AJEE

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ACCESS TO JUSTICE IN EASTERN EUROPE

Special Issue

International Conference on Legal, Socio-economic Issues, and Sustainability

Iryna Izarova
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DID RUSSIA INVADE INTERNATIONAL LAW IN UKRAINE

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CRIMINAL LIABILITY AND VIRAL HOMICIDE – CAN IT BE PROSECUTED AS A CRIME AGAINST HUMANITY?

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SUSTAINABILITY AND CHALLENGES OF ARBITRATION IN ADMINISTRATIVE CONTRACTS: THE CONCEPT AND APPROACH IN SAUDI AND COMPARATIVE LAW

ACCESS TO JUSTICE IN EASTERN EUROPE

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AJEE is an English-language journal which covers issues related to access to justice and the right to a fair and impartial trial. AJEE focuses specifically on law in eastern European countries, such as Ukraine, Poland, Lithuania, and other countries of the region, sharing in the evolution of their legal traditions. While preserving the high academic standards of scholarly research, AJEE allows its contributing authors, especially young legal professionals, and practitioners, to present their articles on the most current issues.

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Editor-in-Chief's Note

ABOUT THE SPECIAL ISSUE AND COLLABORATING FOR A SUSTAINABLE FUTURE: THE IMPORTANCE OF EASTERN EUROPE-MIDDLE EAST CONNECTIONS IN LAW AND JUSTICE

We are thrilled to present this special issue of our journal, featuring articles from esteemed scholars and reviewers from various regions, including Saudi Arabia, Kuwait, Bosnia and Herzegovina, and Great Britain.

Collaboration between Eastern Europe and the Middle East is becoming increasingly important for scholars as it allows for sharing of a diverse range of perspectives and experiences. Despite the differences between legal systems and cultures, scholars from these regions can come together to discuss important issues and learn from each other's expertise. The collaboration often includes cooperative research projects, academic exchanges, and joint conferences. By working together, scholars from Eastern Europe and the Middle East can make significant contributions to the development of the law's rule and access to justice in the globalised world.

We are proud to collaborate with the Second GPDRL College of Law International Conference on Legal, Socio-Economic Issues, and Sustainability to present articles that tackle current and relevant topics in the field of law. This conference provides an opportunity for scholars and experts from various parts of the world to gather, discuss, and exchange ideas on relevant issues related to law and sustainability. This is an excellent platform for scholars to showcase their research and publications, as well as engage in meaningful discussions and debates with their peers.

As a Ukrainian journal, we are happy to cooperate with colleagues within and beyond this issue in preparation. Ukraine and Saudi Arabia have maintained diplomatic relations since 1992 and have cooperated in areas such as trade, energy, and culture. As Ukrainians, we deeply appreciate Saudi Arabia's position in support of Ukraine's territorial integrity and sovereignty during the ongoing war with the Russian Federation.

Our special issue covers a range of important topics, including business ethics in e-commerce, combating human trafficking in Saudi Arabia.

We also explore the impact of corruption on legal frameworks and global issues, including the role of the legal frameworks in attracting foreign investments, and legal mechanisms for the digital economy's stimulation in developing countries.

Overall, we are confident that this Special Issue will contribute to the ongoing discourse on legal, socio-economic, and sustainability issues and serve as a valuable resource for scholars, practitioners, and policymakers alike.

We extend our gratitude to our Guest Editors, Dr. Mohammed Albakjaji from Prince Sultan University and Dr. Maya Khater from Al Yamamah University in Saudi Arabia, for their invaluable contributions in curating this Special Issue. Their guidance and expertise have been invaluable to ensure the quality and relevance of the articles presented here.

Allow me to express our deep gratitude for the exceptional work that Alona Hrytsyk has created, a beautiful and inspiring representation of sustainability that unites the divine elements of Arabian and European art. Her ability to capture the essence of harmony and equality among all civilizations is truly remarkable, and I am honoured to have collaborated with her on the cover for our Special Issue. Alona's work inspires all of us to continue promoting sustainability and cultural harmony in our various initiatives, and we look forward to the opportunity to work with her again in the future. Thank you, Alona, for sharing your incredible talent with us!

As usual, I would like to express my sincere gratitude to our amazing team for their incredible work on this project. First and foremost, I want to thank our Managing Editors, Dr. Yuliia Baklazhenko and Dr. Olha Dunaievska, for their outstanding leadership and expertise. I also want to thank our wonderful assistant, Mag. Polina Siedova, for her invaluable support and dedication to ensuring the success of our project. Our Language Editors, Dr. Sarah White, Lucy Baldwin, and Nicole Robinson, have been our keen eyes to ensure the accuracy and clarity of our content, and we are extremely grateful for their contributions.

I also want to extend a warm welcome to our three new editors who recently joined our team: Ms. Olha Samofal (Editor), Ms. Nicole Robinson and Ms. Yuliia Hartman (Editor of Social Media), who have already made significant contributions to this Special Issue. Lastly, I want to express our shared gratitude to our publisher, VD Dakor, and to Ms. Nataliia Shliapnikova for her endless assistance and support. Your hard work and dedication are instrumental in the success of our project and we truly appreciate all that you have done. Thank you all for your amazing work!

Editor-in-Chief

Prof. Iryna Izarova

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Guest Editor's Note

ABOUT THE SPECIAL ISSUE AND THE COOPERATION BETWEEN THE JOURNAL OF ACCESS TO JUSTICE IN EASTERN EUROPE AND THE COLLEGE OF LAW AT PRINCE SULTAN UNIVERSITY

It is a great pleasure for me to be appointed as a guest editor of such a reputable international journal as Access to Justice in Eastern Europe (AJEE).

The College of Law at Prince Sultan University always looks forward to ways for further cooperation with prestigious international journals, both to benefit from their expertise in the field of academic publishing and to assist faculty members in publishing high-quality pieces of research.

We are so proud to announce that the College of Law at Prince Sultan University is the first college of law in Saudi Arabia that arranged a Special Issue to publish several distinguished papers for academics who participated in the College of Law's conference. This is due to the successful cooperation between the College of Law and the journal.

Through our cooperation with the journal of AJEE, we received the golden opportunity to publish many outstanding pieces of research for academics who participated in the second conference of the College of Law. In fact, it was a priceless opportunity to benefit from the journal's prestigious reputation, and from the advantages of open access, to make these pieces of research available to the majority of researchers. This contributed greatly to introducing the University of Prince Sultan on an international level.

A collection of distinguished articles has been published in this Special Issue, discussing recent and original topics in the field of legal studies, such as cybersecurity, investment and banking laws, company law, administrative law, criminal law, and family law. In addition to publishing research in areas which were not previously published, such as the laws of sports contracts in Saudi Arabia, research is now published regarding the governance of banking sector, arbitration, etc. We are confident that the publication of such topics in international journals with a high-level of academic classification will contribute to the dissemination of the legal framework's development in the Kingdom of Saudi Arabia.

Additionally, we would like to thank the higher management of Prince Sultan University, represented by His Excellency the President of the University, Dr. Ahmed Al-Yamani, the deputies, as well as Dr. Abdulaziz Al-Tuwaijri, the Dean of the College of Law, for all the invaluable assistance and support they provided to make the conference a great success, ultimately facilitating the publishing process.

Finally, we would like to thank the editorial management of the journal of AJEE, represented by Professor Iryna Izarova, and the distinguished editorial team for all the support they provided during the editing and publishing stages.

We are so proud to collaborate with such a hardworking team that has worked long hours during the day to complete the publishing process, including reviewing, editing, proofreading, and communicating with authors and reviewers.

We look forward to continued cooperation in the future between the College of Law at Prince Sultan University and the journal of Access to Justice in Eastern Europe.

Sincerely,

Dr. Mohamad Albakjaji

Prince Sultan University

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Guest Editor's Note

Dear authors,

I am extremely pleased and honoured with the unique opportunity to serve as guest editor for the Special Issue of the prestigious Journal Access to Justice in Eastern Europe (AJEE).

This issue presents a collection of high-quality articles which reflect recent trends and developments in various legal fields and highlights current hot topics in national and international law.

It is my hope that this Special Issue will lead to an increase in research collaboration between Arab universities and the Journal of AJEE.

I extend my sincere prayers for peace to prevail in Ukraine.

