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A preface from the Editor-In-Chief

I am proud to introduce the Fourth Edition of the Warwick Undergraduate Law Journal! This edition has focused on the theme of International Law, primarily due to the relevance of this area of law in today's world. With the genocide in Palestine, and similar atrocities worldwide, critical analysis of International Law and its different avenues is incredibly important. This edition touches on a broad range of topics, such as the Outer Space Treaty, and International Humanitarian Law. It shows the wide scope of International Law, and its real-world impact and influence on our lives.

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We couldn't have done this without the hard work of the authors and are proud to share their work ahead.

For any questions, or to get in contact with the authors or team, please email lawjournal@warwick.ac.uk

Editor-In-Chief – Ilsa Nawaz

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Multilateralism vs Unilateralism: The Contested Future of Semiconductor Trade Secrets Protection in US-China Relations

Damilola Dawodu

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Colossians 3:17 LSB: *"And whatever you do in word or deed, do all in the name of the Lord Jesus, giving thanks to God the Father through Him"*

Abstract

Inept multilateralism and unjust unilateralism have provoked a contested future for protecting semiconductor trade secrets in US-China relations. This research is a first attempt at understanding whether multilateralism or unilateralism sufficiently protects semiconductor trade secrets in the context of an intensifying, and pivotal, US-China rivalry. In doing so, it (i) critically evaluates key TRIPS provisions (Articles 1.1, 3, 7, 39, 41) and the WTO Dispute Settlement Body's effectiveness, (ii) analyses alleged Chinese state-sponsored trade secrets misappropriation and malpractices, (iii) historically contextualises the unilateral use of US Section 301, and (iv) explores potential TRIPS Article 1.1 reforms and the impact of the WTO Appellate Body's sustained paralysis on the future of semiconductor trade secrets protection in US-China relations. There are two key findings. First, that the current multilateral framework appears inadequate, particularly due to the exploitable minimum standards of TRIPS and a lack of confidence in dispute settlement, which is especially highlighted by the paralysis of the Appellate Body. Second, that US Section 301 actions fail to adhere to WTO principles, thus constituting an illegitimate unilateral response to a seemingly incapacitated multilateral system. Moreover, this American response also appears to be underpinned by domestic interests. As such, substantive TRIPS reform does not seem feasible due to conflicting national interests. Thus, despite the necessity of restoring a fully functioning Dispute Settlement Body, there remain almost insurmountable political hurdles, which would not necessarily tame US-China tensions should they be overcome. The research concludes by noting that the tension between inept multilateralism and unjust unilateralism is exacerbated by these national interests, originating a contested future for semiconductor trade secrets protection in US-China relations that risks undermining global innovation and trade.

Keywords: semiconductors, trade secrets, multilateralism, unilateralism, US-China relations

List of Abbreviations

AB	Appellate Body
AUCL	Anti-Unfair Competition Law (China)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATT	General Agreement on Tariffs and Trade
IP	Intellectual Property
IPR	Intellectual Property Right
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
SIA	Semiconductor Industry Association
TRIPS/TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
US	United States
USTR	United States Trade Representative
WTO	World Trade Organization

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18 USC § 1836 (2016)

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9 USC § 2242(a)(1)(A)(c) (1988)

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1. Introduction

"The increasingly supple law of trade secrets has strained the classical system of intellectual property law to the breaking point."[1]

– J.H. Reichman

1.1 The US-China Semiconductor Trade Secrets Battleground

On the 21st of January 2025, United States (US)-headquartered semiconductor company Nvidia surpassed Apple to become the most valuable company in the world.[2] As Nvidia closed out 2024, its annual profits more than doubled to reach US$74.3 billion,[3] and with the company growing 114 per cent in 2024, it posted a record full-year revenue of US$130.5 billion.[4] Taiwan Semiconductor Manufacturing Company is not far behind in its emergence, having become one of the world's top ten most valuable companies in March 2024.[5] Clearly, the semiconductor industry possesses major economic significance for stakeholders worldwide. This is also the case because of the role of semiconductors[6] in technological advancement. Semiconductors form the foundation of computing and are used in making integrated circuits, remote car keys, smartphones, laptops, routers, wind turbines, and the

[1] J H Reichman, 'Computer Programs As Applied Scientific Know-How: Implications of Copyright Protection for Commercialized University Research' (1989) 42(3) Vanderbilt Law Review 639, 667.
[2] Kif Leswing, 'Nvidia passes Apple again to become world's most valuable company' (*CNBC*, 21 January 2025) <https://www.cnbc.com/2025/01/21/nvidia-passes-apple-again-to-become-worlds-most-valuable-company-.html> accessed 19 April 2025.
[3] Clare Duffy, 'Nvidia doubled profits in 2024. And its outlook is rosy despite AI jitters' (*CNN*, 26 February 2025) <https://edition.cnn.com/2025/02/26/tech/nvidia-earnings-ai-growth/index.html> accessed 19 April 2025.
[4] Nvidia Newsroom, 'NVIDIA Announces Financial Results for Fourth Quarter and Fiscal 2025' (*NVIDIA*, 26 February 2025) <https://nvidianews.nvidia.com/news/nvidia-announces-financial-results-for-fourth-quarter-and-fiscal-2025> accessed 19 April 2025.
[5] John Cheng, 'TSMC Reclaims Spot in World's 10 Most Valuable Companies After Stock Rallies to Record' (*Bloomberg UK*, 11 March 2024) <https://www.bloomberg.com/news/articles/2024-03-11/tsmc-re-enters-global-top-10-club-after-rallying-to-record?embedded-checkout=true> accessed 19 April 2025.
[6] (also known as microchips)

communication infrastructures that underpin the internet, for example.[7] As such, the semiconductor industry retains a significant technological importance. However, for companies like Nvidia and Taiwan Semiconductor Manufacturing Company to maintain their value, effective intellectual property (IP) protection is pertinent.[8]

Despite the importance of other intellectual property rights (IPRs), the Semiconductor Industry Association (SIA), the leading American semiconductor trade association and lobbying group, highlights the unique significance of trade secrets.[9] The SIA emphasises that the international protection of this IPR, under the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS/TRIPS Agreement), is vital for fostering competitiveness and innovation in the dynamic global semiconductor industry.[10] Although this agreement protects the layout designs of integrated circuits, the recent advancement of semiconductor technology makes the broader scope of trade secrets protection increasingly valuable.[11] For this reason, trade secrets have become a primary concern for industry stakeholders.[12] Consequently, exploring semiconductor trade secrets protection appears to be more necessary than focusing on TRIPS's layout design

[7] Liv McMahon and Shiona McCallum, 'What are semiconductors and why is Trump targeting them?' (*BBC*, 14 April 2025) <https://www.bbc.co.uk/news/technology-66394406> accessed 19 April 2025.
[8] Keegan Caldwell, 'Unlocking The Value Of Intellectual Property: A Strategic Guide For Startups And Tech Companies' (*Forbes*, 30 January 2024) <https://www.forbes.com/councils/forbesbusinesscouncil/2024/01/30/unlocking-the-value-of-intellectual-property-a-strategic-guide-for-startups-and-tech-companies/> accessed 19 April 2025.
[9] Donald G Rea and others, 'The Semiconductor Industry—Model for Industry/University/Government Cooperation' (1997) 40(4) Research-Technology Management 46, 47.
[10] Semiconductor Industry Association, 'Semiconductors & The World Trade Organization: How Global Trade Rules Have Spurred Semiconductor Growth and Innovation' (November 2020) <https://www.semiconductors.org/wp-content/uploads/2020/11/The-WTO-and-the-Semiconductor-Industry-Nov-2020_2.pdf> accessed 4 February 2025.
[11] Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (TRIPS Agreement), s 6.
[12] Letter from the Biotechnology Innovation Organization and others to the United States Trade Representative (6 November 2017) <https://www.semiconductors.org/wp-content/uploads/2018/06/International-Trade-Secrets-Association-Ltr-111717.pdf> accessed 19 April 2025.

provisions. Brown[13] reinforces this, positing that the misappropriation of trade secrets negatively impacts innovation and must be controlled.[14] Ultimately, much of the value in semiconductors discernibly derives from trade secrets: pieces of information where meaningful steps to protect confidentiality have been taken, and are valuable particularly because they are secret[15].

It must be noted that trade secrets possess a perilous vulnerability in the wake of technological advancement, due to being prone to espionage and cybertheft.[16] TRIPS is an analogue-era treaty, which assumed that international trade aspects of IP were embedded in physical goods.[17] However, modern technology has created innovative ways to steal trade secrets, with professionals in international economic law calling such breaches "extinction-level events".[18] The McKinsey Global Institute substantiated this threat in 2014 by highlighting that knowledge represented half of the global trade flows, and this knowledge-intensive component was growing approximately 1.3 times faster than labour-intensive flows.[19] The increasingly knowledge-based dynamic of global trade flows highlights the importance of trade secrets protection. Despite not being conclusive, empirical research notes

[13] (Professor of Law at the University of Aberdeen)
[14] Abbe Brown and others, *Contemporary Intellectual Property* (6th edn, Oxford University Press 2023) 720.
[15] (note that these are the common elements of trade secrets under the primary international framework; TRIPS Agreement art 39)
[16] Samantha L Blond, 'Cyber Vulnerabilities as Trade Secrets' (2024) 110 Virginia Law Review Online 52, 53.
[17] Antony Taubman, 'TRIPS Encounters the Internet: An Analogue Treaty in a Digital Age, or the First Trade 2.0 Agreement?' in Mira Burri and Thomas Cottier (eds), *Trade Governance in the Digital Age* (Cambridge University Press 2012) 304.
[18] Nigel Cory, 'Trade in Knowledge and Cross-Border Data Flows: A Look at Emerging Digital Regulatory Issues' in Antony Taubman and Jayashree Watal (eds), *Trade in Knowledge* (Cambridge University Press 2022) 638.
[19] James Manyika and others, 'Report – Global flows in a digital age: How trade, finance, people, and data connect the world economy' (McKinsey Global Institute 2014) <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Globalization/Global%20flows%20in%20a%20digital%20age/MGI%20Global%20flows%20in%20a%20digial%20age%20Executive%20summary.pdf> accessed 10 March 2025.

a positive relationship between the rigour of trade secrets protection and innovation.[20] Having studied 37 countries between 1985 and 2010 that are subject to the TRIPS Agreement, the stringency of trade secrets protection in developing countries tended to rise continually.[21] In contrast, the stringency in developed countries typically stabilised after rising in the 1990s.[22] This signifies a gap in global trade secrets frameworks. Hence, Cory's[23] perception of China as a "laggard" and the US as a "leader" in trade secrets protection becomes especially important.[24] The protection of semiconductor trade secrets is essential to the escalating US-China rivalry, given that their possession grants a fast track to technological superiority. Moreover, the incentive to misappropriate semiconductor trade secrets is augmented by the ongoing global semiconductor supply chain shortage.[25] Recognising these stakes, the US passed the CHIPS Act into legislation, and China developed its Made in China 2025 policy.[26] Both ultimately seek to boost the domestic capacity of manufacturing and research in the semiconductor industry. Ergo, industrial policies are an important factor in the competitive terrain of semiconductor trade secrets. However, the potential for unfair competition risks discouraging innovation, subsequently undermining global technological advancement.

[20] Douglas Lippoldt and Mark Schultz, 'Uncovering Trade Secrets – An Empirical Assessment of Economic Implications of Protection for Undisclosed Data' (Organisation for Economic Cooperation and Development Trade Policy Papers 2014) <https://www.oecd.org/content/dam/oecd/en/publications/reports/2014/08/uncovering-trade-secrets-an-empirical-assessment-of-economic-implications-of-protection-for-undisclosed-data_g17a2524/5jxzl5w3j3s6-en.pdf> accessed 20 April 2025.

[21] ibid.

[22] ibid.

[23] (Associate Director in Trade Policy at The Information Technology and Innovation Foundation)

[24] Nigel Cory, 'Trade in Knowledge and Cross-Border Data Flows: A Look at Emerging Digital Regulatory Issues' in Antony Taubman and Jayashree Watal (eds), *Trade in Knowledge* (Cambridge University Press 2022) 640.

[25] Emma Donnelly, 'Resolving American Semiconductor Challenges through Making the ITC a Preferred Forum' (2025) 4(1) The University of Chicago Business Law Review 227, 240.

[26] CHIPS and Science Act of 2022, Pub L No 117–167, 136 Stat 1366 (2022); People's Republic of China State Council, 'Notice of the State Council on the Publication of "Made in China 2025"' (Center for Security and Emerging Technology (tr), Guo Fa No 28, 2015) <https://cset.georgetown.edu/publication/notice-of-the-state-council-on-the-publication-of-made-in-china-2025/> accessed 21 April 2025.

Despite the urgency of protecting semiconductor trade secrets, the WTO's Dispute Settlement Body (DSB) has stared impotence in the mirror due to the US's ongoing obstruction of new appointments to the Appellate Body (AB).[27] This AB paralysis has persisted since December 2019, preventing the resolution of appeals following rulings, thus undermining the DSB's enforcement of WTO provisions.[28] Regrettably, with the WTO members' self-imposed 2024 deadline for restoring a functioning DSB having been missed, the future of multilateralism remains uncertain.[29] This collapse reveals a conflict between the multilateral principle of building stable relationships with other nations in pursuit of mutual gains,[30] and the unilateral principle of making decisions without conferring with, while affecting the position of, other nations.[31] Therefore, with international IP protection being treaty-based, it appears that the US and China are weaponising domestic laws in their battle. [32] This situation presents two core questions for this article to explore. The first question is: are semiconductor trade secrets sufficiently protected by TRIPS and the DSB? The subsequent question is: are unilateral actions through tools such as the US's Section 301 a justifiable response?

[27] Jean Galbraith, 'United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process' (2019) 113(4) The American Journal of International Law 822, 822.
[28] Lindsey Garner-Knapp, Shaina D Western, and Henry Lovat, 'The US, the WTO, and the Appellate Body: From Great Expectations to Hard Times' in Jelena Bäumler and others (eds), *European Yearbook of International Economic Law 2021* (Springer 2022) 24.
[29] Gisela Grieger, 'Briefing – International trade dispute settlement: World Trade Organisation Appellate Body crisis and the multi-party interim appeal arbitration arrangement' (European Parliamentary Research Service 2024) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762342/EPRS_BRI(2024)762342_EN.pdf> accessed 14 March 2025.
[30] Rob de Wijk, Jack Thompson, and Esther Chavannes, *Adjusting the Multilateral System to Safeguard Dutch Interests* (Hague Centre for Strategic Studies 2020) <https://www.jstor.org/stable/resrep26672> accessed 23 April 2025, 17.
[31] Przemysław Saganek, *Unilateral Acts of States in Public International Law*, vol 22 (Brill Nijhoff 2016) 1.
[32] Thomas Cottier, 'Rules Relating to Intellectual Property' *Edward Elgar Encyclopedia of International Economic Law* (2017) 402.

1.2 Situating the Research

This article addresses the intersection of three momentous contemporary issues. First, it addresses the intensifying US-China rivalry. Second, it addresses the semiconductor industry's strategic centrality in global trade, innovation, and domestic development. Third, it addresses the modern challenge of protecting intangible assets, such as trade secrets, that are susceptible to cross-border misappropriation.

The academic sphere has increasingly encapsulated the rivalrous US-China trade relations,[33] cross-border semiconductor trade flows,[34] TRIPS enforcement challenges,[35] the impact of US unilateralism on China,[36] and the evolving protection of trade secrets.[37] However, there are three points of relatively scarce focused analysis. The first key research gap is whether the current international legal framework for resolving US-China semiconductor trade secrets disputes is sufficient. By examining semiconductor trade secrets, Lee's[38] publication appears

[33] Jane K Winn and Yi-Shyuan Chiang, 'The Next Great Global Knowledge Infrastructure Land Rush Has Begun: Will the USA or China Prevail?' in Shin-yi Peng, Ching-Fu Lin, and Thomas Streinz (eds), *Artificial intelligence and international economic law: disruption, regulation, and reconfiguration* (Cambridge University Press 2021); Nerina Boschiero, *US Trade Policy, China and the World Trade Organisation* (1st edn, Routledge 2023).

[34] Long Li and others, 'Analysis of the structure and robustness of the global semiconductor trade network' (2025) 20(1) PLOS One 1 <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0313162> accessed 17 April 2025; K P Prabheesh and C T Vidya, 'Interconnected Horizons: ASEAN's Journey in the Global Semiconductor Trade Network Amidst the COVID-19 Pandemic and Supply Chain Realignments' [2025] Emerging Markets Finance and Trade 1 <https://www.tandfonline.com/doi/full/10.1080/1540496X.2024.2446387> accessed 20 April 2025.

[35] Silke von Lewinski, 'The WTO/TRIPS Dispute Settlement Mechanism: Experiences and Perspectives' in Hanns Ullrich and others (eds), *TRIPS plus 20* (Springer 2016); Thomas Jaeger, 'Merging ACTA into TRIPS: Does TRIPS-Based IP Enforcement Need Reform?' in Hanns Ullrich and others (eds), *TRIPS plus 20* (Springer 2016); Christophe Geiger, 'Towards a Balanced International Legal Framework for Criminal Enforcement of Intellectual Property Rights' in Hanns Ullrich and others (eds), *TRIPS plus 20* (Springer 2016).

[36] Hong Ma and Lingsheng Meng, 'Heterogeneous impacts of the Section 301 tariffs: Evidence from the revision of product lists' (2023) 56(1) Canadian Journal of Economics 164.

[37] Chen Nanrui, 'Choice of law in trade secret cases: a Chinese perspective' (2025) 20(3) Journal of Intellectual Property Law & Practice 147 <https://academic.oup.com/jiplp/article/20/3/147/7916752?login=true> accessed 20 April 2025; Shruti Nandwana, 'Evolving Paradigms of Trade Secret Protection: A Comparative Study of the US, EU, and India' (2025) 2(2) Trends in Intellectual Property Research 17 <https://iprtrends.com/TIPR/article/view/32> accessed 19 April 2025.

[38] (Assistant Professor of Law at National Taiwan University of Science and Technology)

to be the first of three substantive works that come close to achieving this. However, her work analyses domestic US and Taiwanese semiconductor trade secrets litigation to understand the dynamics of alleged Chinese trade secrets theft, thus overlooking TRIPS and the DSB.[39] Huang's[40] case study of the legal dispute between the American Micron, Taiwanese UMC, and Chinese Jinhua offers a foundation for further discussion on the cross-border protection of semiconductor trade secrets, given that each party was a semiconductor company.[41] However, it does not analyse how the dispute ties into the broader rivalry between the US and China.[42] Schmitz's[43] analysis of how alleged Chinese trade secrets theft violates TRIPS overlooks how TRIPS could be perceived as inadequate, thus bypassing any comments regarding unilateralism or the paralysis of the AB.[44] This ties into the second key research gap of how unilateral tools such as Section 301 are simultaneously being employed and seemingly legitimised in the context of semiconductors, and what the implications of this are for the multilateral WTO system. Feng's[45] work stands out with her analysis of why the 2017 United States Trade Representative (USTR) Section 301 investigation into China's laws regarding technology transfer appears to undermine WTO rules.[46] However, her work does not explore why the US might perceive the WTO as inadequate and consequently resort to Section 301.[47] Chen[48] analysed how the US's use of Section 301 has detrimentally shaped

[39] Tzu-I Lee, 'Bordering Secrecy: An Empirical Study on Cross-Border Trade Secret Misappropriation in the Semiconductor Sector' (2024) 39(2) Connecticut Journal of International Law 166, 169-174.
[40] (Shanghai Super Postdoctorate Fellow at the China Institute for Socio-Legal Studies of Shanghai Jiao Tong University)
[41] Kai-Shen Huang, 'Case Study 6.2 - Micron versus UMC and Fujian Jinhua' in Matthew S Erie (ed), *A Casebook on Chinese Outbound Investment* (Cambridge University Press 2025)
[42] ibid 294.
[43] (JD Candidate at American University Washington College of Law when her work was published)
[44] Kassidy Schmitz, 'TRIPing on Trade Secrets: How China's Cybertheft of U.S. Trade Secrets Violated TRIPS' (2021) 36 American University International Law Review 929, 967.
[45] (former Counsellor in the Legal Affairs Division of the WTO Secretariat)
[46] Feng Xuewei, 'Critique of Consistency with WTO Rules of the US Section 301 Investigation against China Concerning Technology Transfer (Billing Code 3290-F7)' (2018) 8(2) Journal of WTO and China 3.
[47] ibid 19-23.
[48] (an SJD Candidate at the University of Pennsylvania when his work was published)

China's trade secrets framework and domestic innovation as a result.[49] However, this overlooks the broader tension that exists between the use of Section 301 and the multilateral WTO system. The third key point of research is trade secrets in general. Trade secrets have historically been "seldom recognised",[50] being named the "ugly duckling",[51] "Cinderella",[52] and "fourth prong" of IPRs.[53] This perception becomes evident once one realises the TRIPS Agreement was the first time trade secrets were afforded an international standard for protection. Whereas, copyrights, patents and trademarks were first internationally protected in the nineteenth century[54].[55] Additionally, some seminal IP texts, as recently as 2023, either do not mention trade secrets[56] or minimally mention them relative to other IPRs.[57] However, with the emergence of technology and a progressively globalised economy, both broader and

[49] Yang Chen, 'Development of China's Trade Secrets Law in the US' Shadow: Negative Consequences for China and Suggestions' (2022) 17 University of Pennsylvania Asian Law Review 138, 195-196.
[50] Christopher May, *The Global Political Economy of Intellectual Property Rights* (Routledge 2000) 10; Kung-Chung Liu, 'The Problems with Trade Secret Protection/Overprotection in Asia' (2022) 53 International Review of Intellectual Property and Competition Law 94, 95.
[51] Fabian Junge, 'The Necessity of European Harmonization in the Area of Trade Secrets' (2016) Maastricht Faculty of Law European Private Law Institute Working Paper, 2016/04 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839693> accessed 20 April 2025.
[52] Nuno Sousa e Silva, 'A practical guide to a fast-changing and increasingly popular subject' (2016) 11(4) Journal of Intellectual Property Law & Practice 310, 310.
[53] Michael B Bixby and Christopher Baughn, 'Trade Secret Theft and Protection' (2010) 12 The Atlantic Law Journal 59, 59.
[54] (copyrights were protected under the Berne Convention for the Protection of Literary and Artistic Works in 1886; both patents and trademarks were protected under the Paris Convention for the Protection of Industrial Property in 1883)
[55] Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (3rd edn, Oxford University Press 2022) 38; 'Appendix 2: Paris Convention for the Protection of Industrial Property' in Winfried Tilmann and Clemens Plassman (eds), *Unified Patent Protection in Europe: A Commentary* (Oxford University Press 2018) 2489-2490.
[56] Richard Schaffer, Beverley Earle, and Filiberto Agusti, *International Business Law and its Environment* (6th edn, Thomson South-Western 2005).
[57] Abbe Brown and others, *Contemporary Intellectual Property* (6th edn, Oxford University Press 2023) 699-722; Nigel Cory, 'Trade in Knowledge and Cross-Border Data Flows: A Look at Emerging Digital Regulatory Issues' in Antony Taubman and Jayashree Watal (eds), *Trade in Knowledge* (Cambridge University Press 2022) 637-640.

scholarly efforts afforded to trade secrets protection appear to be growing.[58] Therefore, this article is a timely addition to the discourse on an underserved, yet increasingly important, IPR.

This research aims to offer a novel perspective, addressing the escalating strain between multilateralism and unilateralism in governing semiconductor trade secrets protection in US-China relations. There are three ways this article strives to achieve this. First, it critically evaluates the effectiveness of key TRIPS provisions[59] and the DSB in addressing alleged state-sponsored semiconductor trade secrets misappropriation. However, it should be noted that it is beyond the scope of this article to evaluate all aspects of TRIPS and the DSB. Second, this research historically contextualises the implications of US Section 301 actions as an alternative method of enforcing semiconductor trade secrets protection, especially in US-China relations. Third, this article seeks to increase awareness of the contested legal landscape governing the semiconductor industry. While it has been established that economic factors are contextually pivotal, this article centres on legal doctrines and sociolegal dynamics, thus relinquishing the potential for in-depth economic analysis.

By filling the aforementioned research gaps, the article may offer three key insights. First, it seeks to extend the understanding of the WTO's centrality in the ongoing US-China technology competition. Second, especially due to the AB's inability to resolve disputes, it aims to evaluate the current and prospective ability of multilateral agreements and unilateral

[58] World Intellectual Property Organization, *WIPO Guide to Trade Secrets and Innovation* (World Intellectual Property Organization 2024); Rochelle C Dreyfuss and Katherine J Strandburg (eds), *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* (Edward Elgar Publishing 2011); Joanna Kim and others, *Guide to Protecting and Litigating Trade Secrets* (2nd edn, American Bar Association 2021); Jens Schovsbo, Timo Minssen, and Thomas Riis (eds), *The Harmonization and Protection of Trade Secrets in the EU: An Appraisal of the EU Directive* (Edward Elgar Publishing 2020).
[59] (TRIPS Agreement, arts 1.1, 3, 7, 39, 41)

tools in managing disputes over strategic technological industries such as semiconductors. Third, it may inform academic and policy debates regarding international trade governance, trade secrets protection, and the risks of state-sponsored competition in strategic industries.

Chapter 2 begins the main body of this article. It analyses China's alleged state-sponsored malpractices to argue that the current multilateral framework is ineffective in protecting semiconductor trade secrets. It is imperative to note that "state-sponsored" actions contextually incorporate a range of activities. These actions can be in the form of direct espionage or a tolerance of malpractice. While it is difficult to prove direct state involvement, this chapter analyses activities that appear to be oriented towards China's Made in 2025 policy. Accordingly, it explains why the US seems to have relied on unilateralism as a safeguard, implicitly undermining trust in the DSB's enforcement of TRIPS. As such, it identifies two key limitations of TRIPS and the DSB in guarding against cross-border semiconductor trade secrets misappropriation.

Chapter 3 develops a historical analysis of Section 301 to argue that the WTO's mishandling of the *US – Section 301 Trade Act* dispute has led to the US's problematic and substantively unjustified attempts to unilaterally govern the protection of semiconductor trade secrets.

Chapter 4 synthesises Chapter 2's established TRIPS and DSB limitations and Chapter 3's exploration into the US's use of Section 301 to indicate why the future of multilateral US-China semiconductor trade secrets protection appears uncertain. It posits that this uncertainty is particularly due to the domestically driven interests surrounding the restoration of a fully functional DSB, despite potential TRIPS reforms and AB alternatives being explored.

Chapter 5 concludes the article by synthesising the key arguments and findings of the research. This chapter uses the 2025 resurgence of the US-China trade war as context to emphasise the article's central thesis: inept multilateralism and unjust unilateralism have

provoked a “contested future” for protecting semiconductor trade secrets in US-China relations.

2. The WTO's Umpiring of US-China Trade Disputes

"Covenants, without the sword, are but words."[60]

– Thomas Hobbes

The WTO's TRIPS Agreement and DSB are currently unfit to address enforcement challenges in cases of US-China state-sponsored semiconductor trade secrets misappropriation. This chapter will argue so by analysing China's allegedly unfair business practices in the context of (i) TRIPS Articles 3, 7, 39, and 41, (ii) the WTO's 2018 dispute, *China — Intellectual Property Rights II*,[61] between China and the US, and (iii) the US's independent handling of matters related to state-sponsored semiconductor trade secrets theft.

2.1 The Chinese Undermining of Semiconductor Trade Secrets Protection

The weaponisation of legal systems in innovation competition is not novel. State intervention has historically driven technological development, as exemplified by Taiwan's 1980s semiconductor industry growth, which was fuelled by technological learning and transfers through personnel movement between companies.[62] In such contexts, trade secrets are often endangered and militarised.[63] Thus, with the semiconductor industry being a cornerstone of the modern global economy, international trade secrets protection is essential to ensure fair competition and innovation. However, TRIPS Article 1.1 establishes minimum binding standards on provisions rather than uniform ones,[64] leading to divergent trade secrets laws

[60] Thomas Hobbes, *Leviathan* (George Routledge and Sons 1885) 82.
[61] WTO, *China – Certain Measures Concerning the Protection of Intellectual Property Rights (China — Intellectual Property Rights II)* (DS542).
[62] Tzu-I Lee, 'Bordering Secrecy: An Empirical Study on Cross-Border Trade Secret Misappropriation in the Semiconductor Sector' (2024) 39 Connecticut Journal of International Law 165, 174.
[63] ibid.
[64] TRIPS Agreement art 1.1.

among WTO members.[65] As such, this essay will now explore how China may be perceived as compromising the intent of trade secrets protection under the TRIPS Agreement.

In 2017, China's allegedly unfair business practices were estimated to have cost the US economy US$225 billion to US$600 billion annually.[66] As such, significant concerns are raised about China's compliance with Articles 7 and 39 of the TRIPS Agreement. For example, as of 2017, the reported cybertheft of US trade secrets amounts to an estimated one to three per cent of American gross domestic product annually.[67] This directly challenges Article 39, which mandates the protection of "undisclosed information", otherwise known as trade secrets.[68] Thus, China's allegedly unfair business practices arguably undermine Article 7's objective of fostering technological innovation and balancing rights with the public interest, as rampant trade secrets theft disrupts fair competition and hinders technological advancement.[69]

China's trade secrets enforcement appears to violate TRIPS Article 3, which mandates that members treat foreign entities no less favourably than their own nationals, suggesting a politicisation of trade secrets protection.[70] While Article 3 aims for equality, Kelly[71] acknowledges that developing countries often prioritise national economic development

[65] Gintarė Surblytė, 'Enhancing TRIPS: Trade Secrets and Reverse Engineering' in Hanns Ullrich and others (eds), *TRIPS Plus 20* (Springer 2016) 725.
[66] The Commission on the Theft of American Intellectual Property, *Update to the IP Commission Report* (2017) 1.
[67] ibid 1-2.
[68] TRIPS Agreement art 39.
[69] TRIPS Agreement art 7; *Protecting U.S. Intellectual Property Overseas: The Joint Strategic Plan and Beyond*, 111th United States Congress, 2nd Session, 80.
[70] TRIPS Agreement art 3.
[71] (former Professor of International Law at the University of Buenos Aires and former ambassador for Argentina in Chile, Italy, Austria, and at the UNESCO)

through preferential treatment for domestic entities.[72] While Kelly's research focused on developing Latin American countries, it is understandable that the US has often accused China, a developing nation[73], of using excessively high and vague criminal enforcement thresholds to disproportionately disadvantage foreign competitors.[74] This sentiment is corroborated by Beconcini, who highlights that China has been accused of politicising IP enforcement, favouring domestic businesses, and institutionalising trade secrets theft via tolerating trade secrets violations by public officials.[75] This is particularly compelling given that China revised its definition of trade secrets[76] to "ensure its alignment" with TRIPS Article 39 in 2017 and 2019, yet Beconcini's text was published in 2021.[77] Hence, it is unsurprising that in January 2025, pursuant to Section 3(a) of President Trump's "America First Trade Policy", the USTR announced a review of the 2020 Economic and Trade Agreement Between the USA and China[78] to assess China's compliance with its commitments.[79] One key commitment included effective trade secrets protection and

[72] Elsa Kelly, ''National Treatment' and the formulation of a Code of Conduct for Transnational Corporations' in Kamal Hossain (ed), *Legal Aspects of the New International Economic Order* (Bloomsbury Publishing 2013) 152.
[73] (as of 2023, per the International Monetary Fund)
[74] International Monetary Fund, 'Groups and Aggregates Information' (April 2023) <https://www.imf.org/en/Publications/WEO/weo-database/2023/April/groups-and-aggregates> accessed 21 March 2025; Office of the United States Trade Representative, 'United States Files WTO Case Against China Over Prohibited Subsidies' (*The Office of the United States Trade Representative*, 2 February 2007) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2007/february/united-states-files-wto-case-against-chi> accessed 6 February 2025.
[75] Paolo Beconcini, 'The State of Trade Secret Protection in China in Light of the US-China Trade Wars: Trade Secret Protection in China before and after the US-China Trade Agreement of January 15, 2020' (2021) 20 UIC Review of Intellectual Property Law 108, 110.
[76] (in the Anti-Unfair Competition Law)
[77] Lydia Lundstedt, *Cross-Border Trade Secret Disputes in the European Union* (Edward Elgar Publishing 2023) 94.
[78] (henceforth, the Phase One Agreement)
[79] Office of the United States Trade Representative, 'USTR Announces Compliance Review for the Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China' (*The Office of the United States Trade Representative*, 24 January 2025) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2025/january/ustr-announces-compliance-review-economic-and-trade-agreement-between-government-united-states> accessed 6 February 2025.

enforcement against misappropriation, [80] with a view to improving semiconductor trade flows.[81] However, it is important to note President Trump's first term in the context of China's compliance assessment. China's 2018 retaliatory tariffs disproportionately impacted Republican-leaning, rural counties reliant on agriculture, weakening Republican support in the 2018 US congressional elections.[82] Therefore, China's February 2025 announcement of retaliatory tariffs on US agricultural products has arguably fuelled the highly charged relationship between the US and China, potentially making impartial domestic legal procedure more challenging.[83] As such, concerns of politicising IP enforcement remain, potentially entrenching discriminatory practices and thus reinforcing concerns of China undermining TRIPS Article 3 to maintain domestic development goals.

The widespread IP infringement reported by one in five US companies surveyed in 2019 suggests a failure to uphold TRIPS Article 41, which mandates effective IPRs enforcement.[84] Despite Schmitz not mentioning only 23 North-American companies were surveyed, the impact remains significant, as the 54 members of the surveyed CNBC Global CFO Council represented a combined market value of US$5 trillion in 2019.[85] The bipartisan echoing of the European Union (EU) is compelling; Dutch semiconductor company ASML's repeated experiences with Chinese espionage led the European Commission to identify advanced

[80] Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China (signed 15 January 2020) (Phase One Agreement), s B.
[81] ibid art 6.2.1(a).
[82] Pablo D Fajgelbaum and others, 'The Return to Protectionism' (2020) 135 The Quarterly Journal of Economics 1 <https://doi.org/10.1093/qje/qjz036> accessed 7 February 2025, 1.
[83] BBC News, 'China announces retaliatory action as Donald Trump's tariffs take effect | BBC News' (*BBC News*, 4 February 2025) <https://www.youtube.com/watch?v=GHoBPgnXtXE&ab_channel=BBCNews> accessed 7 February 2025.
[84] TRIPS Agreement art 41; Kassidy Schmitz, 'TRIPing on Trade Secrets: How China's Cybertheft of U.S. Trade Secrets Violated TRIPS' (2021) 36 American University International Law Review 929, 930.
[85] Simon Myerson, '1 in 5 corporations say China has stolen their IP within the last year: CNBC CFO survey' (*CNBC*, 1 March 2019) <https://www.cnbc.com/2019/02/28/1-in-5-companies-say-china-stole-their-ip-within-the-last-year-cnbc.html> accessed 5 February 2025.

semiconductors as a critical area needing enhanced risk assessments and research security.[86] Moreover, the difficulty of tracking trade secrets theft due to limited public disclosure highlights enforcement and transparency gaps, which are central to Article 41's obligations.[87] Hence, these issues raise doubts about China's compliance with its commitments to provide effective IP enforcement, particularly amid the ongoing US-China trade dispute that began in 2018.[88]

These issues highlight potential systemic violations of TRIPS, posing significant challenges to global semiconductor trade norms and US economic interests. Therefore, it is compelling to posit that China is, at the very least, compromising the intent of trade secrets protection that TRIPS seeks to uphold. This begs the question: how have cases of alleged semiconductor trade secrets theft between the US and China been dealt with?

2.2 The American Escape From Standard Multilateralism

The WTO's TRIPS Agreement and DSB appear unsatisfactory in the context of state-sponsored semiconductor trade secrets theft. Consequently, the US has sought to handle matters independently, revealing a deep-seated mistrust of the WTO system.

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[86] Ian O'Connor, 'Watch Out Europe: China is Stealing Your Chip Secrets' (*Center for European Policy Analysis*, 9 July 2024) <https://cepa.org/article/watch-out-europe-china-is-stealing-your-chip-secrets/> accessed 6 February 2025; European Commission, 'Commission recommends carrying out risk assessments on four critical technology areas: advanced semiconductors, artificial intelligence, quantum, biotechnologies' (*European Commission*, 3 October 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4735> accessed 6 February 2025.

[87] European Commission, 'Case Study 02 - Theft of trade secrets and tracking electronic data in Singapore' (*European Commission*) <https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/south-east-asia-ip-sme-helpdesk/case-studies/case-study-02-theft-trade-secrets-and-tracking-electronic-data-singapore_en#:~:text=Trade%20secret%20theft%20can%20be,of%20a%20lack%20of%20proof.> accessed 6 February 2025; TRIPS Agreement art 41.

[88] Can Huang, Cong Cao, and Wim Coreynen, 'Stronger and more just? Recent reforms of China's intellectual property rights system and their implications' (2023) 18 Asia Pacific Journal of Innovation and Entrepreneurship 210, 210.

The US cannot be trusted to govern state-sponsored semiconductor trade secrets theft cases unilaterally. No US-China state-sponsored semiconductor trade secrets theft disputes exist at a WTO level. Nevertheless, a dispute that indicated what might occur in such a scenario began with the US's March 2018 complaint to the WTO concerning China's allegedly discriminatory IP licensing regulations.[89] However, the dispute was not resolved, with the Panel being suspended at the request of the US in 2021.[90] Hence, potential ramifications for international IP norms and US-China trade relations remain, as exemplified by China's February 2025 complaint brought to the WTO regarding US tariffs on Chinese goods.[91] Nonetheless, despite the US arguing that China's behaviour violates the national treatment principle under Article 3 and contravenes rights conferred by patents per Article 28, they might have included Articles 7 and 41 in their complaint.[92] Two things can be inferred from the US's handling of this dispute. Firstly, the US lacks confidence in the WTO system. Secondly, the US is taking a selective approach to exercising the DSB. These views are supported by the fact that several Chinese semiconductor trade secrets theft cases have been adjudicated and reached judgments in US courts.[93] One such example is the Chinese semiconductor company Fujian Jinhua (Jinhua) being found not guilty of charges related to the semiconductor trade secrets theft of the American company Micron in 2024 due to a lack

[89] WTO, *China — Intellectual Property Rights II*, Request for consultations by the United States (23 March 2018) WT/DS542/1.
[90] WTO, *China — Intellectual Property Rights II*, Lapse of authority for the establishment of the Panel - Note by the Secretariat (11 June 2021) WT/DS542/15.
[91] WTO, *United States — Additional Tariff Measures on Goods from China*, Request for Consultations by China (5 February 2025) WT/DS633/1.
[92] *China — Intellectual Property Rights II* (n 89).
[93] Center for Strategic and International Studies, 'A Survey of Chinese Espionage in the United States Since 2000' (*Center for Strategic and International Studies*, March 2023) <https://www.csis.org/programs/strategic-technologies-program/survey-chinese-espionage-united-states-2000> accessed 9 March 2025.

of evidence.[94] However, soon after the 2018 indictment,[95] the US Department of Commerce added Jinhua to a list of entities with restricted access to US exports amid President Trump's trade war with China.[96] Therefore, while Jinhua welcomed the court ruling on its website,[97] Mi[98] argues it is important that the US is not in a position where it can unilaterally subdue Chinese semiconductor companies based on its laws and interests.[99] Despite *China Daily* being a newspaper owned by the Central Propaganda Department of the Chinese government, and thus potentially having a narrow interpretation of the ruling in this case, Mi's sentiment of not politicising legal procedure holds merit in this context.[100] Hence, although one might argue that the US courts appeared impartial in Jinhua's case, the difficulty of proving trade secrets theft raises questions about whether tangible evidence would have led to a politicised outcome. Regardless, the US government's indictment still indirectly hindered Chinese technological advancement, impacting the wider global economy. Consequently, it is compelling to conclude that the US cannot be trusted to deal with state-sponsored semiconductor trade secrets theft cases unilaterally.

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[94] *United States v Fujian Jinhua Integrated Circuit Co Ltd*, 3:18-cr-00465-MMC-2 (Judgment of Acquittal, ND Cal, filed Feb 28, 2024).

[95] *United States v Fujian Jinhua Integrated Circuit Co Ltd*, 3:18-cr-00465-MMC-2 (Indictment, ND Cal, filed Sept 27, 2018).

[96] United States Department of Commerce, 'Addition of Fujian Jinhua Integrated Circuit Company Ltd. to the Entity List' (*Office of the Federal Register*, 16 October 2018) <https://2017-2021.commerce.gov/news/press-releases/2018/10/addition-fujian-jinhua-integrated-circuit-company-ltd-jinhua-entity-list.html> accessed 7 February 2025.

[97] Jinhua Integrated Circuit Co, 'Statement from Fujian Jinhua Integrated Circuit Co., Ltd.' (*Jinhua Integrated Circuit Co*, 28 February 2024) <https://www.jhicc.com/news.html?info=news7> accessed 7 February 2025.

[98] (a senior researcher at the Chinese Academy of International Trade and Economic Cooperation)

[99] China Daily, 'He Said Against the Backdrop of the Market That Cannot Be Abandoned' (*China Daily*, 1 March 2024) <https://www.chinadaily.com.cn/a/202403/01/WS65e13038a31082fc043b9f38.html#:~:text=He%20said%20against%20the%20backdrop,market%20that%20cannot%20be%20abandoned> accessed 7 February 2025.

[100] Lily Chen, 'Who speaks and how? Studies of voicing in the *China Daily* following a decade of change' (2013) 6 Chinese Journal of Communication 45, 45.

However, with the current state of TRIPS and the DSB, tensions are likely too high for US-China state-sponsored semiconductor trade secrets theft disputes to be effectively settled multilaterally. This view was corroborated in 2022, with WTO members acknowledging the importance and urgency of tackling challenges and concerns related to the DSB, and continuing discussions to establish a fully operational and accessible system for all members by 2024.[101] Nevertheless, there is the question of whether any reforms to the WTO's legal framework would necessarily serve the US more in this situation, given the TRIPS Agreement's original purpose of benefitting twelve US-based chief executive officers[102].[103] The US does not necessarily believe so, having not agreed to proposed dispute settlement reforms thus far, resulting in the WTO's 2024 deadline being missed and a sustained paralysis of the AB.[104] However, the US is simultaneously using its Special 301 reports to influence Chinese trade secrets laws.[105] Zhengyu[106] posits that China's trade secrets protection primarily relies on the Anti-Unfair Competition Law, with contract, employment, and criminal laws providing only symbolic or limited safeguards.[107] The first three changes to China's trade secrets protection in the 2017 Anti-Unfair Competition Law were influenced by

[101] World Trade Organization, '12th Ministerial Conference: Outcome Document' (*World Trade Organization*, 22 June 2022) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/24.pdf&Open=True> accessed 7 February 2025.

[102] (who represented the needs and wants of the multinational corporations they manage)

[103] Susan K Sell, *Private Power, Public Law* (Oxford University Press 2003) 1-2; Christopher May, *The Global Political Economy of Intellectual Property Rights* (Routledge 2000) 90.

[104] Christopher A Casey and Cathleen D Cimino-Isaacs, 'WTO Members' Commitment to Renew the WTO Dispute Settlement System and Its Implications for U.S. Interests' (*Congressional Research Service*, 17 July 2024) 1 <https://crsreports.congress.gov/product/pdf/IF/IF10645#:~:text=WTO%20members%20committed%20to%20renew,trading%20system%20and%20U.S.%20interests> accessed 7 February 2025.

[105] Yang Chen, 'Development of China's Trade Secrets Law in the US' Shadow: Negative Consequences for China and Suggestions' (2022) 17 University of Pennsylvania Asian Law Review 138, 138.

[106] (Assistant Professor at Xiamen University's Intellectual Property Research Institute)

[107] Yang Zhengyu, 'Meiguo Shangye Mimi Dandu Lifa Moshi (The Research on and Insights from the Stand-Alone Trade Secret Law in the US)' (2020) 70 Minshang Fa Luncong 209, 219–21.

US criticism in its Special 301 reports or Chinese commitments made to the US.[108] Therefore, reflecting the TRIPS Agreement's original purpose, the Chinese legislative framework was altered under US pressure. As such, Section 301 appears to be the US's alternative "sword" where the WTO has none.

Through analysing China's unfair business practices, two key limitations stand out. Firstly, TRIPS establishes minimum binding standards, leading to divergent trade secrets frameworks among WTO members such as the US and China. This appears to increase the risk of cross-border semiconductor trade secrets misappropriation. Secondly, members appear to lack confidence in the WTO's ability to enforce TRIPS. This may also motivate the cross-border misappropriation of semiconductor trade secrets. Fuelled by this lack of confidence, WTO members appear to have politicised the terrain of trade secrets, simultaneously undermining the WTO itself. In other words, when the WTO's "umpiring" is deemed insufficient, members appear to resort to politicised methods. It is important to note that these limitations risk undermining TRIPS Article 7's principles that support fair competition and technological innovation. Therefore, the WTO's TRIPS Agreement and DSB are currently unfit to address enforcement challenges in US-China state-sponsored semiconductor trade secrets theft cases.

However, there is the question of whether the US is incentivised to resolve the limitations of TRIPS and the DSB. It is also important to ask whether the intent of trade secrets protection under TRIPS aligns with the US's concept of why semiconductor trade secrets require protection under Section 301. In doing so, the analysis may determine whether the US is justified in sustaining the paralysis of the AB due to the currently misguided dynamic

[108] Yang Chen, 'Development of China's Trade Secrets Law in the US' Shadow: Negative Consequences for China and Suggestions' (2022) 17 University of Pennsylvania Asian Law Review 138, 159.

between TRIPS and the DSB. Consequently, this warrants a deeper exploration of the controversial Section 301.

3. Section 301: Is the United States Fighting Fairly?

"Who is to guard the guards themselves?"[109]

– Juvenal

Section 301 allows the US to act as a "guard" of international trade. However, this chapter argues that the US wields its unilateral power outside the WTO's scope. In doing so, this chapter argues that (i) the WTO's historic inability to regulate the use of Section 301 effectively has negatively impacted the landscape of semiconductor trade secrets protection and (ii) Section 301's unilateral enforcement does not generate outcomes that legitimise the American voyage beyond multilateralism.

3.1 The WTO's Historic Failure to Curb Unilateral American Actions

By examining Section 301's evolution, its potential role in semiconductor trade secrets disputes, and its implications for the DSB, this section explores why the US possesses a platform to sustain its enduring tension between unilateralism and multilateralism.

Section 301[110] has historically enabled the US to champion unilateral trade enforcement despite its multilateral commitments. Section 301 emerged in 1974 as a response to American dissatisfaction with the General Agreement on Tariffs and Trade's (GATT) dispute resolution

[109] Juvenal, 'The Satires of Juvenal' in *The Satires of Juvenal, Persius, Sulpicia, and Lucilius* (William Gifford tr, Harper & Brothers 1881) <https://www.gutenberg.org/files/50657/50657-h/50657-h.htm#Footnote_264_264> accessed 3 March 2025, text above n 264.
[110] Trade Act of 1974, 19 USC § 2411 (1974).

system.[111] Hence, Section 301 predates the WTO, which was established in 1995.[112] Chaisse[113] and Su[114] maintain that early Section 301 investigations were primarily directed at US economic rivals.[115] In 1997, Taylor[116], an American, substantiated this assertion by noting that Section 301 helped the US retain its status as a leading trading nation.[117] Thus, given that Section 301 empowered the USTR to target foreign government practices deemed "unreasonable", "discriminatory", or “burdensome” to US commerce, the notion that the mechanism was overly expansive is compelling.[118] Hence, in 1992, Sykes[119] held that Section 301 covered any trade practice the USTR wished to attack.[120] This viewpoint becomes more persuasive given the 1988 expansion of Section 301’s scope to include “special 301” actions.[121] “Special 301” mandates the USTR to identify countries with inadequate IPR protection, designating those adversely affecting the US as “priority foreign countries” worthy of investigation.[122] Therefore, it is unsurprising that, in 2008, Lowenfeld[123] highlighted that the US used Section 301 to threaten and impose sanctions on countries failing to protect American-owned IPRs.[124] However, with Lowenfeld only focusing on patents, trademarks, and copyrights as IPRs, one may infer an inadequate degree

[111] C O’Neal Taylor, ‘The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System’ (1997) 30 Vanderbilt Journal of Transnational Law 209, 214.
[112] World Trade Organization, ‘History of the multilateral trading system’ (*World Trade Organization*) <https://www.wto.org/english/thewto_e/history_e/history_e.htm#:~:text=The%20WTO's%20creation%20on%201,in%20services%20and%20intellectual%20property.> accessed 6 March 2025.
[113] (Professor of Law at the City University of Hong Kong)
[114] (Research Assistant Professor of Law at the University of Macau)
[115] Julien Chaisse and Xueji Su, ‘Normative Realignment in Domestic Trade Barriers Procedures: Driving Unilateralism in the EU, US, and China’ [2025] World Trade Review 1, 4.
[116] (Professor at the South Texas College of Law)
[117] Taylor (n 111) 222.
[118] Trade Act of 1974, 19 USC § 2411(b) (1974).
[119] (Professor of Law at Stanford University)
[120] Alan O Sykes, ‘Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301’ (1992) 23 Law and Policy in International Business 263, 281.
[121] Omnibus Trade and Competitiveness Act of 1988, 9 USC § 2242(a)(1)(A)(c) (1988).
[122] A Lynne Puckett and William L Reynolds, ‘Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?’ (1996) 90 The American Journal of International Law 675, 679.
[123] (late Emeritus Professor of International Law at New York University)
[124] Andreas F Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press 2008) 109.

of attention given to trade secrets protection at the time. Regardless, in 1996, Silverman asserted that Section 301 starkly contrasted with multilateral agreements such as the WTO and GATT, which aim to maximise general international welfare.[125] However, with Silverman being a JD candidate at the University of Pennsylvania when his work was published, his assertion, while compelling, warrants a deeper exploration. The European Communities shared the view that Section 301 operated outside the scope of the WTO's multilateral framework. Hence, in 1998, they challenged Section 301 under Article 23 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), claiming that it allowed the US to take unilateral trade measures without exhausting WTO dispute settlement procedures.[126] The Panel in this dispute ruled that Section 301 was consistent with WTO obligations, but only if the US adhered to WTO dispute settlement procedures and avoided unilateral actions,[127] given their perspective that DSU Article 23 must be assessed based on its impact on both WTO members and the marketplace.[128] However, despite the *US — Section 301 Trade Act* Panel understanding that unilateral actions can distort trade by influencing economic operators to alter their commercial behaviour, its ruling is unconvincing.[129] The Panel in the preceding *US – Shrimp* dispute affirmed the WTO Agreement's prioritisation of multilateralism when resolving trade issues, with DSU Article 23.1 explicitly rejecting unilateral actions as a substitute for the WTO's dispute settlement

[125] Jared R Silverman, 'Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO (Symposium on Current Issues in the World Trade Organization)' (1996) 17 University of Pennsylvania Journal of International Law 233, 235.
[126] Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) 1869 UNTS 401 (DSU), art 23; WTO, *United States – Sections 301–310 of the Trade Act of 1974*, Panel Report (22 December 1999) WT/DS152/R.
[127] ibid para 8.1.
[128] Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law* (3rd edn, Hart Publishing 2018) 211.
[129] ibid.

procedures.[130] Lester[131], Mercurio[132], and Davies[133] corroborate this view as they note that DSU Article 23 was designed to limit the use of unilateral trade measures.[134] Thus, by allowing the US to retain Section 301, the *US — Section 301 Trade Act* Panel effectively condoned a tool that prima facie violates core WTO principles. Hence, the tension between principle and practice would underpin the perceived success of the Panel's ruling in this dispute. This raises the question: has this ruling comprehensively curbed the US's prohibited unilateral actions under Section 301?

Semiconductor trade secrets have likely become a focal point of Section 301 investigations. While Chaisse and Su contend that Section 301 has evolved from a unilateral tool for economic retaliation into a procedural mechanism linking private complaints to dispute resolution, this narrow interpretation overlooks the resurgence of investigations during President Trump's first term.[135] Their perspective is further weakened by their acknowledgement of a rise in self-initiated Section 301 investigations since 2017.[136] This trend is exemplified by the USTR's December 2024 initiation of an investigation into China's semiconductor industry.[137] Following the initiation, in response to the Section 301 Committee, the SIA's Vice President of Global Policy, Mary Thornton, alleged that China employs forced technology transfers, trade secrets theft, and weak enforcement to boost its

[130] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report (15 May 1998) WT/DS58/R [7.43].
[131] (Legal Affairs Officer for the Appellate Body of the WTO during the *US — Section 301* dispute)
[132] (the Simon FS Li Professor of Law at the Chinese University of Hong Kong)
[133] (Associate Professor of Law at Swansea University)
[134] Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law* (3rd edn, Hart Publishing 2018) 210.
[135] Julien Chaisse and Xueji Su, 'Normative Realignment in Domestic Trade Barriers Procedures: Driving Unilateralism in the EU, US, and China' [2025] World Trade Review 1, 4, 8.
[136] ibid 8.
[137] Office of the United States Trade Representative, 'Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Practices Related to Targeting of the Semiconductor Industry for Dominance' (*Office of the Federal Register*, vol 89, no 249, 30 December 2024) <https://www.federalregister.gov/documents/2024/12/30/2024-31306/initiation-of-section-301-investigation-hearing-and-request-for-public-comments-chinas-acts-policies> accessed 7 March 2025.

semiconductor capabilities.[138] This suggests that semiconductor trade secrets are now a key focus of Section 301 investigations, reflecting their continued use as a unilateral tool to scrutinise perceived unfair practices in strategic industries. Notably, Lowenfeld's omission of trade secrets as an IPR now appears ironic, given their centrality in the SIA's claims.

Thus, semiconductor trade secrets have also likely become a focal point of Section 301 actions. In its December 2024 initiation, the USTR not only committed to assessing the actionability of China's practices under Section 301 but also to determining appropriate responses.[139] This appears to build on the proposed Section 301 tariffs on Chinese semiconductors in 2024, during the Biden-Harris administration.[140] Despite the SIA advocating for multilateral solutions, they also emphasised their deference to the federal USTR, underscoring the potentially politicised nature of these responses.[141] Moreover, President Trump's March 2025 decision to raise tariffs on Chinese imports to 20 per cent early into his second presidential term signals a potential willingness to act on Section 301 findings.[142] The US's use of Special 301 Reports to pressure China into strengthening trade

[138] Letter from the SIA's Vice President of Global Policy, Mary Thornton, to the Co-Chairs of the Section 301 Committee of the Office of the United States Trade Representative, Philip Butler and Megan Grimball (5 February 2025) <https://www.semiconductors.org/wp-content/uploads/2025/02/USTR-2024-0024-00109674-CAT-5016-Public-Document.pdf> accessed 8 March 2025, 1, 16.
[139] Office of the United States Trade Representative, 'Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Practices Related to Targeting of the Semiconductor Industry for Dominance' (*Office of the Federal Register*, vol 89, no 249, 30 December 2024) <https://www.federalregister.gov/documents/2024/12/30/2024-31306/initiation-of-section-301-investigation-hearing-and-request-for-public-comments-chinas-acts-policies> accessed 7 March 2025.
[140] Office of the United States Trade Representative, 'Four-Year Review of Actions Taken in the Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation' (*Office of the United States Trade Representative*, May 2024) <https://ustr.gov/sites/default/files/USTR%20Report%20Four%20Year%20Review%20of%20China%20Tech%20Transfer%20Section%20301.pdf> accessed 12 April 2025, 85-86.
[141] Thornton (n 138) 18; United States Trade Representative, 'Mission of the USTR' (*The Office of the United States Trade Representative*) <https://ustr.gov/about-us/about-ustr> accessed 9 March 2025.
[142] Natalie Sherman, 'Trump team hits pause on tariffs - but still sees them as vital tool' (*BBC News*, 7 March 2025) <https://www.bbc.co.uk/news/articles/c4gmjmymg0no> accessed 9 March 2025.

secrets protection in the 2017 AUCL supports this view.[143] Additionally, the US's lack of confidence in the WTO system is evident in its 2018 decision to initiate a trade war with China while its ongoing WTO dispute regarding China's IP licensing regulations was unresolved. [144] These decisions underscore the US's reluctance to rely on multilateral dispute resolution in highly politicised scenarios. Consequently, Section 301 remains a critical unilateral tool for the US in proactively addressing the protection of trade secrets and perceived unfair practices in strategic sectors like semiconductors.

Ergo, the WTO Panel's ruling in *US — Section 301 Trade Act* merely provided a veneer of compliance, legitimising ongoing American actions of unilateralism. The potential use of Section 301 to address China's alleged semiconductor trade secrets misappropriation further underscores this tension. While the US argues that such actions are necessary to address anticompetitive practices, historical experience suggests that these measures undermine the DSB and risk escalating trade conflicts.[145] This begs the crucial question: do Section 301's ends justify its means?

3.2 Section 301's Ends Do Not Justify Its Means

Access to Section 301 means the US is not necessarily incentivised to resolve the limitations of TRIPS and the DSB. This is because (i) Section 301 allows the US to bypass these

[143] Yang Chen, 'Development of China's Trade Secrets Law in the US' Shadow: Negative Consequences for China and Suggestions' (2022) 17 University of Pennsylvania Asian Law Review 138, 159.
[144] Chi Hung Kwan, 'The China–US Trade War: Deep-Rooted Causes, Shifting Focus and Uncertain Prospects' (2020) 15(1) Asian Economic Policy Review 55, 61.
[145] Office of the United States Trade Representative, 'Four-Year Review of Actions Taken in the Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation' (*Office of the United States Trade Representative*, May 2024) <https://ustr.gov/sites/default/files/USTR%20Report%20Four%20Year%20Review%20of%20China%20Tech%20Transfer%20Section%20301.pdf> accessed 12 April 2025, 85-86.

limitations by granting strategic influence in the semiconductor industry, and (ii) the US believes China, its key rival in this industry, is also acting unilaterally.

The nature of Section 301 raises concerns as to whether it is used to achieve fair and reciprocal trade relationships. Despite TRIPS's original purpose of benefitting American multinational corporations,[146] in 2022, Solovy and Raju[147] noted a "clear link" between trade secrets protection under TRIPS and the "fair and ethical treatment" of those who developed trade secrets.[148] Thus, contemporary interpretation appears to at least somewhat align with the Panel in *Australia – Tobacco Plain Packaging*, who, in 2018, affirmed the centrality of TRIPS Article 7's objective[149] of promoting "technological innovation" and ensuring a "mutual advantage" for stakeholders.[150] This reinforces the SIA's perception of trade secrets protection under TRIPS, which is to ensure fair competition and innovation, resulting in the global advancement of the semiconductor industry.[151] In contrast, Bliss highlights that the fundamental aim of Section 301 is to grant presidential discretion in trade disputes.[152] This view is persuasive given Bliss's background as a lead US negotiator in the WTO and an Assistant US Trade Representative.[153] Therefore, Section 301's fundamental aim may be

[146] Susan K Sell, *Private Power, Public Law* (Oxford University Press 2003) 1-2; Christopher May, *The Global Political Economy of Intellectual Property Rights* (Routledge 2000) 90.
[147] (respectively, Partner and Senior Associate in Global Arbitration, Trade and Advocacy at Sidley Austin, LLP)
[148] Eric M Solovy and Deepak Raju, 'Compulsory Licensing of Trade Secrets: Illegality Under International and Domestic Laws' (2022) 55(2) The International Lawyer 221, 226.
[149] WTO, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging Products*, Panel Report (28 June 2018) WT/DS435/R; WT/DS441/R; WT/DS458/R; WT/DS467/R [7.2402]-[7.2403].
[150] TRIPS Agreement art 7.
[151] Semiconductor Industry Association, 'Semiconductors & The World Trade Organization: How Global Trade Rules Have Spurred Semiconductor Growth and Innovation' (*Semiconductor Industry Association*, November 2020) <https://www.semiconductors.org/wp-content/uploads/2020/11/The-WTO-and-the-Semiconductor-Industry-Nov-2020_2.pdf> accessed 4 February 2025.
[152] Julia Christine Bliss, 'The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response' (1989) 20 Law and Policy in International Business 501, 504.
[153] U.S.-China Economic and Security Review Commission, 'Ms. Christine Bliss' (*U.S.-China Economic and Security Review Commission*, 22 June 2017) <https://www.uscc.gov/sites/default/files/Panel%20II_Christine%20Bliss.pdf> accessed 7 March 2025.

exemplified through the USTR's current Section 301 investigation into the Chinese semiconductor industry amid the ongoing US-China technology competition. The potential effects of the investigation present pervasive problems. Tariffs on China arising from Section 301 investigations risk negatively affecting smaller US semiconductor companies, such as Secure Components LLC, by increasing the cost of essential components.[154] Conversely, larger corporations may benefit from protection and the ability to overcome cost increases. As such, this use of Section 301 may not be interested in protecting all US semiconductor trade secrets, but those with the highest perceived monetary value, conflicting with TRIPS Article 7's principles. Thus, if Section 301 cannot be trusted to protect the trade secrets of all domestic players in the semiconductor industry, there is an insufficient reason to believe it will be used to achieve fair and reciprocal trade relationships, especially given current US-China relations. Therefore, Section 301's unilateralism risks entrenching a structure where trade secrets protection appears to serve political and corporate interests rather than TRIPS Article 7's principles that support multilateral fair competition. Hence, the intent of trade secrets protection under TRIPS likely does not align with the US's politicised concept of why trade secrets require protection under Section 301.

Despite US retorts, alleged Chinese unilateralism does not justify American unilateralism. In response to China's February 2025 WTO complaint regarding the US imposing an additional 10 per cent tariff on Chinese goods,[155] the US communicated that, ironically, China had already unilaterally determined a breach of WTO rules by imposing retaliatory tariffs on US

[154] Letter from the CEO of Secure Components, Todd Kramer, to the Section 301 Committee of the Office of the United States Trade Representative (6 January 2025) <https://comments.ustr.gov/sfc/servlet.shepherd/document/download/069SJ00000JcTNpYAN> accessed 9 March 2025.

[155] WTO, *United States — Additional Tariff Measures on Goods from China*, Request for Consultations by China (5 February 2025) WT/DS633/1 [3].

goods.[156] As such, China filed a WTO complaint but imposed tariffs before dispute resolution. Therefore, with Nakagawa[157] noting that joining the WTO requires members to constrain unilateral policies, China appears to be weaponising WTO procedures while ignoring its rules.[158] However, the context of the US historically imposing tariffs without exhausting the DSB is equally important. This is because Section 301's enabling of country-specific tariffs presents an inherent conflict with core WTO principles. DSU Article 23 prohibits unilateral actions, and GATT Article I, alongside TRIPS Article 4, prohibit discriminatory behaviour against nationals of other WTO members per the "most-favoured-nation" principle.[159] Therefore, the US accusing China of unilateralism implicitly avoids questions of its own compliance. As such, the US, by pointing to China's actions as an apparent justification, risks exacerbating the impact of their mutual unilateralism. However, it appears this risk has been actualised. In April 2025, US tariffs on Chinese goods rose to 145 per cent[160] and Chinese retaliatory tariffs on US goods rose to 125 per cent.[161] This signals that the US is willing to be aggressive in its technology race with China, even if it means acting outside the WTO framework that other members are seeking to amend. This multilateral tension risks splintering the semiconductor industry, where innovation is dependent on cross-border collaboration.[162] Therefore, China and the US risk restricting

[156] WTO, *United States — Additional Tariff Measures on Goods from China*, Communication from the United States (19 February 2025) WT/DS633/2.
[157] (Emeritus Professor of International Economic Law at The University of Tokyo)
[158] Junji Nakagawa, 'The industrial policy of China and WTO law: 'the shrinking policy space' argument as sterile fragmentation' in C L Lim and Bryan Mercurio (eds), *International Economic Law after the Global Crisis* (Cambridge University Press 2015) 188.
[159] General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, art 1; TRIPS Agreement art 4.
[160] Ana Swanson, Eshe Nelson, and Joe Rennison, 'Stocks Dive Again as Angst Rises Over Trump's Trade War' (*The New York Times*, 10 April 2025) <https://www.nytimes.com/live/2025/04/10/business/trump-tariffs-stocks> accessed 10 April 2025.
[161] Thomas Hale, Barney Jopson, and Ryan McMorrow, 'China increases additional tariffs on US imports to 125%' (*Financial Times*, 11 April 2025) <https://www.ft.com/content/706b6281-1077-40b8-ad40-e11ee0f55f92> accessed 11 April 2025.
[162] Akhil Thadani and Gregory C Allen, 'Mapping the Semiconductor Supply Chain' (*Center for Strategic and International Studies*, May 2023) <https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-

innovation and fair competition by politicising the same trade secrets protections meant to foster TRIPS Article 7's objective of "technological innovation" and "mutual advantage". As such, the ends of Section 301 do not justify its means of unilateral action.

