section will focus on the role *qat* plays in the developing war economy and its link with the prevailing context and humanitarian assistance. Unlike poppy in Afghanistan, the *qat* sector is legal in Yemen although remains largely informal.

The crisis in Yemen has had a very negative impact on the economy. This impact ranges from (i) security and logistical challenges to movements of populations and goods outside and inside Yemen (ii) implosion of the banking system, (iii) the sharp depreciation of the Yemeni Rial and the liquidity crisis to (iv) constant regulatory and administrative decisions looking more an element of warfare than an attempt to regulate the economy in time of war. Economic facilities have been targeted and destroyed by parties to the conflict and all the above challenges caused a quasi-collapse of economic sectors. The few remaining economic actors are constantly facing existential challenges. Shipping to Yemen has become costly due to the crisis. The country has classified as high-risk and many shipping lines do not accept business with Yemeni actors, even when some of them do accept, this comes with high costs, including insurance. Economic activities relying on imports become more and more difficult to sustain, under these circumstances. *Qat* being a domestic business seems to soar despite the above challenges.

Qat plays an important economic and social role in the Yemeni society. It is even described as the "fuel" of the society. As the war slowly became protracted, most of the people and businesses slowly developed creative survival strategies. Some of these strategies involve finding alternative supply routes, paying contributions to war efforts, paying "protection taxes". As the *qat* industry involves many actors, it is not difficult for it to find itself at the center of war-related economics. *Qat* fits into the web of complicated mechanisms which actors, at every level, are obliged to adopt in order to sustain their business.

It is important to note that *qat* is not just a regular crop, which is regulated by the Ministry of Agriculture and Irrigation. It is a self-regulated sector and the only one that is subjected to taxation (Ward & Gatter, 2000). Private technical advisors, who built their skills through years of experience provide technical inputs to *qat* farmers. Farmers, intermediates and every person providing inputs to the *qat* production need to find ways to protect their business through contributions to war efforts, paying "taxes" or access fees at various checkpoints on top of regular taxes. By law, a 20 per cent consumption tax is supposed to be levied at entry points into urban areas, but enforcement of this tax has been lacking (Ward & Gatter, 2000). Often, *qat* sellers and transporters make "arrangements" with tax collectors to allow their product in cities.

One does not need to register with authorities to buy *qat* from farmers and sell it in the market. Everyone involved in the *qat* value chain can be a potential intermediate or retailer since services and supplies can be paid in kind, i.e. with bundles of *qat* leaves. No business registration is generally required for one to sell *qat* in the market. This was already the case long before the current context of crisis. *Qat* can easily be accepted in lieu of cash in many instances. Although they operate in the informal sector, most of them pay taxes and make contributions to war efforts within the limits of their income.

Trying to analyze the place of *qat* in the war economy in Yemen is very challenging. Every attempt to regulate and find ways to address Yemen's *qat* problem has hit a hard-concrete wall. The likelihood of *qat* becoming one of the sectors contributing to war is very high as it is one of the few sectors that are on steady growth despite the decline of the country's economy. There are at least two ways that *qat* finds itself in the war economy: (i) as survival mechanism to sustain the economy and (ii) as a factor contributing to pillars of war, although the latter is arguable.

The growth of the *qat* industry despite the rest of the economy in Yemen experiencing a free fall is often explained by respondents by the need to escape from the trauma and devastation of war. Other reasons why the *qat* industry is striving while other sectors are struggling to remain afloat include the fact that *qat* is purely indigenous and is not impacted by imports issues, except for fuel, which used for water pumping and transportation and the delivery of bundles in the market. Many of those who once were active with productive activities end up having plenty of time at their disposal after losing their income sources. With most of businesses having collapsed, children not attending school, electricity outages, the only entertainment and social activity revolves around *qat* chewing, increasing the demand. Although, this is not the only explanation to the phenomenon. The *qat* sector has been on the increase since the 1970s and authorities have been trying to find ways to address it since 1980s. Latest available data suggest a 220 – 250 per cent increase of *qat* planting area from 1981 to 1998 (Ward & Peer, 2000). This growth can be explained by the steady increase of the demand as the population grows. Yemen has one of the highest fertility rates in the region with 3.755 births per woman. Despite the absence of data, most of observers, including officials suggest that the sector has grown faster during the crisis than it did before and has become the most stable and economic sector in Yemen.

The transport and delivery system of *qat* is one of the most effective despite security issues. Bags of *qat* from the Sana'a Basin can reach the plains of Hadramaut quicker than any other commodity. They use every available means of transportation possible from donkeys, bicycle, motorcycle, vans, buses, SUVs, trucks and even planes to deliver *qat* wherever possible before the leaves lose their freshness and value at the same time. A respondent to the key informant interview suggested that the *qat* delivery system is the most effective in Yemen and faster than any other commodities. "Newspapers, postal services, including DHL and the food industry should learn from *qat* distributors", he stated. The effectiveness of this distribution chain commensurate with the level of investment actors in the industry are ready to make and their readiness to comply with security actors and tax agents along distribution routes to make sure that their perishable "commodity" does not "devaluate" due to delays in the delivery.

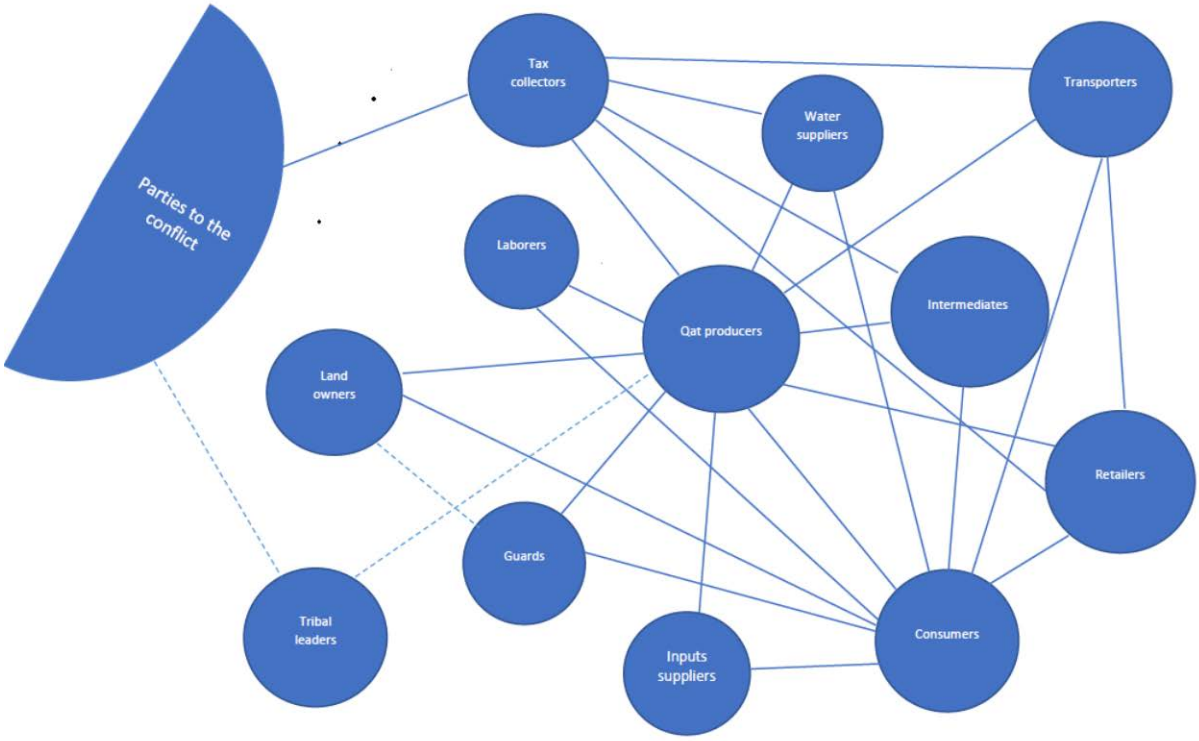

Image 5: Mapping of actors and relationships of actors involved in the *qat* sector

The support to pillars of the conflict is not a clear cut one. Contribution to war efforts is described as the central element of war economy. But in Yemen, almost all sectors are forced to pay their share of contribution to war efforts whether they want it or not. In fact, businesses, including *qat* dealers must make a choice of paying that contribution to maintain their business, close or relocate. In the context of Yemen, paying contributions to war efforts should be considered as a survival choice rather a conscious one to profit from supporting war efforts. The fact that *qat* makes it all the way to frontlines, helping fighters escape the pressure of fighting, is another argument supporting the hypothesis of *qat* being part of the hardcore war economy. Food, soaps and other basic commodities are also supplied to frontlines and they are not labeled as part of war economy. The same account also reports about daily *Qat Ceasefires* being observed by both sides to give fighters time to indulge in their favorite pastime, *qat* chewing (Reuters, 2015).

Overall, *qat's* part in the war economy is mainly survival and coping mechanisms by actors intervening in the value chain of *qat*. Although there is no strong evidence at this stage to support that *qat* is part of war economy *stricto sensu (*a commodity that contributes to fueling the conflict or sustaining it), there may be possible links between some actors to the conflict and the control of the *qat* market in Hajjah, Taizz, Ibb and Sa'ada. This correlation is part of networks that take *qat* all the way to frontline, not as a war commodity, but rather as ration. These networks are more opportunistic and aim at cashing in on a commodity that is not shaken by the hardships of the war. To survive the security and political difficulties, *qat* sector actors are obliged to pay contributions to war efforts, pay multiple taxes, bribing checkpoint agents, etc. Everyone doing business, depending on where they are, is required to comply, whether they support the party to the conflict ruling over the territory they are based in or not. Shadow networks of some of the actors involved in *qat* and other businesses is not within the scope of this paper. The fact that *qat* is legal in Yemen prevented it from falling in the realm of shadow economy. So, how does aid fit in this murky *qat*-fueled environment?

Image 6: 2015 – 2022 International Financing for Yemen (Source: Demetriou, 2019)

Contrary to the common belief, relief assistance is part of the war economy (Carbonnier, 2018: 68). The bulk of humanitarian assistance in conflict situations is to provide relief to affected populations. In itself, it is *band-aid* solutions aimed at helping affected populations to positively cope with the crisis and as such it is an intrinsic part of contemporary war economy (Carbonnier, 2015: 68). This situation is not typical to Yemen. Unintended consequences of activities aimed at saving lives, preserving human dignity and restoring hope may be as negative as predatory activities by profiteers and spoilers in a context of conflict. Around the world, there have been cases where relief assistance has been diverted to feed sympathizers of parties to the conflict and even feeding fighters and their families. In the 1980s, money donated to feed starving people in Ethiopia was reportedly diverted to buy guns (BBC, 2010). In other contexts, revolutionary armed groups *commit* their families to IDP camps where they enjoy physical and material protection while husbands and other men of the community are waging wars against the government.

In contrast to the assertion from what Linda Polman (2011), there is no evidence to suggest that aid prolongs the conflict in Yemen. Fundamental issues having led to the humanitarian crisis do. There is no evidence to suggest that a conflict would have ended should aid have been cut to affected populations. In the context of Yemen, aid keeps people alive and their dignity, in the absence of pre-crisis government-led or supported social protection programs. Humanitarian action represents the only existing safety net for vulnerable households in Yemen. It has, however been observed that aid affects the residual economy in Yemen in one way or another as it became a parallel economy, which sometimes affect markets and threatens economic resilience. Relief items often end up in the market cheaper than import products, creating an unfair competition for national and local economic actors. There is a lack of evidence to assist humanitarian actors in addressing this issue.

Evidence is, itself a major challenge in determining needs and monitoring the impact of aid in Yemen (MSF, 2019). The security context and restrictions preclude efforts to build a robust evidence basis for the response in Yemen. Weaknesses in determining needs and monitoring the impact of assistance opens a whole lot of possibilities for manipulation and diversion of aid by actors to the conflict, organizations and other national stakeholders.

From 2015 to 2022, international assistance to Yemen is estimated at USD17 bn (Demetriou, 2019). Of this amount, around 74 per cent of this amount went to humanitarian assistance. With the economy of Yemen in shambles, this represents the largest source of hard currency and operates in parallel to the regular economy, even though the many areas where both

intersect. Being the largest international aid budget, there are tendencies by actors to control where it goes and who it targets. Recent reports of aid diversion by the United Nations World Food Programme (WFP) attest to that. In December 2018, WFP acknowledged that food assistance was being diverted by local partner associated with one of the parties to the conflict.

The aid system in Yemen is not perfect but is the last barrier between vulnerable Yemenis and inevitable death from hunger, malnutrition and life-threatening diseases. Without serious accompanying economic measures, humanitarians will need to find a way to ensure that their noble actions do not destroy further the ailing economy of Yemen. This is, of course in consideration of *qat* as a complicating factor. The Government of Yemen estimates that the industry is worth USD12 bn (CNN, 2019). This is almost the estimated amount of humanitarian assistance between 2015 to 2022 and almost 3 times development assistance funding for the same period.

Conclusion

For decades, Yemenis have been indulging in chewing *qat*, which has often been seen as a traditional lifestyle and cultural identity for most of them. *Qat* is everywhere in Yemeni social lives, whether it is wedding or family, community and community events. *Qat* is also used to seal a deal or resolution of a dispute between parties. It is also seen as a key to social cohesion in the community. Men and women meet separately to chew *qat* together. This helps seal the bonds within and strengthens the feeling of being part of the community. There are many positive social gains that *qat* brings to the community, when it comes to keeping and strengthening community and social bonds. However, the social good procured by recreational use of *qat* are quickly overshadowed by socio-economic and medical issues that affect the productivity and contribute to malnutrition and poverty among Yemenis. Although *qat* is generally described as a highly profitable cash crop. It employs 17 per cent Yemenis, mostly from rural and per-urban areas. This profitability on one hand, contrasts with the impoverishment it exposes users on the other side.

The use of *qat* costs between 10 to 28 per cent on households' budget and is, for most households, the single high budget item on this budget. With the decline and loss of income most of households experienced since the beginning of the crisis, families cut down costs and eliminate less priority items to cope with the crisis. These cuts include the reduction of number of meals, the quantity of food per meal, pulling out children from school and many other positive and negative coping measures. Despite this, many households continue to maintain and even increase the use of *qat*, reducing even further the economic status of the most vulnerable among them. Some of the households even fell into the trap of *qat* debt to foot the bill of their addiction. The increase in numbers of hours people use *qat* is a serious issue affecting the productivity. Only a few respondents admit to using *qat* while working, most of them prefer idle recreational chewing.

In the context of a protracted humanitarian crisis, *qat* represents a risk factor for the establishment of aid-dependency among populations receiving assistance. The legendary resilience and dignity of Yemenis are progressively disappearing, making way to increased reliance on assistance. Those who were striving to earn even little to maintain their dignity are slowly settling on longer term dependency on assistance, while keeping the little income they generate to sustain their *qat* habit. Health issues associated with the addictive use of *qat* are another strain on families' financial stability as they end up to spending more resources to cover the cost of the medical bills resulting from the addiction. Assistance needs to be designed in a way that takes into account the *qat* factor to avoid destroying the resilience of future generations.

Qat does not only affect socio-economic lives of vulnerable households, but also contributes to the depletion of water resources and affecting the environment. With the water scarcity Yemen has been experiencing for decades, the expansion of cultivated spaces allotted for *qat* farming puts an additional strain on groundwater. This is likely to increase the risk of intra and inter-community conflicts as more and more farmers and water suppliers do not observe the *Urf qabali* and laws that have so far regulated the access, use and distribution of water and served as basis for the prevention and settlement of water-related disputes.

Although it is not possible to assertively say that *qat* is part of hardcore war economy, the fact that it helps fighters on frontlines cope with the pressure of the war and continue fighting, one can arguably say it is definitely part of the war economy as it sustains war in maintaining the morale of troops in front lines. There is a need to look into the way the Yemeni society functions in normal and crisis settings before coming to conclusions. Whether at war or peacetime, Yemenis chew *qat* and they would take it with them wherever they are and whether they are fighting or not.

Addressing Yemen *qat's* problem is more a development than a humanitarian issue. It requires accompanying measures to support a few actors that have been working to reverse the wheel of *qat*. It is not enough to denounce *qat* as an addiction. There is a necessity to come together and understand the problem from different perspectives and set up measures that are tailored to the magnitude of the challenges. Although peace is the prerequisite for a thorough examination of the issue, there are localized, and stop-gap measures that could be taken even in the current context pave the way for a more comprehensive sets of solutions to the qat problem.

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RE-THINKING TRANSITIONAL JUSTICE FOR PEACEBUILDING IN POST-XENOPHOBIC CONFLICT ZONES: A CASE OF SOUTH AFRICA

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Abstract

The paper argues that xenophobia has become a culture interwoven into the South African social fabric. This view forms the premise for the submission that xenophobia for most South Africans is socially just hence its perpetuity. For them, only indigenous South Africans have the sole right to access resources and opportunities of the post-apartheid legacy since they are the ones who experienced the brunt of its ruthlessness. The paper draws parallel lines between the nature and scope of the crime of xenophobia and that of the crimes against humanity as expounded in the Rome Statutes of the International Criminal Court. The recurrence of gross human rights violations resulting in loss of life and property as well as the physical and psychological trauma experienced by the victims of xenophobia ostensibly under the government's watch may point to some government culpability and deficiencies or gaps in the South African justice system. For South Africa, xenophobia is not just attitudinal but has become confictional hence the need for authorities to swiftly and quickly move in to stop the hostilities in order to limit its excesses as a stopgap measure and thereafter establish transitional justice mechanisms where the perpetrators are made to account for their actions and the victims are adequately compensated. It is this paper's assertion therefore that considering transitional justice as a peace building mechanism in the post-xenophobic conflict zones is perhaps the most important of many processes and mechanisms of containing xenophobic violence in South Africa. The paper theorizes the Integrated Threat Theory to delineate the research problem. The research is non-empirical and therefore makes use of secondary sources (documentary analysis) for data collection and qualitative content analysis for data analysis.

Key words; Transitional justice, peace building, xenophobia and conflict

Introduction

Xenophobia, simply put, is the fear or hatred of foreigners or strangers; it is embodied in discriminatory attitudes and behaviour, and often culminates in violence, abuses of all types, and exhibitions of hatred.[1] Xenophobia is also a manifestation of racism[2]. Racism and xenophobia support each other and they share prejudiced discourses.[3] They both operate on the same basis of profiling people and making negative assumptions.[4] Studies on xenophobia have attributed such hatred of foreigners to a number of causes: the fear of loss of social status and identity; a threat, perceived or real, to citizens' economic success; a way of reassuring the national self and its boundaries in times of national crisis.[5] The manifestation of xenophobia undermines social cohesion, peaceful co-existence, and good governance, and constitutes a violation of human rights.[6]

Xenophobic violence has become a longstanding feature in post-Apartheid South Africa.[7] The post-apartheid era in South Africa has been marked by a steady undercurrent of xenophobia, both attitudinal and behavioural.[8] Everyday discrimination is frequently encountered, especially by nationals of Central and West African countries.[9] Vigilante attacks on immigrant individuals, particularly shopkeepers, are disturbingly common[10]. Data from the 1995 World Values Survey showed that South Africans were the most xenophobic nation of the 18 included in the sample.[11] In 2006, xenophobic attitudes were just as prevalent: A survey conducted that year found that almost half of the South African sample wanted foreign nationals, regardless of their legal status, to be deported.[12]

South Africa is party to international human rights and humanitarian treaties, especially on refugees and asylum seekers; obligations to combat xenophobia have both a legal and a moral force.[13] Despite the moral and legal obligations to combat xenophobia, it has remained a permanent conundrum of the South African socio-economic and political order. Not surprising, this notion has largely shaped views from a large body of opinion that the South African government still have a lot to do in order to combat xenophobia and build sustainable peace. One way of building peace in the post-xenophobic conflict zones is perhaps for the South African government to cogitate Transitional Justice mechanisms. Importantly, the concept of transitional justice, as its name hints, closely links transition with the pursuit of justice.[14] It is based on the assumption that in order to move on politically and socially, some

[1] Kosaka H *Xenophobia in South Africa: Reflections, Narratives and Recommendations* (Osaka University Japan and University of the Free State).
[2] South African History on Line "Xenophobic violence in democratic South Africa" available on https://www.sahistory.org.za › article › xenophobic-violence-democratic-s (Date of use: 29 May 2019).
[3] South African History on Line Available at https://www.sahistory.org.za › article › xenophobic-violence-democratic-s (Date of use: 29 May 2019).
[4] South African History on Line Available at https://www.sahistory.org.za › article › xenophobic-violence-democratic (Date of use: 29 May 2019).
[5]Solomon H and Haigh L "Xenophobia in South Africa: Origins, Trajectory and Recommendations" 2009 *Africa Review* 111-131.
[6]Kosaka *Xenophobia in South Africa*.
[7]Misago J P "Responding to Xenophobic Violence in Post-Apartheid South Africa: Barking Up the Wrong Tree?" 2016 *African Human Mobility Review* Volume 2 No2 443-466.
[8]Claassen C *Explaining South African xenophobia* (Afro Barometer 2017 Paper Number 173).
[9] Claassen *Explaining South African xenophobia.*
[10]Claassen *Explaining South African xenophobia.*
[11]Claassen *Explaining South African xenophobia.*
[12]Claassen *Explaining South African xenophobia.*
[13]Kosaka *Xenophobia in South Africa.*
[14] Herman J Martin-Ortega O and Lekha Sriram C Beyond justice versus peace: transitional

form of dealing with gross human rights abuses, crimes against humanity and war crimes is necessary.[15]

Theorising and contextualising the causes of xenophobia in South Africa.

This paper is guided by the Integrated Threat Theory also known as the Intergroup Threat Theory. The Integrated Threat Theory (Herein ITT) is a theory by Stephan and Stephan (1996) that is used to predict attitudes towards an out-group within a society and how an encounter between an in-group and an out-group erupts within a society.[16] It presupposes that society is composed mainly of two groups, the in-group (original citizens of a society) and an out-group (foreigners to the society of the in-group).[17] The manifestations and patterns of xenophobic violence in South Africa resonates well with this school of thought as native South African citizens are considered to be the in-group whilst all immigrants including citizens by naturalization are considered to be the out-group. The major transition in 1994 redefined what it meant to be a South African; this no longer came down to the primordial signifiers of 'race', religion, culture or skin-color, but was based more on nationality and citizenship.[18] This citizenship is based on indigeneity.[19] Indigenous blood citizenship is the only and supreme form of citizenship recognized by xenophobes in South Africa hence the victimization of South Africans not South African enough. Citizenship is granted on the basis of territory and birth, not political agency, and it is emphasized by state power and this is an exclusive concept of nationality, as those believed to be on the outside of the territorial boundaries are excluded from the rights and entitlements of citizenship.[20] In the original version of intergroup threat theory, labeled integrated threat theory four types of threats were included, but this number has since been reduced to two basic types – realistic and symbolic threats.[21] Realistic *group* threats are threats to a group's power, resources, and general welfare whilst symbolic *group* threats are threats to a group's religion, values, belief system, ideology, philosophy, morality, or worldview.[22] In the South African context, there is quiet a large body of evidence and indeed of opinion that points to the existence of these realistic threats as the main cause of xenophobia. The most advanced reason for xenophobic attacks has been that foreigners are a threat to employment prospects of the locals. Foreign nationals are attacked for allegedly taking up jobs that are otherwise supposed to be taken up by the locals. Symbolic threats are also existent in the sense that foreign nationals are accused of influencing the moral decadence of the South African fabric society through engaging in

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justice and peacebuilding strategies Available at https://ecpr.eu › Filestore › PaperProposal (Date of use: 22 August 2019)

[15] Herman J Martin-Ortega O and Lekha Sriram C Beyond justice versus peace: transitional justice and peacebuilding strategies Available at https://ecpr.eu › Filestore › PaperProposal (Date of use: 22 August 2019)

[16] Stephan W G & Stephan C W *Intergroup relations*: *Social psychology series* (Brown & Benchmark Madison 1996) 10-220

[17] Stephan and Stephan *Intergroup relations* 10-220

[18] Hågensen L *Understanding the Causes and the Nature of Xenophobia in South Africa: A Case Study of De Doorns* (Master of Arts Thesis in the Faculty of Arts and Social Sciences Stellenbosch University 2014).

[19] Hågensen L *Understanding the Causes and the Nature of Xenophobia in South Africa*.

[20] Hågensen L *Understanding the Causes and the Nature of Xenophobia in South Africa*.

[21] Stephan and Stephan *Intergroup relations* 10-220

[22] Stephan and Stephan *Intergroup relations* 10-220

criminal activities such as drug trafficking and armed robberies. Immigrants today are seen as carriers of disease and also as potential contaminants of the body politic of the nation by derailing the development and redistribution process and through criminal behavior.[23]

Xenophobia as crime against humanity

There appears to be a very thin dividing line if any between the nature and scope of the crime of xenophobic violence and that of the crime against humanity as expounded in the Rome Statute of the International Criminal Court. The definition of 'crimes against humanity' is codified in article 7 of the Rome Statute of the International Criminal Court (ICC) as, "encompassing crimes such as murder, extermination, rape, persecution and all other inhumane acts of a similar character (willfully causing great suffering, or serious injury to body or to mental or physical health), committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"[24] . Most incidents listed during the xenophobic violence in South Africa may fall within the scope of "widespread or systematic attacks" characterized by "multiple acts of large-scale violence, carried out in an organized fashion and resulting in numerous victims. The attacks were premeditated, barbaric, ruthless, and merciless and systematically targeted unarmed and vulnerable populations such as children and women in the manner that could be described and defined as crimes against humanity by any competent court.

In December 1994 and January 1995, armed youth gangs in the Alexandra Township outside of Johannesburg, Gauteng Province, destroyed the homes and property of suspected undocumented migrants and marched the individuals down to the local police station where they demanded that the foreigners be forcibly and immediately removed[25]. In September 1998, two Senegalese and a Mozambican were thrown from a moving train in Johannesburg by a group of individuals returning from a rally organised by a group blaming foreigners for the levels of unemployment, crime, and even the spread of AIDS[26]. Again in 1998 the police set dogs on three Mozambicans in Johannesburg in a gruesome training session; the event was captured on video and the policemen were tried in court.[27] The video shows the three foreign men pleading for help while the policemen stood by laughing.[28] It became known that it was 'normal procedure' to set dogs on criminals or foreigners in order to train the dogs to bite.[29]

In 2000, seven xenophobic killings were reported in the Cape Flats district of Cape Town[30]. Kenyan Kingori Siguri Joseph died after being attacked and shot, two Nigerians were shot

[23] Hågensen L *Understanding the Causes and the Nature of Xenophobia in South Africa*.
[24] OHCHR "War Crimes, Crimes against Humanity and War Crimes" available on https://www.ohchr.org › Documents › Countries (Date of use: 20 June 2019).