Best regards,

Dr. Maya Khater

Al Yamamah University

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RESEARCH ARTICLE

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Research Article

SUSTAINABILITY AND CHALLENGES OF ARBITRATION IN ADMINISTRATIVE CONTRACTS: THE CONCEPT AND APPROACH IN SAUDI AND COMPARATIVE LAW

Hussein Shhadah Alhussein[1], Zlatan Meskic[2] and Ahmad Al-Rushoud[3]

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Summary: 1. Introduction. – 2. Arbitrability of Administrative Contracts in Comparative Law. – 3. The Concept of the Administrative Contract in Comparative and Saudi Law. – *3.1 The Concept of the Administrative Contract in Comparative Law. – 3.1.1 The administration is a party to the contract. – 3.1.2 The contract is related to public*

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Corresponding author, responsible for writing and research. **Competing interests:** Any competing interests were included. Disclaimer: All authors declare that their opinions and views expressed in this manuscript are free of any impact of any organisations. **Translation:** The content of this article was translated with the participation of third parties under the authors' responsibility. **Funding:** The authors would like to acknowledge the support of the Prince Sultan University for paying the Article Processing Charges (APC) of this publication. This work was supported by the Governance and Policy Design Research Lab (GPDRL) of Prince Sultan University.
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service. – 3.1.3 The administrative contract includes exceptional conditions. – 3.2 The concept of the administrative contract in Saudi law. – 3.3 Evaluation of the Board of Grievances definition of the administrative contract. – 4. The Evolution of Arbitration in the Administrative Contracts in Saudi Law. – *4.1 The stages of evolution of arbitration in administrative contracts in Saudi law. – 4.2 The supervision of the Saudi judiciary on the completion of arbitration clauses in administrative contracts.* – 5. Conclusion

Keywords: Sustainability; SDG 16; arbitrability; arbitration;, administrative contracts; Saudi Arabia

ABSTRACT

Background. *The arbitrability of administrative contracts contributes to sustainable dispute resolution within the United Nations' Sustainable Development Goals 16 (SDG 16). However, different regulation of administrative contracts in comparative law affects the arbitrability of the disputes arising out of them. The question arises – is protection deserved if an administrative contract containing an arbitration clause concluded in violation of the administrative law of the governmental body or without a special approval is invalid, unenforceable, or if the company was unaware of such a requirement? This paper analyses the concept of an administrative contract and its arbitrability in Saudi Arabia and comparative law to provide for sustainable solutions.*

Methods. *The analysis of the applicable arbitration and administrative laws and rules is conducted with the normative method to establish the arbitrability of the disputes arising out of administrative contracts and the concept of the administrative contract. The case analysis reveals if the legislative approach causes difficulties in practice. The dogmatic method is applied to link the reasons for legislative and case law development to the current normative solutions in comparative and Saudi law. The conclusions on the existing problems and possible solutions shall be based on the analytical method.*

Results and Conclusions. *Government contracts are of great importance and their exclusion from arbitration contradicts the set goal of sustainable dispute resolution mechanism. Differences in comparative law in terms of the notion of the administrative contract and the arbitrability may diminish the positive effects of arbitration in administrative contracts, as they may endanger equal access to dispute resolution as part of the sustainable development goals, be enforceable, or even cause discrepancies between states that annul the arbitration awards and others that still enforce the awards despite their annulment.*

1 INTRODUCTION

Sustainable development was long linked to dispute resolution only when analysing disputes on environmental protection, but it took some time before sustainable dispute resolution became a goal in itself.[4] Equal access to dispute resolution is part of the UN sustainable development goals (SDG 16), to which most developed states, including Saudi Arabia, are committed.[5] Alternative dispute resolution mechanism, such as time and cost-effective methods interacts with some other objectives in the field of environmental sustainability

4 N Kaminskienė, I Žalėnienė and A Tvaronavičienė, 'Bringing Sustainability into Dispute Resolution Processes' (2014) 4 (1) Journal of Security and Sustainability 69, doi.org/10.9770/jssi.2014.4.1(6).

5 Z Meskic et al, 'Digitalization and Innovation in Achieving SDGs – Impacts on Legislation and Practice' (International Conference on Sustainability: Developments and Innovations (ICSDI-2022), Riyadh, Saudi Arabia, 19-22 February 2022) (2022) 1026 IOP Conf Ser: Earth and Environmental Science doi: 10.1088/1755-1315/1026/1/012061.

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goals of the 2030 Agenda, which concerns: access to safe water (SDG 6), access to sustainable energy (SDG 7), addressing the environmental consequences of urban development (SDG 11),[6] detaching economic growth from non-sustainable resources (SDG 12), [7] climate change (SDG 13), protection of resources of marine areas, seas, oceans, and usage of these resources based on a sustainable basis (SDG 14), protection and sustainable use of terrestrial ecosystems (SDG 15), and finally, cooperation among all entities, governmental or non-governmental, to support the achievement of the 2030 Agenda objectives (SDG 17).[8]

The state's duty of governing investments in sustainable development[9] includes sustainable dispute resolution.[10] With the development of the state's direct intervention in economic life, and its involvement in international dealings,[11] the need to arbitrate administrative disputes has become a necessity. It shortens the time of dispute resolution and achieves the reassurance sought by the other contracting party with the State.[12] Arbitration is contributing to SDG 16 as effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based dispute resolution system.[13] Nevertheless, arbitration of administrative contracts still provokes controversy in legislation and the judiciary as these contracts differ from civil and commercial contracts and are subject to a different legal regime. The reason behind that is that these contracts target primarily public interest as they are normally related to the management and of public utilities.[14] This means that under some legal regimes the administrative contracts might not be arbitrable[15] and thus may be subject to annulment or non-enforceability due to invalidity of the arbitration agreements or violation of public policy.[16] On the other hand, it has been argued that the state, with all its institutions, is authorised to conclude an arbitration agreement, and it cannot protest on the grounds of its right to sovereignty or judicial immunity to evade the arbitration agreement, if the arbitration has taken place in accordance with the legal conditions.[17] Arbitrability of government contracts is of particular importance for achieving equal access to dispute resolution within SDG 16.

6 AH Memon, AQ Memon, SH Khahro, Y Javed 'Investigation of Project Delays: Towards a Sustainable Construction Industry' (2023) 15(2) Sustainability 1457.

7 Z Yu, I L Ridwan, A R Irshad, M Tanveer, S A R Khan 'Investigating the nexuses between transportation Infrastructure, renewable energy Sources, and economic Growth: Striving towards sustainable development' (2023) 14 (2), Ain Shams Engineering Journal 101843.

8 J Alkhayer, N Gupta and CM Gupta, 'Role of ADR Methods in Environmental Conflicts in the Light of Sustainable Development' (Second International Conference on Sustainable Energy, Environment and Green Technologies (ICSEEGT 2022), Jaipur, Rajasthan, India, 24-25 June 2022) (2022) 1084 IOP Conf Ser: Earth and Environmental Science doi: 10.1088/1755-1315/1084/1/012057.

9 R Alyamani, S Long , M Nurunnabi 'Evaluating Decision Making in Sustainable Project Selection Between Literature and Practice' (2021) 13(15) Sustainability 8216.

10 MC Cordonier-Segger, 'Governing Investment in Sustainable Development: Investment Mechanisms in Sustainable Development Treaties and Voluntary Instruments' in MC Cordonier-Segger, MW Gehring and A Newcombe (eds), *Sustainable Development in World Investment Law* (Global Trade Law Series, Kluwer Law International 2011) 645.

11 Z Meskic et al, 'Transnational Consumer Protection in E-Commerce: Lessons Learned From the European Union and the United States' (2022) 13 (1) International Journal of Service Science, Management, Engineering, and Technology 1, doi: 10.4018/IJSSMET.299972.

12 S Gul, 'Alternative and Indigenous Dispute Resolution: A Legal Perspective' in A Normore, M Javidi and L Long (eds), *Handbook of Research on Strategic Communication, Leadership, and Conflict Management in Modern Organisations* (Business Science Reference 2019) 17, doi: 10.4018/978-1-5225-8516-9.

13 K Duggal and R Rangachari, 'Business, Human Rights, and International Arbitration:Family, Friend, or Foe' (2021) 75 (3) Dispute Resolution Journal 83.

14 C Henckels, 'Arbitration Under Government Contracts and Government Accountability' (2022) 50 (3) Federal Law Review 404, doi: 10.1177/0067205X221107407.