To summarise, Section 301 allows the US to act as a "guard" of international trade without being guarded itself. This chapter has established how, with semiconductor trade secrets likely sitting at the heart of US-China disputes, the WTO's historic inability to effectively regulate the use of Section 301 risks restricting global innovation. Hence, despite the inadequacy of TRIPS and the DSB, the US is not justified in its employment of Section 301. However, the ineptitudes of TRIPS and the DSB do not help the situation. Therefore, the following chapter explores whether the established limitations of the current international legal framework governing trade secrets can be resolved.

05/230530_Thadani_MappingSemiconductor_SupplyChain.pdf?VersionId=SK1wKUNf_.qSF3kzMF.aG8dwd.fFTURH> accessed 10 April 2025.

4. The Limits of Reviving Trust in Multilateralism

"We have no eternal allies, and we have no perpetual enemies. Our interests are eternal and perpetual, and those interests it is our duty to follow."[163]

– Lord Palmerston

The first key limitation of the currently established WTO framework is TRIPS Article 1.1. Its setting of minimum binding standards on TRIPS provisions leads to divergent trade secrets frameworks between WTO members, such as the US and China. Secondly, members appear to lack confidence in the WTO's ability to enforce TRIPS. Fuelled by this lack of confidence, the US and China appear to have politicised the terrain of trade secrets, simultaneously undermining the WTO itself. Therefore, these limitations seem to increase the risk of semiconductor trade secrets misappropriation. This chapter argues that (i) a TRIPS Article 1.1 reform is improbable, and (ii) despite the necessity of restoring a fully functioning DSB, the overarching issue of politicisation makes working towards resolving the second limitation a discouraging prospect.

4.1 The Unattainable TRIPS Article 1.1 Reform

This section builds on the established issue of TRIPS Article 1.1. As such, it explores the potential for reform through (i) establishing a uniform trade secrets framework and (ii) setting a maximum ceiling on TRIPS provisions. However, it argues that each reform would be unrealistic, thus creating a platform to focus on enforcement issues.

[163] 'Lord Palmerston' in Susan Ratcliffe (ed), *Oxford Essential Quotations* (6th edn, Oxford University Press 2018) <https://www.oxfordreference.com/display/10.1093/acref/9780191866692.001.0001/q-oro-ed6-00008130?rskey=E4NsEY&result=2881> accessed 17 April 2025.

TRIPS's minimum binding standards, designed for flexibility, appear to have been exploited, undermining sufficient trade secrets protection. There are systemic biases in the structure of TRIPS that work against developing countries like China. Barbosa[164] notes that the impact of TRIPS was realised through the WTO's "single undertaking" requirement, given that in the Uruguay Round that led to the creation of TRIPS, WTO members had to accept all the agreements beyond those strictly IP-related.[165] Thus, TRIPS implicitly became an issue of trade beyond being a necessarily ideal IP policy. This view becomes compelling given Lamping's[166] argument that those who lead the global trading system control the international IP framework.[167] As such, the context of American multinational corporations influencing the structure of TRIPS is key.[168] This is underscored by Cheng's[169] position that complying with TRIPS has been disproportionately challenging for developing countries, given pressure from developed countries to strengthen their IP frameworks.[170] Hence, in 2010, Liang and Xue[171] argued that Chinese firms have struggled to "catch-up" with leading innovators globally.[172] However, Odagiri[173] notes that TRIPS Article 1.1 substantively creates undue flexibility that

[164] (late Professor of Law at Pontifical Catholic University of Rio de Janeiro)
[165] Denis Borges Barbosa, 'Minimum standards vs harmonization in the TRIPS context: the nature of obligations under TRIPS and modes of implementation at the national level in monist and dualist systems' in Carlos M Correa (ed), *Research Handbook on the Protection of Intellectual Property under WTO rules* (Edward Elgar Publishing 2010) 70; Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization 2013) 303.
[166] (Senior Research Fellow at the Max Planck Institute for Innovation and Competition)
[167] Matthias Lamping, 'Intellectual Property Harmonization in the Name of Trade' in Hanns Ullrich and others (eds), *TRIPS plus 20* (Springer 2016) 345.
[168] Susan K Sell, *Private Power, Public Law* (Oxford University Press 2003) 1-2; Christopher May, *The Global Political Economy of Intellectual Property Rights* (Routledge 2000) 90.
[169] (Professor of Law at Soochow University)
[170] Chia-Jui Cheng, *Basic Documents on International Trade Law* (4th edn, Wolters Kluwer 2012) part 6, ch iv.
[171] (respectively, Professor at and former Dean of the School of Public Policy and Management at Tsinghua University)
[172] Lan Xue and Zheng Liang, 'Relationships between IPR and Technology Catch-Up: Some Evidence from China' in Hiroyuki Odagiri and others (eds), *Intellectual Property Rights, Development, and Catch-Up: An International Comparative Study* (Oxford University Press 2010) 318.
[173] (Professor of Economics at Hitotsubashi University)

enables countries to interpret TRIPS provisions in a self-benefitting manner.[174] Accordingly, it follows that China's decision to align its trade secrets framework with TRIPS Article 39 under Section 301 pressure in 2017 and 2019 may have been disingenuous.[175] This is reflected by the apparent American dissatisfaction with China's protection of semiconductor trade secrets, given the ongoing Section 301 investigation into China's semiconductor industry, following allegations of trade secrets cybertheft.[176]

Despite the apparent exploitation of the minimum standards rule, harmonising trade secrets frameworks to create a uniform standard under TRIPS does not currently seem achievable. Chen holds that the US's impact on the development of China's trade secrets framework has resulted in an insufficient focus on both the local industry's needs and the academic development of basic theories.[177] Despite Chen being an SJD candidate at the University of Pennsylvania when his work was published, this belief is convincing given its correlation with that of Xue and Liang. This perspective also substantiates Nakagawa's presentation of the "shrinking policy space", which argues that international agreements like TRIPS can restrict a nation's ability to pursue policies tailored to its specific economic and social needs.[178] As such, Barbosa importantly notes that TRIPS Article 1.1 defends weaker nations against unilateral pressures, given that uniformity would eliminate this protection.[179]

[174] Hiroyuki Odagiri and others, 'Conclusion' in Hiroyuki Odagiri and others (eds), *Intellectual Property Rights, Development, and Catch-Up: An International Comparative Study* (Oxford University Press 2010) 429.
[175] Lydia Lundstedt, *Cross-Border Trade Secret Disputes in the European Union* (Edward Elgar Publishing 2023) 94.
[176] The Commission on the Theft of American Intellectual Property, *Update to the IP Commission Report* (2017) 1-2.
[177] Yang Chen, 'Development of China's Trade Secrets Law in the US' Shadow: Negative Consequences for China and Suggestions' (2022) 17 University of Pennsylvania Asian Law Review 138, 192.
[178] Junji Nakagawa, 'The industrial policy of China and WTO law: 'the shrinking policy space' argument as sterile fragmentation' in C L Lim and Bryan Mercurio (eds), *International Economic Law after the Global Crisis* (Cambridge University Press 2015) 188.
[179] Denis Borges Barbosa, 'Minimum standards vs harmonization in the TRIPS context: the nature of obligations under TRIPS and modes of implementation at the national level in monist and dualist systems' in Carlos M

Consequently, given Kelly's acknowledgement that developing countries often prioritise national economic development through preferential treatment for domestic entities, a uniform standard would likely not be desirable for a developing country like China.[180] Additionally, the US would likely reject standards weaker than its current domestic laws. Chen's position can be inferred to note the US's preferred unilateral approach to resolving perceived issues of divergent IP frameworks between WTO members. This is substantiated by the US's use of Section 301 to shape China's trade secrets framework in 2017 and 2019, as opposed to relying on multilateralism via the DSB. Moreover, the US-China geopolitical rivalry further amplifies the conflicting interests between the two WTO members. Additionally, the task of harmonising diverse national trade secrets laws adds another layer of difficulty, with WTO members relying on different frameworks for protection. For example, the EU relies on an already harmonised civil law model,[181] and the US on a state[182] and federal[183] common law system.[184] Therefore, TRIPS Article 7's objective of acting in the public interest would likely be irreconcilable in a scenario that seeks to harmonise trade secrets to create a uniform standard under TRIPS.

Despite the infeasibility of a uniform trade secrets framework under TRIPS, efforts towards setting a maximum ceiling on TRIPS provisions would likely prove futile. Akin to Ullrich[185],

Correa (ed), *Research Handbook on the Protection of Intellectual Property under WTO rules* (Edward Elgar Publishing 2010) 75.

[180] Elsa Kelly, ''National Treatment' and the formulation of a Code of Conduct for Transnational Corporations' in Kamal Hossain (ed), *Legal Aspects of the New International Economic Order* (Bloomsbury Publishing 2013) 152.

[181] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1.

[182] Uniform Trade Secrets Act (amended 1985), 14 ULA 437 (l990).

[183] Defend Trade Secrets Act of 2016, 18 USC §§ 1831–1839 and 18 USC § 1836 (2016).

[184] Peter S Menell and others, *Intellectual Property in the New Technological Age: 2022* (Clause 8 Publishing 2022) 33.

[185] (former Professor of Law at the University of the Bundeswehr Munich)

Lamping holds that the fickle nature of TRIPS being indecisively regulated by multilateralism, regionalism, and bilateralism instigates an unmanageable system where IPR protection is enhanced, while competition rules become increasingly impotent.[186] With Ullrich holding this position in 2005, Lamping in 2016, and TRIPS's ongoing inability to foster fair competition among WTO members, it appears this issue remains unresolved, despite gaining relevance with time. Thus, Kur[187] poses setting a maximum ceiling on TRIPS provisions to constrain the progressively unideal system.[188] However, setting an inflexible maximum ceiling also risks triggering a "shrinking policy space" for developed countries if their growth becomes stunted while waiting for the development of others. As such, Kur also realises these ceilings would only be feasible if a global consensus can be reached.[189] Yet, it does not appear likely that a country such as the US, which heavily leans on Section 301 to enhance the IP frameworks of other WTO members, would agree. Therefore, given the currently charged trade climate, setting a maximum ceiling on TRIPS provisions does not seem plausible.

Ergo, the rule of minimum standards on TRIPS provisions affords the necessary benefit of incorporating the interests of diverse IP frameworks. However, the rule retains the critical weakness of enabling the exploitation of TRIPS provisions. Nevertheless, Barbosa persuasively posits that attaining the minimum standards of TRIPS represents a harmonising

[186] Matthias Lamping, 'Intellectual Property Harmonization in the Name of Trade' in Hanns Ullrich and others (eds), *TRIPS plus 20* (Springer 2016) 345-346; Hanns Ullrich, 'Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective' in Keith E Maskus and Jerome H Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press 2005) 754.
[187] (Affiliated Research Fellow at the Max Planck Institute for Innovation and Competition)
[188] Annette Kur, 'From Minimum Standards to Maximum Rules' in Hanns Ullrich and others (eds), *TRIPS plus 20* (Springer 2016) 136-137.
[189] ibid 148.

IP regime.[190] As such, with substantive reform of TRIPS Article 1.1 appearing to be an unrealistic venture, effective resolution may rely on addressing the second established limitation: the lack of confidence in the DSB's ability to enforce the existing binding minimum standards. It is also important to note that even if these reforms were realistic prospects, they would still require effective enforcement.

4.2 The Uncertain Future of Multilateral Enforcement

This section addresses the marked lack of confidence in WTO enforcement, homing in on the DSB and its current AB paralysis. Consequently, it evaluates attempts at restoring this confidence, ultimately concluding that while a restored AB is key, political concerns cast doubt on the long-term prospect of effective multilateral enforcement.

Enforcing TRIPS's trade secrets framework through unilateralism is not a suitable alternative to the paralysed AB. Schmitz's narrow recommendation of using Section 301 actions to uphold the Phase One Agreement, which sought to protect semiconductor trade secrets, is unconvincing, given that the US appears unjustified in its employment of Section 301 to enforce IP protections.[191] The AB's paralysis would exacerbate the impact of this recommendation, as binding WTO appeals are being voided, creating a distinct lack of dispute resolution.[192] This indicates an obstinate American attitude towards the WTO, thus undermining its authority. While the US holds that this decision is in response to an undue

[190] Denis Borges Barbosa, 'Minimum standards vs harmonization in the TRIPS context: the nature of obligations under TRIPS and modes of implementation at the national level in monist and dualist systems' in Carlos M Correa (ed), *Research Handbook on the Protection of Intellectual Property under WTO rules* (Edward Elgar Publishing 2010) 104.
[191] Kassidy Schmitz, 'TRIPing on Trade Secrets: How China's Cybertheft of U.S. Trade Secrets Violated TRIPS' (2021) 36 American University International Law Review 929, 963-964.
[192] World Trade Organization, 'WTO reform – an overview' (*World Trade Organization*, 2022) <https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfwtoreform_e.htm> accessed 15 April 2025.

AB overreach at the expense of WTO members' authority, it is important to highlight that these concerns could be insincerely masking a broader strategy of dodging multilateral constraints.[193] Given the US's tendency to lean on unilateralism, this scepticism appears compelling. As such, due to the sustained paralysis of the AB, the American reliance on Section 301 could further undermine the WTO, given that any adverse rulings regarding its use can be appealed, knowing that they would not be resolved. Hence, relying on unilateral tools is not only unsustainable but would likely also actively contribute to the lack of confidence in the DSB.

Despite the limits of unilateralism, current DSB-provided alternatives to the paralysed AB do not seem sustainable. Lester, Mercurio, and Davies acknowledge the rare use of the DSU's provisions for initiating Article 5 "good offices, conciliation, and mediation"[194] and Article 25 neutral arbitration.[195] This has been substantiated, given that no DSU Article 5 provision has been invoked since the publication of Lester, Mercurio, and Davies's work in 2018.[196] Additionally, only *Turkey — Pharmaceutical Products (EU)* and *Colombia — Frozen Fries* have been resolved using DSU Article 25 arbitrations since 2018, despite the sustained paralysis of the AB.[197] Furthermore, this rare use has been in spite of a subset of WTO members creating the plurilateral Multi-Party Interim Appeal Arbitration Arrangement

[193] Robert E Lighthizer, 'Report on the Appellate Body of the World Trade Organization' (*Office of the United States Trade Representative*, 11 February 2020) <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf> accessed 15 April 2025, 1.
[194] DSU art 5.
[195] DSU art 25; Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law* (3rd edn, Hart Publishing 2018) 169.
[196] World Trade Organization, 'WTO Analytical Index: DSU – Article 5 (Practice)' (*World Trade Organization*, June 2024) <https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art5_oth.pdf> accessed 16 April 2025.
[197] WTO, *Turkey – Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products,* Arbitration under article 25 of the DSU - Award of the Arbitrators (25 July 2022) WT/DS583/ARB25; WTO, *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, Arbitration under article 25 of the DSU - Award of the Arbitrators (21 December 2022) WT/DS591/ARB25.

(MPIA) in 2020, serving as an alternative to the DSB, pursuant to DSU Article 25.[198] Hence, the rare use of Article 25 arbitrations reflects Pauwelyn's[199] perception of the MPIA as an interim solution.[200] This becomes more convincing given that only 27 WTO members, including China but excluding the US, are members of the MPIA.[201] Therefore, the MPIA does not appear to be a universal solution to the sustained paralysis of the AB. Consequently, the alternative solutions provided through DSU Articles 5 and 25 appear unsatisfactory in restoring confidence in the DSB.

Notwithstanding the noticeable necessity of a functional AB, this restoration is not easily attainable nor necessarily sufficient in building long-term confidence in the DSB. Firstly, American concerns regarding the AB would likely have to be addressed, regardless of their validity. Secondly, given (i) the US's history of unilateralism, (ii) the influence of American multinational corporations in shaping TRIPS, and (iii) the US's sustained paralysis of the AB, it is reasonable to question whether the US will respect a revived AB if its rulings oppose domestic interests. As such, a restored AB is unlikely to curb the US's prohibited Section 301 actions, especially in progressively strategic sectors such as semiconductors. Therefore, a functioning AB would still be at risk of being undermined by the US. This is a key consideration because a restored AB may not inherently solve the current issues surrounding American influence on China's trade secrets framework. As such, Lamping's posing of an expansion of DSB competence beyond trade-related aspects of IP is tempting.[202] With the

[198] Joost Pauwelyn, 'The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?' (2023) 22 World Trade Review 693, 694.
[199] (Professor of Law at the Graduate Institute of International and Development Studies)
[200] Pauwelyn (n 198) 701.
[201] WTO Plurilaterals, 'Multi-Party Interim Appeal Arbitration Arrangement (MPIA)' (*Geneva Trade Platform*, 2020) <https://wtoplurilaterals.info/plural_initiative/the-mpia/> accessed 16 April 2025.
[202] Matthias Lamping, 'Intellectual Property Harmonization in the Name of Trade' in Hanns Ullrich and others (eds), *TRIPS plus 20* (Springer 2016) 343.

system potentially being opened to preliminary consultations from national courts and governments, this could lead to less confrontational engagement between WTO members.[203] However, Lamping's work was published in 2016, before the AB paralysis. Realistically, it is unlikely that the US would go a step beyond restoring the AB by accepting an expansion of the DSB's scope, given that perceived overreach is allegedly why they paralysed the AB to begin with. Nevertheless, restoring the AB seems to be critical in rebuilding confidence and enabling the enforcement of the existing TRIPS standards. However, the long-term success of a restored AB seems to be contingent on managing political interests. Ergo, the long-term confidence of WTO members in a fully functioning DSB appears uncertain.

The weaponisation of TRIPS and the DSB in innovation competition remains a challenge for the WTO's authority. While the AB's restoration is necessary, it appears to be incapable of (i) guaranteeing substantive multilateral enforcement and (ii) pacifying the US and China's increasing tensions. It is pertinent to highlight that a WTO in which retaliation carries more significance than principles risks disadvantaging all parties. Therefore, with the prevalence of seemingly "eternal and perpetual" interests politicising legal frameworks, the future of effective semiconductor trade secrets protection under TRIPS and the DSB does not seem favourable.

[203] ibid.

5. Conclusion

Following President Trump's return to the White House in January 2025, the US-China rivalry has intensified. Amid an escalating trade war, four key events occurred within three weeks from March to April 2025. First, the United States House Select Committee on Strategic Competition between the United States and the Chinese Communist Party alleged Chinese artificial intelligence company, DeepSeek, breached American data on behalf of the Chinese Communist Party using Nvidia semiconductors, thus serving as a valuable "open-source intelligence asset".[204] Second, Nvidia forecasted that the new requirement to obtain a special license to sell one of their semiconductor models to China has led to a US$5.5 billion decrease in expected earnings for the first quarter of 2025.[205] Third, President Trump signed an executive order establishing the United States Investment Accelerator.[206] This entity has been tasked with speedily increasing investment volume in the American semiconductor industry, pursuant to the CHIPS Act.[207] Fourth, the Chinese Ministry of Commerce threatened to retaliate against countries cooperating with the US in ways that compromise Chinese interests, following reports of President Trump using tariff negotiations to pressure countries into limiting dealings with China.[208] This volatility appears to underpin the contested and

[204] United States House Select Committee on Strategic Competition between the United States and the Chinese Communist Party, 'DeepSeek Unmasked: Exposing the CCP's Latest Tool For Spying, Stealing, and Subverting U.S. Export Control Restrictions' (*United States Congress*, 16 April 2025) <https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/DeepSeek%20Final.pdf> accessed 22 April 2025, 1.
[205] Michael Acton, Demetri Sevastopulo, and Tim Bradshaw, 'Nvidia to take $5.5bn hit as US clamps down on exports of AI chips to China' (*Financial Times*, 15 April 2025) <https://www.ft.com/content/66e6abfa-2b79-407c-bda6-d04d19b3b814> accessed 21 April 2025.
[206] Reuters, 'Trump signs order to set up new entity to take over Biden's Chips Act program' (*The Guardian*, 1 April 2025) <https://www.theguardian.com/us-news/2025/mar/31/trump-order-chips-act> accessed 21 April 2025.
[207] ibid.
[208] Evelyn Cheng, 'China vows retaliation against countries that follow U.S. calls to isolate Beijing' (*CNBC*, 20 April 2025) <https://www.cnbc.com/2025/04/21/china-to-retaliate-against-nations-that-work-with-us-to-isolate-beijing.html> accessed 21 April 2025.

uncertain future of semiconductor trade secrets protection, due to the tension between inept multilateralism and self-serving unilateralism in US-China relations. Thus, it is important to synthesise the core findings of this article.

There are two core questions this article aimed to answer. The first was whether TRIPS and the DSB sufficiently protect semiconductor trade secrets. The research has found that the current WTO framework appears inadequate in protecting semiconductor trade secrets in US-China relations. Chapter 2 identified two key limitations. The first limitation was that the minimum standards set by TRIPS Article 1.1 are susceptible to exploitation. The second limitation was that there appears to be a lack of confidence in the WTO's ability to enforce the protection of semiconductor trade secrets, partly due to the lack of a fully functioning DSB, thus leading to a politicised terrain of trade secrets. Therefore, based on the analysis, it may be concluded that TRIPS and the DSB are currently perceived as falling short of effective protection and dispute resolution in the context of semiconductor trade secrets between the US and China. This conclusion is especially emphasised by the distinct lack of semiconductor trade secrets disputes brought to the WTO, thus validating the belief that TRIPS and the DSB do not sufficiently protect semiconductor trade secrets. The second core question this article sought to answer was whether unilateral actions through tools such as the US's Section 301 are a justifiable response to multilateral inadequacies in protecting semiconductor trade secrets. Chapter 3 found that the American unilateral tool was inconsistent with multilateral principles such as DSU Article 23, and ultimately unjustified due to its overly expansive nature, thus serving opportune national interests. Ergo, it concluded that, for WTO members, the employment of unilateral tools such as Section 301 is not a justifiable response to perceived ineffectual multilateralism. Consequently, it can be deduced that the failure of multilateralism does not legitimise the somewhat problematic

nature of unilateralism. Hence, it is imperative to note that the actions from both China and the US may serve as masked political interests as opposed to genuine legal justifications. Therefore, when linking the findings of Chapter 2 and Chapter 3, China and the US may be perceived as exacerbating a cycle of global distrust and undermining the WTO's framework of trade secrets protection, thus impeding the protection of semiconductor trade secrets.

This unified system of ineffective multilateralism, illegitimate unilateralism, and conflicting interests between the US and China results in a "contested future" regarding the protection of semiconductor trade secrets in US-China relations. Chapter 4 explained why this deadlock is unlikely to be resolved in both the short and long term. First, its analysis of the infeasibility of a substantive TRIPS Article 1.1 reform was underpinned by the seemingly insurmountable obstacle posed by conflicting domestic political interests among WTO members. Second, Chapter 4 highlighted the US's lack of trust in multilateral enforcement, particularly through its exploration of the American stance of obstructing the restoration of a fully functional DSB by paralysing the AB. This implicit revelation of domestic US interests hinders the ability of WTO members to work towards establishing a reliable multilateral system, for which the deadline has already passed. Thus, Chapter 4 implies that the US's stance on paralysing the AB should raise concerns from other WTO members as to whether a fully functioning DSB can be practically impartial. Consequently, Chapter 4 also notes that the long-term risks associated with the US compromising WTO principles and TRIPS provisions to uphold its strategic interests should not be underestimated. Therefore, for the future of semiconductor trade secrets protection in US-China relations to avoid being "contested", the currently unrealistic scenario of circumventing domestic interests appears necessary.

Continuing in this vein, it is key to reflect on the broader significance and implications of these research findings. It appears that the WTO has not yet adapted to the novel and contemporary issues that strategic technology industries, such as semiconductors, pose. For example, in the wake of the technological rivalry between the US and China, multilateralism itself appears to have been weaponised to exert strategic influence in US-China relations, accordingly disrupting effective governance. As such, this lack of adaptation has highlighted how valuable intangible assets, such as semiconductor trade secrets, can become vulnerable in the face of cross-border political conflict. Therefore, this article has highlighted the difficulty of maintaining a medium between national interests and multilateral agreements, such as TRIPS. Ergo, due to seemingly "eternal and perpetual" domestic interests, Hobbes's concept of a covenant "without the sword" appears to have been actualised in the case of TRIPS, thus highlighting the broader risk of multilateral agreements being undermined.

Building on the implications of these research findings, this article makes four key contributions towards understanding the escalating strain between multilateralism and unilateralism in governing semiconductor trade secrets protection in US-China relations. First, by situating the specific focus on semiconductor trade secrets within the intensifying US-China rivalry, this article provided a timely and focused analysis on the international governance of an increasingly vital IPR that tends to be overlooked. As such, it uniquely highlighted how disputes and policies regarding semiconductors are becoming progressively key in moulding the future of effective international trade secrets protection. Second, with Chapter 2 homing in on TRIPS and the DSB, the article provided a critical evaluation of the multilateral WTO's ability to address alleged state-sponsored semiconductor trade secrets misappropriation. Third, with Chapter 3 critically assessing the US's unilateral alternative of Section 301, this article imparted a historically informed view necessary for understanding its

current employment and its potential implications in the terrain of semiconductor trade secrets. Fourth, Chapter 4 and the earlier part of this conclusion synthesised the findings from Chapters 2 and 3 to explain why the unresolved conflict between multilateralism and unilateralism will guide the "contested future" of trade secrets protection in the context of the US and China. These syntheses underscore how the failures of multilateralism and unilateralism in mitigating the strategic influence of domestic interests and rivalries underpin the current deadlock. As such, this article has achieved its intended novel perspective by addressing the escalating strain between multilateralism and unilateralism in governing semiconductor trade secrets protection in US-China relations. However, it is important to note that in generating this novel perspective, the balance of research fell slightly more on the side of Western and international-level sources, as opposed to those from mainland China. Therefore, to raise awareness of the contested legal landscape governing the semiconductor industry, it is important to establish recommendations for further research, using this article as a quasi-foundational piece.

Six avenues should be considered for further research. First, building on the identified limitation of this research, there seems to be value in gaining further contributions from mainland China on the topics of international semiconductor trade secrets governance, encapsulating perspectives on the effectiveness of TRIPS, responses to unilateralism, and the nuanced frameworks of domestic trade secrets enforcement. Given that the West does not necessarily have easy access to, or comprehensive knowledge of, the nature of China's academic sphere, gaining more diverse Chinese insights would likely extend the already substantial findings of this article. Second, given the currently politicised nature of the DSB, it would be worth conducting further research into the potential for compromises between WTO members that would allow the AB to function, even on a strict ad hoc basis, while

resolutions regarding a fully revamped DSB model continue to be discussed. Third, while this article chose not to focus on in-depth economic analysis, further research that seeks to quantify the impact of semiconductor trade secrets misappropriation and policy interventions may be useful in guiding the future of semiconductor trade secrets protection. Fourth, engaging in a deeper comparative analysis between the trade secrets frameworks of key jurisdictions such as the EU, the US, and China could indicate methods to potentially mitigate the challenges presented by the minimum standards approach of TRIPS. Fifth, evaluating the feasibility of alternative multilateral IP governance mechanisms appears advantageous given the strategic importance of industries such as semiconductors and the perceived limitations of the analogue-era TRIPS Agreement in the globalised technology age. This could be in the form of a universal, non-WTO dispute resolution mechanism specifically made for technology-related disputes, or more foundationally, exploring the potential of establishing a multilateral IP system distinct from international trade law, affording complex IP issues more dedicated focus and, hopefully, more effective governance. Finally, this article posed multilateralism against unilateralism. However, further research might undergo a theoretical exploration into whether these principles can be reconciled to originate a satisfactory dispute settlement mechanism. Overall, given Chapter 4's findings, it is likely that successful future research would seek to unveil pragmatic pathways to relaxing the tensions between key WTO members such as the US and China, as opposed to advocating for aspirational, yet overwhelmingly impractical, reforms.

Therefore, the recent events of (i) the ongoing federal US investigation into DeepSeek, (ii) Nvidia being adversely impacted by US policy, (iii) the ambitious implementation of the CHIPS Act, and (iv) hostile tariff negotiations involving the US and China, appear to crystallise the findings of this article. To conclude, the contest between multilateralism and

unilateralism constructs a precarious foundation for semiconductor trade secrets protection in US-China relations, posing undeniable risks to global innovation, equitable economic prosperity, and international relations.

Bibliography

Books

– – 'Appendix 2: Paris Convention for the Protection of Industrial Property' in Tilmann W and Plassman C (eds), *Unified Patent Protection in Europe: A Commentary* (Oxford University Press 2018)

– – 'Lord Palmerston' in Ratcliffe S (ed), *Oxford Essential Quotations* (6th edn, Oxford University Press 2018) <https://www.oxfordreference.com/display/10.1093/acref/9780191866692.001.0001/q-oro-ed6-00008130?rskey=E4NsEY&result=2881> accessed 17 April 2025

Barbosa D B, 'Minimum standards vs harmonization in the TRIPS context: the nature of obligations under TRIPS and modes of implementation at the national level in monist and dualist systems' in Correa C M (ed), *Research Handbook on the Protection of Intellectual Property under WTO rules* (Edward Elgar Publishing 2010)

Boschiero N, *US Trade Policy, China and the World Trade Organisation* (1st edn, Routledge 2023)

Brown A and others, Contemporary Intellectual Property (6th edn, Oxford University Press 2023)

Cheng C-J, *Basic Documents on International Trade Law* (4th edn, Wolters Kluwer 2012)

Cory N, ‘Trade in Knowledge and Cross-Border Data Flows: A Look at Emerging Digital Regulatory Issues’ in Taubman A and Watal J (eds), *Trade in Knowledge* (Cambridge University Press 2022)

Cottier T, ‘Rules Relating to Intellectual Property’ *Edward Elgar Encyclopedia of International Economic Law* (2017)

de Wijk R, Thompson J, and Chavannes E, *Adjusting the Multilateral System to Safeguard Dutch Interests* (Hague Centre for Strategic Studies 2020) <https://www.jstor.org/stable/resrep26672> accessed 23 April 2025

Dreyfuss R C and Strandburg K J (eds), *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* (Edward Elgar Publishing 2011)

Garner-Knapp L, Western S D, and Lovat H, ‘The US, the WTO, and the Appellate Body: From Great Expectations to Hard Times’ in Bäumler J and others (eds), *European Yearbook of International Economic Law 2021* (Springer 2022)

Geiger C, ‘Towards a Balanced International Legal Framework for Criminal Enforcement of Intellectual Property Rights’ in Hanns Ullrich and others (eds), *TRIPS plus 20* (Springer 2016)

Hobbes T, *Leviathan* (George Routledge and Sons 1885)

Huang K-S, ‘Case Study 6.2 - Micron versus UMC and Fujian Jinhua’ in Erie M S (ed), *A Casebook on Chinese Outbound Investment* (Cambridge University Press 2025)

Jaeger T, ‘Merging ACTA into TRIPS: Does TRIPS-Based IP Enforcement Need Reform?’ in Ullrich H and others (eds), *TRIPS plus 20* (Springer 2016)

Juvenal, ‘The Satires of Juvenal’ in *The Satires of Juvenal, Persius, Sulpicia, and Lucilius* (William Gifford tr, Harper & Brothers 1881) <https://www.gutenberg.org/files/50657/50657-h/50657-h.htm#Footnote_264_264> accessed 3 March 2025

Kelly E, ‘‘National Treatment’ and the formulation of a Code of Conduct for Transnational Corporations’ in Hossain K (ed), *Legal Aspects of the New International Economic Order* (Bloomsbury Publishing 2013)

Kim J and others, *Guide to Protecting and Litigating Trade Secrets* (2nd edn, American Bar Association 2021)

Kur A, ‘From Minimum Standards to Maximum Rules’ in Ullrich H and others (eds), *TRIPS plus 20* (Springer 2016)

Lamping M, ‘Intellectual Property Harmonization in the Name of Trade’ in Ullrich H and others (eds), *TRIPS plus 20* (Springer 2016)

Lester S, Mercurio B, and Davies A, *World Trade Law* (3rd edn, Hart Publishing 2018)

Lowenfeld A F, *International Economic Law* (2nd edn, Oxford University Press 2008)

Lundstedt L, *Cross-Border Trade Secret Disputes in the European Union* (Edward Elgar Publishing 2023)

May C, *The Global Political Economy of Intellectual Property Rights* (Routledge 2000)

Menell P S and others, *Intellectual Property in the New Technological Age: 2022* (Clause 8 Publishing 2022)

Nakagawa J, ‘The industrial policy of China and WTO law: 'the shrinking policy space' argument as sterile fragmentation’ in Lim C L and Mercurio B (eds), *International Economic Law after the Global Crisis* (Cambridge University Press 2015)

Odagiri H and others, ‘Conclusion’ in Odagiri H and others (eds), *Intellectual Property Rights, Development, and Catch-Up: An International Comparative Study* (Oxford University Press 2010)

Ricketson R and Ginsburg J C, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (3rd edn, Oxford University Press 2022)

Saganek P, *Unilateral Acts of States in Public International Law*, vol 22 (Brill Nijhoff 2016)

Schaffer R, Earle B, and Agusti F, *International Business Law and its Environment* (6th edn, Thomson South-Western 2005)

Schovsbo J, Minssen T, and Riis T (eds), *The Harmonization and Protection of Trade Secrets in the EU: An Appraisal of the EU Directive* (Edward Elgar Publishing 2020)

Sell S K, *Private Power, Public Law* (Oxford University Press 2003)

Surblytė G, 'Enhancing TRIPS: Trade Secrets and Reverse Engineering' in Ullrich H and others (eds), *TRIPS Plus 20* (Springer 2016)

Taubman A, 'TRIPS Encounters the Internet: An Analogue Treaty in a Digital Age, or the First Trade 2.0 Agreement?' in Burri M and Cottier T (eds), *Trade Governance in the Digital Age* (Cambridge University Press 2012)

Ullrich H, 'Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective' in Maskus K E and Reichman J H (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press 2005)

VanGrasstek C, *The History and Future of the World Trade Organization* (World Trade Organization 2013)

von Lewinski S, 'The WTO/TRIPS Dispute Settlement Mechanism: Experiences and Perspectives' in Ullrich H and others (eds), *TRIPS plus 20* (Springer 2016)

Winn J K and Chiang Y-S, 'The Next Great Global Knowledge Infrastructure Land Rush Has Begun: Will the USA or China Prevail?' in Peng S, Lin C-F, and Streinz T (eds), *Artificial intelligence and international economic law: disruption, regulation, and reconfiguration* (Cambridge University Press 2021)

Xue L and Liang Z, 'Relationships between IPR and Technology Catch-Up: Some Evidence from China' in Odagiri H and others (eds), *Intellectual Property Rights, Development, and Catch-Up: An International Comparative Study* (Oxford University Press 2010)

Journal Articles

Beconcini P, 'The State of Trade Secret Protection in China in Light of the US-China Trade Wars: Trade Secret Protection in China before and after the US-China Trade Agreement of January 15, 2020' (2021) 20 UIC Review of Intellectual Property Law 108

Blond S L, 'Cyber Vulnerabilities as Trade Secrets' (2024) 110 Virginia Law Review Online 52

Bixby M B and Baughn C, 'Trade Secret Theft and Protection' (2010) 12 The Atlantic Law Journal 59

Bliss J C, 'The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response' (1989) 20 Law and Policy in International Business 501

Chaisse J and Su X, 'Normative Realignment in Domestic Trade Barriers Procedures: Driving Unilateralism in the EU, US, and China' [2025] World Trade Review 1

Chen L, ‘Who speaks and how? Studies of voicing in the *China Daily* following a decade of change’ (2013) 6 Chinese Journal of Communication 45

Chen Y, ‘Development of China’s Trade Secrets Law in the US’ Shadow: Negative Consequences for China and Suggestions’ (2022) 17 University of Pennsylvania Asian Law Review 138

Donnelly E, ‘Resolving American Semiconductor Challenges through Making the ITC a Preferred Forum’ (2025) 4(1) The University of Chicago Business Law Review 227

Fajgelbaum P D and others, ‘The Return to Protectionism’ (2020) 135 The Quarterly Journal of Economics 1 <https://doi.org/10.1093/qje/qjz036> accessed 7 February 2025

Galbraith J, ‘United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process’ (2019) 113(4) The American Journal of International Law 822

Huang C, Cao C, and Coreynen W, ‘Stronger and more just? Recent reforms of China’s intellectual property rights system and their implications’ (2023) 18 Asia Pacific Journal of Innovation and Entrepreneurship 210

Kwan C H, 'The China–US Trade War: Deep-Rooted Causes, Shifting Focus and Uncertain Prospects' (2020) 15(1) Asian Economic Policy Review 55

Lee T-I, ‘Bordering Secrecy: An Empirical Study on Cross-Border Trade Secret Misappropriation in the Semiconductor Sector’ (2024) 39(2) Connecticut Journal of International Law 166

Li L and others, ‘Analysis of the structure and robustness of the global semiconductor trade network’ (2025) 20(1) PLOS One 1 <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0313162> accessed 17 April 2025

Liu K-C, ‘The Problems with Trade Secret Protection/Overprotection in Asia’ (2022) 53 International Review of Intellectual Property and Competition Law 94

Ma H and Meng L, ‘Heterogeneous impacts of the Section 301 tariffs: Evidence from the revision of product lists’ (2023) 56(1) Canadian Journal of Economics 164

Nandwana S, ‘Evolving Paradigms of Trade Secret Protection: A Comparative Study of the US, EU, and India’ (2025) 2(2) Trends in Intellectual Property Research 17 <https://iprtrends.com/TIPR/article/view/32> accessed 19 April 2025

Nanrui C, ‘Choice of law in trade secret cases: a Chinese perspective’ (2025) 20(3) Journal of Intellectual Property Law & Practice 147 <https://academic.oup.com/jiplp/article/20/3/147/7916752?login=true> accessed 20 April 2025

Pauwelyn J, ‘The WTO’s Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What’s New?’ (2023) 22 World Trade Review 693

Prabheesh K P and Vidya C T, ‘Interconnected Horizons: ASEAN’s Journey in the Global Semiconductor Trade Network Amidst the COVID-19 Pandemic and Supply Chain Realignments’ [2025] Emerging Markets Finance and Trade 1 <https://www.tandfonline.com/doi/full/10.1080/1540496X.2024.2446387> accessed 20 April 2025

Puckett A L and Reynolds W L, ‘Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?’ (1996) 90 The American Journal of International Law 675

Rea D G and others, ‘The Semiconductor Industry—Model for Industry/University/Government Cooperation’ (1997) 40(4) Research-Technology Management 46

Reichman J H, ‘Computer Programs As Applied Scientific Know-How: Implications of Copyright Protection for Commercialized University Research’ (1989) 42(3) Vanderbilt Law Review 639

Schmitz K, ‘TRIPing on Trade Secrets: How China’s Cybertheft of U.S. Trade Secrets Violated TRIPS’ (2021) 36 American University International Law Review 929

Silverman J R, ‘Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO (Symposium on Current Issues in the World Trade Organization)’ (1996) 17 University of Pennsylvania Journal of International Law 233

Solovy E M and Raju D, ‘Compulsory Licensing of Trade Secrets: Illegality Under International and Domestic Laws’ (2022) 55(2) The International Lawyer 221

Sousa e Silva N, ‘A practical guide to a fast-changing and increasingly popular subject’ (2016) 11(4) Journal of Intellectual Property Law & Practice 310

Sykes A O, ‘Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301’ (1992) 23 Law and Policy in International Business 263

Taylor C O’N, ‘The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System’ (1997) 30 Vanderbilt Journal of Transnational Law 209

Xuewei F, ‘Critique of Consistency with WTO Rules of the US Section 301 Investigation against China Concerning Technology Transfer (Billing Code 3290-F7)’ (2018) 8(2) Journal of WTO and China 3

Zhengyu Y, ‘Meiguo Shangye Mimi Dandu Lifa Moshi (The Research on and Insights from the Stand-Alone Trade Secret Law in the US)’ (2020) 70 Minshang Fa Luncong 209

Working Paper

Junge F, 'The Necessity of European Harmonization in the Area of Trade Secrets' (2016) Maastricht Faculty of Law European Private Law Institute Working Paper, 2016/04 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839693> accessed 20 April 2025

Official Publications

– – *Protecting U.S. Intellectual Property Overseas: The Joint Strategic Plan and Beyond*, 111th United States Congress, 2nd Session

Casey C A and Cimino-Isaacs C D, 'WTO Members' Commitment to Renew the WTO Dispute Settlement System and Its Implications for U.S. Interests' (*Congressional Research Service*, 17 July 2024) <https://crsreports.congress.gov/product/pdf/IF/IF10645#:~:text=WTO%20members%20committed%20to%20renew,trading%20system%20and%20U.S.%20interests> accessed 7 February 2025

European Commission, 'Commission recommends carrying out risk assessments on four critical technology areas: advanced semiconductors, artificial intelligence, quantum, biotechnologies' (*European Commission*, 3 October 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4735> accessed 6 February 2025

Grieger G, 'Briefing – International trade dispute settlement: World Trade Organisation Appellate Body crisis and the multi-party interim appeal arbitration arrangement' (European Parliamentary Research Service 2024) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762342/EPRS_BRI(2024)762342_EN.pdf> accessed 14 March 2025

Lighthizer R E, 'Report on the Appellate Body of the World Trade Organization' (*Office of the United States Trade Representative*, 11 February 2020) <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf> accessed 15 April 2025

Lippoldt D and Schultz M, 'Uncovering Trade Secrets – An Empirical Assessment of Economic Implications of Protection for Undisclosed Data' (Organisation for Economic Cooperation and Development Trade Policy Papers 2014) <https://www.oecd.org/content/dam/oecd/en/publications/reports/2014/08/uncovering-trade-secrets-an-empirical-assessment-of-economic-implications-of-protection-for-undisclosed-data_g17a2524/5jxzl5w3j3s6-en.pdf> accessed 20 April 2025

Office of the United States Trade Representative, 'Four-Year Review of Actions Taken in the Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation' (*Office of the United States Trade Representative*, May 2024) <https://ustr.gov/sites/default/files/USTR%20Report%20Four%20Year%20Review%20of%20China%20Tech%20Transfer%20Section%20301.pdf> accessed 12 April 2025

Office of the United States Trade Representative, 'Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Practices Related to Targeting of the Semiconductor Industry for Dominance' (*Office of the Federal Register*, vol 89, no 249, 30 December 2024) <https://www.federalregister.gov/documents/2024/12/30/2024-31306/initiation-of-section-301-investigation-hearing-and-request-for-public-comments-chinas-acts-policies> accessed 7 March 2025

Office of the United States Trade Representative, 'United States Files WTO Case Against China Over Prohibited Subsidies' (*The Office of the United States Trade Representative*, 2 February 2007) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2007/february/united-states-files-wto-case-against-chi> accessed 6 February 2025

Office of the United States Trade Representative, 'USTR Announces Compliance Review for the Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China' (*The Office of the United States Trade Representative*, 24 January 2025) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2025/january/ustr-announces-compliance-review-economic-and-trade-agreement-between-government-united-states> accessed 6 February 2025

People's Republic of China State Council, 'Notice of the State Council on the Publication of "Made in China 2025"' (Center for Security and Emerging Technology (tr), Guo Fa No 28, 2015) <https://cset.georgetown.edu/publication/notice-of-the-state-council-on-the-publication-of-made-in-china-2025/> accessed 21 April 2025

United States Department of Commerce, 'Addition of Fujian Jinhua Integrated Circuit Company Ltd. to the Entity List' (*Office of the Federal Register*, 16 October 2018) <https://2017-2021.commerce.gov/news/press-releases/2018/10/addition-fujian-jinhua-integrated-circuit-company-ltd-jinhua-entity-list.html> accessed 7 February 2025

United States House Select Committee on Strategic Competition between the United States and the Chinese Communist Party, 'DeepSeek Unmasked: Exposing the CCP's Latest Tool For Spying, Stealing, and Subverting U.S. Export Control Restrictions' (*United States Congress*, 16 April 2025) 1 <https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/DeepSeek%20Final.pdf> accessed 22 April 2025

World Intellectual Property Organization, *WIPO Guide to Trade Secrets and Innovation* (World Intellectual Property Organization 2024)

World Trade Organization, '12th Ministerial Conference: Outcome Document' (*World Trade Organozation*, 22 June 2022) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/24.pdf&Open=True> accessed 7 February 2025

World Trade Organization, 'WTO Analytical Index: DSU – Article 5 (Practice)' (*World Trade Organization*, June 2024) <https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art5_oth.pdf> accessed 16 April 2025

World Trade Organization, 'WTO reform – an overview' (*World Trade Organization*, 2022) <https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfwtoreform_e.htm> accessed 15 April 2025

Other Secondary Sources

Center for Strategic and International Studies, 'A Survey of Chinese Espionage in the United States Since 2000' (*Center for Strategic and International Studies*, March 2023) <https://www.csis.org/programs/strategic-technologies-program/survey-chinese-espionage-united-states-2000> accessed 9 March 2025

Manyika J and others, 'Report – Global flows in a digital age: How trade, finance, people, and data connect the world economy' (McKinsey Global Institute 2014) <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Globalization/Global%20flows%20in%20a%20digital%20age/MGI%20Global%20flows%20in%20a%20digial%20age%20Executive%20summary.pdf> accessed 10 March 2025

Semiconductor Industry Association, 'Semiconductors & The World Trade Organization: How Global Trade Rules Have Spurred Semiconductor Growth and Innovation' (November 2020) <https://www.semiconductors.org/wp-content/uploads/2020/11/The-WTO-and-the-Semiconductor-Industry-Nov-2020_2.pdf> accessed 4 February 2025

Thadani A and Allen G C, 'Mapping the Semiconductor Supply Chain' (*Center for Strategic and International Studies*, May 2023) <https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-05/230530_Thadani_MappingSemiconductor_SupplyChain.pdf?VersionId=SK1wKUNf_.qSF3kzMF.aG8dwd.fFTURH> accessed 10 April 2025

The Commission on the Theft of American Intellectual Property, *Update to the IP Commission Report* (2017)

U.S.-China Economic and Security Review Commission, 'Ms. Christine Bliss' (*U.S.-China Economic and Security Review Commission*, 22 June 2017) <https://www.uscc.gov/sites/default/files/Panel%20II_Christine%20Bliss.pdf> accessed 7 March 2025

Websites

Acton M, Sevastopulo D, and Bradshaw T, 'Nvidia to take $5.5bn hit as US clamps down on exports of AI chips to China' (*Financial Times*, 15 April 2025) <https://www.ft.com/content/66e6abfa-2b79-407c-bda6-d04d19b3b814> accessed 21 April 2025

BBC News, 'China announces retaliatory action as Donald Trump's tariffs take effect | BBC News' (*BBC News*, 4 February 2025) <https://www.youtube.com/watch?v=GHoBPgnXtXE&ab_channel=BBCNews> accessed 7 February 2025

Caldwell K, ‘Unlocking The Value Of Intellectual Property: A Strategic Guide For Startups And Tech Companies’ (*Forbes*, 30 January 2024) <https://www.forbes.com/councils/forbesbusinesscouncil/2024/01/30/unlocking-the-value-of-intellectual-property-a-strategic-guide-for-startups-and-tech-companies/> accessed 19 April 2025

Cheng E, ‘China vows retaliation against countries that follow U.S. calls to isolate Beijing’ (*CNBC*, 20 April 2025) <https://www.cnbc.com/2025/04/21/china-to-retaliate-against-nations-that-work-with-us-to-isolate-beijing.html> accessed 21 April 2025

Cheng J, ‘TSMC Reclaims Spot in World's 10 Most Valuable Companies After Stock Rallies to Record’ (*Bloomberg UK*, 11 March 2024) <https://www.bloomberg.com/news/articles/2024-03-11/tsmc-re-enters-global-top-10-club-after-rallying-to-record?embedded-checkout=true> accessed 19 April 2025

China Daily, 'He Said Against the Backdrop of the Market That Cannot Be Abandoned' (*China Daily*, 1 March 2024) <https://www.chinadaily.com.cn/a/202403/01/WS65e13038a31082fc043b9f38.html#:~:text=He%20said%20against%20the%20backdrop,market%20that%20cannot%20be%20abandoned> accessed 7 February 2025

Duffy C, ‘Nvidia doubled profits in 2024. And its outlook is rosy despite AI jitters’ (*CNN*, 26 February 2025) <https://edition.cnn.com/2025/02/26/tech/nvidia-earnings-ai-growth/index.html> accessed 19 April 2025

European Commission, ‘Case Study 02 - Theft of trade secrets and tracking electronic data in Singapore’ (*European Commission*) <https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/south-east-asia-ip-sme-helpdesk/case-studies/case-study-02-theft-trade-secrets-and-tracking-electronic-data-singapore_en#:~:text=Trade%20secret%20theft%20can%20be,of%20a%20lack%20of%20proof.> accessed 6 February 2025

Hale T, Jopson B, and McMorrow R, ‘China increases additional tariffs on US imports to 125%’ (*Financial Times*, 11 April 2025) <https://www.ft.com/content/706b6281-1077-40b8-ad40-e11ee0f55f92> accessed 11 April 2025

International Monetary Fund, ‘Groups and Aggregates Information’ (April 2023) <https://www.imf.org/en/Publications/WEO/weo-database/2023/April/groups-and-aggregates> accessed 21 March 2025

Jinhua Integrated Circuit Co, 'Statement from Fujian Jinhua Integrated Circuit Co., Ltd.' (*Jinhua Integrated Circuit Co*, 28 February 2024) <https://www.jhicc.com/news.html?info=news7> accessed 7 February 2025

Leswing K, ‘Nvidia passes Apple again to become world’s most valuable company’ (*CNBC*, 21 January 2025) <https://www.cnbc.com/2025/01/21/nvidia-passes-apple-again-to-become-worlds-most-valuable-company-.html> accessed 19 April 2025

McMahon L and McCallum S, ‘What are semiconductors and why is Trump targeting them?’ (*BBC*, 14 April 2025) <https://www.bbc.co.uk/news/technology-66394406> accessed 19 April 2025

Myerson S, ‘1 in 5 corporations say China has stolen their IP within the last year: CNBC CFO survey’ (*CNBC*, 1 March 2019) <https://www.cnbc.com/2019/02/28/1-in-5-companies-say-china-stole-their-ip-within-the-last-year-cnbc.html> accessed 5 February 2025

Nvidia Newsroom, ‘NVIDIA Announces Financial Results for Fourth Quarter and Fiscal 2025’ (*NVIDIA*, 26 February 2025) <https://nvidianews.nvidia.com/news/nvidia-announces-financial-results-for-fourth-quarter-and-fiscal-2025> accessed 19 April 2025

O’Connor I, ‘Watch Out Europe: China is Stealing Your Chip Secrets’ (*Center for European Policy Analysis*, 9 July 2024) <https://cepa.org/article/watch-out-europe-china-is-stealing-your-chip-secrets/> accessed 6 February 2025

Reuters, ‘Trump signs order to set up new entity to take over Biden’s Chips Act program’ (*The Guardian*, 1 April 2025) <https://www.theguardian.com/us-news/2025/mar/31/trump-order-chips-act> accessed 21 April 2025

Sherman N, 'Trump team hits pause on tariffs - but still sees them as vital tool’ (*BBC News*, 7 March 2025) <https://www.bbc.co.uk/news/articles/c4gmjmymg0no> accessed 9 March 2025

Swanson A, Nelson E, and Rennison J, ‘Stocks Dive Again as Angst Rises Over Trump’s Trade War’ (*The New York Times*, 10 April 2025) <https://www.nytimes.com/live/2025/04/10/business/trump-tariffs-stocks> accessed 10 April 2025

United States Trade Representative, 'Mission of the USTR' (*Office of the United States Trade Representative*) <https://ustr.gov/about-us/about-ustr> accessed 9 March 2025

World Trade Organization, ‘History of the multilateral trading system’ (*World Trade Organization*) <https://www.wto.org/english/thewto_e/history_e/history_e.htm#:~:text=The%20WTO's%20creation%20on%201,in%20services%20and%20intellectual%20property.> accessed 6 March 2025

WTO Plurilaterals, ‘Multi-Party Interim Appeal Arbitration Arrangement (MPIA)’ (*Geneva Trade Platform*, 2020) <https://wtoplurilaterals.info/plural_initiative/the-mpia/> accessed 16 April 2025

Personal Communications

Letter from the Biotechnology Innovation Organization and others to the United States Trade Representative (6 November 2017) <https://www.semiconductors.org/wp-content/uploads/2018/06/International-Trade-Secrets-Association-Ltr-111717.pdf> accessed 19 April 2025

Letter from the CEO of Secure Components, Todd Kramer, to the Section 301 Committee of the Office of the United States Trade Representative (6 January 2025) <https://comments.ustr.gov/sfc/servlet.shepherd/document/download/069SJ00000JcTNpYAN> accessed 9 March 2025

Letter from SIA's Vice President of Global Policy, Mary Thornton, to the Co-Chairs of the Section 301 Committee of the Office of the United States Trade Representative, Philip Butler and Megan Grimball (5 February 2025) <https://www.semiconductors.org/wp-content/uploads/2025/02/USTR-2024-0024-00109674-CAT-5016-Public-Document.pdf> accessed 8 March 2025

The Eroding Rule of Law: Evaluating Hungary's Legal System Under Gowder's Rule of Law Theory

Kristóf Hercegh

To Professor Velimir Živković
thank you for all the advice!

Introduction

April 12 2026 is going to go down in European history as the day that miracles were made reality. For the better part of the last two decades Hungary was viewed as the European Union's black sheep. The main cause of this was a continuous erosion of the rule of law in the country. This process did not go without notice, as can be seen from both the Venice Commission review of the new Fundamental Law and the withheld EU funds. However, with the recent elections the FIDESZ regime has been left as a minority in the parliament.[1] This article was originally written preceding these events and therefore will not discuss them in length. Rather it will simply explore whether Hungary truly managed to erode the rule of law and if so, how deeply, using Paul Gowder's Theory.[2] First a short historical background will be necessary, beginning with the country's change in 1989 from a communist regime to a democratic state. Followed by another shift to a Hybrid Regime.[3] Afterwards, the concept of the Rule of Law will be explored, to gain a working definition. This will be used to observe the shortcomings of the Hungarian system, by taking separate instances which showcase a pattern of erosion. This should be a lesson for both the EU and its member states, never to fall into the same hole that the once bright star of Eastern Europe has fallen into.

Section 1 – History

In the following section the historical background of the Hungarian issue will be shown, as in many aspects the current issues were made possible by the shortcomings of the 1989 events. Moreover, it is salient that the rise of Viktor Orban is known to the reader when exploring the issues of the Hungary of today.

[1] 'POLITICO Poll of Polls — Hungarian Polls, Trends and Election News for Hungary – POLITICO' <https://www.politico.eu/europe-poll-of-polls/hungary/> accessed 22 April 2026.
[2] Paul Gowder, *The Rule of Law in the Real World* (Cambridge University Press 2016) 7.
[3] To be precise the Freedom House describes it as an Autocratizing hybrid for more see 'A Region Reordered by Autocracy and Democracy' (*Freedom House*) <https://freedomhouse.org/report/nations-transit/2024/region-reordered-autocracy-and-democracy> accessed 14 April 2024.

1.1 Communism to Democracy

Like many other ex-communist states of the Eastern Bloc, the constitution of Hungary during the Cold War was akin to the Soviet Stalinist Constitution of 1936.[4] The 1949 "*Alkotmány*"[5] was more of an ideological tool than a foundation of a legal system.[6] At its core it was a "semantic constitution… a political declaration and was never intended to serve as a normative guidance" as also noted by Gábor Attila Tóth.[7] Opposed to a modern democratic constitution, which would ideally include "[a] basic governmental structures… relations between the main powers… functions of government… basic values and commitments",[8] all of which the 1949 *Alkotmány* did not possess. The simple reason for that could be found in the autocratic system of the time. The rules did not need to be codified as they changed with the wills and needs of the Communist Party.[9]

However, with the fall of the Soviet Union and the Eastern Bloc, this all changed. The commencement of the "*rendszerváltás*"[10], term usually referring to the regime change of the 1989 era, signalled the beginning of a period of uncertainty and progress. After the collapse of the Soviet regime, a series of changes were necessary. The same year the National Roundtable talks began,[11] a form of negotiations between the Hungarian Socialist Workers' Party and the combined group of the opposition movements.[12] This Roundtable aimed to

[4] John N Hazard, 'Communist Constitutionalism in a New Form' (1971) 4 Studies in Comparative Communism 107, 111.
[5] 'Alkotmány Meaning in English' <https://dictzone.com/hungarian-english-dictionary/alkotm%C3%A1ny> accessed 22 April 2026.
[6] '1949 Hungarian Constitution.Pdf' <https://lapa.princeton.edu/hosteddocs/hungary/1949%20Hungarian%20constitution.pdf> accessed 24 November 2023.
[7] Gábor Attila Tóth, 'Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism' in Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (1st edn, Cambridge University Press 2017) 390 <https://doi.org/10.1017/9781316585221.013>.
[8] Ruth Gavison, 'What Belongs in a Constitution?' in Stefan Voigt and Hans-Jürgen Wagener (eds), *Constitutions, Markets and Law* (Edward Elgar Publishing 2002) 89 <https://doi.org/10.4337/9781035304653.00008>.
[9] Tóth (n 7) 390.
[10] Rendszerváltás means regime-change in Hungarian. It is also a specific term used for the events of 1989. For more information see K Kulcsár, 'Folyamat És Megszakítás' (2005) 19 Társadalomkutatás 5, 5 <https://doi.org/10.1556/tarskut.19.2001.1-2.1>.
[11] A form of constitution making, for more on Roundtables in general see Andrew Arato, 'Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making' (2012) 1 Global Constitutionalism 173, 173–200 <https://doi.org/10.1017/S2045381711000050>.
[12] László Bruszt and George K Horvath, '1989: The Negotiated Revolution in Hungary' (1990) 57 Social Research 365, 367; A group of social associations were party to it as well, with the purpose of promoting free elections see András Bozóki, 'Hungary's Road to Systemic Change: The Opposition Roundtable' (1993) 7 East European Politics and Societies 276, 282–290 <https://doi.org/10.1177/0888325493007002004>.

facilitate the state's change to a democratic system. They were successful in some aspects, for example with amending the old constitution into a new interim Constitution.[13] Even though it had major shortcomings, for one, it failed to be a final constitution, being temporary only;[14] it did turn out to be a more conventional one.[15] This also brought the adoption of a new parliamentary system, more specifically the German Chancellor-led system. This type is unique for its weak president elected by the parliament.[16] Later on, the position of the Prime Minister as the head of the Government was affirmed in a 1990 constitutional amendment.[17] Finally catching up to the rest of Western Europe.

There are, however, two reasons why the 1989 constitution is still frequently criticised by academics. Firstly, an entirely new constitution was not enacted till 2010.[18] So the process that the Roundtable has started was left unfinished.[19] The interim constitution technically still carried the name of the 1949 constitution, and it was not meant to be permanent.[20] The second critique was that the new system only required a two-thirds parliamentary majority to amend the constitution.[21] Such a majority could be reached by barely more than fifty per cent of the votes. This disparity is created by the implementation of "a mixed majoritarian and proportionate electoral system with single-member districts, county lists and a compensatory list".[22] Thus, it could be reasoned that the Roundtable had failed to finalise the transition to a democratic system.[23]

[13] '1989 Hungarian Constitution.Pdf' <https://www2.ohchr.org/english/bodies/cescr/docs/e.c.12.hun.3-annex2.pdf> accessed 28 November 2023.
[14] In the sense that it was not meant to be the final constitution of the country only a temporary one.
[15] In a sense that it had the system of the state's governance entrenched into it, not just the ideals of a system.
[16] Tóth (n 7) 391.
[17] ibid.
[18] Tóth (n 7) 393–396.
[19] For János Kis's argument detailing Constitution-making in Two Stages see Gábor Attila Tóth (ed), 'From the 1989 Constitution to the 2011 Fundamental Law' *Constitution for a disunited nation: on Hungary's 2011 fundamental law* (Central European University Press 2012) 2–3.
[20] Andras Zs Varga, 'Beyond Rule of Law' (2013) 9 Iustum Aequum Salutare 117, 117; Also stated in the Preamble as being valid till the country's new Constitution is adopted '1989 Hungarian Constitution.Pdf' <https://www2.ohchr.org/english/bodies/cescr/docs/e.c.12.hun.3-annex2.pdf> accessed 28 November 2023.
[21] And even the rule about the four fifth vote that was required to change the cornerstones of it could be turned over with the same two thirds vote. See Article 24 of the constitution for further detail: '1989 Hungarian Constitution.Pdf' (n 20).
[22] Tóth (n 7) 395.
[23] ibid.

1.2 Voting Booth Revolution

The next change came with the 2010 elections and the Fiatal Demokraták Szövetsége (FIDESZ).[24] A party formed in 1988, later becoming the ruling government from 1998 to 2002.[25] Following the 2010 elections, the FIDESZ-KDNP coalition won by earning an overwhelming sixty-eight per cent of the parliamentary mandates.[26] The head of the party, Viktor Orbán, called this landslide win the "revolution at the ballot box".[27] This election, however, was different from their earlier mandate. Not in the program that the party offered, as is usual for political parties, they offered change and protection of national values.[28] What made this election unique were the legislative change that followed. With this much voting power, the much-harder-to-get four-fifths vote required to change major parts of the Constitution was removed.[29] This made the enactment of the Fundamental Law possible, a Constitution much more nationalistic, and much more problematic from a European Union values perspective.[30] This was claimed to be essential to correct the aforementioned issue of the Interim Constitution.[31]

Afterwards even more controversial and radical acts followed, which could best be described as attempts to destroy the system of checks and balances and to cripple the Hungarian Constitutional Court.[32] They include, but are not limited to, the restriction of parliamentary

[24] Hungarian, means: "Alliance of Young Democrats"
[25] For a more detailed history of the FIDESZ see: Sebastian Kubas and Anna Czyż, 'From a Liberal Opposition Party to a Right-Wing Party of Power. Three Decades of the Hungarian Fidesz (1988–2018)' (2018) 3 Annales Universitatis Mariae Curie-Skłodowska. Sectio M. Balcaniensis et Carpathiensis 47 <https://doi.org/10.17951/m.2018.3.47-65>.
[26] Wolters Kluwer Hungary Kft, '1995. Évi XLIV. Törvény a Magyar Köztársaság Alkotmányáról Szóló, Többször Módosított 1949. Évi XX. Törvény Módosításáról - Törvények És Országgyűlési Határozatok' <https://mkogy.jogtar.hu/jogszabaly?docid=99500044.TV> accessed 28 November 2023.
[27] András Sajó and Juha Tuovinen, 'The Rule of Law and Legitimacy in Emerging Illiberal Democracies' (2018) 64 osteuropa recht 506, 506 <https://doi.org/10.5771/0030-6444-2018-4-506>.
[28] 'Wayback Machine' (16 March 2010) <https://web.archive.org/web/20100316215728/http://static.fidesz.hu/download/481/nemzeti_ugyek_politikaja_8481.pdf> accessed 2 November 2023.
[29] Tóth (n 7) 395.
[30] Lóránt Csink and other authors discuss this in further detail in *Rule of Law, Common Values and Illiberal Constitutionalism: Poland and Hungary within the European Union* (Routledge 2020) <https://doi.org/10.4324/9781003052852>.
[31] Gábor Halmai, 'The Making of "Illiberal Constitutionalism" with or without a New Constitution: The Case of Hungary and Poland' in David Landau and Hanna Lerner (eds), *Comparative Constitution Making* (Edward Elgar Publishing 2019) 4 <https://doi.org/10.4337/9781785365263.00021>.
[32] One of the more radical steps was to lower the mandatory retirement age of the Constitutional Court Judges, for more on this see: ibid 2; and David Kosar and Katarina Sipulova, 'The Strasbourg Court Meets Abusive Constitutionalism: "Baka v Hungary" and the Rule of Law' (2018) 10 Hague journal on the rule of law : HJRL 83, 84 <https://doi.org/10.1007/s40803-017-0065-y>.

seats to 200, changing the parliamentary elections from a two-round one into a single-round one and the modification of electoral constituencies.[33]

In summary, despite Hungary sharing a lot of its recent history with other Eastern Bloc countries it is different in one aspect. The process of *rendszerváltás* necessitates a few essential steps, one of which is the need to enact a new Constitution. In Hungary, this was omitted, allowing the FIDESZ-KDNP coalition in 2010 to utilise its majority to implement the new Fundamental Law. This signalled the beginning of the FIDESZ era that aimed to slowly erode the Rule of Law, thus resulting in a Transitional or Hybrid Regime.[34] To see and analyse the results of this process, the rule of law must be understood as a framework and not just a concept, therefore the next section will delve deeper into what the rule of law is and what working definition will be used later on.

Section 2 – What is the Rule of Law?