[25] South Africa History on Line "Xenophobic violence in democratic South Africa timeline" https://www.sahistory.org.za › article (Date of use: 20 June 2019).

[26] Krasner B *Hate Crimes* (Greenhaven Publishing New York 2018) 44.
[27]Hågensen L *Understanding the Causes and the Nature of Xenophobia in South Africa*.
[28]Hågensen L *Understanding the Causes and the Nature of Xenophobia in South Africa*.
[29]Hågensen L *Understanding the Causes and the Nature of Xenophobia in South Africa*.
[30] South Africa History on Line "Xenophobic violence in democratic South Africa timeline" https://www.sahistory.org.za › article (Date of use: 20 June 2019).

dead in NY 99 in Gugulethu, Prince Anya, 36, was hijacked with his wife Tjidi and their toddler in Bothasig. And in Mdolomda Street in Langa, two Angolan brothers Nguiji Chicola, 23, and Mario Gomez Inacio, 25, were trapped inside their house and burnt to death.[31]

In 2008 as the attacks escalated across the country, thousands of migrants searched for refuge in police stations and churches.[32] Chilling stories spread about mobs armed with axes, metal bars, and clubs. The mobs stormed from shack to shack, assaulted migrants, locked them in their homes, and set the homes on fire.[33] Mozambican Ernesto Nhamuave, who became an awful symbol of the violence, was burnt alive in Ramaphosaville on the East Rand.[34] Several smaller groups split off and went door to door searching for foreigners and anyone who could not pass their test, to provide the Zulu word for "elbow," was beaten.[35] This xenophobic violence as it is now called finally abated after three weeks, leaving 62 people dead, 670 wounded, and 100,000 displaced.[36] Zimbabweans and Mozambicans were particularly well-represented among the victims and in all, 62 people were killed.[37]

From 14 to 17 November 2009, 3000 Zimbabwean citizens living in the rural community of De Doorns, an informal settlement near Breede Valley Municipality, in the Western Cape was displaced as a result of xenophobic violence.[38] On 27 February 2013, in Daveyton, East of Johannesburg, eight South African police officers tied the 27 years old Mozambican man, Mido Macia, to the back of a police van and dragged him down the road and subsequently, the man died in a police cell from head injuries.[39] On 26 May 2013, two Zimbabwean men were killed by South Africans mob in xenophobic violence in Diepsloot, South Africa.[40]

In January 2015, a Somali shop owner shot and killed a 14-year-old boy, Siphiwe Mahori, during an alleged robbery in Soweto Township and the incident triggered waves of attacks and looting of foreign owned shops.[41] An estimated 120 Spaza shops owned by Somalis and Bangladeshis across Snake Park, Zola, Meadowlands, Slovoville, Kagiso, Zondi and Emdeni in Soweto were looted.[42] It was also reported that police actively stole goods and helped others raid the shops during the worst attacks on foreigners.[43] In Zondi Section, the police

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[31] South Africa History on Line "Xenophobic violence in democratic South Africa timeline" https://www.sahistory.org.za › article (Date of use: 20 June 2019).

[32] Vromans L, Schweitzer R D, Knoetze K and Kagee A "The experience of xenophobia in South Africa" 2011 *American Journal of Orthopsychiatry* 90-93.
[33] Vromans L, Schweitzer R D, Knoetze K and Kagee A *AJO* 90-93.
[34] Hågensen L *Understanding the Causes and the Nature of Xenophobia in South Africa*.
[35] Claassen *Explaining South African xenophobia.*
[36] Claassen *Explaining South African xenophobia.*
[37] Claassen *Explaining South African xenophobia.*
[38] Hågensen L *Understanding the Causes and the Nature of Xenophobia in South Africa*.
[39] Krasner B *Hate Crimes* 44.
[40] The Southern Times "Anxious SA attempts to tackle xenophobia" Retrieved at https://southerntimesafrica.com/site/news/anxious-sa-attempts-to-tackle-xenophobia (Date of use: 08 October 2019).
[41] Sigamoney R F *The reasons that promote the resilience of a Somali community residing in Fordsburg/Mayfair, Johannesburg* (Master Of Arts In Psychology Dissertation University Of South Africa 2016).
[42] Sigamoney R F *The reasons that promote the resilience of a Somali community*.
[43] Krasner B *Hate Crimes* 44.

instructed looters to queue outside a foreign-owned shop and allowed four of them in at a time to prevent a stampede.[44]

On 21 March 2015, Zulu King Goodwill Zwelithini made comments that foreigners should go back to their home countries because they are changing the nature of South African society with their goods and enjoying wealth that should have been for local people.[45] The king's statement came while Congolese nationals were mourning deaths caused by a series of xenophobic attacks. Noel Beya Dinshistia from Congo, a bouncer at a local nightclub, was doused in a flammable substance before being set alight while on duty.[46]

On 8 April 2015, the spate of xenophobic violence increased. On 10 April 2015, two Ethiopian brothers were critically injured when their shop, in a shipping container, was set on fire while they were trapped inside and one of the men died while in hospital while the other is still fighting for his life.[47]

On 12 April 2015, Attacks on foreign nationals continued in KwaZulu-Natal when shops in Umlazi and KwaMashu, outside Durban, were torched and almost 2,000 foreign nationals from Malawi, Zimbabwe, Mozambique and Burundi were displaced and five killed as a result of the violence.[48] On 14 April 2015, Looting of foreign shops spread to Verulam, north of Durban following a day of clashes between locals, foreigners, and police in the city centre, KwaZulu-Natal[49]. About 300 local people looted foreign-owned shops, and only two people have been arrested.[50]

The Human Rights Watch has reported that in the 2019 xenophobic attacks, at least twelve people have been killed, thousands displaced, and businesses wantonly looted during the violence that began in late August 2019.[51] One of the victims, Isaac Mabandla Sithole, was beaten, stoned, and burned to death by a mob in Katlehong on September 5.[52]

Government's response to xenophobia

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[44] South Africa History on Line "Xenophobic violence in democratic South Africa timeline" https://www.sahistory.org.za › article (Date of use: 20 June 2019).

[45] South Africa History on Line "Xenophobic violence in democratic South Africa timeline" https://www.sahistory.org.za › article (Date of use: 20 June 2019).

[46] South Africa History on Line "Xenophobic violence in democratic South Africa timeline" https://www.sahistory.org.za › article (Date of use: 20 June 2019).

[47] Krasner B *Hate Crimes* 44.

[48] South Africa History on Line "Xenophobic violence in democratic South Africa timeline" https://www.sahistory.org.za › article (Date of use: 20 June 2019).

[49] The Southern Times "Anxious SA attempts to tackle xenophobia" Retrieved at https://southerntimesafrica.com/site/news/anxious-sa-attempts-to-tackle-xenophobia (Date of use: 08 October 2019).

[50] South Africa History on Line "Xenophobic violence in democratic South Africa timeline" https://www.sahistory.org.za › article (Date of use: 20 June 2019).

[51]Human Rights Watch "South Africa: Punish Xenophobic Violence" Retrieved at https://www.hrw.org/news/2019/09/13/south-africa-punish-xenophobic-violence (Date of use: 07 October 2019).

[52]Human Rights Watch "South Africa: Punish Xenophobic Violence" Retrieved at https://www.hrw.org/news/2019/09/13/south-africa-punish-xenophobic-violence (Date of use: 07 October 2019).

Both before and after the 2008 attacks, it is fair to say that the overall government response to xenophobia and related violence in South Africa has been characterized by denialism.[53] In many cases, this denialism is rooted in a discourse which labels all xenophobic violence as 'common crime and not xenophobia,' a categorisation that demands few specific interventions or policy changes.[54] According to The Free Dictionary, a "common crime" is a criminal offense that is less serious than a felony and generally punishable by a fine, a jail term of up to a year or both.[55] It is an instance of bad behavior such as nudity and bearing false witness.[56] Now for the South African authorities to push a "common crimes" narrative and to implicitly place xenophobic violence at parity with bearing false witness is not only mischievous but scandalous as well. This position can be said to have sustained xenophobia in South Africa. After the 2008 xenophobic attacks, it took government two weeks to acknowledge and condemn the attacks on foreigners and when they finally did, South African elites' nonchalant response was one of denial rather than acknowledgement.[57] According to South African elites, the problem lies in migration, and the violence against foreigners is mere criminal activity rather than xenophobia.[58]

The unwillingness to recognize xenophobia coupled with a general weak judicial system has also led to an alarming culture of impunity and lack of accountability for perpetrators and mandated institutions: foreign nationals and others have been repeatedly attacked in South Africa since 2004 but few perpetrators, some of them government representatives at local level, have been charged.[59] Even fewer have been convicted.[60] Nobody up today had been arrested for the horrible murder of Mozambican Ernesto Alfabeto Nhamuave, who was in the 2008 attacks, beaten, stabbed and set alight in Ramaphosa and the Police have closed the case on 27 October 2010 after concluding that there were no witnesses and no suspects.[61]

Early efforts by the government to commit itself to uphold the 'Declaration' adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) held in Durban in 2001 has not yielded any positive results and this could be attributed to the government's denialist approach. The conference recognised the urgent need to translate the objectives of the Durban Declaration into a practical and workable plan but unfortunately more than a decade later no such a plan exists although a 'National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance' spearheaded by the Department of Justice and Constitutional Development has been under discussion for many years.[62]

So much of an aberration was this violence, the government suggested, that sinister forces might be to blame.[63] Minister for Home Affairs Nosiviwe MapisaNqakula told Parliament's Portfolio Committee on Home Affairs that a 'third force' might be orchestrating the

[53] Misago *AHMR*
[54] Misago *AHMR*
[55] The Free Dictionary
[56] The Free Dictionary
[57] Abatan E J A *Responding to xenophobia: What can South Africa learn from Côte d'Ivoire*? (University of Pretoria 2015).
[58] Abatan *Responding to xenophobia*
[59] Misago *AHMR*
[60] Misago *AHMR*
[61] Krasner *Hate Crimes*
[62] Misago *AHMR*
[63] Bond P Ngwane T and Amisi B *Xenophobia and civil Society: Why did it happen*? (Atlantic Philanthropies 2010).

violence.[64] National Intelligence Agency Director General Manala Manzini, went further, insisting that violence was orchestrated 'by internal and external racist elements bent on destabilising next year's general election'.[65] Blaming a 'third force' or 'opportunistic elements' was a useful strategy to avoid a terrible reality that afflicted the government, civil society, journalists and analysts alike: ignorance of prevailing conditions and consciousness deep in the society.[66] As a result of denialism, the government can be said to be complicity in perpetuating the scourge of xenophobia in South Africa. Condemning xenophobia without deliberate specific policy interventions will not stop xenophobes from acting and behaving in a manner that is at variance with the spoken word of condemnation.

Transitional Justice and post-xenophobia peacebuilding

Peace building is construed as a craft of responsive governance.[67] It requires patience and resilience because most peace initiatives fail, though most successes are built on the foundation of prior failures.[68] Since the South African Truth and Reconciliation Commission built on the earlier experience of Latin American truth commissions, truth and memory have been seen as fundamental to peacebuilding and national transitional justice institutions have been seen as the appropriate vehicles for their realization.[69] Perhaps before considering any peacebuliding initiative, the point of departure would be for the South African government to admit that xenophobia is in fact a conundrum that has to be nipped in the bud. In fact since xenophobia has become South Africa's Achilles, the lawmakers may consider a policy framework that codifies a *sui generis* crime of xenophobia in order to sharply focus on its containment. Consequently, this would also clear the path towards the formulation of deliberate government policies biased towards eradication of xenophobia and building sustainable peace in South Africa. However, until such a time when that happens, the South African government has to deal with the legacy of xenophobia in a more or equal manner that it dealt with the legacy of apartheid. One such rout that the government can take is that of Transitional Justice.

There is a general consensus among scholars and peace practitioners that addressing the legacies of past violence and human rights abuse is necessary for fostering sustainable peace.[70] Transitional justice embodies an attempt to build a sustainable peace after conflict, mass violence or systemic human rights abuse.[71] Justice is generally thought to have a positive contribution to the restoration and maintenance of peace in the following ways: by establishing individual accountability, deterring future violations, establishing an historical record, promoting reconciliation and healing, giving victims a means of redress, removing perpetrators and supporting capacity-building and the rule of law.[72]

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[64] Bond Ngwane and Amisi *Xenophobia and civil Society*
[65]Bond Ngwane and Amisi Xenophobia *and civil Society*
[66] Bond Ngwane and Amisi Xenophobia *and civil Society*
[67] Braithwaite J *Truth, Reconciliation and Peacebuilding* (Australian National University 2016) 29-48.
[68] Braithwaite *Truth, Reconciliation and Peacebuilding* 29-48.
[69] Braithwaite *Truth, Reconciliation and Peacebuilding* 29-48.
[70]Peace Building Initiative "Transitional Justice" Retrieved at www.peacebuildinginitiative.org › (Date of use: 20 June 2019).

[71] Peace Building Initiative "Transitional Justice" Retrieved at www.peacebuildinginitiative.org ›

[72] Peace Building Initiative "Transitional Justice" Retrieved at www.peacebuildinginitiative.org ›

Transitional justice aims to restore or create the conditions for peace and stability, through a process in which factors such as truth, accountability and reconciliation are central.[73] This process requires a comprehensive set of strategies that must deal with the events of the past, but must also look to the future, in order to prevent a recurrence of conflict and abuses.[74] Advocates of transitional justice may also argue that accountability processes of some sort are essential for longer-term peacemaking and peacebuilding.[75]

Commissions of inquiry

Truth and Reconciliation Commissions have become common components of post-conflict policy.[76] Their investigations establish an accurate and authoritative record of the past, acknowledged by the government.[77] The South African government's denialist attitude on xenophobia necessitates the establishment of a commission of enquiry in the mould of a Truth Commission which could go a long way in fulfilling some of its fundamental goals that often include: to discover, clarify, and formally acknowledge past abuses. The Hoofnagle brothers, a lawyer and a physiologist from the United States, who have done much to develop the concept of denialism, have defined it as the employment of rhetorical arguments to give the appearance of legitimate debate where there is none.[78] Denialists are driven by a range of motivations.[79] For some it is greed, for others it is ideology or faith, causing them to reject anything incompatible with their fundamental beliefs.[80] Finally there is eccentricity and idiosyncrasy, sometimes encouraged by the celebrity status conferred on the maverick by the media.[81] The South African government's denialist attitude could therefore be to some extend comprehensible in that after a bitter and protracted struggle against injustices and prejudices and thereafter being conferred with the status of African model of democracy the world over, the Rainbow Nation cannot phantom the fact that just a few years later it is now perpetrating the same evils it fought against. A Truth Commission would therefore either affirm or dispute the "common crimes" narrative being propagated by the government. It would establish the official truth about all the nuances surrounding xenophobia and pave way for appropriate response to it. This model assumes that truth precedes reconciliation and peace.

Prosecutions

The other goal of the commission would be to contribute to justice and accountability. Holding perpetrators accountable demonstrates that the principle of the rule of law stands above political decisions or any decision.[82] Many of the violations committed during a conflict are not only violations of national law but also those of international law requiring

[73] Connolly L "Justice and peacebuilding in postconflict situations: An argument for including gender analysis in a new post-conflict model" 2012 *African Centre for the Constructive Resolution of Disputes* Issue 1 5-8.
[74] Connolly 2012 *ACCORD* 5-8.
[75] Connolly 2012 *ACCORD* 5-8.
[76] Aggestam K and Bjorkdahl A *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Routledge New York 2013) 52-55.

[77] Jakobsson E *Transitional Justice – An Analysis of Restorative and Retributive Mechanisms in Sub-Saharan Africa* (Bachelor Thesis in Peace and Development Studies Linne University 2018)
[78]Diethelm P and McKee M "Denialism: what is it and how should scientists respond?" 2009 *European Journal of Public Health* Volume 19 Issue 1 2–4.
[79]Diethelm and McKee 2009 *EJPH* 2-4.
[80]Diethelm and McKee 2009 *EJPH* 2-4.
[81]Diethelm and McKee 2009 *EJPH* 2-4.
[82] Aggestam K and Bjorkdahl A *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Routledge New York 2013) 52-55.

prosecution. Failure to prosecute promotes a culture of impunity and denies what some consider as "the most effective insurance against future repression".[83] Prosecutions act as a deterrent mechanism against future conflicts. Prosecutions can take place in a wide range of forum, namely national courts, ad hoc criminal tribunals, mixed or hybrid tribunals and the International Criminal Court (ICC).[84] However, domestic prosecutions may not always be a possibility where the national court system has been devastated by conflict or corruption or bias is widespread.[85] Moreover, prosecution handles individual accountability well, but it does not address institutional accountability.[86] The importance of dealing with both individual and institutional accountability cannot be ignored if South Africa is to holistically address the problem of xenophobia.

In the case of South Africa as alluded to earlier on, there is worrisome low levels of confidence in the current justice delivery system as far as dealing with xenophobia is concerned for various reasons. Firstly, the alleged involvement in xenophobic violence of some law enforcement agencies especially the police undermines the whole justice delivery system because it is the very same police that are tasked with investigating, arresting and originating of dockets for prosecution. The argument goes that if there is travesty or miscarriage of justice at investigation level this would most likely have a domino effect right up to the courts. Secondly statistics do not favour the South African justice delivery system as very few xenophobes have been accounted for, for example, nobody has been arrested yet for the horrible murder of Mozambican Ernesto Alfabeto Nhamuave and worse still the Police have closed the case on 27 October 2010 after concluding that there were no witnesses and no suspects. The Director of Human Rights Watch for Southern Africa Dewa Mavhinga emphasized the importance of due diligence in law enforcement when dealing with xenophobia by positing that, "The vicious cycles of xenophobic violence are spurred by lack of effective policing to protect foreign nationals and their properties and merely condemning xenophobic violence is not enough to stop it – the police should thoroughly investigate, arrest, and bring to justice the attackers."[87] Prosecutions must be extended to perpetrators and their accomplices. Perpetrators are those that directly took part in the violence and accomplices are those that aided and inspired the violence process such as rogue police officers and some politicians and traditional leaders. It may be necessary for the maintenance of peace to remove these from the society and let them serve time commensurate with the severity of their crimes.

It is therefore this paper's assertion that since xenophobic violence in South Africa by character, nature and scope constitutes crimes against humanity and since it is quite evident that so far the current criminal justice system in South African has so far fallen short of addressing this issue, a Hybrid Tribunal may be best suited to try perpetrators of past xenophobic crimes in the interim whilst the justice system is being reformed. Adoption of a

[83] Herman J Martin-Ortega O and Lekha Sriram C Beyond justice versus peace: transitional justice and peacebuilding strategies Available at https://ecpr.eu › Filestore › PaperProposal (Date of use: 22 August 2019)

[84]Herman J Martin-Ortega O and Lekha Sriram C Beyond justice versus peace: transitional justice and peacebuilding strategies Available at https://ecpr.eu › Filestore › PaperProposal (Date of use: 22 August 2019)

[85] Aggestam and Bjorkdahl *Rethinking Peacebuilding* 52-55.
[86] Aggestam and Bjorkdahl *Rethinking Peacebuilding* 52-55.
[87] Human Rights Watch "South Africa: Punish Xenophobic Violence" Retrieved at https://www.hrw.org/news/2019/09/13/south-africa-punish-xenophobic-violence (Date of use: 07 October 2019).

Hybrid Tribunal by the South African government would not only demonstrate its seriousness in dealing with xenophobic violence but would also be a positive indicator of a young democracy committed to the obliteration of structural violence as well. Hybrid tribunals are often the most effective criminal tribunal currently exercised to adjudicate international crimes because they best blend domestic actors and norms while respecting international *jus cogens* norms.[88] The involvement of domestic penal codes and jurisdiction respects state sovereignty and retains the cultural and political expectations of both the perpetrators and the victims.[89] Hybrid tribunals, in addition to immediately benefitting domestic jurisdiction by involving local actors, are also more effective than other removed criminal bodies because hybrid tribunals do the most to transition the domestic state for long-term stability.[90] Long-term stability is the essence of peace building.

Reparations

There has been growing recognition of the role that restorative justice methods can play in supporting the needs of victims and the building of community relations in addition to the emphasis on punishment of the perpetrator, or retributive justice.[91] Reparations are important instruments of restorative justice.[92] Supporters of reparation argue that by demonstrating the acknowledgement of past abuses and committing resources to restorative means, it provides recognition to victims, builds community trust and public trust in the state.[93] There is no doubt that if South Africa is to make positive strides in the fight against xenophobia it has to consider the path of reparations considering the number of innocent lives lost and injured, amount of property destroyed and looted as well as the psychological trauma that the victims have been subjected to. While reparations will not necessarily and adequately restore the pre-violence status quo of the victims, they may have a justice served effect on the victim. The need to obtain justice for victims of conflict has been recognized as imperative when constructing peace.[94]

Public Apologies and Reconciliation

Rightly understood and formulated, apologies, as a form of dialogue, could become an essential norm-affirming and community-binding measure in the aftermath of mass atrocities, one compatible with a liberal project of transitional justice.[95] In this expose I ague that public apologies must precede and lead to reconciliation. This process must come right at the end after perpetrators have been officially charged and victims officially compensated. After conviction and before being locked away, the perpetrators should be given the platform to

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[90] Carroll C E "Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring within a Domestic State" Accessed at https://scholarship.shu.edu/student_scholarship/90 (Date of use: 22 August 2019).

[91] Aggestam K and Bjorkdahl A *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Routledge New York 2013) 52-55.

[92] Aggestam and Bjorkdahl *Rethinking Peacebuilding* 52-55.

[93] Aggestam and Bjorkdahl *Rethinking Peacebuilding* 52-55.

[94] Jakobsson E *Transitional Justice – An Analysis of Restorative and Retributive Mechanisms in Sub-Saharan Africa* (Bachelor Thesis in Peace and Development Studies Linne University 2018).

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publicly apologize to the victims and all affected by their actions. Reconciliation should therefore come naturally as a consequence of the belief that at least and at last justice is served. However, there is need to see to it that this whole process of transitional justice does not become a temporary remedy susceptible to a relapse of the situation. Massive social transformation campaign programs involving stakeholders such as the government, Civic Society Organisations, Non- Governmental Organisations, former perpetrators and former victims must be rolled out to consolidate the gains of the Transitional Justice process.

Conclusion

Xenophobic violence in South Africa has become endemic and a generational curse. Its perpetuity has largely been blamed on the South African government's laxity to decisively confront the scourge head on as a result of its denialist attitude. In order to holistically tackle xenophobia in all its forms and build peace in post-xenophobic conflict zones, the South African government has to address the crimes and injustices of the past following a sequential order of transitional justice mechanisms proposed in this paper. Firstly, the establishment of a Truth Commission in order to gather all the facts around xenophobic violence, followed by retributive justice for those found to have committed gross human rights violations and then restorative justice for the victims. Lastly the government has to join forces with NGOs and CSOs and promulgate massive social transformation programmes that would naturally and over time lead to reconciliation and sustainable peace.

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Rights of Armed Non-state Actors:

Debating Religious and Moral Theories

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Abstract

Social constructivism offers an interesting framework to judge the impact of one's actions over his basic rights while socially constructing an ethical decision making system. Rational choice of employing violence over non-combatants by armed non-state actors, in pursuit of their objectives, weakens legal position of International Humanitarian Law that demands to be applied equally to all sides in every armed conflict. The politically charged nature of framing and narrating of actors involved in conflict in contemporary world, however, demands careful consideration before curtailing the rights of anyone. Thus, the question that demands research is whether infringing upon the rights of others makes one’s own rights void in the context of armed conflict. Answers need to be drawn from both religious and moral theories, as abridging them would create legitimacy for religiously inspired armed non-state actors and remove grey areas in international law for not encompassing non-state parties.

Keywords

Humanitarian rights, moral theories, social constructivism, armed non-state actors, armed conflict, International Humanitarian Law, Islamic Law of armed conflict.

Introduction

Social creation of identity and role of norms in international politics and international law is an emerging dimension of Social constructivist school of thought. Social constructivist worldview is an attempt to analyze a problem thoroughly before reaching a solution that is socially situated and constructed through interaction with all stakeholders involved[1]. In this perspective it is very promising in explaining how social norms can be created through dialogue/interaction and can result in impacting actors. These thinkers interested in norms are labelled as constructivists. International law itself is very norm focused as it mostly deals with norm creation, evolution and their destruction. This focus brings international law theorists close to constructivists.

Norms are standards of behaviours created in a social setting under mutual expectation. Although many social norms never transform into legal norms, yet many pluralist lawyers keep no distinction between law produced by states and norms formed by voluntary associations, as both are equally effective in shaping behaviour. On the other hand, the international lawyers with positivist frame of mind, believe in the necessity of the fixed state hierarchies for the creation of legal norms and laws, that can exist regardless of its link to social norms[2]. Yet some other theoretical perspectives fall between these two point of views or include some elements of both, for providing competing descriptions of how international law works.

Furthermore, social constructivism framework redefines the ethical decision-making process as it aims at making it more interactive rather than an individual or intra-psychic practice. This approach involves negotiating, creating a consensus and at times even arbitrating to make the process more successful[3]. Moreover, social and cultural factors are also incorporated in determining what an acceptable ethical practice is. Need for establishing universality of ethics is the need of time as now it is widely accepted that moral norms and ethics matter in world politics[4]. Social constructivist theoretical contenders defend ethical positions in the norms of warfare in empirical terms by showing their necessity rather than claiming normative grounds that such norms are ethically desirable[5]. Based on above discussion, various religious and moral theories needs to be presented before judging the rights of armed non-state actors in the contemporary international crisis.

Different Moral Theories

Moral theories or normative theories of ethics are means of distinguishing between right and wrong actions. Although the words 'ethics' and 'moral' are interchangeably used yet they have a difference in meaning. Ethics is regarded as the philosophical study of morality, whereas, morality is a system or a guide towards good or right conduct. Thus, a moral theory is basically the study of 'substantive moral conceptions'[6], aiming at providing a framework in which moral issues are evaluated in a reasoned manner. It deals with ideas of the right, good and moral worth that are organized to create various moral structures. In the light of this explanation, clear demarcation between moral theory and applied ethics becomes a difficult task. For example, critically evaluating any moral issue as right or wrong cannot be done independent without determining or thinking regarding right and wrong conduct. Actions are dependent upon moral conceptions and so are their consequences. Over the years a number of common moral theories and traditions have evolved, broadly categorized into consequentialism, deontology and virtue ethics.