15 G Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2020).

16 H Kronke, P Nacimiento and D Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 34.

17 AAB Sheta, *Explanation of the Egyptian Arbitration Law* (2nd edn, Dar Al-Nahdha Al Arabiya 2004) 124.

This paper establishes a relationship between the concept of administrative contract and its arbitrability in comparative law and Saudi Arabia. It analyses the evolution of the arbitrability of administrative contracts in Saudi Arabia with the aim of providing solutions to the current problems of invalidity and enforceability of arbitration agreements concluded in violation of national administrative laws or without governmental approval. The analysis firstly showcases the variety of approaches to arbitrability of administrative contracts in comparative law and links them to different concepts of the administrative contract in comparative and Saudi law. The evolution of arbitrability of administrative contracts in Saudi Arabia sets the basis for the understanding of current problems in case law with regards to arbitration agreements concluded without governmental approval. The analysis aims to contribute to finding the right path for arbitrability of administrative contracts as part of sustainable dispute resolution mechanism.

2 ARBITRABILITY OF ADMINISTRATIVE CONTRACTS IN COMPARATIVE LAW

From a comparative point of view, the position of states differs in regard to the concept of an administrative contract and the resolution of its disputes. Arbitration legislation and judicial decisions may provide for certain matters to not be capable of settlement by arbitration and thus non-arbitrable.[18] As will be elaborated below, in some states some additional approvals from the ministry or even the parliament may be required.

For instance, the position in Kuwait is that the administrative judiciary is solely competent to decide disputes over administrative contracts of all types. The Kuwaiti Court of Cassation, therefore, refuses to accept arbitration in administrative contracts. In its judgment of 26 November 1989, the Kuwaiti Court of Cassation noted that, according to Art. II of the Law No. 20 of 1981, the Administrative Court alone has jurisdiction over disputes that arise between administrative bodies and other contractors in contracts, public works, supply, or any other administrative contract. In another ruling, the Court of Cassation ruled that the dispute that the arbitral tribunal has the competence to decide, in accordance with Art. II of the Law 11/1995 on Judicial Arbitration in Civil and Commercial Matters, does not extend to administrative disputes, where the Administrative Court has the sole jurisdiction in this respect, in application to Art. II of the Law No. 20 of 1981 as amended by the Law No. 61 of 1982.[19]

However, the position of Kuwait, with an absolute exclusion of all administrative contracts from arbitration, is rather an exception. In Algeria under the Civil and Administrative Procedure Code (CPCA) adopted by Law 08-09 of 12 February 2008, Art. 975-977 specifically regulate and allow for arbitration in administrative contracts.[20] In European civil law systems, it is usually accepted to allow for arbitration in administrative contracts for specific matters.[21] In Australia, it is generally common for the government to enter into contracts with an arbitration clause.[22] However, in Williams v Commonwealth the High court decided in 2012 that parliamentary approval is required for all federal government contracts except those

18 Born (n 15).

19 AM Bouresli, 'Arbitration in Administrative Disputes in the State of Kuwait' (Third Scientific Forum of the Arab Union of Administrative Judiciary: Arbitration in Administrative Contracts, Kuwait, 29-30 April 2018); K Alhamidah, 'Administrative Contracts and Arbitration in Light of the Kuwaiti Law of Judicial Arbitration No 11 of 1995' (2007) 21 (1) Arab Law Quarterly 35.

20 M Trari-Tani, 'Arbitration and Procurement Contracts New Achievements for Improving the Business Climate in Algeria' (2019) 6 International Business Law Journal 729.

21 M Portocarrero, 'Arbitration in Administrative Affairs: The Enlargement Scope of Ratione Materiae in Portugal' (2020) 18 (1) Central European Public Administration Review 204, doi: 10.17573/cepar.2020.1.10.

22 Henckels (n 14).

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pertaining to routine expenditure, thus potentially limiting the use of arbitration clauses.[23] In Saudi Arabia, under Art. 10 of the Arbitration law of 2012, it is allowed for governmental entities to enter into arbitration agreements, but only upon approval by the Prime Minister, unless allowed by a special provision of law.[24] Such an approach is quite typical for Arab states.[25] In the Anglo-American tradition, an administrative contract does not exist so that the use of arbitration can be restricted in government procurement contracts, only if such restrictions are explicitly noted in the contract and they are not derived from any common law concept.[26]

3 THE CONCEPT OF THE ADMINISTRATIVE CONTRACT IN COMPARATIVE AND SAUDI LAW

Given the relationship between the right of the administration to conclude administrative contracts and resort to arbitration in case of disputes, an analysis of this topic requires a discussion of the following main points:

1- The concept of an administrative contract in comparative and Saudi law.

2- The development of arbitration clauses in administrative contracts and Provisions of the Board of Grievances related to the completion of arbitration conditions in administrative contracts.

In this section, we discuss the concept of an administrative contract and the criteria for distinguishing it in comparative and Saudi law.

3.1 The concept of the administrative contract in comparative law

The administrative contract is defined in comparative law as the concurrence of two wills, one of which is the will of the administrative authority, with the aim of organising, investing or managing a public service and achieving its interest or the public benefit.[27] Sometimes, the administration, in concluding contracts with individuals, and companies, use civil or commercial contracts when it finds that this type of contracts fits with a certain activity such as the contracts of sales and lease of private properties owned by administration. Contracts of this nature are governed by private law that regulates the relationships between individuals.[28] However, in such cases the administrative contract often includes contractual clauses granting unilateral rights to the governmental party that are unusual for private and commercial law contracts.[29]

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23 *Williams v Commonwealth* (No 1) (High Court of Australia, 2012) 248 CLR 156.

24 Kingdom of Saudi Arabia, Royal Decree No M/34 'Law of Arbitration' of 16 April 2012 <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=106647&p_country=SAU&p_count=108&p_classification=02&p_classcount=4 > accessed 10 March 2023.

25 N Blackaby et al, *Redfern and Hunter on International Commercial Arbitration* (6th edn, OUP 2015) 127.

26 J Cabrera, D Figueroa and H Wöss, 'The Administrative Contract, Non-Arbitrability, and the Recognition and Execution of Awards Annulled in the Country of Origin: The Case of Commisa v Pemex' (2016) 32 (1) Arbitration International 127, doi: 10.1093/arbint/aiv057.

27 M Al-Qaisi, 'The Eligibility of State Institutions and Bodies to Conclude an Arbitration Agreement (Administrative Contract Disputes)' in W Anani (ed), *Arbitration Lectures* (The Legal Library 2003) 237.

28 A Shafiq, *Judicial Control over the Business of Administration in the Kingdom of Saudi Arabia* (Al Jawaher Publications 2002) 216.

29 I Shehata, 'The Ministerial Approval Requirement for Arbitration Agreements in Egypt: Revisiting the Public Policy Debate' (2020) 37 (3) Journal of International Arbitration 392.

In order to distinguish between an administrative contract and other contracts, the following criteria shall be considered:[30] The administration is a party to the contract; the contract is related to public services; and the contract includes exceptional conditions that are not familiar in private law.

3.1.1 The administration is a party to the contract

The first criterion is an obvious one. If an administrative authority is not a party to a contract, this contract shall not be considered as an administrative contract. The term administration extends to every public legal personality, whether it is centralised such as the state, or non-centralised, such as the decentralised local public personalities. It is noted that this criterion, although necessary, is not sufficient to consider the contract an administrative one. Therefore, the objective criterion must be present, which is the link of the contract with the public utility.[31]

3.1.2 The contract is related to public service

Public service is every activity which is undertaken by a public legal person with the aim of achieving public benefit. On the one hand, public service includes an organisational aspect, meaning every public body which is established and managed by the ruling authority. Such bodies perform services that aim to satisfy public needs. It further includes every activity conducted by the state or any other public corporate entity, which aims to achieve public benefit as well.

The link of the contract to general service is the factor that can determine the nature of the contract. Jurisprudence in France, Egypt, Syria, Jordan, and Libya agree that not all contracts to which the administration is a party are administrative contracts. Some of the administration contracts are completely subject to private law since the administration has the right to make use of private law contracts. The criterion for distinguishing the administrative contract lies in the subject matter of the contract and not solely in the character of the contracting party. Accordingly, the contract is considered administrative if there is an intention of the public legal person to use the means available to it under public law, where there is a connection of the contract with the management of a public facility, and the contract includes certain exceptional conditions.[32]

3.1.3 The administrative contract includes exceptional conditions

Within the administrative contract the administrative body usually enjoys contractual rights different from those within civil or commercial law relationships. Exceptional clauses give the administration powers over its contracting parties, such as the right to change or terminate the contract unilaterally.[33] In administrative contracts, the authority has wide rights and powers to ensure the implementation of the contract and to make sure that everything is going according to the benefit of the public interest.[34]

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30 Alhamidah (n 19) 42.