The following section provides a basic idea of the rule of law. It also introduces some of the most distinct parameters and ideas that the article will later use to understand the Hungarian situation. The relevance of these parameters and theories will also shortly be explained.

2.1 General Overview

The rule of law has been defined by academics, philosophers, and great thinkers in many ways throughout history. Not just in the realm of law but also in many others, like the realm of political morality.[35] From a legal standpoint the definitions can be categorised into two main groups formal and substantive interpretations.[36] The first one is more preoccupied with how the rules are made and how the system functions rather than what constitutes the legal

[33] Tóth (n 7) 397.
[34] The Freedom House defines these as '*Countries receiving this score are typically electoral democracies where democratic institutions are fragile, and substantial challenges to the protection of political rights and civil liberties exist.*' see 'Hungary: Nations in Transit 2024 Country Report' (*Freedom House*) <https://freedomhouse.org/country/hungary/nations-transit/2024> accessed 16 April 2024.
[35] Leonardo Morlino and Gianluigi Palombella, *Rule of Law and Democracy: Inquiries Into Internal and External Issues* (BRILL 2010) 4.
[36] Velimir Živković, *Fair and Equitable Treatment and the Rule of Law* (Edward Elgar Publishing 2023) 64–65.

rules.[37] This is argued by many to be the superior interpretation. The most notable discussion comes from Raz:

> "If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground."[38]

This illustrates that the legal theorists who steer away from the substantive conception do so because asking what good law is can overcomplicate the original question of what the rule of law is. They argue that the issues of the good law and the rule of law are separate. This could result in a theoretical state that might not obey modern moral norms but still applies the rule of law perfectly. A great example of this would be South Africa during the Apartheid.[39] Others would argue that utilising this interpretation leaves out several important elements of a proper system, like human rights. [40]

The main reason why this article employs a formal interpretation is that the academia on the matter is reconcilable to a much larger degree than the substantive interpretation. To showcase this, let us turn to Velimir Živković, who distilled the following list from many contemporary sources such as the UN GA declarations, international organizations like the Venice commission, NGOs and other academics. Through this process he found that most rule of law definitions can be reconciled into a few key, common elements, which will be further elaborated using the wide range of academia available in the matter. The elements are:[41]

[37] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (1st edn, Routledge 2017) 1 <https://doi.org/10.4324/9781315085302-4>.
[38] Joseph Raz, 'The Rule of Law and Its Virtue*' *The Rule of Law and the Separation of Powers* (Routledge 2005) 1–2.
[39] David Dyzenhaus mentions the same argument as well in context of the apartheid in David Dyzenhaus, 'The Pasts and Future of the Rule of Law in South Africa' (2007) 124 South African Law Journal 734, 3.
[40] See for discussion on this Živković (n 36) 65, and materials cited therein'.
[41] The list is presented with short definitions. For the original list see ibid 66–67.

Non-arbitrariness would mean the necessity for principles that limit the system in some form, at least if we use Hayek's definition of an arbitrary power.[42]

Legality, which in Dicey's interpretation, is "the predominance of the judiciary in the constitution".[43] The existence of a system of courts that are bestowed with certain powers. For example, the supremacy of the courts on the interpretation of the Constitution. In a wider context, the "principle of legality" is the necessity for anyone in a community with power given by law to draw from it when reasoning their acts. Said person would also be confined by this law. Additionally, these laws would be required to be drawn from a sort of "higher law", such as a constitution.[44]

Equality before the law and non-discrimination, as mentioned by Robin West and others, means that if two cases share all relevant facts, the judge's decision should be the same.[45] On the other hand, if we go by William Lucy's definition, it entails three components. First, the presumptive-identity component, meaning that the law should view the citizens the same in terms of standards and rights.[46] Second, the uniformity component, suggesting that the law should be based on "general and objective standards equally applicable to all".[47] Finally, the limited avoidability component, stating that only a limited number of exclusions may exist to the standard.[48]

Legal certainty and predictability in Raz's theory are achieved by ensuring that the law is clear and not changed frequently. Furthermore, the making of new laws should be guided by general principles.[49]

[42] FA Hayek and Bruce Caldwell, *The Road to Serfdom: Text and Documents: The Definitive Edition* (Taylor & Francis Group 2007) 107.
[43] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Repr. of the 8. ed. publ. by Macmillan in 1915, Liberty Fund 1982) 170-180 (176).
[44] For an extensive definition see Oscar M Garibaldi, 'General Limitations on Human Rights: The Principle of Legality United Nations, The' (1976) 17 Harvard International Law Journal 503, 506.
[45] Robin West and Robin L West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Ashgate Dartmouth 2003) 107.
[46] William Lucy, 'Equality Under and Before the Law' (2011) 61 The University of Toronto Law Journal 411, 413.
[47] ibid.
[48] ibid 414.
[49] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Reprinted, Oxford Univ Press 2002) 214–218.

Due process should be respected. This, in short, entails open and fair hearings, the absence of bias, and the necessity for government bodies to follow the procedure when using legal powers bestowed upon them.[50]

To contrast the above, a substantive version would entail the necessity of "good" law.[51] What "good" law means is hard to define. The question of "good" law is so difficult that it singlehandedly is the biggest reason why substantive interpretations cannot be easily reconciled. Although the lack of a consensus provides less credibility to a substantive interpretation, these definitions usually contain more protection of certain rights and values, such as generally recognized human rights.[52] These in turn, can give the points in the formal aspect, meaning.[53] This also makes it a less appealing measurement tool, akin to measuring a stick with a ruler that changes its shape based on the person looking at it.

The next part of the article will discuss Paul Gowder's version of the Rule of Law. Instead of the earlier five different points, he defines it in three parts that build on each other, showing the interconnectedness of the rule of law. His theory gravitates towards a formal conception but at moments looks beyond it, on occasion resembling a substantive interpretation. Ultimately, as a tool, it is favourable precisely because of these two properties.

2.2 Gowder's Rule of Law

Paul Gowder's theory is relatively novel because it promotes equality between officials and non-officials, which he names "Vertical Equality".[54] Further, the theory promotes equality among non-officials and other non-officials, calling this "Horizontal Equality".[55] The existence of these is derived from the three individual aspects of an ideal government:[56]

[50] Drawing both from ibid. and Erwin Chemerinsky, 'Substantive Due Process Practising Law Institute Section 1983 Civil Rights Litigation Symposium' (1998) 15 Touro Law Review 1501, 1501–1502.
[51] Živković (n 36) 65.
[52] For more on this see UN. Secretary-General (ed), *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General* (UN 23) para 6 <https://digitallibrary.un.org/record/527647> accessed 16 December 2025.
[53] Živković (n 36) 65.
[54] He first published these ideas in a his previously mentioned paper see Paul Gowder, 'The Rule of Law and Equality' (2013) 32 Law and Philosophy 565 <https://doi.org/10.1007/s10982-012-9161-2>; Later on, he extended on his theory in a book see Gowder (n 2).
[55] Gowder (n 54) 2–3.
[56] ibid.

- Regularity
- Publicity
- Generality

The theorem is divided into "The Equality Thesis" and "The Three Principles."[57] The first can only be understood in context with the second, so this article will also start there.

2.2.1 The Three Principles

The first of the three is Regularity. It prescribes that there should be constraints on the powers of the officials, to protect the non-officials.[58] Such as what he calls Role Separation, meaning that when an official is in the "role of an official", they must act as an agent of the law and not as if these powers would be their own.[59] This is necessary to avoid merging their personal and professional lives.[60] A further constraint is the avoidance of vague laws. This is to avoid officials manipulating these vague laws to achieve ends desired only by them.[61] To avoid this, laws should be sufficiently clear.[62] For the same reason, no laws should have a retroactive effect.

If these constraints are not followed, one official could theoretically retaliate against a citizen without suffering consequences.[63] Gowder adds that too rigid constraints could stop officials from using their powers even when needed.[64] To compensate for this, he introduces the aspect of "Good Faith".[65] What this stands for is as ambiguous as any other interpretation of the concept.[66] Gowder argues that officials should interpret the laws in relation to what they were meant to achieve.[67] Arguably, this would require knowing the intentions behind the creation of the law, which are not always obvious.

[57] Gowder (n 2) 7.
[58] ibid 12.
[59] ibid 12–13.
[60] ibid.
[61] ibid 13–14.
[62] ibid.
[63] ibid 14.
[64] ibid.
[65] ibid 15.
[66] As an example of this see Saul Litvinoff, 'Good Faith' (1996) 71 Tulane Law Review 1645, 1649–1651.
[67] Gowder (n 2) 15.

Some, like Dworkin, argue more for generic principles than hard-set rules.[68] Stating that the law is applied more through principles rather than precisely defined rules. This notion can be reconciled with Gowder's as he states: "What matters for regularity is that officials be constrained, not how they are constrained."[69]

How Regularity translates from theory to everyday life is a different question. In the United States and English law, there is a principle called the "presumption of regularity".[70] In short, it presupposes that everything an official has done is done lawfully, in line with the principle also defined by Gowder. Some have argued that the courts have failed to utilise the doctrine properly, because a doctrine with over a dozen unique interpretations is inconsistent, to say the least.[71]

This highlights how difficult it is to adopt some of the aspects of Gowder's Regularity principle. "Good Faith" and the idea that laws cannot be vague are great examples of this. On the other hand, role separation and the fact that a law cannot be retroactive are somewhat easier to fulfil.

The next one is Publicity. It is built on three main requirements. Firstly, laws giving power to officials must be available to non-officials.[72] Further, laws should not be secret in nature.[73] The Soviet Union's secret laws for example, were unavailable to the public.[74] Secondly, officials must explain their interpretation of these laws to the public when asked.[75] Gowder further alludes to the interconnectedness of these principles, as the officials' interpretation has to meet the standards of Regularity.[76] Finally, in case the officials were asked to publicise their interpretation, the non-officials should be able to participate in its application, mainly by making an argument for a different interpretation.[77] He notably uses legal debates in a court

[68] Ronald M Dworkin, 'The Model of Rules' The University of Chicago Law Review 23–24.
[69] Gowder (n 2) 15.
[70] Aram A Gavoor and Steven A Platt, 'In Search of the Presumption of Regularity' (2022) 74 Florida Law Review 729, 730.
[71] ibid 771.
[72] Gowder (n 2) 16.
[73] ibid.
[74] For interesting example of this see Walter Sawatsky, 'Secret Soviet Lawbook on Religion' (1976) 4 Religion in Communist Lands 24 <https://doi.org/10.1080/09637497608430788>.
[75] Gowder (n 2) 16.
[76] ibid.
[77] ibid.

as an example. [78]In this context, the non-officials should have the right to be represented by a counsel and be confronted with the evidence against them.[79] This idea can be equated with the "respect for due process" requirement mentioned in the 2.1 General Overview above.[80]

Let us contrast this with Bruno Celano's interpretation of Publicity. By his definition, Publicity is: "the notion of common, or mutual, knowledge".[81] In his opinion, to achieve this, a legal system must utilise prescriptions, meaning that both the norms and the mode of their creations are public.[82] His is more of an absolutist version as on top of requiring officials to reason their actions and that these reasons could be contested, it also requires that the creation of the laws themselves must be open.

Finally, the third principle is Generality. This principle presupposes that the previous two are adhered to.[83] So, officials act in accordance with the Regularity and Publicity principles. Moreover, they must not differentiate between the subjects of the law.[84] The only exception that he allows is where a "relevant distinction" exists between groups.[85] To explain this, he considers how, based on the nature of categorisation, Generality either prevails or not. He exemplifies that if we give the seats at the front of the bus to people with disabilities, it is perfectly normal, but if we segregate people of colour to the back of the bus, it is impermissible.[86] Gowder refers to this difference as the "relevance criterion".[87]

In addition, Gowder chooses Public Reason as the basis for the "relevance criterion".[88] To understand Public Reason, as Gowder did, let us turn to Rawls. He specifies that for a reason to become a public one, it must be:[89]

[78] ibid.
[79] ibid 17–18.
[80] Originally mentioned by Velimir Živković see Živković (n 36) 66–67.
[81] Bruno Celano, 'Publicity and the Rule of Law' (2013) 2 Oxford Studies in Philosophy of Law 122, 123.
[82] ibid 144.
[83] Gowder (n 2) 28.
[84] ibid.
[85] ibid.
[86] ibid 32.
[87] ibid 33.
[88] ibid.
[89] ibid 34.

> "at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position."[90]

As to what "reasonable" means, Gowder points towards the legal community and what it deems conventional.[91]

Gowder is not alone in prioritising Generality as a core element of the rule of law. Fuller's theory states that Generality is an essential part of law as it provides for a clear system.[92] His interpretation is arguably more surface level compared to Gowder's as he calls the lack of Generality simply ineffective instead of delving further into how and based on what you can generalise a group of people.[93] Nonetheless, like many others, he too realised that a system that approaches issues exclusively on a case-by-case basis fails. To show this, he uses the Civil Aeronautics Board and the Federal Communications Commission in the United States as examples. The reason being that they utilise a case-by-case system.[94] By his account, these bodies have failed to develop any significant rules.[95]

Marmur's interpretation is similar to Fuller's as he is not concerned with the specific aspect that is chosen to differentiate two groups of people. His theory of Generality is twofold.[96] There is the Generality of the norm itself (the law or rule) and the Generality of the norm-subjects (the people to whom the rule of law applies).[97] Generality concerning the former essentially means that a law should be created in a way that applies not only to a situation that occurs once but as a generally applicable rule.[98] Generality concerning the latter means that laws are prescribed for a group of people defined by a certain feature, not individuals.[99]

[90] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 The University of Chicago Law Review 765, 770 <https://doi.org/10.2307/1600311>.
[91] Gowder (n 2) 34.
[92] Lon L Fuller, 'THE MORALITY THAT MAKES LAW POSSIBLE' *The morality of law* (Revised ed, Yale University Press 1969) 46.
[93] ibid.
[94] ibid 46–47.
[95] ibid.
[96] Andrei Marmor, 'The Rule of Law and Its Limits' (2004) 23 Law and Philosophy 1, 9.
[97] ibid 9–12.
[98] ibid 11–12.
[99] ibid 9.

2.2.2 The Equality Thesis

Let us return to the first half of Gowder's theory. As already mentioned, he differentiates between two types of equality, horizontal and vertical. The latter refers to the equality between the officials and the citizens and is therefore more important for our purpose, so this article is going to focus on it.

Gowder states that Vertical Equality is dependent on the first two of the three principles: Regularity and Publicity.[100] There are two cases that he identifies where Vertical Equality is missing. He named these two Hubris and Terror.[101] In the first, the Publicity thesis is not fulfilled. In the second, neither one of them is.

In a state with Hubris, officials would lack any explanation for the coercive power that they have used.[102] This is because, as mentioned earlier, publicity is more or less a reason-giving principle. In this situation, as there is no Publicity, the officials do not provide a justification for their actions towards non-officials. Here those with power seem superior to the ones without it.[103] This in itself does not question whether the officials are acting maliciously or not, simply whether they offer any reason for their actions.

Gowder identifies three motives for avoiding Hubris.[104] By stating their reasoning, officials prove that they need to have one to use their power.[105] This avoids any scenarios of casual use of power.[106] Moreover, by recognising that they need to have a reason, they express the fact that they are accountable to the non-officials.[107] This makes it clear to the non-officials that they are equal to the officials.[108] Finally, by giving reason they also express that the non-officials are capable of understanding said reason.[109] This makes the non-officials feel like

[100] Gowder (n 2) 18–19.
[101] ibid.
[102] ibid 19.
[103] ibid.
[104] ibid.
[105] ibid.
[106] ibid.
[107] ibid.
[108] ibid.
[109] ibid.

they are treated as adults.[110] These motives are important in avoiding Hubris and the feeling of superiority.[111] That is because casual use of power and not being treated as an equal, would create a situation where the powerless would feel inferior to the powerful.[112]

Not all reasons given are equal either. For instance, imagine being in the shoes of a defendant in court. If the judge, an official, were about to give a sentence of six years in prison, there would be a difference based on the reasoning. If they simply stated, "It is because I willed it so!" they would seem like a tyrant or a superior being.[113] To further avoid Hubris, a reasoning should, therefore, be legal in nature. It illustrates that the judge, or any other official, does not just create the rules on a whim, the appropriate system does. It also acknowledges the relationship between the official and the state, that being of an agent and a principal.

A state of Terror, on the other hand, would be even worse from a rule of law standpoint. Here both Regularity and Publicity are missing. The non-officials live in fear of the officials.[114] They are not equals and this is for two reasons. One, they are relatively powerless in the face of the officials and they do not know the rules.[115] Therefore, they do not know if they are doing something that is illegal or, as a matter of fact, what is illegal.[116] These keep them in a state of constant fear.[117] This is clearly shown by Pseudo-Xenophon as well.[118] In his description of the Spartan and Athenian societies, he brings up a crucial difference. While in Athens, the slaves cannot be stricken just like any other citizen, in Sparta, they are freely abused.[119] This results in Athenian slaves carrying on about their lives just like anyone else would, as opposed to Spartan slaves who do not.[120] They live in fear.[121] The Spartans can

[110] ibid.
[111] ibid.
[112] ibid.
[113] ibid.
[114] ibid 20–21.
[115] ibid 21.
[116] ibid.
[117] ibid 20–22.
[118] ibid 25.
[119] Robin Osborne (ed), *The Old Oligarch: Pseudo-Xenophon's Constitution of the Athenians* (Robin Osborne tr, 4th edn, Cambridge University Press 2023) 20–21 <https://doi.org/10.1017/9781009383608>.
[120] ibid.
[121] ibid.

freely hit them without justification or reason.[122] This makes them expectant to be hit, so to avoid that, they do as the citizens please.[123] They act subservient to avoid danger.[124]

This idea of Equality is central to Gowder's theory. Even in his earlier works, this and the supporting three Principles were clear.[125] Other academics have also tried to explain the concept of Equality in the rule of law. Robin West, for example, simplified it into: "likes should be treated alike".[126] While Gowder's interpretation is a bit more complex, it gives a more detailed account of what Equality should be.

The above constitutes the cornerstone of our legal analysis. The utilisable definition, which is necessary for any worthwhile analysis, consists of two major concepts. The idea of a formal interpretation of the rule of law, and the Gowderian definition of the rule of law. The latter is defined as the sum of two major concepts, The Three Principles and the Equality Thesis. The Principles pinpoint necessary elements to an ideal state while the Equality Thesis shows us what their deficit results in. Now let us Utilise these and continue towards the most important piece of the article, the analysis.

Section 3 – The Hungarian System

In the following section, the article will analyse separate instances when the Hungarian system failed to reach Gowder's rule of law standards, which in turn will reveal a pattern of rule of law erosion. This analysis will employ the Three Principles as those are what his theory was built upon, and the absence of them defines the lack of the Equality Thesis. The structure will follow a reversed order compared to how the Principles were introduced. It does so because if it were to do otherwise then the lack of the first Principle would mean the

[122] ibid.
[123] ibid.
[124] ibid.
[125] Gowder (n 54) 1–2.
[126] West and West (n 44) 107.

lack of all the Principles. The Regularity, Publicity and Generality Principles were written so that they are built upon each other.

The separate sections will discuss instances of law or governmental decisions that show the lack of a given Principle. Seeing as any particular state's system would be too broad to analyse as a whole, this article opts for a wide range of instances where the Hungarian system failed the Gowderian Principles, which in turn shows a pattern of rule of law erosion. The examples, although each of them egregious themselves, should not be viewed as outliers, but as a representation of the whole system.[127]

3.1 What cannot be measured

In Section 1.2, there were references made to other issues that could be proven to be taking away from the Rule of Law in Hungary, there is a need to address their absence in the following analysis. The Gowderian Rule of Law is an adequate tool to measure the laws present in a country and how they should be created to some degree, but it does have its blind spots. The election system of Hungary and the firing of Supreme Court Judges cannot be accounted for as Gowder's system disregards actual legal structures, including the separation of powers.[128] Even in cases where they could arguably fit into one of the Three Principles, for example the case of the Supreme Court being covered in the Regularity principle. It is rather impossible to show how the newly appointed judges act not as "agents of the law" but rather as people connected to the regime. The fact that some officials were discharged with the modification of laws, like in the case of Baka, is not explicitly against the principle of Regularity.[129] This shows that even though Gowder's theory is a great tool to analyse whether a general Rule of Law exists in the country, it is still an imperfect one.

[127] 'Breaches of EU Values: How the EU Can Act (Infographic)' (*Topics | European Parliament*, 27 February 2018) <https://www.europarl.europa.eu/topics/en/article/20180222STO98434/breaches-of-eu-values-how-the-eu-can-act-infographic> accessed 16 December 2025.
[128] Gowder (n 2) 123–124.
[129] Kosar and Sipulova (n 32) 89.

3.2 Generality

Generality is what differentiates a strong rule of law system from a weak one, at least as it is understood in the context of Gowder's theory.[130] This section will provide evidence that the Hungarian system does not possess it, and it will be done through four cases. Firstly, a part of the Fundamental Law concerning minority languages. Secondly, the case of the Central European University and its exit from Hungary. Thirdly, a Special Economic Zone in Göd, and finally, the change of leadership within KARTONPACK Nyrt. The above cases have been chosen as they represent a reoccurring habit of the system.

3.2.1 Minority Languages

Firstly, let us turn to the Venice Commission's 2011 report on the new Fundamental Law of Hungary. In it the Commission found that the Fundamental Law lacks protection for the language of national minorities.[131] The same protection is not lacking for the Hungarian language.[132] To understand if this law abides by the Generality Principle let us see whether there is a Public Reason justifying it. The mistreatment of minorities in itself is viewed as immoral in the European community.[133] This is supported by the view of academics and the newspapers.[134] Further, it is also codified in the European Convention of Human Rights Article 14, European Union Charter of Fundamental Rights Article 21, and in Article One of the 1995 Minorities Convention.[135] These could be taken to be the Public Reason, meaning that any laws contradicting it are not up to the standard of Generality. Although not promising the protection of minority languages does not immediately mean the existence of some sort of mistreatment, it does create an opportunity for it; further leaving them unprotected is, in

[130] Gowder, *The Rule of Law in the Real World* (n 52) 12, 28.
[131] *OPINION ON THE NEW CONSTITUTION OF HUNGARY* [2011] Venice Commission CDL-AD(2011)016 [45].
[132] ibid.
[133] Not just by the Europeans, but the majority of the world. In this case the mention of Europe is enough as the artickle is focused on Hungary, which is a European state.
[134] For an academic example see Jennifer Jackson Preece, 'Minority Rights in Europe: From Westphalia to Helsinki' (1997) 23 Review of International Studies 75, 91–92 <https://doi.org/10.1017/S0260210597000752>; 'Viktor Orban: Hungary "autocracy" Verdict from EU Correct, Say Activists' (16 September 2022) for a newspaper example briefly see <https://www.bbc.com/news/world-europe-62925460> accessed 21 April 2024.
[135] KASPER Lippert-rasmussen, 'The Badness of Discrimination' (2006) 9 Ethical Theory and Moral Practice 167, 174 <https://doi.org/10.1007/s10677-006-9014-x>.

essence, an unnecessary distinction. Unnecessary distinctions are deemed to be contradictory to Generality.[136]

3.2.2 Central European University

The next example is the situation surrounding the Central European University and its partial exit from Hungary. In 2017, the ruling party of Hungary, the FIDESZ, was leading a campaign against George Soros, a widely known philanthropist.[137] A pivotal point of this campaign was the enactment of a new law modifying the regulations and rights of higher education institutes.[138] The specific changes were:

- A higher education institute that possesses a seat outside the European Economic Area has to be backed up by an international agreement. An agreement must be made between the two states in which the institution operates.[139]

- The higher education institute must have educational activities where it possesses a seat.[140]

- The name of a higher educational institute must not be misleading or similar to any Hungarian higher education institute.[141]

- The law that provided higher education institutes with exemption from the need to acquire work visas was repealed.[142]

[136] Gowder (n 2) 33.
[137] For more on this see Tamás Boros, 'The Hungarian "Stop Soros" Act : Why Does the Government Fight Human Rights Organisations?' 2–4.
[138] Act XXV of 2017 modifying Act CCIV of 2011 on National Higher Education for a translation of the relevant parts see *HUNGARY ACT XXV OF 2017 ON THE AMENDMENT OF ACT CCIV OF 2011 ON NATIONAL TERTIARY EDUCATION* [2017] VENICE COMMISSION CDL-REF(2017)029.
[139] Petra Bárd, 'The Rule of Law and Academic Freedom or the Lack of It in Hungary' (2020) 19 European Political Science 87, 2 <https://doi.org/10.1057/s41304-018-0171-x>.
[140] ibid 3.
[141] ibid.
[142] ibid 3–4.

Petra Bárd makes an argument that these laws were aimed at the Central European University.[143] First, let us answer the question whether the changes were General enough. While it is certain that the first change only affects a small spectrum of institutions, that in itself is not enough reason to show a violation of the Generality Principle. The second falls into the same exact category. The law might only be applicable to a select few, but it does not violate the principle. The third change, at face value, seems to be a similar case, but in actuality violates the principle, as the group of institutions that it is applicable to is so narrow that it only contains the Central European University. The government's reasoning could be acceptable if there were any institutions that were trying to confuse citizens with their names being almost identical to existing prestigious institutions. As Petra Bárd also points out, there aren't any; even the Central European University's situation is not concerning.[144] A law that is only applicable to one singular entity is against the Generality Principle. The fourth change, while having an incredible impact on the Central European University, is not exclusively affected by it; as such, it could be acceptable under the Principle.

Now to answer the separate question, whether the Public Reason supported the above law. Petra Bárd's article has shown that the academic community cannot accept the reasoning of the government. With the lack of Public Reason, the principle of Generality has not been met either in the above scenario.[145] Making the case of the CEU a sign toward a degrading rule of law.

3.2.3 Göd

The recent COVID-19 pandemic may have changed the world and the lives of many, but it also changed the situation in Hungary. The Government declared a "State of Danger" or a "State of Emergency" on the 11th of March 2020.[146] The decree in itself was based on a

[143] ibid 8–9.
[144] ibid 5.
[145] ibid 9.
[146] Goverment Decree on the declaration of the state of danger 2020; For a short explanation see: Csaba Győry and Nyasha Weinberg, 'Emergency Powers in a Hybrid Regime: The Case of Hungary' (2020) 8 The Theory and Practice of Legislation 329, 11–14 <https://doi.org/10.1080/20508840.2020.1838755>; and *Observatory on emergency situations* (Venice Comission) https://www.venice.coe.int/files/EmergencyPowersObservatory/HUN-E.htm.

power provided by Article 53 of the 2011 Fundamental Law. In a further section the existence of such a provision and what it entails will be further touched upon, but for the issue at hand, the existence of it is plenty enough. Here, the article will consider the laws enacted under this "state of danger" as if they were any other law.

The government enacted a law on the 17th of June 2020 concerning the future creation of "*Special Economical Areas*". These *Special Economical Areas* would, in essence, take certain taxes concerning public land from the local government and place it in the hands of the regional government.[147] The concept in itself could be considered to be in line with Gowder's definition of Generality. The existence of special purpose areas is not alien to the global community. Special Economic Areas are used in India as well, created by the Special Economic Zones Act 2005, although they have a distinctly different purpose.[148]

Following the enactment of the aforementioned act, the government declared an area near Göd[149] as a *Special Economical Area*.[150] The declared area was used by one of Samsung's factories; as such, the amount of taxes that diverged from the local government was not small. By some accounts the local government lost forty per cent of its tax revenue.[151] Csaba Győri and Nyasha Weinberg pointed out that this action might have come as a result of the local government being opposition-led. Further, the tax revenue was allocated to the municipality, which is mainly FIDESZ lead.[152]

To see whether the Public Reason supported this act, let us once again turn to academia. The law on creating *Special Economical Areas* has some standing, as the earlier mentioned example from India shows.[153] However the situation in Göd is different, as Csaba Győri, Nyasha Weinberg and Judit Siket all indicate that there is no accepted reason to implement the Göd Special Economic Area. The first two question the necessity of it at best, but Siket

[147] 2020. évi LIX. törvény a különleges gazdasági övezetről és a hozzá kapcsolódó egyes törvények módosításáról (Act on the special economical area and the connecting changes in law) 2020.
[148] For a short introduction on the Indian act see Preeti Sampat, 'Special Economic Zones in India' (2008) 43 Economic and Political Weekly 25, 25–26.
[149] A small city in Pest county of Hungary.
[150] 294/2020. (VI. 18.) Kormány rendelet a Göd város közigazgatási területén különleges gazdasági övezet kijelöléséről (Goverment decree on designating a special economic area on Göd's adminiastrative area) 2020.
[151] Győry and Weinberg (n 146) 344.
[152] ibid.
[153] Sampat (n 148) 25–26.

goes further and argues that it creates legal issues concerning the Fundamental Law itself.[154] She also showcases how, even within the parliament, the ruling created multiple complaints towards the Constitutional Court. These ended up creating a constitutional requirement supplied by the Constitutional Court:

> "Parliament must ensure budgetary and financial support proportionally for local self- governments to mandatory tasks performed by them."[155]

This requirement is overshadowed by a later part of the same Constitutional Court's decision that softened the requirement and essentially allowed the Government's actions without necessitating any form of compensation for Göd's local government.[156] The Court's argument was that public goods should be used for the benefit of the public, and in this case, the public refers to the greater public.[157] Siket stated that the Constitutional Court "confined its examination to scratching of surface".[158]

To conclude whether Generality is compatible with the Göd Special Economical Area all the earlier mentioned academics argue against the decision for various different reasons. All of them see the decision as problematic. The government's argument that it needed such laws to restart the economy was completely unfounded.[159] This points towards a lack of Public Reason in the context of the decree and the law. The lack of Public Reason goes against the Generality Principle.

3.2.4 KARTONPACK Nyrt.

During the State of Emergency, there were other government-enacted decrees that were and still are under scrutiny. The one that we are going to examine here concerns a publicly listed company. KARTONPACK Nyrt. is a relatively smaller company with a total revenue of 2,562

[154] Győry and Weinberg (n 139) 344; and Judit Siket, 'How to Preserve Local Autonomy? Special Economic Zones through the Lens of Constitutional Requirements' (2021) 2021 Jogelméleti Szemle 71, 76–77 respectively.
[155] Siket (n 147) 77.
[156] ibid 80–81.
[157] ibid 79.
[158] ibid 83.
[159] For a summary of the goverment's argument see ibid 76; for an alternative reasoning see Győry and Weinberg (n 146) 344–345.

million Hungarian Forints.[160] The company's main profile is manufacturing paper boxes.[161] These are important as neither the size of the company nor the market that it is functioning in signals closeness with the earlier mentioned COVID-19 pandemic.

On the 17th of April, the government decided that it was in the interest of the country for KARTONPACK Nyrt. to be under government control. Following this decision said control was utilised to replace the board of directors with new personnel, all of whom at one point held positions within the FIDESZ.[162] The official explanation was that these actions were required to aid the measures against the COVID-19 pandemic.[163]

This action is one that concerns a singular corporation so the examination will immediately focus on the Public Reason behind it. The government's decree is hanging on the fact that they needed the company to utilise its resources. Győri, Weinberg and Halmai all argue that such reasoning is unfounded.[164] The size of the corporation and the fact that there was a history of legal battles between the minority owners and the government, which was a minority shareholder, further supports the academics.[165] Moreover, the new board was elected without any notice to the shareholders, showing the possible lack of Good Faith.[166] The firm academic consensus on the matter could be taken as the Public Reason. As the Public Reason does not support the law it does not pass the Generality Principle.

The above examples show that the Hungarian system has failed to comply with the principle of Generality on multiple occasions. The current system has been shown to create controversies at its best and fundamental legal issues at its worst. The treatment of minority languages in the Fundamental Law shows that the Government's decisions have been lacking

[160] 'KARTONPACK Nyrt. Company Profile' (*Bet site*) <https://bse.hu/pages/company_profile> accessed 21 March 2024.
[161] ibid.
[162] Gábor Halmai, 'From "Illiberal Democracy" to Autocracy. How Covid-19 Helped to Destroy the Remnants of Democracy in Hungary' in Jakub Urbanik and Adam Bodnar (eds), *Περιμένοντας τους Βαρβάρους. Law in a Time of Constitutional Crisis.* (Verlag CHBECK oHG 2021) 231 <https://doi.org/10.5771/9783748931232-227> accessed 20 March 2024.
[163] 128/2020. (IV. 17.) Kormány rendelet a veszélyhelyzet során teendő intézkedések keretében gazdálkodó szervezet működésének a magyar állam felügyelete alá vonásáról (Government decree on bringing the operations of economic organizations under the supervision of the Hungarian state within the framework of the measures to be taken during the state of emergency) 2020.
[164] Győry and Weinberg (n 139) 345; and Halmai (n 155) 231 respectavely.
[165] About the legal history see Győry and Weinberg (n 139) 345; and about the announcement and the legal situation see Halmai (n 155) 231.
[166] Halmai (n 155) 231.

Generality starting from the beginning of the FIDESZ era. The treatment of the Central European University and the case of Göd shows that certain laws were tailor-made for special purposes and situations that do not abide by the principle of Generality. Other times the laws were utilised in a way not fitting with Generality like in the case of KARTONPACK Nyrt. Through these examples, it is therefore proven that the Generality Principle is lacking in the current Hungarian system. In turn it cannot be considered a strong rule of law country.[167]

3.3 Publicity

Out of the two principles that create the weak version of the rule of law, Publicity is the one that, as stated earlier, could be classified as the reason-giving principle. In the following part, the article will give evidence that Hungary's system lacks the Publicity principle. It will do so by analysing the implementation of cardinal laws in the country, the freedom of information and the State of Emergency introduced during the COVID-19 pandemic.

3.3.1 Cardinal Laws

The concept of a harder-to-modify law in itself is not alien to Europe as many of its countries, such as, France and Spain, have been using such legal tools more and more frequently in the last decades.[168] These laws are defined by countless names, but the article will call them Cardinal Laws as that is how they are referred to in Hungarian jurisprudence. To understand this legislative tool, let us look at the main elements that define it. For a law to be classified as a Cardinal one, it needs to be enacted with a qualified majority and potentially go through additional safeguards. After enactment, it has a standing close to, if not on the level of, the Constitution.[169] They are meant as a tool to protect certain crucial fields of law.[170]

[167] Gowder (n 2) 12, 28.
[168] Boldizsár Szentgáli-Tóth, 'Organic Laws/Cardinal Laws' paras 1–3 <https://real.mtak.hu/155309/1/MPECCoL302_organiccardinallaws_Szentgali-Toth_20220405zG(1).pdf> accessed 27 March 2024.
[169] ibid 1–2.
[170] ibid 2.

The Hungarian government first adopted the concept in 1990, during the *rendszerváltás*.[171] In 2010 the new Fundamental Law reaffirmed their existence, and further described areas of the legislation they would govern.[172] This is the pivotal point for our analysis. This tool could potentially be used to stabilise a country's system by creating rules about the elections and rules about the procedures of the parliament. In other cases, like in France and Austria, the Cardinal laws are used to achieve just that, stability.[173] The Hungarian situation is different, as the Venice Commission puts it, the Cardinal Laws are excessive. The legislative areas that are governed by these laws include:

> "family policy, … the designation of ministries and other public administration organs, … the term of office and remit of the "Autonomous Regulatory Organs", … the judiciary, the basic rules of public finances, public service provisions, pension system etc., … the State Audit Office, the Budgetary Council, … the defence forces, … the police and the national security services, the rights of nationalities.[174]

The principle of Publicity, being a reason-giving requirement, requires a place and an opportunity for discourse; the lack of such place and opportunity would mean the lack of the principle itself. In a system that is freely using Cardinal Laws to this extent, the opportunity for challenging the governing powers' reasoning is minimal. That is because the majority of the laws are treated as the constitution itself, so changing them requires the same amount of force. Even if this situation is not strictly against the Gowderian view on Publicity, it definitely reduces the potential for debate, which would not be fitting with the Publicity principle.

3.3.2 Freedom of Information

Laws concerning the media in Hungary have been criticised for impeding debate over relevant issues.[175] This began when the FIDESZ-led government introduced a bundle of laws

[171] ibid 4.
[172] *OPINION ON THE NEW CONSTITUTION OF HUNGARY* (n 125) [22–24].
[173] ibid 23.
[174] ibid 22.
[175] Bárd (n 139) 2.

just before the new Fundamental Law around 2010 and 2011.[176] These laws were dubbed the "New Media Law" as they signalled a complete overhaul of the rules in the media sector.[177] There is a strong parallel that could be drawn between these laws and the Fundamental Law. In both cases changes were needed that everyone, including the academics, expected, and both are heavily criticised.[178]

The changes were spearheaded by an amendment to the former constitution modifying Article 61 and going from a direct prohibition of monopolies in the media to establishing a new independent observatory system.[179] A later law further specified the amendment establishing the National Media and Info-communications Authority (Media Authority) and its Media Council.[180]

The Media Authority's exact power will be discussed later but now let us see how independent it is. The law states that it is an "autonomous administrative authority operating with members elected by the Parliament."[181] This implies independence but also partially highlights the main problem with the law, that it is only independent in theory. The main body is the Authority, and the Media Council's role is to supervise the implementation of the new media rules in accordance with the freedom of expression.[182] The head of the Authority is appointed by the Prime Minister, and they are, ipso jure, the candidate for the chairperson of the Media Council.[183] So the system where at face there is a duality in that the Authority observes the Media at large and the Media Council supervises said Authority, or at least its actions, in the end the person with the final say is the same. The President has the further power to select the managers of the Authority and at will let them go without justification.[184] The role is also meant to be a nine-year-long mandate in both the President's and Chairperson's cases.[185] The rest of the Media Council is elected through an ad hoc committee that has members drawn from the factions in the parliament, who are weighted based on the

[176] Ellen Hinsey, 'The New Opposition in Hungary' (2012) 33 New England Review (1990-) 126, 3.
[177] ibid.
[178] ibid.
[179] ibid.
[180] ibid.
[181] ibid.
[182] Lucia Bellucci, 'Media Law, Illiberal Democracy and the COVID-19 Pandemic: The Case of Hungary' in Mathieu Deflem and Derek MD Silva (eds), *Media and Law: Between Free Speech and Censorship*, vol 26 (Emerald Publishing Limited 2021) 154 <https://doi.org/10.1108/S1521-613620210000026010>.
[183] ibid.
[184] ibid.
[185] ibid.

number of seats represented there.[186] It is essential to mention here that the FIDESZ-KDNP coalition government at the time had an overwhelming two-thirds majority compared to other fractions.[187] Later, following heavy criticism, the law was amended so that the President of the Media Authority had to be appointed by the President of Hungary on the proposal of the Prime Minister.[188] This change does not shift the supervision of the Government of the Media Authority in any major way, as the government resisted the pressure to separate the Media Council from the Authority.[189]

The power of the Media Authority is clearly shown when seen through the case of the Klubrádió and its license to the 92.2 MHz frequency.

The Klubrádió is an independent radio station in Hungary, meaning that it is not connected to the government or any person affiliated with it.[190] The Radio was in possession of a license concerning the 92.2 MHz broadcasting frequency that it was using.[191] In 2011, the Media Council, instead of allowing Klubrádió to renew its license, assigned the frequency to another radio following an invitation to tenders exclusively for music radios.[192] Klubrádió, not being a music radio, was forced out of its right to renew the license. This decision was appealed at the Budapest Court of Appeal and won.[193] Following this, the Media Council once again resisted the renewal and instead re-examined the tenders previously submitted, excluding Klubrádió once again.[194] The radio appealed this decision as well and won. The Media Council only accepted Klubrádió's tender once the court of appeal ordered it to do so.[195] This whole procedure did not just show an extensive bias against the Radio but also placed it at financial risk.[196] The positive ending was overshadowed when the Media Council announced that it would revoke the Radio's rights to the frequency in 2020.[197] The Media Authority reasoned that Klubrádió breached the Hungarian Media law thus they were in their right to

[186] ibid.
[187] 'Az Országgyűlés Összetétele' <https://static.valasztas.hu/dyn/pv10/outroot/vdin2/hu/l50.htm> accessed 4 April 2024.
[188] Bellucci (n 182) 155.
[189] ibid.
[190] ibid 157.
[191] ibid 158.
[192] ibid 157.
[193] ibid 158.
[194] ibid.
[195] ibid.
[196] Hinsey (n 176) 11.
[197] Bellucci (n 182) 158.

revoke their license.[198] The exact breaches weren't revealed, and even the owner of the radio stated that they never got any official reasoning.[199] This questionable legal situation did not escape the European Commission as it referred the case to the European Court of Justice.[200]

The Publicity principle, as stated earlier, is a reason-giving principle. Requests to such reasonings are an essential part of it. Freedom of the Press and the Freedom of Information are important cornerstones of requesting or sharing such Requests. The above-described legal situation, and further, the case, which serves as a glimpse of how the law is regularly used, shows that Hungarian law cannot provide for the Freedom of the Press. Further, the lack of communication from the Authority also hints at the lack of Publicity in the system.

3.3.3 State of Emergency

The State of Emergency in Hungary was mentioned earlier in the context of some of the laws that were implemented through it. At this point the article will analyse whether the concept itself is fitting with the Publicity principle. To provide some context, during the COVID-19 pandemic, multiple states utilised a form of emergency power to combat the crisis. Out of all of these, Hungary was the most extreme, where the government was granted a right to rule by decree, the only restriction being a direct revocation by the parliament.[201]

The legal basis for this was laid down in Article 53 of the Fundamental Law. It gives the government the power to invoke a state of danger in a select number of cases.[202] If it is evoked, the government has unrestricted rule for the following 15 days. Afterwards, the Parliament has to approve any extensions. At the end of it, all the decrees brought during the

[198] ibid.
[199] 'Hungary Forces Klubradio Off Air | Human Rights Watch' (10 February 2021) para 2 <https://www.hrw.org/news/2021/02/10/hungary-forces-klubradio-air> accessed 5 April 2024.
[200] 'Media Freedom: EU Electronic Communications Rules' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2688> accessed 5 April 2024.
[201] Győry and Weinberg (n 146) 329.
[202] There is an extensive list containing such situations in the Catastrophe Defence Act (Katasztrófavédelmi törvény), for some examples see ibid 338–339.

period would be annulled.[203] In case the Parliament approves an extension, the State of Emergency, in theory, can stay active indefinitely.[204]

The decisions made under the recent State of Emergency can be categorised into four groups:[205]

- Containment
- Healthcare
- Economic
- Interference with the legal order

Containment-wise, while some serious restrictions were indeed implemented, Hungary's COVID-19 stringency index score was middle of the pack, signifying that the rules were not extreme in this regard.[206]

Healthcare, being the centre of attention during the pandemic, received heightened attention from the government. Medical trials were fast-tracked for COVID-19 vaccines, and certain medical necessities were banned from being exported. These kinds of decrees were common in Europe. However, what was rare was that the hospitals were brought under military control.[207] This, although strange, could feasibly be argued to be reasonable in such a crisis.

Economic policies came in many shapes and forms. Some were questionable, of which the article has already discussed a few. Others could be justified as "drastic measures in drastic times", like tax breaks for certain small businesses.[208]

Interference with the legal order is where things get complicated. Firstly, what is worth mentioning is the "justice break" that was enacted. It meant that the courts would not sit other than for a select number of cases.[209] The use of such a "break" is not alien to Hungarian law,

[203] ibid 339.
[204] ibid.
[205] ibid 346.
[206] 'COVID-19 Government Response Tracker | Blavatnik School of Government' <https://www.bsg.ox.ac.uk/research/covid-19-government-response-tracker> accessed 8 April 2024.
[207] Győry and Weinberg (n 146) 343.
[208] ibid 344.
[209] ibid 342.

but this case is unique in its vagueness.[210] A law that basically stops the cogs of justice, but does not include instructions as to how to handle deadlines, could be catastrophic.[211] Another example is the almost total suspension of the GDPR, which gave the government the right to any personal information it deemed necessary for the fight against the pandemic.[212] Further, they also suspended any freedom of information requests.[213]

The above-described situation is anything but fitting with the Publicity principle. A Government ruling by decree with near-infinite power does not allow for any kind of debate, as not even the parliament was involved in the majority of these decisions. Additionally, the suspension of freedom of information requests goes straight against the principle as it disallows access to information.

The end of the State of Emergency did not erase all of these laws, only some. A bulk of these were reintroduced in a grandiose law package that also created a sub-constitutional emergency regime leaving a considerable amount of power in the hands of the government.[214]

The three cases examined in this section (3.3) exhibit that the Hungarian system falls short of the standards set out in the Publicity principle on multiple occasions. The situation concerning the State of Emergency is especially worrisome as it allows the government to further damage the Rule of Law without restraints.

3.4 Regularity

The final principle of the Gowderian rule of law and debatably the most important one. It describes multiple constraints on both the lawmakers and government actors that even the formal conception of the rule of law regularly contains. In the following section, the article

[210] ibid.
[211] ibid.
[212] ibid 346.
[213] ibid.
[214] ibid 348.

will examine how the Hungarian system lacks this principle, and it will do so by analysing the Fundamental Law and the excessive amounts of corruption in the state.

3.4.1 Vagueness in the Fundamental Law

The first example here comes once again from the Fundamental Law. The exact same law that has been proven to be the root of many issues in the last two sections. For the final time let us analyse it to assess one of its biggest issues. The Fundamental Law as many other constitutions contains a preamble. These are meant to function as political rhetorical tools and also contain a declaration of basic values.[215] In the Hungarian case Article R § 3 changes this as it states that: "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution."[216] The act of making the Preamble a semi-law can cause issues as it is vague in nature and contains questionable statements.[217]

This vagueness is in itself contradictory to the Regularity principle. It also appears to be a theme in a variety of legislation as well. Another example could be the earlier mentioned "justice break". The Preamble, however, is the most worrying, as it verbatim states that the 1949 Constitution is not recognised and is therefore invalid, which could lead to a legal crisis in the country. It would affect the laws brought under the former constitution and international treaties that were signed during, which could prove to be invalid.[218] Some of these treaties are essential to the functioning of the current legal system like joining the European Union.[219] The annulment of the previous constitution could further be seen as a law attempting to have a retroactive effect. The law not being clear on these issues and their implied retroactive effect creates legal vagueness, instability, and uncertainty, which therefore signals the system's lack of Regularity principle.

[215] *OPINION ON THE NEW CONSTITUTION OF HUNGARY* (n 131) para 31.
[216] The National Avowal is in essence the preable ibid 34.
[217] ibid.
[218] ibid 35.
[219] Just a reminder, that the constitution preceding the 2010 Fundamental Law was the 1949 Constitution with most of it amended as compared to the original script.

Since the Fundamental Law's enactment, the Venice Commission took this question to the Hungarian Government, and the Authorities confirmed that the 1949 constitution's invalidity is only a political statement.[220] While this answers one question it also brings further ones into light. The primary question is, whether Article R § 3 is invalid or the Preamble should be taken with a grain of salt? This, up till the writing of the article, remains unclear.

3.4.2 Corruption and State Capture

Corruption has been present in Hungary at least since the transition in 1989. During this time period of uncertainty corruption was understood to be a "hardly avoidable network of illegal social interactions without which the new political system could have not operated".[221]

This brought something familiar back from before the communist era: an elite that influenced the legislation through unjust, undemocratic power. Before the *rendszerváltás*, the Party controlled everything, and after a new ruling class emerged with similar power.[222] This is commonly referred to as State Capture.[223] A holistic definition would be: "steering of the tangible benefits of public action to advantage private parties" in a state.[224] This process requires corruption to bend the rules of the law and engineer a state that only benefits the select few.[225]

This newly emerged elite at the writing of this article consists of personnel in, or close to the FIDESZ Party. There are almost undeniable cases of this, like Orbán's son in law, István Tiborcz's misuse of European Union funds consisting of an extraordinary 40 million Euros.[226] Another could be the intriguing situation of how almost all of Viktor Orbán's family members are subcontractors to the government, even though sometimes the prices that they

[220] *OPINION ON THE NEW CONSTITUTION OF HUNGARY* (n 131) para 37.
[221] Petra Burai, 'Transitioning Boundaries between Law and Social Practice: Corruption in Hungary before and after 1989' (2017) 7 Central and Eastern European Socio-Political and Legal Transition Revisited 96.
[222] Stephen White, 'What Is a Communist System?' (1983) 16 Studies in Comparative Communism 247, 249.
[223] Burai (n 221) 96.
[224] Barry M Mitnick, 'Capturing "Capture": Definition and Mechanisms' (2011) 11 Handbook on the Politics of Regulation 34, 45 <https://doi.org/10.4337/9780857936110>.
[225] Burai (n 221) 96.
[226] Edit Zgut, 'Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland' (2022) 14 Hague Journal on the Rule of Law 287, 296 <https://doi.org/10.1007/s40803-022-00170-0>.

offer are higher than those of their competitors.[227] The most worrisome cases are the takeovers of certain enterprises by this elite through pressured sales.[228] Since 2012 corruption in Hungary only seemed to worsen as shown by Transparency International, going from a CPI score of 55 to 42 while other countries in the region, like Romania and Poland, have either shown an increase or at least stayed above a CPI of 44.[229]

These cases show that Role Separation is almost non-existent in the system, as public power is utilised for personal gains. A lack of Role Separation therefore means a lack of the Regularity principle.

Regularity is an important building block of the Gowderian rule of law. It is one of the two most basic principles in his theorem. A system lacking Regularity would not possess even a weak rule of law. The article has shown that the Hungarian system lacks this essential principle. This was achieved through analysing the cases of the vague fundamental law and the deep-rooted corruption in the country.

Conclusions

This article's aim was to analyse the current Hungarian system through the lens of Gowder's theory. It did so firstly by providing an overview of its recent history from the transition in 1989 to the 2010 elections. It also highlighted the unfinished process of the *rendszerváltás*, and the problematic Fundamental Law introduced after the 2010 elections.

In Section Two, the rule of law and its most prominent interpretations were discussed. Then the theory of Gowder was introduced and analysed, showing its comparative advantage in its interconnectedness. This was then used as a measuring tool in Section Three, which focused on the Hungarian system and its shortcomings with regard to the rule of law.

[227] ibid.
[228] ibid.
[229] '2023 Corruption Perceptions Index: Explore the Results' (*Transparency.org*, 30 January 2024) <https://www.transparency.org/en/cpi/2023> accessed 13 April 2024.

Section Three focused on specific examples where the system failed to abide by Gowder's Three Principles. Concerning Generality these were: the 2011 Fundamental Law and its lack of protection for minority languages, the case of Central European University and the State of Emergency. The following sub-section analysed cases in the context of Publicity, the first being the overuse of Cardinal Laws in the legislation. Later the article looked at the case of the New Media Law and its effects on the "Klubrádió". In the final part of Section Three, the system's lack of the Regularity principle was seen by observing two separate issues, the vagueness in the Fundamental Law and the deep-rooted corruption in the system, the extent of which has seemed to worsen every year since 2012.

Does this mean that the Rule of Law is completely gone from Hungary? No, of course not, not entirely at least. To live with the words of Jack Watson: "Without any rule of law, there would soon be nothing left of real civilization."[230] However, this article presents an argument that it is heavily damaged in the Hungarian system. It is slowly disappearing, and if it continues to do so, then there will be consequences, both economic and social, the first signs of which can already be seen. The classification of the state by the Freedom House shows that it is not a democracy but a Transitional or Hybrid Regime.[231] The Venice Commission has reported on Hungary on multiple occasions with concerning results.[232] Further, seeing as economist have suggested that there is a connection between Foreign Direct Investment and a state's status as a democracy.[233] This erosion has potentially led to the country losing its leading position in the region.[234] It has also been proven that there is a need for the Rule of Law, especially for legal stability and equality before the law for the growth of the economy.[235]

[230] Jack Watson, 'You Don't Know What You've Got 'til It's Gone: The Rule of Law in Canada - Part I' (2014) 52 Alberta Law Review 689, 697.
[231] 'Hungary: Nations in Transit 2024 Country Report' (n 34).
[232] *OPINION ON THE NEW CONSTITUTION OF HUNGARY* (n 131); and *Observatory on emergency situations* (n 146).
[233] For the correlation between Foreign Direct Investment and Democracy see Nathan M Jensen, 'Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment' (2003) 57 International Organization 587, 612 <https://doi.org/10.1017/S0020818303573040>; and for the lack of Rights and Liberties see 'Hungary: Nations in Transit 2024 Country Report' (n 34).
[234] Michael Bernhard, 'Democratic Backsliding in Poland and Hungary' (2021) 80 Slavic Review 585, 585–586 <https://doi.org/10.1017/slr.2021.145>.
[235] Daron Acemoglu, Simon Johnson and James A Robinson, 'Chapter 6 Institutions as a Fundamental Cause of Long-Run Growth' in Philippe Aghion and Steven N Durlauf (eds), *Handbook of Economic Growth*, vol 1 (Elsevier 2005) 12 <https://doi.org/10.1016/S1574-0684(05)01006-3>.

Although these might be important for a country to prosper in the long run, the Rule of Law is also an essential part of a democratic state. The lack of it signifies the lack or the imperfection of the democratic system.[236] This in turn could entail severe consequences for the country, like the reduced number of essential rights and liberties.

The recent elections, as mentioned in the beginning of the article could finally signal change, however the country's issues run deep and a potential road to redemption is clearly long. The first step is evident: the Constitution needs to change. The Fundamental Law of the country is not an adequate foundation for a state's legal system. Through creating a new Constitution, the repair of the Rule of Law could finally begin. A process of healing that the country has been in need of for years.

[236] Guillermo O'Donnell, 'Why the Rule of Law Matters The Quality of Democracy' (2004) 15 Journal of Democracy 32, 32.

Bibliography

‘1949 Hungarian Constitution.Pdf’ <https://lapa.princeton.edu/hosteddocs/hungary/1949%20Hungarian%20constitution.pdf> accessed 24 November 2023

‘1989 Hungarian Constitution.Pdf’ <https://www2.ohchr.org/english/bodies/cescr/docs/e.c.12.hun.3-annex2.pdf> accessed 28 November 2023

‘2023 Corruption Perceptions Index: Explore the Results’ (*Transparency.org*, 30 January 2024) <https://www.transparency.org/en/cpi/2023> accessed 13 April 2024

‘A Region Reordered by Autocracy and Democracy’ (*Freedom House*) <https://freedomhouse.org/report/nations-transit/2024/region-reordered-autocracy-and-democracy> accessed 14 April 2024

Acemoglu D, Johnson S and Robinson JA, ‘Chapter 6 Institutions as a Fundamental Cause of Long-Run Growth’ in Philippe Aghion and Steven N Durlauf (eds), *Handbook of Economic Growth*, vol 1 (Elsevier 2005) <https://doi.org/10.1016/S1574-0684(05)01006-3>

‘Alkotmány Meaning in English’ <https://dictzone.com/hungarian-english-dictionary/alkotm%C3%A1ny> accessed 22 April 2026

Arato A, ‘Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making’ (2012) 1 Global Constitutionalism 173 <https://doi.org/10.1017/S2045381711000050>

‘Az Országgyűlés Összetétele’ <https://static.valasztas.hu/dyn/pv10/outroot/vdin2/hu/l50.htm> accessed 4 April 2024

Bárd P, ‘The Rule of Law and Academic Freedom or the Lack of It in Hungary’ (2020) 19 European Political Science 87 <https://doi.org/10.1057/s41304-018-0171-x>

Bellucci L, ‘Media Law, Illiberal Democracy and the COVID-19 Pandemic: The Case of Hungary’ in Mathieu Deflem and Derek MD Silva (eds), *Media and Law: Between Free Speech and Censorship*, vol 26 (Emerald Publishing Limited 2021) <https://doi.org/10.1108/S1521-613620210000026010>

Bernhard M, ‘Democratic Backsliding in Poland and Hungary’ (2021) 80 Slavic Review 585 <https://doi.org/10.1017/slr.2021.145>

Boros T, ‘The Hungarian “Stop Soros” Act : Why Does the Government Fight Human Rights Organisations?’

Bozóki A, ‘Hungary’s Road to Systemic Change: The Opposition Roundtable’ (1993) 7 East European Politics and Societies 276 <https://doi.org/10.1177/0888325493007002004>

‘Breaches of EU Values: How the EU Can Act (Infographic)’ (*Topics | European Parliament*, 27 February 2018) <https://www.europarl.europa.eu/topics/en/article/20180222STO98434/breaches-of-eu-values-how-the-eu-can-act-infographic> accessed 16 December 2025

Bruszt L and Horvath GK, ‘1989: The Negotiated Revolution in Hungary’ (1990) 57 Social Research 365

Burai P, ‘Transitioning Boundaries between Law and Social Practice: Corruption in Hungary before and after 1989’ (2017) 7 Central and Eastern European Socio-Political and Legal Transition Revisited

Celano B, ‘Publicity and the Rule of Law’ (2013) 2 Oxford Studies in Philosophy of Law 122

Chemerinsky E, ‘Substantive Due Process Practising Law Institute Section 1983 Civil Rights Litigation Symposium’ (1998) 15 Touro Law Review 1501

‘COVID-19 Government Response Tracker | Blavatnik School of Government’ <https://www.bsg.ox.ac.uk/research/covid-19-government-response-tracker> accessed 8 April 2024

Craig P, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (1st edn, Routledge 2017) <https://doi.org/10.4324/9781315085302-4>

Dicey AV, *Introduction to the Study of the Law of the Constitution* (Repr. of the 8. ed. publ. by Macmillan in 1915, Liberty Fund 1982)

Dworkin RM, ‘The Model of Rules’ The University of Chicago Law Review

Dyzenhaus D, ‘The Pasts and Future of the Rule of Law in South Africa’ (2007) 124 South African Law Journal 734

Fuller LL, ‘THE MORALITY THAT MAKES LAW POSSIBLE’ *The morality of law* (Revised ed, Yale University Press 1969)

Garibaldi OM, ‘General Limitations on Human Rights: The Principle of Legality United Nations, The’ (1976) 17 Harvard International Law Journal 503

Gavison R, ‘What Belongs in a Constitution?’ in Stefan Voigt and Hans-Jürgen Wagener (eds), *Constitutions, Markets and Law* (Edward Elgar Publishing 2002) <https://doi.org/10.4337/9781035304653.00008>

Gavoor AA and Platt SA, ‘In Search of the Presumption of Regularity’ (2022) 74 Florida Law Review 729

Gowder P, ‘The Rule of Law and Equality’ (2013) 32 Law and Philosophy 565 <https://doi.org/10.1007/s10982-012-9161-2>

——, *The Rule of Law in the Real World* (Cambridge University Press 2016)

Győry C and Weinberg N, ‘Emergency Powers in a Hybrid Regime: The Case of Hungary’ (2020) 8 The Theory and Practice of Legislation 329 <https://doi.org/10.1080/20508840.2020.1838755>

Halmai G, ‘The Making of “Illiberal Constitutionalism” with or without a New Constitution: The Case of Hungary and Poland’ in David Landau and Hanna Lerner (eds), *Comparative Constitution Making* (Edward Elgar Publishing 2019) <https://doi.org/10.4337/9781785365263.00021>

——, ‘From “Illiberal Democracy” to Autocracy. How Covid-19 Helped to Destroy the Remnants of Democracy in Hungary’ in Jakub Urbanik and Adam Bodnar (eds), *Περιμένοντας τους Βαρβάρους. Law in a Time of Constitutional Crisis.* (Verlag CHBECK oHG 2021) <https://doi.org/10.5771/9783748931232-227> accessed 20 March 2024

Hayek FA and Caldwell B, *The Road to Serfdom: Text and Documents: The Definitive Edition* (Taylor & Francis Group 2007)

Hazard JN, ‘Communist Constitutionalism in a New Form’ (1971) 4 Studies in Comparative Communism 107

Hinsey E, ‘The New Opposition in Hungary’ (2012) 33 New England Review (1990-) 126

‘Hungary Forces Klubradio Off Air | Human Rights Watch’ (10 February 2021) <https://www.hrw.org/news/2021/02/10/hungary-forces-klubradio-air> accessed 5 April 2024

‘Hungary: Nations in Transit 2024 Country Report’ (*Freedom House*) <https://freedomhouse.org/country/hungary/nations-transit/2024> accessed 16 April 2024

Jensen NM, ‘Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment’ (2003) 57 International Organization 587 <https://doi.org/10.1017/S0020818303573040>

‘KARTONPACK Nyrt. Company Profile’ (*Bet site*) <https://bse.hu/pages/company_profile> accessed 21 March 2024

Kft WKH, ‘1995. Évi XLIV. Törvény a Magyar Köztársaság Alkotmányáról Szóló, Többször Módosított 1949. Évi XX. Törvény Módosításáról - Törvények És Országgyűlési Határozatok’ <https://mkogy.jogtar.hu/jogszabaly?docid=99500044.TV> accessed 28 November 2023

Kosar D and Sipulova K, ‘The Strasbourg Court Meets Abusive Constitutionalism: “Baka v Hungary” and the Rule of Law’ (2018) 10 Hague journal on the rule of law : HJRL 83 <https://doi.org/10.1007/s40803-017-0065-y>

Kubas S and Czyż A, ‘From a Liberal Opposition Party to a Right-Wing Party of Power. Three Decades of the Hungarian Fidesz (1988–2018)’ (2018) 3 Annales Universitatis Mariae Curie-Skłodowska. Sectio M. Balcaniensis et Carpathiensis 47 <https://doi.org/10.17951/m.2018.3.47-65>

Kulcsár K, ‘Folyamat És Megszakítás’ (2005) 19 Társadalomkutatás 5 <https://doi.org/10.1556/tarskut.19.2001.1-2.1>

Lippert-rasmussen K, ‘The Badness of Discrimination’ (2006) 9 Ethical Theory and Moral Practice 167 <https://doi.org/10.1007/s10677-006-9014-x>

Litvinoff S, ‘Good Faith’ (1996) 71 Tulane Law Review 1645

Lucy W, ‘Equality Under and Before the Law’ (2011) 61 The University of Toronto Law Journal 411

Marmor A, ‘The Rule of Law and Its Limits’ (2004) 23 Law and Philosophy 1

‘Media Freedom: EU Electronic Communications Rules’ (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2688> accessed 5 April 2024

Mitnick BM, ‘Capturing “Capture”: Definition and Mechanisms’ (2011) 11 Handbook on the Politics of Regulation 34 <https://doi.org/10.4337/9780857936110>

Morlino L and Palombella G, *Rule of Law and Democracy: Inquiries Into Internal and External Issues* (BRILL 2010)

O’Donnell G, ‘Why the Rule of Law Matters The Quality of Democracy’ (2004) 15 Journal of Democracy 32

Osborne R (ed), *The Old Oligarch: Pseudo-Xenophon’s Constitution of the Athenians* (Robin Osborne tr, 4th edn, Cambridge University Press 2023) <https://doi.org/10.1017/9781009383608>

‘POLITICO Poll of Polls — Hungarian Polls, Trends and Election News for Hungary – POLITICO’ <https://www.politico.eu/europe-poll-of-polls/hungary/> accessed 22 April 2026

Preece JJ, ‘Minority Rights in Europe: From Westphalia to Helsinki’ (1997) 23 Review of International Studies 75 <https://doi.org/10.1017/S0260210597000752>

Rawls J, ‘The Idea of Public Reason Revisited’ (1997) 64 The University of Chicago Law Review 765 <https://doi.org/10.2307/1600311>

Raz J, *The Authority of Law: Essays on Law and Morality* (Reprinted, Oxford Univ Press 2002)

——, ‘The Rule of Law and Its Virtue*’ *The Rule of Law and the Separation of Powers* (Routledge 2005)

Rule of Law, Common Values and Illiberal Constitutionalism: Poland and Hungary within the European Union (Routledge 2020) <https://doi.org/10.4324/9781003052852>

Sajó A and Tuovinen J, 'The Rule of Law and Legitimacy in Emerging Illiberal Democracies' (2018) 64 osteuropa recht 506 <https://doi.org/10.5771/0030-6444-2018-4-506>

Sampat P, 'Special Economic Zones in India' (2008) 43 Economic and Political Weekly 25

Sawatsky W, 'Secret Soviet Lawbook on Religion' (1976) 4 Religion in Communist Lands 24 <https://doi.org/10.1080/09637497608430788>

Siket J, 'How to Preserve Local Autonomy? Special Economic Zones through the Lens of Constitutional Requirements' (2021) 2021 Jogelméleti Szemle 71 <https://doi.org/10.59558/jesz.2021.3.71>

Szentgáli-Tóth B, 'Organic Laws/Cardinal Laws' <https://real.mtak.hu/155309/1/MPECCoL302_organiccardinallaws_Szentgali-Toth_20220405zG(1).pdf> accessed 27 March 2024

Tóth GA (ed), 'From the 1989 Constitution to the 2011 Fundamental Law' *Constitution for a disunited nation: on Hungary's 2011 fundamental law* (Central European University Press 2012)

——, 'Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism' in Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (1st edn, Cambridge University Press 2017) <https://doi.org/10.1017/9781316585221.013>

UN. Secretary-General (ed), *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General* (UN 23) <https://digitallibrary.un.org/record/527647> accessed 16 December 2025

Varga AZ, 'Beyond Rule of Law' (2013) 9 Iustum Aequum Salutare 117

'Viktor Orban: Hungary "autocracy" Verdict from EU Correct, Say Activists' (16 September 2022) <https://www.bbc.com/news/world-europe-62925460> accessed 21 April 2024

Watson J, 'You Don't Know What You've Got 'til It's Gone: The Rule of Law in Canada - Part I' (2014) 52 Alberta Law Review 689

‘Wayback Machine’ (16 March 2010) <https://web.archive.org/web/20100316215728/http://static.fidesz.hu/download/481/nemzeti_ugyek_politikaja_8481.pdf> accessed 2 November 2023

West R and West RL, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Ashgate Dartmouth 2003)

White S, ‘What Is a Communist System?’ (1983) 16 Studies in Comparative Communism 247

Zgut E, ‘Informal Exercise of Power: Undermining Democracy Under the EU’s Radar in Hungary and Poland’ (2022) 14 Hague Journal on the Rule of Law 287 <https://doi.org/10.1007/s40803-022-00170-0>

Živković V, *Fair and Equitable Treatment and the Rule of Law* (Edward Elgar Publishing 2023)

HUNGARY ACT XXV OF 2017 ON THE AMENDMENT OF ACT CCIV OF 2011 ON NATIONAL TERTIARY EDUCATION [2017] VENICE COMMISSION CDL-REF(2017)029

Goverment Decree on the declaration of the state of danger 2020

128/2020. (IV. 17.) Kormány rendelet a veszélyhelyzet során teendő intézkedések keretében gazdálkodó szervezet működésének a magyar állam felügyelete alá vonásáról (Government decree on bringing the operations of economic organizations under the supervision of the Hungarian state within the framework of the measures to be taken during the state of emergency) 2020

2020. évi LIX. törvény a különleges gazdasági övezetről és a hozzá kapcsolódó egyes törvények módosításáról (Act on the special economical area and the connecting changes in law) 2020

294/2020. (VI. 18.) Kormány rendelet a Göd város közigazgatási területén különleges gazdasági övezet kijelöléséről (Goverment decree on designating a special economic area on Göd’s adminiastrative area) 2020

Observatory on emergency situations (Venice Comission)

OPINION ON THE NEW CONSTITUTION OF HUNGARY [2011] Venice Commission CDL-AD(2011)016

Gaza's Famine: Starvation as a Method of Warfare and Violations of International Humanitarian Law

Farhan Khan

1. Introduction

"She was suffering from severe malnutrition. For three months, I was taking my daughter to Al-Rantisi Hospital non-stop, and during that time she also had chronic diarrhoea. When I took her there, the doctors did some tests and told me she had severe malnutrition. They also said that other necessary tests and treatments were not available in Gaza. They mentioned a type of milk that could stop the diarrhoea, but it was unavailable. I looked everywhere—in pharmacies, other hospitals, and even approached the Ministry of Health—but it just wasn't available in Gaza."—

These were the words of a mother , who cradled her four-month-old daughter, Jinan Iskafi, as malnutrition stole her life in May 2025 at the Al-Shati refugee camp in Northern Gaza.[1]

Jinan's death was not just a single tragedy but part of a grim pattern that led to a devastating humanitarian catastrophe. The United Nations had officially confirmed a famine in Gaza, where all 2.1 million residents were suffering from extreme food shortages, resulting in severe malnutrition, disease, and even death.[2] According to UN-backed food security experts, the situation constituted one of the worst-case famine scenarios.[3] By mid-August 2025, malnutrition had claimed at least 227 lives, 103 of whom were children, alongside over 63,000 deaths and approximately 161,000 injuries due to Israel's intense attacks, which human rights experts and organisations have characterised as genocide.[4] For more than two years, Israel's actions have repeatedly displaced people and severely restricted humanitarian access. Continuous blockades and interruptions to the supply of food, water, and medical aid, along with the destruction of agriculture, livestock, and fisheries, have forced them to the brink of starvation. The collapse of health services, sanitation, and local markets has further deepened the crisis.