Consequentialism believe in judging an act as moral or immoral solely based on its consequences. Outcome of the act is enough to judge its moral worth, according to this school of thought. Utilitarianism is the most common form of consequentialism. Jeremy Bentham, founder of modern utilitarianism, has described its fundamental axiom, as the greatest happiness of the greatest

number that is the measure of right and wrong[7 8]. Thus, according to him the best moral actions is the one having largest utility. However, this race of ends justifying the means can have negative implications on justice. The belief that rights of some may be compromised for the greater good is against the fundamental principle of equal universal human and humanitarian rights for all. It also ignores the fact that it's impossible to determine accurately the possible consequences of an act and moral subjectivity is bound to label others in minority as deviants. In the context of rights of armed non-state actors, this moral framework holds disastrous consequences like total annihilation to ignoring of basic rights in order to satisfy the ruling majority, without giving consideration even to legitimate demands of armed non-state actor. Thus, a more suitable criteria to judge the morality of an action is through the act itself, as is done in deontological theories.

Deontology is a moral theory that focuses on the act itself and claims that morality is intrinsically attached to it. It is basically a duty based moral theory as the name suggests (as the Greek word deon means duty). Its primary emphasize is on duties and obligation that are right or wrong in themselves and not on the consequences that follow those actions. The most well-known formulation of deontological ethics is by Immanuel Kant's standard on rationality, termed as 'Categorical Imperative'[9 10]. It demands action that can be generalized as a universal law based on rational human behaviour. For example, if defending oneself in self-defence is justifiable then it should be universally acceptable. Thus, conformity with moral norm is the primary criteria for an action to be deemed right. According to Kant it's not the prerogative of the agent to act in certain way rather it is his duty to act in accordance with a moral norm even ignoring more tempting benefits to act otherwise. For rights of armed non-state actors such a criteria means that their modus operandi in the conflict would determine the extent of the rights they have. In this case ends do not justify the means but cultural relativism may prove to be a hindrance in its universality. Actions considered morally right in one culture or circumstances may be wrong in other settings. Furthermore, rational control over conscious actions is also debatable[11]. In order to solve this dilemma another moral theory is considered which focuses on the character of the agent called Virtue Ethics.

Virtue Ethics posits that a virtuous agent would act morally despite of consequential benefits of the act or the nature of act itself. Modern virtue ethics are defined by the concept of eudemonism which derives heavily from Aristotelian ideas that argue happiness is the ultimate goal and people should actively work towards achieving happiness, flourishing and well-being[12 13]. Eudemonism demand a person to live a life of moderation that creates virtuous character. However, happiness and well-being of one group may at times be at the expense of some other group as is usually seen in the conflicts involving deprived armed non-state actors. Thus, this moral framework is criticized for not recognizing inherent moral worth and lacking recipient dimension of morality[14]. Thus, to eliminate the gaps of moral subjectivity and cultural relativism of before mentioned moral theories, contemporary rights-based theories of ethics need to be evaluated.

Kantian Ethics

Kantian approach of ethics is distinct from other theories as it focuses on the intrinsic worth of individuals. Intrinsic worth, also referred to as dignity of individuals, is linked to their ability to think and act rationally[15 16]. There is a recent hike in prominence of Human Rights in international law due to various ongoing international and non-international conflicts around the world but its dominant discourse fails to recognize importance of normative status of the individuals. There is a continued focus on the rights and duties of the states as was in the traditional international legal theory. The statist conception of international law distinguishes between justice and legitimacy. It argues that domestic systems struggle for promoting justice, whereas, international systems only works for order and compliance[17]. This dual paradigm: one domestic and other international,

ignores the fact that rights of states are derived from the rights of individuals residing in the state. Immanuel Kant was of the view that domestic justice and international law are fundamentally connected and inseparable, contrary to the popular belief that one deals with individuals and other with states only[18]. His theory commits to the premise of normative individualism and his theory considered individual as a unit of analysis instead of the state. He redefined the notion of state sovereignty by stating that respect of states is derived from respect from individuals. He introduced his normative moral philosophy in international law by linking respect of states with the concerns of individual freedom and human rights.

Human rights, enshrined in liberal theory and influenced by Kant, cover a broad spectrum of rights from individual freedom, respect for individual preferences to individual autonomy. Contemporary researchers argues the universality of human rights but they are universal only because they are derived from the Kantian categorical imperative[19]. This argument links international law to human rights and individual autonomy, decentralizing international authority and emphasizing ideas of justice for all. International law in backdrop of Kant's moral theory provides a rationale for the international organization capable of establishing a lasting peace if allowed to work without political biases. Kant essentially foresaw a revolution of human rights and provided philosophical basis for it. Kant's essay 'Perpetual Peace'[20] mentions an unattainable moral ideal that states should aspire to for maintaining international relations. He advocates for pacifism and internationalism throughout the articles mentioned in this essay, much like an international law treaty.

The idea of duty and obligation is always associated with the rights of others. The international order that Kant is proposing is a law not a right in subjective sense[21]. Underlying principles that Kant gives in his essay of Perpetual Peace[22] are to eliminate; chances of war in future, forceful interference in affairs of foreign states and use of deceitful tactics in wars that shatter the trust of the opponent. He proposes a republican civil constitution for every nation, an international law based on a federation of Free states and cosmopolitan law based on the idea of universal hospitality. All these prepositions are based on Kant's primary analogy of the state as a moral person[23]. Hence, international and domestic law, according to him, was to protect individual freedom by giving priority to human rights over the state.

Human rights, for Kant, are linked to the intrinsic worth of the human beings that is based in the idea of rationality. Human reason makes a person worthy of respect and an end in themselves. This faith in individual reason and autonomy leads him to envision a republican state based on the principles of freedom and equality[24] [25]. Kant phrases the idea of 'your freedom ends where mine begins' as:

"No one can compel me (in accordance with his belief about the welfare of others) to be happy after his fashion; instead, every person may seek happiness in the way that seems best to him, if only he does not violate the freedom of others to strive toward such similar ends as are compatible with everyone's freedom under a possible universal law ...." (Kant, 1983, p. 72)

Universal Declaration of Human Rights (UDHR), adopted by United Nations General Assembly on 10 December 1948, also expresses freedom and equality as the primary element of its thirty articles. Right to life, liberty, personal security, and freedom from discrimination, slavery, torture and degrading treatment are declared inalienable rights of all human beings. This universality of law has another important component of equality, argued by Kant as well in his theory of morality. Principle of equality is the primary requirement to make a law universal and it is ensured through accepting that everyone has exactly the same right as everyone else. Ascribed and acquired status does not prescribe anyone to get preferential treatment. Kant's moral philosophy is thus, considered a protest against distinctions and privilege[26]. This principle of equality, however, also demands

same rights for the aggressor and the victim which goes against its primary validation of rationality. Aggressor consciously and with reason commits the acts of aggression, for example in a war, killing and aggression is justified as a duty towards state or self. The victim, however, may or may not have provoked these acts of aggression. For instance, non-state armed actors committing crimes against civilians, justify their acts are done for a fair moral cause in their own eyes but the victims have not directly provoked this treatment of aggression. Under these circumstances, equality of right of life, security and freedom of both parties involved in the conflict does not appeal to the very reason that establishes the intrinsic worth of the human beings.

Critics of Kantian ethics debate that linking intrinsic worth of human being to their ability to reason is not an all-encompassing approach for whole mankind. Relating moral worth to a capacity paradigm negates the principle of universality. On the contrary, recipient centric rights based theories of ethics argue for the inherent worth of human beings instead of intrinsic worth[27 28]. Thus, grounding human rights in the fact of one's status of being human. This, however, still poses the problem of equality of rights of aggressor and the victim, which goes against the understanding of justice. Furthermore, Kant's focus on individual to decide for himself what is wrong and right is also troublesome. While establishing the authority of reason in the moral theory, Kant, ignores the fact that human reason alone cannot fully comprehend reality. Subjective morality is the prime reason behind initiating a conflict. In order to remove this subjectivity from moral theory, later philosophers have weighed into an opposing viewpoints to achieve a rational consensus.

Discourse Ethics by Habermas

Moral theories like Kantian Ethics and Discourse Ethics by Jurgen Habermas provide interesting framework to judge the impact of one's actions over his basic rights. The Habermas's variant of idea of morality called Discourse Ethics puts forward the principle of universality based on the idea that respect for law can only be created when individual affected by it, are involved in its formulation and a rational consensus is established[29]. His work is inspired by critical theory and in ethics he comes closest to the Kantian tradition. He supports cognitivist position that contemplates the ideas of the right and the just[30]. He deviates from Kantian ethics in defending 'just' over the 'good'. This neo-Kantian moral theory defines moral theory based on the importance of justness and individual rights, however, misses the role of shared conceptions of good life play in grounding our moral intuitions. It is, however, more appropriate and relevant explanation of moral theory in contemporary circumstances as it admits the possibility of validity of opponent's point of view. Discourse ethics presented by Habermas shifts the focus from rule guided, rational choice realm to the jurisdiction of sociological institutionalism through his theory of communicative action and the ideas of discourse. In addition to utility-maximizing action and rule-guided behaviour governed by rational choice, human actors participate in truth seeking by establishing mutual understanding through reasoned consensus.

Logic of arguing is differentiated on the basis of meta-theoretical approaches that focuses on modes or logics of social action characterized by different rationalities or goals. In real life it rarely occurs that each of these mode of social action are considered as ideal type. The distinction between 'logic of consequentialism' and 'logic of appropriateness' introduced by James March and Johan Olsen[31] comprehends this real life problem. Rational choice approaches that in the realm of 'logic of consequentialism' interests and inclinations of actors are inflexible and their interactions are based on a strategic behaviour. Thus, actors work towards maximizing utility and collaboration is possible only when it optimizes actor's interests. Contrary to the consequentialist, the social constructivists follow different rationality called 'logic of appropriateness'. It argues that actors follow rule guided behaviour by trying to 'do the right thing' rather than maximizing utility[32 33] This

type of rationality, however, is influenced by social norms and institutions that not only regulate behaviour but also shapes social identities. For example, it defines that good people perform certain duties or acts in a certain manner considered appropriate socially. All those deviating from these social norms and ideals are labelled as bad, wrong, immoral or even criminal. Consequently, norms regarding Human Rights are to protect citizens from state interference and also to define civilized state vis-à-vis the modern world.

Social constructivist's contribution towards establishing collective norms and understanding of social identities helps in defining the rules that govern social interactions of all the actors involved. This does not provides safeguard to these norms against change or violation, rather define their present status. For example, norm of state sovereignty has transformed dramatically in relation to Human rights over the years, yet we cannot define state without the reference to sovereignty[34]. Norms, however, are internalized through the process of socialization which makes it part of subconscious behaviour of individuals. Similar is the concept of communicative action, according to Habermas, it is any social interaction which is accepted without objection by the particular population in question[35]. Now in order to bridge between groups that are socialized with different set of norms, Habermas puts forward the idea of discourse that aims at establishing rational consensus between the differing groups.

Discourse is any social interaction involving opposing or differing viewpoints aimed at achieving a new rational consensus. The concept of appropriate norm by March and Olsen[36] is a conscious process of selecting norm in accordance to the situation confronted to the actor[37]. Through discourse only, an appropriate norm is selected in consideration to the viewpoints of others. First preconditions for such an argumentative consensus is the ability to empathize with the opponent. Secondly, there is need of 'common lifeworld' provided through common language, norm system or shared culture. This is important to establish common understanding towards truth claims. Last factor is that actors should identify each other as equals and equally able to access discourse which should also be public in nature. Due to these prerequisites elements of power, force and coercion are eliminated from argumentative consensus by giving equal rights to all parties involved[38]. This recognition of equality of rights in accessing and contributing to discourse laid the foundation for the principle of universality given by Habermas. Habermasian ethics develops on the principle of universality given by Kant which focuses on an individual to determine what moral law is and believed in its universality. Kant encourages individuals to act in a manner that may by their will to become universal law of nature. Hence, universality of the law, according to Kant, can be judged by considering the consequences of masses acting in manner considered right by an individual. On the contrary Habermas seeks to establish universal law after incorporating point of views of opposing parties. He highlights the acceptability by all to the consequences and side effects by those involved in discourse due to sense of satisfaction that their interests are catered for[39]. Habermas puts a condition on universally binding nature of law to the mutual agreement on a maxim established through discourse. Kant's golden principle of respect for humanity has been validated by Habermas. He, however, considers that respect for laws protecting humanity can be ensured only through taking everyone on board while formulating these laws. Discursive and argumentative processes leading to creation of international regimes regarding human rights drive heavily from discourse ideas presented by Habermas. International institutions provide a normative framework to carry out structured interaction on a particular issue area and deliberation on international policy. Similar is the case of UDHR, a milestone document which was drafted by representatives with legal expertise belonging to different cultural backgrounds from around the world. Now it serves as a common standard for all people belonging to different nations to protect their fundamental human rights by recognizing

"...the inherent dignity and of the equal and inalienable rights of all members of the human family."

This lays the foundation for freedom, justice and peace in the world. The rational consensus established on this document was through discourse and argumentative processes, in terms of Habermasian ideology. This argumentative consensus is, however, not absolute and it is bound to evolve and change over time.

Informal interactions leading to argumentative rationality in international domain differs from bilateral or multilateral diplomatic negotiation in many ways. Firstly, they are more open to non-state elements (like NGOs or advocacy groups) rather than being confined to state actors. Secondly, international public discourses are more apt at initiating debate on social identity related aspects of the actors involved. Thirdly, there is a civilizing impact of the public discourse on the actors as it encourages them not to act considering their egoistic interests only rather work for a greater common good[40]. This common normative framework developed through discourse helps in recognizing and providing a platform to less privileged actors to voice their arguments. Consequently, opinions of actors having moral authority and knowledge are more likely to be accepted than the actors promoting vested interests or having access to power. This method, thus, establishes power parity between state and non-state actors in matters of having opportunity to express their opinion and its acceptability in public discourse.

Criticism on discourse ethics stems from same prerequisites that are considered its positive points. Michel Foucault argues that external power relations impacts the actors involved in the discourse[41 42]. These power relations penetrate the discourse itself by setting the rules governing public debates and consequently they even help in sustaining power disparities in social structures. Another precondition for the argumentative consensus, the availability of common language, norm system or shared culture, is also problematic in making discourse universal. Thus, this peculiarity of the situation demands that other school of thoughts regarding ethics and morality to be consulted to get a better understanding regarding formulation and implementation of human rights in the contemporary world.

Ethics in Islam

Theological and philosophical based ethics are the initial theories constructed to explain and demand moral behaviour in the society. Modern normative ethics present today derive heavily from these theological and philosophical debates and have evolved from western ideas of rational theology and philosophy. These modern ethical theories have some linkages even with ideas found in East Asia but western intellectual history has largely ignored and neglected Islamic thought in this perspective[43]. Ethics form the core of Islam as the Holy Quran repeatedly mentions belief in God and good deeds in the same phrase, linking the two. One instance of exemplifying this linkage is:

"...if they fear Allâh (by keeping away from His forbidden things), and believe and do righteous good deeds, and again fear Allâh and believe, and once again fear Allâh and do good deeds with Ihsân (perfection). And Allâh loves the good-doers." (The Holy Quran, 5:93)

Many intricate things get lost in translation of Quran from Arabic to English, one such thing is the concept of 'Ihsan', an adverb that defines the kind of good commanded in the verse. 'Ihsan' is an Arabic word which is roughly translated as 'perfect', hence the divine command is to do good deeds with perfection. The criteria of doing good deeds with perfection demands best intentions on the part of the actor among other things. Moral worth of an action is defined in a Hadith as "Actions are according to intentions, and everyone will get what was intended" (Al-Bukhari and Muslim). Linking actions with intentions shows the connection between physical and spiritual components of any human being. Consequences of an act are linked to its underlying intention. Act with good

intentions but undesirable consequences would still be rewarded as a good act contrary to the beliefs of consequentialists. This, however, can be troublesome if not regulated by other laws to guide an individual's behaviour. A person may have a valid justification of harming another person in his mind but the consequence of these actions may not be just for the victim and go against the rule of law. To check these tendencies legal professions in the initial days of Islam formulated the law of Shari'a to cover various ethical situations, paving the foundation for the Islamic civilization. In Islam the divine law and the ethics are interlinked. Thus an everlasting debate in Islam on the ontological position of values in ethics and the source of human knowledge regarding such values initiated. Historically, Mu'tazilite theologians were on the position that values have objective existence that can be interpreted through human reason or from scripture (Quran and traditions of the Prophet) or both. Ash'arites, on the contrary, believe that values are in essence commands from God and reason can only be used in subordination of the scripture. Third school of thought belonged purely to philosophers that believe that values are objective and can be perceived by reason, independent of any other aid[44]. Philosophy (or al-falsafa) had been a foreign science at the time of the Holy Prophet, inspired mainly from Greeks. But as the empire grew and Persian influence came on the caliphate, theology and philosophy increasingly interacted. Decline of Muslim civilization in about eleventh century A.D. led to the bifurcation of the two, once again. Difference of opinion about the concept of justice in these school of thought highlights the theological and philosophical debate of ethics in Islam.

Concept of justice is derived from God's attributes in Islam but its interpretation varies according to the theological and philosophical underpinnings. God's attributes of omnipotence, all knowing and wisdom, results in linking standards of 'value' to the 'will of God', in the opinion of Mu'tazilites (ibid). This means that whatever God wills is good by definition. Thus, making this 'ethical voluntarism' underlying principle of Islamic law in the opinion of Shafi'i (d. 820), an Islamic jurist. But the traditionalist theologians or Ash'arites claim there is no ethical limit to God's will, as He is not being 'unjust' when He punishes someone for what He has predestined. For them justice is obedience to divine law and God is superior to all laws. This theory of divine justice leaves man responsible for the acts that he commits and culpable for his sins as it still can practice by freewill in addition to the element of predestination. Consequently, divine law were extracted from the Holy Scripture, Quran and traditions of the Prophet, to define civil liberties of individuals and protect their basic human rights.

The responsibility of consequences of every act done by human agent is upon him, even though God creates and enables man to do that act. The correctness of an act is determined by what is permitted by divine authority and it supersedes even rationality. In terms of human rights, right to life is of utmost importance in Islam. Islamic perspective on war, however, shows a commitment towards peace but not to pacifism[45]. This is depicted in the Holy Quran as:

"Fighting is enjoined upon you, while it is hard on you. It could be that you dislike something, when it is good for you; and it could be that you like something when it is bad for you. Allah knows, and you do not know." (The Holy Quran, 2: 216)

In this context it is important to mention, even though fighting in permissible in Islam not only for a just cause (jus ad bellum) but also mentions rules related to the conduct of war (jus in bello) to prevent any transgression or 'zlm'.

Acts of transgression or 'zlm' are repeatedly mentioned in negative terms in the holy scripture in Islam. Various authoritative lexicographers have defined 'zlm' as 'placing in a wrong place'. In the perspective of ethics it means 'to act in such a way as to transgress the proper limit and encroach upon the right of some other person'[46]. Committing a forbidden act is considered a wrong done to the self, as Islam believes in the innate goodness of a person and crime is considered

as offensive as usurping the rights of others. Death penalty prescribed by Islam is primarily for two offences. Firstly for person who is guilty of killing of another individual and as a retribution or 'Qisaas' the one who has committed the crime has to be dealt in similar manner. Second instance for prescribing death penalty is for the one who commits crimes against the community or state, which is termed as 'Hiraabah' or 'Fasaad fil Ardh' in Quran (Holy Quran, 5:32). Depending upon interpretation the second instance may include treason, apostasy, terrorism, piracy, rape and adultery etc. In these circumstance the punishment used to circumscribe the rights of the transgressor or one found guilty of the crime is to establish justice in the society and is done for the greater good of the people.

In Islam punishment is used as a reformatory act for the guilty, a source of retribution to the victim and a deterrent for the society. Islam differentiates between the rights of the transgressor and the victim in order to establish and sustain justice in the society. To express the concept of justice the terms used are 'adl' and 'qist', both are antonyms of 'zlm' but have slight difference in meaning. 'Qist' refers to the action of an agent towards another, whereas, 'adl' refers to the equitable distribution of something between two or more recipients[47]. Equal compensation for all, however, at times may not be just in the situation and it may demand reparation according to one's input or act. Thus, although there is a general rule of equality of all in basic rights but it is reinforced by the concept of equity in order to make justice more appropriate to different circumstance and point of view of people that led them to commit an act. Consequently, idea of justice and rights in Islam do not focus of any particular element rather encompass all aspects ranging from consequence of the act, nature of the act itself, intent of the agent and conformity to divinely ordained laws.

The treatise on ethics by Al-Ghazali, an 11th century Ash'arite-Sufi jurist, is an interesting mix of western scholarship with Islamic ideas. He declares Quran as the means of attaining truth, hence he calls it 'the Just Balance'[48] as it expounds the moral relations between persons and the consequent balance in their actions. Al-Ghazali's idea is similar to the ancient Greek tradition of justice which defines giving and taking one's due in interpersonal relationship. Like Plato he was of the opinion that justice is sum of all virtues rather than being a single independent quality[49]. Similar to Plato he indicated a need of Harmonious relationship between the king, the army and the people with a distinction that according to him justice can only be established if you treat people in a manner in which you would deem right to be treated yourself. This decree applies on the ruler and the subjects alike. Furthermore, he considered controversy among people as necessary and an eternal condition[50] that can be contained through ethics of power, indicating the inseparability of religion and the government. Al-Ghazali's ethico-religious system is a balance between all three major schools of thoughts regarding moral theories. He encourages people to strive for the end goal of greatest happiness or the state of 'blessedness' as he terms it and also talks about excellence ingrained in Human Nature[51]. The term blessedness, however, encompasses both the ultimate end and the means to achieve that end. Usefulness of the means is categorized on the benefits that can be acquired in this world and the hereafter. Contrary to the utilitarian scholars, Al-Ghazali is not concerned with the end of greatest happiness of the greatest number of people he rather emphasizes the advantages gained by individuals whose excellence and perfection of action may benefit the society as well. Similarly, Al-Ghazali's ideas bear resemblance with Kant's categorical imperative as it demands only those actions to be undertaken that are acceptable to oneself when done to you by others. This duty bound imperative, according to Kant however, should be rooted in freewill of the individual instead of attraction of benefits of the results or some other ulterior motive. Al-Ghazali differs from Kant regarding the absoluteness of free will as he accommodates pre-destination with individual will in determining the every action of the individual. Thus, Al-Ghazali's ethico-religious system rooted in Islam offers interesting blend of philosophical moral theories that developed centuries after him.

Analysis of three moral conceptions

Depending upon the source of ethical knowledge, traditions of ethical thinking can be termed as secular or religious. Similarly, ethical theories in theological and philosophical modes is different from normative ethics. The difference between the two lies in the importance given to rationality as a source of knowledge. The debate on which one is the superior source of knowledge, either its reason or divine revelation has been going on since ages. This bifurcation, however, got augmented by the argument of mind body duality presented by Rene Descartes in 17th century. This idea of dualism laid the foundation secularism in the modern west, thus making reason to be supreme and only source of knowledge for the realm of worldly affairs. And religion or divine revelation was restricted for the fulfillment of spiritual needs. Determining course of action in worldly affairs through reason only, however, has its limitations due to confines of reason itself.

Human reason or rationality is the power of mind to think, comprehend and form logical judgments. This ability is aided by the five senses that are used to perceive the world around us. These sensory perceptions are, however, not absolute and are restricted by simple barriers like walls and other hindrances. Reason based on these imperfect perceptions cannot be trusted to make right decisions under all circumstances that can be generalizable. Thus, in order to eliminate this gap divine revelation is consulted as a source of superior knowledge, which at times would not even appeal to reason but has to be trusted to be just. Sceptics of the religion, however, have a hard time believing in such a justification and question this very premise. The issue of human and humanitarian rights in contemporary world is also debated on similar lines that either it can be construed independently from religion on secular or philosophical normative knowledge or divine revelation provides a more just alternative to define human rights.

Philosophical moral debate in the main schools of thought of consequentialism, deontology and virtue ethics focusing on only one aspect of the act i.e, end result, act itself or moral standing of the agent, respectively. Concept of rights and duties in Islam, however, is a synthesis of all the main traditions of moral theories categorized into consequentialism, deontology and virtue ethics. Islam promotes those acts that do not violate the rights of anyone as a consequence and the act itself needs to be well within the limits of permissibility as it does not adhere to the doctrine of 'ends justifies the means'. Furthermore, since the act is dependent upon the intention of the agent, hence a lot of focus is on the individual to create a virtuous character in them. This virtuous character is guided by the golden principle of reciprocity, which is a moral maxim promoting altruism in most religions and cultures around the world[52] [53]. This idea is repeatedly expressed in Islam as well and once it is stated by the Holy Prophet (PBUH) as:

"Do unto all men as you would wish to have done unto you; and reject for others what you would reject for yourselves." (Hadith Collection, Abu Dawud)

This principle makes the concept of ethics in Islam not just a recipient centric rights based theory rather it also aims at protecting the rights of the agent. Thus, establishing a fundamental difference between religion and other duty based ethical codes.

Moral theories like Kantian Ethics and Discourse Ethics by Jurgen Habermas provide interesting framework to judge the impact of one's actions over his basic rights. Kantian ethics focuses on the intrinsic worth of the human being linked to their ability of rationality. Categorical Imperative presented Kant aims at establishing a principle for the permissibility of an act based on its universal applicability. An act considered permissible by an individual should remain acceptable by that individual if everyone in the universe starts doing the same act. However, if an act performed by others is not acceptable to an individual than its morally obligatory upon him that he should refrain from that act. Whereas, Habermasian discourse ethics aims at establishing a mutual

consensus after discourse on an issue and believes in equal right of participation in that debate. These both theories, however, derive a lot from individual reason to establish justice without any sense of accountability. Islam also emphasizes on the importance of universal dignity of human beings as is seen in the case of deontological ethics but differs from them on the idea of its absolute inviolability.

Islam gives the space of taking revenge if a wrong is committed against one's rights, although forgiveness is always considered a superior action. Repeatedly it's mentioned in Quran to *'return evil with kindness'* (13:22, 23:96, 41:34, 28:54, 42:40). Yet, in order to accommodate human nature and reason, right to inflict as much pain unto others as has been experienced due to action of others is also given. Right to life is the most protected right in the light of Islamic law but even this is violable if demand arises. Quran mentions: *"...And do not kill the soul which Allah has forbidden except for the requirement of justice; this He has enjoined you with that you may understand"* (The Holy Quran, 6:151). Thus, establishment of justice is a higher priority than rights of transgressors. The concept of punishments to establish justice is also profound as it is used to create empathy for others by making the culprit experience the same pain as it has inflicted on others.