31 M Alhussein and M Noah, *Administrative Contracts* (Damascus University 2006) 17-8.

32 ibid 34; MAQ Ali Abreesh, *The Impact of Arbitration on Contractual Administrative Disputes: A Comparative Study between Jordanian and Libyan Law* (Middle East University 2016) 59.

33 AA Alanzi, 'Saudi Procurement System and Regulations: Overview of Local and International Administrative Contracts' (2021) 10 (2) Laws 37, doi :10.3390/laws10020037.

34 Alhussein and Noah (n 31) 53.

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3.2 The concept of the administrative contract in Saudi law

The concept of an administrative contract under Saudi law is much broader than the concept adopted in comparative law. The Board of Grievances, as the administrative judiciary body in the Kingdom of Saudi Arabia, is specialised in hearing and ruling all contract disputes to which the state is a party. It is the administrative court in the Kingdom of Saudi Arabia. The Law of the Board of Grievances[35] states in Art. 1 that the Board of Grievances is an "independent administrative judiciary body that is reporting directly to the King." It further provides that administrative courts have jurisdiction to hear "cases related to contracts in which the administration is a party"[36]. The term contract in the law of the Board of Grievances is general and absolute and includes all contracts to which the government or one of its bodies is a party, regardless of the type of contract, the activity that results from it, or the conditions it includes.[37]

While the Law of the Board of Grievances provides for a broad jurisdiction of the administrative courts for all contracts to which a governmental body is a party, it does not contain a definition of the administrative contract.[38] The Board of Grievances defined the administrative contract in some of its rulings in accordance with comparative law, requiring two conditions: the use of the means of public authority and the connection of the contract with public services. The administrative contract is the contract "to which the state (or one of the public legal persons) is a party in its capacity as a public authority and the dispute relates to a public property which is owned by the state" (Judgment, No. 189/1997).[39]

However, in the majority of its rulings the Board of Grievances indicated that it is sufficient to consider the contract as an administrative one if the administration is a party to that contract.[40] This is clear from several rulings of the Board of Grievances, that broadly concluded that "An administrative dispute is the dispute in which one of the administration's bodies is a party" (Judgment, No. 29/1994). The Board of Grievances, in its Judgement No.14 of 1996, defined an administrative contract as "the compatibility or association of two or more wills with the intent of achieving statutory effects that may be the creation, transfer or termination of obligations". This ruling was later confirmed in judgement No. 14 of 2002 by concluding that "the public contract is an agreement concluded by one of the administrative authorities with an individual in which the rights and obligations of each of the parties are determined in accordance with the provisions of the law." The Board of Grievances equally broadly establishes its own jurisdiction. Under its judgement No. 17 in 1995, "the Board of Grievances is an administrative judiciary body that is competent to hear cases in which the government or a public legal person is a party." This was confirmed in a later judgement, No.10 in 2007, with the reasoning "since the dispute is contractual and one of the parties is a government entity, the Board of Grievances has the right to decide it".

Therefore, the Board of Grievances is competent to hear all administrative disputes relating to contracts concluded by the administration, whether they belong to administrative contracts with their known elements and pillars or not. Based on the aforementioned, it can be

35 Kingdom of Saudi Arabia, Royal Decree No M/78 'Law of the Board of Grievances' of 1 October 2007 <https://laws.boe.gov.sa/Files/Download/?attId=40708ea3-0b40-4978-8b46-adbb0113c063> accessed 10 March 2023.

36 ibid, art 13 (d).

37 AH Alwahaibi, *The Rules Governing Administrative Contracts and Their Applications in the Kingdom of Saudi Arabia* (3rd edn, Al-Jeraisy, 2011) 70.

38 KAA Alkhdair, *Arbitration in Administrative Contracts* (Ministry of Justice) 68.

39 H Altahrawi, *Saudi Administrative Judiciary* (2nd edn, Office of Lawyer Kateb Al-Shammari 2017) 115.

40 SS Almutawa, *Administrative Contracts in the Light of the Saudi Procurement and Competition Law* (2nd edn, 2008) 51.

concluded that an administrative contract in the Kingdom of Saudi Arabia is "any contract to which the administration is a party". It is thereby not of importance if it is an administrative contract that relates to a public purpose, in which the administration uses the methods of public authority with clauses giving special contractual rights to the administrative body, or a private contract in which the administration and individuals are equal.

3.3 Evaluation of the Board of Grievances definition of the administrative contract

There is a difference between the concept of the administrative contract in Saudi law and its counterpart in comparative laws. The administrative contract in the Saudi judiciary does not require its connection to the public services, nor does it require exceptional powers of the administrative body within the contractual relationship. It is sufficient to consider the contract as an administrative one if the administration is a party to the contract and the Board of Grievances shall have jurisdiction to hear the cases arising from it. On the positive side, the Board of Grievances has thereby avoided the problems that may arise in some countries regarding the distinction whether the contract in question is an administrative contract, or a private contract. It considers that the purpose of the Board of Grievances is to unify the jurisdiction in administrative contract disputes.[41]

On the other hand, such understanding is very broad and causes some tensions due to the private and commercial law effects of such contracts, including their arbitrability. As discussed above, in comparative law if the relation to public services is not given and the contract does not include special provisions in favour of the administrative body, it shall not fall within the jurisdiction of the administrative judiciary. It becomes within the jurisdiction of the ordinary judiciary as a private contract, even if an administrative body is a party to it. Another reason to submit such contracts to ordinary judiciary or arbitration instead of administrative courts is that the contractual relationship between the parties will be in most part governed by contract law - for which ordinary judiciary and arbitrators have more experience and expertise - and not administrative law.[42]

4 THE EVOLUTION OF ARBITRATION IN ADMINISTRATIVE CONTRACTS IN SAUDI LAW

Under Art 10 of the Saudi Arbitration law of 2012, unless allowed by a special provision of law government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister. This is the result of the long development of arbitration in administrative contracts in Saudi Arabia. In this chapter, we will discuss the stages of development of arbitration in administrative contracts in Saudi Arabia and analyse the most important cases of arbitration in administrative contracts.

4.1 The stages of evolution of arbitration in administrative contracts in Saudi law

Regulation of arbitration in administrative contracts in the Kingdom of Saudi Arabia has developed over time and can be summarised in six stages that will be briefly described below.

41 HS Alhussein, *Commercial Arbitration in the Kingdom of Saudi Arabia* (PSU 2015) 192.

42 Alanzi (n 33).

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The first phase was heavily influenced by the outcome of the famous case of *Saudi Arabia v Arabian American Oil Co (ARAMCO),* decided in 1963, with a negative outcome for Saudi Arabia, which nevertheless honoured the award to the full extent.[43] The Council of Ministers Resolution No. 58 dated 10/06/1963, states that "no government entity may accept arbitration as a mean of settling disputes that arise between it and any individual, company or private body, with the exception of special cases in which the state grants an important privilege, and it has a paramount interest in including the arbitration clause."

Implementing this decision, the Council of Ministers issued Resolution 1007 dated 30/09/1968 to accept arbitration in the contract concluded between the Riyadh Municipality and Inkas Company for the Riyadh Development Project, in which the two parties agreed that each of them would choose a recognised representative at the International Chamber of Commerce in Paris, and if the representative could not reach a settlement, the dispute will be referred to the Board of Grievances to decide the dispute.

In the second phase, the former arbitration law was issued by Royal Decree No. 46 dated 25/04/1983, which repealed the resolution M.58. Art. 3 of the old arbitration law of 1983 stipulating that "government bodies may not resort to arbitration to settle their disputes with others, except after the approval of the Prime Minister, and this provision may be amended by a decision of the Council of Ministers."

In the third phase, executive regulations to the former arbitration law of 1983 were issued by the Council of Ministers No. 7 dated 28 May 1985. Art. 8 of the executive regulations stipulated the following: "In disputes in which government agencies are party and consider resorting to arbitration they must prepare a memorandum on arbitration of the dispute explaining its subject, the justifications for arbitration and the names of the litigants, to be submitted to the Prime Minister to consider the approval of arbitration. A prior decision of the Prime Minister may authorise a government body in a specific contract to terminate the disputes arising from it through arbitration, and in all cases the Council of Ministers shall be notified of the judgments issued therein."