The use of starvation as a method of warfare is expressly prohibited under international humanitarian law, including the Additional Protocols to the Geneva Conventions,[5] and is

[1]World Health Organization, 'WHO / Gaza Malnutrition' (UNifeed – UN Media, 9 May 2025) <https://media.un.org/unifeed/en/asset/d339/d3393537> accessed 15 October 2025.
[2] World Health Organization, 'Famine Confirmed for First Time in Gaza' (WHO News, 22 August 2025) <www.who.int/news/item/22-08-2025-famine-confirmed-for-first-time-in-gaza> accessed 15 October 2025.
[3] 'In Gaza, mounting evidence of famine and widespread starvation' (UN News, 29 July 2025) <https://news.un.org/en/story/2025/07/1165517> accessed 15 October 2025.
[4] 'Record starvation and malnutrition in Gaza; more West Bank displacement' (UN News, 12 August 2025) <https://news.un.org/en/story/2025/08/1165636> accessed 15 October 2025
[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the

recognised as a war crime under the Rome Statute of the International Criminal Court.[6] These legal provisions make it clear that actions such as destroying farms and food supplies, obstructing humanitarian assistance, or denying civilians access to vital resources like food, water, and medicine are not only unlawful under international humanitarian law but strike at the core of civilian protection during armed conflict.

This article examines the humanitarian consequences of the blockade, the policies that have intensified the crisis, and the legal interpretations and case analysis of these prohibited acts under international law. It also highlights the shortcomings in existing accountability systems and proposes both immediate and long-term measures to prevent further humanitarian collapse. Grounded in empirical evidence and legal analysis, this study seeks to clarify state obligations during humanitarian crises and underscores the urgent need to uphold international law and protect civilian life.

2. Background

On 7 October 2023, Hamas — a Palestinian resistance movement and nationalist political organisation that has administered the Gaza Strip since 2007 — carried out a surprise attack on Israel, resulting in the deaths of over a thousand people, including Israeli soldiers and settlers, and the taking of approximately 200 hostages.[7] According to Hamas officials, the attack was carried out in response to a combination of factors including Israel's occupation and blockade of Gaza, the arbitrary control of the Al-Aqsa Mosque, violence by settlers against Palestinians, restrictions on Palestinian movement, and the unlawful detention of thousands of Palestinians in Israeli prisons.[8] To fully understand why this resistance exists, however, it is important to look much further back in history. The roots of Palestinian outrage stretch back to 1948 — an event Palestinians call the Nakba, meaning "the catastrophe." During the 1947–49 war, an estimated 750,000 Palestinians — around 80% of the Arab population of what became Israel — were expelled or forced to flee.[9] Today, more than 5.9 million Palestinians are registered as

Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II).

[6] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 8(2)(b)(xxv).

[7] 'What is Hamas and why is it Fighting with Israel in Gaza?' *BBC News* (14 October 2025) <https://www.bbc.com/news/articles/clyv7w3gdy2o> accessed 18 February 2026.

[8] Ibid

[9] Human Rights Research Center, *War and Colonization: An Introduction to the Palestinian Refugees' Question* (11 April 2024) <https://www.humanrightsresearch.org/post/war-and-colonization-an-introduction-to-the-palestinian-refugees-question> accessed 10 April 2026.

refugees, making them one of the world's largest refugee populations.[10] In 1967, a further 300,000 Palestinians were displaced following Israel's occupation of the West Bank, East Jerusalem, and the Gaza Strip — followed by decades of land seizures, home demolitions, and forced evictions.[11] In the years leading up to October 2023, violence against Palestinians was also rising at a record pace. By end of 2022, it was the sixth consecutive year of increases in settler attacks, making it the deadliest year for Palestinians in the West Bank since UN records began in 2005.[12] By mid-2023, settler incidents had reached a daily average of three — the highest rate since recording began in 2006.[13] The 7 October attack did not occur in a vacuum. It was the product of 75 years of displacement, occupation, and escalating violence — a context that is essential to understanding the conflict in its full complexity.

Following this, Israel initiated a large-scale military offensive, framing it as a campaign to dismantle Hamas and secure the return of hostages, and justifying its actions as an exercise of the right to self-defence.[14] However, as per reports, the scale of Israel's bombardment on Gaza has been equivalent to six Hiroshima-sized explosives, amounting to over 70,000 tonnes of explosives.[15] By mid-October 2025, more than 68,234 people have been killed, including over 20,000 children, and around 170,373 others have been injured.[16] Another study in July 2024 by a medical journal *The Lancet* has estimated that the ongoing conflict in Gaza may have caused as many as 186,000 deaths, or possibly even more.[17] While Israel asserts that it cares about civilian population, numerous reports point to patterns of conduct that indicate deliberate violations even prior to the war. These include using civilians as human shields, employing

[10] Nathan Citino, Ana Martín Gil and Kelsey P Norman, 'Generations of Palestinian Refugees Face Protracted Displacement and Dispossession' (Migration Policy Institute, 3 May 2023) <https://www.migrationpolicy.org/article/palestinian-refugees-dispossession> accessed 4 April 2026.
[11] Institute for Middle East Understanding, 'Timeline: The Palestinian Nakba (Catastrophe) & Establishment of Israeli Apartheid' (14 May 2013) <https://imeu.org/article/timeline-the-palestinian-nakba-catastrophe-establishment-of-israeli-apartheid> accessed 4 April 2026.
[12] United Nations, '2022 Among Deadliest Years for Palestinians in West Bank, Middle East Peace Process Coordinator Tells Security Council' (Press Release SC/15086, 28 October 2022) <https://www.un.org/unispal/document/2022-among-deadliest-years-for-palestinians-in-west-bank-middle-east-peace-process-coordinator-tells-security-council-press-release-sc-15086/> accessed 16 April 2026.
[13] Human Rights Watch, 'Israel and Palestine' in *World Report 2024* (11 January 2024) <https://www.hrw.org/world-report/2024/country-chapters/israel-and-palestine> accessed 24 April 2026.
[14] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 51.
[15] University of Bradford, 'Gaza bombing "equivalent to six Hiroshimas" says Bradford world affairs expert' (16 April 2025) <https://www.bradford.ac.uk/news/archive/2025/gaza-bombing-equivalent-to-six-hiroshimas-says-bradford-world-affairs-expert.php> accessed 16 October 2025.
[16] United Nations Office for the Coordination of Humanitarian Affairs – Occupied Palestinian Territory, Humanitarian Situation Update #334 | Gaza Strip (23 October 2025) <https://www.ochaopt.org/content/humanitarian-situation-update-334-gaza-strip> accessed 17 October 2025.
[17] Rasha Khatib, Martin McKee and Salim Yusuf, 'Counting the dead in Gaza: difficult but essential' (2024) 404 The Lancet 237.

banned weapons like white phosphorus, intentionally targeting hospitals, and committing sexual violence against detainees in Israeli prisons.[18] The scale of Israel's conduct has drawn mounting international condemnation. As of 2025, 145 countries have recognised a Palestinian state, with 19 — including 15 European nations — extending recognition in 2024 and 2025 alone.[19] The International Criminal Court issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Defence Minister Yoav Gallant for war crimes and crimes against humanity.[20] South Africa brought a landmark genocide case against Israel at the International Court of Justice,[21] which ruled it plausible that Israel's acts could infringe rights protected under the Genocide Convention and issued provisional measures accordingly.[22] This has led to significant legal and diplomatic developments, alongside a broader shift in global public opinion.

3. Humanitarian Impact of Famine in Gaza: Evidence of Systematic Deprivation

The question of whether Gaza's famine constitutes intentional starvation as a method of warfare requires first establishing what conditions existed in the territory and whether those conditions meet the international legal thresholds that trigger specific prohibitions. The famine in Gaza has emerged as one of the gravest humanitarian catastrophes of the contemporary period. The Integrated Food Security Phase Classification (IPC), the internationally recognised authority on hunger classification, defines famine (also classified as phase 5) as a condition in which at least one in five households has almost no food access, approximately one in three children suffer acute malnutrition, and mortality approaches two deaths per 10,000 daily from starvation or hunger-related disease.[23] In August 2025, the IPC reported that nearly 640,000 people in

[18] Human Rights Watch, 'Israel: 50 Years of Occupation Abuses' (4 June 2017) <https://www.hrw.org/news/2017/06/04/israel-50-years-occupation-abuses>accessed 17 October 2025.
[19] Annette Choi and Lauren Kent, 'Which countries recognize a Palestinian state and why does it matter?' *CNN* (22 May 2024) https://edition.cnn.com/world/middleeast/countries-recognize-palestinian-state-intl-vis accessed 24 April 2026.
[20] International Criminal Court, 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant' (Press Release ICC-CPI-20241121-PR1856, 21 November 2024) https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges accessed 14 April 2026.
[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (International Court of Justice) <https://www.icj-cij.org/case/192> accessed 9 January 2026.
[22] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Order of 26 January 2024) General List No 192, paras 54–59 <https://www.icj-cij.org/node/203447> accessed 6 January 2025.
[23] IPC, 'Famine facts' (October 2025) <https://www.ipcinfo.org/famine-facts/> accessed 16 February 2026.

Gaza were enduring Phase 5 conditions.[24] The direct evidence of famine is deaths from malnutrition. As of September 2025, at least 361 Palestinians, including 130 children, had died from malnutrition.[25] These deaths occurred within a defined territory under Isarel's occupation, where the Israel exercises effective control over food production, external aid flows, and medical provision. What distinguishes systematic deprivation from localised scarcity is the distribution of malnutrition across the entire population. No family remained unaffected by food insecurity, suggesting that deprivation operated as a comprehensive phenomenon rather than as the consequence of particular circumstances affecting isolated groups. The Lancet study found that 54,600 children suffered acute malnutrition and faced serious risk of death without medical care, while 11,500 pregnant women experienced extreme malnutrition with nearly 70% of newborns born underweight or prematurely.[26] UN Secretary-General António Guterres described the crisis as "the deliberate collapse of the systems needed for human survival," characterising it as man-made rather than circumstantial.[27] The evidence demonstrates that famine has affected the entire civilian population systematically and has produced generational harm. Whether the famine resulted from deliberate policy choices rather than circumstance requires an examination of the blockade of external humanitarian aid, the dismantling of civilian aid infrastructure, and the destruction of agricultural and medical capacity. An analysis of these measures and their consistency with international humanitarian law obligations follows in the next section.

4. Israel's Policies contributing to the Famine

Since October 2023, Israel's policy has pursued a coherent pattern designed to subjugate the civilian population through deliberate starvation. Under international humanitarian law, this constitutes a systematic violation. The destruction of croplands and medical infrastructure, the banning of humanitarian organisations, and the dismantling of civilian aid systems in favour of militarised distribution cannot be characterised as security responses. This constitutes

[24] IPC – Integrated Food Security Phase Classification, "Gaza Strip: Famine is imminent as 1.1 million people, half of Gaza, experience catastrophic food insecurity" (Issue 97, December 2023)
[25] World Health Organization, *Public Health Situation Analysis – Occupied Palestinian Territory: September 2025* (10 September 2025) <https://www.who.int/publications/m/item/public-health-situation-analysis---occupied-palestinian-territory-September> accessed 15 April 2026.
[26] Masako Horino and others, 'Assessment of malnutrition in preschool-aged children by mid-upper arm circumference in the Gaza Strip (January, 2024–August, 2025): a longitudinal, cross-sectional, surveillance study' (2025) 406 The Lancet 1993.
[27] United Nations, 'Calling Famine in Gaza 'Man-Made Disaster, Moral Indictment and Failure of Humanity Itself', Secretary-General Stresses Time for Action Is Now' (UN Press Release, 22 August 2025)

collective punishment — the deliberate denial of resources to an entire civilian population — explicitly prohibited under international humanitarian law.

4.1 Blockade of Humanitarian Aid

The systematic restriction of humanitarian access to Gaza represents one of the most legally contested dimensions of Israel's conduct in the conflict. Over the past two years, Israel's border policy has become increasingly restrictive, with authorities consistently invoking allegations of Hamas aid diversion to justify the denial of relief to civilian populations.[28] When a full blockade was imposed in March 2025, food parcels, medical supplies, hygiene kits, and items necessary for maternal and infant care remained stranded at border crossings, unable to reach those in need.[29] By July 2025, the United Nations Relief and Works Agency (UNRWA) reported that approximately 6,000 truckloads of aid were stalled at crossings in Egypt and Jordan.[30] At the same time, numerous requests by humanitarian organisations to deliver assistance were denied.[31] While states retain a degree of discretion in regulating the entry of goods during armed conflict, that discretion is not unlimited. International humanitarian law imposes a clear obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief where civilian populations are inadequately supplied.[32] In this context, the scale, persistence, and pattern of restrictions raise serious questions as to whether the blockade can be justified as a lawful security measure, or whether it amounts to the unlawful denial of objects indispensable to civilian survival. It is important to note that the blockade is not a recent development but forms part of a longer-standing policy framework; however, its intensity and humanitarian impact have significantly escalated since 2023. Following Hamas's victory in the Palestinian Authority elections in 2006, Israel imposed a blockade on Gaza, cutting off imports, exports, electricity, water, and humanitarian aid.[33] This marked the beginning of prolonged

[28] BBC News, 'New Israeli rules stopping critical aid getting into Gaza, charities say' (14 August 2025) <https://www.bbc.com/news/articles/cj6ynz22871o> accessed 20 October 2025.
[29] Human Rights Watch, 'Israel Again Blocks Gaza Aid, Further Risking Lives' (Human Rights Watch, 5 March 2025) <https://www.hrw.org/news/2025/03/05/israel-again-blocks-gaza-aid-further-risking-lives> accessed 21 October 2025.
[30] UNRWA, *UNRWA Situation Report #183: Situation in the Gaza Strip and West Bank (including East Jerusalem)* (8 August 2025) <https://www.unrwa.org/resources/reports/unrwa-situation-report-183-situation-gaza-strip-and-west-bank-including-east-jerusalem> accessed 21 October 2025.
[31] Norwegian Refugee Council, 'Gaza joint statement: Israel threatens to ban major aid organizations as starvation deepens' (Question of Palestine, 13 August 2025) <https://www.un.org/unispal/document/gaza-joint-statement-nrc-13aug25/> accessed 21 October 2025.
[32] Additional Protocol I (n 5) art 70.
[33] Euro-Med Human Rights Monitor, *A Generation under Blockade: Consequences of Israel's 17-Year Blockade of the Gaza Strip* (25 January 2023) <https://euromedmonitor.org/en/article/5541/A-generation-under-blockade:-Consequences-of-Israel%E2%80%99s-17-year-blockade-of-the-Gaza-Strip> accessed 16 April 2026.

isolation, economic deprivation, and hardship for Gaza's population. While some may argue that security concerns justify such measures, the indiscriminate nature of the blockade suggests otherwise. By targeting entire communities rather than specific combatants, Israel blurs the line between legitimate military objectives and collective punishment — a practice prohibited under Article 33 of the Fourth Geneva Convention.[34] This raises difficult questions about intent: is the objective truly security, or is it to weaken and demoralise the civilian population?

4.2 Dismantling UNRWA and the introduction of militarised aid distribution system.

For many years, the United Nations Relief and Works Agency (UNRWA) played a central role in supporting Palestinians in Gaza. Established by the United Nations in 1949, the agency was mandated to deliver relief and works programmes for Palestinian refugees displaced in the aftermath of the 1948 Palestine war.[35] Since then, it has continued to provide food, medical assistance, and education to families struggling under blockade and recurrent hostilities. In early 2025, however, Israel banned UNRWA's operations,[36] cutting off Gaza's principal humanitarian network, and justified the decision on the basis of alleged links with Hamas. Nevertheless, the International Court of Justice found that Israel had not provided sufficient evidence to substantiate the allegations.[37] Israel dismantled Gaza's civilian aid structure and replaced it with the Gaza Humanitarian Foundation (GHF), a new body supported by Israel and the United States.[38] Unlike UNRWA, which worked through community networks, the GHF operates under military supervision. Civilians were forced to walk long distances, mostly through areas designated as combat zones, to reach a limited number of distribution points. These centres are guarded by armed contractors and controlled by Israeli forces. Before this change, around 400 UN-led aid sites functioned across Gaza.[39] After the UN system was

[34] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 33.
[35] Dhannisha Shetty, 'Role of the United Nations Relief and Works Agency (UNRWA) in the Israel–Palestine Conflict: A Critical Analysis' (2025) 7(2) *International Journal for Multidisciplinary Research*.
[36] 'Israel Cuts Ties with UNRWA Over Links with Terror Groups, as Ban Comes into Effect' The Times of Israel (30 January 2025) <https://www.timesofisrael.com/israel-cuts-ties-with-unrwa-over-links-with-terror-groups-as-ban-comes-into-effect/> accessed 22 October 2025.
[37] *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory* (Advisory Opinion) [2025] ICJ Rep 41.
[38] UN Office of the Human Rights Commissioner (OHCHR), 'UN experts call for immediate dismantling of Gaza Humanitarian Foundation' (5 August 2025) <https://www.ohchr.org/en/press-releases/2025/08/un-experts-call-immediate-dismantling-gaza-humanitarian-foundation> accessed 30 October 2025.
[39] Daniel Estrin, 'The U.S. has a plan for getting food into Gaza. Top aid groups object to the idea' (11 May 2025) *NPR* <https://www.npr.org/2025/05/11/nx-s1-5395011/israel-new-gaza-aid-plan-us> accessed 22 October 2025.

largely dismantled and replaced in mid-2025, only four major military-controlled distribution sites served the territory's population of over two million people. At these sites, people waited in long lines for hours, sometimes only to receive meagre rations of dry food without water, oil, or fresh produce. Human Rights Watch described these areas as 'regular bloodbaths' as Israeli soldiers repeatedly opened fire on crowds of civilians waiting for aid.[40] At least 1,373 Palestinians died while trying to obtain food. Of these, 859 were killed near the 'GHF' distribution sites and 514 along food convoy routes. The majority of these deaths were caused by Israeli forces.[41] The principle of distinction, regarded as a cornerstone of customary international humanitarian law, requires parties to a conflict to distinguish at all times between civilians and combatants and to direct their operations accordingly.[42] The repeated killing of unarmed civilians standing in food queues is not a borderline case under that principle. Where such killings involve the deaths of protected persons, they engage Article 147 of the Fourth Geneva Convention, which defines wilful killing and the wilful causing of great suffering to protected persons as grave breaches.[43] The recurrence of lethal violence at sites operating under Israeli military command raises questions of command responsibility that cannot easily be deflected. Article 86 of Additional Protocol I imposes a duty on superiors to prevent or repress breaches committed by forces under their control;[44] Article 28 of the Rome Statute reflects the same obligation under customary law.[45] The regularity of these incidents — documented, reported, continuing — makes it difficult to sustain the argument that they were unknown to those in command.

4.3 Famine Fuelled by the destruction of basic lifelines

By early 2025, almost 98.5% of Gaza's cropland had been damaged or cut off, leaving only 1.5% available for cultivation.[46] This remaining area was largely unreachable, as it lay within 'no-go zones. Consequently, farmers lost access to their land and livestock, while the

[40] Médecins Sans Frontières, 'Not 'aid', but 'orchestrated killing'' (August 2025) <https://msf.org.uk/article/msf-gaza-report-not-aid-orchestrated-killing> accessed 22 October 2025, 12.
[41] Office of the United Nations High Commissioner for Human Rights, 'Killings of Palestinians seeking food in Gaza continue as starvation deepens' (July 2025) <https://reliefweb.int/report/occupied-palestinian-territory/killings-palestinians-seeking-food-gaza-continue-starvation-deepens-enar> accessed 22 October 2025.
[42] Additional Protocol I (n 5) art 48.
[43] Fourth Geneva Convention (n 34) art 147.
[44] Additional Protocol I (n 5) art 86.
[45] Rome Statute of the International Criminal Court (last amended 2010) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 28.
[46] Food and Agriculture Organization, 'Gaza Strip: 98.5 Percent of Cropland Unavailable for Cultivation as Famine Looms' (August 2025) <https://www.fao.org/newsroom/detail/gaza-strip--98.5-percent-of-cropland-unavailable-for-cultivation-as-famine-looms/en> accessed 18 February 2026.

destruction of irrigation networks and local markets caused the entire agricultural sector to collapse. The effect was not merely a reduction in food production — it was the elimination of the territory's capacity for any meaningful food self-sufficiency, and the forced, total dependence of its population on external aid that was simultaneously being denied at the border. Gaza's healthcare infrastructure was subjected to proportionate devastation. By early 2025, air strikes and repeated attacks had damaged or destroyed at least 94% of hospitals, rendering most facilities non-operational.[47] Hundreds of doctors and healthcare workers have been killed, while many have been arbitrarily detained.[48] UN experts stated that health workers were continuously targeted, detained and tortured in custody.[49]

It prohibited to attack, destroy, remove, or render useless of objects indispensable to the survival of the civilian population — including foodstuffs, agricultural land, crops, livestock, and drinking water installations — when done for the purpose of denying those objects to the civilian population.[50] The destruction of virtually all of Gaza's agricultural capacity, coordinated with the obstruction of external supply, satisfies the material elements of this prohibition plainly. The destruction of medical infrastructure engages Article 19 of the Fourth Geneva Convention,[51] which extends protection to civilian hospitals, and ICRC customary IHL Rules 28 and 29, which protect medical units and personnel from attack.[52] These provisions represent some of the most settled ground in international humanitarian law. Their violation here was not incidental. The targeting was systematic, its consequences foreseeable, and its effect — the elimination of medical capacity for a population already deprived of food — entirely consistent with the broader strategy.

5. Legal Analysis: Starvation of civilians as a Method of Warfare under International Humanitarian Law

[47] World Health Organization, *Hostilities in the occupied Palestinian territory (oPt): Public Health Situation Analysis (PHSA)* (10 September 2025) <https://cdn.who.int/media/docs/default-source/documents/emergencies/who-phsa-opt-100925.pdf> accessed 22 October 2025, 1.
[48] Human Rights Watch, 'Israel: Palestinian healthcare workers tortured, forcibly disappeared' (26 August 2024) <https://www.hrw.org/news/2024/08/26/israel-palestinian-healthcare-workers-tortured> accessed 23 February 2026.
[49] Office of the United Nations High Commissioner for Human Rights, 'UN experts appalled at relentless Israeli attacks on Gaza's healthcare system' (5 August 2025) <https://www.ohchr.org/en/press-releases/2025/08/un-experts-appalled-relentless-israeli-attacks-gazas-healthcare-system> accessed 23 February 2026.
[50] Additional Protocol I (n 5) art 54.
[51] Fourth Geneva Convention (n 34) art 19.
[52] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (ICRC/CUP 2005) Rules 28 and 29.

To assess whether Israel's conduct as documented above constitutes a violation of international law, it is necessary to identify the applicable legal standards and measure Israel's actions against them. The question is whether Israel's sustained deprivation of food, destruction of civilian infrastructure, and obstruction of humanitarian access cross the legal threshold established by treaty and customary international law. International humanitarian law unequivocally prohibits the starvation of civilians as a method of warfare. The ICRC defines this as the intentional infliction of hunger upon the civilian population, in particular through the denial of food, resources, or other objects necessary for survival.[53] This prohibition is codified across multiple instruments directly applicable to Israel's conduct in Gaza.

5.1 Geneva Convention's Additional Protocol (1977)

The Additional Protocols to the Geneva Conventions adopted in 1977, represent the most explicit treaty-based prohibition on starvation and provide the primary legal benchmark against which Israel's conduct falls to be assessed. Article 54(1) of Additional Protocol I states unequivocally that the starvation of civilians as a method of warfare is prohibited in international armed conflicts.[54] This rule applies in both occupied and unoccupied territories — a point of direct relevance given Israel's long-established control over Gaza's borders, airspace, and territorial waters. The prohibition is breached not only when the denial of food leads to death, but also when a population is subjected to hunger through the intentional deprivation of food sources or essential supplies.[55] The scale of malnutrition, the documented obstruction of aid, and the destruction of food production capacity set out in sections 3 and 4 are therefore directly probative of an Article 54(1) violation.

Article 54(2) further prohibits the attack, destruction, removal, or rendering useless of objects indispensable to civilian survival — including foodstuffs, agricultural areas, livestock, and drinking water installations — where done for the purpose of denying their sustenance value to the civilian population.[56] The use of the phrase "such as" is legally significant: the enumerated items are illustrative rather than exhaustive, and the protection extends to all objects upon which civilian survival depends. The operative verbs — "attack, destroy, remove,

[53] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC 1987) Protocol I, art 54.
[54] Additional Protocol I (n 5) art 54(1).
[55] International Committee of the Red Cross, *Commentary on Article 54 of Additional Protocol I* (ICRC Customary IHL Database) <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-54/commentary/1987> accessed 28 October 2025.
[56] Additional Protocol I (n 48) art 54(2)

or render useless" — are equally broad, capturing the destruction of crops, contamination of water supplies, and systematic dismantling of food distribution networks. Israel's documented strikes on markets, water infrastructure, and agricultural land, alongside the dismantling of food distribution network, engage Article 54(2) directly.

Article 54(3) does permit limited exceptions where food supplies are intended exclusively for enemy armed forces, or where otherwise protected objects are used in direct support of military operations.[57] However — and this is analytically decisive — even where a military justification is advanced, such action remains unlawful if it is foreseeable that the civilian population will be left without adequate food or water, resulting in starvation or displacement. The prohibition is therefore engaged not only where the intent is to starve civilians, but equally where starvation is the reasonably foreseeable consequence of an ostensibly military act.[58] Given the density of Gaza's population, the near-total destruction of its food systems, and the documented scale of civilian hunger, the foreseeability threshold is plainly satisfied on the evidence available. This substantially narrows the scope of any military necessity defence Israel might advance.

While Israel has not ratified Additional Protocol I, this does not relieve it of legal responsibility. As established through customary international humanitarian law — binding upon all parties to armed conflict irrespective of treaty ratification — the prohibition on starvation admits no exception on grounds of non-ratification. This forecloses any argument that Israel's treaty status insulates it from accountability, and paves the way for the analysis of criminal responsibility under the Rome Statute that follows.

5.2 The Rome statute and the ICC'S Case Against Israeli Officials

For much of modern history, the starvation of civilians in war was condemned in principle but rarely prosecuted in practice. That changed, at least on paper, with the adoption of the Rome Statute in 1998, which established the International Criminal Court and, for the first time, expressly named the intentional starvation of civilians as a war crime. Understanding this provision — what it covers, what it demands, and where it falls short — is essential to understanding why the events in Gaza since October 2023 have placed the ICC and the broader international criminal justice system under such extraordinary and unprecedented pressure.

[57] Additional Protocol I (n 48) art 54(3).
[58] Dapo Akande and Emanuela-Chiara Gillard, 'Conflict-induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law' (2019) 17 Journal of International Criminal Justice 753, 764.

Article 8(2)(b)(xxv) of the Rome Statute criminalises:

> "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions." [59]

Read against the documented reality of Gaza, this provision is almost uncomfortably precise. To establish the crime, it must be established that the perpetrator deprived civilians of objects indispensable to their survival, intended to use starvation as a method of warfare, acted in the context of and in connection with an international armed conflict, and was aware of the factual circumstances establishing the existence of that conflict.[60] The provision does not require proof that every civilian starved as a direct result of a single order. It requires proof of deliberate, intentional deprivation — and it was exactly this standard that the ICC Prosecutor turned to when he sought arrest warrants in May 2024. In addition to the war crime of starvation, the Rome Statute also prohibits deliberate attacks on humanitarian assistance essential to civilian survival.[61]

The Arrest Warrants:

On 21 November 2024, Pre-Trial Chamber I of the ICC issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and Defence Minister Yoav Gallant, following six months of judicial review of the Prosecutor's application.[62] The warrants were issued in the context of the Court's ongoing investigation into the Situation in the State of Palestine, formally initiated on 3 March 2021 under Article 58 of the Rome Statute.[63] Arrest warrants were also sought for Hamas leaders Ismail Haniyeh, Mohammed Deif, and Yahya Sinwar, though these were subsequently withdrawn after all three were confirmed dead.[64]

The Chamber found reasonable grounds to believe that Netanyahu and Gallant had used starvation as a weapon of war.[65] Between October 2023 and May 2024, both leaders are alleged

[59] Rome Statute (n 45) art 8(2)(b)(xxv).
[60] International Criminal Court, Elements of Crimes (ICC 2011) 21.
[61] Rome Statute (n 45) art 8(2)(b)(iii).
[62] International Criminal Court, 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects State of Israel's challenges' (12 November 2025) <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges> accessed 8 November 2025.
[63] Ibid.
[64] Ibid.
[65] Rome Statute (n 45) art 8(2)(b)(xxv).

to have systematically blocked food, water, electricity, fuel, and medicine from reaching civilians in Gaza — conduct that caused severe hunger, disease, and the deaths of numerous people, including children. Critically, the Court found that these restrictions carried no military justification and were intended to collectively punish the civilian population of Gaza. The Chamber further found that both leaders had failed to prevent attacks on civilians and had obstructed the entry of humanitarian aid despite repeated warnings from the United Nations and other international bodies. Taken together, the judges concluded, their actions formed part of a widespread and deliberate attack on the people of Gaza, amounting not only to war crimes but to crimes against humanity.[66] This was not a peripheral or technical finding. It was a direct application of Article 8(2)(b)(xxv) to a live, ongoing conflict — the first time the ICC had moved against sitting or recently serving leaders of a state with close military and political ties to major Western powers.

Israel's Jurisdictional Challenges and Their Rejection:

Israel responded by mounting two formal jurisdictional challenges before the Court, both of which were unanimously rejected on the same day the warrants were issued.[67] The first challenge was brought under Article 18(1) of the Rome Statute, which governs the notification of states about investigations and allows them to assert that they will exercise their own jurisdiction.[68] Israel argued that the Hamas attacks of 7 October 2023 had fundamentally altered the nature of the situation, giving rise to new crimes and circumstances that required the Prosecutor to issue a fresh notification to states.[69] Israel further relied on the principle of complementarity, maintaining that its own domestic mechanisms were capable of investigating the alleged crimes and that it was therefore entitled to priority jurisdiction.[70] The Chamber rejected this comprehensively. It held that the existing 2021 notification remained legally sufficient, that the post-7 October events were part of the same factual and legal situation already under investigation, and that no renewed Article 18 process was required.[71] Crucially, the Chamber reaffirmed that Palestine is a State Party to the Rome Statute and that the Court's

[66] Ibid art 7.
[67] International Criminal Court, *ICC-01/18-375* <https://www.icc-cpi.int/court-record/icc-01/18-375> accessed 6 December 2025.
[68] Rome Statute (n 45) art 18(1).
[69] International Criminal Court**,** *ICC-01/18-Related Records: 0902EBD180994069.pdf* <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd180994069.pdf> accessed 6 December 2025.
[70] Ibid para 7**.**
[71] ICC, *ICC-01/18-375* (n 67).

territorial jurisdiction extends to Gaza and the West Bank, including East Jerusalem, rejecting outright Israel's contention that the Court's jurisdiction required Israel's consent.[72]

The second challenge, filed under Article 19(2), contested the Court's jurisdiction on the grounds that Palestinian statehood remained legally unsettled and that, under the Oslo Accords, Palestinian authorities lacked criminal jurisdiction over Israeli nationals and therefore could not delegate such jurisdiction to the Court.[73] The Chamber disposed of this challenge on procedural grounds — states may not bring Article 19 challenges prior to the issuance of arrest warrants — and further held that the Court's prior jurisdictional ruling on Palestinian statehood had become res judicata, meaning it could not be reopened.[74]

Israel filed appeals against both decisions.[75] On 15 December 2025, the Appeals Chamber dismissed Israel's appeal on the Article 18 question, confirming that the Pre-Trial Chamber's reading of the Statute fell within a reasonable legal interpretation.[76] On the Article 19 appeal, the Appeals Chamber found in April 2025 that the Pre-Trial Chamber had not adequately addressed Israel's central argument and remanded the matter for reconsideration — a procedural development that Israel attempted to present as a substantive victory, though it was not.[77] Upon reconsideration, the Pre-Trial Chamber reaffirmed its earlier position and rejected Israel's jurisdictional objections in full. The ICC's arrest warrants accordingly remain in force.

The Enforcement Gap:

Israel is not a State Party to the Rome Statute, which means the ICC cannot compel its cooperation directly. The Court relies instead on its member states: if Netanyahu or Gallant were to travel to a State Party, that state's authorities would be under a legal obligation to arrest and transfer them to The Hague.[78] This is not merely a theoretical point. In practice, it has already produced a significant test of the international community's commitment to the rule of

[72] Ibid.
[73] International Criminal Court, *Public Redacted Version of "Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute"* (23 September 2024) ICC-01/18-354-AnxII-Corr**.**
[74] International Criminal Court, *Decision on Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute*, ICC-01/18-374 (Pre-Trial Chamber I, 23 September 2024).
[75] International Criminal Court, *ICC-01/18-386* <https://www.icc-cpi.int/court-record/icc-01/18-386> accessed 25 December 2025.
[76] International Criminal Court*, ICC-01/18-481* <https://www.icc-cpi.int/court-record/icc-01/18-481> accessed 25 December 2025.
[77] International Criminal Court, *ICC-01/18-422* <https://www.icc-cpi.int/court-record/icc-01/18-422> accessed 25 December 2025.
[78] *Rome Statute* (n 6) arts 86 and 89.

law. Some of the ICC member states[79] have signalled, in varying degrees of explicitness, that they would not enforce the warrants — a position that sits in direct contradiction to their treaty obligations under the Rome Statute and that sends a deeply damaging signal about the selectivity with which international criminal justice is actually applied. There is also a structural limitation in the Rome Statute itself that the Gaza conflict throws into sharp relief. When the Statute was originally adopted, it criminalised starvation as a war crime only in international armed conflicts. The question of whether the Gaza conflict is properly classified as international or non-international — given the complex legal status of Israel's occupation of Palestinian territory — has therefore been a live and contested issue with real legal consequences. This gap was partially closed in December 2019, when the Assembly of States Parties unanimously extended the starvation war crime to non-international armed conflicts under Article 8(2)(e)(xix).[80] However, this amendment applies only to states that have individually ratified it,[81] which continues to constrain the Court's reach in internal conflicts globally.

5.3 UNSC Resolution 2417 (2018)

The UN Security Council adopted Resolution 2417 on 24 May 2018.[82] The resolution strongly condemns the use of starvation as a method of warfare, calls on states to investigate such violations, and, critically, is designed to trigger action when there is a risk of conflict-induced famine affecting civilian populations. It establishes a reporting framework in which the Secretary-General is required to regularly brief the Security Council on food insecurity and famine risks in conflict-affected countries and to alert the Council promptly when a situation deteriorates to a critical threshold.[83] The reporting system functioned as intended. On 28 February 2024, the Security Council met formally under the auspices of Resolution 2417 and received briefings from OCHA, FAO, and WFP officials, whose reports warned that at least 576,000 people in Gaza were facing famine-like conditions as a result of Israeli actions.[84]

[79] Human Rights Watch, 'Hungary: Orbán Government Withdraws from ICC' (16 June 2025) <https://www.hrw.org/news/2025/06/16/hungary-orban-government-withdraws-from-icc> accessed 5 January 2026.
[80] International Committee of the Red Cross, Rome Statute Amendment on Article 8(2)(b)(xxv): Starvation as a Method of Warfare (ICRC Customary IHL Database) accessed 3 November 2025.
[81] Ibid.
[82] United Nations Security Council Resolution 2417 (24 May 2018) UN Doc S/RES/2417 (2018).
[83] Ibid paras 11–13.
[84] International Rescue Committee, 'NGOs call on UN Security Council to Urgently Convene and Pass Resolution Demanding Ceasefire in Gaza' (Press Release, 18 December 2023) <https://www.rescue.org/press-release/ngos-call-un-security-council-urgently-convene-and-pass-resolution-demanding> accessed 17 April 2026.

Similarly, the UN, Human Rights Watch, and other humanitarian organisations warned that the starvation of civilians as a method of warfare was being used in Gaza — conduct in direct breach of Resolution 2417.[85] Despite this, the Security Council remained institutionally paralysed. Contrary to its own resolutions, and despite continued warnings from the UN and humanitarian organisations, the Council failed to act due to the use of the veto by its permanent members. Notably, the United States vetoed — for the third time — a resolution calling for an immediate ceasefire in February 2024 alone.[86] The failure in Gaza exposed a structural deficiency that goes beyond the specifics of one conflict. Although Resolution 2417 requires the Secretary-General to report swiftly on situations of conflict-induced famine, the Gaza crisis illustrated that alerts often reach the Council only after acute food insecurity has already emerged. Weak institutional follow-up mechanisms and the absence of a standing focal point within the UN system for implementing Resolution 2417 continue to limit timely and coordinated responses.[87] There is also an intrinsic limitation in the resolution's legal architecture. The resolution's definition of starvation as a war crime is considered too narrow by some legal scholars, as it applies only when intentionality can be proven as a direct and deliberate action — an evidentiary threshold that is difficult to meet in practice, even when the predictable outcome of military and blockade policy is mass starvation.[88] What Gaza ultimately revealed is that Resolution 2417 succeeded in building a system of warning but not a system of response. The Council received detailed, authoritative briefings under the resolution's framework; it heard from its own agencies that famine was imminent; it had legal and institutional tools under Chapter VII to act.[89] Fourteen of fifteen Council members repeatedly voted in favour of resolutions that would have demanded humanitarian access and condemned the starvation of Palestinians — yet those resolutions failed because of a single veto.[90]

[85] Save the Children, 'Joint Statement: Conflict-induced hunger in Gaza' (21 December 2023) <https://www.savethechildren.net/news/joint-statement-conflict-induced-hunger-gaza> accessed 17 April 2026.
[86] Michele Kelemen, 'U.S. vetoes call for ceasefire in Gaza for a third time' *NPR* (20 February 2024) <https://www.npr.org/2024/02/20/1232763327/u-s-vetoes-call-for-ceasefire-in-gaza-for-a-third-time> accessed 17 April 2026.
[87] Security Council Report, 'Conflict and Food Insecurity' (31 October 2025) <https://www.securitycouncilreport.org/monthly-forecast/2025-11/conflict-and-food-insecurity-2.php> accessed 17 April 2026.
[88] Food and Agriculture Organization of the United Nations, *Gaza Strip: IPC Acute Food Insecurity Analysis (15 February – 15 July 2024)* (Report, 18 March 2024) <https://openknowledge.fao.org/server/api/core/bitstreams/836632c4-0108-4c66-bd68-08150fee2d81/content> accessed 17 April 2026.
[89] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 39.
[90] United Nations, 'Security Council Fails to Adopt Resolution Demanding Immediate Ceasefire in Gaza, as United States Casts Negative Vote' (Press Release SC/15907, 20 November 2024) <https://press.un.org/en/2024/sc15907.doc.htm> accessed 25 April 2026.

6. The Genocide Convention and the UN Independent Commission's Findings on Gaza

The report released on 16 September 2025 by the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel presented serious findings concerning the situation in Gaza.[91] After months of investigation and evidence gathering, the Commission concluded that the conduct of the Israeli authorities and their security forces amounted to acts of genocide against the Palestinian people.[92] The report identified a repeated pattern of civilian killings, including women and children, destruction of homes, hospitals, and shelters, and attacks on locations protected under international law.[93] It further highlighted the deliberate obstruction of access to food, water, electricity, fuel, and medical assistance, creating conditions of severe hunger, disease, and widespread famine.[94] According to the Commission, these acts were neither isolated nor incidental but constituted part of a coherent and organised policy aimed at destroying the population.

The Commission concluded that four of the five acts defined in Article II of the Genocide Convention[95] were established in relation to Israel's conduct toward Palestinians, including the killing of members of the group, the infliction of serious physical and mental harm, the imposition of living conditions calculated to bring about the group's physical destruction, and the imposition of measures intended to prevent births within the group. This satisfied the material elements of the crime of genocide.[96]

Establishing the commission of genocidal acts alone is insufficient under international law; the crime of genocide further requires proof of *dolus specialis*, that is, a specific intent to destroy a protected group, in whole or in part.[97] The Commission identified two principal and mutually reinforcing bases for concluding that such intent existed. First, it relied on statements by senior Israeli officials that, in its view, explicitly or implicitly conveyed an intent to destroy the protected group. Second, it concluded that genocidal intent was the only reasonable inference that could be drawn from the overall pattern of conduct, assessed in light of the totality of the

[91] UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, *A/HRC/60/CRP.3* (16 September 2025).
[92] Ibid para 252.
[93] Ibid paras 31–34.
[94] Ibid para 48.
[95] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art II.
[96] Ibid art II; Rome Statute, art 6.
[97] UN Human Rights Council, A/HRC/60/CRP.3 (n 78) para 156.

evidence. With respect to the first basis, the Commission cited public statements made by high-ranking officials, including former Defence Minister Yoav Gallant, who described Palestinians as "human animals" and declared that Gaza would be eliminated entirely.[98] It also referred to remarks by President Isaac Herzog attributing responsibility to the population as a whole,[99] and to statements by Prime Minister Benjamin Netanyahu invoking the biblical narrative of Amalek,[100] which the Commission interpreted as endorsing the destruction of an entire group. The Commission emphasised that even if such statements were considered in isolation, they could independently give rise to legal responsibility under the Convention. Article 3(c) criminalises direct and public incitement to commit genocide, irrespective of whether genocidal acts are ultimately carried out. On this basis, the Commission reasoned that the statements alone were sufficient to engage liability under the Convention.

Beyond these statements, the Commission pointed to additional contextual evidence supporting the existence of genocidal intent. This included rhetoric by lower-level political figures, documentation by Amnesty International of slogans such as "Destroy Gaza" displayed at Israeli military positions, and the absence of meaningful investigations or disciplinary measures in response to Israeli soldiers' public celebrations of the destruction of civilian property in Gaza. Based on this evidence the Commission found that Israel acted with genocidal intent.[101] Whether one approaches these findings with scepticism or acceptance, their legal architecture deserves serious engagement. The Commission's conclusions are not reducible to political advocacy; they engage established doctrinal standards and apply them to a documented evidentiary record.

7. The Architecture of Impunity: How Third-State Conduct Has Frustrated Accountability

International law generates binding obligations not only for the state directly committing a violation but for the international community as a whole. Serious breaches of peremptory norms, such as genocide, deliberate starvation, and apartheid, give rise to obligations erga omnes, thereby engaging the legal responsibility of all states irrespective of direct injury.[102] In

[98] Ibid para 226
[99] Ibid para 227
[100] Ibid para 228
[101] Ibid para 220.
[102] *Barcelona Traction, Light and Power Company Ltd (Belgium* v *Spain) (Second Phase)* [1970] ICJ Rep 3, para 33; International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts'

practice, however, the response to Gaza has been shaped less by legal obligation than by strategic interest. While states such as South Africa, Nicaragua,[103] and Colombia[104] have sought to invoke accountability mechanisms or curtail bilateral engagement with Israel, countries such as the United States, Germany, and the United Kingdom have continued to arm, economically sustain, and facilitate Israel's military operations. The result is a clear asymmetry: states willing to pursue accountability lack the institutional leverage to enforce it, whereas those capable of decisive intervention have used that capacity in Israel's favour. This section examines how that imbalance has rendered legal accountability structurally unattainable across three distinct domains.

7.1 The Duty Not to Shield: Political Obstruction of Accountability

Diplomatic complicity in the context of Gaza operates not as passive indifference but as deliberate political obstruction — a sustained effort by powerful states to insulate Israel from the consequences of international legal scrutiny. Common Article 1 of the four Geneva Conventions of 1949 obliges all High Contracting Parties not only to respect, but also to ensure respect for, international humanitarian law in all circumstances.[105] One of the clearest manifestations of the failure to discharge this obligation lies in the repeated use of the veto at the United Nations Security Council. The United States has blocked more than fifty resolutions critical of Israel since 1972,[106] and this pattern has continued with particular intensity since October 2023. In September 2025, a draft resolution co-sponsored by ten Council members — commanding fourteen votes in favour — was vetoed on the grounds of Israel's right to self-defence,[107] despite calling for nothing beyond a ceasefire and unrestricted humanitarian access.[108] The right of self-defence cannot operate as a blanket shield against international

in *Report of the International Law Commission on the Work of its Fifty-third Session* (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, arts 41(1) – (2).

[103] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany)* (Request for the Indication of Provisional Measures) (1 March 2024).

[104] Manuel Rueda, 'Colombia's president signs decree to ban coal exports to Israel over the war in Gaza' *AP News* (18 August 2024) <https://apnews.com/article/colombia-israel-coal-exports-467a61fed8c0779f27a3179629717436> accessed 18 April 2026.

[105] Fourth Geneva Convention (n 34) art 1.

[106] Creede Newton, 'A history of the US blocking UN resolutions against Israel' *Al Jazeera* (19 May 2021) <https://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel> accessed 1 January 2026.

[107] Amnesty International, 'US sixth veto of resolution on ceasefire, hostage release is a greenlight for Israel's campaign of annihilation in Gaza' (19 September 2025) <https://www.amnesty.org/en/latest/news/2025/09/us-sixth-veto-of-ceasefire-resolution-greenlight-for-israels-campaign-of-annihilation-in-gaza/> accessed 28 October 2025.

[108] UN Security Council, *Draft Resolution* UN Doc S/2025/583 (18 September 2025).

humanitarian law obligations, and its invocation in this context functions less as a legal justification than as a political instrument to foreclose scrutiny.

The same pattern of obstruction is evident in state reluctance to support international judicial processes. Of the sixty-three states identified in recent UN reporting as implicated in the situation in Gaza, only thirteen chose to support South Africa's case before the ICJ.[109] This is not merely a political observation — it carries direct implications under the Genocide Convention. The Convention imposes on all state parties both a duty to prevent and a duty to punish genocide.[110] The ICJ confirmed in Bosnia and Herzegovina v Serbia and Montenegro (2007) that the duty to prevent arises as soon as a state learns of, or should normally have learned of, a serious risk that genocide may be committed, and that the obligation is one of conduct rather than result.[111] A state incurs responsibility where it manifestly fails to take all measures reasonably within its power to prevent genocide, provided that genocide is in fact committed, even if it is not attributable to that state.[112] The refusal of Western states to engage seriously with genocide allegations, particularly following the ICJ's provisional measures orders of January and May 2024, raises the question of whether those states are themselves in breach of independent obligations under the Genocide Convention — a question that has received insufficient attention in mainstream legal and political discourse.

The same pattern of political shielding is apparent in state responses to ICC arrest warrants. All states parties to the Rome Statute bear a legally binding obligation to cooperate with and execute arrest warrants upon the entry of indicted individuals into their territory.[113] The continued freedom of movement of Israeli officials across European airspace, notwithstanding the existence of those warrants, constitutes a potential breach of this obligation across multiple jurisdictions simultaneously. Hungary's conduct went further still: its reception of Prime Minister Netanyahu with full diplomatic honours in April 2025, followed immediately by its

[109] UN General Assembly, *Situation of Human Rights in the Palestinian Territories Occupied since 1967: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Francesca Albanese* UN Doc A/80/492 (18 October 2025) para 25.
[110] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art I.
[111] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, paras 430–431.
[112] Ibid.

[113] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 89.

withdrawal from the Rome Statute,[114] represents not merely non-compliance but deliberate repudiation of the Court's authority. Formally, withdrawal is permissible upon one year's notice.[115] However, withdrawal does not extinguish obligations arising from crimes committed during the period of membership,[116] and the timing of Hungary's decision — coordinated with Netanyahu's visit — reinforces its characterisation as an act of deliberate diplomatic facilitation rather than a principled legal position. When powerful states veto Security Council resolutions, decline to engage with genocide proceedings, and fail to execute arrest warrants, they do not merely tolerate violations; they actively reproduce the conditions in which those violations persist with impunity. The cumulative effect is the erosion of the very peremptory norms upon which the international legal order depends for its foundational legitimacy — a consequence that extends well beyond the immediate situation in Gaza.

7.2 The Duty Not to Aid: Military and Economic Enablement

The duty under customary international law — not to aid or assist in the commission of internationally wrongful acts[117] — finds its most concrete expression in the continued supply of arms and the maintenance of economic relations with Israel. Though analytically distinct, military and economic support operate in practice as mutually reinforcing systems of enablement. Neither strategic security considerations nor commercial advantage can justify derogation from obligations owed to the international community as a whole. On the military dimension, the scale of state support extended to Israel has been substantial and well documented. Since October 2023, the United States approved more than 742 weapons shipments to Israel, bypassing ordinary congressional oversight through emergency powers,[118] and the Biden administration subsequently sought an additional $14.3 billion in military funding.[119] Germany and Italy ranked among the largest European arms suppliers during this period,[120] while the United Kingdom, though less directly implicated in weapons exports,

[114] BBC News, 'Hungary withdraws from International Criminal Court during Netanyahu visit' (3 April 2025) <https://www.bbc.com/news/articles/c807lm2003zo> accessed 28 October 2025.
[115] Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 127(1).
[116] Ibid art 127(2).
[117] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) art 16.
[118] Dawn, '63 countries complicit in Gaza genocide: UN report' (29 October 2025) <https://www.dawn.com/news/1951984 accessed 30 October 2025> accessed 30 October 2025.
[119] Al Jazeera, 'US House passes $14.5bn military aid package for Israel' (3 November 2023) <https://www.aljazeera.com/news/2023/11/3/us-house-passes-14-5bn-military-aid-package-for-israel> accessed 22 November 2025.
[120] Stockholm International Peace Research Institute (SIPRI), 'How top arms exporters have responded to the war in Gaza: 2025 update' (2025) <https://www.sipri.org/commentary/topical-backgrounder/2025/how-top-arms-exporters-have-responded-war-gaza-2025-update> accessed 28 October 2025.

facilitated a critical American supply route from its bases in Cyprus and conducted over 600 surveillance flights above Gaza, sharing intelligence with Israeli forces.[121] The ongoing supply of arms and military support cannot be separated from the legal responsibilities that States have accepted under the Arms Trade Treaty, which prohibits the authorisation of exports where a state knows, or should reasonably have known, that the arms in question would be used to commit international crimes.[122] It further requires exporting states to conduct rigorous risk assessments and extends these obligations to transit, trans-shipment, and indirect transfers[123] — meaning that every state in the supply chain bears responsibility, not only the primary exporter.[124] Given the volume of documented civilian harm and the findings of UN bodies pointing to serious violations of international humanitarian law, it is difficult to sustain the argument that states authorising these transfers did not know, or could not have known, the use to which they would be put. The systemic failure of states to apply the ATT's risk assessment requirements in this context reflects not merely oversight but a deliberate policy choice — one that carries legal consequences under both treaty law and the customary rules of state responsibility. The picture is further complicated by the asymmetry of international responses. While Western states have materially sustained Israel's military capacity, states more sympathetic to Palestine have faced structural constraints that limit the practical effect of their support. Turkey suspended trade with Israel in May 2024,[125] but the measure remained partial and subject to continuing diplomatic recalibration. Nicaragua likewise sought to challenge third-state complicity by instituting proceedings against Germany before the ICJ, alleging that German military assistance and the suspension of UNRWA funding enabled serious violations in Gaza.[126] South Africa initiated proceedings before the ICJ,[127] and a coalition of twelve states acting through the Hague Group has adopted coordinated measures to restrict engagement with Israel, including efforts to halt arms transfers and review economic and contractual ties,[128] but these efforts remain isolated and are unable to substitute for the coordinated action that only

[121] Action on Armed Violence, *The UK Royal Air Force's Surveillance Flights over the Occupied Palestinian Territory: Examined* (April 2025) <https://aoav.org.uk/wp-content/uploads/2025/04/The-UK-Royal-Air-Forces-surveillance-flights-over-the-Occupied-Palestinian-Territory-examined.pdf> accessed 20 November 2025.
[122] Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) Art 6(3).
[123] Ibid art 7.
[124] Ibid art 2.
[125] 'Turkey says it halts trade with Israel over Gaza aid access' *Al Jazeera* (2 May 2024) <https://www.aljazeera.com/news/2024/5/2/turkey-says-it-halts-trade-with-israel-over-gaza-aid-access> accessed 15 April 2026.
[126] *Nicaragua v Germany* (n 103).
[127] *South Africa v Israel* (n 22).
[128] 'Hague Group announces steps to hold Israel accountable in Bogota summit' Al Jazeera (16 July 2025) <https://www.aljazeera.com/news/2025/7/16/hague-group-announces-steps-to-hold-israel-accountable-in-bogota-summit> accessed 15 April 2026.

Security Council authorisation could provide. The pattern that emerges is one in which states most willing to apply meaningful pressure on Israel are least positioned to do so effectively, while those with the greatest leverage — the United States foremost among them — have deployed it in Israel's favour.

On the economic dimension, the continuation of normal trade relations has compounded this pattern of material support. In 2024, international trade accounted for fifty-four per cent of Israel's GDP, with the European Union serving as its single largest partner, responsible for approximately one-third of total trade.[129] Leaked internal documents revealed that EU officials were actively working to preserve *business-as-usual* relations with Israel, effectively sidelining calls to suspend cooperation agreements.[130] Private actors have also played a significant role: shipping companies including Maersk were reported to have transported fuel and military-related equipment essential to Israel's operations in Gaza.[131] It is worth noting that trade agreements concluded under the World Trade Organization expressly allow States to depart from core trade principles — such as the most-favoured-nation obligation — when this is necessary to fulfil their duties under the UN Charter relating to international peace and security, including compliance with peremptory norms of international law.[132]

In normative terms, the existence of such asymmetries in state responses raises the question of what meaningful compliance with the duty not to aid or assist requires in practice. A range of lawful measures remains available to third states short of collective Security Council action, including the suspension of arms export licences, restrictions on dual-use goods, denial of transit and basing facilities, suspension of preferential trade arrangements, and targeted sanctions against entities implicated in serious violations of international humanitarian law. States also retain the capacity to support accountability through universal jurisdiction and more active engagement in international proceedings, thereby reinforcing rather than fragmenting

[129] SOMO, 'Economic Sanctions by the EU on Israel: Israel is the Largest Investor' (undated) <https://www.somo.nl/economic-sanctions-eu-is-israel-largest-investor/> accessed 1 January 2026.
[130] David Cronin, 'Internal paper shows EU sought to shield Israel from sanctions' (The Electronic Intifada, 12 August 2025) <https://electronicintifada.net/blogs/david-cronin/internal-paper-shows-eu-sought-shield-israel-sanctions> accessed 30 October 2025.
[131] Danwatch, 'Israel/OPT: Maersk transported thousands of tonnes of weapons parts to Israel potentially failing to comply with UNGPs, according to new Danwatch investigation' (9 February 2025) <https://www.business-humanrights.org/en/latest-news/israelopt-maersk-transported-thousands-of-tonnes-of-weapons-parts-to-israel-potentially-failing-to-comply-with-ungps-according-to-new-danwatch-investigation/> accessed 30 October 2025.
[132] General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187 (GATT 1994) art XXI(c); see also Charter of the United Nations, art 103.

legal responsibility. At the humanitarian level, sustained access to Gaza can be facilitated through coordinated diplomatic pressure on crossing points, strengthened UN-led delivery mechanisms, and protected humanitarian corridors backed by credible consequences for obstruction. The central constraint lies less in the absence of legal tools than in the lack of coordinated political will to deploy them.

Beyond state action, non-state and market actors also shape the material environment of the conflict. The Boycott, Divestment and Sanctions (BDS) movement operates through consumer boycotts, institutional divestment, and reputational pressure on companies linked to Israeli policy. While its immediate macroeconomic impact remains limited, its significance lies in cumulative and long-term effects. Boycotts increase reputational risk, influence investment behaviour, and contribute to divestment decisions by institutional investors. Over time, they generate incremental commercial and normative pressure, making association with contested conduct increasingly costly. In this sense, even where direct economic disruption is modest, boycott strategies contribute to a broader architecture of pressure that complements state-based enforcement.

7.3 The Duty to Cooperate: The Deliberate Paralysis of International Institutions

If the preceding sections describe what powerful states have done, this section addresses what they have prevented — namely, the effective functioning of the three principal international institutions through which accountability for mass atrocity is meant to be secured. The UNSC, the ICC, and the ICJ each possess distinct mandates and legal tools, but all three have been rendered substantially ineffective in the context of Gaza. Crucially, this ineffectiveness is not merely a structural deficiency; it has been actively produced and sustained by the conduct of states with the capacity to do otherwise.

UNSC

The United Nations Security Council is the only UN body authorised to adopt binding enforcement measures, including sanctions and the military intervention.[133] In principle, this grants the Council extensive authority to respond to mass atrocities: it can call for ceasefires, impose sanctions, mandate investigations, and advance accountability. In reality, however, its capacity to act is curtailed by the veto power of its five permanent members — the United

[133] UN Charter arts 25, 41, 42.

States, the United Kingdom, France, Russia, and China. Under the UN Charter, the objection of any one of these States is sufficient to prevent the adoption of a resolution,[134] irrespective of the breadth of international support. In the present context, the Council's effectiveness has been systematically undermined by the United States, which has exercised its veto more than 50 times since 1972 to block resolutions critical of Israel.[135]

ICC

Similarly, the arrest warrants issued by the International Criminal Court against Israeli officials have had little practical effect. Since Israel is not a member of the ICC and the Court has no independent enforcement mechanism, execution of the warrants depends entirely on state cooperation.[136] The Court's effectiveness is further constrained by structural limitations, including a restricted budget, limited number of judges, and limited prosecutorial capacity. Political opposition has further weakened the Court's authority. The United States, a close ally of Israel and a non-party to the Rome Statute, imposed sanctions in 2020 on senior ICC officials, including former Prosecutor Fatou Bensouda, in an effort to obstruct investigations.[137] Also, in December 2025, the imposition of sanctions on judges of the ICC Appeals Chamber after they rejected Israel's appeal[138] raised serious concerns about interference with judicial independence. The United Kingdom threatened reductions in funding,[139] while several European states sought to avoid their obligation to execute arrest warrants.[140] This exposes a fundamental lacuna in international law, where accountability is shaped by geopolitical power dynamics rather than the rule of law.

ICJ

[134] Ibid art 27(3)
[135] Creede Newton, 'A history of the US blocking UN resolutions against Israel' *Al Jazeera* (19 May 2021) <https://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel> accessed 1 January 2026.
[136] *Rome Statute* (n 6) arts 86, 89.
[137] Human Rights Watch, 'US Sanctions on the International Criminal Court' (14 December 2020) <https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court> accessed 30 October 2025.
[138] US Department of State, 'Sanctioning ICC Judges Directly Engaged in the Illegitimate Targeting of Israel' (Press Statement, 18 December 2025) <https://www.state.gov/releases/office-of-the-spokesperson/2025/12/sanctioning-icc-judges-directly-engaged-in-the-illegitimate-targeting-of-israel> accessed 1 January 2026.
[139] David Hearst and Imran Mulla, 'Could David Cameron be prosecuted for threatening the ICC?' (*Middle East Eye*, 9 June 2025) <https://www.middleeasteye.net/news/could-david-cameron-be-prosecuted-threatening-icc> accessed 30 October 2025.
[140] Human Rights Watch (n 79).

In proceedings instituted by South Africa against Israel[141] under the Genocide Convention, the International Court of Justice issued a series of binding provisional measures. In its Order of 26 January 2024, the Court directed Israel to prevent genocidal acts, facilitate humanitarian assistance, and preserve evidence relevant to the alleged violations.[142] These obligations were reinforced in subsequent Orders of 28 March 2024,[143] which stressed the need for humanitarian aid to be delivered at scale to avert famine, and 24 May 2024, which required an immediate halt to the military offensive in Rafah and any actions capable of bringing about the destruction of Gaza.[144] Despite the binding nature of these measures, compliance remained limited, as military operations continued alongside restrictions on aid and ongoing civilian harm reported by UN bodies and independent monitors through 2025.[145] The Court itself lacks enforcement authority, the responsibility for securing compliance lies with the United Nations Security Council, where the exercise of political vetoes has rendered enforcement ineffective.

International law has developed sophisticated tools for establishing accountability, but has not yet developed effective means of deploying those tools against the resistance of its most powerful members. Whether that gap can be closed — through General Assembly action under the Uniting for Peace resolution, through universal jurisdiction proceedings in domestic courts, or through the gradual construction of coalitions willing to act outside the paralysed Security Council framework — remains the central question for the future of international accountability.