Empathy is the root from which Islam's moral theory is derived which is contrary to rationality of Kantian ethics. Empathy is a unilateral moral commitment towards the welfare of others without expecting same favour in return. Whereas, rationality compels man to consider and prioritize worldly benefits over likely benefits of others. Thus, rationality may dehumanize others by considering them a threat or competition to the rights of self and consequently compromising the human rights of others. Empathy, on the other hand, encourages work to be done for the greater good of the humanity inspired by spiritual rewards to be gained in this and after life. Secular ethical knowledge lacks the spiritual incentives that religion attracts people with, in order to govern their relation with others. Similar is the case with discourse ethics that offers a cognitivist position to resolve the questions of rights and just, but lacks the supra-human knowledge that the divine revelation can offer. Acceptance of absoluteness and superiority of divine knowledge by secular philosophers is an impossibility but needs to be kept in consideration while driving moral argumentation and normative justification for the acts of those overwhelming majority of people that follow religion very passionately and justify their worldly acts in religious context.

Conclusion

Some individuals not only infringe upon the rights of others but at the same time demand the fulfillment of their rights. Thus, the dilemma faced by contemporary world in establishing a lasting peace is regarding the rights of individuals that don't respect the rights of others. Analyzing competing moral theories offers solution to this problem. The main theme behind these moral conceptions is the universal norm of human dignity of all and the ways it can be preserved. Nature and purpose of morality and ethical theories is to distinguish right from wrong and are broadly categorized into school of thoughts of consequentialist, deontology and virtue ethics. These normative conceptions of morality offer partial solution while discussing their application in various situations. Each one of them focuses only on one aspect of the situation like the end result, the act itself and the motivational force of the agent rooted in its character. This piecemeal approach does not offer wholesome understanding of the criteria to judge an act as right or wrong. Among others, Kantian ethics and Habermasian Discourse Ethics offer an attempt to create a moral theory that can be universalized.

Kantian ethics posits that human beings have moral worth due to their intrinsic ability to reason. This rationality makes an individual capable to judge right from wrong and the criteria to judge the correctness of this decision is that it remains acceptable to that individual if everyone else

in the world did the same act or behave in a similar manner. Kant's idea of categorical imperative was further enhanced by Habermas as he suggested that a decision on an act cannot be made individually rather it has to be deliberated collectively through discourse and constructive argumentation. Decision made by such mutual understanding has universal value and appeal as everyone has an equal opportunity in deciding upon it. Both these ideals, however, have limitation of human reason which is surpassed by religion through divine knowledge in revelation but is still viewed with skepticism by the rationalists.

Religion, especially Islam offers equality of basic human rights for all but curtails the rights of the transgressor as a repercussion of its acts. It goes on to the extent that if a man takes the life of another unjustly then as a compensation, life of the aggressor too should be taken. Normative ethics, on the contrary, advocate against the death sentence if consensus is established on that and also because intrinsic worth of an individual makes every life sacred. Thus, Islam more appropriately addresses the innate psyche of people that demands retribution for the wrongs committed against self rather than suppressing emotions in order to establish higher moral ideal, thus addressing the problem of rights of armed non-state actors in a conflict. When actors enjoy the good that they have a right to, including revenge for the wrongs committed against them, then justice has a better chance to be established. Whatever may be the case, growth and development of ethical and moral norms has had a positive contribution in creating respect for human life and act as a deterrence against wrongs.

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Strategic Public Interest Litigation as the mean of Social Change: Focusing on the Case of South Korea

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Abstract

Public Interest Litigation(PIL) refers to a form of social movement to realize the public interest by litigation. Since Brown v. Board of Education, the landmark decision which began PIL, Social Movement through enforcement of law has been implemented in many countries with considerable influences. PIL, as a relief of right for minorities and disadvantaged, contributed to the resolution of the internal conflicts and social cohesion with the Probono activities. PIL, in Korea, has also developed actively from the case regarding the flood damage of MangWon-dong in 1980s with the rise of civil rights movements. Along this social flow, the concept of 'law initiating social change' has been a complicated, multi-dimensional and controversial subject. Particularly, many cases of PIL in Korea, however, provide significant implications on the effectiveness of PIL as an instrument of social change. This paper put its focal point on the mechanism which law brings about social change and peaceful society. This paper undertakes the empirical analysis of the case of Korea in the variation of perspectives from the decisions of the judicial branch to its circumstances and social impacts. This paper begins with the question of how the PIL is defined under the context of legal theory and practice. The paper examines the ability of law to generate social change. The criticism employs multi-dimensional approaches. Expanding the criticism provided by Rosenberg, the limitations are found in the distintiveness of law, the disparate concept between the law and the social movement, distortions and judicial restraint which are found on the field of legal practice. Moreover, the approach also contains considerations regarding chances of winning and a perspective from the civil society. The necessity of PIL is also proven by shedding light on its values and potentials. The possitive perspective discovers its basis from the liberty of the Judicial Branch from the capital power, trigger for the social change, effect of Judgement and advantageousness of minorities by choosing PIL rather than other methods. Finally, this paper discusses the institutional remedies regarding PIL to improve its effectiveness and maximize its possitive values. This paper provides following suggestions as their measures: the alleviation of the locus standi, a more active role of judicial branch, establishment of the proper standards of burden of proof, invigoration of constitutional review(exceptional introduction of abstrakten normenkontrolle) and introduction of class action system. It is definite that the PIL is one of the important means which the social movement can opt. However, It can not guarantee that winning the lawsuit always brings positive results to the society. Furthermore, it is compelled to point out the substantial probability not to fulfill its primary goal. In the other hands, the social phenomenon regarding active PIL movements indicate the effectiveness of law as an instrument which realizes justice and peace.

Corresponding conference theme(s): Law and Justice, Internal Conflicts, Culture and Society, Government and Politics

Key Words: Public Interest Litigation(PIL), Public Interest, Social Change, Social Movement, Minority, Human Rights, Probono activity, Social Cohesion, Internal Conflicts

Introduction

When a democratic law-governing country is on track, civic movements are primarily interested in improving laws and systems. In a democratic law-governing country which consensus of the community is enforced by "law," utilizing the law is the most effective way to change the world in the direction it wants. In the case of Korea, social movements using the law as a tool began to be activated after the democratization in 1980s. The possibility that citizens can directly influence politics has increased with democratization. Legitimate ways of exercising within the institutional framework, such as enacting or revising laws, or filing lawsuits systematically and strategically, have been meaningful. Strengthening the independence of the judiciary and prosecution, increasing lawyers' participation in society, and improving citizens' sense of rights have been other factors of the background. Such use of the law by civic movements has been mainly conducted under the heading of "law and social movements," calling it "legally mobileization" or "mobilization of laws and systems."

Establishment of a public interest litigation(PIL) and public interest law system are subjects of great interest, in Korea, not only to the legislature, the administration, but also to the judiciary. In particular, in the case of the judiciary, the Judicial Reform Committee under the Supreme Court adopted a proposal in 2005 that it would be desirable to activate public interest litigation to protect the rights of the weak and the minority. The discourse on Korea's public interest litigation has been centered on the establishment of public interest law systems, such as class action suits and punitive damages. As a result, a considerable number of current systems have been legislated by referring to overseas legislative cases. For example, the securities-related class action suit system and the residents' lawsuit system were enacted and implemented. Collective action systems, such as consumer group litigation and personal information group litigation, were also introduced. In addition, the collective dispute settlement system and punitive damages system were introduced restrictively.

The purpose of this study is to summarize the current discussion of the limitations and possibilities of the PIL system at first, and to draw up implications to be considered in the search for alternatives for its development. In a strict sense, there is no authoritative regulation on the definition of the concept of "public interest litigation" under the Korean law.[1] Nevertheless, The debate on PIL has been proceeded under common understanding on it. Therefore, this study seeks to conduct an analysis on the concept and function of the PIL in the first place, in Chapter 1. Law and social change is one of the classical themes of law and sociology. The interrelationships of law and social change, namely the implications of society on law and on society of law and its conditions and limitations, will be discussed in Chapter 2 and Chapter 3. Finally, in Chapter 4, problems of PIL that have been pointed out in the current system, and the alternatives are to be explored.

[1] Article 2 No. 1 of the Protection of Whistleblowers Act stipulates that "public interest" infringement is an act that infringes on "the health and safety of the people, the environment, the interests of consumers and fair competition," which could be interpreted as an attempt to set a legislative category for "public interest."

I. Basic Concepts of Public Interest Litigation

Public interest litigations (PIL) refers to the attempt to realize the public interest through a lawsuit. In other words, PIL is a form of lawsuits that issues on the public interest law are brought to the court. For systematic discussions on PIL, a review of the definition of PIL needs to be preceded. It is very difficult to define a PIL as a single and unified concept due to its variablity and fluidity, depending on the contextual background.[2] In addition, the concept of 'public interest' must be pre-defined in order to define the concept of PIL. With that in mind, the following will review the conceptual definition of the public interest and the various attempts at defining PIL that have been discussed so far. The paper is going to try to define the descriptive definition of the concept and features of PIL on the basis of these reviews.

Public interest is one of the traditional concepts used for a long time in law. There is no clear definition of the concept of the public interest although thare are various approaches to the definition.[3] The public interest has been understood as all kinds of interests that benefit the public, not limited to any restricted area so far. It is common to understand that it refers to "legitimately unprotected interests."[4] There are several reasons for legitimately unprotected interests. Excluding the economic perspective, there could be two specific explanations: ① the case that a social benefit is not properly recognized as a legal right although it is an important legal issue, ② the case that benefit from using the legal institution is too small.[5] In the former case, the rights of the weak or the minority deprived from social powers, such as the state or large business, or social prejudice, may be cited as examples of the public interest. In the latter case, rights that are important for society as a whole and are fragmented among individuals, such as consumers' rights or environmental rights, may be refered to the public interest.[6]

Black's Law Dictionary defines PIL as 'a kind of lawsuit that is brought to court for the realization of the public or the general interests, such as the monetary interests of a particular class of people or society, or interests that affect their legal rights or responsibilities.' Durban Symposium[7] has broadened the concept of PIL unlike the previous definition. It defines public interest law as any individual law or any legal field that affects the public interest in the first place. Then, it defines PIL as any litigation that are relevant to the public interst law. It also includes any revision of laws or legal education or legal services related to them in the category of public interest law and public interest litigation. Abram Chayes defines PIL as "a kind of lawsuit which aims to initiate social changes, such as reforming laws, implementing existing laws or clarifying public norms, through court decisions."[8] In addition, some approaches also define PIL as a lawsuit for the

[2] Hershkoff, Helen. "Public Law Litigation: Lessons and Questions."*Human Rights Review*10.2 (2009): 157-181.

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[5] Lee, Seoktae, and Inseob Han. *Public Interest Litigation in Korea*. Kyungin Publishing, (2010), 21-22.

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[7] A symposium held in Durban, South Africa, under the theme "Symposium on PublicInterest Law in Eastern Europe and Russia" from June 29, 1997 to July 8, 1997.

[8] Abram Chayes, “The Role of the Judge in Public Law Litigation”, *89 Harv. L. Rev*. 1281 (1976).

purpose of reforming society while, at the same time, aiming to establish important court rules or rights, with the primary purpose of protecting the socially and economically underprivileged.[9]

The litigation movement basically proceeds with filing a lawsuit and proceeding with the lawsuit. There are two main types of lawsuits: lawsuit for the protection of the human rights of minorities (e.g., sexual harassment suits, conscientious objection suits, refusal to bring in prison books, confirmation of the violation of the standard of livelihood protection, suit of the amendment of election rights, etc.) and lawsuits for the correction of the government's wrongful policies (e.g. 4 major rivers project lawsuits). Depending on the case, various forms of litigation can be chosen, including administrative litigation, civil litigation and unconstitutional litigation. The litigation movement is not limited to trials, but is combined with the various methods of civic actions, such as media, campaigns, rallies, demonstrations, debates, briefings, declarations. In some cases, it could also have been developed along with the legal and legislative campaigns.

II. Challenges and Limitations

Distinctiveness of the law can cause the limitation of litigation campaigns itself. As for the limitations of social change through the law, Rosenberg focuses on three things: First, the court cannot fully accept the various arguments of the social movement according to the theory of law. This can rather distort the original goal of the social movement. In order for civil society's demands to be realized through litigation, their assertions must rely on existing laws. At this point, lawyers serve to translate civil society's demands into language and logic that can be accepted in court. The problem is that the original demand could be distorted in the process. In fact, there may be cases where socially important content is ruled out by a lawyer because it is legally meaningless. The fundamental difference between the law and the social movement significantly increases the defeatability. This can be found in the legal case of Four Major Rivers Project in Korea.[10] The main issue in this case were government's reports, which might be described as 'rough and ready procedure'; it was rather excessive to regard them as 'illegal'. In the end, it was not a matter of legal/illegal nature, but of desirable/undesirable. It would be fair to make political opposition to large-scale projects being pressed with hasty investigations and assessments. However, there arised a question of whether it is desirable to leave these judgments to the court to determine their legality. Furthermore, an issue of whether judges are trained to make such judgments has arisen as well. In fact, a few legally meaningful issues are only picked up and contested in court, not every single issue. In some cases, the focus of the problem shifts to the question of legality, removing the original rich points of contention, and taking up the position of dull legal terms and laws.[11]

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[9] Gloppen, Siri. "Litigation as a strategy to hold governments accountable for implementing the right to health." *health and human rights* (2008): 21-36.

[10]Four Major Rivers Project is a nation's main business to protect and maintain the rivers conducted by former president Lee's administration. The administration has spent massive national budget, which has been criticized by a massive waste of money and a negative impact on the ecosystem.

[11] A. Marshall, “Social Movements Strategies and the Participatory Potential of Litigation”,in A. Sarat & S. A.

Secondly, it is also problematic that the judiciary can not be completely free from political power. In order for the legal movement to become an effective way, the judiciary must pay active attention to public rights[12] and drastically do what other state instirutions, such as the National Assembly and the administration, can not do. The judiciary, however, has rarely played such roles in practice. Indeed, in the case of successful litigation campaigns, the judiciary usually made a decision only when the public opinion was fully ripe through social movements other than lawsuits. For example, the hoju-je(partiarchal system that organizes family relashionships in Korea) lawsuit was successful in Korea. It was not just the power of the lawsuit itself, but the power of the hoju-je abolishion movement itself.[13] In fact, by the time the Constitutional Court ruled in 2005, the majority of lawmakers had already agreed to abolish the hoju-je. So the reason why the hoju-je could be ruled unconstitutional is because it has gained enough supports from civil society, not just because the court has led the problem to be solved regardless of that. Of course, although the judiciary's decision to put an end to the problem can never be ignored, it would be right not to interpret it as the independent success of the PIL. After all, the judiciary made a safe choice following the views of the majority of society at the time. Many precedents in Korea reveal judicial restraint. For example, South Korea's Constitutional Court decided in 2004 that the impeachment of President Roh should be overturned. This passive decision-making attitude can be attributed to the fundamental distinctiveness of the law itself. Legal stability functions as an important ideology and value of the legal system, along with the purposefulness, and specific validity.[14] Only when such legal stability is properly ensured, predictability and reliability can be formed, so that the legal system can function intactly.[15] In particular, the tendency of judicial restraint increases when ①the greater the complexity of the legal benefits to be compared, ②the greater the importance or ripple effect of the case, ③the more serious the severity of conflict between interested groups.[16] In this context, it is a question of how effective the legal movement through the judiciary can be, especially at a time when it is difficult for a progressive judiciary to exist.

Third, the court only makes a ruling that affects to each case, not an institution that draws up and enforces any policy which leads and brings about substantial social changes. In fact, even if a person wins a lawsuit, the effect is limited to the case according to the legal principle. Even if you win a case, you may have to file a lawsuit for each time. There could be another case. If you solve a problem through a lawsuit, you may have to file another suit if the problem still matters at a lower degree. For example, even if 20 million dollars of candidate deposites is ruled unconstitutional because it excessively restricts the suffrage, but a legislator responds by slightly lowering the deposit to 15 million dollars, he or she has to file another suit against the law to take issue with it

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Scheingold (ed), Cause Lawyers and Social Movements, Stanford:Stanford University Press, 2006, 166.

[12] Lee, Seoktae. "Planning and Performing Public Interest Litigation." *Public Interest Litigation in Korea*, Kyungin Publishing, 2010, pp. 9–9.

[13] Jin, Seonmi. "Constitutional Lawsuit on the Patriarchal Family System." *Public Interest Litigation in Korea*, Kyungin Publishing, 2010.

[14] Schuhr, Jan C. *Rechtssicherheit durch Rechtswissenschaft*. Mohr Siebeck, 2014.

[15] Luhmann, Niklas. *Vertrauen: Ein mechanismus der reduktion sozialer komplexität*. Vol. 2185. Lucius & Lucius DE, 2000.

[16] Hong, Junhyung. "The Role of Judiciary in the Policy Process." *Journal of the Academic Conference of the Seoul Administrative Society*, 2008, pp. 169–203.

and take a long process.[17] It it notable that political and social impacts of a legal case of US is differenct with that of Korea.[18]

These problems show that litigation is not the only way or goal of the social movement, and its contribution is partial and limited. In addition to the three limitations that Rosenberg presents, the limitations of social change through litigation campaigns are manifested in its own desirability. Even if the litigation movement works effectively on social issue solving, the question of desirability is another matter. In other words, this is a matter of properness about the situation that democratic demands of civil society are realized by the judicial branch. It is a critical perspective that social changes are accomplished, not through elections and political processes, but in a way that appeals to the judiciary by resorting to the power of several experts and lawyers.[19] As the legal process is rigid to function as a liberal forum for citizens, the method of communication in litigation is reciprocal, and the legal logic is closed and formal, judicial process is not suitable for the democratic formation.[20] In fact, politics serves to maintain society as a process of seeking social consensus while diverse interests are being coordinated. The judiciary's decision, however, always takes a drastic measure because its decision making process requires a split between the winner and the loser.[21]

From a perspective from the social movement, it is a problem that the lawsuit absorbs all of the energy of the social movement which just shifts to the fight in court. From an activist's point of view, there might be some cases where a lawyer in charge of litigation leads the movement over a social activist. Namely, the litigation movement replaces the social movement. If the movement is led by the legal judgment of the lawyer, the tendency to replace the arguments of activists with the strict legal logic will deepen.

The negative impact of losing the case is also one of the limiting factors that cannot be ignored. Indeed, the defeat in the lawsuit is only a loss in the legal issue that had been in question. For example, the defeat in the Four Major Rivers Project lawsuit is a ruling that permits for the project is legal, not a ruling that it was appropriate politically. However, when a judgment actually takes place in a society, it has the effect of confirming the overall legitimacy of the case. As every lawsuit always has the possibility to lose, it can always be a question of whether it is desirable to file a suit under such risks. This problem indicates the importance of coordinating various means while planning the social movements, not just focusing on the litigation.[22] In fact, when the civic

[17] Lee, Chanjin. "Performance and Challenges of the Public Interest Litigation Campaign in Social Welfare." *Monthly Welfare Trends*72 (2004): 24-35.

[18] Hong Ilpyo. "Special thesis: Civil society and law; mobilization of Korean social movements and laws after democratization: as a repertoire of campaign.." *Civil Society and NGO*6.2 (2008): 33-65.

[19] P. K. Howard, Life WithoutLawyers: Restoring Responsibility in America, W. W. Norton & Company, 2010; The Deathof Common Sense: How Law is Suffocating America, Grand Central Publishing, 1996.

[20] Hong, Sungsoo. "the active duty of the state the role of the judiciary to realize human rights." *Citizen and the World*17 (2010): 397-400.

[21] Hong, Sungsoo. "Limitations of Social Change Strategies through litigation." *Law and Society*38 (2010).

[22] Hong Ilpyo. "Special thesis: Civil society and law; mobilization of Korean social movements and laws after democratization: as a repertoire of campaign.." *Civil Society and NGO*6.2 (2008): 56.

society lost the Four Major River Project lawsuit, the Ministry of Land, Infrastructure and Transport released a statement that the legitimacy of the project was confirmed through the courts.

Furthermore, it can be pointed out that raising a lawsuit just for drawing social attention, even though the probability of winning is not that high, could negatively affect the efficient use of limited judicial resources.

III. Values and Potentials

While these problems still exist, it is believed that the public interest lawsuit is still very likely to succeed as a strategy to bring about positive changes in our society. Solving inequality as a lawsuit has many significant points. One point is that judiciary is still relatively free from capital though it's being conservative. Although the legislature and the administration should be based on democratic control, it is difficult for the legislature or administration to properly represent the people's opinions due to the limitations of democracy itself. In particular, in the case of the legislature, it is difficult to actively discuss the protection of rights and interests of minority groups because the discussions are usually formed in a nature of party politics, dividing legislators into factions. In that situation, the judiciary is relatively free from those conditions, which leaves great portion for positive results that can not be expected from the legislature or the executive branch.

While PIL can't bring about fundamental change, it can still be a small starting point for social change. A lawsuit regarding web accessibility for the disabled in Korea is an example for this. In Korea, with the enactment of the Anti-Discrimination Act against the Disabled, all websites are required to comply with the Web Accessibility and to pay damages to the disabled if they do not guarantee the Web accessibility. Companies and public institutions, however, did not respond to this. The reason was that these companies examines the comparison between the risk to be sued and the cost of fixing their web site. According to the comparison, they decided not to fix the web because of the low probability to be sued and the low amount of compensation cost. When the civic society filed a lawsuit regarding to this issue in 2015, there was additional effect that companies started to actively carry the act, considering the movements. What this case clearly indicates is that PIL serves as the starting point for social change.

Losing a lawsuit does not necessarily mean failure of the movement. Even if the trial results were not good, it could have achieved positive results to spread the importance of the values of the arguments to the society, and to influence future policy or institutional improvements.[23] In other words, lawsuits can serve to shape the agenda of social movements, to raise public awareness, to persuade opponents and to bring them to the dialogue table to bring about concessions or compromises.[24] Even if a movement loses the case, its assertions can be included in the minority

[23] McCann, Michael. "Law and social movements."The Blackwell companion to law and society, Malden, MA: Blackwell(2004): 506-22.

[24] McCann, Michael W. "Legal mobilization and social reform movements: Notes on theory and its application."*Law and social movements*. Routledge, 2017. 3-32.

opinion on the Supreme Court ruling or the Constitutional Court's decision, which anticipates future changes. For example, although the sevreral PIL for the conscientious objectors case did not achieve its desired outcome by being ruled unconstitutional, it played a significant role in invoking the issue through a number of trials.

As a strategy for social change, PIL has an advantage in terms of effectiveness, due to the compulsory effect of the ruling. For example, the subjected law can be suspended in a judicial review, and the administrative action can be cancelled in an administrative suit. In some cases, there might be greater ripple effects beyond this direct effect. For example, in “University's Sexual Harassment case” in Korea, there was a direct effect of the victim's damages being compensated. However, the social attention to the sexual harassment increased during the trial process, leading to legislative results. Although the effect of the litigation is limited, in principle, to the case, the case may be easily handled through court follow-up measures or by forming a precedent to influence subsequent rulings. For example, in the “Correction of Gender of Transgendsrs case”, the Supreme Court had practical effects of correcting the sexes in the case, the court then established an “office guidelines”, allowing other transgenders to apply to the court for gender correction.[25]

In some cases, litigation campaigns are more advantageous in terms of the minority and the weak than legislative or other social movements. Social movements must be fairly organized and systematic in order to exert influence on the enormous citizens or the assembly or the administration. However, PIL only needs a lawyer who will carry out the suit and can persuade the court in order to achieve the desired purpose. As mentioned earlier, legislative movements are not easy to carry out unless a leadeing organization secures considerable resources and systematic power. At this point, litigation campaigns can be a relatively easier way for minority forces comparing to previous method. Furthermore, as it is difficult to get the support of the majority of society on the issue of minority, litigation can be a more effective way of social change. While Congress and the administration are bound to be constrained by the wishes of the majority, the judiciary, free from political responsibility, can make independent decisions on the side of the minority.

IV. Complement Institutions

The current litigation law, which has a party-based legal structure, is basically not familiar with public-interest issues with unspecified entities. At least in the case of legal issues based on the basic constitutional rights, legislation needs to drastically ease matters concerning the qualifications of the parties. One of the characteristics of countries where public-interest litigation has been activated is that they attempt to mitigate the qualification on the basis of traditional party standing system. As the PIL aims to prevent the infringement of the interests held by the socially disadvantaged, it is more efficient to qualify organizations to represent interests on behalf of the injured party than to only recognize the qualifications of the injured party. These examples of

[25] Jang, Seoyeon, “Gender correction case in the family registry of transgender”, *Public Interest Litigation in Korea*, Kyungin Publishing, 2010, pp. 937-992.

legislation of countries could be the choice that the Korea can take: ① The case of India, which grants civic organizations a status of plaintiff that file a lawsuit on behalf of the injured, ② US Parens patriae system which administrative agencies file a lawsuit, standing for the victims, in areas such as consumer protection, environmental issues and fair trade, ③ German and French collective lawsuits, ④ British system which allows victims or others who can claim the relief of rights of any person to the court on behalf of the victims, ⑤ Other similar cases of Japan, Sweden and Chile.

In the case of countries where the PIL system has developed, the court's role is extended to play a more active role, not to remain in the passive role of resolving disputes. Typically, in the case of India, the court is able to play an active role in bringing about changes in the social structure through rulings, by the means of mitigating the traditional legal requirements of plaintiff, and imposing active duty on legislative flaws, as well as establishing a new legal structure that deviates from the traditional party-centered litigation structure. Easing the burden of proof that the plaintiff is responsible for should be eased. It is very difficult to prove the illegality of the defendant's conduct from the plaintiff's perspective in PIL.[26] It is rarely possible to acquire any evidence in the circumstances where most of the relevant evidence is on the defendant's side at first. Even though the plaintiff obtains such data, it is almost impossible to prove the illegality of the defendant's actions based on the materials acquired in the professional domain. This difficulty of burden of proof frequently appears in the case regarding environmental issues and lawsuits against the business. Therefore, there is a need to alleviate the burden of proof of plaintiff.

Specifically, it possible to consider such measures that determines the total amount of damages by statistical methods while the victims are enough to prove some portions of the damages. It can alo be considered to mitigate the burden of proof or shift the burden depending on the issue. In addition, a system needs to be in place to enables the plaintiff to readily access the subjected materials. Activating the order for submission of documents should be considered in the first place. Further more, it is necessary to develop an institutional system that restrictively allows the plaintiff to obtain the materials that the other party has. Furthermore, such shift of the proof of burden that acknowlege illegality if the defendant fails to demonstrate the legitimacy of his or her actions while the degree of proof which brings about reasonable doubt is considered enough.