In the fourth phase, the new arbitration law No. M-34 dated 16 April 2012 was issued, which abolished the previous arbitration law of 1983. Article 10 (2) of the Arbitration law of 2012, which is still in force, states the following: "Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law." This provision makes it clear that arbitration is not a matter of controversy anymore. Regardless of its relation to international or domestic trade, it is subject to approval of the Prime Minister.

In the fifth phase, the new Government tenders and procurement law of 16 July 2019 was issued, which allows recourse to arbitration with the approval of the Minister of Finance. Art. 92 of the Government tenders and procurement law stipulates the following:

1. A government agency shall fulfil its contractual obligations. If it fails to do so, the contractor may file a claim for compensation with the Administrative Court.

2. A government agency may, following the Minister's approval, agree to resort to arbitration, in accordance with the Regulations.

3. The Regulations shall specify other methods for settling disputes that may arise during the execution of contracts.

In the sixth and final phase thus far, Art. 154 of Executive regulations of Government tenders

43 AT Martin, 'Aramco: The Story of the World's Most Valuable Oil Concession and Its Landmark Arbitration' (2020) 7 (1) BCDR International Arbitration Review 3, doi: 10.54648/bcdr2021015.

and procurement law was issued, as amended by provisions of Ministerial Resolution No. (3479) of 05 April 2020, which states:

"Taking into account what is stated in paragraph (2) of Art, 92 of regulation, The following conditions are required to agree to arbitration:

1. Arbitration shall be restricted to the contracts whose estimated value exceeds one hundred million Saudi Riyals. The Minister may amend such limits as he deems proper.

2. The laws of the Kingdom of Saudi Arabia shall apply to the subject-matter of the dispute. Arbitration before international arbitration panels outside of the Kingdom and enforcement of procedures thereof shall be inadmissible except for the contracts concluded with foreign persons.

3. The arbitration and its terms shall be set forth in the contract documents. The provisions of Government tenders and procurement law make it clear that arbitration is allowed upon approval in both national and international cases, but in both of them the contract needs to provide for the application of Saudi law.

4.2 The supervision of the Saudi judiciary on the completion of arbitration clauses in administrative contracts

Among the cases heard by the Board of Grievances is case No. 235/sq/2/1995, which was filed by the Dutch company (Ogem BV) against King Abdulaziz University.

The Dutch company Ogem PV contracted with King Abdulaziz University to design and implement facilities for the university in return for the payment of an amount of 112,652,077 Riyals. The contract concluded between them stipulated that "all kinds of disputes or disagreements, if any, in which the engineer's decision has not become final and binding... shall be referred to arbitration, which consists of three members."

During the implementation, a dispute arose between the two parties, and by honouring the arbitration clause, the arbitral tribunal issued the following award:

1- King Abdulaziz University shall pay to OGEEM 7,779,566.77 Riyals.

2- King Abdulaziz University shall release the bank guarantees provided by OGEM, the value of which is 22,031,553 riyals.

3- The King Abdulaziz University submits to the Ministry of Finance a request to exempt the plaintiff from delay fines.

Based on this ruling, the university released the bank guarantees, and paid the Dutch company an amount of 6,499,377.26 Riyals and declined to pay the rest of the required amounts according to the arbitration decision.

OGEEM Company filed a suit in the Board of Grievances, requesting a ruling to oblige King Abdulaziz University to pay the amount of 1,280,189,50, which is the difference between the amount due according to the award of the arbitration tribunal and the amount paid. After the case was referred to the Ninth Administrative Circuit, the representative of the university attended and responded to the Dutch company's request, "that if we accept what the arbitration committee decided, resorting to arbitration in the dispute of this contract is illegal, because the Board of Grievances is the only judicial body that has the right to hear cases." This is in accordance with Cabinet Resolution No. 58 - Date 10-06-1963, which stipulated that: No government entity may accept arbitration as a mean of settling disputes that may arise between it and any individual, company, or private body, with the exception of special cases in which the state grants a general privilege, and shows its utmost interest granting

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the concession, including the arbitration clause. Likewise, paragraph (b) of the same resolution states that "in cases where contracts concluded by any ministry contain texts that violate the government's procurement regulation and the implementation of its projects and works, the contract is referred to the Board of Grievances for decision in a manner that achieves justice."

The Ninth Circuit of the Board of Grievances issued a ruling in which it concluded that "Pursuant to Council of Ministers Resolution No. 487 dated 11-07-1978, which held the Board of Grievance's right to hear cases resulting from contracts that contain texts that violate public policy, and in order to achieve justice, it requires the adoption of the arbitral tribunal's decision, because its legal ground is to fulfil contracts so they should respect their obligations agreed by them. Also, it is in accordance with Sharia's rule that stated that Muslims are bound by their conditions. Therefore, it is not possible to overturn the arbitrators' ruling except with what invalidates the ruling of the judge, and therefore the obligation to do so is compatible with the requirements of justice, and the administrative body has the right to refer to the one who caused the violation of public order from among its employees. Based on the foregoing, the court issued its ruling enforcing the university to pay the required amount.

Again, an appeal was filed to the Cases Audit Committee (First Circuit), which eventually did not agree with the ruling of the Ninth Circuit of the Board of Grievances regarding the permissibility of resorting to arbitration in the administrative contract signed between a public authority, and individual, or company, pursuant to Cabinet Resolution No. 58/1963.[44]

The contradictory decisions of Saudi courts and arguments in the case of Ogem BV against King Abdulaziz University showcase that the requirement of ministerial approval for the arbitration agreement is not easily enforceable in practice. In civil and Shariah law countries, the principle of good faith and the provisions of the contract laws on agency would take into consideration to which extent the foreign company was aware of such a requirement, and if it impacted the validity of the arbitration agreement. Thereby it would possibly also allow for annulment of the arbitral award, or it would only create obstacles for enforceability of the award in the state to which the governmental party belongs, in this case Saudi Arabia. Should it only impact the enforceability of the award in the state of the governmental body, the award would still remain enforceable in other states where the governmental body would have assets.

The case of Commisa v PEP, ICC Case No 13613/JRF shows that even awards on administrative contracts which have been annulled in a state to which the governmental body belongs might remain enforceable in other states where this body has assets. In this concrete case, in 2011 the Mexican appeals court annulled the ICC award of 2009, however the district court in New York confirmed the ICC Award, paving the way for Commisa to begin executing on Pemex's assets in the USA.[45]

5 CONCLUSION

Governmental contracts are of great importance and their exclusion from arbitration contradicts the set goal of a sustainable dispute resolution mechanism. However, the arbitrability of administrative contracts is very diverse in different legal cultures and ranges from general acceptance in the Anglo-American legal tradition to a requirement of governmental approval present in the Middle East and Latin America under the influence of French tradition, with the possibility of the government also revoking their

44 Alkhdair (n 38) 146; JH AlSharif, *The Judicial Principles and Jurisprudence of the Saudi Courts in Arbitration* (Dar Al Ejadah 2020) 159.

45 Cabrera, Figueroa and Wöss (n 26) 126.

approval unilaterally or having unilateral rights to terminate the contract. Such a situation in comparative law causes legal insecurity for companies entering into international commercial contracts with a foreign government, where they might be unaware of such administrative requirements while entering into a contract and would potentially face obstacles for enforcement of the international arbitration awards in the state in question.

The development in Saudi Arabia reveals that it has a long tradition of entering into arbitration agreements and honouring them even in the case when the award was eventually decided against it, as was the case in the famous Aramco case of 1963. The recent arbitration legislation allows resorting to arbitration upon the approval of the Prime Minister, while the new government competition and procurement regulation only requires the approval of the Minister if the value of the contract exceeds one hundred million riyals and provided that Saudi law is applied. On the other hand, the Saudi judiciary defines the administrative contract by merely having the administration as a party to the contract. This leads to exclusive jurisdiction of the administrative courts for administrative contracts, which may create tensions in cases arbitrated without governmental approval. Such tensions might be even more important in international disputes, considering that in comparative law a contract will be considered administrative only if it is related to public services and if it gives some special powers to the governmental body. Such differences in comparative law in terms of the notion of the administrative contract and the arbitrability may diminish the positive effects of the arbitration in administrative contracts, as they may endanger equal access to dispute resolution as part of the sustainable development goals, be enforceable, or even cause discrepancies between states that annul the arbitration awards and others that still enforce the awards despite their annulment.