8. Conclusion

In this article, we examined the catastrophic conditions in Gaza and, drawing on evidence from independent human rights organisations, UN bodies, independent commissions, and other authoritative sources, demonstrated that serious international crimes have been committed by

[141] *South Africa v Israel* (n 21).
[142] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Order of 26 January 2024) General List No 192, paras 54–59 <https://www.icj-cij.org/node/203447> accessed 6 January 2025.
[143] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Order of 26 January 2024) General List No. 192, para 54**.**
[144] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Order of 24 May 2024) General List No 192, paras 35–36.
[145] Oxfam, 'The Cost of Inaction and Impunity: Examining Israel's Compliance with the ICJ Aid Measure' (Research Report, 27 January 2025) <https://www.oxfam.org/en/research/cost-inaction-and-impunity-examining-israels-compliance-icj-aid-measure> accessed 8 January 2026.

Israel. We analysed how deliberate policies of siege, deprivation, and obstruction of humanitarian relief led to famine and continue to starve the people of Gaza. At the same time, the international community has not only failed to stop these violations but has also enabled and sustained them through political protection, military support, and continued economic engagement. Despite the existence of an extensive international legal framework consisting of treaty obligations, customary norms, and institutional mechanisms, accountability has remained elusive. The persistent failure of enforcement, the selective application of legal standards, and the dominance of geopolitical interests expose a fundamental lacuna in international law. Even after such grave violations of international humanitarian law, ICC member States failed to fulfil their obligation to enforce arrest warrants against the perpetrators, highlighting the systemic fragility of international criminal justice. Although a so-called formal ceasefire has been declared, conditions on the ground remain dire. Civilians continue to be killed, entire neighbourhoods remain in ruins, and vast numbers of people are still displaced, forced to live in tents without adequate food, water, or medical care. The continuation of these conditions shows that temporary pauses in hostilities, in the absence of accountability or structural change, do not offer real protection to civilian populations. In the immediate term, urgent humanitarian measures are indispensable. These include the large-scale and sustained delivery of food, water, medical supplies, shelter, and nutrition assistance; the full restoration of essential infrastructure such as electricity, sanitation, and water systems; and the opening of all border crossings to ensure unimpeded humanitarian access across Gaza. Adequate and sustained funding for humanitarian organisations is equally critical to address the scale of human suffering.

Beyond emergency relief, however, lasting solutions must focus on accountability and structural reform. States must fulfil their obligations to cooperate with international courts, exercise universal jurisdiction where applicable, suspend military and economic support that contributes to ongoing violations, and impose lawful sanctions on those responsible for international crimes. At the systemic level, the international community must confront the structural weaknesses of international law itself — the misuse of veto power, the absence of enforcement mechanisms for judicial decisions, and the selective application of legal norms to powerful and powerless states alike. This brings us to the hardest question that Gaza forces us to confront: is reform of the existing international legal order actually possible, or has the system demonstrated so thoroughly its own limitations that something fundamentally different is required?

The case for reform is not without basis. The legal norms themselves — the prohibitions on starvation, the protection of civilians, the crime of genocide — are not the problem. They exist, they are clear, and in the case of Gaza, they have been invoked repeatedly and correctly by courts, agencies, and independent experts. What is broken is the political machinery that sits above those norms, most visibly the veto system in the Security Council, which allows a single permanent member to shield any state from binding collective action regardless of the severity of the conduct in question. Targeted reform of this system — whether through restricting veto use in cases of mass atrocities, as the Accountability, Coherence and Transparency group of states has long proposed, or through strengthening the General Assembly's emergency powers — would not require dismantling international law. It would mean making it work the way it was supposed to. But there is an honest counterargument. Gaza is not an isolated case of the system misfiring — it is the latest and most visible in a long line of crises, from Rwanda to Yemen to Myanmar, in which the architecture of international law produced documentation, condemnation, and impunity in equal measure. If the same structural failures reproduce themselves across every major humanitarian catastrophe, one must ask whether incremental reform is capable of addressing what is, at its root, a problem of power. The international legal order was built in the aftermath of World War Two largely by the victorious powers, and it has always, to varying degrees, reflected their interests. Patching that order without addressing the underlying distribution of power may simply produce a more sophisticated version of the same impunity.

What seems clear is that neither pure optimism nor pure scepticism serves the people currently living under the consequences of these failures. Reform is not only possible — it is necessary, and it must be pursued with genuine urgency. But reform that stops at technicalities while leaving intact the political arrangements that enable powerful states to act above the law will not be enough. Whether the international community has the collective honesty and political courage to confront that deeper problem is, ultimately, the question that the people of Gaza — and every future population exposed to mass atrocity — will need answered.

Bibliography

Treaties and Conventions

Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 1

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187 (GATT 1994)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Cases

Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany) (Request for the Indication of Provisional Measures) (Order of 30 April 2024)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Order of 26 January 2024) ICJ Case 192

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43

Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3

Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory (Advisory Opinion) [2025] ICJ Rep 41

Situation in the State of Palestine (Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice) ICC-01/18-375 (21 November 2024)

Official Documents

ICC Assembly of States Parties, 'Resolution on the amendments to article 8 of the Rome Statute of the International Criminal Court' (6 December 2019) ICC-ASP/18/Res.5

International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Report of the International Law Commission on the Work of its Fifty-third Session* (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10

UN General Assembly, 'Situation of Human Rights in the Palestinian Territories Occupied since 1967: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Francesca Albanese' (18 October 2025) UN Doc A/80/492

UN Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel' (16 September 2025) UN Doc A/HRC/60/CRP.3

UN Security Council, 'Draft Resolution' (18 September 2025) UN Doc S/2025/583

United Nations General Assembly (UNGA), 'Report of the Special Rapporteur on the right to food, Michael Fakhri' (2024) UN Doc A/79/170

Books

Henckaerts J-M and Doswald-Beck L (eds), *Customary International Humanitarian Law, Volume II: Practice* (Cambridge University Press 2005)

Henckaerts J-M and Doswald-Beck L, *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge University Press 2005)

International Criminal Court, *Elements of Crimes* (ICC 2011)

Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) 1479.

Journal Articles

Akande D and Gillard E, 'Conflict-induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law' (2019) 17 Journal of International Criminal Justice 753

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' (1920) 14 American Journal of International Law 95

Horino M and others, 'Assessment of malnutrition in preschool-aged children by mid-upper arm circumference in the Gaza Strip (January, 2024–August, 2025): a longitudinal, cross-sectional, surveillance study' (2025) 406 The Lancet 1993.

Khatib R, McKee M and Yusuf S, 'Counting the dead in Gaza: difficult but essential' (2024) 404 The Lancet 237.

Pejic J, 'The Right to Food in Situations of Armed Conflict: The Legal Framework' (2001) 83 International Review of the Red Cross 1097.

Shetty D, 'Role of the United Nations Relief and Works Agency (UNRWA) in the Israel–Palestine Conflict: A Critical Analysis' (2025) 7(2) International Journal for Multidisciplinary Research.

Reports and Policy papers

Action on Armed Violence, *The UK Royal Air Force's Surveillance Flights over the Occupied Palestinian Territory: Examined* (Research Report, April 2025) <https://aoav.org.uk/wp-content/uploads/2025/04/The-UK-Royal-Air-Forces-surveillance-flights-over-the-Occupied-Palestinian-Territory-examined.pdf> accessed 20 November 2025

Citino N, Martín Gil A and Norman KP, 'Generations of Palestinian Refugees Face Protracted Displacement and Dispossession' (Migration Policy Institute, 3 May 2023) <https://www.migrationpolicy.org/article/palestinian-refugees-dispossession> accessed 8 April 2026

Danwatch, 'Israel/OPT: Maersk transported thousands of tonnes of weapons parts to Israel potentially failing to comply with UNGPs, according to new Danwatch investigation' (9 February 2025) <https://www.business-humanrights.org/en/latest-news/israelopt-maersk-transported-thousands-of-tonnes-of-weapons-parts-to-israel-potentially-failing-to-comply-with-ungps-according-to-new-danwatch-investigation/> accessed 30 October 2025

Food and Agriculture Organization of the United Nations, 'Gaza Strip: IPC Acute Food Insecurity Analysis (15 February – 15 July 2024)' (Report, 18 March 2024) <https://openknowledge.fao.org/server/api/core/bitstreams/836632c4-0108-4c66-bd68-08150fee2d81/content> accessed 17 April 2026

Human Rights Watch, 'Israel: Palestinian healthcare workers tortured, forcibly disappeared' (26 August 2024) <https://www.hrw.org/news/2024/08/26/israel-palestinian-healthcare-workers-tortured> accessed 23 February 2026

IPC – Integrated Food Security Phase Classification, 'Gaza Strip: Famine is imminent as 1.1 million people, half of Gaza, experience catastrophic food insecurity' (Issue 97, December 2023)

Médecins Sans Frontières, *Not 'aid', but 'orchestrated killing'* (Research Report, August 2025) <https://msf.org.uk/article/msf-gaza-report-not-aid-orchestrated-killing> accessed 22 October 2025

Oxfam, *The Cost of Inaction and Impunity: Examining Israel's Compliance with the ICJ Aid Measure* (Research Report, 27 January 2025) <https://www.oxfam.org/en/research/cost-inaction-and-impunity-examining-israels-compliance-icj-aid-measure> accessed 8 January 2026

Security Council Report, 'Conflict and Food Insecurity' (31 October 2025) <https://www.securitycouncilreport.org/monthly-forecast/2025-11/conflict-and-food-insecurity-2.php> accessed 17 April 2026

SOMO, *Economic Sanctions Now: The EU is Israel's Largest Investor* (Research Report, 15 July 2025) <https://www.somo.nl/economic-sanctions-eu-is-israel-largest-investor/> accessed 1 January 2026

Stockholm International Peace Research Institute, 'How top arms exporters have responded to the war in Gaza: 2025 update' (Topical Backgrounder, 2025) <https://www.sipri.org/commentary/topical-backgrounder/2025/how-top-arms-exporters-have-responded-war-gaza-2025-update> accessed 28 October 2025

WHO and UNICEF, Progress on household drinking-water, sanitation and hygiene 2000-2022: Special focus on gender (Report, 6 July 2023) 45

World Health Organization, 'Hostilities in the occupied Palestinian territory (oPt): Public Health Situation Analysis (PHSA)' (10 September 2025) <https://cdn.who.int/media/docs/default-source/documents/emergencies/who-phsa-opt-100925.pdf> accessed 22 October 2025

World Health Organization, 'Public Health Situation Analysis – Occupied Palestinian Territory: September 2025' (10 September 2025) <https://www.who.int/publications/m/item/public-health-situation-analysis---occupied-palestinian-territory-September> accessed 15 April 2026

News Articles

'Israel Cuts Ties with UNRWA Over Links with Terror Groups, as Ban Comes into Effect' *The Times of Israel* (30 January 2025) <https://www.timesofisrael.com/israel-cuts-ties-with-unrwa-over-links-with-terror-groups-as-ban-comes-into-effect/> accessed 22 October 2025

'New Israeli rules stopping critical aid getting into Gaza, charities say' *BBC News* (14 August 2025) <https://www.bbc.com/news/articles/cj6ynz22871o> accessed 20 October 2025

'Gaza Malnutrition to Have 'Generational' Impact on Newborns, UN Warns' The Hindu (23 October 2025) <https://www.thehindu.com/news/international/gaza-malnutrition-to-have-generational-impact-on-newborns-un-warns/article70194557.ece> accessed 18 February 2026

'Hague Group announces steps to hold Israel accountable in Bogota summit' *Al Jazeera* (16 July 2025) <https://www.aljazeera.com/news/2025/7/16/hague-group-announces-steps-to-hold-israel-accountable-in-bogota-summit> accessed 15 April 2026

'Hungary withdraws from International Criminal Court during Netanyahu visit' BBC News (3 April 2025) <https://www.bbc.com/news/articles/c807lm2003zo> accessed 28 October 2025

'In Gaza, mounting evidence of famine and widespread starvation' (UN News, 29 July 2025) <https://news.un.org/en/story/2025/07/1165517> accessed 15 October 2025

'Record starvation and malnutrition in Gaza; more West Bank displacement' (UN News, 12 August 2025) <https://news.un.org/en/story/2025/08/1165636> accessed 15 October 2025

'Turkey says it halts trade with Israel over Gaza aid access' *Al Jazeera* (2 May 2024) <https://www.aljazeera.com/news/2024/5/2/turkey-says-it-halts-trade-with-israel-over-gaza-aid-access> accessed 15 April 2026

'US House passes $14.5bn military aid package for Israel' Al Jazeera (3 November 2023) <https://www.aljazeera.com/news/2023/11/3/us-house-passes-14-5bn-military-aid-package-for-israel> accessed 22 November 2025

'US to resume shipping 500-pound bombs to Israel, US official says' Reuters (10 July 2024) <https://www.reuters.com/world/middle-east/us-resume-shipping-500-pound-bombs-israel-us-official-says-2024-07-10/> accessed 20 October 2025

'What is Hamas and why is it Fighting with Israel in Gaza?' BBC News (14 October 2025) <https://www.bbc.com/news/articles/clyv7w3gdy2o> accessed 18 February 2026

'63 countries complicit in Gaza genocide: UN report' Dawn (29 October 2025) <https://www.dawn.com/news/1951984> accessed 30 October 2025

AFP, 'ICC rejects Israeli appeal against arrest warrants for Netanyahu and Gallant' *The Times of Israel* (18 October 2025) <https://www.timesofisrael.com/icc-rejects-israeli-appeal-against-arrest-warrants-for-netanyahu-and-gallant/> accessed 15 November 2025

Estrin D, 'The U.S. has a plan for getting food into Gaza. Top aid groups object to the idea' (11 May 2025) *NPR* <https://www.npr.org/2025/05/11/nx-s1-5395011/israel-new-gaza-aid-plan-us> accessed 22 October 2025

Food and Agriculture Organization, 'Gaza Strip: 98.5 Percent of Cropland Unavailable for Cultivation as Famine Looms' (August 2025)

<https://www.fao.org/newsroom/detail/gaza-strip--98.5-percent-of-cropland-unavailable-for-cultivation-as-famine-looms/en> accessed 18 February 2026

Hearst D and Mulla I, 'Could David Cameron be prosecuted for threatening the ICC?' (Middle East Eye, 9 June 2025) <https://www.middleeasteye.net/news/could-david-cameron-be-prosecuted-threatening-icc> accessed 30 October 2025

Human Rights Watch, 'Israel Again Blocks Gaza Aid, Further Risking Lives' (5 March 2025) <https://www.hrw.org/news/2025/03/05/israel-again-blocks-gaza-aid-further-risking-lives> accessed 21 October 2025

Human Rights Watch, 'US Sanctions on the International Criminal Court' (14 December 2020) <https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court> accessed 30 October 2025

Newton C, 'A history of the US blocking UN resolutions against Israel' Al Jazeera (19 May 2021) <https://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel> accessed 1 January 2026

Rueda M, 'Colombia's president signs decree to ban coal exports to Israel over the war in Gaza' *AP News* (18 August 2024) <https://apnews.com/article/colombia-israel-coal-exports-467a61fed8c0779f27a3179629717436> accessed 18 April 2026

World Health Organization, 'Famine Confirmed for First Time in Gaza' (WHO News, 22 August 2025) <www.who.int/news/item/22-08-2025-famine-confirmed-for-first-time-in-gaza> accessed 15 October 2025

World Health Organization, 'WHO / Gaza Malnutrition' (UNifeed – UN Media, 9 May 2025) <https://media.un.org/unifeed/en/asset/d339/d3393537> accessed 15 October 2025

Press Release

International Criminal Court, 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant' (Press Release ICC-CPI-20241121-PR1856, 21 November 2024) <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges> accessed 15 April 2026

International Rescue Committee, 'NGOs call on UN Security Council to Urgently Convene and Pass Resolution Demanding Ceasefire in Gaza' (Press Release, 18 December 2023) <https://www.rescue.org/press-release/ngos-call-un-security-council-urgently-convene-and-pass-resolution-demanding> accessed 17 April 2026

Norwegian Refugee Council and others, 'Gaza joint statement: Israel threatens to ban major aid organizations as starvation deepens' (Joint Press Statement, 13 August 2025) <https://www.un.org/unispal/document/gaza-joint-statement-nrc-13aug25/> accessed 21 October 2025

Office of the United Nations High Commissioner for Human Rights, 'UN experts appalled at relentless Israeli attacks on Gaza's healthcare system' (Press Release, 5 August 2025) <https://www.ohchr.org/en/press-releases/2025/08/un-experts-appalled-relentless-israeli-attacks-gazas-healthcare-system> accessed 23 February 2026

Office of the United Nations High Commissioner for Human Rights, 'Killings of Palestinians seeking food in Gaza continue as starvation deepens' (Press Release, July 2025) <https://reliefweb.int/report/occupied-palestinian-territory/killings-palestinians-seeking-food-gaza-continue-starvation-deepens-enar> accessed 22 October 2025

Office of the United Nations High Commissioner for Human Rights, 'UN experts call for immediate dismantling of Gaza Humanitarian Foundation' (Press Release, 5 August 2025) <https://www.ohchr.org/en/press-releases/2025/08/un-experts-call-immediate-dismantling-gaza-humanitarian-foundation> accessed 30 October 2025

Save the Children, 'Joint Statement: Conflict-induced hunger in Gaza' (21 December 2023) <https://www.savethechildren.net/news/joint-statement-conflict-induced-hunger-gaza> accessed 17 April 2026

UNISPAL, 'Gaza "Unliveable", UN Special Rapporteur for the Situation of Human Rights in the OPT Tells Third Committee – Press Release (Excerpts)' (Press Release, 24 October 2018) <https://www.un.org/unispal/document/gaza-unliveable-un-special-rapporteur-for-the-situation-of-human-rights-in-the-opt-tells-third-committee-press-release-excerpts/> accessed 21 October 2025

United Nations Secretary-General, 'Calling Famine in Gaza "Man-Made Disaster, Moral Indictment and Failure of Humanity Itself", Secretary-General Stresses Time for Action Is Now' (Press Release SG/SM/22772, 22 August 2025) <https://press.un.org/en/2025/sgsm22772.doc.htm> accessed 19 October 2025

United Nations, '2022 Among Deadliest Years for Palestinians in West Bank, Middle East Peace Process Coordinator Tells Security Council' (Press Release SC/15086, 28 October 2022) <https://www.un.org/unispal/document/2022-among-deadliest-years-for-palestinians-in-west-bank-middle-east-peace-process-coordinator-tells-security-council-press-release-sc-15086/> accessed 24 April 2026

United Nations, 'Humanitarian System in Gaza Faces Total Collapse, Senior Officials Tell Security Council, as Speakers Call for End to War, Unhindered Aid Access' (Press Release SC/15907, 18 November 2024) <https://press.un.org/en/2024/sc15907.doc.htm> accessed 17 April 2026

United Nations, 'Security Council Fails to Adopt Resolution Demanding Immediate Ceasefire in Gaza, as United States Casts Negative Vote' (Press Release SC/15907, 20 November 2024) <https://press.un.org/en/2024/sc15907.doc.htm> accessed 20 April 2026

US Department of State, 'Sanctioning ICC Judges Directly Engaged in the Illegitimate Targeting of Israel' (Press Statement, 18 December 2025) <https://www.state.gov/releases/office-of-the-spokesperson/2025/12/sanctioning-icc-judges-directly-engaged-in-the-illegitimate-targeting-of-israel> accessed 1 January 2026

World Health Organization and others, 'Famine confirmed for first time in Gaza' (Joint Press Release, 22 August 2025) <https://www.who.int/news/item/22-08-2025-famine-confirmed-for-first-time-in-gaza> accessed 15 October 2025

Websites and Blogs

Amnesty International, 'US sixth veto of resolution on ceasefire, hostage release is a greenlight for Israel's campaign of annihilation in Gaza' (19 September 2025) <https://www.amnesty.org/en/latest/news/2025/09/us-sixth-veto-of-ceasefire-resolution-greenlight-for-israels-campaign-of-annihilation-in-gaza/> accessed 28 October 2025

Choi A and Kent L, 'Which countries recognize a Palestinian state and why does it matter?' *CNN* (22 May 2024) <https://edition.cnn.com/world/middleeast/countries-recognize-palestinian-state-intl-vis> accessed 15 April 2026

Choi A and Kent L, 'Which countries recognize a Palestinian state and why does it matter?' *CNN* (22 May 2024) <https://edition.cnn.com/world/middleeast/countries-recognize-palestinian-state-intl-vis> accessed 14 April 2026

Cronin D, 'Internal paper shows EU sought to shield Israel from sanctions' (*The Electronic Intifada*, 12 August 2025) <https://electronicintifada.net/blogs/david-cronin/internal-paper-shows-eu-sought-shield-israel-sanctions> accessed 30 October 2025

Euro-Med Human Rights Monitor, 'A Generation under Blockade: Consequences of Israel's 17-Year Blockade of the Gaza Strip' (25 January 2023) <https://euromedmonitor.org/en/article/5541/A-generation-under-blockade:-Consequences-of-Israel%E2%80%99s-17-year-blockade-of-the-Gaza-Strip> accessed 16 April 2026

Human Rights Research Center, 'War and Colonization: An Introduction to the Palestinian Refugees' Question' (11 April 2024) <https://www.humanrightsresearch.org/post/war-and-colonization-an-introduction-to-the-palestinian-refugees-question> accessed 10 April 2026

Human Rights Watch, 'Israel and Palestine' in *World Report 2024* (11 January 2024) <https://www.hrw.org/world-report/2024/country-chapters/israel-and-palestine> accessed 16 April 2026

Human Rights Watch, 'Israel: 50 Years of Occupation Abuses' (4 June 2017) <https://www.hrw.org/news/2017/06/04/israel-50-years-occupation-abuses> accessed 17 October 2025

Institute for Middle East Understanding, 'Timeline: The Palestinian Nakba (Catastrophe) & Establishment of Israeli Apartheid' (14 May 2013) <https://imeu.org/article/timeline-the-palestinian-nakba-catastrophe-establishment-of-israeli-apartheid> accessed 15 April 2026

IPC, 'Famine facts' (October 2025) <https://www.ipcinfo.org/famine-facts/> accessed 16 February 2026

United Nations Office for the Coordination of Humanitarian Affairs – Occupied Palestinian Territory, 'Humanitarian Situation Update #334 | Gaza Strip' (23 October 2025) <https://www.ochaopt.org/content/humanitarian-situation-update-334-gaza-strip> accessed 17 October 2025

University of Bradford, 'Gaza bombing "equivalent to six Hiroshimas" says Bradford world affairs expert' (16 April 2025) <https://www.bradford.ac.uk/news/archive/2025/gaza-bombing-equivalent-to-six-hiroshimas-says-bradford-world-affairs-expert.php> accessed 16 October 2025

Beyond Obsolescence: The Ideological Repurposing of the Outer Space Treaty

Victoria Etteh

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- Phillippians 4:13

Abstract

Traditionally pursued during the Cold War's Space Race, the Outer Space Treaty (OST) governed space exploration and diffused geopolitical tensions. However, contemporary private enterprise in the celestial arena is increasingly challenging the treaty's efficacy. While existing scholarship frequently uses these tensions to dismiss the OST as an outdated relic, this paper argues that such critiques fail to capture the treaty's true contemporary function. The central thesis of this paper is that the OST is not failing; rather, it argues that the treaty's deliberate flexibility is being actively reinterpreted in this new era of neoliberal pursuits. By adopting a socio-legal and theoretical methodology, this research demonstrates how foundational ambiguities (specifically the vague scope of 'non-appropriation' (Article II) and the 'common benefit' principle (Article I)) are insidiously leveraged. The analysis uncovers a paradox: the OST remains highly functional as its legal form persists while its substance is reshaped to legitimise market efficiency and strategic state interests. This creates a fundamental ideological conflict, wherein neoliberal priorities of commercial exploitation and private accumulation directly undermine the treaty's original cosmopolitan goal of equitable access for all. It concludes that understanding this dynamic of ideological reinterpretation is essential to further academic discussions and developing counter-mechanisms to mitigate asymmetric space governance. This paper argues that a normative recommitment to space as a 'global commons', combined with multilateral oversight, is essential to reclaim the OST's potential for equitable global governance in a commercialised era.

Table of cases

The Case of the SS 'Lotus' (France v Turkey) (1927) PCIJ Rep Series A No 10

Table of Legislation

- Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (adopted 19 December 1967, opened for signature 22 April 1968, entered into force 3 December 1968) 672 UNTS 119
- Commercial Space Launch Competitiveness Act of 2015, Pub L No 114-90, 129 Stat 704
- Committee on the Peaceful Uses of Outer Space, *Report of the Legal Subcommittee on its Sixty-third session held in Vienna from 15 March to 26 April 2024* (2023) UN Doc A/AC.105/1271
- Convention on International Liability for Damage Caused by Space Objects (adopted 29 November 1971, opened for signature 29 March 1972, entered into force 1 September 1972) 961 UNTS 187
- Executive Order 13914, 'Encouraging International Support for the Recovery and Use of Space Resources' (6 April 2020) 85 FR 20381
- Law on the Exploration and Use of Space Resources 2017 (Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace) (LU)
- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 19 December 1966, opened for signature 27 January 1967, entered into force 10 October 1967) 610 UNTS 205
- United Nations General Assembly Resolution 1472 (XIV) (12 December 1959) UN Doc A/RES/1472(XIV)
- Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Abbreviations

Outer Space Treaty (OST)

Customary International Law (CIL)

International Law (IL)

Vienna Convention on the Law of Treaties (VCLT)

Introduction

Since the genesis of space exploration, many countries have aimed to gain advantages in this unclaimed domain[1]. Outer space represents a final frontier[2] of global governance as law, sovereignty, economic and geopolitical power intersect in ways that challenge traditional legal frameworks. The 1967 Outer Space Treaty[3] (OST), birthed from Cold War diplomacy, was designed to ensure space remained a neutral domain. It typifies space as a province of all mankind (Article I[4]) promoting that all space activities are conducted peacefully and for the benefit of all nations[5]. Notably, it prohibits States from appropriating or claiming ownership of areas of space through sovereignty, use or occupation (Article II)[6]. Thus, the OST is positioned as a cornerstone for international space law. However, as contemporary space activity develops, driven by increased privatisation, the treaty's capacity to regulate these developments has been increasingly scrutinised.

[1] Declan Tevyaw, 'Failures and Successes of the Outer Space Treaty' (ACE USA Blog, 31 October 2023) < https://ace-usa.org/blog/foreign-policy-region/space-oceans-and-polar-regions/failures-and-successes-of-the-outer-space-treaty/ > accessed 8 Novemeber 2024.
[2] Sophie Goguichvili and others, 'The Global Legal Landscape of Space: Who Writes the Rules on the Final Frontier?' (Wilson Center, 1 October 2021) < https://www.wilsoncenter.org/article/global-legal-landscape-space-who-writes-rules-final-frontier > accessed 8 November 2024.
[3] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 19 December 1966, opened for signature 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 (Outer Space Treaty).
[4] Outer Space Treaty, art I.
[5] United Nations Office for Outer Space Affairs, 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies' (UNOOSA) < https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html > accessed 7 November 2024.
[6] Ibid.

A significant body of scholarship has critically examined the OST, frequently noting its perceived ambiguities, state-centricity and general inadequacy in the face of rapidly evolving space technologies and commercial interests[7]. Many label the treaty 'outdated' or ineffective, particularly as its broad principles struggle to govern private enterprise[8]. Recognising the validity of these legal critiques, this paper contends that such analysis stops short of interrogating the deeper ideological forces shaping the treaty's contemporary application. It is this critical gap that the present inquiry seeks to address.

This paper argues that the treaty's current challenges transcend legal insufficiency or obsolescence. It asserts that the ideologies framing how the law is viewed are crucial to the construction and application of its 'normativity'. As legal theorists emphasise, the defining feature of law lies precisely in this normativity[9] – its authority and perceived legitimacy. Thus, the interpretation and application of the treaty, like any legal text, depends on its perceived jurisprudential underpinnings[10]. Whilst much scholarship discusses the geopolitical context that informed the OST's creation, partially adopting this normative approach, this paper extends this understanding. This methodology aligns with Critical Legal Theory, which posits that the law reflects and is informed by power structures and dominant ideologies,[11] often masked by seemingly objective legal language. Adopting this critical theoretical lens is essential as it illustrates how the same legal text within the treaty yields different interpretations and applications depending on the prevailing ideological assumption of the interpretive community[12]. The central contention, therefore, is that the OST is undergoing a profound ideological reformulation. This paper will demonstrate that the treaty's original normative ideology was cosmopolitan – a diplomatic necessity premised on broad, equitable access and preventing unilateral dominance in a new frontier. Yet, in this modern era, the treaty's 'outdatedness' can be further understood as a neoliberal reinterpretation[13]

[7] Yuree Nam, 'One-Way Ticket to Mars: The Privatization of the Space Industry and its Environmental Impact on Earth and Beyond' (2023) 19 Northwestern Journal of Law and Social Policy 149.
[8] Ibid.
[9] Gerald J Postema, 'Jurisprudence as Practical Philosophy' (1998) 4 Legal Theory 329, 331.
[10] David McGrogan, 'On the Interpretation of Human Rights Treaties and Subsequent Practice' (2014) 32 Netherlands Quarterly of Human Rights 347.
[11] Raymond Wacks, 'Critical Legal Theory' in Raymond Wacks *Philosophy of Law: A Very Short Introduction* (2nd edn OUP 2014) 107
[12] Michael Waibel, 'Interpretive Communities in International Law', in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford Academic 2015)
[13] A Claire Cutler, 'New Constitutionalism and the Commodity Form of Global Capitalism' in Stephen Gill and A Claire Cutler (eds), *New Constitutionalism and World Order* (CUP 2014) 193

(which prioritises market efficiency, deregulation, and private accumulation), thereby betraying its original cosmopolitan purpose.

Additionally, this paper notes that this interpretive community shaping the space law is no longer state-exclusive. Private actors play a central role by having growing authority over developing legal meaning, as opposed to passive 'new entrant' participants[14]. To deconstruct the OST's contemporary trajectory, this paper interrogates its text and shifting ideological frameworks that shape its normative meaning. The treaty's inherent flexibility has rendered it vulnerable to neoliberal reinterpretation. This maintains the OST's formal legal principles while substantively transforming its function to align with emerging preferences for market efficiency, private accumulation and strategic state influence. This is often at the expense of its original cosmopolitan commitments and the interests of less powerful states[15]. The central inquiry, therefore, moves beyond asking if the OST is failing, to how its very structure is being appropriated[16] to legitimise asymmetrical modes of space governance.

Chapter Outline

To inform this argument, this paper uses a multi-faceted approach to progress through a structured analysis.

Chapter 1: The Geopolitical and Historical Context of the Outer Space Treaty

Exploring the historical context of the OST, this chapter highlights that understanding the Cold War's imperatives and the influence of decolonising nations is essential for appreciating the OST's primary construction as a framework for managing geopolitical tensions and broad diplomatic consensus. Framing its ambiguities as an intentional flexibility is therefore paramount to understanding its subsequent susceptibility to reinterpretation.

Chapter 2: The Outer Space Treaty in Contemporary Context: Regulation, Responsibility and the Challenge of Privatisation

[14] European Space Policy Institute, 'The Rise of Private Actors in the Space Sector' (Executive Summary, ESPI July 2017) <https://www.espi.or.at/wp-content/uploads/2022/06/ESPI-report-The-rise-of-private-actors-Executive-Summary-1.pdf > accessed 20 March 2025.
[15] Perpetua Akoth Adar, 'Space and the Future of Humanity: A TWAIL Critique of International Space Law and Space Discourse' (2022) 3 TWAIL Review 92.
[16] Cutler (n 13)

This chapter critically examines the OST's core principles (particularly Articles I[17] and II[18]) under the contemporary pressure of increasing privatisation. Adopting a socio-legal methodology, it analyses the doctrinal tensions and practical governance gaps that emerge when applying a state-centric treaty to a domain increasingly populated by powerful commercial actors. Specifically, this reveals the symptoms of the OST's contemporary strain: the rise of de facto appropriation through mega-constellations, the unilateral reinterpretation of resource rights through national legislation like the US Space Act, and the growing asymmetry in access to space. All of which creates a clear disparity between its formal commitments and evolving practical application.

Chapter 3: Designed to fail? The ideological architecture of the OST

Significantly, this chapter develops Chapter 2's symptomatic analysis to offer an academic diagnosis. It adopts a theoretical methodology by interrogating the underlying philosophies and ideologies underpinning the OST's origin and evolution. This is crucial for evaluating its justification beyond the geopolitical context discussed in Chapter 1. It employs cosmopolitanism, economic structure theory[19] and crucially, a neoliberal lens to argue that the OST is being actively reinterpreted and its inherent ambiguities are being exploited. This reinstates the value of the theoretical approach as it illustrates how, beyond being 'outdated', different theories and ideologies influence the treaty's interpretation and enforcement.[20] Building on Manoli's concept of "legal aesthetics,"[21] this chapter contends that the crucial analytical question is not merely the treaty's effectiveness. Discussions will consider how its legal form is instrumentalised to serve new ideological functions, transforming its substance while preserving its legitimising façade.

Chapter 4: Reclaiming Purpose

This chapter explores potential pathways for reform with reference to Chapter 3's theoretical findings. The OST's ideological reinterpretation warrants more than technical legal amendments. It proposes a normative reclaiming of outer space as a 'global commons'[22].

[17] Outer Space Treaty, art I.
[18] Outer Space Treaty, art II.
[19] Joel P Trachtman, *The Economic Structure of International Law* (Harvard University Press 2008)
[20] Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1990) 12 Michigan Journal of International Law 371.
[21] Maria Manoli, 'The Architecture of Authority in Global Space Governance: The Moon Agreement as a Deconflicting Mechanism of Space Activities' (2024) 20(1) Utrecht Law Review 100.
[22] Cassandra Steer, 'Who Has the Power? A Critical Perspective on Space Governance and New Entrants to the Space Sector' (2020) 48 Ga J Int'l & Comp L 751.

Though this may be diplomatically fragile, supplementation with multilateral governance mechanisms may mitigate this. Specifically, it picks the UN COPUOS to facilitate this.

Defining the Scope and Key Terminology

This paper focuses on the challenges relating to Articles I and II of the OST in light of privatisation. Whilst other aspects of space law are relevant and substantial consideration is given to domestic law applications, these articles are central to the current debate on resource exploitation and equitable access. Terms such as ‘neoliberalism’ will be understood as an ideology prioritising market-based solutions, deregulation, and economic efficiency[23] which often influences state policy and international legal interpretation. Cosmopolitanism posits that all human beings are members of a single, universal community, bound by a shared morality that transcends national boundaries. Within the framework of the Outer Space Treaty, this is understood as a normative principle that prioritises global humanity over national loyalties, advocating for all individuals as "world citizens" with equal moral worth[24]. The analysis in Chapter 3 will interrogate how this "cosmopolitan legal aesthetic"[25] was intentionally embedded in the treaty and its subsequent vulnerability to reinterpretation. Moreover, ‘repurposing’ defines the functional intent and application of the OST, which are altered without formal amendment, typically through evolving state practice and neoliberal interpretations[26].

Ultimately, this paper seeks to demonstrate that the Outer Space Treaty is not simply a relic[27] rendered obsolete by private enterprise. It is a malleable framework being shaped by powerful ideologies. By deconstructing the mechanisms of this neoliberal repurposing, this research provides the necessary foundation to argue for tangible reform. Restoring the treaty's original intent requires moving beyond technical fixes, towards a normative reclassification of space as a 'global commons' supported by enhanced multilateral oversight. Only through

[23] Stephen Gill, ‘Market civilisation, new constitutionalism and world order’ in Stephen Gill and A Claire Cutler (eds), *New Constitutionalism and World Order* (CUP 2014)
[24] Martin Švec and Nikola Schmidt, ‘International Space Law as the Transiting Path to Cosmopolitan Order’ in Nikola Schmidt (ed), *Governance of Emerging Space Challenges* (Space and Society, Springer 2022)
[25] Manoli (n 21)
[26] Cutler (n 13)
[27] Joanne Irene Gabrynowicz, ‘Space Law: Its Cold War Origins and Challenges in the Era of Globalization’, (2004) 37 SUFFOLK U. L. REV. 1041, 1043.

such counter-mechanisms can space governance reflect the 'province of mankind' rather than serving the strategic imperative of a select few.

Chapter 1: The Geopolitical and Historical Context of the Outer Space Treaty

Averting Cosmic Conflict: The Cold War Genesis of the OST

The OST emerged as a political instrument from a pressing Cold War need to contain volatility and codify mutual restraint between the two nuclear superpowers[28]. The bipolar geopolitical order, defined by an ideological clash between the US and the Soviet Union[29], fuelled a quest for technological superiority[30]. In 1957, the Soviet Union launched the first artificial satellite, Sputnik 1[31] followed by the first successful test of an intercontinental ballistic missile (ICBM). Such rapid technical advancements increased US anxieties, as it was seen as capable of attacking the US with a nuclear payload[32]. Consequently, the US accelerated its space programmes a year later. ICBMS in this nuclear standoff were significant as they could quickly strike targets across global distances. Furthermore, it was less susceptible to defence and interception, unlike previous weapons such as bombs, making it highly innovative and dangerous. It uniquely required space-based surveillance and military prowess. These prompted accelerated efforts to develop rocket and rocket interception technology[33]. Outer space had progressed from an apolitical and symbolic frontier to a domain of escalating military relevance with the bubbling threat of nuclear weapons, which further fuelled anxieties on both sides. Considering all these factors, maintaining a neutral domain was a diplomatic necessity[34].

[28] Peter Jankowitsch, 'The Background and History of Space Law' in Frans G von der Dunk and Fabio Tronchetti (eds), Handbook of Space Law (Edward Elgar Publishing 2015).
[29] Ibid.
[30] Maddie Davis, 'The Space Race' (Miller Center, 2020) <https://millercenter.org/the-presidency/educational-resources/space-race> accessed 7 November 2024.
[31] 'Timeline: U.S.-Russia Nuclear Arms Control' (Council on Foreign Relations) < https://www.cfr.org/timeline/us-russia-nuclear-arms-control > accessed 8 November 2024.
[32] Ibid.
[33] Britannica Editors, 'Nike missile' (Encyclopedia Britannica, 15 July 2013) <https://www.britannica.com/technology/Nike-missile> accessed 8 November 2024.
[34] Christopher D Johnson, 'The Outer Space Treaty at 50' (*The Space Review*, 27 March 2017) < https://thespacereview.com/article/3155/1> accessed 15 February 2025.

Decolonisation and the Push for Inclusive Principles

While Cold War tensions and rapid nuclear development were pivotal, beyond the bipolar rivalry, the OST was also influenced by pressures from newly independent nations[35]. During the 1950s and 1960s, decolonisation after World War II and international law empowered many Asian and African nations' claims to legally recognised rights, such as self-determination and permanent sovereignty over resources[36]. This profoundly altered global diplomacy, enabling them to shape international legal norms[37] for emerging domains like space. Their delegations were wary of legal territorial traditions being imposed in ways that might perpetuate inequality or exploitation[38]. Hence, their advocacy stressed principles that reflected states outside the superpower rivalry and their historical disadvantage. Crucially, this signifies a more complex subtext and negotiation. This awareness of colonial legacies suggests an increasing sensitivity when accommodating the multilateralism of a decolonising world. This necessitated a design more inclusive than a purely superpower-centric treaty might have produced. As such, their advocacy profoundly impacted the treaty's architecture, shaping the broad, equitable framing of Article I and Article II's strict prohibition on sovereignty.

Key Principles and Their Geopolitical Rationales

a. Article I: Creating Compromise

Against this backdrop, the treaty was signed, primarily shaped by political compromise for restraint and international cooperation. These dual challenges warranted a broad and ambitious treaty to promote peaceful relations amongst the rival superpowers. Article I[39] comprises two significant elements in this context. Broadly, it declares that outer space and celestial bodies are free for exploration and use by all States, defining this as the 'province of all mankind'[40]. First, this is noteworthy as this encouraged scientific and peaceful use of space, placating the need to demilitarise the space domain and codify peace between the two powers. This reflects the broader political influence from decolonised states, explaining the

[35] Jia Aggarwal, 'Space Policy Imperative: The Urgency for a New International Space Governance System' (2024) 22(1-2) Astropolitics 102.
[36] Decolonisation and International Law' (Global Challenges Foundation) < https://globalchallenges.ch/issue/10/decolonisation-and-international-law/ > accessed 15 March 2025.
[37] Aggarwal (n 35).
[38] Stephen Buono, 'Merely a Scrap of Paper' The Outer Space Treaty in Historical Perspective' (2020) 31:2 Diplomacy & Statecraft 350.
[39] Outer Space Treaty, art I.
[40] Ibid.

treaty's emphasis on diplomacy and inclusivity. Secondly, re-examining Article I with this context highlights a balancing of global equity concerns within the bipolar dynamic. Critically, the treaty frames 'use and exploration' as a shared commons, rather than outer space itself[41].

Aggarawal highlights, therefore, that celestial territory is not legally defined as a shared property but as an ownerless one (res nullius)[42]. While this distinction seems technical, it is legally and politically crucial. It detaches outer space from traditional property-based, territorial frameworks[43]. Thus, the OST avoids creating rigid legal obligations regarding ownership or sovereignty. This establishes a broad principle of accessibility and non-exclusion, ensuring no single state dominates the domain. Critically, it aligns with the interests of all actors, specifically portraying this recognition of the Global South's earlier scepticism of applying "terrestrial" legal traditions to space, and instead advocating for legal principles that would insulate the domain from exploitation, militarisation, and inequality[44], thus ensuring more equitable participation. Articles II[45] and IV[46] further express this political balancing, which codifies the treaty's diplomatic ethos in legal terms.

b. Article II: The Pragmatism of Ambiguity

Article II's non-appropriation prohibits national appropriation by claim of sovereignty, use or occupation, or "by any other means"[47]. This final phrase, whilst often criticised for its ambiguity[48], acts as an umbrella preventing any method of national appropriation and claims to sovereignty to minimise loopholes[49] whilst allowing scope for the use of celestial resources. This aimed to preserve political consensus among ideologically opposed states. Its vague ratification prevents any appropriation. This goal would have been significantly undermined had the signatories at the time not understood the treaty to apply broadly[50]. By

[41] "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies," U.S. Department of State, Bureau of International Security and Nonproliferation (ISN), https://2009–2017.state.gov/t/isn/5181.htm (accessed July 12, 2023).
[42] Aggarawal (n 35) 104.
[43] Manoli (n 21) 108.
[44] Buono (n 38)
[45] Outer Space Treaty, art II
[46] Outer Space Treaty, art II.
[47] Ibid.
[48] Stephen Gorove, 'Interpreting Article II of the Outer Space Treaty' (1969) 37 Fordham L. Rev. 349.
[49] Teyvaw (1).
[50] Abigail D Pershing, 'Interpreting the Outer Space Treaty's Non-Appropriation Principle: Customary International Law from 1967 to Today' (2019) 44 Yale J Int'l L 149, 155.

imposing this binding restraint, it extended peace beyond article I's inclusive rhetoric, thus diffusing tensions in the bipolar war and multipolar interests.

c. Article IV

Article IV's second paragraph also aims to diffuse tensions as it forbids the establishment of military bases, installations of fortifications or weapons testing. In particular, this reflects the growing military threat posed by ICBMS. The advantage of this is that it recognises the necessity of space utilisation and its potential, as it further explicitly permits and encourages a more scientific approach to space use for 'peaceful purposes' as opposed to a militarised one[51]. The focus on state behaviour signifies how the provision was designed to prevent territorial competition and militarisation in space. In particular, the article's vagueness enabled a broad interpretation. This was crucial as states feared the outcome of both major powers gaining legal rights to appropriate, particularly since they'd be equipped to launch nuclear weapons[52]. Therefore, this reflects the treaty's core purpose as a mechanism for stabilising Cold War tensions rather than enforcing rigid governance.

Introducing The Issues: Political Success or Legal Failure?

However, whilst the treaty is celebrated for its political success, its vagueness was criticised as legally defective. Critics, like Vlasic, argued that whilst the ambiguity of the treaty is effective in certain aspects, it is disadvantageous in others[53]. In particular, Article II was legally scrutinised as being formulated too generally to provide states with adequate guidance[54]. Vlasic questioned whether, given the probable scarcity of safe landing sites on the moon, early explorers would be allowed to claim certain exclusive rights in sites they first discovered[55]. It is important to note at the time of this criticism, claiming exclusive rights amongst first discovery wasn't a concern as the signatories understood the treaty to apply broadly and thus, was not considered legally ambiguous[56]. However, the foresight of this criticism must be acknowledged, as discussed in later chapters, this is a critical source for much of the OST's contested effectiveness.

[51] Ivan A. Vlasic, 'The Space Treaty: A Preliminary Evaluation' (1967) 55 California Law Review, 507, 514.
[52] Pershing (n 50) 154-155.
[53] Vlasic (n 51)
[54] Ibid.
[55] Ibid.
[56] Pershing (n 50) 154.

In addition to facilitating political flexibility, the treaty's ambiguity supports legal flexibility. Whilst scholars rightly highlight legal insufficiencies, they overlook the treaty's true legal function, or lack thereof. Beyond intentional vagueness to accommodate state consensus, this fluid structure has a foundational purpose that needs to be interrogated. Rather than a robust legal code, it was built as a foundational, flexible framework, neither exhaustive nor comprehensive. The intention was to be vague as it was designed to accommodate new space-related developments[57]. This criticism overlooks this logic as when reconciled with the political context, space was a novel frontier and it would have been implausible to regulate too extensively and pre-emptively. For example, the treaty greatly informed many future international agreements and conventions, adapting once new issues arose. In 1968, the Rescue Agreement[58] was formed, expanding articles 5[59] and 8[60] of the OST. 1972 marked the establishment of the Liability Convention,[61] which expanded Article VII, clarifying total liability for launching states for damages caused by their space objects[62]. This solidifies the treaty's prioritisation of diplomatic and legal flexibility over legal precision. Further, this reflects the treaty's primary aim of diffusing geopolitical tensions. This is a remit often overlooked in contemporary critiques of its regulatory weaknesses. Emphasising this context shifts the debate beyond discussions of its legal deficiencies and questions whether a treaty primarily crafted for security concerns can effectively evolve into an efficient governance model for modern commercial and scientific expansion.

In conclusion, this chapter demonstrates the OST's satiation of geopolitical urgency. Its primary construction was a strategic framework for managing superpower rivalry, codifying mutual restraint, and acknowledging the new legal personalities of a changing world order through inclusive principles. However, as chapter 2 discusses, the critical discussion is whether this treaty's unique construction is compatible with a significantly privatised landscape in the 21st century.

[57] Teyvaw (1).
[58] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (adopted 19 December 1967, opened for signature 22 April 1968, entered into force 3 December 1968) 672 UNTS 119 (Rescue Agreement).
[59] Outer Space Treaty, art V.
[60] Outer Space Treaty, art VIII.
[61] Convention on International Liability for Damage Caused by Space Objects (adopted 29 November 1971, opened for signature 29 March 1972, entered into force 1 September 1972) 961 UNTS 187 (Liability Convention).
[62] Outer Space Treaty, art VII.

Chapter 2: The Outer Space Treaty in Contemporary Context: Regulation, Responsibility and the Challenge of Privatisation

While the OST established foundational norms for peaceful state behaviour in space, the shifting landscape of private activity challenges its legal adequacy[63]. This chapter discusses the trajectory of the OST's application, adopting a sociolegal lens to highlight its legal and political insufficiencies, particularly against foreign applications of Articles I and II. Some scholars criticise the treaty as outdated[64] but a more nuanced understanding is necessary. It follows that the treaty's state-centric framework and broad principles reveal an inherent structural incompleteness[65] when tasked with regulating dynamic private actors. This limitation precedes its vulnerability to the ideological repurposing explored in Chapter 3.

The Limits of a Treaty Built for Another Era

a. Private Enterprise and the Growing Legal Gap

The rise of privatised space actors exposes a critical limitation of the treaty. Its state-centric design, effective for Cold War diplomacy, is considered outdated[66] and incompatible with regulating private activity and its ambitious goals. New Space actors spearhead enterprise in

[63] Preeti Naik, 'Loopholes in International Space Law: An Observation' [2024] Reva University 1 <https://ssrn.com/abstract=4937581> accessed 1 May 2025.
[64] Aggarawl (n 35) 110.
[65] Roman Kwiecień, 'The Space Resource Mining Activities and the Problems of (In)completeness and (Un)certainty of International Space Law: A Critical Overview of the Main Issues' [2022] Review of International, European and Comparative Law 31.
[66] Gabrynowicz (n 25).

the cosmos[67] at times with aggressive marketing strategies and a "fail fast, learn faster[68]" experimentalism which frequently pushes the boundaries of the existing legal framework. For example, SpaceX's Starlink mega-constellation project[69] aims to deploy 42,000 satellites in Low Earth Orbit (LEO) to improve internet coverage[70]. However, though framed as technological innovation, this approach risks monopolising orbital real estate and frequency bands[71]. The treaty prohibits states from claiming ownership of space territory (per Article II[72]), yet Musk's mega-constellation challenges this as it can still occupy key altitudes and frequency bands[73]. Moreover, the volume alone consequently deters entry for others, effectively granting him significant ownership over that domain. In doing so, the project challenges both Article I's commitment to equitable access[74] and Article II's prohibition of appropriation, despite not breaking sovereignty in formal terms[75].

b. A State-Centric Framework in a Post-State Space Age

Critically, this development highlights a broader conceptual flaw. The technological limitations during the treaty's drafting are crucial when considering the original scope of the non-appropriation principle for two reasons. First, Pershing notes private individuals weren't mentioned because drafters were under the assumption that only states would be the primary actors in space. Secondly, given the historic technical capabilities, it was unprecedented for a private actor to have the necessary resources to launch satellites and rockets similar to those of entire states[76]. Whilst historically correct, it is clear that the treaty is legally inadequate in this regard. Private actors' exploitative approach encroaches on territory traditionally reserved for nation-states, creating a tension challenging the application of these state-centric

[67] Nam (n 7).
[68] Kiran Kachela, 'Elon Musk's SpaceX's Triumph Over Boeing: The Fail Fast, Learn Faster Approach' (CI Projects 19 Nov 2024) < https://ciprojectsltd.co.uk/elon-musks-spacex-triumph-over-boeing/ > accessed 21 February 2025.
[69] Tereza Pultarova, Daisy Dobrijevic and Adam Mann, 'Starlink Satellites: Facts, Tracking and Impact on Astronomy' (*Space* 14 April 2022) <https://www.space.com/spacex-starlink-satellites.html> accessed 1 May 2025.
[70] Aaditya Vikram Sharma, 'Starlink and International Law: The Challenge of Corporate Sovereignty in Outer Space' (*EJIL: Talk!* 17 March 2025) <https://www.ejiltalk.org/starlink-and-international-law-the-challenge-of-corporate-sovereignty-in-outer-space/#:~:text=There%20is%20also%20an%20argument,after%20damage%20is%20already%20done.> accessed 1 May 2025.
[71] Ibid.
[72] Outer Space Treaty, art II.
[73] Ibid.
[74] Outer Space Treaty, art I.
[75] Ibid.
[76] Virgiliu Pop, 'Appropriation in Outer Space: The Relationship Between Land and Ownership and Sovereignty on the Celestial Bodies' (2000) 16 SPACE POL'Y 275, 276.

principles to non-state bodies. This exposes a core vulnerability of the treaty, rendering it potentially outdated and thus, scholars profoundly note the inherent difficulty of reconciling the freedom of Article I with the limits of Article II in an unanticipated commercial realm[77] due to state-centric design. The treaty's incapability to anticipate the emergence of economically powerful non-state actors illustrates the risks of designing legal regimes in times of geopolitical urgency. What once promoted peace now permits appropriation in everything but name.

State Responsibility and Private Actors

a. The Limits of Foresight: Article VI and the US Space Act

Whilst it is argued that the OST's state-centricity renders it a Cold War relic[78], this overlooks a critical nuance. Article VI[79] explicitly anticipated the involvement of private actors, requiring states to bear 'international responsibility' for non-governmental entities' activities under their jurisdiction[80]. This suggests a degree of foresight and adaptability. However, the OST's foundational ambiguity significantly limits its ability to regulate the kind of commercial autonomy that now defines space activity. In 2015, responding to rising commercial activity and legislative pressure from a blooming space mining industry[81], the US enacted the Commercial Space Launch Competitiveness Act (Space Act 2015[82]). Whilst purporting to comply with US international obligations under Article VI[83], it goes further by affirming that U.S. citizens engaged in commercial recovery of space resources are entitled to possession, ownership, transportation and profits from the resource obtained in space[84]. At first glance, this may appear to be a logical domestic extension of the treaty's flexible framework. However, the implications of this move require deeper scrutiny.

Potentially, it demonstrates the treaty's deliberately open design functioning as intended: it provides a framework to accommodate[85] the development of domestic law. Yet contrastingly, this flexibility creates an interpretive ambiguity so expansive that it permits national

[77] Setsuko Aoki, 'Outer Space Treaty and Fundamental Principles', in Sandeepa Bhat B., Dilip Ukey, and Adithya Variath (eds), *International Space Law in the New Space Era: Principles and Challenges* (Oxford, 2024) 73.
[78] Gabrynowicz (n 25).
[79] Outer Space Treaty, art VI.
[80] Ibid.
[81] Schmidt (n 24)
[82] Commercial Space Launch Competitiveness Act of 2015, Pub L No 114-90, 129 Stat 704.
[83] Outer Space Treaty, art VI.
[84] 51 USC § 51303 (2015).
[85] Teyvaw (1).

legislation to reshape international obligations to fit commercial goals. The Space Act, by granting private property rights over extracted space resources[86] seemingly promotes exploitative practice rather than exploration.

b. An Interpretive Interrogation

The primacy of the issue lies within Article II[87]. Whilst it prohibits national appropriation, it fails to clarify whether this prohibition extends to extracted resources, as they aren't 'in situ' (physically situated on celestial bodies). Some interpretations keep weight to the word national, suggesting that as long as the state itself was not asserting ownership, private actors are exempt[88]. This view is reflected in national frameworks, like in the US. However, legal scholars challenge this logic. Many academics contend that allowing private companies to own and profit from space resources (which no nation can claim) distorts the abundantly clear ban[89] in Article II[90]. It would be paradoxical to allow a business to contravene the same obligations its nation is beholden to.[91] However, this chapter's focus is not solely on whether the US interpretation is legally justifiable; its deeper concern is that the treaty's ambiguity makes such reinterpretation plausible. As Vlasic warned as early as 1967, the non-appropriation principle is "too broad to offer definitive guidance"[92].

c. Beyond Ambiguity: the OST's Structural Incompleteness

Kwiecień's argument shifts the critique of the treaty beyond interpretive vagueness as he identifies a deeper epistemological and ontological incompleteness[93]. He suggests epistemologically, articles I and II are incomplete, as the full extent of the meaning of 'free use' and 'non-appropriation' is unclear. Dually, he suggests the articles are 'ontologically incomplete' because they purely lack rules enabling the legal classification of certain actions[94]. This is compounded in article VI as the treaty recognises the presence of non-state

[86] Philip De Man, 'Luxembourg Law on Space Resources Rests on Contentious Relationship with International Framework' (Working Paper No 189, Leuven Centre for Global Governance Studies July 2017) 1, 15 < https://ghum.kuleuven.be/ggs/publications/working_papers/2017 > accessed 1 May 2025.
[87] Kwiecień (n 65).
[88] Ethan Hutchins, 'Outer Space Resource Acquisition – A Legal Perspective (Reddie & Grose, October 2024) < https://www.reddie.co.uk/2024/10/09/outer-space-resource-acquisition-a-legal-perspective/#:~:text=Outer%20Space%20Treaty%20(1967)&text=There%20are%20differing%20views%20on,separating%20public%20and%20private%20entities.> accessed 15 March 2025.
[89] Aoki (n 77)
[90] Outer space treaty, art II
[91] Hutchins (n 88)
[92] Vlasic (n 51).
[93] Kwiecień (n 65).
[94] Ibid 34.

actors but declines to offer how their actions should be governed. Thus, we see the provisions marred by interpretive difficulties, and as a result, the US paradoxically carves out an exception to Article II whilst simultaneously complying with the treaty. Thus, while it is tempting to view the OST's limitations as a natural consequence of technological evolution[95], Kwiecień escalates this, thus informing the broader thesis: the OST's enduring weakness is not that it has been overtaken by change. Rather, its original flexibility or incompleteness, intended for legal flexibility, has now become the mechanism through which it is being reshaped.

d. Reframing the Discourse

It is essential to pause here to reframe the discourse. The merit of Kwiecień's argument is that it suggests the OST's failures are not incidental gaps caused by age but rather a structural flaw rooted in its original drafting[96]. This complements Buono's lens in viewing the treaty as incomplete[97]. The treaty's flexibility facilitates its survival, but its ontological and epistemological incompleteness left a critical regulatory vacuum, which logically enables states and private actors to exploit for commercial gain. Critically, continuing to label the OST as merely outdated potentially obscures a most dangerous quality: that it can be exploited precisely because it remains legally operable. Perhaps this attitude directly encourages subsequent legislation like the US Space Act. Luxembourg similarly followed suit with a domestic act[98], rescinding their reference to the OST's international obligations, stating 'it would be premature and not conducive to legal certainty to assume space appropriation has been settled under international law[99]. Thus, the OST was not strictly 'eclipsed' by technological advancement or the influx of private actors, it was structurally unprepared to guide it.

<u>The Symptoms of Legal Incompleteness:</u>

a. Sovereignty by proxy?

Yet, this incompleteness is not overlooked; it creates space for powerful states to advance sovereign interests under the veneer of legal compliance. Whilst private entities are depicted

[95] Pershing (n 50)
[96] Kwiecień (n 65)
[97] Buono (n 38) 353.
[98] Law on the Exploration and Use of Space Resources 2017 (Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace) (LU)
[99] De Man (n 84)

as the main pioneers of space in this new era, this overlooks their deeply interconnected relationship with state authority[100]. Art VI imposes international responsibility on States for non-governmental activities and this implicitly shows how private actors are legally perceived as annexes to a broader activity of State character[101]. For example, Bezos' Blue Origin garnered $40 million worth of state, regional, and local incentives to build his launch facility in Florida[102]. These companies may appear autonomous, but they are embedded in state-sponsored projects[103].

As aforementioned, the ambiguity of Article II enables some commentators to interpret it narrowly, giving weight to the 'national' part of the phrase, which separates public and private entities[104]. However, the interpretive logic of Article VI reveals that private appropriation cannot be separated from sovereign endorsement. Therefore, appropriation by non-governmental actors cannot occur legally without state approval, since ownership requires sovereign jurisdiction[105]. From this lens, the Space Act[106] functions beyond a domestic regulatory response and instead can be classified as a strategic reinterpretation of Article II. When the Act authorises private claims to extracted resources, it constitutes a reassertion of sovereign control whilst appearing compliant with the treaty due to such interpretive ambiguity and incompleteness. By reframing exploitation as a non-sovereign activity while securing privileged access to space resources, the West's rigid interpretation of Article II opens the door for traditional claims to sovereignty[107].

b. Inequitable Access

Furthermore, despite Article I's commitment that space activity should be 'for the benefit and in the interest of all countries, ' its structural incompleteness enabled an asymmetric application in practice. The failure to clarify private property rights over extracted resources

[100] Pawel Frankowski, 'Outer Space and Private Companies: Consequences for Global Security' (2017) 50 Global and Regional Security Challenges 131.
[101] George. D. Kyriakopoulos, 'Positive Space Law and Privatization of Outer Space: Fundamental Antinomies' in George D Kyriakopoulos and Maria Manoli (eds), *The Space Treaties at Crossroads* (Springer 2019)
[102] Irene Klotz, 'Florida county sweetens bid for Jeff Bezos' rocket company' (*Reuters*, 1 September 2015) < https://www.reuters.com/article/technology/florida-county-sweetens-bid-for-jeff-bezos-rocket-company-idUSKCN0R14S1/ > accessed 7 April 2024.
[103] European Space Policy Institute, 'The Rise of Private Actors in the Space Sector' (Executive Summary, ESPI July 2017) <https://www.espi.or.at/wp-content/uploads/2022/06/ESPI-report-The-rise-of-private-actors-Executive-Summary-1.pdf > accessed 20 March 2025.
[104] Hutchins (n 88)
[105] Aoki (n 77)
[106] Commercial Space Launch Competitiveness Act of 2015.
[107] Buono (n 38) 353.

has not translated into equitable economic participation or distribution of space-derived wealth. It potentially restricts economic benefits for the wider global citizenry in favour of a small class of wealthy American investors, reinforcing US dominance in space[108]. The US Act demonstrates this trajectory. The broader geopolitical dissatisfaction with the US Space Act is worth noting as it highlights the vulnerability of the OST to unilateral reinterpretation. Belgium's disapproval of the US and insistence that Article II must be read in combination with Article I(2)'s commitment to equal access[109] highlights a legal and political urgency. The US's interpretation selectively involved the OST's theoretical ideals, yet it avoids its redistributive and egalitarian spirit. It exemplifies how vague treaty language facilitates dominant actors in shaping legal obligations for geopolitical advantage. Significantly, it raises the question: Who is the OST now governing for?[110] Improving diplomatic relations by preventing sovereignty claims and ensuring collective benefit regardless of status was crucial to the OST's design. If countries like the US can pass legislation through loopholes that permit exclusive appropriation, this fundamentally contradicts the treaty's inherent purpose.

The material consequence of such a legal strategy is already visible, endorsing a more muscular stance from the US, correlating with an uneven distribution of its soft power and economic dominance in space. For example, in a 1st quarter 2025 annual report, US equity investment in space was $179bn, dominating global investment proportions at 51%[111]. Of the 7560 satellites in space, the US owns 5184[112]. And despite 77 countries having space programmes, only 16 are classified as spacefaring nations with independent launch capability[113]. Whilst the OST was historically flexible enough to accommodate the geopolitical and economic interests of dominant spacefaring nations, particularly the United States, it has not proven equally expansive when evolving into a more equitable or enforceable governance regime.

[108] Samuel Stockwell, 'Legal 'Black Holes' in Outer Space: The Regulation of Private Space Companies' (E-International Relations, July 2020) < https://www.e-ir.info/2020/07/20/legal-black-holes-in-outer-space-the-regulation-of-private-space-companies/ > accessed 29 October 2024.
[109] Aoki (n 77)

[110] Steer (n 22)
[111] Space Capital, 'Space Investment Quarterly: Q1 2025 Update' (Space Capital, October 2024) <https://spacecapital.docsend.com/view/9d69zpfz4ddms3ry > accessed 1 May 2025.
[112] *Union of Concerned Scientists, 'UCS Satellite Database' (UCS, 1 May 2023) < https://www.ucsusa.org/resources/satellite-database > accessed 2 May 2025.*
[113] Space Crew Team, 'Space Agencies around the World' (*Space Crew* 2024) <https://spacecrew.com/blog/space-agencies-around-the-world> accessed 2 May 2025.

In conclusion, contrary to its historical origins, the treaty has given effect to a new economic imbalance, further entrenching the inequalities it ostensibly sought to mitigate. The OST's key strength was its flexible, principle-based drafting. Whilst this flexibility has materialised in some respects, the following chapter uses an ideological and theoretical lens to further investigate the dichotomy between its proposed goals and the symptoms of its fragility.

Chapter 3: Designed to fail? The ideological architecture of the OST

Building upon the preceding doctrinal analysis, this chapter probes the OST's contemporary paradox: how a treaty rooted in mid-century cosmopolitanism persists amidst aggressive privatisation and market expansion. Manoli stipulates that considering the aesthetics of law[114] (or ideology) is particularly insightful because it extends beyond a mere interpretative approach; it operates as a methodology for understanding how legal ideals are constructed and applied within broader cultural and political contexts[115]. This reveals how law facilitates the expression of certain values and power structures. Despite the treaty's failure to uphold its foundational goals, the chapter argues that the OST is not outdated. Conversely, it is dangerously functional. Its foundational ambiguities are consistently leveraged by neoliberal interpretation[116]. Examining its cosmopolitan aesthetic[117], underlying economic structure[118] and susceptibility to neoliberal ideology[119] reveals the treaty's enduring form. However, this neoliberal reframing subtly maintains the treaty's legal form whilst transforming its function, lending legitimacy to asymmetrical governance and deepening global inequalities behind a guise of continuity.

[114] Manoli (n 21)
[115] Ibid.
[116] Linda Billings, 'Neoliberalism: Problematic. Neoliberal Space Policy? Extremely Problematic', in James S.J. Schwartz, Linda Billings, and Erika Nesvold (eds), *Reclaiming Space: Progressive and Multicultural Visions of Space Exploration* (Oxford Academic, 2023)
[117] Manoli (n 21)
[118] Trachtman (n 21)
[119] Billings (n 116)

Cosmopolitanism: Revisiting the Treaty's Design

a. A Historical Justification

Crucial to the geopolitical context discussed in chapter 1, the OST projects a cosmopolitan legal aesthetic[120] necessary to symbolically unify states under shared ideals rather than a comprehensive legal instrument. Its advantage lies in the coherence of its aspirations: a commitment to universalism[121] and shared access to a new 'frontier[122]'. It aims to diffuse Cold War tensions and accommodate the rising influence of decolonised nations. Manoli compellingly highlights that such ideals operate through legal aesthetics – expressive frameworks which encode these underlying symbolic concepts, cultures and fantasies[123]. For the OST, this meant envisioning outer space as a domain more than national sovereignty, but one that benefited a global community[124].