The current Constitutional Court Act stipulates very strict requirements for filing constitutional suits on the premise of the concrete rule control, allowing those who are infringed upon their rights to file an exceptional suit only if there are no other means of relief. Due to the limitations of the Constitutional Court Act, a constitutional decision is very hard to be made. Therefore, the Act should be amended in such forms that allows exceptional abstract norm control if certain requirements are met, such as Germany's constitutional system. If these institutional improvements are made, we will be able to realize a democracy where civic power is able to conduct post-control of the legislations through the litigation.

The class action law, which can cover individual areas of law as the fundamental law, should be enacted. Class action refers to a case in which one or several victims file a suit on behalf of a whole range of groups without explicit delegation from the individuals. Such lawsuits are

[26] Lee, Changlim. “A Study on the Resident's Procedure System - Focused on Comparative Law Studies with Japan -.” *Ph.D. Thesis of Korea University*, 2011, pp. 25–26.

commonly used in compensation suits traditionally, but they can also be utilized in public areas such as social welfare payments. The specific form of the system could be introduced on the basis of the class action system in the United States. Currently, the Class Action Act on Securities and Exchange only stipulates class action suits for damages caused by securities transactions. Therefore, it is impossible to utilize class action to other areas as it is limited to damages in stock trading. The important thing is that the class action system should have special rules on reducing legal costs. This is because such a cost burden should not limit judicial access as the original purpose of class action suits is to realize the public interest.

Conclusion

It is clear that litigation movement is one of the important means that social movements can take. The era of law functioning to protect human rights, not to suppress and control, has already opened. There have been numerous achievements that can be remembered as victory of law and victory of citizens as well. However, winning the lawsuit does not necessarily lead to positive results in society. It is true that there are many things that can be lost in the process. According to various legal and social studies, "law" is one of many social institutions that can change society. Therefore, litigation movement is just only one of the many strategic options that social movements can take. Such accurate diagnoses of the limitations of the litigation movement are important even to gauge its viability. Analyzing the limitations of the PIL may be a reference in deriving the challenges that need to be overcome in order to achieve the desired objective rather than demonstrating its futility. At this point, practical meaning of various studies may also become clearer to gauge the effectiveness and limitations of the strategic social change through the law. This could also lead to issues concerning whether the judiciary is a necessary body for social change or the social effects of court rulings. The revitalization of social change through the law is also a reinterpretation of the essential nature of the law. This is because the minority and the weak are able to take advantage of the law, unlike the traditional interpretation of "Marxism" that the law represents the interests of the strong. At this sense, law would be an independent variable for social change. Several cases of successful social movements through law are empirical to this nature of law.

R. A. Baum explains that PIL is "not only a useful tool to fill the voids in our legal system, but also a point where social movements meet the law." Looking only at the not-so-long history of Korean PIL, it is easy to gauge the magnitude of the power that the lawsuits bring to the change of society in various aspects. While there are still many challenges for PIL, in terms of social awareness and institutions, as long as there are people who wish to dedicate themselves to its value, the utility of the law will be fully achieved through the PIL. In the legal case of NAACP v. Button, an US Supreme Court case, Judge Brennan said, "Under the modern government, litigation is the only practical way for minorities to petition to correct undue pressure, and for these groups, solidarity for litigation is the most effective form of political solidarity." I look forward to the day when PIL will be judged accordingly in our society.

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THE LAW OF THE LAND AND COMMUNAL CONFLICT IN INDONESIA

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Abstract
The background of this article is the rise of land conflicts in Indonesia with reason of respect for traditional values. The purpose of this paper is to describe the customary land conflicts experienced by migrant and local farmers and customary law on customary land in Tamiai village, Kerinci district, Indonesia. The method of this research is descriptive qualitative, by interviewing 12 people that involved in the conflict. The results of the study found that; land conflicts occur because one party violates customary law on land use. As punishment, the offender can be evicted from the land that has been his livelihood. Conflicts can be resolved if the offender returns to comply with customary provisions related to land use. This research concludes that customary law in Indonesia is still strong in regulating the use and ownership of customary land. Unfortunately, in some cases the community justifies criminal acts because of defending customary law. This research recommends that local governments regulate law on customary land, so that community rights and obligations are protected.

Keywords : customary law, customary land, conflict

Introduction

Land conflicts is rank in highest position of various types of conflicts in Indonesia. Based on the report of Legal Aid Institute (LBH), in 2018 they handled 300 cases of land conflicts in 16 Provinces, with the disputed land area of 488,404.77 hectares. In the previous year, 2017, the Agrarian Reform Consortium (KPA) note that there are 659 land conflicts, with an area of 520,000 hectares and involving 652,000 households. Some cases that become police's attention because they consist of intimidation, violence and criminalization. The author has an initial assumption that is, cases of land conflicts in Indonesia are caused by two things; *first,* the community does not yet have the ability to negotiate their interests and needs properly. *Second,* the state policies that governing agrarian affairs doesn't able to protect people's rights related to their land ownership, especially land with have status of customary land. As a result, people use *hukum rimba* (the law of the jungle) in overcoming the conflicts. The community justifies committing acts of violence, arguing that they are defending their property. This situation disturbs the security and the comfortable of people's lives in conflict areas, in terms of social, cultural, economic, legal or even political.

Conflict is the differentiation between belief, interest, will, needs, purpose, value, power, status, resources, attitudes and goal among individual or groups that contradict each other (Dewi, 2017). Conflict with land objects is the biggest conflict issue throughout the ages because it's strategic function (Dewi, 2006). Land conflicts can easily occur because of the offense between the owner and the cultivator because land see as a place of agricultural productivity, mining exploration and development activities (Dewi, 2013). Arsadi (I Putu Prana Suta Arsadi & Artha, 2018) identified four behaviors that trigger land conflicts; *First,* claims of land ownership by the community without proof of a valid land certificate from the government. *Second,* violation of the agreement by one of the parties in making an agreement. *Third,* violation of customary law regarding the prohibition of selling customary land. *Fourth,* injustice in compensation for land acquisition.

In addition to the reasons above, several results of research on land conflicts in Indonesia reveal that communities use oral traditions to approve on land use agreements and determination of land boundaries. Oral tradition has the opportunity for uncertainty about who owns the land and where the location of the land will be in the future. As a result, there is distrust and animosity between the two parties (Dewi, 2010). Rahmawan (Dicky Rachmawan, 2016) states that the interests of the government to conduct the construction of public facilities on people's land resulted in loss of livelihoods. Communities also lose space to express cultural and artistic traditions so that people's identities can be lost. (Maladi, 2012) see that the movement of the community in defending their land because of the state's favoring the capitalists. The position of the community as a powerless party has triggered conflicts and demonstrations against large companies that are protected by the state. Along with that, (Dewi, 2014) states that land conflicts between communities are difficult to resolve because of differences in beliefs, interests, disappointments, weaknesses and prejudices making it difficult to negotiate and mediate. An interesting thing was conveyed by (Alting, 2011) that the conflict between the community and the company was due to inadequate compensation and the government's tend to favoring the investors.

This paper describes the land conflicts in Tamiai village, Batang Merangin sub-district, Jambi Province, Indonesia. This conflicts happen between immigrants and local farmers and has been going on since 2016 until now. The case becomes public attention because it have been three times occur as headlines in the local mass media. The main issue is the violation of *adat* by migrant farmers. Although the issue raised is a violation of *adat*, but there are other factors that also influence the conflict, that is; *First,* since 1979 the status of migrant farmer show that the income of migrants exceeds the income of the local community. This economic disparity has led to social jealousy and suspicion to migrants. *Second*, local

farmers together with the Batang Merangin sub-district and the customary institution Depati Muara Langkap (DML) carried out an orderly control by violence of *tanah ulayat.* Mediation efforts and FGDs carried out four times during January-March 2017 by the Kerinci district government and the Batang Merangin Head of District have not satisfied both parties. Conflict is difficult to resolve because conflict control and its resolution are in the hands of the Tamiai village customary authority rather than the Regional Government. This means that the community believes that adat sanctions must be a guideline in resolving land conflicts. This paper aims to describe; (1) Chronology of customary land conflicts in Tamiai village (2) Customary law on customary land.

Method

The method that used in this paper is constructive qualitative. This method is able to achieve the purpose of this paper which is to describe some of the main provisions of customary law regarding land and which aspects of the conflict are vulnerable. This research was conducted for one year, by staying at the research location in Tamiai Village for 3 months. During this time, 25 informants were obtained, consisting of four groups; migrants farmers, local farmers, traditional leaders, and local government including the police.

Result and Discussion

This paper describes two results; (1) Chronology of customary land conflicts in Tamiai village (2) Customary law regarding customary land.

Communal Conflict

The chronology of the Tamiai village land conflict is divided into two periods; *first,* the arrival of immigrant cultivators to Tamiai Village area in 1979. *Second,* The crisis between newcomers and local farmers during 2017. The following sequence of events in the conflict:

No	Migrants Farmer	Year	Local Farmer
1	Migrants farmers are allowed to plant the fields by Tamiai custom leaders with a number of provisions, including the obligation to pay *adat* money at each harvest, prohibited from selling land and prohibited to plant the land outside the specified limits.	1979	Migrants farmers cultivate the land that far from the residential area of Tamiai village community. In the first period, migrant farmers routinely handed over *adat* money to custom leaders of Tamiai village.
2	A notice letter from the custom leader (Depati Muara Langkap Tamiai) state that the migrants farmers who do not have permission to plant they must leave the land.	Jan 2017	This decision was made because for 40 years the migrants farmers doesn’t respect the Tamiai village's custom.
3	This notice caused restlessness.	Jan 2017	This decision is punishment for migrant farmers who do not respect the custom of Tamiai village.
4	The migrants farmers asked for support from the Tigo Luhah Semurup Youth Association (PPTLS) and the Peladang	Jan 2017	Local farmers are not willing to hold consultations with migrants farmers.

	Community Forum (FMP) urging the head of the regional government (Bupati) to become a mediator for migrant farmers and local farmers.		
5	The Kerinci district government has banned the curbing of migrant farmers by local farmers.	Jan 2017	The custom leader of Tamiai village continued to curb migrant farmers by giving an X sign with red paint on the door of the migrant farmers hut.
6	Migrant farmers surrender to the decision of Tamiai village custom leaders, they are ready to pay *adat* money, participate in the development of Tamiai village and take care of permits for the use of Tamiai village's customary land.	Jan 2017	Local farmers reported various losses suffered by Tamiai villagers since migrants farmers cultivated their customary land, one of which was that their fields were dry due to the direct flow of the river to the migrant farmers fields.
7	The FGD resulted in three decisions; migrant farmers pay *adat* money, participate in the construction of Tamiai Village and perform prostration to ask permission to allowed to re-enter the field.	Jan 2017	Local farmers and youth from Tamiai village attended the FGD facilitated by the Kerinci Regency Government.
8	Some of the migrant farmers rejected the results of the FGD and then carried out mass actions, namely as many as 1,500 migrants farmers led by the Forum Masyarakat Peladang which came to the DPRD to submit several demands to refuse curbing by local farmers and traditional leaders as well as to request law enforcement for persons who commit criminal acts in migrant fields.	Feb 2017	Local farmers and traditional leaders of Tamiai Village did not respond to this action, and planned a counter-action.
9	Local farmers carry out curbing followed by a criminal act burning settler farm huts and their matter.	March 2017	This action is a response to the mass action spearheaded by the Forum Masyarakat Peladang.
10	300 migrant farmers comes to sub-district office to protest the partiality of the Batang Merangin sub-district. This	March 2017	The arrival of 300 migrant farmers to the sub-district office is a threat and must be

	action resulted in the loss of migrant farmers, because 72 motorbikes that were left behind were burned by a person in the village of Tamiai, 4 of the migrants farmers suffered injuries.		resisted by expelling and burning 72 motorcycle that belong to migrant farmers.
11	The Governor of Jambi came to seek reconciliation through; safeguarding by the authorities at the location of the conflict, the migrant farmers are prohibited plant on their land until found a settlement.	March 2017	Local farmers accept advice from the Governor of Jambi
12	Migrant farmers agreed to the legalization of the agreement at the Regent's official residence, consist of 7 points; *sirih bateh, tembo tanah*; that is, agreements to protect the environment, the obligation to comply with customary rules, take care of the legality of land ownership, the obligation of migrant farmers to comply with village regulations and participate in development. The obligation to maintain security, to socialize the peace agreement and legal sanctions for those who violate the agreement.	March 2017	Local farmers agree to the legalization of the agreement at the Regent's official residence, consist of 7 points; *sirih bateh, tembo tanah;* that is, agreements to protect the environment, the obligation to comply with customary rules, take care of the legality of land ownership, the obligation of migrant farmers to comply with village regulations and participate in development. The obligation to maintain security, to socialize the peace agreement and legal sanctions for those who violate the agreement.
13	Migrants farmers promotes peace agreements to the community of migrants farmers.	March 2017	Local farmers socialize peace agreements with the community especially Forum Masyarakat Pendatang at the Depati Tigo Luhah traditional hall.
14	The Regent of Kerinci broke his promise to hold a festivity as a condition to legalize the payment of *adat* money by migrants farmers.	May 2017	The custom leader of Tamiai Village is waiting for the festivity to be financed by the Kerinci Regent
15	The *adat* leader of Tamiai Village sent again a letter to regulate the legality of land use by the migrants farmers. This letter from the Muara Langkap Tamiai	Jun 2017	Customary Organization of Depati Muara Langkap Tamiai no longer wants to wait for a conflict resolution by the

	Customary Institution became a threat and caused unrest for the migrant farmers. The contents of the letter states that every migrant farmers who plant customary land must show permit to sale and purchase until 30 June 2017, if not, then they must leave the land.	Regent. Therefore a notification of control was issued, the contents is migrants farmer who worked on customary land must show permit of sale or purchase. Until June 30, 2017 could not show a letter, migrants farmer must leave the land.

Table 1 by author

The table above shows that conflict can be avoided if the migrants farmer are consistent with the initial agreement to comply with the customary law of Tamiai Village. There are three types of violations of customary law that trigger anger of *adat* leaders and the local farmers. *First,* claiming that the land they have been working on since 1979 (40 years) has been turned into land owned by settlers. *Second,* within 40 years, some unscrupulous farmers sell land to other migrants farmers, so that there are customary land pegs that are no longer in place. *Third,* because they feel that they are already the landowners, the migrant farmers no longer pay *adat* money to the Tamiai village traditional leader. In addition, local farmers felt that the use of land by migrant farmers caused dry river flows, as they were directed to irrigate their plantations. Plus the emergence of economic jealousy between migrants and local farmers, but migrants farmer do not want to participate in the development of Tamiai Village.

The Law of the Land

Three violations of *adat* by migrant farmers are contained in the Kerinci and Minangkabau customary laws. A tambo book written by Dt. Toeah (1989) wrote five rules for customary land;

1. Customary land is used for daily living needs, but can't transfer or sell to others.
2. The use of customary land by the community must be in accordance with limits that have been decided.
3. Indigenous peoples should increase yields rather than customary land by cultivating new fields, livestock need to be bred, ponds need to be expanded and other efforts to improve the welfare of family members.
4. It is considered awkward and embarrassing if the customary land controlled by the nephew is mortgaged for household needs, spree fees, or buying liquor, gambling and other immoral paths, especially if they sell customary land. Provisions of customary land should not be sold or just removed, because it will be passed on to the next generation.
5. Utilization of customary land by other parties not originating from indigenous peoples is permissible as long as it fulfills two conditions: *First,* permission has been given by the customary authority, *Second,* after paying the *adat* money "*Adat di Isi Limbago dituang"*.

Specifically in provision number five, external parties who obtain permits to use customary land must fulfill the requirements;

1. Production sharing agreements or giving a sum of money as a sign will utilize customary land from local customary leaders who are different from themselves. If it has been completed and no longer used, then the land will return to the ruler or the owner of the original customary land as the traditional custom of *"Kabau Tagak Kubangan Tingga"*.
2. St. Mahmoed and A. Manan Rajo Panghulu (1978) wrote that selling customary land in principle should not be done by indigenous people especially by other parties whose status

is customary land tenants, because it based on the proverbs "*jua indak dimakan bali, gadai indak dimakan sando"*.

3. D. Toeah (1989) describes the use of customary land by other parties subject to regulations; *adat bunga kayu, adat takuk kayu, adat bunga tanah, dan adat tanah batu.* Customary leaders who allow their customary land to be used by other parties, the first step is to indicate to what extent customary land may be used, with the term specified *watas pasupadannya*. Usually the border symbol used wood so it is called *adat takuk kayu*. There is also the marking by planting a stone, then it is called the *adat tanam batu*. After the observation or grouping is done by the other party, the customary leader gains 10% of the total results obtained. This profit sharing is in accordance with the customary agreement on land interest.
4. Further Dt. Toeah explained (1989) giving 10% of the results of operations to customary landowners called "*mengisi adat, menuang lembaga*". The results of the business given are in accordance with the effort, so that the terms of rattan flower, rosin flower, gum flower, candle flower, wood flower, *tambang tagah*, and others appear. As in the Mount Sahilan area, as many as ten bushels of each piece of rice field, are paid as rice flowers (*bunga padi*) to traditional leaders. If you are looking for gold in the land or river, the *tambang tagah* is *sepaha* (1/4 portion) for each one golden income. Even in the *Singkarak* and *Bonjol* areas, each gold paid one gold, in the Kerinci area paid ¼ gold or a maximum of one Dutch rupiah.

A.B. Dt. Madjo Indo (1999) states that if there is a violation of *adat* by another party, a strong impetus arises for the customary community to defend their customary land as a manifestation of a philosophy of life of standing (*hidup bapandirian*). This philosophy is written in the following saying:

> "*Kok ditutuik urang banda sawah, dianjak urang lantak pasupadan, diubah urang kato bana, baribu sabab nan datang, basuangkan dado ang buyuang, caliakkan tando laki-laki, namun dalam kabanaran, jan cameh darah kataserak, jan takuik nyao kamalayang, jan takuik tanah ka sirah. Basilang tombak dalam parang, walau dipancuang lihie pituih, satapak jan namuah suruik, nan bana diubah tidak*".

This proverb is about to ignite the spirit of defending the truth that must be shown, that is, if someone is closed by a waterway to a rice field, someone is moved by a boundary mark, changed the right words, then whatever the reason, show courage, show that you are a real man in upholding the truth. Don't worry, blood will be scattered about, don't be afraid of lives will be lost, don't be afraid that the ground will turn red. Crossing spears in war, even if you cut off the neck, do not back down, say no to change the truth ". The adage above requires courage to defend the truth in order to preserve property and customary land ownership.

Zaiyardam Zubir (2010) states that the *Hiduik Bapandirian* philosophy is sometimes a justification for customary leaders to get involved in *"bacakak banyak"* (fighting between villages) in order to maintain customary land. Land owned by the village will be retained even if only a span, even if the plants on it are just a single blade of grass, as the saying goes – *Kok tanah nan sabingkah alah bamilik* (If a piece of land has been owned). *Kok rumpuit nan sahalai alah bapunyo* ((If one piece of grass already owned). This attitude shows that indigenous peoples are very calculating and maintain their interests in customary land ownership. For indigenous peoples, customary land must not be reduced, instead it must be maintained and even added.

Conclusion

Indonesia is one of the countries that gives recognition to the existence of indigenous peoples and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the unitary state of the Republic of Indonesia (Constitution 1945 article 18 (2)). One type of customary law that still applies in the community is customary land law. With the recognition of customary law in the community, conflicts over violations of customary land are left entirely to customary leaders to be resolved. However, in this case, the methods used by traditional leaders to discipline customary land from migrant cultivators have exceeded the boundaries so that they tend to be anarchic, containing criminal elements and need to be handled by the authorities. So that violations of rights no longer occur in the name of customary law, the Kerinci district government must be encouraged to produce policies related to the use of customary land. This paper is expected to contribute to the study of customary law and conflict sociology. The authors urge that other field experts be able to analyze this case from the perspective of other sciences.

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The Peace and Conflict Studies Archipelago: Where Interdisciplinarity has served us best, and how it could improve our theory and praxis still further.

Brett R. O'Bannon
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There are undeniable tensions among those who identify with an established discipline, such as Political Science, History, or Economics, and those whose research and teaching interests have necessitated their disciplinary "boundary transgressions" (Krings et. al. 2016). Disciplinarians proudly point to their flagship journals as the repository of the discipline's accumulated knowledge and, thanks to its established methodologies constituting its status as a "normal science," the field's principle quality control mechanism. Those, however, who find that their training in an established discipline inadequately equipped them to engage with what they see as the most pressing of the world's problems point to the same journals and the same established methodologies as the reasons we are so poorly responding to global crises of climate change, globalization-driven inequality, and the continuing, but ontologically transformed, scourge of war.

PACS iconically represents how frustration with the stifling nature of "paradigm mentalities" (Walker 2010) led to the transgression of many disciplinary boundaries and to the emergence of what some in the field, much to the chagrin of the author, claim is an established discipline in its own right. It is precisely where there are signs of disciplinary formation in the PACS archipelago, that we are weakest. The openness of PACS to experimental methodologies and novel experiential-based theorizing is the hallmark of our field. This presentation aims to show how our interdisciplinarity has propelled us forward and kept us wed to reflective scholarship and reflexive practice. We are weakest, both in our theory and our praxis, in those locations of the PACS archipelago that have obtained disciplinary status. Contrasting the field's incorporation of complex systems theory with the field's conception of "culture" will demonstrate this point.

As I have discussed elsewhere (O'Bannon 2019A, 2019B), Interdisciplinary Research and Teaching (IDR/T) is paradoxically a growth industry in the academy while at the same time an effort that comes at quite considerable risk, to those who seek to seriously engage in IDR/T, of quite serious and potentially even fatal cost to their academic careers. Despite this paradox, and the myriad dilemmas with which IDR/T scholars must grapple, and which leave them vulnerable to attacks from both well-intentioned and not-so well intentioned critics, the benefits of IDR/T can be said to be clearly of such substantial value that we who occupy our particular interdisciplinary field, or archipelago as I will later refer to it, have an obligation to remain wed to the transgressive roots of our epistemic community. For given the reasons that drive IDR/T forward across the academy, and the very significant humanitarian implications of our work, to do any less would be a betrayal of the commitments that drove most of us to Peace and Conflict Studies (PACS) in the first place.

The Vulnerability of IDR/T

Scholars committed to IDR/T face myriad vulnerabilities, many captured with the dynamics associated with the Matthew Effect, the term coined by Robert Merton and Harriet Zuckerman to describe the accumulation of further advantage by the advantaged (Merton 1968). Often hired into disciplinary grounded departments such as Political Science, Sociology, Anthropology, or History, but whose work is more aptly identified with, say, the transdisciplinary fields of Culture Studies, Women, Gender, and Sexuality Studies, Critical Race Studies, or indeed Peace and Conflict Studies (PACS), these boundary transgressing scholars and scholar/practitioners very quickly see the challenges before them. They note that they will be assessed for tenure and promotion by disciplinarians who often do not have adequate familiarity with the work of their junior colleagues and the community of scholars with which they find common cause, to legitimately assess the merits of their scholarship. The departmental elders cannot simply rely on standard facile metrics such as journal impact scores, book publishing reputation, and the like, because flagship journals and leading publishers are themselves often so steeped in disciplinary traditions that IDR/T scholars must seek out lesser known, more experimental journals, or indeed, found their own. In doing so, they lose many of the privileges and safety features that their disciplinary colleagues enjoy.

Nowhere was the vulnerability of IDR/T scholars revealed more clearly, and in ways that revealed the sometimes ideologically driven agenda of those would exploit their vulnerabilities than in the so-called "Grievance Studies" hoax, perpetrated by the editor of the right-wing online magazine *Aero*, Helen Pluckrose, and two colleagues. By now the story is already the stuff of legend: three singularly ideologically motivated critics of the academy (all within the strict confines of the Classical Liberalism), and especially virulent critics of feminism (9 of the 11 targeted journals represent Women, Gender, and Sexuality Studies), submitted 21 bogus papers to 11 academic journals, journals they represented as "leading journals in their respective fields" and had 2/3 of them rejected. Seven, however, all making quite outlandish claims, but claims represented to the journals as supported by real data the authors had dutifully collected, but which it turns out were all total fabrications, were accepted. Debates ensued in the pages of the *Chronicle of Higher Education*, which, as it should, featured opposing views. In venues that must be seen as *Aero* companion forums, like the right-wing *Quillette*, not debates, but celebrations were offered, with lineups of like-minded opponents of feminism and including a stellar cast of 'racial realists", alt-right activists, eugenicists, etc. – all singing the praises of the hoaxers.

What seems to have not been appreciated in even the Chronicle's forum, is the way in which the 11 journals targeted in the hoax, were in some important respects made vulnerable not by their normative commitments, nor by their alleged adherence to post-modernism – and to be clear, not all the targeted journals are especially post-modern in their outlook – but by their commitment to interdsciplinarity.

Defenders of the hoaxers claim that "leading journals" of long-established disciplinary fields such as Political Science, Anthropology and Economics would never have accepted any of the seven papers accepted by the victims targeted by Pluckrose and company. And it seems reasonable to concede the point. But what constitutes a 'leading journal" in an interdisciplinary field like Culture Studies or Women's Studies, or in established disciplinary field, for that matter?

Let's consider simply two indicators of a journal's potential capacity to defend against hoaxers like Pluckrose et. al., who are prepared to engage in academic misconduct and misrepresent their work as based on actual data. It is worth noting, first, given what Bergstrom says about peer-review, that even well-established disciplinary journals might also be susceptible to hoaxers, when they are prepared to commit such flagrant academic misconduct as engaged in by the *Aero* trio. "Peer review," notes Bergstrom,

> is simply not designed to detect fraud. It doesn't need to be. Fraud is uncovered in due course, and severe professional consequences deter almost all such behavior. Nor is the peer-review process designed to weed out every crazy idea. Given the self-correcting nature of scholarship, it is far better to let through a few bad ideas than to publish only those that are so self-evident as to be without controversy (2018).

Indeed, one seemingly bad idea that the iconic journal *Foreign Affairs* published by Edward Luttwak (1999), that given shortcomings identifiable with negotiated settlements it would be preferable simply to let civil wars continue unimpeded for however long it takes for one side to achieve victory. "Give war a chance," Luttwak's deeply cynical paraphrase of John Lennon's anti-Vietnam war anthem, seemed to reflect familiarity with none of the phenomenological accounts of the daily, lived experience of those who endure the horrors of contemporary organized armed violence. But precisely as Bergstrom anticipates, allowing Luttwak a forum to espouse a doctrine of such monstrously callous proportions, has indeed recently given forth to more nuanced understandings of how negotiated settlements might better be compared to wars ended by (rebel) victory (Toft 2010).

But to show how these hoaxers targeted the vulnerable, let us consider two factors, journal age and reviewer community. If we consider, first, long-established social science disciplines – Political Science, Anthropology, Sociology and Economics – we discover their flagship journals range in age from 83 years for *American Sociological Review* (that Sociology has the youngest flagship journal reflects the relative age of the discipline) to 133 years for Britain's *Quarterly Journal of Economics*. The median year of first publication is 1908 for a median age for the established disciplines' flagship journals of 110 years. See Table 1.