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Research Article

DID RUSSIA INVADE INTERNATIONAL LAW IN UKRAINE

Adnan Mahmutovic [1]

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Summary: 1. The Annexation of Crimea and Self-determination Denied. – *1.1. Introduction. – 1.2. Annexation of Crimea. – 1.3. The right to self-determination.* – 2. History of recognising breakaway republics. – 3. Russia invaded international treaties. – 4. International law will prevail. – 5. Conclusion.

Keywords: Annexation, International law, Self-determination, Russian invasion, International Criminal Court.

ABSTRACT

Background: *It has been a year since Russia heavily invaded Ukraine, leading to prolonged violence and devastation. Russia had previously disregarded international law by annexing Crimea, violating the principle of the use of force, and breaking numerous treaties that safeguard Ukraine's sovereignty and territorial integrity. Despite the invasion occurring a year ago, Ukraine remains in a dire situation, with the conflict causing significant harm to its people and infrastructure. This paper aims to examine the legal implications of Russia's*

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invasion from an international perspective, and to consider the potential repercussions of such actions.

Methods: *This research paper analyses the legal implications of the conflict between Russia and Ukraine, focusing on Russia's invasion and annexation of Crimea. Through the application of legal positivism, which seeks to analyse the law in a way that is objective and value-neutral, the paper argues that Russia's actions contravene Ukraine's sovereignty and territorial integrity.*

Conclusion and recommendations: *The Russian Federation's invasion of Ukraine and subsequent territorial seizure constitutes a violation of international law. While there are ways to address this violation, the possession of nuclear weapons by a state may make it difficult to take action. The ICC is investigating the situation in Ukraine and can prosecute individuals for international crimes, but national courts also have a crucial role in ensuring justice. Notwithstanding, it is imperative for the international community to unite and condemn aggression against independent nations, with a critical mass of states prepared to take measures to halt or decrease acts of aggression while also providing assistance to victims. It is vital to demonstrate that international law remains valid and binding, and that the illegitimate use of force will never be accepted or even tolerated.*

1 THE ANNEXATION OF CRIMEA AND SELF DETERMINATION DENIED

1.1 Introduction

Since 1991 and its independence, Ukraine has become an area of increasing tensions with Russia, both inherited from historical processes and developed during the post-Cold War era. Ukraine has had a tangled history with Russia, with tensions over issues like natural gas pricing and the status of its Russian-speaking populations.[2] Furthermore, some in Russia have seen Ukraine's drift towards the West, and particularly its association with the European Union and NATO, as a threat to Russia's security and interests.[3] Therefore, the country has been marked by conflicting interests and deep-seated divisions.[4] However, most of the Ukrainian population support a pro-Western stance, and as a result, their calls for preserving Ukraine's sovereignty today have been backed by many Western European nations. The conflict in Ukraine has been ongoing since 2014, when Russian forces annexed Crimea and pro-Russian separatists took control of areas in the eastern regions of Ukraine. Since then, there have been numerous outbreaks of violence, with innocent civilians caught in the crossfire.

The ongoing conflict in Ukraine, like the one in Syria, is a bloody business because of the devastating impact on the lives of ordinary people, and it is the responsibility of the international community to take action to prevent and resolve these conflicts. This bloody business has shaken the international order to its core and now represents one of the main global security challenges. On February 24th, 2022, the Russian president took further action by ordering troops to be sent into Ukraine from various directions and explained to Russian citizens that his objective was to "demilitarize and de-Nazify

2 Eve Conant, 'Russia and Ukraine: The Tangled History that Connects–and Divides–Them' (*National Geographic*, 24 February 2023) <https://www.nationalgeographic.com/history/article/russia-and-ukraine-the-tangled-history-that-connects-and-divides-them> accessed 6 March 2023.

3 Ronald D Asmus, *A Little War That Shook the World: Georgia, Russia, and the Future of the West* (St Martin's Press 2010).

4 Bartosz Gierczak, 'The Russo-Ukrainian Conflict' (*ResearchGate*, 8 May 2020) <https://www.researchgate.net/publication/349948624_The_Russo-Ukrainian_Conflict> accessed 6 March 2023.

Ukraine" or, in other words, to eliminate military presence and fascist ideologies.[5] He stated that his intentions were to protect individuals who have been subjected to oppressive actions and genocide by the Ukrainian government.[6] However, these claims found no factual grounds to support them.

Many legal scholars and researchers have written on the topic and have provided a variety of perspectives on the legal implications of the conflict.[7] Some of the key issues that have been discussed include the annexation of Crimea by Russia,[8] the role of separatist groups in eastern Ukraine,[9] the responsibility of states for the actions of non-state actors,[10] and the applicability of the laws of war to the situation in Ukraine. Some of them pointed out that the latest crisis is not about Crimea or parts of Ukraine, it is about undermining the norms and international law and threatening the international peace and security system.[11] The Russian Federation's actions in recent years have raised serious concerns about the effectiveness of the international legal order in maintaining peace and security. Therefore, this paper aims to examine the legal implications of Russia's invasion from an international perspective, and to consider the potential repercussions of such actions. Additionally, the paper will highlight that Russia is not only violating Ukraine's territorial sovereignty but also openly disregarding international law. The goal of this paper is to demonstrate that international law remains valid and binding, and that the illegitimate use of force will never be accepted or even tolerated.

1.2 Annexation of Crimea

In March 2014, Russia and the Republic of Crimea signed a treaty of annexation, in which Crimea was annexed by the Russian Federation. Russia annexed Crimea following a controversial referendum in which a majority of people in the region allegedly voted in favour of joining the Russian Federation. According to international law, a treaty can only be concluded between states that have the capacity to enter into legal relations.[12] Therefore, any treaty involving Crimea would have to be concluded between Russia and Ukraine, not just Russia and Crimea, as it would have to respect the territorial integrity and sovereignty of Ukraine. From an international law perspective, the treaty of annexation between Russia and Crimea is likely to be considered void *ab initio*.

It is clear that the annexation of Crimea by Russia constitutes a flagrant violation of Ukraine's sovereignty and territorial integrity as it was done without the consent of the Ukrainian

5 FP Staff, '"Demilitarise and Denazify": How Vladimir Putin Justifies Russia's Invasion of Ukraine' (*Firstpost*, 24 February 2022) <https://www.firstpost.com/world/demilitarise-and-denazify-how-vladimir-putin-justifies-russias-invasion-of-ukraine-10405181.html> accessed 6 March 2023.

6 Paul Kirby, 'Why Did Russia Invade Ukraine and Has Putin's War Failed?' (*BBC News*, 24 February 2023) <https://www.bbc.com/news/world-europe-56720589> accessed 6 March 2023.

7 Rokoua Mataiciwa, 'The Russian-Ukrainian War: An Explanatory Essay Through the Theoretical Lens of International Relations' (*ResearchGate*, 22 June 2022) <https://doi.org/10.13140/RG.2.2.18975.64169/1> accessed 6 March 2023.

8 Oleksandr Merezhko, 'Crimea's Annexation in the Light of International Law: A Critique of Russia's Legal Argumentation' (2016) 2 Kyiv-Mohyla Law and Politics Journal 37, doi: 10.18523/kmlpj88181.2016-2.37-89.

9 Ivan Katchanovski, 'The Separatist War in Donbas: A Violent Break-Up of Ukraine?' in NN Petro (ed), *Ukraine in Crisis* (Routledge 2017) ch 5.

10 Tracey German and Emmanuel Karagiannis (eds), *The Ukrainian Crisis: The Role of, and Implications for, Sub-State and Non-State Actors* (Routledge 2018).

11 Michał Woźniak, 'The Ukraine Crisis and Shift in US Foreign Policy' (2016) 18 (2) International Studies 87, doi: 10.1515/ipcj-2016-0011.

12 See Art 2 (a), Vienna Convention on the Law of Treaties (with annex) (adopted 23 May 1969, entered into force 27 January 1980) [1987] UN Treaty Series 1155/18232.