Schmidt notes that this cosmopolitan aesthetic is most tangibly expressed through the broad articulation of the treaty's first 2 principles[125]. Article I vaguely construes space as an ownerless 'province of all mankind'[126] and deliberately avoids legal precision regarding ownership and benefit of distribution. Schmidt's interpretation of cosmopolitanism is relevant here as she highlights that the principle can be interpreted as creating a symbolic space for global, inclusive governance[127], accommodating multiple state interests within such aspirational language. Framing space as ownerless yet accessible to 'all mankind' expresses this cosmopolitan framework where participation is not dictated by territorial control but rather positions all states, even those who have not ratified the treaty, as beneficiaries of this global community, thus becoming universally applicable[128]. This is significantly cosmopolitan as it makes an indirect yet normative claim that the political boundaries and national identities are arbitrary and that all members are the primary units of moral worth in this "universal political community"[129]. However, this 'exploration' as a 'province of all mankind'[130] is not unlimited. Article II's non-appropriation principle broadly states that space

[120] Manoli (n 21) 108.
[121] Schmidt (n 24)
[122] Goguichvili (n 2)
[123] Manoli (n 21) 108.
[124] Schmidt (n 24)
[125] Ibid.
[126] Outer Space Treaty, art 1.
[127] Schmidt (n 24) 66.
[128] Cestmir Cepelka and Jamie HC Gilmour, 'The application of general international law in outer space' (1970) 36(1) Journal of Air Law and Commerce 30.
[129] Schmidt (n 24) 66.
[130] Outer Space Treaty. Art 1.

is not susceptible to sovereignty claims[131] 'by any means'. This reinforces space as res nullius (ownerless territory) rather than res communis (collectively owned) and ensures access without conferring ownership. The strategic decision to avoid defining what constitutes 'appropriation' in future contexts is worth re-examining in this lens. It reflects the pragmatic need to defer latent conflict over resource rights or new uses in favour of securing agreement of core principles of peaceful intent and non-sovereignty.

Critically, this regulation was not robust and as such, it was incompletely designed to accommodate new space-related developments and laws[132]. Thus, it provides a legal status to cosmopolitan ideals[133]. This perspective reveals how the broad language facilitated the expression of such cosmopolitan values. Understanding this foundational vulnerability, born from both the fears and aspirations[134] of its cosmopolitan aesthetic, offers a distinctive lens for analysing the treaty's legal projection. It highlights the tension between its aspirational rhetoric and practical limitations in enforcing equitable governance.

b. Contemporary Vulnerabilities

However, the cosmopolitan lens, most justifiable within its historical context, becomes most vulnerable when interpreted through practices that oppose its foundational ideals[135]. Crucially, Kwiecén[136] and Buono's[137] arguments can be strengthened here. The treaty's ontological incompleteness (its structural refusal to define core legal categories[138]) was an intentional design choice rooted in its cosmopolitan ambition to remain inclusive and flexible. This incompleteness becomes most visible in Article II: it prohibits national appropriation but lacks rules on whether the prohibition extends to extracted resources, private actors and state-enabling legislation[139]. This leaves a critical gap in which States can pursue domestically favourable interpretations without breaching the treaty's formal language[140]. Reconsidering the US Space Act[141] exemplifies this. By authorising private

[131] Schmidt (n 24) 83.
[132] Teyvaw (n 1).
[133] Allen E Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2007)
[134] Gabrynowicz (n 25) 1043.
[135] Manoli (n 21)
[136] Kwiecén (n 65)
[137] Buono (n 38)
[138] Kwiecén (n 65)
[139] Ibid.
[140] Alan Wasser and Douglas Jobes, 'Space Settlements, Property Rights, and International Law: Could a Lunar Settlement Claim the Lunar Real Estate It Needs to Survive?' (2008) 73 Journal of Air Law and Commerce 37, 1.
[141] Commercial Space Launch Competitiveness Act of 2015.

ownership over extracted resources without directly exerting sovereignty, it floats around the cosmopolitan spirit of Art II, exploiting its structural incompleteness[142].

c. The Permissive Default: Interpreting Incompleteness through Customary International Law

This structural incompleteness, exemplified by the US Space Act, inevitably invites recourse to foundational principles of customary international law (CIL) to interpret the scope of state obligations. Here, the OST's cosmopolitan vulnerability becomes most legally acute through the application of the *Lotus*[143] principle. As a core doctrine reflecting the permissive default of state sovereignty[144], it attempts to protect the completeness of the law[145]. It holds that states are free to act in the absence of an express prohibition: "whatever is not explicitly prohibited is permitted"[146]. Reconciling with the OST's open-textured nature, specifically, Article II's silence on the legal status of *extracted* resources, it provides a powerful legal rationale for permissive state action.

Consequently, the U.S. position in authorising private claims to extracted space resources[147] did not constitute a technical violation of Article II's principle. Such legal plausibility isn't from any alignment with the treaty's original cosmopolitan purpose (indeed, it arguably subverts it). Perhaps more doctrinally, since the ethos wasn't articulated as an enforceable prohibition on this specific activity, it could not be explicitly breached, and thus, CIL's permissive default governs. This interaction with CIL's foundational logic powerfully reveals the true nature of the OST's cosmopolitanism, as described by Manoli, as precisely a legal 'aesthetic'[148]. Demonstratively, when tested against the default rules of international law, these aspirational ideals of being ownerless and inclusive hold little legal weight without concrete legal prescriptions. The 'aesthetic' proves to be just that: a normative façade offering weak resistance to state practices justified by CIL's deeper, state-centric logic. While CIL's permissive default provides the legal pathway for reinterpretation, it does not explain the motive. To understand the contemporary trajectory of the OST, the inquiry must turn to the

[142] Kwiecień (n 65)
[143] *The Case of the SS 'Lotus' (France v Turkey)* (1927) PCIJ Rep Series A No 10.
[144] Marco Vohringer, 'State Jurisdiction and the Permissiveness of International Law: Is the Lotus Still Blooming?' (2021) 7 LSE Law Review 29.
[145] Kwiecén (n 65) 40.
[146] Vohringer (n 144)
[147] Commercial Space Launch Competitiveness Act of 2015.
[148] Manoli (n 21)

strategic and economic imperatives incentivising states to actively instrumentalise these structural gaps.

The Economic Structure of International Space Law

a. The OST as a Jurisdictional Marketplace

The OST's perceived legal insufficiencies, commonly cited to label the treaty outdated, can be more incisively understood through an economic lens that reveals a deeper logic underpinning international law's constitution[149]. Trachtman compellingly argues that international law operates as a jurisdictional marketplace[150] where legal commitments are not universally binding moral ideals; they are strategically negotiated and internalised selectively to maximise state preferences[151]. In this model, sovereignty functions as a tradable commodity: states consent to certain legal rules in exchange for regulatory benefits, geopolitical stability or economic advantage[152]. Market 'efficiency' in international law equates to the optimal effectiveness of regulation as an expression of these state preferences[153].

Applying this framework to the OST reveals that its foundational ambiguity was a deliberate feature rather than a flaw. It represented a diplomatic compromise where states sacrificed elements of their sovereignty[154] (as highlighted in Article II's non-appropriation principle) in exchange for the maximisation of global peace and security demanded by the volatile Cold War environment. Through this lens, the treaty reflects an explicit contract[155]: a consciously incomplete legal agreement that facilitated initial consensus around these business terms with the expectation that future legal elaboration would follow as circumstances evolved. The theoretical strength of this lens is that it perfectly complements the earlier analysis of the cosmopolitan aesthetic, reinforcing that the treaty's flexibility was normatively strategic. Trachtman suggests that this ambiguity in international law merely reflects a calculated legislative decision[156] to defer conflict to avoid the extra political price that immediate, hard

[149] Trachtman (n 19)
[150] Trachtman (n 19)
[151] Ibid 15.
[152] Ibid.
[153] Ibid 22.
[154] Ibid.
[155] Ibid 149.
[156] Ibid 211.

decisions would exact, in a bipolar standoff[157]. The OST's cosmopolitan ethos thus served to guide state behaviour within this economic structure, providing the normative reasoning for initial compliance and establishing broad principles rather than strict rules[158].

b. Normative Adaptation as Opposed to a Legal Breakdown

Trachtman's economic lens skilfully illustrates that the treaty was not ineffective. It reframes apparent 'violations' like the US and Luxembourg's legislation, which enable ownership over extracted space resources, not as a breach but as rational expressions of a system designed to tolerate selective compliance. Trachtman likens CIL to an 'implicit contract',[159] contrasting the 'explicit contract' logic of treaties. In CIL formation, maintaining existing state practices and political flexibility precedes immediate legal certainty[160]. This explains how legal norms evolve around seemingly fixed treaty text[161]. This economic analysis clarifies why the OST has not 'failed' in a strict legal sense. Implicitly, it signals a shift in governance logic where states pursue maximal achievement structured on a desired level of compliance rather than a universal one[162].

Consequently, emerging national legislation may not undermine the treaty. Potentially, it suggests a renegotiated order driven by evolving state preferences. The apparent erosion of cosmopolitan ideals can thus be reimagined as a continuation of its own flexible logic under changed economic conditions. This analysis offers more than a doctrinal representation of ambiguity. The treaty's incompleteness paradoxically facilitates resilience and malleability, enabling shifts in governance without formal disruption[163]. However, this can often occur without accountability. This conceptualisation of international law as a 'jurisdictional marketplace', whilst explaining the OST's original resilience, also crucially establishes a framework valuing efficiency, negotiation and adaptation based on state preference. This is highly conducive to the subsequent neoliberal interpretation focused on economic maximisation.

[157] Ibid 213.
[158] Ibid.
[159] Ibid 149.
[160] Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems '(2004) 15 EJIL 523.
[161] Trachtman (n 19)
[162] Ibid 23.
[163] Irina Burga, 'Subsequent Practice as a Means of Treaty Modification', *Modification of Treaties by Subsequent Practice* (Oxford, 2018)

A Neoliberal Shift in Space Governance

The structural shift in international law's logic is most sharply illustrated through a neoliberal lens[164]. It reveals that privatisation is not an external disruption to the OST framework but is a logical extension of its economic structure. The treaty's original cosmopolitan ambition managed state interests and diffused tensions through inclusive rhetoric[165]. However, the Soviet Union's collapse[166] removed the geopolitical urgency for those ideals. Subsequently, neoliberalism emerged as the dominant politico-economic ideology and began to reshape international governance[167]. It promoted the reorganisation of legal and institutional frameworks around market logic[168]: prioritising private property rights, privatisation, deregulation and economic efficiency as a metric for evaluating legal regimes and state action[169]. Thus, while the treaty's principles and 'explicit contractual' obligations remain intact, Pershing argues that its underpinning values, such as sovereignty, now correlate with market preferences and economic efficiency[170]. Perhsing's argument warrants further scrutiny. It suggests a shift in customary international law wherein legal rules evolve not solely through multilateral consensus, but through the normative practices of private actors and their enabling states. Reconciled with Trachman's economic model of international law as a jurisdictional marketplace, and the examples discussed in chapter 2, the neoliberal lens explains how the OST's contractual logic has been redefined: its formal provisions remain consistent, yet its legal function prioritises capital expansion[171] in space over strict diplomatic consensus. Thus, neoliberalism offers a useful analytical lens to explain this trend[172]. In effect, neoliberalism redefines the 'currency' of international legal exchange, elevating economic efficiency as the primary value. Hence, the 'goods' traded within this supranational marketplace have shifted. States now trade legal ambiguity for market access, pursuing a

[164] Billings (n 116)
[165] Schmidt (n 24)
[166] Gary Gerstle, *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (OUP 2022)
[167] Ibid.
[168] Gill (n 17)
[169] Ibid.
[170] Pershing (n 50)
[171] Victor L Shammas and Thomas B Holben, 'One Giant Leap for Capitalistkind: Private Enterprise in Outer Space' (2019) 5(1) Palgrave Communications art 19 < https://www.nature.com/articles/s41599-019-0218-9 > accessed 22 March 2025.
[172] Dag Einar Thorsen, 'The Neoliberal Challenge. What Is Neoliberalism?' (2010) 2(2) Contemporary Readings in Law and Social Justice 188.

maximisation of their new neoliberal preferences[173] rather than solely seeking geopolitical stability.

The Neoliberal Reinterpretation of the OST Principles

Interpreting international treaties, including the OST, typically operates within the VCLT's principles. This concerns deriving its textual meaning according to its object and purpose[174]. However, the OST's ambiguities, when challenged by neoliberal ideologies and dominant actors' strategic interests, create interpretive space. Within this space, it highlights a contrast between formal interpretive methodology and ideologically driven outcomes.

This is evidenced in Article I's reinterpretation, where the commitment to activities being for 'the benefit and interests of all countries'[175] is equated with economic growth driven by private enterprise, subordinating equitable distribution[176]. Starkly, this ideological shift is illustrated by statements like that of former US Commerce Secretary Wilbur Ross, who urged the dismantling of regulatory space frameworks to match the rate of technological advancement[177]. Viewed through the economic model, Ross's statement advocates for radically reducing the 'price' of market participation to maximise this new primary neoliberal 'benefit'[178]: rapid technological and commercial development driven by space actors. This implicitly prioritises market speed and efficiency over the deliberative negotiation processes embedded in the OST's original, cautious cosmopolitan spirit. The OST's flexible 'contractual' structure, historically designed for geopolitical accommodation, becomes repurposed here as an infrastructure to be streamlined for market dynamism[179]. Consequently, the OST's weak 'standards-based' provisions and the evolving nature of customary interpretations absorb and facilitate this neoliberal shift. In this light, the neoliberal lens compels a more nuanced reading of contemporary developments. Article II's non-appropriation principle is also subject to reinterpretation. As previously discussed, its legal silence on extracted resources is leveraged by neoliberal arguments favouring commercial exploitation[180]. Legislative developments like the US Space Act and interpretations that

[173] Trachtman (n 19)
[174] See generally Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 31-32.
[175] Outer Space Treaty, art I.
[176] Stockwell (n 108)
[177] Shammas (n 171)
[178] Trachtman (n 19) 15.
[179] Cutler (n 13)
[180] Stockwell (n 108)

narrowly define 'appropriation' to exclude resource ownership once removed from a celestial body, permit private claims justified by economic efficiency[181]. In a subtle yet dangerous distinction, these consistent violations may be understood as proposals to establish new rules and terms within the greater jurisdictional marketplace[182], ones that value economic efficiency as the new 'benefit'. In this case, although Article II was historically understood as a strict prohibition, when read permissively, it becomes a principle that does not impede resource commercialisation. Rather than an outdated treaty, this framing exemplifies the OST's significant adaptability. Moreover, it shows how privatisation does not operate as an external force disrupting the treaty's effectiveness, but operates as a logical extension under a broader neoliberal ideology.

From Reinterpretation to Reshaped Governance

Moreover, this neoliberal reorientation stretches international law's 'economic' structure beyond Trachtman's state-centric scope. Whilst his model explains how states negotiate in a jurisdictional marketplace, the rise of powerful private entities as agents of neoliberalism introduces non-state actors who significantly influence the market's terms. It transforms a system designed for state-based preference maximisation into one that endorses asymmetrical private dominance[183]. Trachtman's model, whilst insightful, falters by presuming states remain the central agents in shaping and trading legal commitments. The neoliberal lens complicates this assumption as it reveals a shift in agency where commercial actors develop and shift customary international law[184]. The US Space Act can be reimagined through this lens. Private actors recognised the economic potential of the space mining industry, yet perceived the absence of corresponding legislation (an ontological incompleteness) as a fundamental barrier. Consequently, they applied significant pressure on the US government, thus forming the Act[185]. This demonstrates how CIL is being pre-emptively shaped to maximise capitalist preferences not only in space access but also future space governance.

a. Neoliberalism's Normative Authority in Space Governance

More profoundly, this dynamic encourages the reformulation and naturalisation of traditionally public governance functions[186]. The Trump administration's proposal to include

[181] Hutchins (n 88)
[182] Trachtman (n 19) 115.
[183] Adar (n 11)
[184] Pershing (n 50) 169.
[185] Schmidt (n 24) 144.
[186] Cutler (n 13)

executives from major private corporations such as SpaceX, Blue Origin and Boeing to the National Space Council[187] exemplifies this trend. This integration risks embedding corporate objectives and market-driven rationale within the states policy-making apparatus[188], blurring the boundary between public interest and private commercial advantage. This conflation risks legitimising their incentives as if they inherently align with the public, 'constitutional' or customary duties[189] concerning space. This portrays a fundamental risk, promoting private actors beyond stakeholders and instead as arbiters of the public good in the space domain[190]. Logically, this integration extends to influencing the development of customary international law as authority increasingly emanates from the conduct of private firms rather than traditionally collective state practice. Thus, the OST's cosmopolitan framework becomes subtly repurposed[191] as its flexibility becomes a site for strategic interpretation, aligning with dominant market logic. Apparent adherence to the treaty's international legal form masks the underlying shift that privileges neoliberal pursuits, offering public protection to exploitative private interests[192]. The OST's designed flexibility, far from rendering it obsolete, enables its neoliberal reformulation, potentially entrenching inequality through the very mechanisms intended for universal governance. Therefore, the neoliberal lens highlights a duality: a change in the effects of how space is used and also a persuasive authority for future developments of how space is governed[193]

Future Trajectories: Repurposed Law and Asymmetrical Governance

The analysis thus reveals that the primary challenge facing contemporary space governance transcends binary questions centred around the OST's effectiveness or obsolescence. The deeper issue lies in the trajectory of space governance being redefined through soft sovereignty, where state authority provides a cover for market dominance and solidifies asymmetric access. This makes the treaty's original goals potentially unobtainable[194].

[187] Shammas (n 171)
[188] Ibid.
[189] Cutler (n 13)
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Gabrynowicz (n 25) 1047.
[194] Pershing (n 50) 170.

a. Repurposing sovereignty

As previously observed, there is a mutually reinforcing relationship[195] between dominant states and private actors, exemplifying this shift. Private space companies benefit from substantial public investment: generous SAAs, government funding and further inclusions in regulatory space councils to further their private enterprise. Moreover, since private actors are legally considered as annexes of a broader state character[196]States can leverage private enterprise[197] to pursue strategic objectives and reclaim sovereignty previously sacrificed in the original cosmopolitan jurisdictional marketplace. The neoliberal lens reveals that sovereignty in the space domain has been strategically reconstituted, allowing states to advance national interests under the guise of private enterprise. This potentially displaces the OST's cosmopolitan ethos. Beyond chapter 2's discussion on the impact of inequitable access, it concentrates global regulatory power with dominant states that operate according to their neoliberal interests[198]. The treaty's clarity is particularly challenged by the expanding context of this hybrid of public-private governance and international-commercial overlap in space[199].

b. Exclusion by design: The marginalisation of the Global South

This public-private hybrid inevitably produces disproportionate impacts, illuminated by the TWAIL perspective. The neoliberal repurposing deepens systemic inequality as it reinforces a global hierarchy of dominance. With Western dominance in space legitimised, Global South states remain peripheral[200]. This deepens the statistics observed in chapter 2: whilst the US accounts for over half of equity investment in space, Global South contributions remain negligible. This is compounded by the recent US stance against acknowledging space as a global commons[201] and with initiatives like the Artemis Accords' controversial promotion of US dominance over international cooperation[202]. Such a policy effectively relegates foundational and inclusive OST principles like Article I's 'common benefit of all mankind'

[195] Frankowski (n 100)
[196] Kyriakopoulos (n 101)
[197] Peter L Nelson and Walter E Block, *Space Capitalism: How Humans Will Colonize Planets, Moons, and Asteroids* (Springer 2018)
[198] Steer (n 22)
[199] Gabrynowicz (n 25)
[200] Steer (n 22) 753.
[201] Executive Order 13914, 'Encouraging International Support for the Recovery and Use of Space Resources' (6 April 2020) 85 FR 20381 < https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-encouraging-international-support-recovery-use-space-resources/ > accessed 18 April 2025.
[202] Dennis O'Brien, 'The Artemis Accords: Repeating the Mistakes of the Age of Exploration' (The Space Review, 29 June 2020)) <https://www.thespacereview.com/article/3975/1 > accessed 1 May 2025.

from a legal and binding obligation to a historical and aspirational concept[203]. Problematically, such practices exclude the Global South's from meaningfully influencing the development of future norms[204], creating a system where they are symbolically included under the treaty's cosmopolitan banner but practically excluded from substantive decision-making[205].

c. From Violation to Redefinition

Perhaps most worrisome is the impending shift in CIL toward recognising 'in situ' appropriation as permissible under Article II[206]. Driven by the prospect of space resource extraction, private companies are increasingly incentivised to pressure states to validate in situ property rights[207]. Considering their long-term commercial goals is key. SpaceX aims to make humans a multiplanetary species[208], suggesting permanent settlement. Moreover, Blue Origin plans to move heavy industry off Earth[209]. These present emerging governance pressures since such goals would require property and ownership rights in space, conflicting with the non-appropriation principle. Convincingly, some legal scholars maintain that the language of Article II implicitly bans individual appropriation. When interpreted with Article I's guarantee of free access to all celestial bodies, they suggest private appropriation will not legally occur[210]. However, this reduces the issue to a binary between compliance and violation. The OST's ontological incompleteness, coupled with private actors' increasing normative authority, means that the legal danger is not explicit breaches, but the redefinition of what fundamentally constitutes a breach. In this neoliberal order, the power to shape legal meaning increasingly lies with dominant parties, capable of acting first and framing later, excluding those who cannot to the periphery[211]. As the economic methodology of international law and prior examples illustrate, prioritising commercial development and

[203] Adar (n 11)
[204] Steer (n 22) 751.
[205] Ibid 752.
[206] Pershing (n 50)

[208] David Young and Niall Docherty, 'An Anticipatory Regime of Multiplanetary Life: On SpaceX, Martian Colonisation and Terrestrial Ruin' (2024) Science as Culture 1 < https://doi.org/10.1080/09505431.2024.2393096 > accessed 27 April 2025.
[209] Plastic Pollution Coalition Editor, 'Jeff Bezos Wants to Pollute Space, but He Could Prevent Pollution on Earth Instead' (*Plastic Pollution Coalition* 21 July 2021) <https://www.plasticpollutioncoalition.org/blog/2021/7/21/jeff-bezos-wants-to-pollute-space#:~:text=%E2%80%9CWe%20need%20to%20take%20all,Blue%20Origin%20flight%20into%20space.> accessed 2 May 2025.
[210] Perhsing (n 50)
[211] Steer (n 22)

market access is no longer cast as ideologically opposing the OST's principles, but reframed as its 'common sense'[212] plausible contemporary application. This subordinates cosmopolitan contractual obligations when they obstruct economic expansion[213]. The OST is not simply 'outdated'; even its future trajectory is dangerously resilient. Its designed flexibility permits economic self-interest into a legally plausible application. Thus, at the dawn of an era potentially defined by competition in space, these consequences highlight that the treaty is not an outdated agreement to be abandoned, nor a fluid one to be taken for granted[214].

In conclusion, the treaty's inherent flexibility makes it an ideal vessel for neoliberal repurposing, precisely because it doesn't need to be formally changed. Whilst the cosmopolitan aesthetic is outdated in practice, its political usefulness still provides the essential veneer of legitimacy as neoliberal actors gain a significant advantage by camouflaging their actions within the OST's accepted language and ideals. However, this prospect should be particularly disquieting for those who hope for an equitable distribution of space resources[215]. There is a danger if the OST's malleability continues to serve strategically dominant parties rather than maintain multilateral restraint. Future reforms must then confront legal deficiencies and, more diagnostically, the deeper normative crisis of a governance framework that risks increasingly serving power before principle.

[212] Cutler (n 13)
[213] Shammas (n 171)
[214] Buono (n 38) 353-354
[215] Pershing (n 50) 169.

Chapter 4: Reclaiming Purpose: Towards Equitable Space Governance

Building on the diagnosis that the OST is not outdated but ideologically repurposed[216] through the exploitation of its inherent flexibility, this chapter proposes pathways to recalibrate its application with principles of equity and shared stewardship. Addressing the identified legal ambiguities and vulnerability to neoliberal repurposed diagnosed in chapter 3 warrants a dual approach. A reframing of outer space and strengthened procedural safeguards within the existing international framework to resist interpretive dominance suggests a valid prospect. This is necessary to balance legitimate economic pursuits with equitable access[217] to both space and legal decision-making, addressing the asymmetries perpetuated by the current trajectory.

Towards a Global Commons

The cornerstone of the necessary normative shift is the explicit re-categorisation of outer space as a global commons[218] as opposed to a terra nullius. This subtle distinction carries significant weight. Despite the inclusive ambition of the OST, because it is ownerless, it places individual responsibility upon states for supervising space activity[219] (as expressed in

[216] Cutler (n 13)
[217] Pershing (n 50)
[218] Steer (n 22)
[219] Ibid 752

Article VI[220]). This highlights an inscribed contradiction. It is counterintuitive to impose individual responsibility on states to regulate a global interest,[221] particularly as they operate according to their own interests[222]. The value of viewing it as a global commons is that it promotes this shared responsibility and consequently calls for international cooperation[223].

Doctrinally, it presents a crucial counter-narrative to the permissive interpretations that currently enable strategic exploitation, particularly under Article II[224]. This is because it can be analogised to the 'tragedy of the commons'[225]. It indicates that if individuals have access to a public commons, the resources will be depleted[226] where there is a lack of effective governing measures to prohibit exploitation[227]. Through this framing, the global commons can be translated as an avoidance of the tragedy of the commons[228]. An awareness of the potential tragedy of space as a global commons means that future collective legal responsibility can be construed to mitigate exploitation as it embeds shared stewardship[229]. This critical scope is absent from the OST's terra nullius framing. Advantageously, this reconceptualisation redirects normative logic away from exploitative access towards sustainable equity. This is relevant to the current crisis, as despite its original flexibility accommodating evolving uses, the OST's failure to articulate enforceable governance mechanisms enabled dominant actors to pursue unilateral economic interests. Moreover, to balance economic efficiency whilst satiating potential legal issues, ascribing space as a shared ownership, rather than ownerless, would pre-emptively recognise a capability for private ownership and may pave the way for more specific rules regarding private ownership. This would appropriately liberalise private parties' activities[230] since they'd be included as global users of the space and would be subject to such shared notions of responsibility and accountability.

[220] Outer Space Treaty, art VI.
[221] Steer (n 22) 752.
[222] Ibid.
[223] Di Mei, 'Integrating outer space as a global commons with private property rights to outer space resources' (2024) 5 Front. Space Technol 1, 3 < https://www.frontiersin.org/journals/space-technologies/articles/10.3389/frspt.2024.1351850/full > accessed 05 May 2025
[224] Outer Space Treaty, art II.
[225] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243, 1248.
[226] A Spiliakos, 'Tragedy of the commons: examples and solutions' (Harvard Business School, 2019) < https://online.hbs.edu/blog/post/tragedy-of-the-commons-impact-on-sustainability-issues > accessed 5 May 2025.
[227] D Feeny and others, 'The tragedy of the commons: twenty-two years later' (1990) 18 Hum. Ecol. 1, 12.
[228] Mei (n 223)
[229] Ibid.
[230] Ibid.

However, as discussed in the previous chapter, conceptual reframing alone is insufficient to counter entrenched interests and the dynamics of ideological repurposing. Some critics presently dismiss reframing efforts as symbolic, subordinating them to 'political correctness'[231]. This further suggests it may lack the tangible force to reshape behaviour. Whilst framing space as a commons can operate as a strategic discursive tool to entrench collective responsibility and equitable access into legal consciousness[232], this is of no value without multifaceted enforcement. When reimagining a new ideal, it is important to further imagine the law's ideal method of application[233]. Thus, linguistic shifts must be reinforced by procedural mechanisms capable of operationalising the commons principle and resisting interpretive capture or disregard by dominant states and commercial actors. Rather than pursuing a new treaty, there is a need to adopt a stronger procedural system for legal enforcement under the existing framework.

Procedural Enforcement

Translating the 'global commons' principle into effective governance logically requires engagement within the primary multilateral forum established for space matters: the UN Committee on the Peaceful Uses of Outer Space (COPUOS)[234]. However, Chapter 3's analysis suggests the current consensus-based economic model is ill-equipped to counteract the ideological repurposing of the OST, often challenged by dominant state interpretations aligned with neoliberal interests. Instead, COPUOS should be potentially granted quasi-judicial[235] powers to strengthen adherence to this normative shift and guide future space governance. Firstly, this would fulfil its original mandate to study and resolve legal problems[236]. Secondly, applying this mandate in a contemporary context necessitates active intervention to clarify ambiguities exploited by rapid commercialisation: for example, mediating disputes over resource extraction rights or managing orbital congestion caused by private mega-constellations.

[231] Adar (n 11) 111.
[232] Silvia Kaugia, 'Structure of Legal Consciousness' [1996] JURIDICA INTERNATIONAL. LAW REVIEW. UNIVERSITY OF TARTU 16.
[233] Manoli (n 21) 108.
[234] The Committee on the Peaceful Uses of Outer Space was established by UNGA Res 1472 (XIV) (12 December 1959) UN Doc A/RES/1472(XIV)
[235] Feyisola Ruth Ishola, 'Legal Enforceability of International Space Laws: An Appraisal of 1967 Outer Space Treaty' (2021) 9 New Space 33.
[236] 1959: UN General Assembly resolution 1472 (XIV)

Such a functional enhancement would be pragmatic, drawing on the Committee's deep institutional history and expertise from drafting the foundational space treaties. Its proposed quasi-judicial function requires a distinction: it would not involve formal adjudication but instead, the capacity to issue these expert, reasoned analyses and interpretive guidelines on applying commons principles. To ensure legitimacy with established international legal methodology, any interpretive guidelines developed by an enhanced COPUOS should be anchored in the principles of treaty interpretation enshrined in the VCLT[237]. Critically, this requires considering the treaty's object and purpose. This paper argues that to resist further ideological capture, the purpose must now be decisively understood and enforced through the lens of the 'global commons[238].

This sets up its most compelling advantage as such a mechanism confronts the OST's core issue[239]. The OST is being interpreted in ways that resemble legal compliance but substantively subvert its original cosmopolitan goals. Crucially, this ambition is not abstract. The 2024 UNCOPOUS Legal Subcommittee reports grappled with agenda items, reviewing potential legal models for space exploration, exploitation and utilisation[240]. Despite being limited to agenda-setting, this demonstrates a fundamental recognition of diverging state views and the difficulty in reconciling treaty principles with new private enterprise activities. The fact that COPUOS considers how to improve existing treaty language with the realities of commercial exploitation shows a legal appetite for more equitable evolution. In a commercially welcoming era, such rethinking is warranted. A strengthened COPUOS interpretive role would revitalise the treaty's relevance and also democratise its legal trajectory. From a TWAIL perspective, this could offer Global South states a meaningful seat in shaping the future of space governance[241]. In this way, reform would not discard the OST, but reanimate its normative architecture in line with its foundational ideals.

In conclusion, the normative approach, reframing outer space as a global commons, has strong theoretical validity. It aims to reestablish the OST's inclusive purpose whilst still being practical. This optimistically meets the need to balance this with the inevitability of economic efficiency. However, the broader geopolitical landscape exposes barriers that may prevent

[237] Vienna Convention on the Law of Treaties
[238] Steer (n 22)
[239] Ishola (n 235)
[240] Committee on the Peaceful Uses of Outer Space, *Report of the Legal Subcommittee on its Sixty-third session held in Vienna from 15 March to 26 April 2024* (2023) UN Doc A/AC.105/1271.
[241] Steer (n 22)

meaningful implementation. The UNCOPUOS as a potential quasi-judicial body, may provide the procedural enforcement needed to maintain the normative approach. Whilst it may be difficult, "if there is no struggle, there is no progress"[242].

Conclusion

The contemporary significance of the OST has produced legal contestation when confronted by the aggressive forces of privatisation in the New Space Revolution. Scholarship often critiqued the treaty as 'outdated', with its foundational principles remaining too ambiguous for modern challenges. However, its challenges permeate far deeper than commonly cited obsolescence issues or simple legal gaps. Interrogating the deeper ideological mechanisms exposed how modern developments do not simply strain the treaty's foundational structure. Its inherent architecture (designed flexibility and intentional ambiguity) is actively reshaped. The critical output is a legitimisation, both subtle yet profound: the increasingly asymmetrical modes of space governance[243] underwritten by neoliberal ideology.

The OST's broad principles, as historically analysed, existed to manoeuvre Cold War tensions and decolonial demands, justifiably favouring diplomatic consensus and strategic restraint over detailed regulation between states. This produced a highly flexible treaty, essential for initial broad compliance, but it was undoubtedly proven consequential. Examining its doctrinal limitations and their incompleteness[244] found that this foundational flexibility is strained when confronted by powerful private actors and ambitious commercial ventures.

[242] Philip Foner and Yuval Taylor Fredirick Douglass: Selected Speeches and Writings (Lawrence Hill Books, 1999).
[243] Adar (n 11)
[244] Kwiecień (n 65)

Particularly, analysing Articles I and II showed how their ambiguity creates significant governance issues concerning resource appropriation and equitable access. Critically, these were symptoms of the inherent limitations of applying a state-centric, diplomatically-oriented treaty to a rapidly commercialising and privatising domain. This exposed its structural unsuitability in resisting certain exploitative interpretations, highlighting disparate applications of its historical cosmopolitan ideals[245].

The analytical core in Chapter 3 then diagnosed these symptoms through theoretical lenses. Such an approach was warranted, given that international law's application is driven by interpretation and state practice. Thus, considering how the OST's interpretation has evolved was the inquiry's legal focal point. It was proven that the OST's cosmopolitan aesthetic and its underlying economic structure as a 'jurisdictional marketplace'[246] rendered it prone to neoliberal reinterpretation. This explained the profound difference between its formal universalist commitments and its current practical application. Pertinent examples include the US Space Act's[247] reinterpretation of Article II and the relegation of Article I's inclusive ethos reflected by the Global South's marginalised access. Trachtman's model highlights how such creative interpretations insidiously comply with international legal norms. Neoliberal values prioritising market efficiency and private accumulation find purchase within these interpretive 'black holes'[248], allowing the OST's legal form to be preserved while its substantive function is transformed[249].

Thus, it is unsurprising that the treaty's structural flexibility has been subject to neoliberal interpretation. Nevertheless, the critical finding of this inquiry is that the OST's aspirational design functions as a double-edged sword. An analysis of its flexibility shows potential for its cosmopolitan ideals to be reclaimed, an idea gaining traction in UNCOPUOS discussions, it also enables detrimental repurposing. Thus, chapter 4's proposed solutions (a recommitment to space as a 'global commons' and institutional strengthening of COPUOS) are directly conceived as counter-mechanisms to this process of ideological reinterpretation. They aim not to replace the OST, but to reclaim its potential by making its interpretation and application more resilient to unilateral or market-driven repurposing.

[245] Manoli (n 21)
[246] Trachtman (n 19)
[247] Commercial Space Launch Competitiveness Act of 2015
[248] Stockwell (n 108)
[249] Burga (n 163)

Limits

While this paper focused primarily on the ideological and structural repurposing of Articles I and II, this was done through a predominantly Western lens. Further research could, if scope would allow, provide specific responses and counter-narratives from emerging non-Western states or an exploration into environmental consequences.

The findings suggest a salient need for future scholarship to investigate the precise legal and political mechanisms through which private actors can influence customary international law. Perhaps, this suggests reconsidering international law more broadly, and whether its true subjects are limited to nation states. This paper has outlined that the treaty's struggle is more than its age. Future scholarly focus should not regard it as antique, nor should key actors perceive it as legally optional. Its provisions should be reinforced by balancing both equitable access and economic efficiency. The task is to ensure the OST becomes a shield for the common interest, not a subtle sword for particular advantage.

Bibliography

Adar PA, 'Space and the Future of Humanity: A TWAIL Critique of International Space Law and Space Discourse' (2022) 3 TWAIL Review 92

Aggarwal J, 'Space Policy Imperative: The Urgency for a New International Space Governance System' (2024) 22(1-2) Astropolitics 102

Aoki S, 'Outer Space Treaty and Fundamental Principles' in Sandeepa Bhat B, Dilip Ukey, and Adithya Variath (eds), International Space Law in the New Space Era: Principles and Challenges (OUP 2024) (Assuming OUP and 2024 based on context, please verify publisher and year if different)

Billings L, 'Neoliberalism: Problematic. Neoliberal Space Policy? Extremely Problematic' in James S J Schwartz, Linda Billings, and Erika Nesvold (eds), Reclaiming Space: Progressive and Multicultural Visions of Space Exploration (OUP 2023) < https://doi.org/10.1093/oso/9780197604793.003.0002> accessed 3 May 2025

Britannica Editors, 'Nike missile' (Encyclopedia Britannica, 15 July 2013) <https://www.britannica.com/technology/Nike-missile> accessed 8 November 2024

Buchanan AE, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law (OUP 2007)

Buono S, 'Merely a Scrap of Paper' The Outer Space Treaty in Historical Perspective' (2020) 31(2) Diplomacy & Statecraft 350 (This appears to be a journal article, but your footnote 29 & 88 treat it more like a general reference)

Burga I, 'Subsequent Practice as a Means of Treaty Modification', *Modification of Treaties by Subsequent Practice* (Oxford, 2018)

Cepelka C and Gilmour, JHC, 'The application of general international law in outer space' (1970) 36(1) Journal of Air Law and Commerce 30

Cutler AC, 'New Constitutionalism and the Commodity Form of Global Capitalism' in Stephen Gill and A Claire Cutler (eds), New Constitutionalism and World Order (CUP 2014)

Davis M, 'The Space Race' (Miller Center, 2020) <https://millercenter.org/the-presidency/educational-resources/space-race> accessed 7 November 2024

De Man P, 'Luxembourg Law on Space Resources Rests on Contentious Relationship with International Framework' (Working Paper No 189, Leuven Centre for Global Governance Studies July 2017) <https://ghum.kuleuven.be/ggs/publications/working_papers/2017 > accessed 1 May 2025

Decolonisation and International Law (Global Challenges Foundation) <https://globalchallenges.ch/issue/10/decolonisation-and-international-law/ > accessed 15 March 2025

Di Mei, 'Integrating outer space as a global commons with private property rights to outer space resources' (2024) 5 Front Space Technol 1< https://www.frontiersin.org/journals/space-technologies/articles/10.3389/frspt.2024.1351850/full > accessed 05 May 2025

European Space Policy Institute, 'The Rise of Private Actors in the Space Sector' (Executive Summary, ESPI July 2017) < https://www.espi.or.at/wp-content/uploads/2022/06/ESPI-report-The-rise-of-private-actors-Executive-Summary-1.pdf > accessed 20 March 2024

Feeny D and others, 'The tragedy of the commons: twenty-two years later' (1990) 18 Hum Ecol 1

Foner P and Taylor Y (eds), Frederick Douglass: Selected Speeches and Writings (Lawrence Hill Books 1999)

Frankowski P, 'Outer Space and Private Companies: Consequences for Global Security' (2017) 50 Global and Regional Security Challenges 131

Gabrynowicz JI, 'Space Law: Its Cold War Origins and Challenges in the Era of Globalization' (2004) 37 Suffolk U L Rev 1041

Gerstle G, The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era (OUP 2022)

Gill S, 'Market civilisation, new constitutionalism and world order' in Gill S and Cutler AC (eds), New Constitutionalism and World Order (CUP 2014)

Goguichvili S and others, 'The Global Legal Landscape of Space: Who Writes the Rules on the Final Frontier?' (Wilson Center, 1 October 2021) < https://www.wilsoncenter.org/article/global-legal-landscape-space-who-writes-rules-final-frontier > accessed 8 November 2024

Gorove S, ‘Interpreting Article II of the Outer Space Treaty' (1969) 37 Fordham L Rev 349

Hardin G, 'The Tragedy of the Commons' (1968) 162 Science 1243

Hearsey CM, 'The Evolution Of Outer Space Law: An Economic Analysis Of Rule Formation' (PhD thesis, University of North Dakota 2015) < https://commons.und.edu/theses/1901 > accessed 5 May 2025

Hobe S, ‘The Impact of New Developments on International Space Law (New Actors, Commercialisation, Privatisation, Increase in the Number of Space-Faring Nations)’ (2010) 15 Unif L Rev 869

Hutchins E, 'Outer Space Resource Acquisition – A Legal Perspective (Reddie & Grose, October 2024) < https://www.reddie.co.uk/2024/10/09/outer-space-resource-acquisition-a-legal-perspective/ > accessed 15 March 2025

Ishola FR, 'Legal Enforceability of International Space Laws: An Appraisal of 1967 Outer Space Treaty' (2021) 9 New Space 33

Jankowitsch P, ‘The Background and History of Space Law’ in Frans G von der Dunk and Fabio Tronchetti (eds), Handbook of Space Law (Edward Elgar Publishing 2015)

Johnson CD, 'The Outer Space Treaty at 50' (The Space Review, 27 March 2017) < https://thespacereview.com/article/3155/1 > accessed 15 February 2025

Johnstone I, ‘Treaty Interpretation: The Authority of Interpretive Communities’ (1990) 12 Michigan Journal of International Law 371

Kachela K, 'Elon Musk's SpaceX's Triumph Over Boeing: The Fail Fast, Learn Faster Approach' (CI Projects, 19 Nov 2024) < https://ciprojectsltd.co.uk/elon-musks-spacex-triumph-over-boeing/ > accessed 21 February 2025

Kammerhofer J, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL 523

Kaugia S, ‘Structure of Legal Consciousness’ [1996] JURIDICA INTERNATIONAL. LAW REVIEW. UNIVERSITY OF TARTU 16.

Klotz I, 'Florida county sweetens bid for Jeff Bezos' rocket company' (Reuters, 1 September 2015) < https://www.reuters.com/article/technology/florida-county-sweetens-bid-for-jeff-bezos-rocket-company-idUSKCN0R1451/> accessed 7 April 2024

Kwiecień R, 'The Space Resource Mining Activities and the Problems of (In)completeness and (Un)certainty of International Space Law: A Critical Overview of the Main Issues' [2022] Review of International, European and Comparative Law 31

Kyriakopoulos GD, 'Positive Space Law and Privatization of Outer Space: Fundamental Antinomies' in George D Kyriakopoulos and Maria Manoli (eds), The Space Treaties at Crossroads (Springer 2019)

Manoli M, 'The Architecture of Authority in Global Space Governance: The Moon Agreement as a Deconflicting Mechanism of Space Activities' (2024) 20(1) Utrecht Law Review 100

McGrogan D, ‘On the Interpretation of Human Rights Treaties and Subsequent Practice’ (2014) 32 Netherlands Quarterly of Human Rights 347

Naik P, 'Loopholes in International Space Law: An Observation' [2024] Reva University 1 < https://ssrn.com/abstract=4937581 > accessed 1 May 2025

Nam Y, 'One-Way Ticket to Mars: The Privatization of the Space Industry and its Environmental Impact on Earth and Beyond' (2023) 19 Northwestern Journal of Law and Social Policy 149

Nelson PL and Block WE, Space Capitalism: How Humans Will Colonize Planets, Moons, and Asteroids (Springer 2018)

Nelson PL and Block WE, Space Capitalism: How Humans Will Colonize Planets, Moons, and Asteroids (Springer 2018)

O'Brien D, 'The Artemis Accords: Repeating the Mistakes of the Age of Exploration' (The Space Review, 29 June 2020) < https://www.thespacereview.com/article/3975/1 > accessed 1 May 2025

Pershing AD, 'Interpreting the Outer Space Treaty's Non-Appropriation Principle: Customary International Law from 1967 to Today' (2019) 44 Yale J Int'l L 149

Plastic Pollution Coalition Editor, 'Jeff Bezos Wants to Pollute Space, but He Could Prevent Pollution on Earth Instead' (Plastic Pollution Coalition, 21 July 2021) < https://www.plasticpollutioncoalition.org/blog/2021/7/21/jeff-bezos-wants-to-pollute-space > accessed 2 May 2025

Pop V, 'Appropriation in Outer Space: The Relationship Between Land and Ownership and Sovereignty on the Celestial Bodies' (2000) 16 Space Pol'y 275

Pultarova T, Dobrijevic D and Mann A, 'Starlink Satellites: Facts, Tracking and Impact on Astronomy' (Space.com, 14 April 2022) < https://www.space.com/spacex-starlink-satellites.html > accessed 1 May 2025

Shammas VL and Holben TB, 'One Giant Leap for Capitalistkind: Private Enterprise in Outer Space' (2019) 5(1) Palgrave Communications art 19

Sharma AV, 'Starlink and International Law: The Challenge of Corporate Sovereignty in Outer Space' (EJIL: Talk!, 17 March 2025) < https://www.ejiltalk.org/starlink-and-international-law-the-challenge-of-corporate-sovereignty-in-outer-space/ > accessed 1 May 2025

Space Capital, 'Space Investment Quarterly: Q1 2025 Update' (Space Capital, October 2024) < https://spacecapital.docsend.com/view/9d69zpfz4ddms3ry > accessed 1 May 2025

Space Crew Team, 'Space Agencies around the World' (Space Crew 2024) < https://spacecrew.com/blog/space-agencies-around-the-world > accessed 2 May 2025

Spiliakos A, 'Tragedy of the commons: examples and solutions' (Harvard Business School Blog, 2019) < https://online.hbs.edu/blog/post/tragedy-of-the-commons-impact-on-sustainability-issues > accessed 5 May 2025

Steer C, 'Who Has the Power? A Critical Perspective on Space Governance and New Entrants to the Space Sector' (2020) 48 Ga J Int'l & Comp L 751

Stockwell S, 'Legal 'Black Holes' in Outer Space: The Regulation of Private Space Companies' (E-International Relations, 20 July 2020) < https://www.e-ir.info/2020/07/20/legal-black-holes-in-outer-space-the-regulation-of-private-space-companies/ > accessed 5 December 2024

Švec M and Schmidt N, 'International Space Law as the Transiting Path to Cosmopolitan Order' in Niklas Schmidt (ed), Governance of Emerging Space Challenges (Space and Society, Springer 2022) < https://doi.org/10.1007/978-3-030-86555-9_5> accessed 8 December 2024.

Tevyaw D, 'Failures and Successes of the Outer Space Treaty' (ACE USA Blog, 31 October 2023) < https://ace-usa.org/blog/foreign-policy-region/space-oceans-and-polar-regions/failures-and-successes-of-the-outer-space-treaty/ > accessed 8 November 2024

Thorsen DE, 'The Neoliberal Challenge. What Is Neoliberalism?' (2010) 2(2) Contemporary Readings in Law and Social Justice 188

Timeline: U.S.-Russia Nuclear Arms Control (Council on Foreign Relations) < https://www.cfr.org/timeline/us-russia-nuclear-arms-control >accessed 8 November 2024

Trachtman JP, The Economic Structure of International Law (Harvard University Press 2008)

Union of Concerned Scientists, 'UCS Satellite Database' (UCS, 1 May 2023) < https://www.ucsusa.org/resources/satellite-database > accessed 2 May 2025

United Nations Office for Outer Space Affairs, 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies' (UNOOSA) < https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html accessed> 8 October 2024

United Nations Office for Outer Space Affairs, 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies'
(UNOOSA)< https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html> accessed 7 November 2024

US Department of State, Bureau of International Security and Nonproliferation (ISN), ‘Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies’ <https://2009-2017.state.gov/t/isn/5181.htm > accessed July 12, 2023

Vlasic IA, 'The Space Treaty: A Preliminary Evaluation' (1967) 55 California Law Review 507

Vohringer M, 'State Jurisdiction and the Permissiveness of International Law: Is the Lotus Still Blooming?' (2021) 7 LSE Law Review 29

Wacks R, ‘Critical Legal Theory’ in Raymond Wacks *Philosophy of Law: A Very Short Introduction* (2nd edn OUP 2014) 107

Waibel M, 'Interpretive Communities in International Law', in Bianchi A, Peat D, and Windsor M (eds), *Interpretation in International Law* (Oxford Academic 2015)

Wasser A and Jobes D, 'Space Settlements, Property Rights, and International Law: Could a Lunar Settlement Claim the Lunar Real Estate It Needs to Survive?' (2008) 73 Journal of Air Law and Commerce 37

Young D and Docherty N, ‘An Anticipatory Regime of Multiplanetary Life: On SpaceX, Martian Colonisation and Terrestrial Ruin' (2024) Science as Culture 1

FROM PALACES TO PARLIAMENTS: THE ANACHRONISM OF MALE PRIMOGENITURE IN INDIA AND THE UK

Simone Avinash Vaidya and Arohi Malpani

At Downton, being a Crawley daughter is a curse: the estate bows to the eldest male, always.

I. INTRODUCTION

The 7th Duke of Westminster, Hugh Grosvenor, was the sole heir of the title and vast estate that devolved to him in 2016.[1] On displacing his two elder sisters, Grosvenor ranked among the wealthiest men in the United Kingdom.[2] A decade later, the irony is that the very rule which secured his fortune is the same anachronistic principle that will bar his newborn daughter from succeeding to her father's 9.8 billion pound estate,[3] which will fall into the hands of the heir presumptive, distant Earl of Wilton.[4]

Primogeniture, historically, is the rule by which the eldest son alone succeeds to titles, estates, and privileges, while daughters are excluded regardless of merit or seniority. It is a principle designed to keep property and power intact in the male line, ensuring that wealth, land, and status pass undivided from father to son. This principle has travelled across cultures and centuries, and it continues to shape succession laws in both India and the UK, although in different ways.[5]

"*Kingship knows no kinship*" is a medieval proverb[6] that continues to echo in contemporary times through Hindu inheritance laws in India. This is evident in Section 5(ii) of the Hindu Succession Act, ('S. 5(ii)'),[7] which carves out an exception to the application of the statute to princely rulers who sought to preserve their succession customs in the covenants that formed the basis of their accession to the Indian Union.[8] Such a provision enables the erstwhile rulers to inherit not only property but also privilege, serving as a notable contradiction for an

[1] Caroline Davies, 'New Duke of Westminster inherits £9bn fortune aged 25' (The Guardian, 10 August 2016) <https://www.theguardian.com/uk-news/2016/aug/10/new-duke-of-westminster-hugh-grosvenor-inherit-fortune> accessed 1 October 2025.
[2] Danielle Stacey, 'Why the Duke of Westminster's future child could be affected by centuries-old rule' (HELLO!, 19 March 2025) <https://www.hellomagazine.com/royalty/554178/duke-of-westminster-future-children-affected-by-hereditary-peerage-rule/> accessed 1 October 2025.
[3] ibid.
[4] Susan Morris, *Debrett's Peerage and Baronetage* (Debrett's 2020) 4797.
[5] Poonam Pradhan Saxena, 'Succession Laws and Gender Justice' in 'Redefining Family Law in India' (Routledge India, 2009) p 24; Sir Crispin Agnew of Lochnaw and Gillian Black, 'Reforming the Law of Succession to Peerages, Baronetcies and Dignities: Identifying Problems and Exploring Solutions' (2023) *Public Law* 104.
[6] History Unravelled, 'Alaudding Khalji and his conquests' (History Unravelled, 24 January 2025) <https://historyunravelled.com/warriors/alauddin-khalji-and-his-conquests> accessed 15 April 2026.
[7] The Hindu Succession Act, 1956, §5(ii).
[8] Ministry of States, White Paper on Indian States (1950) pp. 198-286.

anachronistic rule to remain in a statute that commits itself to uniformity and reform.[9] In the UK, however, while reforms to the Crown have abandoned male preference,[10] the aristocracy and landed estates remain untouched and bound by the same archaic rule.[11] Primogeniture persists stubbornly, preserving both privilege and economic concentration.[12] Therefore, both systems evidently preserve exclusion through different institutional paths. The Indian model upholds this rule through statutory exceptions and muddled judicial interpretation, while Britain follows suit through parliamentary inertia and judicial restraint.

This paper argues against the anachronistic principle of succession by first tracing the operation and consequences of primogeniture in India under S. 5(ii) of the Hindu Succession Act. It shall then turn to its persistence and broader societal impact in Britain with respect to Nobility and estates. While the paper primarily undertakes a doctrinal analysis of both models, it also moves beyond the legal framework to demonstrate the intersectional impact this anachronistic practice has historically had, and continues to exert, in modern times. It argues that both models reveal distinct institutional failures, and that, ultimately, each system has lessons to learn from the other, moving closer to equality in practice.

II. THE INDIAN MODEL

Primogeniture is the prevalent form of succession among Hindu royals, wherein the eldest male child is duty-bound to carry forward the lineage, thus inheriting the sovereign property[13] simultaneously with the crown on the death of the incumbent ruler. Historically and as per customary practice, the firstborn son has always been considered the rightful heir of the estate.[14]

[9] Hindu Succession Bill, 1954 Deb (Bill 10) 1 October 1955, Rajya Sabha Session 10 p 5541.
[10] Succession to the Crown Act 2013.
[11] Lloyd Bonfield, 'Farewell *Downton Abbey*, Adieu Primogeniture and Entail: Britain's Brief Encounter with Forced Heirship' (2018) 58 *American Journal of Legal History* 479.
[12] ibid at 491.
[13] "Sovereign property" is used here to denote property that devolves as an incident of rulership (gaddi) under customary law, as opposed to private or self-acquired property. This interpretation is supported by the decision of the Delhi High Court in Maharaja Jagat Singh v. Lt. Col. Bhawani Singh, 1995 SCC OnLine Del 156–

> *"9. On the devolution of the properties from one monarch to his successor, the successor would take the same as an absolute monarch, and not as a son by way of inheritence. It was further observed that on succession of a sovereign Ruler, the property cannot be claimed to be a joint family property, since the estate in the hand of the Ruler would be a sovereign estate and its chief a sovereign Ruler. In fact the sovereign ruler acquire the property in exercise of his sovereign rights."*

[14] Arun Mohan, *Princely States and the Reform in Hindu Law* (Bombay M.N. Tripathi Pvt. Ltd., 1990) p 7, 127, 163, 164.

The 26th Constitutional Amendment of 1971[15] abolished the privy purse,[16] or payments made to the ruling families of former princely states as part of their agreements to merge their states into India after independence.[17] This was followed by the Rulers of Indian States (Abolition of Privileges) Act in 1972,[18] which repudiated various other privileges, such as thirteen-gun salutes and various tax benefits. Both of these enactments ('the Two Acts') were passed consecutively, and the 1972 Act does not repeal S. 5(ii) of the Hindu Succession Act. In *Municipal Corporation of Delhi* v. *Shiv Shankar,*[19] the Supreme Court of India ('SCI') cautioned against interpreting implied repeals in the absence of express or implied legislative intent.[20] Thus, owing to ordinary statutory interpretation, the provision is considered to survive the upheaval caused by the Two Acts.[21]

This section seeks to establish a case for the repeal of S. 5(ii) by *first* highlighting the socio-political consequences of primogeniture, and subsequently arguing that it fails to withstand the scrutiny of Article 14 on the anvil of the twin tests of reasonable classification. Next, the authors draw attention to the recurrent judicial misinterpretations of the provision, which might have the desired outcome of nullifying the provision, but continue to be bad in law due to a troubling disregard for legislative intent. Finally, the authors conclude by establishing how this matter is firmly in the legislative domain, stressing the need for repeal despite the redundancy of the provision.

1. Caste-Patrilineal Power Persisting Through Property

Feudalism is alive and breathing in India, with legal provisions such as S. 5(ii) further entrenching caste and clan privileges. Primogeniture must be situated within the broader context of policy obsolescence and its role in perpetuating these inequalities. Such succession practices among former royal families is not merely a relic of feudal tradition, but a caste-inflected institution reinforcing inequalities as the ruling class consisted almost exclusively of the *Kshatriya*, or warrior caste.[22] Ensuring patrilineal succession prevented the fragmentation of wealth, land and power, which enabled these families to retain their privilege at the upper

[15] The Constitution (Twenty-Sixth Amendment) Act, 1971.
[16] Rakesh Ankit, 'The Indian Maharaja Under Check: The Abolition of Privy Purses an Princely Privileges, 1967-71 and the End of an Era' (2022) Loughborough University 1-3.
[17] Ministry of States, White Paper on Indian States (1950) pp. 198-286.
[18] Rulers of Indian States (Abolition of Privileges) Act, 1972.
[19] AIR 1971 SC 815.
[20] *Id* at ¶5.
[21] Arun Mohan, *Princely States and the Reform in Hindu Law* (Bombay M.N. Tripathi Pvt. Ltd., 1990) p 216.
[22] Smita Tewari Jassal, 'Primogeniture in Awadh: Sociological Implications for Class and Gender' (1997) 32(22) EPW 1255, 1263.

echelons of society.[23] Caste pride is a feudal concept, hinging on endogamy and purity, with property and land serving as tools to clamp down on social mobility.[24]

Impartible estates are characterised by joint families, and not coparceneries, which necessarily entail wider rights of partition and restraining alienation. In *Trijugi Narain* v. *Sankoo*,[25] the SCI clarified the distinction between these concepts. An impartible estate is a "creature of custom" wherein its partition is prohibited, and succession is generally by rule of primogeniture.[26] By contrast, a coparcenary is a narrower body consisting of only those persons who acquire by birth an interest in the property.[27] Rather than primogeniture, the rule of succession for coparcenary properties is survivorship.[28]

The proposition of the eldest male son inheriting property to the exclusion of all other family members is yet another manifestation of the patrilineal Hindu joint family systemically depriving women of property rights.[29] The link between effective female inheritance and empowerment has been established in existing literature,[30] and the consequences of being denied these rights undoubtedly undermine their financial independence and economic agency.

This is also reflective of a more nuanced and complex issue concerning gender-based social marginalisation within a historically dominant ruling caste. One indicative example is the Rajput women of Rajasthan, who constituted the ruling class but still faced systemic oppression rooted in patriarchal traditions and feudal values.[31] They were largely confined to the domestic and symbolic spheres within royal and landed households and denied participation in decision-making and finances.[32] Their elite caste status acts as a veil, or *purdah*, obscuring deep structural inequalities and exemplifying how patriarchy adapts to other hierarchies such as castes.[33] Therefore, such provisions perpetuate the patriarchal legal regimes even within high

[23] RADHABINOD PAL, *The History of the Law of Primogeniture With Special Reference to India Ancient and Modern* (1st Ed. Modern, 1925) p 39.
[24] B.T. Ranadive, 'Caste, Class and Property Relations' (1979) 14(7) EPW 337.
[25] (2021) 15 SCC 561
[26] *Id* at ¶¶11, 14.
[27] *Id* at ¶8.
[28] *Id.*
[29] Debarati Halder & K. Jaishankar, 'Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval and Modern India' (2008) 24(2) J. Law & Rel. 663.
[30] Deininger et al., 'Women's Inheritance Rights and Intergenerational Transmission of Resources in India' (2013) 48(1) J Hum. Res. 114; Sanchari Roy, 'Empowering Women? Inheritance Rights, Female Education and Dowry Payments in India' (2015) 114 J. Dev. Eco. 233.
[31] Pratibha Jain & Sangeeta Sharma, 'Honour, Gender and the Legend of Meera Bai', (2002) 37(46) EPW 4646.
[32] ibid 4648.
[33] Geetanjali Tyagi, 'The World of Royal Rajput Women: Honour, Related Rituals and Practices' (2007) PhD Dissertation, JNU 56.

society, ensuring that women are excluded systematically. Such entrenched inequalities do not stand the test of constitutionality, inviting scrutiny under Article 14.

2. Article 14 and Constitutional Incompatibilities

The classification doctrine is the prevalent test to evaluate violations of Article 14, comprising two tests of whether the classification made by the rule is based on an intelligible differentia, and if it has a rational nexus with the object it seeks to achieve.

A. The Collapse of Intelligible Differentia

The test of intelligible differentia hinges on reasonable agreement over the classification of an entity into one group or the other.[34] The 26th Amendment Act has categorically derecognised royals, and by no logical inference can S. 5(ii) sustain, as the class it seeks to protect no longer exists as a distinct legal entity.[35] Thus, there is no intelligible differentia in terms of the application of the provision to a certain group of people. Neither is there an intelligible differentia between classes of properties to which the provision applies.

The covenants distinguish between private and State properties, delineating that the customs preserved are concerning the "succession to the *gaddi*, and to personal rights, privileges, dignities and titles".[36] *Per contra*, the provision broadly refers to succession to estates,[37] which has not been substantiated in the covenants, resulting in uncertainty in application. While it is established that private property would remain with the rulers, nothing in the provision indicates the type of property that would devolve to a single heir by primogeniture. Particularly whether it is "sovereign" ancestral property, non-sovereign ancestral property or self-acquired property.

The nature of property is pertinent, and the distinction in this regard is made based on, *firstly*, how it is acquired, and *secondly*, whether it is incidental to succeeding to the *gaddi*. The broad and acceptable division of property on the first rubric is ancestral property, inherited from the father, grandfather or great-grandfather, or self-acquired during the course of one's lifetime.[38]

[34] *Budhan Choudhary v. State of Bihar*, AIR 1955 SC 191; *R.K. Garg v. Union of India*, (1981) 4 SCC 676.
[35] Constitution of India, art. 363A.
[36] Arun Mohan, *Princely States and the Reform in Hindu Law* (Bombay M.N. Tripathi Pvt. Ltd., 1990) p 7, 127, 163, 164.
States such as Gwalior, Indore and Malwa, Rajasthan, and Vindhya Pradesh have also provided for a final authority to decide cases wherein the dispute is over the nature of the property.
[37] The Hindu Succession Act, 1956, §5(ii).
[38] *CN Arunachala Mudaliar v. CA Murugantha Mudaliar & Anr*., AIR 1953 SC 495.

Under the second criterion, ancestral property can be further divided into sovereign and non-sovereign, depending on whether it is characterised as being succeeded to as an incident of the *gaddi*, or the sovereign power of the state. The word "sovereign" is used symbolically in this paper, as a reflection of power that was wielded by the erstwhile royals.

To illustrate, the entire estate of an erstwhile royal comprises the following: the ancestral palace that was historically used for sovereign functions, such as *durbars* or assemblies (1); lands acquired in another state as a part of the personal property of the family (2); and the self-acquired controlling shares in a tourism company (3). In this case, it is evident that (1) is a sovereign ancestral property, (2) is a non-sovereign ancestral property and (3) is the self-acquired property. Thus, if the eldest male descendant of an erstwhile royal family were to acquire certain property during his lifetime, his eldest male progeny could claim succession to (2) and (3) by primogeniture, as qualified by S. 5(ii), as there is no distinction created in this regard.

Even if self-acquired property were to be excluded by the reasoning that the interpretation of the word "estate" is frozen to the state of the estate at the time of signing the covenants, the anomaly created by the grouping of sovereign and non-sovereign property would continue to persist. Subsequent sections of this paper shall demonstrate the existing judicial position through the multiplicity of interpretations, reflecting the uncertainty in the application of this provision. The absence of clarity on whether a sole heir would succeed to the entirety of the estate renders the classification unintelligible. This has the consequence of the provision failing the first prong of the conjunctive Article 14 test of an unreasonable classification.

B. Policy Obsolescence and the Rational Nexus

It is essential to examine the legitimacy of such a goal before assessing whether the law has a rational nexus to it. Such a provision was undoubtedly incorporated to honour the terms of the covenants entered into with the royals at the time of independence, having due regard to treaty law.[39] The political developments of the next decade, however, demonstrated the overarching policy of the Indian Government, to equalise the erstwhile royals by making them ordinary citizens by repudiating their Privy Purse and extra privileges.[40] Article 362, which mandates

[39] Constitution of India, art. 362.
[40] The Constitution (Twenty-Sixth Amendment) Act, 1971, §2, §3.

the Parliament to adhere to the covenants, is also a relic of the past, having been omitted by the 26th Amendment.[41] Thus, such a provision is no longer consistent with the developmental objectives of 21st-century India.

Justice Pardiwala had conceived the Doctrine of Temporal Unreasonableness in his dissenting opinion in *In Re Section 6A*,[42] introducing a temporal test as another prong of manifest arbitrariness.[43] The Doctrine follows the principle that some laws might be valid at the time of enactment, but they cease to be constitutional due to the temporal and changing circumstances over time.[44]

The Legislature had the foresight to incorporate this principle in its Two Acts, highlighting how the State cannot perpetuate feudalism in Indian society by preserving such privileges.[45] In *Raghunathrao Ganpatrao* v. *Union of India*,[46] the SC validated the Twenty-Sixth Amendment Act, and the SC highlighted how establishing an egalitarian society carries the necessary cost of nullifying a just *quid pro quo* delineated in the covenants.[47] Thus, there is established legislative precedent of repudiation of privileges accorded to royals as a matter of policy, which has been validated by the SCI as well.