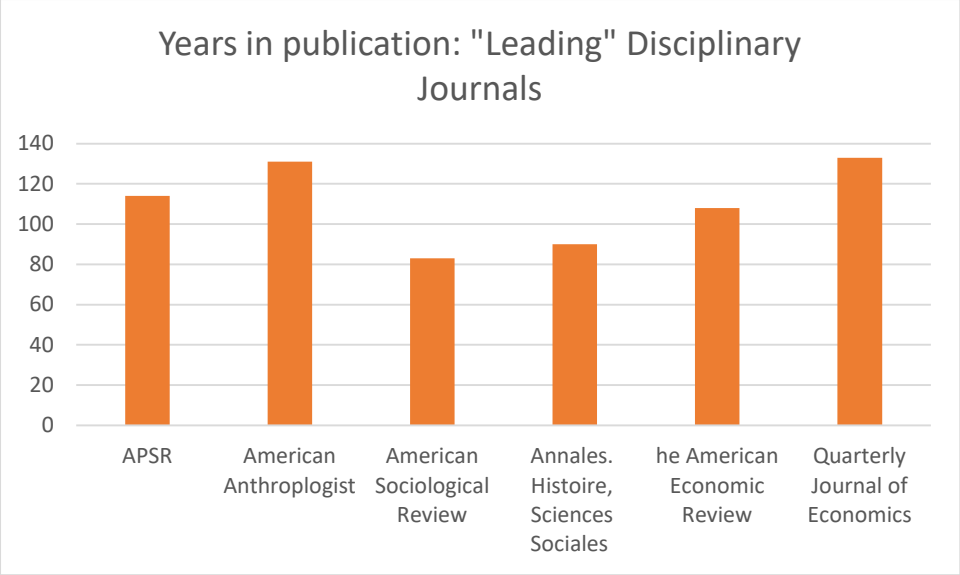

Table 1. Established Discipline's Leading Journals

If, however, we consider the targeted victims of the hoax, we see a startling difference. For the 11 interdisciplinary Cultural Studies journals (including 9 of them Women's Studies) we see they range in age from 5 years for *Porn Studies* to 44 years for *Sex Roles*. The median year of first publication is 1994, rendering a median age for what the hoaxers repeatedly referred to as "leading journals" of 26 years. See table 2.

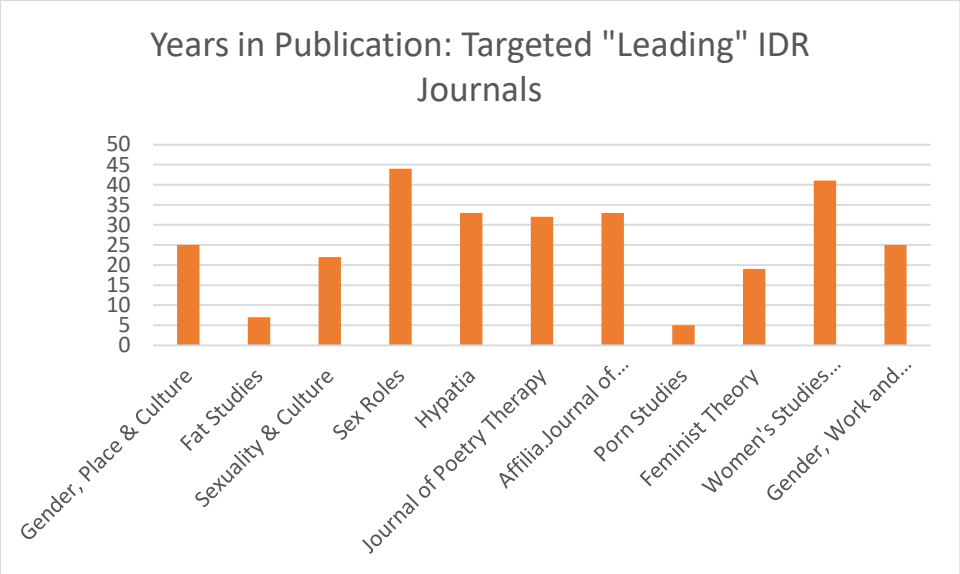

Table 2. Grievance Studies Targeted Victims

The age difference between these two groups of journals can be taken as a proxy for a number of critical variables associated with vulnerability to the perpetrators of academic misconduct such as that perpetrated by the hoaxers. These include the degree to which they have established sub-fields each with their own mature, orthodox methodologies deemed appropriate for inclusion in their respective journals, well-established long-standing annual conferences where members of the respective epistemic communities establish close, multi-generational personal relationships. Clearly the targeted IDR journals must be seen as suffering significant deficits across all these variables of vulnerability. And highly correlated with age and the associated proxies of vulnerability is the size of the community of reviewers of which the respective journals can boast. And though there is growing appreciation of the need better recognize the contributions of reviewers, and thus some journals have taken to publishing once a year the list of their reviewers. Many do not, however, and for many, that number is not revealed. But the American Political Science Review, now published in Cambridge, reveals this number in an annual year-end report. The APSR in 2018 boasted of a total of 4005 reviewers. The number of reviewers the APSR had in 2018 is nearly equal to one circulation figure for the targeted journal Hypatia - total number of libraries that offer world-wide access Hypatia is 4048 (Hypatia 2016). That is, the *APSR* has as many reviewers as *Hypatia* as library subscribers.

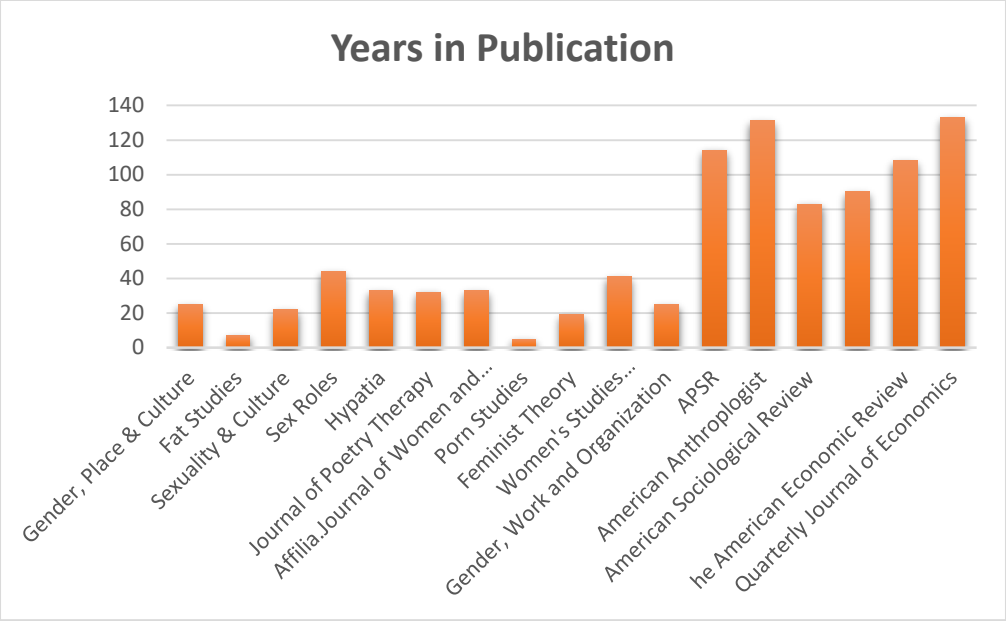

Table 3. IDR and Disciplinary Journals

The Case for Interdisciplinarity

Defining our Term

The Committee on Facilitating Interdisciplinary Research (CFIR) defines interdisciplinary work, as that carried out:

> ... by teams or individuals that *integrates* information, data, techniques, tools, perspectives, concepts, and/or theories from two or more disciplines or bodies of specialized knowledge to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a single discipline or field of research practice.
>
> Research is truly interdisciplinary when it is *not just pasting two disciplines together* to create one product but rather is an *integration and synthesis of ideas and methods*. An example is the current exploration of string theory by theoretical physicists and mathematicians, in which the questions posed have brought fundamental new insights both to mathematicians and to physicists. (2005, 2; Emphases added)

Though the CFIR holds, perhaps correctly, that the social sciences lag behind the natural sciences in terms of interdisciplinary research, I would argue that the field of New Institutional Economics (NIE) is a quintessential interdisciplinary enterprise. It employs the foci of Political Science and Sociology on institutions (often called "structures" in sociology) in the analysis of economic activity. What emerges is the study of how, for example, political, legal and social institutions (e.g., land tenure regimes) structure the prospects (and processes, for that matter) for economic development. The resultant (integrative) insight is that political institutions (the stuff of political science) structure the incentives under which economic agents operate (the stuff of economics): a politically bounded microeconomic rationality emerges; giving rise to a transformed methodology that is neither pure economics nor pure political science.

The same report characterizes multidisciplinarity as that which:

> ...involves more than a single discipline in which each discipline makes a separate contribution. Investigators may share facilities and research approaches while working separately on distinct aspects of a problem. For example, an archaeological program might require the participation of a geologist in a role that is primarily supportive. Multidisciplinary research often refers to *efforts that are additive but not necessarily integrative* (Ibid. 27-29).

Though the CFIR implicitly holds that interdisciplinary work is superior to multidisciplinarity a strong case can be made for multidisciplinarity as well. For a start, Rogers, Scaife and Rizzo argue that, in practice, real interdisciplinarity tends to remain elusive. Researchers and teachers may collaborate, but "they remain, however, essentially within the boundaries of their own disciplines both in terms of their working practices and with respect to the outcomes of the work" (2005, 266). Further, they hold that "major breakthroughs result not from interdisciplinary collaborations but from multidisciplinary ones in which limited tools and concepts are shared and borrowed across disciplines while disciplinary alliances are maintained" (Ibid.). That may be so, but I suspect that stems from the still formidable obstacles facing truly integrative interdisciplinarity. And below I suggest they might now have reason to revisit their view from 2005.

Given the personal and professional costs often associated with the effort of scholars to pursue interdisciplinary research and teaching, that is, given host of obvious disincentives to

invest in the efforts to learn new subject matter, new methods of inquiry, indeed the new languages associated with boundary separated disciplines not of their graduate training, why does interdisciplinary research and teaching continue to thrive and grow? For that we need an understanding of the principle functional responses that disciplinary boundary transgression offers. There appear to be four key drivers or motivating and/or permissive causes of the continued growth in IDR/T.

Drivers of interdisciplinarity

1. The inherent complexity of nature and society

Nowhere has this complexity been made more evident than in the history of modern physics and its drive for a unifying theory. Once apparent incompatibilities between relativity and quantum theory emerged, new methods of inquiry developed, new tools were necessary to move the field forward. Physics became chemistry became mathematics became... Today, globalization in all its forms (economic interdependence, policy convergence, weapons technology proliferation, a global communication infrastructure unimaginable 20 years ago) requires not just a rethinking of our paradigms, but often a retooling of the scholars seeking to grapple with these rapid transformations. There are, simply put, some questions more complex than the disciplines we have inherited from the previous generations of scholars can manage.

2. The drive to explore the interfaces of disciplines

Today there is wide scale interest in academia in overcoming what Campbell called the "ethnocentrism of disciplines" (2005, 3). Despite its challenges, which I explore below, interdisciplinary work seems to offer the scholar an opportunity to "max out" the epistemological possibilities of the fields in which they were trained as graduate students. For many, this is an exploration of the questions that matter most to them, often the ones that drove them to pursue graduate studies in the first place, but which are often ignored by the mainstream of their disciplines or departments.

And when I say that *many* in the academy are compelled in this way, there is ample evidence to support my claim. An anonymous posting on the internet on October 17, 2000 eventually led to what *The Chronicle of Higher Education* referred to as "storming the palace in Political Science." It asked questions like, "Why do a majority of political scientists who do comparative politics ignore APSA and APSR and go to their regional meetings and read regional association journals--such as those associated with East Asia, Latin America, Hispanic Studies etc?" Additionally, the author who became known as Mr. Perestroika, asked, "Why are all the articles of APSR from the same methodology--statistics or game theory--with a 'symbolic' article in Political Theory that is often a piece that has been rejected by the journal *Political Theory*. Where is political history, International history, political sociology, interpretive methodology, constructivists, area studies, critical theory and last but not the least---post modernism.?"

It is clear to many that the field had been begun to show signs of an appreciable but less than revolutionary transformation within a decade after this posting dared to ask, "Why are the overwhelming majority of Presidents of APSA or editorial board members of APSR WHITE and MALE? Where are the African-Americans, Hispanics, Women, Gays, Asians---in short, where is the diversity of United States and the world that APSA "pretends" to study?" To

wit? In 2004, the flagship journal *APSR*, which Mr. Perestroika had correctly pointed out in 2000 was “ignored by the majority” because it marginalized alternative theories and approaches, and paid no heed to the diversity of the world it presumed to study, awarded the Heinz Eulau Award for Best Article Published in *the American Political Science Review* to Mary Hawkesworth’s “Congressional Enactments of Race-Gender: Toward a Theory of Raced-Gendered Institutions.” The palace appeared to have been stormed. The peasants had much to offer. As Susanne Hoeber Rudolph of the University of Chicago summed up, "A wish to have precise answers drives you to narrow methodology. A wish to have broader answers drives you to multiple methodologies."

3. The need to solve societal problems

Though industry has long demanded an efficacy to our efforts, it is no longer alone in expecting a functional response from the academy to our world’s pressing problems. But, what exactly, *should* a state’s policy on global climate change be? How *should* the international community respond to the proliferation of nuclear, biological and chemical weapons technology (and materiel) that globalization has made ever more possible? What is the cause of Africa’s persistent development crisis? What can be done to stop the global AIDS pandemic? The world food crisis requires what kind of response? These questions engage with the most pressing issues of our time. Their severity, their very nature, the very fact that these are societal problems that *need* solving, has encouraged interdisciplinary responses across the academy. They defy discipline. They demand a transcendence of departments and an integration of what disciplinary departments have produced. This functionality explains as well as anything can the proliferation of Environmental Studies programs that promote collaborative research among geoscientists, ethicists, and policy analysts, to name only a few. This functionality is clearly behind the proliferation of policy analysis centers that bring together economists, anthropologists, political scientists, etc. in the exploration of problems which have left their respective disciplines seemingly dumbfounded. Solving social problems is where demand meets supply. The desire to solve social problems drives undergraduate students in great numbers to the very interdisciplinary programs the problems have helped bring about.

4. The stimulus of generative technologies

Speaking of the fourth driver, CFIR notes “[g]enerative technologies are those whose novelty and power not only find applications of great value but also have the capacity to transform existing disciplines and generate new ones” (CFIR 2004). The internet and other modern elements of the global communications infrastructure have greatly reduced the transaction costs of collaboration. As a result, epistemic communities have developed consisting of constituents across the globe. Today, the Large Hadron Collider is arguably the highest profile generative technological development in the world and has delivered on its promise to move physics a step closer to its coveted unified theory. In 2012, for example, work at LHC confirmed the existence of the elusive Higgs Boson, and the Nobel Prize was awarded the following year.

A much more accessible but still important generative technology that has promoted a great deal of interdisciplinary work at academic institutions across the globe, particularly in environmental studies and, indeed PACS, is the Geographic Information System. Referring to but one of the many ways in which GIS has impacted PACS, Altaweel notes,

> Territorial conflicts and mapping have had a close relationship long before GIS emerged. However, what is different now is that we see GIS also affecting outcomes and conflict resolution. Understanding space and the fact GIS gives voice to many parties has reshaped territorial conflicts and potentially how they can be resolved (Altaweel 2018).

It is clear that the integration of discrete methodologies and paradigms often offers teachers and researchers the tools they need to pursue work that cannot be pursued otherwise. In that respect, interdisciplinary programs are by their very nature at the forefront of production of knowledge. But disciplines are important as well. Critics of interdisciplinary programs often highlight the importance of disciplines in maintaining high standards of scholarship. Asked about the future of disciplinary-based departments at Pomona College, the outgoing president had this to say:

> ... the reason departments remain so powerful in collegiate culture is that they're the quality control mechanism. People are trained in departmental disciplines. We know what constitutes good methodology, and sound peer-reviewed outcomes within those disciplines, and when you move outside that domain, it suddenly isn't quite clear what constitutes good practice (Stanley 2003).

Questions about "what constitutes good methodology" are indeed at the center of the disciplinary – interdisciplinary divide. One must concede to disciplines their capacity to "discipline" – both in a modernist and a post-modernist (Foucauldian) sense. In a modernist sense, disciplines (as a noun), discipline (as a verb) in that they have the capacity "to punish someone" or "to teach someone to behave in a controlled way" (Cambridge Dictionary 2019). They do this starting in graduate training in ways ranging from the subtle to not-so-subtle. The author was several times made aware in his doctoral program that some subjects and some theoretical perspectives would not receive an acceptable grade from the most powerful members of the department, while others, even if in the eyes of the author the submitted work was of lesser quality, would be perfectly acceptable. Mary Hawkesworth, one the leading feminist scholars in the United States, and winner of the Heinz Ulau award mentioned above, was very clearly told by a senior member of the faculty, who was also a well-known conservative foreign policy advisor and later high ranking diplomat for President Ronald Reagan, that she would simply not be allowed to receive a doctorate from Georgetown University, if she chose to pursue a dissertation that adopted a feminist framework (Personal conversation).

Disciplines discipline in a Foucauldian sense by the modernist means described above, but also through more subtle methods of regulating thought and behavior. Indeed the very

physical architecture of the modern university favors departmental based disciplines. The status accorded to those in academic communities who adhere more closely to established, orthodox disciplinary methods of inquiry stems from the much higher probability that they will receive favorable tenure and promotion reviews, which stems from a higher probability of receiving grants to support their research, and thus a higher probability of having their research published in their disciplines' flagship journals.

So Peter Stanley is certainly right when he concludes that "the question then is how interdisciplinary and multidisciplinary programs will fit into that department-based world." The case for interdisciplinarity seems well made on its intellectual and functional merits. There is an additional case to be made, however. Interdisciplinary education is not only good for academy, it is widely popular among undergraduates, particularly at select liberal arts colleges and universities.

> Students at Brown University have shown a consistent interest in interdisciplinary programs... At Columbia University the number of students majoring in interdepartmental or interdisciplinary programs has increased dramatically over the last 10 years ...Harvard University students are also increasingly interested in interdisciplinary studies: the number of undergraduate joint concentrations in chemistry and physics has risen from 14 to 45 over the last 15 years.... At Stanford University a multiyear decline in the number of students majoring in earth science was reversed when the major, originally based in the single discipline of geology, was reformulated into the interdisciplinary program "earth systems" ... Undergraduate students have shown themselves to be responsive to interdisciplinary and problem-driven questions, especially those of societal relevance (CFIR 2005, 62-63).

If we stipulate that disciplines remain important, and few would suggest otherwise, but that the drivers of interdisciplinarity are compelling, then we must conclude that healthy, robust interdisciplinary programs, along side discipline-bounded departments, are consistent with the most important developments in academia. But developments in one domain do not necessarily translate into changes in the other. Thus teaching may lag behind research. It has been found, for example, that "in contrast to biological *research*, undergraduate biology *education* has changed relatively little during the past two decades. The ways in which most future research biologists are educated are geared to the biology of the past, rather than to the biology of the present or future....Connections between biology and the other scientific disciplines need to be developed and reinforced so that interdisciplinary thinking and work become second nature..."11 What is true of the natural sciences, is true across the academy.

The bottom line?

As interdisciplinary research, scholarship, and teaching increase in importance in institutions of higher education, so does the urgency to find new policies and structures that accommodate interdisciplinarity. Successful institutions are likely to be those that are nimble and willing enough to develop such policies. The likely outcomes of the policies could be tougher levels of external support for the institutions, greater success in recruiting the most promising new faculty and students, and enhanced service to society in the form of successful

scholarship and research at the frontiers of knowledge (Committee on Undergraduate Biology Education to Prepare Research Scientists for the 21st Century 2002)

Resurgent Science War meets Culture Wars

It is clear that, especially in the United States, there are resurgent academic (and increasingly public) debates in the philosophy of science about the proper nature of scientific and social scientific inquiry. These are not unconnected to the Culture Wars longer raging in the US, but the rise of Right-Wing populist movements in Europe is now beginning to reveal similar deep societal divisions between progressivism and orthodoxy over hot button issues like reproductive rights, religion, LGBTQ rights, immigration, etc. It is in this context that the Grievance Studies hoax gained such massive notoriety and approval from those not normally engaged with the esoterica of academic life. But Pluckrose has been making the rounds of the right-wing talk shows hosted by the likes of Glen Beck and ethnonationalist platforms such as the Ramsay Centre for Western Civilization.

In such a context, it might be easy for PACS scholars and scholar practitioners to see themselves and their work as safely outside these arenas. But PACS is under attack by these same forces and have been for some time. It is critical to remember that the common thread among all the targets of the Pluckrose and company was not post-modernism, nor even feminism, but IDR. And PACS is, at its best, an IDR enterprise *par excellence,* driven to solve the pressing social problems of violence, war and mass atrocity that defy discipline. And though our most vehement critics often reveal a staggering ignorance of the substance, theoretical foci and central concepts of our field, they nevertheless claim authority to pronounce, as the crowds applauding the attack on IDR manifested in the Grievance Studies hoax do, our work as vacuous, lacking in rigor, and offering nothing of value to the study or practice of conflict and its resolution.

Barbara Kay ranted eloquent in the *National Post* asserting that PACS

> hasn't produced practical prescriptions for managing or resolving global conflicts, because ideology always trumps objectivity and pragmatism. The movement exploits the terminology of human rights, borrowing lofty catchwords like "empowerment," "reconciliation," "ripeness," "rebalancing of power relationships" and "historic justice." Peaceniks extol the values of dialogue and empathy. Their promotional materials exude sentimental cliches: "[We can find] ways of working toward a just and harmonious world community. Our realists can’t keep the literal barbarians from our gates (2009).

Bruce Bawer, in the City Journal (and picked up by papers across the US) writes about “The Peace Racke,t” which he describes as “[a]n anti-Western movement [that] touts dictators, advocates appeasement – and gains momentum.” What are the sins of PACS scholars and scholar practitioners who have dedicated their careers to helping find ways to ease or end the scourge of war? The field as whole he asserts is “opposed to every value that the West stands for—liberty, free markets, individualism—and despises America, the supreme symbol and defender of those values.” And in language channeling the prosecutor at Socrates’ trial, he decries the “tenured professors pushing such anticapitalist nonsense on privileged suburban

kids." And the worst of our sins? We instill in our students not the desire "to spend their lives on some remote mountainside in Nepal contemplating peace, harmony, and human oneness." No, our real crime is that our students "want to remake our world."

The PACS Archipelago

To begin to offer a rejoinder to those who misrepresent our work, but do so ever more effectively thanks to the echo chambers of *Aero* and *Quillette*, I sought to map the PACS "archipelago." I suggest the PACS "archipelago" because "field" implies a more bounded space than we are. PACS remains largely porous and open to influences from surrounding epistemological and ontological spaces. Well, not always, as I will note, but when we do, we are at our best; we remain reflective in our theorizing, reflexive in our praxis, and as a result, move to bridge the theory-practice gap that limits our contributions on the ground. To pursue this mapping exercise I selected 7 of the most widely read and widely recognized authoritative readers and handbooks that seek to present our interdisciplinary endeavor in single volumes. The consulted works are:

- Barash, David and Charles Webel. 2008. Peace and Conflict Studies 2nd Edition, Thousand Oaks: SAGE Publications, Inc;
- CQ Researcher. 2011. Issues in Peace and Conflict Studies: Selections from CQ Researcher, Los Angeles: SAGE
- Deutsch, Morton, Coleman, Peter and Eric Marcus. 2006. The Handbook of Conflict Resolution, San Francisco: Jossey-Bass.
- Jeong, Ho-Won. 2000. Peace and Conflict Studies: An Introduction, Aldershot: Ashgate Publishing.
- Levinger, Matthew. 2013. Conflict Analysis: Understanding Causes, Unlocking Solutions, Washington, D.C., United States Institute for Peace
- Ramsbotham, Oliver, Woodhouse, Tom and Hugh Miall. 2011. Contemporary Conflict Resolution, Cambridge: Polity.
- Woodhouse, Tom, Hugh Miall, Oliver Ramsbotham, Christopher Mitchell. 2015. The Contemporary Conflict Resolution Reader, Cambridge: Polity.

From my analysis of these volumes I identified 10 "islands" of theory and 4 islands theoretically informed practice. See Table 4. These are

1. The Ontology of Peace, Conflict, and War (from Ethnography to Statistical Measurement)
2. Theories of Peace and War (Causes of war, and conditions for negative and positive peace)
3. Organized Armed Violence (Civil War, mass atrocity, and terrorism)
4. Non-violence and social movements
5. Conflict Transformation and Peacebuilding
6. Conflict Analysis
7. The Security – Development Nexus
8. Atrocity Prevention and Response (Ethics, Just War Tradition, and International Law)
9. Human Security and Humanitarian Action
10. Cosmopolitan Conflict Resolution (Gender, Environment, Religion, Culture, and Identity)

Praxis

1. Prevention (Risk assessment, early warning, structural and operational prevention)
2. Peacemaking (Mediation, negotiation, multi-track diplomacy, peace agreements, etc.)
3. Peacekeeping (traditional peacekeeping to assertive peace enforcement)
4. Post-Conflict Peacebuilding

Table 4. The Peace and Conflict Archipelago

The Disciplinary Weaknesses of PACS (Culture)

The Relationships between the Right to Information, Media and Consumerism in Promoting a Peaceful Society

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Abstract

The right to information and the right to be informed are basic human rights. Media could serve as a gatekeeper in the distribution of proper information with good intentions. Instead of leveraging its own power to manipulate the industry and having conflicts of interest, media could be utilized as a means of promoting a peaceful society and benefit all stakeholders. From a practical perspective, media needs financial backing to achieve healthy operations and remain competitive to ensure long-term survival in society while businesses need media's assistance to promote product information, uses, harmful effects, care and demonstration to name a few. Coming between media and businesses are consumers who need information about product usage, safe consumption and protection, in addition to education about being moral and ethical citizens. Conflicts to maintaining a peaceful society arise from this triadic relationship in the forms of consumerism, threats to social and cultural values, information withholding, false information, conflicts of interest, and breaches of privacy. Every stakeholder has their own agenda to achieve; media's role as a mediator and its extensive role in sending out messages to consumers is one of the most essential channels in society to reduce conflict and promote peace. Instead, consumers and stakeholders have brought attention to some societal conflicts. With such premises, from a theoretical perspective, if media can balance opportunities and challenges, the outcome would be a perfect world; however, from a practical perspective, it would be a challenge to sustain while consumers might benefit the most in social, political, economic, and cultural ways.