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government. Under Article 134 of the Constitution of Ukraine, Crimea is considered to be an "inseparable constituent part of Ukraine."[13] Article 138, paragraph 2 of the Ukrainian Constitution states that the Autonomous Republic of Crimea has the right to organise local referendums in accordance with the laws of Ukraine.[14] This means that the referendums organised in Crimea must pertain to issues that are specific to the region and must be in compliance with the laws and regulations of Ukraine.

The autonomy of Crimea is limited by the Ukrainian Constitution, which states that Crimea is an autonomous republic within Ukraine and that it cannot secede from Ukraine. Despite a clear constitutional constraint, the Supreme Council of Crimea and the Sevastopol City Council adopted as joint resolution the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol on March 11, 2014.[15] The resolution (Article 3) stated that if a majority of voters in a referendum held on March 16, 2014 voted in favour of the proposal, the Autonomous Republic of Crimea will turn to the Russian Federation with the proposition to accept the Republic of Crimea on the basis of a respective interstate treaty into the Russian Federation as a new constituent entity of the Russian Federation. On March 15, the United States drafted a resolution that declared the upcoming secession referendum in Crimea to be invalid. The resolution was vetoed by the Russian Federation and China.[16] The Constitutional Court of Ukraine declared the Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1702-6/14, which called for an all-Crimean referendum, to be unconstitutional. As a result, the resolution was considered null and void from the day that the Constitutional Court issued its judgment.[17] The President of Ukraine, Petro Poroshenko, in his inaugural address on June 7, 2014, emphasised the importance of Crimea to Ukraine, and stated that "Crimea is, was and will be Ukrainian."[18] This statement reflects the official position of the Ukrainian government regarding the status of Crimea, which is that it is an integral part of Ukraine and that its annexation by Russia in 2014 was illegal and illegitimate. The annexation was also widely condemned by the international community, including the UN General Assembly,[19] the EU, and many other countries such as the USA and UK have made statements that the annexation of Crimea is illegal, and numerous countries and international organisations have imposed sanctions on Russia as a result.[20] At the same time, Russian-backed separatists seized part of the Donbas of south-eastern Ukraine, consisting of the Luhansk and Donetsk oblasts.

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13 Constitution of Ukraine No 254 k/96-BP of 28 June 1996 (as amended of 02 March 2014) ch X <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed20140302#Text> accessed 6 March 2023.

14 ibid.

15 Resolution of the Supreme Council of the Autonomous Republic of Crimea No 1727-6/14 'Declaration of Independence of the Autonomous Republic of Crimea and the city of Sevastopol' of 11 March 2014 <https://www.voltairenet.org/article182723.html> accessed 6 March 2023; Natalia Cwicinskaja, 'The Case of the City of Sevastopol: Domestic and International Law' (2017) 5 (3) Russian Law Journal 69, doi: 10.17589/2309-8678-2017-5-3-69-85.

16 Somini Sengupta, 'Russia Vetoes UN Resolution on Crimea' (*The New York Times*, 15 March 2014) <https://www.nytimes.com/2014/03/16/world/europe/russia-vetoes-un-resolution-on-crimea.html> accessed 6 March 2023.

17 Decision No 3-рп/2014 in Case No 1-15/2014 (Constitutional Court of Ukraine, 20 March 2014) [2014] Official Gazette of Ukraine 27/776.

18 'Poroshenko Sworn in as Ukraine's President, Says Crimea "Will Be Ukrainian"' (*NBC News*, 7 June 2014) <https://www.nbcnews.com/news/world/poroshenko-sworn-ukraines-president-says-crimea-will-be-ukrainian-n125146> accessed 6 March 2023.

19 'General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region' (*United Nations Press*, 27 March 2014) <https://press.un.org/en/2014/ga11493.doc.htm> accessed 6 March 2023.

20 'International Reactions to the Annexation of Crimea by the Russian Federation' (*Wikipedia*, March 2023) <https://en.wikipedia.org/wiki/International_reactions_to_the_annexation_of_Crimea_by_the_Russian_Federation> accessed 6 March 2023.

1.3 The right to self-determination

International law recognises a right to the self-determination of peoples.[21] In 1995, the International Court of Justice determined that the right to self-determination possesses an "*erga omnes character*", meaning that every state has an obligation to the entire international community to support the right.[22] The UN Charter states that "equal rights and self-determination of peoples" is the foundation for building friendly relations between nations.[23] It recognises the right of self-determination for all "peoples" but it does not provide a definition for the term "peoples" or establish guidelines for how this right should be exercised. So far, this right has mainly been invoked by colonised communities.[24] However, the Friendly Relations Declaration provides a more detailed explanation of self-determination, which includes the right for a people to freely decide their political status and to develop economically, socially, and culturally without outside interference.[25] The lack of specificity in the original definition may be due to it being a rejection of the traditional idea of a divine right to govern.

The Russian Federation has argued that the people of Eastern Ukraine have a right to self-determination, and that this right justifies its actions in the region. The self-determination of the Donbas region has been a contentious issue since the outbreak of the conflict in 2014. The region has a significant population of ethnic Russians and Russian-speakers, and some separatist groups in the region have sought to exercise their right to self-determination by seeking autonomy or independence from Ukraine. Some would understand the self-determination of the two autonomous regions as a continuation of what has been already agreed in the Minsk II agreement. The Minsk II agreement is a peace deal reached in 2015 to end the ongoing conflict in Eastern Ukraine between Ukrainian government forces and pro-Russian separatists. It calls for measures of political autonomy for the two autonomous republics of Donetsk and Luhansk, as well as other measures to normalise the situation along the Ukraine-Russia border. It was unanimously endorsed by the UN Security Council.[26]

The right of peoples to self-determination is a fundamental right under international law, recognised by the UN Charter and in various human rights instruments.[27] Despite the potential impact of territorial disputes on populations and the significant role of self-determination in international law, there exists an unexplored paradox concerning the lack of emphasis on self-determination in territorial disputes presented to the ICJ.[28] The primary reasons for this are the Court's prioritisation of the principle of stable boundaries and states' prioritisation of their territorial integrity.[29] The ICJ has defined self-determination

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21 Glen Anderson, 'A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?' (2016) 49 (5) Vanderbilt Journal of Transnational Law 1183, 1185.

22 *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 102 (30 June 1995).

23 See Ch I, art 1, para 2, United Nations Charter (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) <https://www.un.org/en/about-us/un-charter> accessed 6 March 2023.

24 Louis Busingye, 'Remedial Secession – A Principle or a Mere Theory of International Law' (ResearchGate, 8 August 2020) <https://www.researchgate.net/publication/343525239_Remedial_Secession_-A_principle_or_a_mere_theory_of_International_Law_2#fullTextFileContent> accessed 6 March 2023.

25 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 Octovber 1970) UN Doc A/RES/25/2625.

26 Minsk Agreement on Ukraine Crisis (12 February 2015) <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/11408266/Minsk-agreement-on-Ukraine-crisis-text-in-full.html> accessed 6 March 2023.

27 Catriona Drew, 'The East Timor Story: International Law on Trial' (2001) 12 (4) European Journal of International Law 663, doi: 10.1093/ejil/12.4.651.

28 Yusra Suedi, 'Self-Determination in Territorial Disputes Before the International Court of Justice: From Rhetoric to Reality?' (2023) 36 (1) Leiden Journal of International Law 161, doi: 10.1017/S0922156522000620.

29 ibid.

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as the obligation to consider the freely expressed will of peoples, and this was emphasised in the Western Sahara case,[30] where the Court required consultation with the inhabitants of a particular territory. When it comes to the Donbas region, we can agree that all peoples have the right to freely determine their political status and pursue their economic, social, and cultural development. This right applies to all peoples, including ethnic minorities within a state.

However, the right to self-determination is not synonymous with secession. The right of self-determination has been understood as having two distinct aspects: "internal self-determination" and "external self-determination". Internal self-determination refers to the protection of minority rights within a state, while external self-determination refers to the right to secede from a state.[31] It does not automatically include the right to unilaterally secede from a state to create a separate state. Instead, it can be exercised in different ways, such as through greater autonomy within a state or through the protection of minority rights. Some authors suggest a new typology with four categories: polity-based, secessionary, colonial, and remedial forms. This new framework provides a more nuanced and comprehensive approach to understanding the various claims to self-determination, their legal basis, and their implications for contemporary international relations.[32] The right to secede is a complex one that can depend on a variety of factors such as the historical, cultural, and political context of the situation. In general, it is up to individual states to decide how they will interpret and apply the principle of self-determination within their borders.