3. Arbitrary Outcomes and Judicial Misinterpretation

Even if the goal of the State was legitimate, such a provision still cannot be reconciled with maintaining princely privileges due to the inconsistency in results and interpretations. A third test to examine a law on the anvil of the Right to Equality is the arbitrariness test, wherein unreasonable, capricious, irrational, excessive, or disproportionate actions are liable to be struck down.[48] Such a provision has yielded different and confused results over the years, on account of subjective interpretations of the law.

In *Pratap Singh* v. *Sarojini Devi*,[49] Justices Kuldip Singh and S. Mohan of the SCI held that the principle of primogeniture solely applied to rulership, or succession to the *gaddi*, and not

[41] The Constitution (Twenty-Sixth Amendment) Act, 1971, §2.
[42] Pardiwala J., dissenting, Section 6A of the Citizenship Act 1955, In Re, 2024 SCC OnLine SC 2880.
[43] ibid 183.
[44] ibid 180.
[45] Abolition of Privileges Bill, 1972 Deb 26 August, 1972, Rajya Sabha Session 5 p 247.
[46] 1993 AIR 1267 SC.
[47] ibid ¶ 194.
[48] State of Madhya Pradesh v. Bhopal Sugar Industries Ltd., AIR 1964 SC 1179;
[49] 1994 Supp (1) SCC 734

to the ownership and inheritance of property. This view has been reiterated by the High Courts several times since 1993. In *Rajkumari Amrit Kaur* v. *Maharani Deepinder Kaur*,[51] the Punjab & Haryana High Court held that private property of the ruler could not fall within the exception of S. 5(ii) of the Act, as the covenants did not explicitly delineate the same. In *Maharaj Shri Manvendrasinhju Jadeja* v. *Rajmata Vijaykunverba*,[52] the Gujarat High Court relied on similar reasoning as the aforementioned cases, as well as the Two Acts to assert that primogeniture had been abolished. The consensus across these cases is that such estates ceased to be impartible and governed by primogeniture, thus devolving as coparcenary property.

Such rulings are difficult to reconcile with the text and context of the provision, as preserving primogeniture in the covenants and the provision was not merely a political and symbolic remnant. The proposition that the succession custom would be limited solely to inheriting the *gaddi,* due to the language of the covenant, is erroneous, as the covenant also delineates that such succession would also apply to the "*personal rights*" of the ruler.[53] This term is broad enough to construe that the succession to private property would also fall within the ambit of this particular provision in the Covenant. Moreover, the bare text of S. 5 reads that the Act is not to apply to certain *properties*, making specific reference to the *estates* of the erstwhile royals.[54]

Additionally, the Two Acts relied upon by the Gujarat High Court were conspicuously silent on the non-applicability of S. 5(ii) of the Hindu Succession Act. In contrast, most other privileges were categorically repudiated and repealed.[55] Thus, these factors decisively point to succession to private property also being governed by primogeniture, as reiterated by the Delhi High Court in *Maharaja Jagat Singh* v. *Lt. Col. Bhawani Singh*.[56] In this case, the Court took a contrary point of view, firmly establishing that the estate of the Maharaja of Jaipur did not cease to be impartible after merging with India.[57] It held that the private properties of an

[51] AIR OnLine 2020 P&H 590.
[52] 1999(1) GLR 261.
[53] The Clause is common across most Covenants, and reads as follows: "*The Dominion Government guarantees the succession, according to law and custom, to the Gaddi of the State and to the Maharaja's personal rights, privileges, dignities and titles*". See n. 2.
[54] The Hindu Succession Act, 1956, §5(ii).
[55] Rulers of Indian States (Abolition of Privileges) Act, 1972, § 2-7.
[56] AIR 1996 Delhi 14.
[57] ibid ¶ 8, 9.

erstwhile Maharaja do not become coparcenary property, thus preserving its impartibility and devolution by primogeniture.

It is noteworthy that in every instance, these cases were civil suits, which do not warrant any *obiter* on the constitutionality of such a provision, as there were no specific challenges to the same. By such misguided interpretations, the judiciary might have achieved the desired outcome of aligning succession laws with equity and Constitutional values, but such reasoning erodes the legitimacy of statutory law. Interpretive shortcuts risk undermining the stability of the rule of law. Despite the judiciary misinterpreting S. 5(ii) into obsolescence, this section concludes by reiterating the sustained need to repeal the provision.

Such a matter falls firmly within the legislative domain as it has implicitly saved S. 5(ii) by not repealing it in 1972, demonstrating its intent. Furthermore, the dilution of S. 5(ii) based on its misalignment with constitutional values can always be overruled in *per incuriam* decisions so long as the provision survives. A future bench of the High Courts or the SCI may well incorporate a textualist approach, identifying the loopholes in previous precedents and deferring to legislative intent. Consequently, the practice of primogeniture shall be given a new lease of life as such a decision would not be unsound unless and until the provision is either declared unconstitutional under Articles 32 or 226, or repealed by the Parliament. The retention of this provision does not honour the covenants entered into with the erstwhile rulers, but in fact reveals the cracks in India's democratic structure as an antithesis to feudalism.

Until the Legislature takes action, the Hindu Succession Act shall remain haunted by the ghost of S. 5(ii), which is anachronistic in spirit, hollow in effect and incompatible with all constitutional values. Such unresolved tension invites an inquiry into how similar principles have been addressed in other legal systems, most notably in the United Kingdom.

III. THE BRITISH MODEL

Britain's treatment of succession reveals a contradiction that is both progressive and regressive. The reform of succession to the Crown was decisive and symbolic, with the law now recognising the eldest child as the heir to the throne irrespective of sex.[58] Princess Charlotte's

[58] Succession to the Crown Act 2013.

secure place in the line of succession is the clearest example of this change.[59] The United Kingdom thus abandoned a principle that had shaped monarchy for centuries, yet the very polity that declared the dynastic principle gender neutral at the highest level has preserved primogeniture in the aristocracy with land and title. It remains a significant doctrinal contradiction that while Princess Charlotte may inherit the Crown, in another life, she would still have been denied the right to inherit a dukedom or an estate. This contradiction is visible not only in abstract argument but also in cultural and political life. And while parliamentary debates have acknowledged the injustice time and again,[60] their interventions continue to stop short of dismantling the economic core of this inherently unjust system. In Britain, royal succession has been modernised, but aristocratic succession, especially to landed wealth, remains untouched.

In this section, the authors delineate the difference between primogeniture as applied to titles and to estates, highlighting the incongruity of attempting to abolish the principle for titles while retaining it for estates. Subsequently, the authors examine the multi-fold impact of the prevalence of this anachronistic custom in modern times and contemporary society. The authors argue how it erodes fundamental objectives a modern state seeks to protect- rights of marginalised communities, gender equality, democratic principles and individual economic autonomy.

1. Primogeniture in the UK: titles and estates

The law of hereditary titles in the UK is both fragmented and complex. Older baronies created by writ of summons can descend through the bloodline and occasionally reach daughters where no male heir exists.[61] Later peerages created by patent, on the other hand, typically descend to the male heir.[62] Some exceptions were carved out through special remainders, as in the cases of Nelson, Kitchener and Mountbatten.[63] Yet these were not the norm but rare deviations, shaped less by principle than by power. Baron Braybrooke's title passed to a distant male cousin rather than to one of his eight daughters.[64] The Duke of Rutland's three daughters cannot

[59] Caitlin O'Kane, 'Princess Charlotte makes royal history in line to the throne' (*CBS News*, 24 April 2018) <https://www.cbsnews.com/news/princess-charlotte-makes-royal-history-in-line-to-the-throne/> accessed 1 October 2025.
[60] House of Lords Debates, 20 April 2021, vol 811, col 50.
[61] HC Deb, 25 March 2013, vol 560, col 1131.
[62] ibid.
[63] HC Deb, 25 March 2013, vol 560, col 1131.
[64] ibid

inherit Belvoir Castle. The handful of women who do inherit are treated as anomalies rather than the norm.[65]

A. Legislative Attempts and Institutional Inertia

The UK's preservation of primogeniture is peculiar, stemming not from a rejection of its inherent injustice but from an unwillingness to navigate the complexity of reforming entrenched laws. Legislative attempts to correct this inequality go back decades, with Lord Lucas's Equality Titles Bill in 2013,[66] Lord Trefgarne's Succession to Peerages Bill in 2015,[67] and Harriet Baldwin's Hereditary Titles Female Succession Bill in 2022,[68] all seeking reform. The most recent effort was Lord Northbrook's Succession to Peerages and Baronetcies Bill in 2024.[69] Each has been premised on the recognition that exclusion by sex is indefensible. Nonetheless, each has either failed to pass or been framed in terms that avoid the real economic issue. Even the latest bill preserved a form of male preference by ranking brothers and their sons ahead of sisters.[70] More importantly, Clause 4(2) applied only to titles and expressly excluded land and property, applying only to titles, avoiding the economic core of this problem and rendered the reform symbolic.[71] The parliament has been willing to modernise symbolic dignities but unwilling to legislate for the distribution of wealth that sustains aristocratic power.

B. The Economic Engine of Primogeniture

The continued parliamentary reluctance and constrained reform perpetuate the deeper economic logic that primogeniture is designed to protect. Without addressing the mechanisms that concentrate wealth, evident from the persistence of primogeniture in estates, these partial reforms remain ultimately hollow. Entails and strict settlements were the natural corollary of primogeniture.[72] They were created to preserve lineal succession by preventing estates from being broken up or transferred outside the family through daughters, gifts or alienation.[73] This was not incidental but the economic engine of the aristocracy. Keeping estates intact and directing them to a single heir entails concentrated capital, political influence and social status

[65] ibid
[66] Equality (Titles) Bill [HL] 2013-14.
[67] Succession to Peerages Bill [HL] 2015-16.
[68] HC Deb, 20 April 2022, vol 712, col 167.
[69] Succession to Peerages and Baronetcies Bill [HL] 2023–24.
[70] ibid.
[71] Succession to Peerages and Baronetcies Bill [HL] 2023–24, cl 4(1).
[72] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, Pelican Books 1973) 484–85.
[73] ibid.

in one line.[74] Doctrines like coverture reinforced this by collapsing the legal and economic identity of married women into that of their husbands.[75] Daughters were viewed as dangerous conduits and liabilities through whom land could be lost.[76] Even when statutory change weakened the formal power of entails, the cultural and structural logic endured.[77] Families placed estates in trusts and family offices and tax planning evolved to replicate the effect of consolidation.[78] Titles could be separated from land but wealth was still preserved intact in the male line, institutionalising primogeniture, designed to prevent property from ever escaping the proposed line.[79] Thus, reform that addresses titles but ignores this infrastructure leaves the exclusionary core intact.

C. Democracy, Gender, and Trans Rights

The consequences are visible in Parliament itself. The House of Lords Act 1999[80] reduced the hereditary element to ninety-two accepted peers, out of which currently none is a woman. Five female hereditary peers survived the reform, but by 2020, all had died or retired and each was replaced by a man through elections.[81] Out of more than two hundred hereditary peers eligible to stand in these by-elections, only two are women. One of these is Matilda Simon, a trans woman who succeeded to the barony of Simon of Wythenshawe and appears on the register as Lord Simon of Wythenshawe.[82] Her case reveals how deeply this culture of primogeniture is entrenched in the system with relatively progressive laws like the Gender Recognition Act

[74] BG Carruthers and L Ariovich, 'The Sociology of Property Rights' (2004) 30 *Annual Review of Sociology* 23, 27.
[75] Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England* (Princeton University Press 1989) passim, eg 8, 26, 66; Susan Staves, *Married Women's Separate Property in England, 1660–1833* (Harvard University Press 1990) 27–36, 129–30, 217; Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (University of Toronto Press 1983).
[76] Anastasia B Crosswhite, 'Women and Land: Aristocratic Ownership of Property in Early Modern England' (2002) 77 *N Y U Law Review* 1; Timothy Winterbottom, A Letter to Isaac Tompins and Peter Jenkins on Primogeniture (5th edn, William Pickering 1835) 23.
[77] *Primogeniture and Entail in England: A Survey of Their History and Representation in Literature* (Cambridge Scholars Publishing 1999).
[78] A. W. Brian Simpson, *A History of the Land Law* (2nd edn, Oxford University Press 1986) 239; Zouheir Jamoussi, *Primogeniture and Entail in England: A Survey of Their History and Representation in Literature* (Cambridge Scholars Publishing 1999).
[79] Anastasia B Crosswhite, 'Women and Land: Aristocratic Ownership of Property in Early Modern England' (2002) 77 *N Y U Law Review* 1.
[80] *House of Lords Act* 1999.
[81] Heather Evennett, "Women, hereditary peerages and gender inequality in the line of succession" (House of Lords Library, 3 October 2022) <https://lordslibrary.parliament.uk/women-hereditary-peerages-and-gender-inequality-in-the-line-of-succession/#heading-2> accessed 21 September 2025.
[82] 'Item of Business: 11 May 2022, section 40' *Lords Business* <https://lordsbusiness.parliament.uk/ItemOfBusiness?itemOfBusinessId=111899&sectionId=40&businessPaperDate=2022-05-11> accessed 21 September 2025.

2004 also aiding it.[83] Under the Act succession depends on sex as recorded for descent, not on acquired gender.[84] A trans woman who was recorded male at birth can inherit and transmit a peerage in the male line while excluding a trans man who is the firstborn daughter, capturing the inherent inequality of a rule that has no space for female heirs and no mechanism to accommodate gender diversity.

2. Societal and Economic Impact

The societal impact of preserving primogeniture is severe and multi-fold. *First*, it entrenches economic exclusion, which lies at its centre. While women may be considered fit to govern a state, they remain legally barred from stewarding their own estates. This reflects a gendered structure of property relations in which autonomy and agency are withheld from women to preserve male control.[85] From the perspective of economic theory, primogeniture sustains intergenerational concentration of wealth. Bourdieu describes landed estates as patrimonial capital that reproduce advantage by converting economic assets into social and cultural power across generations.[86]

Feminist analysis highlights how inheritance rules function as a patriarchal bargain that ensures women remain dependent.[87] Such concentration of wealth through intact transmission results in inequality. Britain today remains one of the most unequal societies in Europe in terms of land ownership.[88] *Second*, it entrenches a democratic deficit. Hereditary peers continue to legislate in the House of Lords by virtue of succession rules that exclude women.[89] The chamber is populated almost entirely by men chosen not for ability but by birth, a direct affront to principles of democratic equality. *Third*, it produces incoherence in light of modern understandings of gender. The insistence on an eldest son erases daughters and renders transgender heirs invisible.

[83] *Gender Recognition Act* 2004 S. 16.
[84] ibid.
[85] Srinivas Goli and Ladumai Maikho Apollo Pou, 'Landholding-Patriarchy Hypothesis and Women's Autonomy in Rural India: An Exploration of Linkage' (2014) 41 *International Journal of Social Economics* 213.
[86] Pierre Bourdieu, 'The Forms of Capital' (1986) <https://home.iitk.ac.in/~amman/soc748/bourdieu_forms_of_capital.pdf> accessed 21 September 2025.
[87] Deniz Kandiyoti, 'Bargaining with Patriarchy' (1988) 2 *Gender & Society* 274.
[88] 'Income Inequality' (OECD Data) <https://www.oecd.org/en/data/indicators/income-inequality.html> accessed 21 September 2025; The Scale of Economic Inequality in the UK (Equality Trust) <https://equalitytrust.org.uk/scale-economic-inequality-uk/> accessed 21 September 2025.
[89] Women, Hereditary Peerages and Gender Inequality in the Line of Succession (House of Lords Library, 3 October 2022) <https://lordslibrary.parliament.uk/women-hereditary-peerages-and-gender-inequality-in-the-line-of-succession/> accessed 21 September 2025.

This situation also sits uneasily with Britain's human rights obligations. Discrimination on grounds of sex and gender identity conflicts with commitments under the CEDAW and Article 14 of the ECHR.[90] The impasse lies in the parliament's recognition of injustice but refusal to act and the judiciary's recognition of its existence but deference to the parliament. In contrast, Indian courts have not hesitated to dismantle discriminatory succession provisions when faced with S. 5(ii), even if the results have been incoherent. The divergence is striking, with Britain acknowledging the injustice but preserving it in one form or another and India attempting to attack the injustice but remedying it imperfectly. The result in both systems is uniform, leaving women and marginalised heirs vulnerable through different institutional failures.

The British story shows how modern states preserve instruments of patriarchal exclusion not through explicit defence but through inertia and institutional caution. The monarchy abandoned primogeniture, but the aristocracy retained it. Both India and its former colonial ruler reveal societies unwilling to confront the full economic implications of equality. The persistence of primogeniture in titles and estates is the survival of an economic order that denies women property, sustains intergenerational inequality, excludes transgender heirs and entrenches a democratic deficit. Until Britain fixes its deficit, the paradox will continue. Women may be considered fit to rule kingdoms, but they will remain unfit in the eyes of the law to inherit their own homes.

IV. CONCLUSION

The defanging and dilution of S. 5(ii) constitutes judicial overreach, as it flagrantly disregards the legislative intent behind the provision, as has been established in previous sections. Similarly, reform in Britain means little if it is cosmetic. Allowing daughters to inherit titles while leaving the estate structure untouched remains a fragmented reform that fails both symbolic and substantive objectives, with dignity without capital, and equality in name without access to power. Credible reform must therefore address entails, settlements and trusts. It should be prospective enough to avoid retrospective unfairness but principled enough to dismantle exclusion. It must also recognise transgender and non-binary heirs rather than forcing them into categories that deny their identity and in turn, perpetuate the same form of injustice it sought to fix. Without such change, India and Britain will continue to preserve logic

[90] UNGA, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNTS vol 1249, p 13 (entered into force 3 September 1981); *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights),* signed 4 November 1950, entered into force 3 September 1953, as amended by Protocols Nos 11, 14 and 15.

identified at the outset wherein hereditary privilege is sustained through law, wealth and status descend by birthright, and exclusion is perpetuated under the guise of tradition.

The importance of considering TWAIL and feminist approaches when analysing international refugee law

Jeff Wong

Introduction

International refugee law, in its current state, has been criticised for legitimating the unequal position of women worldwide. According to Mathilde Crépin, the current legislative framework is 'based on behavioural standards rooted in men's daily experiences and does not adequately reflect the complexity of women's circumstances.'[1] The Convention Relating to the Status of Refugees (CSR) and its 1967 Protocol are the main instruments which govern international refugee law. However, these instruments were drafted within a particular historical and political context that has been criticised as Eurocentric and in practice, more attuned to forms of persecution typically experienced by men, thereby limiting their responsiveness to gender-specific harms. Drafted in 1951, the CSR aimed to deal with the specific historical circumstances of the Cold War. The CSR '[continues] to reflect the principal concerns of that period – namely the need to protect individuals from state persecution resulting from political beliefs or personal identity.'[2] The CSR contributed to the perception that refugees were male dissidents involved in traditional political activities.

Feminist approaches suggest that refugee law was designed 'to serve male elites' in a patriarchal society.[3] Natalie Oswin argues that the current set of feminist approaches fails to scrutinise the ways in which female refugees' experiences are multiply-determined by gender, race and sexuality.[4] Feminist approaches are particularly significant in this context, as it has been argued that 'the content of the rules of international law privilege[s] men'.[5] Refugee determination processes should be expanded to support women, who experience 'forms of persecution that have no parallel in men's experience.'[6] Gender-specific forms of persecution

[1] Mathilde Crépin, *Persecution, International Refugee Law and Refugees: A Feminist Approach* (1st edn, Routledge 2021) 113.

[2] Nahla Valji, Lee Anne de la Hunt and Helen Moffett, 'Where Are the Women? Gender Discrimination in Refugee Policies and Practices' [2003] Agenda: Empowering Women for Gender Equity 61, 62.

[3] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613, 615.

[4] Natalie Oswin, 'Rights Spaces: An Exploration of Feminist Approaches to Refugee Law' (2001) 3 International Feminist Journal of Politics 347, 351.

[5] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613, 614-615 (see n 3).

[6] Linda Hossie, 'For Women, Oppression is Often a Way of Life' *Globe and Mail* (Toronto, 5 Feb 1993).

include rape, domestic violence and female genital mutilation (FGM). There are gender-related issues in refugee law, including sexual violence and forced marriage, which must be analysed from a critical, gender-specific perspective.

In addition to feminist approaches, Third World Approaches to International Law (TWAIL) provide a useful analytical framework in refugee law. According to Makau Mutua, TWAIL is a political and intellectual movement which opposes the global hegemony of Western states.[7] Developed during the decolonisation movement after World War II, TWAIL sees the current regime of international law as illegitimate due to its Eurocentric nature. TWAIL rejects the exilic basis of international refugee law, as it fails to protect refugees from Third World countries. This essay argues that feminist approaches promote greater doctrinal consistency while avoiding the requirement for women to portray themselves as victims. It concludes that TWAIL and feminist approaches warrant serious consideration when analysing international refugee law.

Feminist Approaches to Refugee Law

Feminist approaches to refugee law—understood as analyses that foreground gendered experiences of persecution and structural inequality—provide a necessary lens through which the limitations of the current framework can be critically examined. The current refugee definition suggests that inflicting harm in a private setting does not constitute persecution. Under Article 1A(2) of the CSR, a person must possess 'well-founded fear' of persecution in order to qualify for refugee status. In *Horvath v SSHD*, the House of Lords held that persecution included by definition a failure of state protection.[8] For most women, abuse occurs 'not at the hands of the state [...] but at the hands of private individuals, and within their communities.'[9] Such persecution has been repeatedly sidelined, because the state is often not at fault in cases of private abuse. It is difficult to establish state responsibility for sexual crimes, due to the intimate nature of such offences, and the private setting in which they occur. Audrey Macklin

[7] Makau Mutua and Antony Anghie, 'What Is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31, 37.

[8] *Horvath v Secretary of State For The Home Department* [2001] 1 AC 489.

[9] Nahla Valji, Lee Anne de la Hunt and Helen Moffett, 'Where Are the Women? Gender Discrimination in Refugee Policies and Practices' [2003] Agenda: Empowering Women for Gender Equity 61, 65 (see n 2).

argues that sexual violence committed in the home is 'systemic, systematic, and [emerges] out of the deeply rooted subordination of women.'[10] The persecution faced by women has traditionally fallen within the private sphere. According to Georgina Firth and Barbara Mauthe, the state's refusal 'to intervene in the private sphere of the home only insulates abuse of pre-existing patriarchal power within the private sphere'.[11] As Mathilde Crépin argues, 'for their asylum application women would have to often conform their experiences to those of men in order to be successful.'[12]

In *DM Albania*, an Albanian woman was continually harassed by her ex-partner.[13] She had also experienced one incident of physical violence.[14] The judges applied a high threshold in assessing the notion of persecution, analysing her suffering against Article 3 of the European Convention of Human Rights (ECHR). They concluded that the harm she faced did not amount to persecution. This case illustrates that domestic violence does not always amount to persecution. In *Islam; Ex parte Shah*, the claimants were married Pakistani women, who had been forced to leave their homes.[15] The House of Lords came to a different conclusion in *Islam*, ruling that the harm feared by the women amounted to persecution.[16] The application of a human rights framework for interpreting persecution has led to a series of inconsistent decisions. A feminist approach would produce greater doctrinal consistency by '[providing] decisions that are better adapted to the protection needs of refugee women.'[17] Feminist approaches would allow courts to reach consistent decisions when assessing the notion of persecution, especially in cases of domestic violence.

[10] Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 Human Rights Quarterly 213, 244.

[11] Georgina Firth and Barbara Mauthe, 'Refugee Law, Gender and the Concept of Personhood' (2013) 25 International Journal of Refugee Law 470, 476.

[12] Mathilde Crépin, *Persecution, International Refugee Law and Refugees: A Feminist Approach* (1st edn, Routledge 2021) 111, 112 (see n 1).

[13] *DM (Sufficiency of Protection - PSG - Women - Domestic Violence) Albania v Secretary of State for the Home Department*, CG [2004] UKIAT 00059.

[14] ibid.

[15] *Islam (AP) v SSHD; R v Immigration Appeal Tribunal and another, Ex parte Shah* [1999] 2 AC 629 (HL).

[16] ibid.

[17] Mathilde Crépin, *Persecution, International Refugee Law and Refugees: A Feminist Approach* (1st edn, Routledge 2021) 139 (see n 1).

The refugee definition is geared towards the experience of public actors: men who joined political activities and fled repressive regimes.[18] Under Article 1A(2) of the CSR, refugees must have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[19] This definition is silent on the issue of gender. This silence is a controversial aspect of the refugee definition. Mattie Stevens argues that the current definition has a 'decidedly white, male slant' to it.[20] She contends that the existing categories overlook women's needs, and that 'gender' should be added as a sixth category.[21] Stevens believes that creating a new category would address the unique problems that women face, allowing them to receive the full benefits of refugee law. Macklin expands on Stevens' point, arguing that 'the trouble with not acknowledging gender as a discrete basis of persecution is that it masks the specificity of women's oppression.'[22] In doctrinal terms, the inclusion of gender within the refugee definition would formally recognise gender as a distinct ground of persecution and provide a clearer legal basis for addressing gender-specific harms.

Article 3 of the CSR provides that its provisions shall be applied 'without discrimination as to race, religion or country of origin.'[23] Article 3 did not address discrimination on the basis of gender. Alice Edwards argues that the drafting of the CSR was characterised by 'a complete blindness to women, gender, and issues of sexual inequality.'[24] She added that regional instruments, implemented after the CSR, also ignored the safeguards against sexual inequality. She specifically mentioned The Organisation of African Unity (OAU)'s 1969 Convention,

[18] Efrat Arbel, Catherine Dauvergne and Jenni Millbank, *Gender in Refugee Law – From the Margins to the Centre* (1st edn, Routledge 2014) 3.

[19] Convention relating to the Status of Refugees (Geneva, 28 July 1951) 189 U.N.T.S. 137, *entered into force* 22 April 1954.

[20] Mattie Stevens, 'Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category' (1993) 3 Cornell Journal of Law and Public Policy 179, 215.

[21] ibid.

[22] Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 Human Rights Quarterly 213, 260 (see n 10).

[23] Convention relating to the Status of Refugees (Geneva, 28 July 1951) 189 U.N.T.S. 137, *entered into force* 22 April 1954.

[24] Alice Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950 – 2010' (2010) 29 Refugee Survey Quarterly 21, 22.

which included a wider non-discrimination clause. Although this clause was wider than Article 3, it still failed to incorporate sex or gender. Edwards concludes that these omissions have 'relegated women and women's experiences to second-class status.'[25]

Sherene Razack argues that 'women's claims are most likely to succeed when they present themselves as victims of dysfunctional, exceptionally patriarchal cultures and states.'[26] Successful claimants had to portray themselves as emotional victims. This is evidenced by the decision in *Refugee Appeal No. 71427/99*.[27] The claimant was a divorced Iranian woman who had fled to New Zealand with her son. Before her divorce, she was regularly beaten and was banned from leaving the house in her husband's absence. Her claim for refugee status succeeded, because she presented herself as a victim of Iran's patriarchal culture, which encouraged non-state actors to cause serious harm to women. The expectation that female refugee claimants portray themselves as vulnerable victims has been criticised for reinforcing reductive characteristics. Feminist approaches provide a valuable framework for analysing international refugee law, particularly in highlighting how existing structures may encourage women to portray themselves as victims.

A counterargument is that feminist approaches should not be emphasised when analysing international refugee law, because they perpetuate the stereotype of male dominance. Some scholars oppose the explicit addition of gender in Article 1A(2). Macklin observes that feminist approaches in refugee law 'can reinforce women's [marginalisation] by implying that only men have political opinions, only men are activated by religion, only men have racial presence'.[28] By adding gender to the refugee definition, courts create the stereotype that 'men "own" the categories of oppression that are not explicitly "gendrified"'[29] Some scholars argue that feminist approaches risk perpetuating gender stereotypes.

[25] ibid 23.

[26] Sherene Razack, 'Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender' (1995) 8 Can J Women & L 45, 50.

[27] Refugee Appeal No 71427/99, Refugee Status Appeals Authority, 16 August 2000

[28] Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 Human Rights Quarterly 213, 259 (see n 10).

[29] ibid 260.

Another counterargument is that adopting feminist approaches would cause countries to be flooded with refugees. Recognising gender as a specific category may lead to an influx of female refugees. Mattie Stevens has posed a rebuttal to this argument: arriving in a specific country does not guarantee refugee status.[30] Even if gender were added to the refugee definition, female refugee claimants would still need to jump through procedural hurdles.

In summary, the structure of international refugee law reflects a male perspective and ensures its continued dominance. A feminist analysis of the CSR reveals the structural features that sustain male domination.

TWAIL Approaches to Refugee Law

TWAIL approaches are particularly relevant to the analysis of international refugee law, given the Eurocentric foundations of existing frameworks. The CSR marginalised the needs of refugees from Third World countries, which were economically underdeveloped and unaffiliated with world superpowers during the Cold War.[31] TWAIL scholars oppose 'an international system of laws that evolved in consideration of Euro-centric cultures'.[32] According to Jay Ramasubramanyam, '[refugeehood] has been [...] predicated on the interests of Europeans and European states.'[33] He argues that 'international refugee law is a European solution to a European problem, thereby placing displacement in the global south outside the purview of these frameworks.'[34] TWAIL scholarship emphasises the importance of drawing on intellectual resources from the Third World in challenging unequal structures. The partition of India illustrates the Eurocentricity of refugee law. When India and Pakistan achieved independence in 1947, many people lost their citizenship when they relocated across the newly created borders. World War II had recently ended, so the international community was

[30] Mattie Stevens, 'Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category' (1993) 3 Cornell Journal of Law and Public Policy 179, 215 (see n 20).

[31] Caroline Banton, '"Third World" Countries: Definitions, Criteria, and Modern Classifications' (*Investopedia*, 21 March 2026) <https://www.investopedia.com/terms/t/third-world.asp> accessed 9 April 2026.

[32] Samuel Berhanu Woldemariam, Amy Maguire and Jason Von Meding, 'Forced Human Displacement, The Third World and International Law: A TWAIL Perspective' (2019) 20 Melbourne Journal of International Law 1, 4.

[33] Jay Ramasubramanyam, 'TWAIL, archives, and refugee law' (2024) 37 Journal of Refugee Studies 994, 994.

[34] ibid 995.

preoccupied with displacement in Europe. Western observers believed that 'displacement in South Asia was not a refugee crisis but was an exchange of populations.'[35] Displacement in South Asia was dismissed due to the prioritisation of European crises. For example, India has devised ad-hoc practices of refugee protection, due to its 'non-conformist stance to instruments of international refugee law'.[36] Echoing the words of Antony Anghie, '[the] refugee definition itself is based, as is so much else of international law, on European experience'.[37] International refugee law prioritises the needs of European refugees, without considering refugees from other backgrounds.

International instruments have created a 'myth of difference' between European and non-European refugees. B.S. Chimni argues that 'the nature and character of refugee flows in the Third World were represented as being radically different from refugee flows in Europe'.[38] This myth was accompanied by an 'internalist interpretation of the root causes of refugee flows', which blamed postcolonial states for producing refugees.[39] By sustaining the binary of 'refugee-receiving' and 'refugee-producing' states, Western countries can blame 'refugee-producing' Third World countries for worsening the issue of population displacement.[40] Western countries consider themselves superior because they are 'refugee-receiving' states. Moreover, Chimni describes the 'normal' refugee as 'white, male and anti-communist'. Based on this description, refugees fleeing Third World countries are not considered to conform to the 'normal' refugee category. The prevailing image of a 'normal' refugee is presented as sitting uneasily with individuals fleeing the Third World.[41] Crucial to the myth of difference is the idea that 'the root causes of refugee flows in the Third World are markedly different from

[35] ibid 996.

[36] ibid 998.

[37] Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 European Journal of International Law 7, 77.

[38] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350, 351.

[39] ibid.

[40] Natalie Oswin, 'Rights Spaces: An Exploration of Feminist Approaches to Refugee Law' (2001) 3 International Feminist Journal of Politics 347, 352 (see n 4).

[41] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350, 351 (see n 37).

the causes which led to displacement of refugees in Europe.'[42] The myth of difference has had two main consequences: the rejection of the exilic basis of international refugee law, and an over-reliance on the solution of voluntary repatriation. Chimni argues that TWAIL approaches can 'deconstruct and debunk the myth of difference'.[43]

TWAIL approaches are essential to analyses of international refugee law because imperialism has played a central role in the forced displacement of people. Imperialism has forcibly displaced many communities from their lands and sources of income. An example is British imperialism in India, which led to the forced displacement of millions along religious lines. Another example is the externalisation of the European Union (EU) border, which limited 'the scope for non-Europeans to legally access refuge in Europe.'[44] Chimni argues that much of 20th-century displacement 'has been caused by the geographical spread of capitalism and the politics of imperialism.'[45] Imperialism has led to the introduction of borders, which remains a cause of conflict between Third World countries. Moreover, anti-colonial struggles have led to massive displacements in the Third World: between 1963 and 1966, the number of displaced individuals in Africa rose from 300,000 to 700,000.[46] This example demonstrates how imperialism is closely linked to widespread displacement and refugee crises. Chimni acknowledges the effect of imperialism on refugee law, arguing that most refugee-producing conflicts 'can themselves be traced [...] to the legacy of imperialist politics or to its pursuit in the contemporary era'.[47] The Third World continues to host the highest number of displaced persons, due to the weak framework of responsibility sharing under international law. Third World countries, such as Uganda, Bangladesh and Jordan, host large numbers of refugees.[48]

[42] ibid 360.

[43] ibid 369.

[44] John Reynolds, 'Fortress Europe, Global Migration and the Global Pandemic' (2020) 114 American Journal of International Law 342, 342.

[45] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350, 359 (see n 37).

[46] Samuel Berhanu Woldemariam, Amy Maguire and Jason Von Meding, 'Forced Human Displacement, The Third World and International Law: A TWAIL Perspective' (2019) 20 Melbourne Journal of International Law 1, 18 (see n 31).

[47] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350, 359 (see n 37).

[48] Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 European Journal of International Law 7, 76 (see n 36).

Forced displacement has a disproportionate impact on Third World countries, despite their limited capacity to support displaced populations.

The introduction of a meaningful burden-sharing scheme is essential to address the disproportionate concentration of displaced people in Third World countries, which host the vast majority of the world's refugees despite having the least resources.[49] By redistributing financial, logistical, and resettlement responsibilities more equitably among states, such a scheme would alleviate pressure on overburdened host countries while promoting a fairer international refugee regime. As Woldemariam argues, '[forced] displacement as it existed in the Third World — caused and perpetuated by colonialism — was not considered during the development of the existing rules.'[50] TWAIL approaches foreground the relationship between imperialism and forced displacement, highlighting how historical and ongoing structures of domination have shaped patterns of migration and asylum.

Conclusion

This essay has argued that feminist approaches expose the limitations of the current framework, particularly its failure to recognise and adequately respond to women's needs. Female refugees' experiences cannot be equated to those of their male counterparts. Women face a series of unique challenges, including forced pregnancy and domestic violence. The absence of gender from the refugee definition suggests that legal instruments were shaped in ways that prioritised male experiences of persecution. With its emphasis on public acts, the CSR fails to recognise that abuse in the private sphere should also constitute persecution. Moreover, Article 3 of the CSR should be expanded to include gender. Incorporating gender explicitly would strengthen protection against gender-based discrimination and reinforce a more inclusive understanding of persecution.

[49] Samuel Berhanu Woldemariam, Amy Maguire and Jason Von Meding, 'Forced Human Displacement, The Third World and International Law: A TWAIL Perspective' (2019) 20 Melbourne Journal of International Law 1, 29 (see n 31).

[50] ibid.

With reference to Sherene Razack's views, this essay argued that the refugee determination process leads to the victimisation of female claimants.[51] Women seeking refugee status are often expected to present themselves in narrow and stereotypical terms, emphasising passivity and vulnerability to satisfy prevailing legal narratives.[52] This perpetuates the stereotype that women depend on the protection of men.

Another key argument is that TWAIL approaches provide a critical lens through which to analyse refugee law. The CSR was drafted in a particular historical context that largely reflected a narrower conception of the 'typical' refugee, which has been criticised for insufficiently capturing the diverse experiences of refugees from the Third World. During the Cold War, most refugees fled from state persecution. Nowadays, refugees leave their countries due to a wider range of harms, including gender-based violence. TWAIL approaches challenge the purported distinction between Western and non-Western refugees by exposing it as a constructed and often misleading narrative. They recognise the fact that refugee law has largely been shaped by imperialist tendencies. TWAIL approaches facilitate an examination of the relationship between imperialism and refugee flows, highlighting how historical and current power structures shape patterns of displacement.

A critical perspective on refugee law is necessary because its key instruments were drafted within a Cold War context. International refugee law was developed to protect European men fleeing state prosecution. Having considered the historical context of its development, this essay concludes that TWAIL and feminist approaches should be rigorously engaged with in analyses of international refugee law.

[51] Sherene Razack, 'Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender' (1995) 8 Can J Women & L 45, 50 (see n 26)

[52] Natalie Oswin, 'Rights Spaces: An Exploration of Feminist Approaches to Refugee Law' (2001) 3 International Feminist Journal of Politics 347, 348 (see n 4).

Table of Cases

DM (Sufficiency of Protection - PSG - Women - Domestic Violence) Albania v Secretary of State for the Home Department, CG [2004] UKIAT 00059

Horvath v Secretary of State For The Home Department [2001] 1 AC 489

Islam (AP) v SSHD; R v Immigration Appeal Tribunal and another, Ex parte Shah [1999] UKHL 20

Refugee Appeal No 71427/99 (Refugee Status Appeals Authority, 16 August 2000)

Table of Legislation

Convention relating to the Status of Refugees (Geneva, 28 July 1951) 189 U.N.T.S. 137, *entered into force* 22 April 1954

Bibliography

Books

Arbel E, Dauvergne C and Millbank J, *Gender in Refugee Law – From the Margins to the Centre* (1st edn, Routledge 2014)

Crépin M, *Persecution, International Refugee Law and Refugees: A Feminist Approach* (1st edn, Routledge 2021)

Journal Articles

Anghie A, ‘Rethinking International Law: A TWAIL Retrospective’ (2023) 34 EJIL 7

Charlesworth H, Chinkin C and Wright S, ‘Feminist Approaches to International Law’ (1991) 85 American Journal of International Law 613

Chimni BS, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11 Journal of Refugee Studies 350

Edwards A, ‘Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950 – 2010’ (2010) 29 Refugee Survey Quarterly 21

Firth G and Mauthe B, ‘Refugee Law, Gender and the Concept of Personhood’ (2013) 25 International Journal of Refugee Law 470

Macklin A, ‘Refugee Women and the Imperative of Categories’ (1995) 17 Human Rights Quarterly 213

Mutua M and Anghie A, ‘What Is TWAIL?’ (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31

Oswin N, ‘Rights Spaces: An Exploration of Feminist Approaches to Refugee Law’ (2001) 3 International Feminist Journal of Politics 347

Ramasubramanyam J, ‘TWAIL, archives, and refugee law’ (2024) Journal of Refugee Studies 994

Razack S, ‘Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender’ (1995) 8 Can J Women & L 45

Reynolds J, ‘Fortress Europe, Global Migration and the Global Pandemic’ (2020) 114 American Journal of International Law 342

Stevens M, ‘Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category’ (1993) 3 Cornell Journal of Law and Public Policy 179

Valji N, de la Hunt LA and Moffett H, ‘Where Are the Women? Gender Discrimination in Refugee Policies and Practices’ [2003] Agenda: Empowering Women for Gender Equity 61

Woldemariam SB, Maguire A and Von Meding J, ‘Forced Human Displacement, The Third World and International Law: A TWAIL Perspective’ (2019) 20 Melbourne Journal of International Law 1

Newspaper Articles

Hossie L, ‘For Women, Oppression is Often a Way of Life’ *Globe and Mail* (Toronto, 5 Feb 1993)

Websites

Banton C, '"Third World" Countries: Definitions, Criteria, and Modern Classifications' (*Investopedia*, 21 March 2026) <https://www.investopedia.com/terms/t/third-world.asp> accessed 9 April 2026

Section 9 of the Arbitration & Conciliation Act: A Case for Direct Recognition of Foreign Seated Emergency Arbitration[1]

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Section 9 of the Arbitration & Conciliation Act: A Case for Direct Recognition of Foreign Seated Emergency Arbitration

The case of Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. AIR 2021 SC 3723 signaled a significant shift in India's approach to emergency arbitral awards. The decision recognized the term "emergency arbitrator" to come within the scope of the definition of "arbitral tribunal" under Section 17 of the Indian Arbitration Act 1996 However, since the arbitration in the case was seated in Delhi, many have contended that India does not recognize foreign seated emergency arbitration orders. This argument is given more weight since there is no provision akin to Section 17 under Part 2 of the Act which deals with foreign seated awards. This has resulted in a dichotomy where India Seated emergency awards are directly enforced under Section 17(2) of the Act whereas foreign seated ones are considered de novo by the courts under a Section 9 application. This gives the power to the courts to completely interfere with the order of the tribunal and essentially gives the losing party a "second bite at the cherry," where they may challenge the entire process at the stage of enforcement.

This article argues that the de novo consideration at the stage of Section 9 goes against the intent of Section 9, which is to only interfere if the tribunal is not constituted or unable to give an efficacious remedy. Secondly, the losing party gets a "second bite at the cherry" as they may challenge the entire process at the stage of enforcement. To remedy this, the article proposes that the scope of the interference by the courts be limited solely on a prima facie analysis of the grounds given in Article 17I of the Model Law.

I. INTRODUCTION

Emergency arbitration may be defined as an expedited mode of arbitration which takes place before the formation of the arbitral tribunal, to address matters of great urgency.[3] As a mode of dispute resolution, it gained currency post the addition of this term in the ICDR Rules in 2006.[4] Earlier the term "referee" was used instead of arbitrator which led to complex questions about

[3] Akash Shrivastava, *Emergency Arbitration and India—A Long Overdue Friendship,* (2021), 10 IJAL 98.
[4] *Ibid.*

the nature of the process.[5] The French decision in *Société Nationale des Pétroles du Congo and République du Congo v. TEP Congo* expressly refused to recognize the "referee" as an arbitrator and enforce his decision, further adding to the conundrum.[6] However, since the amendment of the ICC Rules in 2013, many other arbitral institutions like the HKIAC, SIAC, JCAA have recognized emergency arbitrations and laid down express rules regarding the process.[7] These rules have gained traction, with the ICC itself receiving over a hundred cases since their introduction.[8]

Due to speed being the overarching norm, emergency arbitrations are conducted in a matter of weeks instead of months. This does not indicate a compromise in their due process as extensive guidelines have been laid down under the institutional rules which have to be adhered to.

Despite the popularity of this mode of arbitration, there are limiters which prevent its effective utilization. Primarily, doubts have arisen as to whether the decision given by the Emergency arbitrator can be called an award under the New York Convention.[9] This has arisen of the fact that such decisions are not "final" and are subject to change by both the emergency arbitrator and the final arbitral tribunal.[10] The term “award” will be used to refer to orders given by emergency arbitrators for the remainder of this article. Additionally, the transient nature of these decisions further complicates their status, as many institutional rules impose a fixed time limit for the expiry of an emergency award..[11] Unlike traditional arbitration where the tribunal dissolves upon passing the award an emergency arbitrator continues to retain jurisdiction and may even amend their order.[12] Because the relief granted is bound by a strict expiration date and remains inherently susceptible to ongoing revision, the decision lacks the definitive permanence traditionally required to be deemed sufficiently "final." To circumvent this hurdle, multiple jurisdictions have interpreted finality in a purposive manner looking beyond strict

[5] *Ibid.*
[6] *Société Nationale des Pétroles du Congo and République du Congo v TEP Congo* (Cour d’appel de Paris, 25 September 2008).
[7] Singapore International Arbitration Centre, Arbitration Rules (2010) r 26 and sch 1; International Chamber of Commerce, Rules of Arbitration (2012) art 29 and sch V; Hong Kong International Arbitration Centre, Arbitration Rules (2013) art 23 and sch 4.
[8] Shrivastava, (n 1), 2.
[9] Ajar Rab, ‘Chapter 10: Enforcement of Interim Measures’ in Interim Measures in International Commercial Arbitration: A Comparative Review of the Indian Experience (Kluwer Law International 2022).
[10] *Ibid.*
[11] Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules (1 January 2017) app 2 arts 4(2) and 8(1); London Court of International Arbitration, Arbitration Rules (1 October 2020) arts 9.6 and 9.8; Singapore International Arbitration Centre, Arbitration Rules (6th edn, 1 August 2016) sch 1 paras 3 and 9.
[12] *Ibid.*

literal definitions to the practical objective of the law arguing that an award is "final" if it definitively disposes of the specific interim issue currently before it, thereby implicitly recognizing emergency awards.[13]

Thus, the primary issue which arises against emergency arbitration is that it is often unenforceable. This was reflected in the survey carried out by the ICC in collaboration with the Queen Mary University, which found out that more that 70 percent of the participants agreed that enforcement was the biggest issue in emergency arbitration.[14] The survey also found out that more than 60 percent of the awards were voluntarily complied with, however a lack of a legal mode of enforcement leads to lessening of the strength of the whole process.

This article limits its purview to the enforcement of emergency awards in India. Pursuant to the same, Section 2 will analyze the current position of law with regards to the enforcement of emergency awards.

The third section will highlight the ambit of Section 9 of the Act and argue that its purpose is to limit the intervention of the Courts within the arbitration process. The fourth section considers the judgment laid down in *Ashwani Minda* by the Hon'ble Delhi High Court which expressly barred the claimant from having a "second bite at the cherry" upon obtaining an unfavorable decision by the emergency arbitrator.[15]

The fifth section explores Articles 17H and 17I of the Model law which lay down the process for the enforcement of interim award. Despite being loosely based on Article 36 which deals with the enforcement of final awards, Articles 17H and 17I have adapted owing to the peculiarities of interim awards. This Section also explores the scope of interference by the court in a Section 9 application for enforcement since a de novo consideration is not desirable as argued in the previous sections.

[13] Amazon NV Investment Holdings LLC v Future Retail Ltd (2022) 1 SCC 209 (Supreme Court of India, 6 August 2021); Raffles Design International India Pvt Ltd v Educomp Professional Education Ltd (2016) 234 DLT 349 (Delhi High Court, 10 May 2016).
[14] White & Case and School of International Arbitration, Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (2015) 28. <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf\> accessed 26 March 2025.
[15] Ashwani Minda v U-Shin Ltd AIR 2020 (NOC) 953 (Del) [52] (India).

II. ENFORCEMENT OF EMERGENCY AWARDS IN INDIA

Section 17 of the Indian Arbitration Act recognizes the power of the tribunal to grant interim measures which can be enforced as decrees of the Court.[16] Section 17(1) lays down the powers of the tribunal to pass an interim decision. It is in pari materia with the powers given to the Court under Section 9. Section 17(2) relates to the enforcement of such interim measures and lays down that subject to any appeal under Section 37, the awards are deemed to be decrees of the courts and may be enforced as the same.[17]

The case of *Amazon NV v. Future Retail* concerned the enforcement of a SIAC administered emergency arbitration seated in Delhi. The decision was passed in favor of Amazon, (.) However, upon noncompliance by Future Retail, an enforcement petition was filed by Amazon.[18] Two key issues arose for consideration before the court. Firstly, whether the Act contemplated the emergency arbitrator's award; secondly, whether the same could be considered as an order under Section 17(1).[19] Two contentions were raised against the latter. It was argued that Section 17 refers to an arbitral tribunal and an Emergency Arbitrator does not fall within the definition given under Section 2(1)(d) and that the Emergency Arbitration proceedings could not be within the arbitration proceedings as they are formally started only after the constitution of the tribunal.[20]

The court answered the first question affirmatively by analyzing the scope of party autonomy read with Section 21 which lays down when an arbitration proceeding is deemed to begin. It held that the Act granted the parties freedom to choose institutional rules permitting emergency arbitration. Since the SIAC rules permitted the same, it was held that nothing in the act would prohibit it.[21]

[16] Arbitration and Conciliation Act 1996 (India) s 17.
[17] *Ibid* s 17(2).
[18] Amazon.com NV Investment Holdings LLC v Future Retail Ltd (n 12) [20].
[19] *Ibid* para 9.
[20] *Ibid* paras 5, 7.
[21] *Ibid* para 12, 13.

Regarding Future's second contention, specifically whether an emergency arbitrator's award falls "within the arbitration proceedings" as mandated by Section 17 the Court turned to Section 21, which stipulates that arbitration proceedings are deemed to commence the moment the respondent receives the notice of arbitration. It observed that this was subject to an agreement to the contrary by the parties and held that where the institutional rules provide otherwise, the same should be followed.[22] SIAC Rules state that the arbitration is deemed to start when a notice is received by the registrar. This indicated that they begin much before the tribunal has been constituted, hence falling squarely "during the arbitral proceeding."

The Court then proceeded to look at the term "arbitral tribunal" and address whether emergency arbitrator comes within its ambit. The respondents contended that the term is limited to a sole arbitrator or a panel of arbitrators which can pass both interim and final awards, thus impliedly limiting its scope to the tribunal which would finally deal with the merits of the dispute.[23] The Court while accepting the contention of the Respondents stated that this definition was applicable "unless the context required otherwise."

The Court relied on the definition of "arbitration" given in 2(1)(a) which states that arbitration includes any arbitration whether administered by a permanent arbitral tribunal or not.[24] It read this with Sections 2(6) (relating to the freedom of parties to permit anyone to adjudicate their dispute), and 2(8) (such agreement to include the rules) to hold that interim awards passed by the emergency arbitrators are within the scheme of Section 17(1). Essentially, it relied on its earlier reasoning that where the rules permit emergency arbitration, the act will not prohibit it. It further ruled that the term "arbitration proceedings" are not limited by any definitions and thus include proceedings before an emergency arbitrator.

The Court considered Section 9 and held that the term arbitral tribunal as used under Section 9(3) must be accorded the same meaning as its counterpart under Section 17. It held that Section 9(3) and 17 form part of the same scheme since both lay down the framework regarding interim awards/orders, and the term arbitral tribunal as used under 2(1)(d) would be inapplicable to both.[25]

[22] Singapore International Arbitration Centre, Arbitration Rules (6th edn, 1 August 2016) art 3.
[23] *Ibid* paras 18-20.
[24] Arbitration and Conciliation Act 1996 (n 14) s 21.
[25] *Ibid* para 20.

The court concluded that interim awards under Section 17 would include emergency awards, which can be enforced directly under Section 17(2) of the Act. Since Section 17 is in Part 1 and is applicable only to India Seated arbitrations, this unknowingly created a dichotomy between India and Foreign seated emergency awards.[26] The position of law regarding enforcement of foreign seated emergency awards was laid down in the *Raffles Design* case by the Delhi HC. It held that for enforcement of such awards, a separate petition needed to be filed under Section 9 which would then be considered by the Court of enforcement "de novo."[27]

Additionally, this judgment implicitly limited the recognition of emergency arbitration to fall within the term "arbitral tribunal" as used in Section 17 and 9(3).[28] Thus, it did not recognize emergency arbitration within the general definition of the term arbitral tribunal as laid down in 2(1)(d). Recognition under 2(1)(d) would have meant that the entirety of the act is applicable to emergency arbitrators. This would have made the position akin to the law in Singapore which expressly recognizes "arbitral tribunal" to include emergency arbitrators.[29] The Law Commission of England and Wales rightly pointed out that this would lead to undue interference by the court during the process, for instance in the appointment of the arbitrator itself.[30] The parties would have an option to approach the court under Section 11 for the appointment of the emergency arbitrator which flies in the face of the due regard given to the parties' autonomy to choose the Rules to govern them. This could have also drastically increased the scope of dilatory tactics being used to delay the emergency proceedings, thereby vitiating the purpose of emergency arbitration itself. Thus, the court , by recognizing emergency arbitrators as constituting "arbitral tribunals" as used in Sections 17 and 9(3), impliedly limited the scope of court interference otherwise.

III. A DE NOVO CONSIDERATION GOES AGAINST THE PURPOSE OF SECTION 9

[26] *Ibid* para 41.
[27] Raffles Design International India Pvt Ltd v Educomp Professional Education Ltd (n 12) [100]
[28] Amazon.com NV Investment Holdings LLC v Future Retail Ltd (n 12) [20]
[29] International Arbitration Act 1994 (Singapore) s 2
[30] Law Commission, Review of the Arbitration Act 1996: A Consultation Paper (Consultation Paper No 257, 2022) ch 7, para 40

Section 9(3) of the Act states that "once the arbitral tribunal has been constituted, the Court shall not entertain an application under Sub Section (1), unless the Court finds circumstances exist which may not render the remedy provided by Section 17 efficacious.[31]

Section II of this article discussed the term "arbitral tribunal" as used under Sections 9 and 17, and the interpretation accorded to it in the *Amazon NV* case. Since the term includes emergency arbitrators, this leads to the conclusion that the court shouldn't interfere unless the emergency arbitrator is able to provide an efficacious remedy.[32]

An analogy may be drawn to the jurisprudence around Section 44 of the English Arbitration Act to clear the air regarding the scope of interference by the Courts. Section 44(5) lays down that "In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively."[33]

Thus, effectiveness is the determining factor which influences the interference by the courts, much like the efficaciousness in the Indian context. The decision of the English Court in *Gerald Metals* which concerned the granting of a freezing order against a trust.[34] The arbitral tribunal had previously refused on the grounds of the assurances provided by the trust, which obviated the immediate threat to the claimant.

Hon'ble Justice Leggatt while refusing the freezing order against the trust, observed that Section 44 is a mechanism for the court to provide support to the arbitral regime.[35] It empowers the court to act in instances where the tribunal cannot provide an effective remedy within the relevant timescale. For instance, where the appointment process is taking time, or the matter concerns third party rights and other such instances. It could not be made a mechanism for overriding a decision of the tribunal which can act but has chosen not to. These observations were echoed by the Law Commission of England and Wales when it sought to answer the question on the degree of Court interference in Emergency Arbitration.[36] These observations

[31] Arbitration and Conciliation Act 1996 (n 14) s 9(3)
[32]See Section II above
[33] Arbitration Act 1996 s 44
[34] Gerald Metals SA v Timis [2016] EWHC 2327 (Ch).
[35] Gerald Metals SA v. Timis, (n 33) paras [14]-[15].
[36] Law Commission (n 29) ch 7, paras 52–62.

are highly relevant to the Indian scenario as well and hence a narrow interpretation must be accorded to the term "efficaciousness" to prevent unnecessary interference.

It is accepted by the author that the scope of interference under section 9(3) is different from the court's power to interfere under a separate application for enforcement of the emergency award. The former is usually in the middle of the arbitral proceedings , where the tribunal is unable to provide an efficacious remedy. The latter, on the other hand, is an application asking the court to enforce the emergency award. In other words, the latter concerns the enforcement of the efficacious remedy provided by the emergency arbitrator. However, the purpose of Section 9 is to aid the tribunal and the parties by enabling the court to interfere where the tribunal is unable to provide a remedy. Hence, it is counterproductive to use it as a tool to check the remedy provided by the arbitral tribunal. Therefore, a "de novo" consideration goes against the purpose of Section 9.

IV. A DE NOVO CONSIDERATION AMOUNTS TO GIVING THE LOSING PARTY A SECOND BITE OF THE CHERRY.

In the case of *Ashwani Minda*, the Hon'ble Delhi High Court laid down that the losing party cannot be afforded a second bite at the cherry against the decision of a validly appointed emergency arbitrator.[37] The case concerned a JVA executed by the disputing parties regarding designing of automotive components. The dispute resolution clause of the JVA laid down that arbitration would be seated in Japan and conducted under the auspices of the JCAA Rules if started by the Respondent or be seated in India under ICA Rules if started by the Applicant. Disputes arose and the respondent filed for emergency arbitration pursuant to the same. The emergency arbitrator ruled in their favor. Consequently, the Applicant sought to move to the Delhi HC by filing a Section 9 petition. They relied on the decision of the Court in Raffles Design and argued that the court had the power to consider the case de novo.

The Court, while rejecting their argument, held that its jurisdiction under Section 9 had been impliedly excluded by virtue of the parties choosing the JCAA Rules. It further held that the Applicants could not misuse Section 9 to make the Court stand in appeal over the emergency arbitrator.[38] The Court then went on to hold that the losing party could not have "a second bite

[37] Ashwani Minda v U-Shin Ltd AIR 2020 (NOC) 953 (Del) [52] (India).
[38] Japan Commercial Arbitration Association, Commercial Arbitration Rules (2021) arts 77–80.

at the cherry" as no material change in circumstances had been shown. It must be kept in mind that the court had already decided that the parties had excluded its jurisdiction, hence it is unclear what would have been the effect if there had been a material change in circumstance. It is likely the court would not have interfered and would have given respect to its earlier finding.

The court addressed the *Raffles* decision and held it to be inapplicable to the present proceedings. [39]Firstly, the parties in the *Raffles* case had chosen the SIAC Rules to govern the dispute, which allows for interference unlike the JCAA Rules.[40] Moreover, the *Raffles* case concerned the enforcement of the emergency award, whereas the Ashwani Minda case concerned a de facto appeal against the decision of the JCAA emergency arbitrator as the applicants sought to use Section 9 to check the validity of the award.[41]

This leads to the belief that the "second bite at the cherry" principle is inapplicable in cases of enforcement. It may be argued that the two judgments ought to be read harmoniously and that the Court has the power to consider the matter de novo when a separate application is filed under Section 9 to enforce the emergency award and not when Section 9 is being used to challenge the emergency award.

This is untenable for one primary reason; that the principle underlying both the situations is the same. The concept of not giving the losing party a second bite at the cherry entails that it doesn't get a second chance *both* at the stage of enforcement or challenge. If the judgment of *Ashwani Minda* is read narrowly, there is a risk of grave misuse of Section 9 to make the Court sit as a Court of Appeal under the garb of enforcement since the court will be considering the matter from the beginning at the stage of enforcement as well. Thus, it is paramount that the judgment is not construed narrowly to point to such a conclusion.

V. SCOPE OF INTERFERENCE UNDER SECTION 9

[39] Raffles Design International India Pvt Ltd v Educomp Professional Education Ltd (n 12) [100]
[40] Singapore International Arbitration Centre, Arbitration Rules (2025) r 12 and sch 1.
[41] Ashwani Minda v U-Shin Ltd (n 36) [2]–[5].

Section 9 of the Indian Arbitration Act lays down the interim measures which may be given by the court. These measures are akin to those given by the emergency arbitrator.[42] The Court recognized the "concept" of emergency arbitration in *Amazon NV* and not merely India seated emergency arbitration.

This recognition is evident from the way the court formulated its decision. It relied on party autonomy and read Section 2 to allow parties to choose the institution and rules of their choice. It further read Section 21 as being subject to an agreement to the contrary to allow emergency arbitration to come "within the course of the proceedings" under Section 17. It laid down that nothing in the Act prohibited emergency arbitration once the parties had agreed to it. As discussed in Section II of this article, the court analyzed Section 17 through the lens of party autonomy and its inherent purpose and concluded that the term "arbitral tribunal" mentioned therein included emergency arbitration. It understood Section 9 and 17 to form a complementary scheme regarding granting of interim measures in arbitration. Since section 9 applies to both foreign and India seated arbitrations unless specifically excluded, it may not interfere in emergency proceedings as they constitute an "arbitral tribunal."[43]

Thus, it may be concluded that the Court recognized emergency arbitration as a *concept* in India. This entails that the rights generally given to arbitral tribunals are bestowed upon emergency arbitrators. This position is akin to several arbitration friendly jurisdictions across the world which recognize emergency arbitrators as constituting arbitral tribunals attracting the concomitant rights and duties.[44] The above analysis entails that the sole reason why foreign seated emergency awards are not directly enforceable in India is that there is no provision akin to Section 17 under Part 2 of the Act. This is furthered by the reasoning in *Raffles* which, despite recognizing emergency arbitration, was unable to enforce the same because of the absence of a provision like Section 17.[45]

The problem of enforcement may be removed by adding another subsection to Section 9 which specifically deals with enforcement of foreign seated emergency awards. This proviso would

[42]Arbitration and Conciliation Act 1996 (India) s 9 SIAC Rules (n 39) r 12 and sch 1; HKIAC Rules (n 11) art 23 and sch 4; ICC Rules (n 11) art 29 and app V; JCAA Rules (n 11) arts 77–80.
[43] See Section II above.
[44] Arbitration Act 1996 (New Zealand) s 2(1); International Arbitration Act (n 28) ss 2(1) and 12(6); Arbitration Ordinance (Cap 609, Hong Kong) s 22B.
[45] Raffles Design International India Pvt Ltd v Educomp Professional Education Ltd (n 26) [100].

be in consonance with the intent of Section 9 which is to aid the arbitration process and with the overall scheme of the Act. It would also vitiate the danger of repeating the mistake of Singapore of recognizing emergency arbitrator to come within the general definition of "arbitral tribunal" entailing the applicability of the whole of the Act.

The subsection should borrow from Articles 17H and 17I of the UNCITRAL Model Law. Article 17H of the Model Law deals with the enforcement of interim measures whereas Article 17I presents the sole grounds of exceptions on which the court may refuse enforcement.[46]

An analysis of the Articles with their relevance to the Indian context is provided in the next Section.

VI. THE INCORPORATION OF THE MODEL LAW

Article 17 of the Model Law was substantially amended in 2006 to lay down a comprehensive scheme for interim measures.[47] As observed by Gary Born the Article provides the "only" grounds for refusal of enforcement and is intended to provide a ceiling on court interference. Thus, countries may choose a more favorable regime but cannot increase the number of exceptions.[48]

Article 17H of the UNCITRAL model law on International Commercial Arbitration lays down that "An interim measure issued by the arbitral tribunal shall be recognized and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Article 17I.(") [49]

The Article uses the term "interim measures" akin to Section 17 of the Indian Arbitration & Conciliation Act, 1996 instead of "interim award." Thus, there is no need for characterization of the emergency award as an interim award for the purposes of enforcement. The sole requirement is that it must be given by an arbitral tribunal and be valid as per the provisions

[46] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (2006) arts 17H–17I.
[47] *Ibid* Art. 17.
[48] Gary B Born, International Commercial Arbitration (3rd edn, Kluwer Law International 2021) 5792
[49] UNCITRAL Model Law (n 44) art 17H.

under Article 17I. India already recognizes emergency arbitrators to fall within the definition of the term "arbitral tribunal," hence the Article may easily be added to Indian Law without substantial amendments. The case for this addition under section 9 is strengthened further because the Supreme Court recognized emergency arbitrator to form the arbitral tribunal within the context of Section 9.[50]

Article 17I lays down the grounds on which the Courts may interfere with the interim measure. The article alludes repeatedly to Article 36 of the model law. The intent behind such references is to ensure uniformity in interpretation between the two provisions.[51]

These grounds may be divided into two categories. The first category includes the grounds which can only be considered by the courts upon the application of the parties. The second category refers to the grounds which the court may consider of its own motion. Furthermore, paragraph 2 of Article 17I expressly states that "any determination made by the Court on any ground in paragraph (1) of this Article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The Court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure." This impliedly reduces the scope of interference by the Court into the merits of the dispute and remove the present anomaly of the "de novo" consideration.[52]

A. THE SCOPE OF COURT INTERFERENCE UNDER ARTICLE 17I IN INDIA

The grounds mentioned under Article 17I are in pari materia with the grounds under Article 36 of the Model Law. Section 48 of the Indian Arbitration Act lists down the exhaustive and restrictive grounds under which an Indian Court may refuse the enforcement of a foreign award. These grounds are substantially borrowed from Article 36; however, section 48 is inapplicable to emergency awards owing to the aspect of finality.[53]

[50] Amazon.com NV Investment Holdings LLC v Future Retail Ltd (n 12) [20].
[51] UNCITRAL Model Law (n 44) art 17I(2).
[52] Ajar Rab (n 17) 317.
[53] Ajar Rab (n 17) 331.

Despite this, the best course of action while incorporating the provisions of Article 17I under the Indian Act would be to interpret them as per the jurisprudence of Section 48. This well-settled body of law is characterized by a strong pro-enforcement bias, advocating for minimal judicial interference and a strictly narrow interpretation of exceptions, such as the "public policy" defense.

Applying this jurisprudence directly furthers the purpose of uniformity. The continuous reference made by Article 17 to Article 36 in the Model Law is intentionally designed to ensure that both interim measures and final awards are judged by the exact same enforcement standards. By interpreting Article 17I considering Section 48, Indian courts would mirror this international intent. It ensures that both emergency interim orders and final foreign awards are evaluated under a single, consistent, and predictable legal standard, avoiding fragmented interpretations within the Act.