Key words: media, consumerism, right to information, conflicting views, media consequences, peaceful society

The Relationships between the Right to Information, Media, and Consumerism in Promoting a Peaceful Society

The right to information and the right to be informed are basic human rights (Flowers, Bernbaum, Rudelius-Palmer, & Tolman, 2000). Human rights are intangible, valuable, practical, and inspirational in promoting a peaceful, free and just society (Flowers et al). This at least is a minimal standard for how individuals and organizations should treat people; they should empower people to claim and defend their own rights as well as the rights of others. Based on this perspective, any member of a democratic society has the right to obtain information, especially information related to his/her own health and safety risks, access to quality of life, financial information from organizations (business ethics); and access to the kinds of information the public has the right to know (journalistic ethics), just to name a few (Holley, 1998). Consumers have a right to information while businesses, despite sometimes opposing self-interested agendas, still have an ethical responsibility to disclose information. If these two entities are able to collaborate to reduce the conflicts, then we would likely have a more peaceful society.

The Need for Information Disclosure

Why do we need information disclosure? The need for information disclosure starts from the right to information and right to be informed (Holley, 1998). In any democratic society, free flow of information and information disclosure are important legal obligations that numerous institutions, particularly in the fields of politics, international relations, government, science, health care, business, and media are to be held accountable to. If an entity is legally obligated to disclose information, they can appropriately inform those who have the right to be informed by coordinating with media channels; this correspondence would have a credible impact in solving some societal problems or, if not, at least can prevent unnecessary conflicts and continuously contribute to the betterment of society. Access to necessary information can empower people to make autonomously informed choices in order to maintain a more peaceful and hence higher quality life.

Media

What can media do and what role does it play? Media, from a general point of view, can convey the problems about important issues currently concerning society and/or individual problems. As a result, media can effectively operate in its role as a gatekeeper and a change agent in transmitting the appropriate amount and the type of available information to the public in general and to specific individuals in particular. For example, there are certain media avenues such as magazines that target audiences with specific interests. In addition, media can serve as a public educator, as an observer and commentator on certain issues and presenter of alternative viewpoints. Furthermore, media could also oppose popular misconception to help form more accurate understandings. For example, some products have been marketed as good for health when they actually are not. So, media could step in to help correct these types of misconceptions.

The objectives of media are to send out accurate information which demands strictly double-checking facts; to report fair and balanced opinions and information on critical issues without personal bias; and to promote public understanding of media messages which are both manifest and latent (Day, 2006). Media is partially responsible for building awareness

among its audiences. For example, media is responsible for building awareness about products and services' availability and price variations (Holley, 1998). Next, media should raise awareness about consumer rights in terms of safety, malfunction of products, and the risks involved. Furthermore, media is responsible for reviews and recalls of the products. This is because media works closely with business enterprises through advertisements, marketing, and news stories. In sum, media does play an important role and does have the power to take concrete actions that can contribute to a more peaceful society.

Consumerism

Next, let us look at how consumer protection can contribute to a more peaceful society. First, what is consumerism? According to the Cambridge Dictionary, consumerism is defined as "the state of an advanced industrial society in which a lot of goods are bought and sold (politics)" or "protection of consumers against harmful products or business methods (social studies)" (Consumerism, n.d). Since this paper is concerned with the right to information, it will discuss consumerism from the social studies perspective. To protect consumers against harmful products or business methods, consumers need to be well informed about products and product prices as a most basic right. The right to consumer information may include the right to choose and information about the availability of products and prices; or the right to be heard about the consumer's interests and complaints; and lastly, the right to education. For example, consumers have the right to get proper education about the products/services offered, price offers, risks involved and consumer protection information prior to the decision making process about a purchase. Ethical business policies regarding consumerism are fundamentally based on the right to information in protecting consumer welfare. Summing up, people have the right to be protected from the potential harm from consumerism and this protection is likely to allow them to feel and live more peacefully.

Conflicts

Where and how do conflicts begin? To maintain a peaceful society, it becomes important to examine the triadic relationship between media, consumers and businesses. Every stakeholder has their personal agenda to achieve their desired outcomes based on their own self-interest. Consumers have the right to information while media and businesses have the obligation to disclose information, which tends to cause some conflicts in this triadic relationship. From a practical perspective, media needs financial backing to achieve healthy operations and remain competitive to ensure long-term survival in society and focus on future growth. Businesses, as separate entities, need media's assistance to build awareness about products and services offered; product demonstration, uses, care and harmful effects; to inform, persuade and remind consumers in order to create demand; to build brand preferences and brand loyalty; and to introduce product innovation. Therefore, the interdependency between media and business is based on an obligation to disclose the necessary information to consumers. Besides this interdependency, each entity is required to follow government policies, regulations, and restrictions while trying to attain its own objectives. Conflicts may arise when government policies, which are designed to protect consumers, restrict the freedom of media, advertising and marketing activities, hence affecting the revenues in these industries.

Another type of conflict is related to determining the type of information and the amount of information revealed if we are concerned with the rights and obligations to

disclose information. Consumers have the privilege to the right to information and education on obtaining necessary and sufficient information prior to buying, during the decision-making process, as well as after-sales rights regarding the product usage, safe consumption and protection, and risks reduction. Recent disturbing news reports that "China is Harvesting Thousands of Human Organs from its Uighur Muslim Minority, UN Human-Rights Body Hears" (Martin, 2019) might raise the ethical concern to the public about what type of information and what amount of information disclosure one may need as a medical patient. Although the values and perceptions may differ between different individuals, ethical dilemmas may arise among some members of society. Similar to the above organ transplant case, a related case is regarding the ethical consumption of meat and dairy products (Jackson, 2019). Since we are familiar with animal cruelty and mistreatment of animals in the livestock and dairy products industries, do we want to exercise our right to know? As a consuming member of society, do we also want to be educated regarding the type of information that we are entitled to have access to? Or would we prefer to not know about how animals are treated, in this case, and simply enjoy consumption? These questions may arise but preferences likely differ depending on each individual's point of view.

Between the obligation to information disclosure and the right to information, who is accountable for dealing with negative information about products/services? This poses the next conflict with the consumerism. Although both parties may be held accountable for misinformation, media still has the responsibility of allowing the free flow of truthful information. However, media sometimes finds itself in a dilemma with two opposing forces, namely revenue vs. ethics. There are a few examples of classic legal suits where conflicting views between the right to information vs. withholding information were seen regarding global brands: Philip Morris maintaining silence on the side effects of nicotine consumption (Bates & Rowell, n.d); silicone breast implant causing cancer discovered ten years after the surgery (Todd, 2019); Vioxx, the painkiller medicine by Merck causing heart attacks and paralysis (Prakash & Valentine, 2007); asbestos being found in Johnson & Johnson's baby powder causing cancer (Bellon, 2019) with J&J denying it (Feeley, 2019); and moral degradation in the case of Gillette's "Toxic Masculinity" advertisement (CBS News, 2019). These relate to the proper way for media to handle negative information. If media reveals the truth, or intends to reveal the truth, are they in a better position to do so? Are businesses solely responsible for the malfunctioning or side effects of the products? Should media also be responsible for revealing negative information in the case of businesses withholding truthful information? By reviewing the pros and cons of each entity, society may be able contribute to correcting the situation to achieve a more peaceful world.

Milder versions of conflict, while not directly related to product safety and usage, however are entangled with society's values, beliefs and attitudes. For example, Coca-Cola's "Together Beautiful" campaign using "Beautiful America" sung by bi-lingual Americans raised conflicting patriotism issues (Cause Marketing, 2017). Coca-Cola stands by its campaign theme and defended that "this is what makes America beautiful and the singers are after all Americans who were born and raised in the United States of America." But so-called Americans (possibly stereotypically defined as "whites") argued that "Beautiful America" should be sung only by "real" Americans and in English language. A challenge to this argument would be to ask the following question: how would the opponent of this campaign define "Americans" and why should the song be sung only in English? This raises the question in terms of the right to information that words can convey meaning rather than just simply information. Sometimes that meaning can be helpful or harmful to certain individuals or groups, depending on the context. In terms of this paper's theme, some of these conflicts

might be ameliorated in order to contribute to a more peaceful society if sensitivity is employed as to how these meanings could be interpreted in different contexts and if media, business, and consumers hold each other accountable for the truthful and ethical dissemination of information.

Conclusion, Limitations, Implications, and Further Directions

In conclusion, the right to information is the simplest and the most valuable privilege of any member of society. Human rights organizations and governments collaborate and develop policies and restrictions to protect consumers' rights and attempt to ensure safe consumption. These practices are the foundation of any free market economy where media and businesses are accountable for the benefits and welfare of consumers in dispensing product and service information in a pluralistic society.

Media's role as a mediator and distributor of manifest and latent messages to consumers is one of the most essential channels in society to reduce conflict and promote a peaceful society. With these premises, from a theoretical perspective, if media can balance opportunities and challenges, the outcomes would be a perfect world; however, from a practical perspective, it would be a challenge to sustain while consumers might benefit the most in social, political, economic, and cultural ways. Instead of leveraging its own power to manipulate the industry and having conflicts of interest, media could be utilized as a means of promoting a peaceful society and benefit all stakeholders.

This paper highlights that there has not been much specialized research conducted in this specific area of the interest. We especially recommend more cross-disciplinary or inter-disciplinary studies in regards to how the entities in the triadic relationship interact and could potentially collaborate with each other in order to promote a more peaceful society. We strongly encourage academics, business entities, psychologists, and international relations counterparts, among others, to collaborate in furthering this particular research agenda.

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Yemen conflict and its impact on health of Refinery Workers

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Abstract

Background

Yemen conflict has an impact on infrastructure of refinery which not undergo any modernization over more than three decades and that lead to increase of hazardous emissions. The workers in Aden (Yemen) Petroleum Refinery are exposed to a wide variety of hazards that may have negative impact on their health. The aim of this work is to identify the prevalence of work related morbidities and some associated risk factors among Aden refinery workers.

Materials and methods

This is a cross sectional study which was conducted among 398 workers in Aden Refinery Company (ARC). The data was collected from the workers by questionnaires which included personal data, detailed occupational history and data about the post-employment diseases occurrence.

Results

The study showed that allergy is the most frequently recorded illness (55.5%) among the study participants especially among those who were smokers. Hypertension (42.2%) is the second common illness among them. 32.7% of the study sample had medical history of hearing defects statistically significant more frequently occurred among those with higher work duration; those had history of noise exposure (37.5%) and those who were smokers. 8 cancer cases (2%) among the study participants were diagnosed post employment.

Conclusions

Petroleum refinery workers are exposed to hazards that affect their health in different ways. These health effects are higher among workers who are smokers and those with higher work duration.

KEYWORDS: Aden refinery workers, Hazards, Occupational asthma Allergy, Hearing defects.

INTRODUCTION

The oil and natural gas industry has an important role in the world's economy. This field is expanding rapidly and providing many new job opportunities; but at the same time there is a increasing risk of work related fatality, injury and diseases(1). Today, refinery and petrochemical products are consumed by numerous industries such as car industries, aviation sector, manufacturing industries, and electrical power generation (2, 3).

Petroleum refinery operations involve the conversion of crude oil (the complex mixture of hydrocarbons and inorganic compounds) to consumable lower molecular weight products such as liquefied petroleum gas (LPG), petrol, kerosene, diesel, naphtha and heavier hydrocarbon products (asphalt, lubricating oil and wax) at high temperatures and pressures using vessels and equipments (4, 5).

Petroleum refinery workers are exposed to many hazards which affect their health in different ways. They exposed to wide varieties of numerous hazardous chemical substances used either as process chemicals and/or present in resultant effluents, in addition to invisible emissions, which include petroleum itself and other aromatic hydrocarbons (benzene, toluene, phenol, etc.), hydrogen sulphide and other natural gases (methane, propane, butane, etc.), carbon monoxide, asphalt, toxic heavy metals (arsenic, chromium, cadmium, nickel, zinc, etc.),coke dust, lead alkyls, silica, asbestos etc. They also exposed to physical hazards (noise, vibration, radiations and higher temperature) and ergonomic hazards (manual handling dangerous activities and repetitive motions, awkward postures) (1).

Yemeni oil production was estimated to be 385,000 barrels per day (bbl/d), Oil Consumption was 69,000 bbl/d and Net Oil Exports was 316,000 barrels per day (bbl/d). There are two main refineries in Yemen one in Aden and the other in Mareb governorate, each of them with refining capacity more than 10,000 b/d. Aden Refinery company with its office located in little Aden At Al Buriqah district, Aden governorate, The republic of Yemen was basically owned by the British oil company (BP) who established and constructed it from 1952 to 1954 as the production had commenced on July 1954. The production capacity of this refinery initially is 120,000 Barrel per day then it expanded in the sixties (1960'S) to reach a production of 150,000 Barrel per day and remained on that level of production.

The numbers of work force in this refinery exceed 4000 workers in different facilities. Promotion researches for prevention and control the health problems that may occur in the petroleum refineries should be done. There is no previous researches study the health problems among the petroleum refinery workers in Yemen. This study will enrich the petroleum sector in Yemen about the health status of workers in this industry.

Aims of the study are to identify the prevalence of work related morbidities among Aden refinery workers and to study some associated risk factors.

MATERIALS AND METHODS

The present study was conducted in Aden Refinery Company (ARC) present in Little Aden at Alburigah district, Aden governorate, Republic of Yemen was basically owned by the British Petroleum (BP) who established and constructed it. The Industrial units in ARC are LPG(Liquefied Petroleum Gas,) Production Unit, Fractional Atmospheric Distillation Unit, Vacuum Distillation Unit, Hydrotrating Unit, Gasoline Reforming Unit, Merox Unit (sweeting unit for Gasoline, Kerosene) and De asphalting Unit. The ARC is one of those which use Hydrogen to process its products like LPG (Liquefied Petroleum Gas), Motor Gasoline’s (Regular and Premium), Diesel Oils, ATK (Aviation Turbine Kerosene) Fuel Oils,

Waxy Gas Oils and Asphalt. This refinery is designed to process high Sulfur crude, Kuwaiti crude and Qatar crude. The company is currently employing about 4000 workers. The vast majority of them 2500 workers (62.5%) are working in administrative ,financial ,commercial, marine and logistic supply of fuel for ships ,firefighting ,security and company 's hospital .About 700 workers(17.5%) are working in maintenance of the refinery .About 600 workers (15%) are working in operation .About 200 workers(5%) are working in power plant . Sample size was calculated Using EPI info 2000 statistical package. The calculation was done using confidence interval 95% which resulted in the inclusion of 398 workers. This study was based on stratified random sample of the workers in the company. Explanations and formal consent were taken from all workers, who shared in this study. Data were collected from the workers under the study by semi structured questionnaires where data about the occurrence of diseases post-employment already diagnosed by a physician like: anemia , skin disease, tumors, liver diseases , hypertension, cardiovascular diseases , cataract, recurrence of infections, bowel disturbance , allergy , hearing defects and any work- related affections were obtained . Besides this the questionnaires contained questions about personal data, smoking history where the tobacco smoke exposure (TSE) was calculated in‘‘pack-year” units (6), smoking categories were defined as current smoker, non-smoker (who had never smoked) and ex smoker (who had give up smoking at least since 6 months), details about occupational history of the present occupation(duration of exposure in years, working days/week, shift duration in hours and type of exposure) , detailed occupational history of the previous jobs, and data about personal protective devices including: personal protective devices supplied or not, types of devices supplied, adherence of workers to safety measures.

Statistical analysis

Analysis of data was done using SPSS (Statistical Package for the Social Sciences) program version 16. Statistical methods were applied including: descriptive statistics (mean, standard deviation, frequency distribution and cross tabulation), significance tests (T test for quantitative data and chi-square) for categorical data. A significant p value was considered when it less than 0.05.

RESULTS

Table (1): shows that the mean age of the studied workers in years is (42.91 ± 7.89). The majority of them (92.2%) are male. About half of them (49.2 %) are from Alburiqa distract and nearly two thirds of them (66.1%) are non-smokers. 53.3 % have secondary school education.

Table (2): shows that the allergy is the most frequently recorded post employment illness among the study participants (55.5%). It also shows higher occurrence of occupational asthma (8.3%) among them. Hypertension (42.2%) is the second common post employment illness among them. About one third (32.7%) of the sample has medical history of post employment hearing defects.18.6% of the study participants are suffering from cataract,17.8% are suffering from recurrent infections, 13.6% are suffering from anemia and 8% are suffering from hepatic insufficiency. it also reveals that 8 cancer cases (2%) among the study participants were diagnosed post employment.

Figure (1): shows statistically significant higher occurrence of hearing defects among the study participants who have history of noise exposure (37.5%) than those who not have history of noise exposure (17%) **(P.value=0.000*).**

Figure (2): shows statistically significant higher occurrence of skin diseases among the study participants who have history of chemicals exposure (32.9%) than those who not have history of chemicals exposure (23.2%) **(P.Value =0.034*).**
Table (3): shows that about 10% of the workers suffering of symptoms during the working hours. It also shows that the most frequently reported manifestations are fatigue and headache (57.5%) followed by nasal irritation and difficulty of breathing (20%) followed by nervousness (15%).

Table (4): It reveals that the ***post-employment health problems are higher among those with work duration 30 years and more*** than those with work duration less than 30 years. It also shows that hepatic insufficiency, hypertension, cardiovascular diseases, cataract and hearing defects are significantly more frequently occurring among those with work duration 30 years and more (14.8%,62%, 31.3%, 47.8%and 53.9% respectively) than those with work duration 20- <30 years (7.8%, 44.6%, 6%, 10.8%and 33.1% respectively) and those with work duration less than 20 years (1.7%, 29.5%, 1.7%, 0.9%and 11.1% respectively) . (Values <0.05*).
Table (5): shows that ***the post-employment health problems are more common among the smokers than non-smokers*** but the differences between them are statistically significant only for hypertension, cardiovascular diseases, allergy and hearing defects (55.1%, 17.8%, 66.7% and 39.3% respectively for smokers) and (40.3%, 9.1%, 49.8% and 29.3% respectively for non-smokers) (P.Values <0.05*).

Table (1): Demographic characteristics of the study participants, Aden refinery 2017.

	No. (398)	**%**
Age: (years) Mean ± SD (Range)	42.91 ± 7.89 (19.0 – 59.0)	
Sex:		
Male	367	92.2
Female	31	7.8
Address:		
Company accommodation	32	8.0
Alburiqa	196	49.2
Al-Mansora	140	35.2
Others	30	7.5
Educational level:		
Illiterate	2	0.5
Read & write	1	0.3
Basic education	88	22.1
Secondary	212	53.3
University	95	23.9
Smoking status:		
Smoker	135	33.9
Non-smoker	263	66.1

Table (2): Medical history of post-employment health disorders among the study participants, Aden refinery 2017.

	No. (398)	%
1-Medical history of anemia	54	**13.6**
2-Medical history of skin diseases	107	**26.9**
2.1Type of skin diseases:		
Eczema	15	14.0
Skin tags	24	22.4
Skin allergy	98	91.6
Skin discoloration	43	40.2
Others	3	2.8
3-Medical history of tumor	8	**2.0**
4-Medical history of hepatic insufficiency	32	**8.0**
5-Medical history of hypertension	168	**42.2**
6-Medical history of cardiovascular diseases	48	**12.1**
7- Medical history of recurrent infections	71	**17.8**
8- Medical history of allergy	221	**55.5**
8.1Site of the allergy:		
Occupational asthma	**33**	**8.3**
Skin allergy	122	55.2
Eye allergy	107	48.4
Allergic rhinitis	174	78.7
9- Medical history of cataract	74	**18.6**
10- Medical history of hearing defects	130	**32.7**

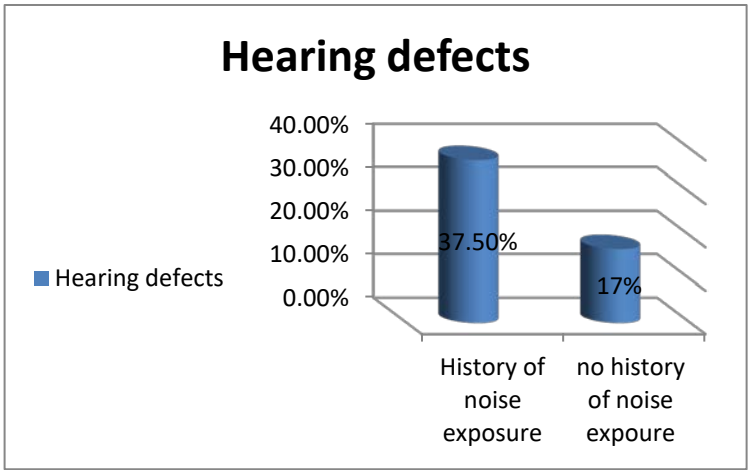

Figure (1): History of noise exposure and development of hearing defects among the study participants in Aden refinery company, Aden, 2017.

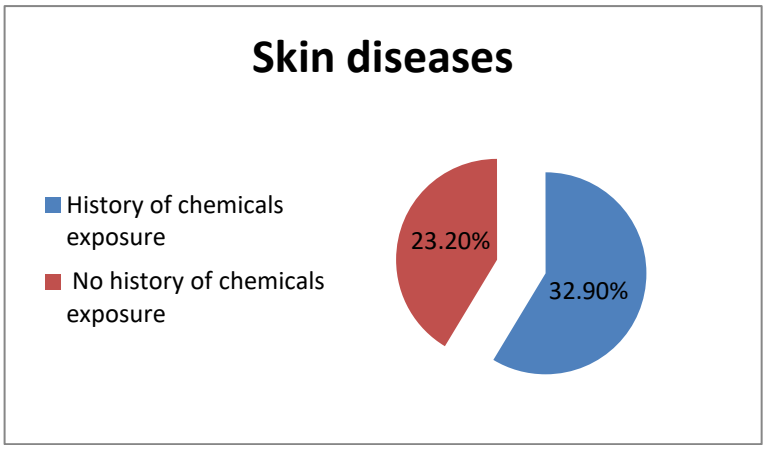

Figure (2): History of chemicals exposure and development of skin diseases among the study participants in Aden refinery company, Aden, 2017.

Table (3): Clinical manifestations experienced during the working time by the study participants, Aden refinery 2017.

	No. (398)	**%**
Clinical manifestations experienced during the working time:		
Yes	40	10.1
No	358	89.9
Type of clinical manifestation:		
Fatigue & headache	23	57.5
Lack of concentration	3	7.5
Nasal irritation & difficulty of breathing	8	20.0
Nervousness	6	15.0

Table (4): Distribution of post-employment health disorders among the study participants in relation to their work duration, Aden, 2017.

Medical history of post employment	**Duration of working**						**P-value**
	< 20		**20 - < 30**		**>= 30**		
	No.	**%**	**No.**	**%**	**No.**	**%**	
Anemia	12	10.3	24	14.5	18	15.7	0.442
Skin diseases	26	22.2	47	28.3	34	29.6	0.389
Hepatic insufficiency	2	1.7	13	7.8	17	14.8	0.001*
Hypertension	31	29.5	70	44.6	67	62.0	0.000*
Cardiovascular diseases	2	1.7	10	6.0	36	31.3	0.000*

Cataract	1	0.9	18	10.8	55	47.8	0.000*
Recurrent infections	19	16.2	24	14.5	28	24.3	0.090
any sort of allergy	59	50.4	92	55.4	70	60.9	0.278
hearing defects	13	11.1	55	33.1	62	53.9	0.000*

Table (5): Distribution of post-employment health disorders among the study participants in relation to their smoking status ,Aden,2017.

Medical history of post employment	**Smoking status**				**P-value**
	Smoker		**Non-smoker**		
	No.	**%**	**No.**	**%**	
Anemia	23	17.0	31	11.8	0.148
Skin diseases	41	30.4	66	25.1	0.261
Hepatic insufficiency	12	8.9	20	7.6	0.656
Hypertension	70	55.1	98	40.3	0.007*
Cardiovascular diseases	24	17.8	24	9.1	0.012*
Cataract	24	17.8	50	19.0	0.765
Recurrent infections	31	23.0	40	15.2	0.056
any sort of allergy	90	66.7	131	49.8	0.001*
hearing defects	53	39.3	77	29.3	0.044*

DISCUSSION

Although oil is primarily an energy source, it is also used as a raw material in manufacturing more than a thousand of other products including; plastics, paints, fertilizers, detergents, cosmetics, insecticides, and even food supplements. The workers in Aden (Yemen) Petroleum Refinery are exposed to a wide variety of hazards that may affect their health which can be broadly classified as; physical, chemical, biological, mechanical/ergonomics and psychological respectively.

In this study, the mean age of the studied workers in years is (42.91 ± 7.89), the majority of them (92.2%) are male and married (91.2%), about half of them (49.2 %) are from Alburiqa distract and more than half (66.1%) are non- smokers and (53.3 %) have secondary school education.

Concerning the post employment health effects among the study participants, ***allergy (in form of allergic rhinitis, skin allergy, eye allergy and occupational asthma) is the most frequently recorded illness among them (55.5%).*** Allergy occurrence was statistically significant higher among the smokers; also occurrence was higher among those with work duration≥ 30 years than other age groups but without statistical significant difference between different groups.

This is might be explained by that the employees in the oil and gas companies are exposed to chemicals and gases produced which lead to occupational diseases of the lungs, skin and other organs if exposure occurs for a longer period to these chemicals and smoking may worsen the respiratory conditions caused by chemical exposure(1). Results from Different studies have found that individuals who live near oil fields or wells or who take part in activities of cleaning oil spills have presented with different health conditions, such as skin, eyes and mucous membranes irritations(7). Asphalt as a product of petroleum refinery can cause severe skin burns and eye irritation(8).

This is consistent with that of Arif and Shah, (2007) who conducted a cross-sectional study on a representative sample of the US population and found that environmental exposure to volatile organic compounds (VOCs) such as benzene, toluene, poly aromatic hydrocarbons (PAHs) containing three to five benzene rings which through potentiating oxidative stress in the respiratory tract, leading to aggravation of asthma symptoms (as well as heavy metals e.g. chromium, were associated with adverse respiratory effects). Low continuous exposures to these compounds over long period, may lead to irritant-induced asthma and skin irritation (9, 10).

In a cross-sectional study among 80 subjects employed in the coking unit of a petroleum refinery in Italy, the Prevalence of overall respiratory symptoms (33.7%) and nasal symptoms (36.2%) were higher among the study population(11).

The present study revealed that ***26.9% of the study participants were suffering from skin diseases (26.9%), skin allergy (91.6%) was the most reported skin disease among them and there was statistical significant higher occurrence of skin diseases among those with history of chemicals exposure.***

This may be due to prolonged and repeated exposure to liquid petroleum products which come in contact with the skin and causing skin irritation and some of these products can be absorbed through the skin(12).

These results were in accordance with a study conducted in Ecuador on workers from the refinery industry and nearby schools' students where it was observed that one of the main pollutants is nickel; note that nickel has been shown to produce skin irritation and is known to be a human carcinogen (13).

In this study, hypertension (42.2%) is the second common illness among the study participants. Also, in the current study, 12% of petroleum refinery workers were suffering from cardiovascular diseases. ***Hypertension and cardiovascular diseases were significantly higher among smokers and those with work duration ≥ 30 years.***

Many risk factors are associated with occurrence of coronary heart diseases and stroke. Tobacco exposure, unhealthy diets and obesity, physical inactivity, stress, diabetes and dyslipidemia are among the risk factors responsible for occurrence of these diseases(14). Oil and gas industry`s workers are exposing to a serious physical and mental stress in the form of noise, heat, depression and isolation, particularly those involved offshore. These workers also have incorrect eating behaviors, characterized by excessive intake of food with high calorific value; all these factors are risky for the development of cardiovascular diseases (CVD) among them (15). A meta-analysis of epidemiological studies has established strong and positive associations between exposure to pollutants such as polycyclic aromatic hydrocarbons, sulfur oxides, particulate matter (PM), volatile organic compounds, polycyclic biphenyls, nitrogen oxides, and Ozone (O3) and increased cardiovascular risk(16, 17).

An observational cross-sectional study was carried out among workers in an oil and gas and energy company in Italy and found that the study workers especially those more than 45 years had significant higher risk to have obesity, hypertension, high blood fasting glucose, high cholesterol and triglycerides levels(18).

These findings also were in accordance with a cross-sectional survey done on residents of oil and gas polluted communities in the Niger Delta region of Nigeria. It was found that more than one-third of participants were hypertensive (37.4%). For every 10 years increase in the age of the participants, the odds of developing hypertension increased by 108% (a OR = 2.08, 95% CI: 1.77–2.43)(19).

In this study, ***the prevalence of hearing defects among the study participants was about 32.7% and the occurrence was statistically significant higher among smokers, those with work duration ≥ 30 years and those with history of noise exposure (37.5%).***

Noise exposure has long been recognized as the major contributor to occupational hearing loss. The severity of hearing loss is affected by the intensity of the noise and the duration of exposure(1).

Increased prevalence of high frequency hearing loss also has been reported after solvent exposure in the face of noise levels below the threshold limit value(20). A study done by Sliwinska-Kowalska et al., (2004) on 701 dockyard workers suggesting the additive damaging effect of co exposure to noise and organic solvents to the auditory organ (21).
These results were matched with a study done on workers from a refinery (n = 438) in South America and found that the prevalence of hearing loss within the exposed groups ranged from42 to 50%, significantly exceeding the 15–30% prevalence observed for unexposed groups(20).

This study also showed *that**18.6% of the study group was suffering from cataract and this was statistically significant more frequently occurring among those with work duration ≥30 years.***
Petroleum refinery workers are exposed to heat which has an adverse effect on their eye lens. Epidemiological and clinical observations have indicated a link between heat exposure and cataract. It was reported that workers in the molten metal industry are at higher risk for cataract formation(22).

17.8% of the study group was suffering from recurrent infections, 13.6% of them were suffering from anemia and 8% of them were suffering from hepatic insufficiency. Hepatic insufficiency was statistically significant more frequently occurring among those with work duration ≥30 years. The current study also revealed that 8 cancer cases (2%) among the study participants were diagnosed post employment.

Petroleum refining industries are the major sources of benzene(which is a major Volatile Aromatic Hydrocarbons (VAH) emitted during petroleum refinery operations and has been widely used as a solvent in industries such as printing and the manufacture of shoes), PAHs and other toxic Chemicals(23). Benzene is an intrinsic component of tobacco smoke, and tobacco smokers have a higher body burden of benzene than nonsmokers (24). Chronic exposure to benzene can cause serious adverse health effects such as hematological disorders (in form of leukemia, lymphoma, aplastic anemia, and pancytopenia), hepatotoxicity, genotoxicity, increased levels of persistent chromosome aberrations and reproductive effects (25-27). Also benzene is well known to be a carcinogen in both animals and humans(28). Asbestos, often used in oil refineries for the thermal insulation of boilers and pipes, has long been associated with pulmonary fibrosis, lung cancer and malignant mesothelioma among maintenance, repair and removal workers (1).
These findings were matched with as study conducted in Texas City in 2014 on non smokers' residents exposed to benzene following a flaring incident at the British petroleum plant and found significant alterations in their hematological and liver markers(24).
Occupational diseases are slow and generally develop over an extended period of time. They are cumulative in their effects and irreversible (1).
In the present study, ***about 10% of the workers experienced clinical manifestations during the working time. It also showed that the most frequently reported manifestations were fatigue, headache, nasal irritation and difficulty of breathing and nervousness.***

Australian Institute of Petroleum, (1998), has conducted a study over 20000 workers (past and present employees) in their organizations and found that the employees of oil and Gas

Company are facing dizziness, problem of headaches, drowsiness and nausea, which is associated with exposure to hydrocarbons .Breathing petroleum vapors can cause nervous system effects (such as headache, nausea, and dizziness) and respiratory irritation(29).
This also in accordance with a study on 49 workers at 6 gasoline stations in the inner and outer areas of Bangkok which found that the most prevalent symptoms among the study workers were headache (61%), fatigue (29%) and throat irritation (11%), respectively. Exposure to benzene and toluene was significantly associated with fatigue(28).

CONCLUSION

Petroleum refinery workers are exposed to hazards that affect their health in different ways. Allergy, hypertension and hearing defects are the most frequently reported health effects among the study participants. Moreover these workers are exposed to some petroleum products such as polycyclic aromatic hydrocarbons which have serious adverse health effects and may be carcinogenic. These health effects among petroleum refinery workers are higher among those who are smokers and with higher work duration. Intervention programs should be done to eliminate the effects of these hazards.

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YOUTHS AS AGENTS OF COUNTERING TERRORISM AND VIOLENT EXTREMISM IN NORTH-EAST NIGERIA

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Abstract

Efforts of youths in ensuring peace and security is acknowledged by various countries including Nigeria, despite constituting huge percentage in the facilitation of crimes and violent actions at the same time. The North-eastern region of Nigeria is faced with violent conflicts including the monstrous Boko Haram terrorism, which led to the deaths and displacements of various persons and groups. This condition led to the establishment of many counter terrorism and extremism strategies by various groups and individuals. It is against this background that the paper conceptually examines the position of youths as agents of countering terrorism and extremism in North-eastern Nigeria. The paper is content analysis but it reveals that youths have enormously contributed in the war against terrorism in the region, especially with the establishment of CJTF, who fiercely fight the Boko Haram members; through various means such as stop-and-check efforts, vigilance work, and campaigns and advocacies in line with counter extremism by the youths in the region. The paper thus concludes that youth's despite being part of the disaster, are undoubtedly significant in ameliorating it. As such, it is recommended that such groups and individuals be empowered, encouraged and rewarded adequately.

Keywords: Youths, Terrorism, Violent Extremism

Introduction

Peace and security in any nation is not the sole responsibility of government or any specific category of people. It is the responsibility of all citizens. Government, however, is the leader in this effort. Aside from government, there exist various stakeholders, including the civil society, interest groups and organized private sector. In all these, a particular set of people, referred to as "youths" does the remarkable work, as they constitute the vibrant, energetic and responsive set of people. Over the years, youths have enormously contributed towards the development of Nigeria through various facets such as democracy, governance, politics, economy, security and community development, among others. On the aspect of security, youth efforts on instigating violence as well as ameliorating it cannot be overlooked. Youths, despite being the backbones of any development, still constitute huge percentage in facilitating different sorts of violent acts in Nigeria, including farmer-herder conflict, militant vandalizations and Boko Haram insurgency.

North-eastern Nigeria is one of the regions of the country that is bedevilled with various forms of conflict including terrorism and other forms of religious extremism. Since, the first attack of Boko Haram Islamic sect in July 2009, a lot of damages have been made to persons and establishments which further triggers lots of counter terrorism and counter extremism efforts by international aid groups, national and state governments, non-governmental organisations, indigenous local groups and other interested parties. It is against this backdrop that the paper examined the roles of youths in countering terrorism and violent extremism in the North-eastern Nigeria.

Conceptual Clarification

Youth: Two principles, statistical purposes and sociocultural meaning (Spencer, 2005; FGN, 2009; Obaje & Uzodike, 2013) have guided what constitutes a youth. Youth is often defined by delineating the age – group that falls within the category and it is often for developmental or academic purposes. This could be seen in the United Nations definition of youth as those persons between the ages of 15 and 24 years. Obaje & Uzodike (2013) noted that the United States of America (USA) Population Reference Bureau, gave age grouping for youth as people from the ages of 10 up to 24. The EU in its strategic framework targets young people between 15 and 29 years of age. The Federal Republic of Nigeria gave its youth age group as 18 to 35 years (Federal Republic of Nigeria, 2001). The variations in the age categorisation indicates variation in sociocultural practices and beliefs. This informs the second way of understanding and conceptualising youth.

Sociocultural, what is youths is fluid or in a flux, as Eurostat (2009, p. 17) puts it, youth is defined as "the passage from a dependant childhood to independent adulthood", when young people are in transition between a world of rather secure development to a world of choice and risk. Similarly, Perovic (n.d.) notes that there is no official, unambiguous definition of young people. It varies due to circumstances, especially with regard to sociocultural patterns, geography and various policy settings. Whoever defines youth, defines it from his/her sociocultural perspective. Such a person is prejudiced by sociocultural dictates of his environment.

Terrorism: The world of the 21st century is bedevilled by this phenomenon, and hardly is any country immune to it. Scholars have in various ways try to understand and define what constitutes terrorism. As it will be seen an action could be classified as terrorism in one place but such same action will be considered as freedom fighting in another place. It is not very easy to define and designate an action as terrorism. This informed Malachy (2013) to state that there is no commonly accepted conceptualization of terrorism. In his argument,

during imperial and autocratic regimes, any group that acts against the interests of the imperial or autocratic power, they are designated as terrorist, even when they are indeed fighting against despotic rule. Nations and persons against despotic rule will see this same action as heroic. Malachy (2013) therefore argued that the debate over what could be designated as terrorism is represented in the saying, 'one man's freedom fighter is another man's terrorist.'

More decisively, Gurr (1988) defined terrorism as any violent reaction against an established social order. In this definition, terrorists are persons seeking for change in society and use violence as instruments to destroy the existing framework of society in order to establish a new, perhaps more favourable to them. Gurr (1998) further explained that terrorists are off shoots of the failure of the state to meet up with societal needs. He argues that human needs require satisfaction on a hierarchical basis. Indifference to such needs on the part of government normally leads actors into violence against the state. This implies that if the basic human needs of individual non-state actors are unsatisfied they can generate grievance terrorism, revolutionary terrorism or reactionary terrorism, which has an agenda for either destroying or reforming the existing social system.

Counter Terrorism: Counter-terrorism referred to organized activity designed to combat terrorism. The UN adopted the global counter-terrorism strategy in 2006, the strategy is a unique global instrument to enhance national, regional and international efforts to counter-terrorism. Through its adoption that all Member States have agreed for the first time to a common strategic and operational approach to fight terrorism, not only sending a clear message that terrorism is unacceptable in all its forms and manifestation but also resolving to take practical steps individually and collectively to prevent and combat it (UN, 2006). Those practical steps include a wide array of measures ranging from strengthening state capacity to counter terrorist threats to better coordinating United Nations system's counter-terrorism activities. Organization for Security and Co-operation in Europe (OSCE, 2008) argued that participating States agree that terrorism is one of the most significant threats to peace, security and stability, as well as to the enjoyment of human rights and social and economic development. The organization is therefore resolute in implementing effective measures to prevent and combat terrorism, in all its forms and manifestations, as a serious crime that has no justification, whatever its motivation or origin may be.

Violent Extremism: There is prominent divisive positions among the scholars on the term "violent extremism". The first category and view believed that, as with the term terrorism, there is no universal accepted definition of the term (Glazzard, 2016, UNHCR, 2017, and UNDP 2018). Some scholars considered it as synonym for terrorism. E.g. United States Department of Homeland Security states that, violent extremist threats "come from a range of groups and individuals, including domestic terrorists and home grown violent extremists in the United States, as well as international terrorist groups. While others regarded violent extremism to mean different thing, as defined by United States Federal Bureau of Investigation, violent extremism is "encouraging, condoning, justifying, or supporting the commission of a violent act to achieve political, ideological, religious, social, or economic goals. Consequently, also a portion of people usually considers violent extremism to be more inclusive term than terrorism.

Udal, (2006, p. 34) defines violent extremism as "advocating, engaging, preparing, or otherwise supporting ideologically motivated or justified violence to further social, economic or political objectives". Although, this definition may be wide for this article, violent extremism undermines our collective efforts towards maintaining peace and security, fostering sustainable development, protecting human rights, promoting the rule of law and

taking humanitarian action. Violent extremist groups are contributing significantly to the cycle of insecurity and armed conflict affecting many regions of the world. During the violent events, extremists attacked both civilians and off-duty military and police personnel. Civilians alike were also killed in retaliatory strike by security forces (Abolurin, 2015). Between 2009 and 2013, there was sporadic violent extremism in Northeast; extremist attacked a number of prominent Nigerian security personnel and in retaliation, the military killed a number of innocent people in the region.

The State of Youths and the Society's Perception in Nigeria

Youths in Nigeria have been attributed with all sorts of evils. No social problem is devoid of a youth in this country. Adebayo (2017) and Kadiwa (2016) argued that when society becomes a tool for marginalising youth, when society fails to protect the interest of its youth and abandons them to the fringes and mercies of poverty, inequality, alienation, an absence of quality education, and unemployment, then radicalization, involvement in violent acts and extremism will ensue. They argued that the youth who were recruited by Boko Haram mostly were uneducated, school dropouts, jobless youths, political thugs and students from low socioeconomic background. This has been seen as youth reacting to the socioeconomic injustice and marginalisation meted on them by the society. In northern Nigeria, Aghedo and Osumah (2012) argued that the situation in northern Nigeria is even more worrisome. They related the situation of the child beggars, locally also known as *Almajirai* who are in dire need of social amenities, infrastructural and human capacity development for years. Their exposure to this extreme difficult socioeconomic situation have rendered them vulnerable to recruitment by extremist elements in North-eastern Nigeria.

Youth in Nigeria are associated with violence and unruly behaviours. Whether youth are violently inclined or the portrayal of them as violent inclined has made them violently inclined is a debate, perhaps the postulate of the self-fulfilling prophecy may offer theoretical explanation; that youth become what its' society says it is. Discuss abound in literature showing that society sees youth as a problem, Jupp et al (2011, p.4) noted, "The media portrays young people more negatively than positively, which leads to the public forming an unbalanced perception of the behaviour and attitudes of young people." Their argument is that the media has built up a negative image of youth in the mind of society and perhaps in the mind of the youth themselves. The society are made to see the youth as the root of all evils in the society, they are painted as being the centre of all violence, be it political, ethnic, religious, gang and the list goes on. Jupp, et al (2011) argued that the portrayal of young people as being intrinsically bad and unruly, has created a bad image and has continued to entrench stereotyping of youth in the society. They argued that the images portrayed of youth in recent time is an accumulation from a long past, where the behaviour of a few youth has led to the generalisation of the entire youth as being a negative force in the society.

Similarly, Umar (2016) observed that young people have remained the violent apparatus utilised for political violence and thuggery, they are behind all politically motivated violence. Indeed, Umar (2016) quickly underscored the fact that political 'leaders' play the subversive role of manipulating, mobilizing young people to violently actualise, realize, and further their own selfish political objectives. According to him, youth get involved in the acts of violence for various reasons; he enunciated exclusion from mainstream economic and political life of society, lack of opportunities, unemployment, among others. These he argued have led to youth disillusionment and their ultimate participation in violence in the society.

Politicians have used youths in Northern Nigeria as political thugs, the condition society placed them in made them vulnerable (Dan-Azumi & Azeez, 2018). As various studies have shown many people, who later joined Boko Haram were youths used by

politicians and dumped. Youth in Northern Nigeria, like any other society have contributed both negatively and positively to their societies (Ubaje & Uzodike, 2013). They were used during the Maitatsine insurgency of the early 1980s, they became tool in the hands of Boko Haram to kill and to destroy, and politicians for their selfish ends are still using them as political thugs. However, viewing youths in Northern Nigeria in this perspective alone, would obscure their positive impact in the society and the fact that society shares in the blame for their negative actions. Therefore, one must also look at their contribution in the area of resistance to the inversion of their communities by Boko Haram and the effort to protect and preserve the cultural heritage of the North. This argument has been well articulated by the International Crisis Group (2017) as they called it anti-Boko Haram vigilantism. They narrated the selflessness with which youths in Northern Nigeria, confronted Boko Haram with the aim of protecting their community, which was under the onslaught of Boko Haram, and the military who at the time could not differentiate between innocent youths and the members of the Boko Haram. Their effort was said to have turned around the battle against Boko Haram and they received accolades from the government, society and the military. With the aid of the Civilian Joint Task Force, Maiduguri was largely purged of Boko Haram cells, and there have been few subsequent attacks in the city. International Crisis Group (2017) noted that in the late 2014, Boko Haram threatened to march on Yola, the capital of Adamawa state south of Borno, the Youths in Adamawa reacted with a major mobilisation of hunter brotherhoods, and Boko Haram never had the chance to make the attempt, as they were pushed back into the forest.

Youths in every society could serve as an engine of development as they constitute the labour force that drives the economy in the production of goods and services. Every society needs to provide needed socioeconomic environment for the development of its youth, which will ultimately serve the development of the society. However, the Nigerian development agenda of the 1960s, did not consider Nigerian youths. It was until 1973 that the Nigeria Government started the National Youths Service. Even that was an attempt to foster unity and not necessarily to develop the youth. The National Youth Policy which came up in 2001, is a sign of how recent government and the Nigeria society started thinking about its youth. If well harnessed, the youths could be a source of labour inputs as well as human capital in production, which would improve total productivity in a region of the world where capital formation is limited. When employed, youths could be a reliable source of demand for the economy through their consumption activities. In addition, the youths could be critical for the development of a new class of entrepreneurs (Odoh & Innocent, 2014).

Odoh and Innocent (2014) further noted that in recent times effort to eradicate poverty and empower youth have taken priority, several programmes have been initiated over the year by government to empower youths, if successful, it is expected that this would lead to social and economic development of the state. If the state therefore plays its role, to empower young people, through education and economic opportunities, the youth will become a veritable force for nation building, otherwise, they will eventually, though not most, become a destructive force.

Closely related to the concept of youth is how society perceives the youth, Spencer (2005, p. 48) noted that:

> *In relation to the notion of transition, youth is perceived as an unusually intense and 'risky' period of life. When the transitions are not made successfully, there is trouble both for the individual and for society. For example, those who refuse schooling in early youth are less likely to access training and employment in later youth and therefore more likely to become*

> *poor as they fail to make a successful transition to the waged labour which would bring adult independence and responsibility.*

In a more derogatory manner Spencer (2005, p.46) painted the picture of the youth and how they are viewed in the society, according to him: "'Youths' is a word carrying a great deal of baggage. That baggage includes ideas about unruly young people, often male, operating in groups, and at the very least, being a nuisance on the streets. The concept of youth is therefore not a neutral description of young people, though it is often used as though it were. When it is not used critically and carefully it brings with it mainly negative assumptions about the behaviour and character of young people both as individuals and in groups. Spencer shows that the simple mention of the word youth, carries a negative connotation. The youth therefore do not need to commit an act of unruly behaviour, before s/he is tagged unruly, but being referred to as youth carries that label already. This labelling perhaps, has also contributed to youth behaving as they are labelled.

Contrary to the forgoing argument, Bureau for Crisis Prevention and Recovery (2005, p.31) argued that it is "worth pointing out from the very beginning that the single most glaring gap in many researches is the lack of attention to, and thorough documentation of, the positive contributions of young people in society. This translates into an increasing securitisation of the issue of youth. While it is often pointed out that youth should not be regarded as merely a negative force, this comment appears to be an add-on or a sort of a priori disclaimer". The society has wittingly ignored any positive contribution of youth to society and overemphasised the negative aspects of their activities, but have youth not offered society any positive contribution? Like the current vigilante fight against insurgents in the North East Nigeria, or the Bakkasi Boys, fight against criminal elements in the South East Nigeria.

As literatures create a marred youth image, time is not taken to ask whether the youth exist in vacuum, sociologically, a child is born as a tabular razar (clean slate), society writes on the minds of the child, who then grows into what society made of him/her. The gap in literature, which this study will seek evidence for is that society made the youth what s/he is and when society offers the youth the chance, they make positive impact, like in the case of Civilian JTF of Borno state. According Idike & Eme (2015), the national youth policy itself offers the potential positive contribution of youth the Nigerian society; "Youths are the foundation of a society. Their energies, inventiveness, character and orientation define the pace of development and security of a nation. Through their creative talents and labour power, a nation makes giant strides in economic development and socio-political attainments. In their dreams and hopes, a nation founds her motivation; on their energies, she builds her vitality and purpose. And because of their dreams and aspirations, the future of a nation is assured (FGN, 2001).

Role of Youths in Countering Terrorism and Violent Extremism in Northeast Nigeria

At a point in time, when the insurgency was at its peak, youths in Borno State witnessed onslaught from two directions and had nowhere to run. They had Boko Haram on one side attacking, killing and destroying the establishments in the communities, while on the other side they had the military who could not differentiate Boko Haram members from innocent youths in the communities. The dilemma was that as a youth, you either get killed by Boko Haram or forced to join them, or you get killed or arrested by the military. In the light of this situation, the youth took the only option left, to fight back and resist the

insurgents. This is believed to be the reason behind the formation of Civilian Joint Task Force (CJTF) in Borno State in 2013.

Summarising the activities of the CJTF, International Crisis Group (2017) noted that they were involved in carrying out intelligence, surveillance and protection missions in their communities, notably operating checkpoints and patrolling to check on newcomers in public spaces (mosques, markets and the entrances of villages and towns). As some communities were displaced, CJTF have followed, often continuing surveillance in their IDP camps or host communities. They perform arrests and deliver suspects to the security forces, and some have been closely involved as auxiliaries to those forces. They have also screened and interrogated suspects in detention centres. The army has asked them to join in long-distance operations, usually mixing CJTF familiar with the targeted terrain with groups from other areas. They have also been deployed away from their communities, to control newly captured towns or support local CJTF. In several instances, they have launched autonomous armed operations.

In other words, Dan-Azumi and Azeez (2018) further noted that the CJTF are involved in complementing the efforts of the state's joint task force/multinational task force in the anti-terrorism war, they stood against the insurgents with bows and arrows, swords and machetes in their communities thereby given combat and intelligence support respectively. They have continued to play the role of community-based policing in communities affected by the insurgency. The Civilian JTF has helped in identifying, arresting and execution of many members of the Boko Haram sect through local intelligence and the use of local weaponry. More so, these youths have used local skills to fish out hiding Boko Haram members in their various neighbourhoods. In the process, they have greatly helped in improving civil–military relations.

In the year 2011 at Azare local government area of Bauchi State, some prominent elders were assassinated by unknown bandits, and the uproar created a fear in the minds of people as many elders expects they might be next in line of the killing. The unwholesome incident escalated until the youth mobilized themselves and arrested the perpetrators and handed them over to the security operatives. This type of resistant effort by Bauchi youths is an example of why Boko Haram group despite ravaging the northeast region including Bauchi State did not have much impact (Bab, 2018).

Forty-five (45) youths experienced youths on activism and peace advocacy from Borno, Yobe, Adamawa, Taraba and Bauchi have benefitted from The North East Intellectual Entrepreneurship Fellowship (NEIEF) project, which trains them on countering violent extremism and empowered them entrepreneurially and intellectually under the sponsorship of Office for Transition Initiatives (OTI), United States Agency for International Development (USAID). The fellows are presently impacting in line with countering violence in the region through publications and social media outreaches with a hashtag #Not Another Nigerian (Bab, 2018).

Youth vigilante initiatives in Gombi, Madagali, Mubi North and South Local Government Areas of Adamawa State and in Biu Local Government Area of Borno State mount check points and move from house to house to fetch out suspected Boko Haram members and hand them over to the military. The youths use scanners to scan people and cars as they enter into market places to prevent bombing. They also trained other young people on the dangers of engaging in gang activities that serve as a recruitment base for violent extremist groups (Ekpon, 2017).

Young persons across the northeast have made numerous efforts in countering violent extremism. For instance, Olakunle Joel Adewale, a young African Leader (certified Mandela

Washington Fellow) employed his talent of visual art to empower the victims of Boko Haram insurgency, and counter the extremist narratives. He uses dance, theatre and painting to cultivate a community of young ambassadors who promote peace and tolerance by sharing their stories through visual art. In line with this effort, Tangirala (2016) argued that empowering the victims of terrorism is a critical component of countering violent extremism. Not engaging with such victims will leave communities with more dangers and vulnerable as they can serve as recruitment base of conflict entrepreneurs. With the support of International Coalition for the Eradication of Hunger and Abuse (ICEHA), Adewale has worked with over 3,000 survivors of Boko Haram by helping them develop credible and constructive narratives. He ensured that the displaced persons are effectively engaged, and reintegrated through interventions that are relevant to their lives (Tangirala, 2016).

Conclusion

From the foregoing, it is obvious that differences in the understanding a youth exist, but it is a generally acceptable fact that they are the strength of every nation. However, the state of the youth in Nigeria is so alarming, with all sorts of social problems including unemployment, poverty, violent activities among others. The societal perception of youths is an added problem as most at times; only the negative side of the youths are portrayed by the media or acknowledged by people. Yet, extant literatures have established the enormous contributory efforts of youths in the fight against terrorism and extremism in the northeaster Nigeria. Youths therefore are not only nuisance to the society, nor do they only contribute in the democracy and governance, they are vibrant set of humans that are immensely contributing in the spheres of peace and security through countering terrorism and violence efforts in north-eastern Nigeria.

Recommendation

The paper recommends that the effort of youths in counter terrorism and countering violent extremism be adequately harnessed, utilized, encouraged and be rewarded. CJTF for instance, who sacrificed their lives in the confrontation with Boko Haram terrorists be empowered with more trainings and skills, and with military related jobs at the end of this war. Governmental and non-governmental aid groups should continue support youth groups and individuals working in line with countering violent extremism. More campaigns must be staged in by interest groups on peace advocacy in order to shun terrorism in the north-eastern region.

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