1. INTERPLAY BETWEEN ARTICLE 17I(1)(A)(I) AND ARTICLE 36 OF THE MODEL LAW

17I(1)(a)(i) lays down that refusal may be warranted when there is a violation of the grounds set out under Article 36(1)*(a)*(i), (ii), (iii) or (iv).

Article 36(1)(a)(i) deals with the incapacity of the parties to the arbitration agreement or the invalidity of the agreement itself(.) is based on the principle that arbitration agreements need to be valid to be enforceable. Courts have also generally upheld the separability presumption with regards to the validity of the arbitration agreement where the underlying contract is invalid.[54] The challenge on the lack of capacity is usually at the start of the proceedings.[55] In *Republic of Poland v. Saar Papier Vertreibs GmbH*, it was held that a party may lose the chance to challenge on the ground of capacity if it fails to challenge on this basis early in the arbitral proceedings.[56] Since the Model law does not define what is meant by incapacity, generally applicable rules regarding capacity which are consistent with the approach to the validity of

[54] Gary B Born (n 46) 5812.
[55] Suryansh Singh Kushwah, Shreyansh Goyal and Neeral Jain, 'Foreign Awards in International Commercial Arbitration: Recognition, Enforcement and Challenges to an Award' (2017) Special Edition Indian Journal of Law and International Affairs 61, 69–70.
[56] Republic of Poland v Saar Papier Vertriebs GmbH (Federal Court of Justice, 20 September 2000).

contracts under Articles II and V are applied by the national courts.[57] An instance of invalidity was seen in the case of *Fougerelle SA (France) v. Ministry of Defense of Syrian Arab Republic*, the court refused to enforce the two ICC awards on the basis that they were nonexistent.[58] This finding was based on the violation of the Syrian law which mandated the "preliminary advice" of the council of states for referring such a dispute for arbitration.

Article 36(1)(a)(ii) lays down that the award may be refused enforcement where due process is not followed. It is premised on the principle that each party should have a fair opportunity to present its case.[59] A catena of decisions have established that it is not the Court's prerogative to enforce a high threshold regarding due process as the provision merely envisages a fair hearing for the parties. The Singapore Court of Appeal (Upper case “A”)has held that due process does not require that the tribunals sacrifice efficiency for the hearing of parties’ unreasonable demands.[60] Courts have repeatedly held that only a significant and material mistake would lead towards the successful application of this ground.[61] For instance, in *Kanoria v. Guinness*, the English Court of Appeal laid down that the fact that the respondent was unable to present its case owing to serious illness attracted this ground as it was a violation of due process. Overall, courts have been reluctant to hold this ground and refuse enforcement.[62]

Emergency arbitration is a fast-paced process; hence the applicability of this exception may increase. However, arbitral institutions worldwide have laid down that the arbitrator, when devising the arbitration schedule must give adequate time for the respondent. Thus, the requirement for "fair" allocation of time is ordinarily fulfilled.

Article 36(1)(a)(iii) states that the award may be refused enforcement where it deals with a subject matter not falling within the terms of submission or is beyond the scope of submission. The scope of interference of the courts under this exception is limited to deciding whether the tribunal had the power to adjudicate on the issue at hand and not whether it had adjudicated

[57] Gary B Born (n 46) 5838.
[58] Fougerollem SA v Ministry of Defense of Syria (Damascus Administrative Tribunal, 1990) XV Yearbook Commercial Arbitration 515 (Syria).
[59] Iran Aircraft Industries v Avco Corporation 980 F2d 141 (2d Cir 1992); Minmetals Germany v Ferco Steel (1999) XXIV Yearbook Commercial Arbitration 739; Restatement of the US Law of International Commercial and Investor-State Arbitration § 4-11 comment e (2019).
[60] China Machine New Energy Corp v Jaguar Energy Guatemala LLC [2020] SGCA 12 [97], [103] (Singapore).
[61] Gary B Born (n 46) 5884.
[62] Kanoria and others v Guinness [2006] EWCA Civ 222.

correctly.[63] It applies where there is an "excess of jurisdiction" exercised by the tribunal. It may occur in instances where the tribunal grants a relief requested by neither of the parties, adjudicates a matter beyond the submission or where the decision exceeds the scope of the underlying arbitration agreement.[64] The courts have usually accorded deference to the tribunal regarding instances where it allegedly grants relief requested by neither of the parties or adjudicates a matter beyond submission.[65] This is in line with the word "contemplation" used by the Model law leading to the court necessarily looking at the foreseeable scope of matters which may arise from the submission. Hence, a rigid stance is not taken. Regarding the aspect on exceeding the underlying arbitration agreement, courts have considered the underlying agreement and its terms and conditions to see if the dispute is not contemplated.[66] It may also look at subsequent agreements between the parties to ascertain their intent. Usually where the parties have agreed that arbitrators have the competence to "finally" resolve disputes over the scope of the arbitration clause, there is minimal judicial interference.[67]

Article 36(1)(a)(iv) lays down that nonadherence to the agreement of the parties or violation of the laws of the seat while constituting the tribunal is a ground for refusal. This exception promotes party autonomy in International Arbitration by mandating that the choice of seat by the parties is paramount. The constitution of the arbitral tribunal must be as per the agreement between the parties. The agreement includes both express and implied terms.[68] The exception becomes applicable upon a material violation of the agreement. The arbitration agreement overrides the law of the seat as well, however noncompliance with the law of the seat when it is not in conflict with the provisions of the agreement may also lead to non-recognition of the award.[69]

2. Other grounds under Article 17I(1)(a)

There are two further grounds under this article. Firstly, 17I(1)(a)(ii) lays down that the award may be refused enforcement where the where the order of security for the issuance of the award

[63] Gary B Born (n 46) 5924.
[64] *Ibid,* at 5925.
[65] *First Investment Corp v Mawei Shipbuilding (Supreme People's Court of China, Min Si Ta Zi No 35, 2007).*
[66] Esplosivi Industriali SpA v L-3 Fuzing & Ordnance Systems 843 F Supp 2d 509, 517 (D Del 2012).
[67] Gary B Born (n 46) 5929.
[68] *Ibid,* at 5937-5939.
[69] *Ibid,* at 5952.

was not complied with. The conventional practice is that the tribunal gives immediate effect to the order while giving the party a period to provide security. Since the word "decision" is used in the provision, the scope is not limited to merely awards but includes orders and interim measures as well.[70]

Secondly, Article 17I(1)(a)(iii) allows the court of the court to suspend or terminate the award according to the law of the place where the arbitration takes place or the law under which the interim measure was granted. Where an award is terminated under either of the two cases, it may be refused enforcement or recognition as well. The reference to the law of the place or the law governing the interim measure refers to the lex arbitri and the same was borrowed from Article 36(1)(a).[71]

3. ARTICLE 17I(1)(B): GROUNDS WHERE THE COURT MAY INTERFERE OF ITS OWN MOTION

The second category includes the grounds which the court may interfere of its own motion. They allow the court to firstly modify the award to for the purpose of enforcement. Secondly, the court may refuse enforcement where the subject matter of the award is inarbitrable. Thirdly, the violation of the public policy of India also entitles the court to refuse enforcement. All three grounds deal with contentious issues in the Indian Arbitration landscape consequently they are explored in greater depth as compared to the first set of grounds. Ultimately the author advocates for a narrow scope of interference by Courts over here as well.

a. Modification

Article 17I reads that "Where The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance."[72]

[70] Howard M Holtzmann and others, A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary (2015) 187.
[71] *Ibid.*
[72] UNCITRAL Model Law (n 44) art 17I.

India does not permit the modification of an arbitral award by a court.[73] This question has been extensively debated within the context of Section 34 of the act which only allows the court to set aside the award. The court has taken a recourse to its power to do complete justice under Article 142 of the constitution to modify arbitral awards, however it cannot be used in a routine manner.[74] Jurisdictions like England, Singapore, U.S.A and Australia have expressly given the court powers to modify the arbitral award, subject to strict limitations.[75] Singapore recognizes modification of emergency awards owing to their statutory recognition as arbitral awards. In India, the Viswanathan committee recommended granting the courts this power only in exceptional circumstances to further the ends of justice.[76]

This article contends that believes that this addition will be supremely beneficial for emergency arbitration. In light of the prevailing confusion, it would be desirable if the legislature decides to expressly lay down that the court will have the power to modify emergency awards to avoid further litigation. This will give the court powers to modify the award without delving into the merits. It will provide the ideal balance between the two extremes of de novo consideration and noninterference.

b. Arbitrability

Arbitrability refers to whether the matter can be decided upon by an arbitral tribunal.[77] The test laid down in *Booz Allen* stated that generally actions in rem are not arbitrable whereas actions in personam are arbitrable.[78] This differentiation is based the principle that arbitration being a

[73] Urvashi Misra and Natasha Singh, 'To Vary or Not To Vary: The Future of Modification of Arbitral Awards in India' (Kluwer Arbitration Blog, 24 December 2024) <https://arbitrationblog.kluwerarbitration.com/2024/12/24/to-vary-or-not-to-vary-the-future-of-modification-of-arbitral-awards-in-india/\> accessed 12 March 2025.
[74] Hindustan Zinc Ltd v Friends Coal Carbonization 2006 AIR SCW 2146 (India); M/S Oriental Structural Engineers Pvt Ltd v State of Kerala AIR 2021 SC 2031 (India); Royal Education Society v Lis (India) Construction Co Pvt Ltd AIR 2009 SC 1650 (India); Vedanta Ltd v Shenzhen Shandong Nuclear Power Plant AIR 2018 SC 4773 (India).
[75]Arbitration Act 1996 (n 32) ss 67–69; Arbitration Act (Cap 10, Singapore, 2001) s 49; 9 USC s 11 (1925); Model Commercial Arbitration Act 2010 (Australia) s 34A.
[76] T K Viswanathan Committee, *Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to Make it Alternative in the Letter and Spirit* (7 February 2024) 23 (India).
[77] Harshad Pathak and Pratyush Panjwani, *'The Arbitrability Doctrine and Tribulations of Tribunalization'* (2021) 10(1) Indian Journal of Arbitration Law 72.
[78] Booz Allen & Hamilton Inc v SBI Home Finance Ltd (2011) 5 SCC 532 [27] (India).

private mode of dispute resolution cannot decide disputes which affect the world at large. *Booz Allen* also gave an indicative list of 6 categories of disputes which are inarbitrable. Subsequent caselaw on intellectual property disputes led to additions to this list. Some courts permitted a party to file a copyright infringement claim against another.[79] Other courts, relying on the fact that such a decision would inevitably include adjudication on whether the person owned copyright and hence deciding a matter in rem, prohibited the same from being arbitrable.[80] This scope was curtailed by the decision in *Himangini Enterprises* which prohibited arbitration of disputes arising under the Transfer of Property Act despite there being no express ban against the same.[81]

Finally, the Supreme Court in *Vidya Drolia* laid down the position of law followed presently regarding arbitrability. It upheld the in rem versus in personam classification and explored it further.[82] It laid down that subordinate rights in personam arising from actions in rem are arbitrable. Thus, copyright disputes involving the suing of another party are arbitrable, however disputes whose main subject matter is regarding the ownership of copyright are not.[83] Additionally, it also held that actions affecting third party rights, having an erga omnes effect, disputes involving inalienable sovereign and public interest functions are inarbitrable. It also held as inarbitrable where the subject matter of the dispute " is expressly or by necessary implication non- arbitrable as per mandatory statute(s)."[84]

The scope of interference while ascertaining arbitrability of the dispute should be limited to a prima facie analysis of the claims.[85] Emergency arbitration, by its nature occurs before the constitution of the final arbitral tribunal. Section 16 of the Indian Arbitration act recognizes the principle of kompetenz kompetenz, i.e. the power of the tribunal to determine its own jurisdiction. Where the court delves into the merits of the claim at a preliminary stage, there is a risk of usurpation of this power of the tribunal.[86]

[79] Eros International Media Ltd v Telemax Links India Pvt Ltd 2016 SCC OnLine Bom 2179 [14] (India); Lifestyle Equities CV v QDSeatoman Designs Pvt Ltd 2017 SCC OnLine Mad 7055 (India).
[80] The Indian Performing Right Society Ltd v Entertainment Network (India) Ltd 2016 SCC OnLine Bom 5893 (India).
[81] Himangni Enterprises v Kamaljeet Singh Ahluwalia (2017) 10 SCC 706 [24] (India).
[82] Vidya Drolia v Durga Trading Corporation (2021) 2 SCC 1 (India).
[83] *Ibid* para 48.
[84] *Ibid* para 79.
[85] *Ibid* paras 76.1–76.4.
[86] Ifrah Shaikh and CAM Corporate Team, 'How Much is Too Much? Supreme Court on the Scope of Examination of Arbitration Agreement at the Pre-Arbitral Stage' (Cyril Amarchand Mangaldas Blog, 11 June 2021) <https://corporate.cyrilamarchandblogs.com/2021/06/how-much-is-too-much-supreme-court-on-scope-

An analogy may be drawn to the jurisprudence around Sections 8 and 11, as both also involve interference by courts before the constitution of the arbitral tribunal.[87] Section 8 lays down the process of reference by courts to arbitration the matters before it and Section 11 deals with the appointment of arbitrators and both presuppose a valid claim and an arbitrable dispute. In *Vidya Drolia* itself, the court recognized the need for parity between Sections 11 and 8 regarding the scope of court interference during enforcement.[88] It applied the prima facie standard to both the sections to see the existence of the arbitration agreement.[89] Since existence is inextricably linked to the validity of the agreement, the overall scope under both the sections remains the prima facie standard. Justice Ramanna, in his concurring opinion underlined the scope of the prima facie examination to the formal requirements of writing, communication and competency. Arbitrability was also to be judged by the same metric. The case of *Pravin Electricals* provided further clarity with respect to arbitrability. Here, the Court noted that the arbitral tribunal is better suited to deal with the cases where there was substantial factual enquiry and evidentiary issues which require a deep examination.[90] Thus, the scope of interference at the stage of enforcement should be limited to a prima facie analysis keeping in line with the existing jurisprudence.

c. Public policy

The current position of law regarding the application of the public policy exception to foreign awards has undergone a tremendous positive shift over the past decade. The Hon'ble Supreme Court in *Shri Lal Mahan Ltd. v. Progetto Grano Spa* laid down that "public policy" as applicable to foreign awards should be construed more narrowly than domestic awards.[91] It laid down additional guidelines regarding court interference at the enforcement stage in the *Vijay Karia* case. The case prohibited a consideration of the merits of the claim, entailing a prohibition from assessing the fairness of the conclusions reached, interpretation of the agreement and valuation.[92]

of-examination-of-arbitration-agreement-at-pre-arbitral-stage/\> accessed 12 March 2025; Vidya Drolia (n 80) [237].
[87] Arbitration and Conciliation Act 1996 (n 14) ss 8 and 11.
[88] Vidya Drolia (n 80) [237].
[89] *Id.*
[90] Pravin Electricals Pvt Ltd v Galaxy Infra and Engineering Pvt Ltd (2021) 5 SCC 671 [27] (India).
[91] Shri Lal Mahal Ltd v Progetto Grano Spa (2014) 2 SCC 433 [25] (India).
[92] Vijay Karia v Prysmian Cavi e Sistemi Srl (2020) 11 SCC 1 [37] (India).

The sole grounds where the court may interfere in a foreign award are where the award violates the fundamental policy of India and vitiates the basic notions of justice and morality.[93] *Vijay Karia* defined the term "fundamental policy" as referring to the core values of India's public policy as a nation, finding expression not only in statutes but also the time honored and venerated principles followed by the courts.[94] Thus, mere statutory violation is not a ground for non-enforcement.

The second ground earlier used to be limited to just morality and justice. The qualifier "basic notions of" was added in the 2015 amendment to further curtail its scope.[95] The court highlighted that failure to decide an issue which goes to the root of the matter or failure to decide a claim or counter claim in its entirety may have the effect of shocking the court's conscience and consequently violating the basic principles of justice and morality.[96]

While Section 48 is inapplicable to emergency awards, it is arguable that the same standards should be applicable to them. Since "public policy" under Section 48 constitutes international public policy, it is based on Article 36 of the model law. As mentioned earlier, the constant reference to Article 36 under Article 17 is for the reason of uniformity of interpretation, this entails that the interpretation of Article 17 be the same as well.[97] Thus, a narrow definition of public policy is suitable for the enforcement of emergency awards in India under Article 17I of the Model Law.

VII. CONCLUSION

Emergency Arbitration has grown to be a cornerstone of international arbitration. The rules of most of the important arbitral institutions as well as the hubs of arbitration recognize the process. The *Amazon NV* decision has provided a breakthrough for India seated emergency

[93] Dushyant Dave, 'Chapter 11: Recognition and Enforcement of Foreign and Domestic Arbitral Awards: Role of National Courts' in Dushyant Dave, Martin Hunter and others (eds), Arbitration in India (Kluwer Law International 2021) 235–260.
[94] *Id.*
[95] *Id.*
[96] *Ibid* at 248.
[97] See Section IV above.

arbitration. However, the next step should be to recognize foreign seated emergency arbitration. This aligns with India's vision to promote institutional arbitration. The present state of law in India is conducive towards emergency arbitration, as minimal changes are required to adopt the same. Incorporating Articles 17H and I in the Indian Arbitration Act under Section 9 or under a separate chapter for emergency arbitration should be the next step to bring India's arbitration landscape in step with the world.

Bibliography

Primary Sources:

International Treaties and National Legislation

- Arbitration Act 1996 (United Kingdom)
- Arbitration and Conciliation Act 1996 (India)
- Arbitration and Conciliation (Amendment) Act 2015 (India)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention)
- International Arbitration Act 1994 (Singapore)
- UNCITRAL Model Law on International Commercial Arbitration 1985 (with 2006 amendments)

Table of Cases

- *Amazon.com NV Investment Holdings LLC v Future Retail Ltd* (2022) 1 SCC 209
- *Ashwani Minda and another v U-Shin Ltd and another* [2020] SCC OnLine Del 721
- *Booz Allen & Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532
- *Braspetro Oil Services Company – Brasoil v The Management and Implementation Authority of the Great Man-Made River Project* (Cour d'appel de Paris, 1 July 1999)
- *CE International Resources Holdings LLC v SA Minerals Ltd Partnership* 2012 US Dist LEXIS 176158 (SDNY 2012)
- *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] SGCA 12
- *Eros International Media Ltd v Telemax Links India Pvt Ltd* [2016] SCC OnLine Bom 2179

- *Esplosivi Industriali SpA v L-3 Fuzing & Ordnance Systems* 843 F Supp 2d 509 (D Del 2012)
- *Fougerollem SA v Ministry of Defence of the Syrian Arab Republic* (French Court of Cassation, 1990) XV YB Com Arb 515
- *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch)
- *Hall Steel Co v Metalloyd Ltd* 492 F Supp 2d 715 (WD Pa 2007)
- *Himangni Enterprises v Kamaljeet Singh Ahluwalia* (2017) 10 SCC 706
- *Hindustan Zinc Ltd v Friends Coal Carbonisation* (2006) 4 SCC 699
- *Iran Aircraft Industries v Avco Corp* 980 F2d 141 (2d Cir 1992)
- *Island Creek Coal Sales Co v Gainesville* 729 F2d 1046 (6th Cir 1984)
- *Kanoria and others v Guinness* [2006] EWCA Civ 222
- *Lifestyle Equities CV v QDSeatoman Designs Pvt Ltd* [2017] SCC OnLine Mad 7055
- *M/S Oriental Structural Engineers Pvt Ltd v State of Kerala* (2021) 6 SCC 150
- *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] XXIV YB Com Arb 739
- *Pravin Electricals Pvt Ltd v Galaxy Infra and Engineering Pvt Ltd* (2021) 5 SCC 671
- *Publicis Communication v True North Communications Inc* 206 F3d 725 (7th Cir 2000)
- *Raffles Design International India Pvt Ltd v Educomp Professional Education Ltd* [2016] SCC OnLine Del 5521
- *Republic of Poland v Saar Papier Vertriebs GmbH* (Federal Court of Justice, 20 September 2000)
- *Royal Education Society v LIS (India) Construction Co Pvt Ltd* AIR 2009 SC 1650
- *Shri Lal Mahal Ltd v Progetto Grano SpA* (2014) 2 SCC 433

- *Société Nationale des Pétroles du Congo and République du Congo v TEP Congo* (Cour d'appel de Paris, 25 September 2008)
- *The Indian Performing Right Society Ltd v Entertainment Network (India) Ltd* [2016] SCC OnLine Bom 5893
- *Vedanta Ltd v Shenzhen Shandong Nuclear Power Construction Co Ltd* AIR 2018 SC 4773
- *Vidya Drolia v Durga Trading Corpn* (2021) 2 SCC 1
- *Vijay Karia v Prysmian Cavi e Sistemi SRL* (2020) 11 SCC 1

Secondary Sources:

Books and Treatises

- Blackaby N and others, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022)
- Born G, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021)
- Malhotra OP, *The Law and Practice of Arbitration and Conciliation* (4th edn, Thomson Reuters 2020)
- Yesilirmak A, *Interim and Conservatory Measures in Voluntary Arbitration* (Kluwer Law International 2015)

Journal Articles

- Al-Mulla F, ‘Emergency Arbitration: A Comparative Analysis of Enforcement Mechanisms’ (2022) 39(2) *Journal of International Arbitration* 215
- Pathak H and Panjwani P, ‘The Arbitrability Doctrine and Tribulations of Tribunalization’ (2021) 10(1) *Indian Journal of Arbitration Law* 72
- Scherer M, ‘The New 2021 ICC Rules of Arbitration’ (2021) 38(1) *ASA Bulletin* 12
- Shrivastava A, ‘Emergency Arbitration and India—A Long Overdue Friendship’ (2021) 10(1) *Indian Journal of Arbitration Law* 98

Institutional Rules

- HKIAC Administered Arbitration Rules 2024
- ICC Rules of Arbitration 2021
- JCAA Commercial Arbitration Rules 2021
- LCIA Arbitration Rules 2020
- SIAC Arbitration Rules 2016

Official Reports and UNCITRAL Materials

- Law Commission of England and Wales, *Review of the Arbitration Act 1996* (Law Com No 413, 2023)
- Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Report No 246, 2014)
- UNCITRAL, *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006* (2008)
- UNCITRAL, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012)

- UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (2016 edn)

Online Commentary and Blogs

- Misra U and Singh N, 'To Vary or Not To Vary: The Future of Modification of Arbitral Awards in India' (*Kluwer Arbitration Blog*, 24 December 2024) https://arbitrationblog.kluwerarbitration.com/2024/12/24/to-vary-or-not-to-vary-the-future-of-modification-of-arbitral-awards-in-india/ accessed 24 March 2026

- Queen Mary University of London and White & Case, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (2021) https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/ accessed 24 March 2026

- Shaikh I and CAM Corporate Team, 'How Much is Too Much? Supreme Court on the Scope of Examination of Arbitration Agreement at the Pre-Arbitral Stage' (*Cyril Amarchand Mangaldas Blog*, 11 June 2021) https://corporate.cyrilamarchandblogs.com/2021/06/how-much-is-too-much-supreme-court-on-scope-of-examination-of-arbitration-agreement-at-pre-arbitral-stage/ accessed 24 March 2026

Can Autonomous Weapons Systems comply with the proportionality standard in international humanitarian law?

Celina Deng

Abstract

The widespread use of Autonomous Weapons Systems (AWS) in modern warfare raises issues of compliance under international humanitarian law. This article examines whether AWS can satisfy the proportionality principle as codified in Article 51(5)(b) of Additional Protocol I to the Geneva Conventions. It argues that it cannot. The analysis proceeds on three grounds. First, the current legal framework governing proportionality is insufficiently clear, as key terms such as "military advantage," "injury to civilians," and "excessive" remain deeply ambiguous. Second, even if the standard were clarified, proportionality is inherently subjective and qualitative in nature, requiring incommensurable value judgements that cannot be undertaken by AWS. Current proposals for incorporation are shown to be inadequate. Third, contemporary AWS are ill-equipped to apply proportionality due to systemic unpredictability, algorithmic bias, and decontextualisation inherent in machine learning. This article concludes by evaluating potential responses available to states while noting the political obstacles to reform. Until meaningful legal and technological developments are achieved, AWS should not be considered lawful under international humanitarian law.

Introduction

As drone usage grows more common, Autonomous Weapons Systems (AWS) have become the new frontier of technology in war.[1] AWS systems 'The Gospel', 'Lavender', and 'Where's Daddy?' are deployed in Israel to target Hamas operatives.[2] Meanwhile, the US, China, Russia, and other major international powers are all developing their own AWS to aid military capacity.[3]

Despite the proliferation of AWS, its compliance with international humanitarian law is heavily contested.[4] This essay will assess whether AWS can comply with the proportionality principle (proportionality) in international law, ultimately arguing that it cannot. Section 1 will demonstrate that the current state of law is too ambiguous to be accurately determined for application in armed conflicts. Section 2 will argue that the subjective and qualitative features inherent in proportionality mean it is fundamentally incompatible with AWS. Section 3 will suggest that even if the standard can be implemented, contemporary AWS cannot accurately apply it. Finally, Section 4 will propose suggestions to ensure compliance with international humanitarian law, either through the adoption of new treaties addressing AWS or their prohibition from warfare altogether.

There is no accepted international definition of what constitutes an autonomous weapon.[5] From academic sources, AWS can be defined as having two key features. First is the ability to operate independently and engage targets without being programmed to specifically do so, and second is the capability to make discretionary decisions.[6] It is therefore distinct from automated systems, which are predictable within the range they are programmed.[7] The vast majority of AWS also contains artificial intelligence capable of machine learning. This is, in

[1] N Robins-Early, 'AI's 'Oppenheimer moment': autonomous weapons enter the battlefield', *The Guardian* (London, 14 Jul 2024)
[2] Y Serhan, 'How Israel Uses AI in Gaza—And What It Might Mean for the Future of Warfare' *Time (18 Dec 2014)* 1; Y Abraham, ''Lavender': The AI machine directing Israel's bombing spree in Gaza', *+972 Magazine* (Israel-Palestine, 3 Apr 2024).
[3] K Woodcock, 'Human/Machine(-Learning) Interactions, Human Agency and the International Humanitarian Law Proportionality Standard' (2024) 38(1) Global Society 100, 102; M Newton, 'How are Drones Changing War? The Future of the Battlefield' (*Centre for European Policy Analysis*, 3 Nov 2025) <https://cepa.org/article/how-are-drones-changing-war-the-future-of-the-battlefield/> accessed 23 Jan 2025.
[4]
[5] E Winter, 'Autonomous Weapons in Humanitarian Law: Understanding the Technology, Its Compliance with the Principle of Proportionality and the Role of Utilitarianism' (2018) 6(1) GroJIL 183, 185.
[6] J Kellenberger, 'International humanitarian law and new weapon technologies' (Keynote address, 34th Round Table on Current Issues of International Humanitarian Law, San Remo, 8–10 September 2011) 5.
[7] M Wagner, 'The Dehumanization of International Humanitarian Law: Legal, Ethical, and Political Implications of Autonomous Weapon Systems' (2014) 47(5) Vanderbilt Journal of Transnational Law 1371, 1383.

turn, defined as processing data to gradually establish patterns to apply to specific circumstances.[8]

This essay only concerns to the standard of proportionality. It will exclude mentions of humanity from the Martens Clause, as well as elements of targeting inherent within proportionality. Individual criminal responsibility will only be mentioned where relevant to proportionality.

(1) The law on proportionality is not clear enough

For proportionality to be incorporated into AWS, its requirements must first be determined. This paper will argue that the current state of law does not provide the clarification necessary for this purpose. It will analyse treaties, commentary on the treaties, and case law in turn.

(i) Proportionality in Additional Protocol I

Proportionality is set out in Article 51(5)(b) of the Additional Protocol I to the Geneva Conventions. It prohibits attacks

> "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[9]

It is also a rule in customary international law.[10] The rule in AP I applies only to international armed conflicts, whereas the customary rule applies to both international and national armed conflicts.[11] Where the proportionality standard is not met, there is an obligation to either refrain from launching the attack, or to suspend or cancel it.[12] There is also an obligation to review the development of new weapons to ensure their employment complies with

[8] K Woodcock, 'Human/Machine(-Learning) Interactions, Human Agency and the International Humanitarian Law Proportionality Standard' (2024) 38(1) Global Society 100, 102.
[9] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted on 8 June 1977) art 51(b). Hereafter referred to as "proportionality".
[10] ICRC, *Customary International Humanitarian Law* (CUP, 2005) 46.
[11] ibid
[12] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted on 8 June 1977) Art 57(2)(a)(iii); (2)(b).

proportionality.[13] It is associated with the prohibition of indiscriminate attacks and reflective of the doctrine of double effect.[14]

From the text in AP I, several conclusions can be drawn. First, the incidental harm to civilians can only be justified by advantages of a military nature.[15] Second, this must be concrete and direct rather than hypothetical or speculative.[16] Foreseeable second and third-order effects must also be considered, though the extent is not stated.[17] Third, proportionality relies on contextual judgement rather than any rules-based, objective criteria.[18]

(ii) Official Commentary on AP I

Commentary on AP I recognises that proportionality is vague. The ICRC notes the "imprecise wording and terminology", which necessitates "complete good faith on part of the belligerents" and the "desire to conform with the general principle of respect for the civilian population" for the intended effect of protection.[19] The commander must use "common sense and good faith" in the decision.[21] Additionally, "Concrete and direct" necessitates the advantage be substantial and relatively close.[22] "Substantial" and "relatively close" are *prima facie* ambiguous terms and there is insufficient clarification.

(iii) Case law

Though not binding, rulings by international courts may assist in the interpretation of the primary sources.[23] Through key cases, I will evaluate four different elements in proportionality: (a) military advantage, (b) harm to civilians, (c) the standard of the reasonable military commander, and (d) excessiveness. The first two elements, military advantage and civilian injury, are drawn from the analysis of AP I. The following two will be

[13] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted on 8 June 1977) Art 36.
[14] P Perišić and M Tomljenović, 'Legal Permissibility of Autonomous Weapon Systems, with Specific Reference to the Principles of International Humanitarian Law' (2024) 61(4) Collected Papers of the Faculty of Law in Split 531, 543.
[15] N Melzer, *International Humanitarian Law* (ICRC 2016) 101.
[16] ibid
[17] ibid
[18] P Perišić and M Tomljenović, 'Legal Permissibility of Autonomous Weapon Systems, with Specific Reference to the Principles of International Humanitarian Law' (2024) 61(4) Collected Papers of the Faculty of Law in Split 531, 543.
[19] ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969 (Martinus Nijhoff Publishers 1987) para 1977 and 1979.
[21] ibid para 2208
[22] ibid para 2209
[23] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 73.

identified from case law. This paper concludes that each element lacks adequate clarity for a consistent application of proportionality.[24]

The status of proportionality as a rule of customary law was reinforced in the ICJ ruling in *Nuclear Weapons Advisory Opinion*, where the United Nations General Assembly asked the court to consider the legality of nuclear weapons. Judge Higgins, dissenting, stated that proportionality was customary law and the military advantage must be related to either the survival of the state or the prevention of vast and severe suffering to justify its deployment.[26] Judge Guillaume, in a separate opinion, reiterated that the military advantage had to be "very huge", while Vice-President Schwebel, in a dissenting opinion, listed examples where nuclear weapons could be used without violating proportionality, such as in naval warfare.[27] The consensus of the court was that the military advantage must be "huge" in this context, but beyond this, no general principles were assessed in detail. The same applies to civilian injury, as Vice-President Schwebel did not provide clarification beyond the examples.

The extent of incidental harm was clarified by the ICTY Trial Chamber in *Kupreškić.*[28] Six were persecuted under Article 5 of the Rome Statute for their part in the massacre in Ahmici. The Trial Chamber stated that proportionality required consideration of any "incidental (and unintentional) damage to civilians", while noting that the provision left a wide margin of discretion to belligerents.[29] Applying the test, it ruled that "even if it can be proved that the Muslim population of Ahmici was not entirely civilian…still no justification would exist for widespread and indiscriminate attacks against civilians".[30] Consequently, the judgment did address the principle of proportionality but did so in vague terms, offering limited meaningful clarification on the elements. For example, the military advantage to be gained was identified as "some armed elements" within the Muslim population of Ahmici.[31] And while civilian injury included unintentional damage, the type of damage was left unaddressed.[32] Nor did the judgment provide detailed consideration of the standard to be used in the application of

[24] Note that the Eritrea-Ethiopia Claims Commission cases will not be considered as the charges on proportionality were dismissed due to insufficient proof. See J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023 80.
[26] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep. 1996 587
[27] ibid 289, 320-322
[28] Prosecutor v. Kupreškić et al. (Trial Judgement) (2000) ICTY T-95-16-T. The Appeals Chamber did not mention proportionality.
[29] Prosecutor v. Kupreškić et al. (Trial Judgement) (2000) ICTY T-95-16-T para 524.
[30] ibid para 513
[31] ibid
[32] ibid para 24

proportionality, or determine why exactly the attack was excessive beyond stating there was "no justification". It is submitted that the judgment only clarified the law to the extent it explicitly included incidental damage.

The Trial Chamber of the ICTY set a standard for proportionality in *Galić*.[33] General Galić was prosecuted under Article 7 of the Rome Statute in relation to his actions during the siege of Sarajevo by the Sarajevo-Romanija Corps.[34] In the obiter dicta, the Trial Chamber stated that the standard to be used was that of "a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her". [35] It also noted that military advantage does not refer to actual damage but that which is "anticipated".[36] As the Trial Chamber did not have to decide on the issue, only general principles were mentioned.[37] Thus, while the standard that applied to proportionality was established, there was no clarification of military advantage and civilian injury other than reaffirming what was set out in the ICRC Commentary. Note that the standard of the reasonably well-informed person itself leaves room for interpretation and focusses more on the use of available information rather than the consideration of factors.[38] There were no general principles related to excessiveness.

Prlić, which concerned the destruction of the Old Bridge of Mostar, presented the most in-depth consideration of proportionality.[39] The Trial Chamber emphasised that the Old Bridge was "essential" to the belligerents for its activities on the front line, although its destruction put the residents of the nearby enclave in virtually total isolation and bore significant psychological impacts due to its religious significance.[40] Thus, it was held as being disproportionate to the level of advantage gained as the damage to the civilian population was "indisputable and substantial".[41] The majority in the Appeals Chamber ruled, *inter alia*, that

[33] Prosecutor v. *Galić* (Trial Judgement and Opinion) (2003) T-98-29-T. The Appeals Chamber dismissed the appeal because, *inter alia*, no mention is made for indiscriminate or disproportionate attacks as the basis for conviction.
[34] The addition of "clearly" in the Rome Statute is submitted not to be of material importance when considering the standard of proportionality. See J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 251.
[35] Prosecutor v. *Galić* (Trial Judgement and Opinion) (2003) T-98-29-T para 58.
[36] Prosecutor v. *Galić* (Trial Judgement and Opinion) (2003) T-98-29-T 26.
[37] I Henderson and K Reece, 'Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2018) 51 Vanderbilt Journal of Transnational Law 835, 838.
[38] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 73 Boogaard 243.
[39] Prosecutor v. Prlić et al. (Judgement and Opinion) (2013) IT-04-74-T.
[40] ibid para 1583
[41] ibid para 1584

since the Old Bridge was a military target and its destruction offered a definite military advantage, it could not in and of itself be considered as unjustified wanton destruction.[42]

In a dissenting opinion, Judge Pocar stated that the majority had neglected to address incidental civilian losses, failing to demonstrate that the Trial Chamber had made an error.[43] I agree with Judge Pocar. There are obvious issues in the application of the proportionality standard in this case. First, both the Trial Chamber and the Appeals Chamber did not engage in determining excessiveness beyond noting the incidental civilian injury in the final calculation.[44] This was likely because the charge was "wanton destruction not justified by military necessity", meaning any military necessity would be sufficient.[46] Second, the Trial Chamber had expanded civilian harm to include emotional damage without stating the criteria for inclusion.[47] This assessment appears to provide an arbitrary approach. Is this limited to diagnosed mental disorders or do fluctuations in mood also count? And why just emotional damage, and not mental injury more broadly? The destruction of the religiously significant Old Bridge could also cause mental injury through threat to religiosity? Third, the Trial Chamber did not identify what standard was used.[48] Was it the reasonably well-informed person? There was no clarification on these elements, nor was there additional consideration of military advantage. Therefore, though certain elements of proportionality were considered, there was not enough elaboration to render a precise application of those elements.

Review

I argue that proportionality, in its current form, is insufficiently clear.

At the outset, the temporal scope of the term "military advantage" is unclear.[49] The ICRC commentary requires it to be "substantial and relatively close".[50] The terms are vague, and there is no clear cut-off limit. The difference in academic opinion underscores the ambiguity. Bothe holds that the advantage must be "concrete", meaning specific and perceptible, and

[42] Prosecutor v. Prlić et al. (Judgement) (2017) IT-04-74-A 172.
[43] Prosecutor v. Prlić et al. (Dissenting Opinion of Judge Fausto Pocar) (2017) IT-04-74-A 6.
[44] Prosecutor v. Prlić et al. (Dissenting Opinion of Judge Fausto Pocar) (2017) IT-04-74-A 83; Prosecutor v. Prlić et al. (Judgement) (2017) IT-04-74-A 172.
[46] Though for our purposes the issue of proportionality is considered to be engaged.
[47] I Henderson and K Reece, 'Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2018) 51 Vanderbilt Journal of Transnational Law 835, 838.
[48] I Henderson and K Reece, 'Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2018) 51 Vanderbilt Journal of Transnational Law 835, 842.
[49] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 233
[50] Y Sandoz, C Swinarski, B Zimmermann and C Pilloud, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969 (ICRC 1987) para 2209.

"direct".[51] Hays-Park criticises this on the basis that it is too limiting and proposes the consideration of long-term advantages.[52] Shamash then rejects this, as the consideration of long-term advantages would reduce the protection afforded to civilians.[53] I broadly align with Shamash, as one of the fundamental principles of international humanitarian law is to protect civilians. But ultimately what is highlighted is the divergence in opinion on the definition of "military advantage". I thus agree with Dinstein that the definition is too vague to justify the lawful use of military tools such as AWS. [54]

Similar gaps in clarity can be seen surrounding the element of "incidental harm". While military advantage must be "concrete and direct", there is no such requirement for indirect harm to civilians. In *Kupreškić* unintentional injury was included. What constitutes unintentional injury is unaddressed, the extent of the effects to be considered is unclear, and the type of harm is left unspecified. Reece and Henderson, as well as Schmitt, note that there is no consensus in either case law or scholarly opinion on the scope of the expected collateral damage.[55]

The lack of clear guidance is especially prominent when it comes to the time frame. Indirect effects are often delayed, but it is uncertain whether this matters and whether an additional causal link is required. Shamash argues that the current customary law focusses on short-term collateral damage and cites the use of proportionality by the US military in Iraq.[56] But the practice of one State cannot reflect general State Practice. Thus, I agree with Reece and Henderson that there is insufficient guidance.[57]

Second, there is also ambiguity surrounding the sort of injury that can be taken into consideration.[58] *Prlić* had considered emotional trauma when determining civilian injury. Winter argues that it was an unwarranted addition as AP I was drafted at a time when mental

[51]M Bothe, KJ Partsch, AW Solf and M Eaton, *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (Leiden: Martinus Nijhoff Publishers 2013) 365.
[52] WH Parks, 'Air War and the Law of War' (1990) 32 AF L Rev 1, 141.
[53] HE Shamash, 'How Much Is Too Much? An Examination of the Principle of Jus in Bello Proportionality' (2005-2006) 2 IDF LR 103, 118.
[54] Y Dinstein, *The Conduct of Hostilities under the Law of International Armed* Conflict (3rd ed, CUP, 2016) 106.
[55] MN Schmitt, *Perspectives on the ICRC Study on Customary International Humanitarian* (1st edition, 2007, Cambridge University Press) 159.
[56] NA Canestaro, 'Legal and Policy Constraints on the Conduct of Aerial Precision Warfare' (2004) 37 Vanderbilt Journal of Transnational Law 431, 464.
[57] I Henderson and K Reece, 'Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2018) 51 Vanderbilt Journal of Transnational Law 835, 854.
[58] E Winter, 'Autonomous Weapons in Humanitarian Law: Understanding the Technology, Its Compliance with the Principle of Proportionality and the Role of Utilitarianism' (2018) 6(1) Groningen Journal of International Law 183, 197.

health was not widely considered and the drafters could not have intended to include it.[59] There could be a counterargument to this, as every reference in AP I on physical health also included mental health.[60] I am inclined to believe that if the protection of health in AP I referred to both physical and mental health, it is plausible that the drafters had intended emotional trauma to be included in civilian injury. The conclusion this essay draws from this is that the law is unclear on this issue. This uncertainty parallels that of proportionality in general, hindering its application in AWS.

Regarding the standard of the reasonable military commander, academic opinion notes two things. First, there is a divergence between scholarly interpretation and the law.[61] The use of the reasonable military commander by different publications diverged from the reasonably well-informed standard in *Galić.*[62] The implication is that a lawyer might hold different opinions compared to a military commander who was trained to focus on the military elements of an attack. Second, the standard itself does not enhance objectivity because the comparison is between two incommensurable elements; the use of the standard only provides value where an attack is clearly disproportionate.[63]. Where the comparison is less stark, it provides no help. This will be further elaborated below.

Finally, there was no metric provided for excessiveness. This essay agrees with van den Boogaard that ICTY judges would usually mention the rule without applying it to the facts of the case.[64] Judges mentioned proportionality but either limited themselves to essentially restating the principle (*Nuclear Weapons),* stating the attack was unjustifiable (*Kupreškić),* or not balancing between both components (*Prlić).* Thus, while opinion is divided on whether there can be a meaningful comparison between incommensurable values, it is submitted that neither AP I, the ICRC Commentary nor the cases provide any guidance.

Thus, there has been insufficient guidance to make the application of proportionality uniform enough to be determined and implemented for the use of AWS.

[59] ibid
[60] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted on 8 June 1977) Art 11.
[61] I Henderson and K Reece, 'Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2018) 51 Vanderbilt Journal of Transnational Law 835, 842.
[62] ibid 845
[63] Y Dinstein, 'The Principle of Distinction and Cyber War in International Armed Conflicts' (2012) 17(2) Journal of Conflict and Security Law 261, 271.
[64] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 77.

(2) Proportionality is inherently subjective and qualitative

This paper submits that proportionality involves so many value determinations that it is meaningfully subjective. And because it requires subjective determination, it reflects qualitative and not quantitative judgement. Even on the basis that the proportionality principle was sufficiently clear, for AWS to comply with the standard, the parameters within which AWS makes decisions must be objective and quantifiable.[65] Therefore, as the proportionality standard is inherently both subjective and qualitative, AWS cannot adequately perform the necessary judgements in order to satisfy any lawful application.

Fundamentally, the determination of excessiveness is subjective. This is because the two values to be compared are incommensurable. This is accurately portrayed by Dinstein, who raises the example of comparing metaphorical apples and oranges.[66] If the comparison was between different advantages or different injuries it could be objective, but where the question is between advantages and injuries, a subjective and qualitative determination must be made to determine the relational value . Although Newton and May attempt to quantify the comparison by reducing military advantage to lives saved in the belligerent home country, it does not take away that the reduction is still a subjective determination.[67] The "comparison is still not between human lives and human lives, because the military advantage of killing different people varies".[68] Thus there is no real alternative to subjectivity.

Assigning values to each component also depends on subjective judgement. To begin with, the value of incidental civilian injury depends on the individual valuation of human life. The standard of an average military commander differs depending on their background and values as well as their culture.[69] The same case applies to damage inflicted on civilian objects. Where there is insufficient information, the foreseeable harm would depend on a subjective selection and assessment of the relevant factors.[70] This also applies for the expected military advantage. How much a reasonable military commander values the different forms of tactical

[65] M Sassoli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' 90 Int'l Stud 308, 332.
[66] Y Dinstein, 'The Principle of Distinction and Cyber War in International Armed Conflicts' (2012) 17(2) Journal of Conflict and Security Law 261, 271.
[67] M Newton and L May, *Proportionality in International Law* (OUP 2014) 285.
[68] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 244.
[69] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 242-243.
[70] See Y Sandoz, C Swinarski, B Zimmermann and C Pilloud, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969 (Martinus Nijhoff Publishers 1987) para 2212 for the various factors.

gains depends on subjective judgement, especially where that military advantage can be considered accumulatively with political, psychological, and economic advantages.[71]

Thus, even if the standard of excessiveness could be precisely determined, which it cannot, assigning value to the components of proportionality still requires subjective judgement. This section now turns to alternative interpretations.

The establishment of an objective standard is supported normatively by Shamash and Waters, who argue that ambiguity benefits the belligerents and not the civilians.[73] This paper does not argue against the normative value of an objective approach. If it were possible, the objective application of proportionality would likely grant stronger protection to civilians.[74] However, that is unlikely to be an accurate description of reality.

Some posit there is an objective standard. Newton and May argue that the prolonged use of proportionality has resulted in a clear "fixed standard" setting objective limits on the discretion of commanders.[75] However, as stated above, the use of proportionality in international law has not substantially clarified the principle. Moreover, there is not and cannot be a clear fixed standard surrounding the components. Given the unpredictability on the battlefield, discretionary judgement is required to determine compliance. I submit that the infinite permutation of circumstances is also why simply assigning numeric values to each circumstance would not work, as there are simply too many. [76] Ultimately, both the ambiguity in law and the reality of warfare demonstrates that there is no such objective standard.

Other scholars suggest an objective standard for proportionality could, to a limited extent, be utilised by attempting to quantify its components. For instance, Schmitt and Thurnher argue that AWS could be programmed to follow Collateral Damage Estimation Methodology (CDEM), which is a five-stage analytical framework currently used to assess collateral

[71] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 18.
[73] HE Shamash, 'How Much Is Too Much? An Examination of the Principle of Jus in Bello Proportionality' (2005-2006) 2 IDF LR 103, 135; TW Waters, 'Unexploded Bomb. Voice, Silence, and Consequence at the Hague Tribunals: A Legal and Rhetorical Critique' (2003) 35 NYU J Int'l L & Pol 1015, 1073.
[74] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 22.
[75] M Newton and L May, *Proportionality in International Law* (OUP, 2014) 3.
[76] See E Winter, 'Autonomous Weapons in Humanitarian Law: Understanding the Technology, Its Compliance with the Principle of Proportionality and the Role of Utilitarianism' (2018) 6(1) GroJIL 183, 201 for the argument that a value can be placed on lives.

damage in the intended area of attack,[77] based on objective and scientific data.[78] However, its current functionality is limited to aiding human military commanders in determining an attack.[79] Such limited adoption calls into question whether CDEM can satisfactorily quantify civilian injury. Even if it were possible to quantify civilian injury to an adequate standard, CDEM does not assess what constitutes excessive collateral damage and military advantage.[80] Thus, even if CDEM is capable of autonomously calculating the value of civilian injury, which is dubious, it only addresses one part of the whole and any extension would have to deal with the components of military advantage and excessiveness. Quantifying these two elements is considerably more challenging.

Winter argues that proportionality is a permutation of utilitarianism, as a decision is made "when the tendency it has to augment the happiness of the community is greater than any it has to diminish it".[81] This essay rejects the fundamental premise of the argument. Utilitarianism concerns situations where a decision is made based on the maximisation of happiness.[82] Proportionality, on the other hand, assesses whether a certain decision fulfils a preset criterion. Thus, a decision can satisfy proportionality without having to adhere to utilitarianism. On this basis, Winter's statements can be more accurately understood as arguing for the quantification of the factors, as evidenced by the focus on determining the precise value of each component.[83] The arguments above, that neither the standard of excessiveness nor the value of military advantage nor civilian injury can be objective or quantified, therefore apply.

A fourth interpretation is that it is objective with subjective elements. Henderson and Reece propose that proportionality is an objective, in this context meaning reasonable,[84] assessment

[77] E Winter, 'The Compatibility of Autonomous Weapons with the Principles of International Humanitarian Law' (2022) 27(1) Journal of Conflict & Security Law 1, 16.
[78] MN Schmitt and J Thurnher, 'Out of the Loop: Autonomous Weapon Systems and the Law of Armed Conflict' 4 Harvard National Security Journal (2013) 254, 255.
[79] ibid
[80] JD Wright, ''Excessive' Ambiguity: Analysing and Refining the Proportionality Standard' (2012) 94 Int'l Rev Red Cross 820, 833.
[81] E Winter, 'The Compatibility of Autonomous Weapons with the Principles of International Humanitarian Law' (2022) 27(1) Journal of Conflict & Security Law 1, 15.
[82] J Driver, 'The History of Utilitarianism' (*Stanford Encyclopedia of Philosophy*, 27 March 2009) <https://plato.stanford.edu/entries/utilitarianism-history/> accessed 30 April 2025.
[83] E Winter, 'The Compatibility of Autonomous Weapons with the Principles of International Humanitarian Law' (2022) 27(1) Journal of Conflict & Security Law 1, 17.
[84] Note that this differs from the standard of the reasonably well-informed person.

of the subjective factors of military advantage and civilian damage.[85] Yet the standard of reasonableness is still arguably subjective, as the reasonable person differs based on factors like education, culture, and occupation. Especially since humanitarian law applies internationally, a standard that vaguely references reasonableness is largely subjective. Additionally, the issue of incommensurability still applies.

Therefore, having addressed the arguments that claim proportionality is either objective or objective with subjective elements, I argue it is better understood as being wholly subjective. The inherent qualitative, discretionary, and subjective nature of proportionality leads to no other interpretation.

[85] I Henderson and K Reece, 'Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2018) 51 Vanderbilt Journal of Transnational Law 835, 840.

(3) Even if proportionality were objective and quantifiable, contemporary AWS could not accurately comply

There is currently no multilateral treaty that bans the entire category of autonomous weapons systems.[86] Despite this, there are a number of existing flaws within AWS, examined below, that render them unable to comply with proportionality.

The first is that AWS are unpredictable. This means that proportionality cannot be guaranteed or even applied consistently.[87] There are different reasons for the unpredictability – inadequate technical specification, design flaws, poor manufacturing, or environmental conditions.[88] Crucially, even where there are no design or manufacturing flaws, it may still be affected by limited data or where the circumstances do not correspond to an existing data set.[89] This is exemplified in existing research on AWS. Investigating the unpredictable tendency to escalate in experiments, researchers hypothesised that it was because AWS analysed data sets of escalation rather than de-escalation.[90] It is made more problematic when it is not feasible for militaries to commit the resources to collect and label training.[91]

This is exacerbated by the fact that the AI decision-making process is opaque.[92] If military commanders are unable to understand the process, then review becomes harder. Even if model reasoning, which exhibits the reasoning process, is introduced to AWS, they are still subject to unreliability and irrationality. For example, AI decided, whilst operating in a simulated environment, to escalate to nuclear war nuclear war after balancing the views supporting and disputing their use.[93]

[86] T McFarland, *Autonomous Weapon Systems and the Law of Armed Conflict* (CUP, 2020) 85.
[87] M Sassoli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' 90 Int'l Stud 308, 322.
[88] A Blackstrom and I Henderson, 'New capabilities in warfare: an overview of contemporary technological developments and the associated legal and engineering issues in Article 36 weapons reviews' (2012) 94 Int'l Rev Red Cross 483, 510.
[89] K Woodcock, 'Human/Machine(-Learning) Interactions, Human Agency and the International Humanitarian Law Proportionality Standard' (2024) 38(1) Global Society 100, 112.
[90] J Rivera et al, 'Escalation Risks from Language Models in Military and Diplomatic Decision-Making' (2024) FAccT '24: Proceedings of the 2024 ACM Conference on Fairness, Accountability, and Transparency 836, 841,843.
[91] K Woodcock, 'Human/Machine(-Learning) Interactions, Human Agency and the International Humanitarian Law Proportionality Standard' (2024) 38(1) Global Society 100, 113.
[92] ibid 114
[93] J Rivera et al, 'Escalation Risks from Language Models in Military and Diplomatic Decision-Making' (2024) FAccT '24: Proceedings of the 2024 ACM Conference on Fairness, Accountability, and Transparency 836, 843.

The further implications are that it negates the potential benefit of efficiency,[94] as there is no point in being efficient where their outcomes are flawed. And if they are subject to review in every instance, the benefit of efficiency would be lost.

Secondly, biases may be present in algorithmic decision-making. This may be from historical bias (human bias reflected in the output), data-set bias (data labelling process generating a distorted view of the world), or algorithmic bias (either one of the previous biases being amplified in the information compression process).[95] The risk is especially prominent where marginalised groups are concerned.[96] And contrary to the assumption that computers are more objective than humans, AWS do not statistically undertake decisions that are necessarily less biased.[97]

Finally, the machine learning process is subject to decontextualisation, which is dangerous because proportionality is a contextual standard . Machine learning models process data through inherently quantitative methods, so the qualitative factors that are context-dependent are not measurable by its algorithm.[98] This is demonstrated by a "technological rendering of the world as a statistical data relationship",[99] as well as the generation of predictions based on how well input data fits the trends from the training data instead of considering individual circumstances.[100] Therefore, AWS would neglect the contextual and qualitative parts central in the application of proportionality. It might also take into consideration irrelevant factors due to irrelevant trends which it recognises.[101] This negates the possible benefit of adaptability, as AWS are not adequately adapted to consider the relevant, contextual factors specific to the case at hand.

In conclusion, unpredictability, biases, and decontextualization are issues within AWS that cannot be resolved as of now. These issues mean that application of proportionality in

[94] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 23.
[95] Pasquinelli and Joler, 'The Nooscope manifested: AI as instrument of knowledge extractivism' (2021) 36 AI & Society 1263, 1265.
[96] SS Venkatesh, 'The unequal battlefield: a critical reflection on the use of fully autonomous weapons in situations of war' in E Askin and H Stoll (eds), Contested Equality (Edward Elgar Publishing Limited, 2024), 225
[97] J van den Boogaard, *Proportionality in International Humanitarian Law* (CUP, 2023) 22.
[98] K Woodcock, 'Human/Machine(-Learning) Interactions, Human Agency and the International Humanitarian Law Proportionality Standard' (2024) 38(1) Global Society 100, 109.
[99] E Schwarz, 'Autonomous Weapons Systems, Artificial Intelligence, and the Problem of Meaningful Human Control' (2021) 5(1) The Philosophical Journal of Conflict and Violence 53, 60.
[100] K Woodcock, 'Human/Machine(-Learning) Interactions, Human Agency and the International Humanitarian Law Proportionality Standard' (2024) 38(1) Global Society 100, 109.
[101] ibid.

decision-making would be flawed. Thus, AWS are highly unlikely to comply with the proportionality standard within the international humanitarian law framework.

(4) Recommendations

Given that AWS are unlikely to comply with proportionality, this section turns to suggest measures available to states that may help ensure conformity.

The first is to adopt a treaty that would either regulate AWS or provide clarification on the application of existing law in relation to AWS. States have agreed that this would have to be made by consensus among states.[102] Little progress has been made so far.[103] The Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, formed by the High Contracting Parties to the Convention on Certain Conventional Weapons, might be able to facilitate a solution.[104] This essay shares existing calls for a treaty to be concluded by 2026.[105]

A second solution is to limit the operation of AWS. Sassoli argues that by limiting AWS to only target those objects which are without question targetable, proportionality is no longer considered and so all the practical difficulties are removed.[106] I agree, expanding the argument to cover instances where collateral civilian injury is unlikely. Borrowing from the Separate Opinion of Judge Guillaume in the *Nuclear Weapons Advisory Opinion*, naval or desert warfare could be such scenarios.[107]

Lastly, some propose subjecting existing AWS to human overview. If the weapon is supervised remotely and switched off when potentially dangerous to non-military objects, it

[102] United Nations, 'Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 13–15 November 2019' (13 December 2019) UN Doc CCW/MSP/2019/9.
[103] P Perišić and M Tomljenović, 'Legal Permissibility of Autonomous Weapon Systems, with Specific Reference to the Principles of International Humanitarian Law' (2024) 61(4) Collected Papers of the Faculty of Law in Split 531, 546.
[104] Office for Disarmament Affairs, 'Convention on Group of Governmental Experts on Lethal Autonomous Weapons Systems' Certain Conventional Weapons' (*United Nations*, 2024) <https://meetings.unoda.org/ccw-/convention-on-certain-conventional-weapons-group-of-governmental-experts-on-lethal-autonomous-weapons-systems-2024> accessed 30 April 2025.
[105] The 2026 meeting is currently ongoing, and will be concluded by the 4th of September, 2026. Additionally, there is a 'rolling text' of an instrument that may form the basis for such a treaty. See Office for Disarmament Affairs, 'Convention on Certain Conventional Weapons – Group of Governmental Experts on Lethal Autonomous Weapons Systems' (United Nations, 2026) <'https://meetings.unoda.org/ccw-/convention-on-certain-conventional-weapons-group-of-governmental-experts-on-lethal-autonomous-weapons-systems-2026> accessed 24 April 2026.
[106] M Sassoli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' 90 Int'l Stud 308, 337.
[107] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep. 1996 p.289

would facilitate compliance with international humanitarian law.[108] Nevertheless, this essay agrees with Blackstorm and Henderson that operators may be overwhelmed by the large volumes of data, especially where a plethora of decisions are being made all at the same time.[109] Therefore, it submits that human overview might not provide an adequate safeguard unless AWS is used in sporadic instances where humans can meaningfully review the data to ensure compliance with proportionality.

Conclusion

This paper has argued that AWS cannot comply with the standard of proportionality. It has done so on three grounds: ambiguous legal rules, the subjective nature of proportionality, and technological deficiencies within AWS. It then provided recommendations for states to comply with an adequate standard of proportionality while preserving the use of AWS. However, such developments as proposed in the recommendations are unlikely to see any implementation in the foreseeable future due to the significant tactical gains AWS provides.[110] Still, as demonstrated, AWS is fundamentally ill-suited for use in armed conflicts. It should not be considered lawful under international humanitarian law until further clarification.

[108] A Blackstrom and I Henderson, 'New capabilities in warfare: an overview of contemporary technological developments and the associated legal and engineering issues in Article 36 weapons reviews' (2012) 94 Int'l Rev Red Cross 483, 496.
[109] ibid 497
[110] Y Serhan, 'How Israel Uses AI in Gaza—And What It Might Mean for the Future of Warfare' *Time (18 Dec 2014)* 1.

Bibliography

Treaties and International Instruments

- Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (opened for signature 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3

Cases

- Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Rep 226
- Prosecutor v Kupreškić (Trial Chamber) ICTY-95-16-T
- Prosecutor v Galić (Trial Chamber) ICTY-IT-98-29-T
- Prosecutor v Prlić and others (Trial Chamber) ICTY-IT-04-74-T; (Appeals Chamber) ICTY-IT-04-74-A

Books

- ICRC, *Customary International Humanitarian Law* (CUP, 2005).
- van den Boogaard J, *Proportionality in International Humanitarian Law* (CUP, 2023).
- Bothe M, Partsch KJ, Solf AW and Eaton M, *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (Leiden: Martinus Nijhoff Publishers 2013).
- Newton M and May L, *Proportionality in International Law* (OUP 2014).
- Schmitt MN, *Perspectives on the ICRC Study on Customary International Humanitarian* (1st edn, 2007, Cambridge University Press).
- Melzer N, *International Humanitarian Law* (ICRC 2016) 101.
- T McFarland, *Autonomous Weapon Systems and the Law of Armed Conflict* (CUP, 2020).
- Sandoz Y, Swinarski C, Zimmermann B and Pilloud, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969* (ICRC 1987) (Martinus Nijhoff Publishers 1987)

Journal Articles

- A Blackstrom and I Henderson, ‘New capabilities in warfare: an overview of contemporary technological developments and the associated legal and engineering issues in Article 36 weapons reviews’ (2012) 94 Int’l Rev Red Cross 483.

- E Winter, ‘Autonomous Weapons in Humanitarian Law: Understanding the Technology, Its Compliance with the Principle of Proportionality and the Role of Utilitarianism’ (2018) 6(1) GroJIL 183.
- E Winter, ‘The Compatibility of Autonomous Weapons with the Principles of International Humanitarian Law’ (2022) 27(1) Journal of Conflict & Security Law 1.
- HE Shamash, 'How Much Is Too Much? An Examination of the Principle of Jus in Bello Proportionality' (2005-2006) 2 IDF LR 103.
- I Henderson and K Reece, ‘Proportionality under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects’ (2018) 51 Vanderbilt Journal of Transnational Law 835.
- J Rivera et al, ‘Escalation Risks from Language Models in Military and Diplomatic Decision-Making’ (2024) FAccT '24: Proceedings of the 2024 ACM Conference on Fairness, Accountability, and Transparency 836.
- JD Wright, ‘‘Excessive' Ambiguity: Analysing and Refining the Proportionality Standard’ (2012) 94 Int’l Rev Red Cross 820.
- K Woodcock, ‘Human/Machine(-Learning) Interactions, Human Agency and the International Humanitarian Law Proportionality Standard’ (2024) 38(1) Global Society 100.
- M Pasquinelli and V Joler, ‘The Nooscope manifested: AI as instrument of knowledge extractivism’ (2021) 36 AI & Society 1263.
- M Sassoli, ‘Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified’ 90 Int’l Stud 308.
- M Wagner, ‘The Dehumanization of International Humanitarian Law: Legal, Ethical, and Political Implications of Autonomous Weapon Systems’ (2014) 47(5) Vanderbilt Journal of Transnational Law 1371.
- MN Schmitt and J Thurnher, 'Out of the Loop: Autonomous Weapon Systems and the Law of Armed Conflict' 4 Harvard National Security Journal (2013) 254.
- NA Canestaro, ‘Legal and Policy Constraints on the Conduct of Aerial Precision Warfare’ (2004) 37 Vanderbilt Journal of Transnational Law 431.
- P Perišić and M Tomljenović, ‘Legal Permissibility of Autonomous Weapon Systems, with Specific Reference to the Principles of International Humanitarian Law’ (2024) 61(4) Collected Papers of the Faculty of Law in Split 531.

- SS Venkatesh, ‘The unequal battlefield: a critical reflection on the use of fully autonomous weapons in situations of war’ in E Askin and H Stoll (eds), Contested Equality (Edward Elgar Publishing Limited, 2024).
- TW Waters, ‘Unexploded Bomb. Voice, Silence, and Consequence at the Hague Tribunals: A Legal and Rhetorical Critique’ (2003) 35 NYU J Int’l L & Pol 1015.
- WH Parks, 'Air War and the Law of War' (1990) 32 AF L Rev 1.
- Y Dinstein, ‘The Principle of Distinction and Cyber War in International Armed Conflicts’ (2012) 17(2) Journal of Conflict and Security Law.

Others

- J Driver, ‘The History of Utilitarianism’ (*Stanford Encyclopedia of Philosophy*, 27 March 2009) <https://plato.stanford.edu/entries/utilitarianism-history/> accessed 30 April 2025.
- J Kellenberger, ‘International humanitarian law and new weapon technologies’ (Keynote address, 34th Round Table on Current Issues of International Humanitarian Law, San Remo, 8–10 September 2011).
- M Newton, ‘How are Drones Changing War? The Future of the Battlefield’ (Centre for European Policy Analysis, 3 Nov 2025) <https://cepa.org/article/how-are-drones-changing-war-the-future-of-the-battlefield/> accessed 23 Jan 2025.
- N Robins-Early, ‘AI’s ‘Oppenheimer moment’: autonomous weapons enter the battlefield’, The Guardian (London, 14 Jul 2024)
- Office for Disarmament Affairs, ‘Convention on Group of Governmental Experts on Lethal Autonomous Weapons Systems’ Certain Conventional Weapons’ (*United Nations*, 2024) <https://meetings.unoda.org/ccw-/convention-on-certain-conventional-weapons-group-of-governmental-experts-on-lethal-autonomous-weapons-systems-2024> accessed 30 April 2025.
- Office for Disarmament Affairs, ‘Lethal Autonomous Weapon Systems (LAWS)’ (United Nations, 2025) <https://disarmament.unoda.org/the-convention-on-certain-conventional-weapons/background-on-laws-in-the-ccw/> accessed 30 April 2025.
- Office for Disarmament Affairs, ‘Convention on Certain Conventional Weapons – Group of Governmental Experts on Lethal Autonomous Weapons Systems’ (United Nations, 2026) <‘https://meetings.unoda.org/ccw-/convention-on-certain-conventional-weapons-group-of-governmental-experts-on-lethal-autonomous-weapons-systems-2026> accessed 24 April 2026.

- United Nations, ‘Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 13–15 November 2019’ (13 December 2019) UN Doc CCW/MSP/2019/9.
- Y Abraham, ‘‘Lavender’: The AI machine directing Israel’s bombing spree in Gaza’, +972 Magazine (Israel-Palestine, 3 Apr 2024).