The right to self-determination is generally considered to be the last resort to severe human rights violations and oppression.[33] The right to secession is only allowed in extreme cases of repeated oppression or subjugation of the minority, leaving it with no other option to exercise "internal self-determination" in a meaningful way.[34] This is known as "remedial secession" which is a modern interpretation of the principle of self-determination, and it is only allowed under certain circumstances and under the supervision of the international community.[35] The principle of Remedial Secession is based on the United Nations principle of the "Responsibility to Protect", which holds that states and the international community have a responsibility to protect people from such atrocities.[36] However, the principle of Remedial Secession is not universally recognised and accepted by the international community, and its application can be controversial. There is no agreement among nations on what level of restriction on internal self-government would justify a region breaking away. The International Court of Justice sidestepped the issue in the Kosovo case by determining the legality of declaring independence, rather than examining the act of seceding.[37] The people of Donbass may face two challenges in claiming the right to self-determination: first, the restriction on their self-government may not be severe enough to justify secession. Second, the ability to secede may be determined before the fact, after the fact, or as a gradual process, depending on the severity of each new restriction imposed on Donbass.[38]

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30 See, *Western Sahara* (Advisory Opinion) (16 October 1975) [1975] ICJ Rep 12, 25, para 59.

31 Rocky Esposito, 'Ukraine, Self-Determination, and Emerging Norms for Unilateral Secession of States' (2021) 19 (1) Washington University Global Studies Law Review 139.

32 Tom Sparks, *Self-Determination in the International Legal System: Whose Claim, to What Right?* (Hart Publishing 2023).

33 Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6 (1) St Antony's International Review 38.

34 Nicolás Brando and Sergi Morales-Gálvez, 'The Right to Secession: Remedial or Primary?' (2019) 18 (2) Ethnopolitics 107, doi: 10.1080/17449057.2018.1498656.

35 ibid.

36 See, 2005 World Summit Outcome, UNGA Res A/RES/60/1 (16 September 2005) paras 138, 139.

37 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 (22 July 2010).

38 Esposito (n 31).

2 HISTORY OF RECOGNISING BREAKAWAY REPUBLICS

It is important to note that Russia has a history of recognising breakaway republics in areas where it has territorial aspirations. When Putin became president, there was a clear change in Russia's approach towards the former Soviet republics. The focus of Russian foreign policy was to maintain influence and control over these countries, particularly those in Eastern Europe and the Caucasus region. The Kremlin's primary goal was to prevent these countries in Eastern Europe and the Caucasus from aligning with Western political and military structures. Following the collapse of the Soviet Union, several breakaway republics emerged in post-Soviet states, South Ossetia and Abkhazia in Georgia,[39] Transnistria in Moldova,[40] Artsakh (also known as Nagorno-Karabakh) between Azerbaijan and Armenia,[41] and more recently, Crimea, Donetsk, and Luhansk in Ukraine. Many of these conflicts have been ongoing for several decades. Each of these separatist movements, known as "frozen conflicts", arose from different geographical, political, and ethnic grievances. They pose a common issue: how can international law evaluate the legitimacy of these breakaway movements? While international law has dealt with issues related to secessionist movements in the past, unilateral secessions by non-colonised states or proto-states raise unique factual and legal issues.[42] One of them is that statehood is no longer based solely on effectiveness and the right to self-determination, but also on compliance with peremptory norms.[43] Peremptory norms are immutable legal rules, which means that states cannot opt-out of or deviate from their requirements. If a secessionist entity violates peremptory norms, the international community will not recognise it as a state, and there will be a legal obligation not to acknowledge its statehood. This is because the international community has a legal obligation to uphold peremptory norms and prevent their violation. This could explain why countries like Bangladesh, Bosnia, and Kosovo were able to achieve statehood through unilateral secession, while other entities like Abkhazia, South Ossetia, and Transnistria have not been recognised as states.[44]

The actions taken by the Russian state towards Ukraine, including the annexation of Crimea in 2014, the alleged support for separatist rebels in eastern Ukraine, and the imposition of economic sanctions on Ukraine, have been widely seen as a violation of the principle of non-intervention. The United Nations General Assembly Resolution A/RES/25/2625 (XXV), issued on October 24, 1970, reinforced the principle of non-interference in the internal affairs of states as a fundamental principle of international law.[45] It holds that states should not interfere in the internal affairs of other states, and is closely related to the principle of state sovereignty, which recognises the equal and exclusive rights of states to govern their own territory.[46] This principle prohibits any type of interference, encompassing not only military

39 Bruno Coppieters, 'The Roots of the Conflict' (1999) 7 Accord, A Question of Sovereignty: The Georgia-Abkhazia Peace Process 18.

40 Mihály Borsi, 'Transnistria – An Unrecognized Country Within Moldova' (2007) 10 (4) South East Europe Review (SEER) 45.

41 Glenn E Curtis, *Armenia, Azerbaijan, and Georgia: Country Studies* (Federal Research Division Library of Congress 1995) 18-25.

42 Glen Anderson, 'Unilateral Non-Colonial Secession and the Criteria for Statehood in International Law' (2015) 41 (1) Brooklyn Journal of International Law 1.

43 ibid.

44 ibid.

45 UNGA Res 2625 (XXV) (n 25). The United Nations General Assembly Resolution 2625, "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" was adopted by the General Assembly on 24 October 1970, during a commemorative session to celebrate the twenty-fifth anniversary of the United Nations.

46 Zhang Naigen, 'The Principle of Non-Interference and its Application in Practices of Contemporary International Law' (2016) 9 Fudan Journal of the Humanities and Social Sciences 449, doi: 10.1007/s40647-016-0126-y.

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intervention but also any acts of intervention or coercion aimed at the State's political, economic, or cultural elements including its personality.[47] However, some authors argue that Art. 2(4) prohibits only the use of force that threatens the territorial integrity and political independence of a state.[48] Other uses of force, such as rescuing citizens abroad, would be allowed since they do not threaten the state's territorial integrity or political independence. These authors believe that the second part of Art. 2(4), which requires force to be compatible with the United Nations' purposes, supports their position.[49] The historical development of rules on the limitation of the use of force supports the idea that all documents aimed at limiting the use of force specifically refer to the use of force that endangers another state's territorial integrity and political independence. For example, the Briand-Kellogg Pact prohibited war, the Montevideo Convention of 1933 prohibited the acquisition of territory by force, and the General Assembly resolution on the definition of aggression prohibited aggression. While these documents aimed to ban the most serious form of the use of force - force that threatens the existence of another sovereign state - it is not necessarily accurate to assume that the UN Charter only prohibits this specific type of force. The Charter's revolutionary significance lies in its use of the term "force" instead of "war" or "aggression," implying a ban on all forms of force except for the exceptions it provides. Had the Charter intended to only prohibit force that endangers territorial integrity and political independence, it would have used the same rhetoric as previous documents.

3 RUSSIA INVADED INTERNATIONAL TREATIES

In the post-Cold War period, Russia has generally favoured a conservative approach to the international legal order, emphasising the importance of territorial sovereignty and the primacy of state sovereignty over the rights of individuals and other non-state actors. However, it is important to note that Russia's focus on territorial sovereignty and state sovereignty has long been at odds with its foreign policy practice in the Commonwealth of Independent States (CIS) region, where it has often sought to assert its dominance over its neighbouring states. Since 2008, Russia's conduct towards its CIS neighbours has been seen as increasingly aggressive and expansionist, reflecting a belief in hierarchy rather than sovereign equality. The Russia-Georgia war in August 2008 is widely seen as a turning point in Russia's foreign policy, marking a shift towards a more assertive stance towards the West. Since the war, Russia has been involved in several conflicts and disputes with Western-aligned countries, including the invasions of Georgia and now Ukraine. These actions have been seen as an attempt to prevent these countries from integrating with Western institutions such as the European Union and NATO.

In addition, Russia has been criticized for its domestic policies, which have been seen as a rollback of democratic freedoms and human rights. This has led to questions about the future of governance not only in Russia but also across the Federation. Furthermore, Russia has been involved in the Syrian civil war and has been militarising the Arctic. All these actions have raised concerns about Russia's intentions and its role in the international community. This represents a departure from its traditional approach and has reached its limits in the era of the current president Putin. One of the clear signs of this departure has been the violation

47 Florica Bra?oveanu and Constantin Anechitoae, 'The Principle of Non-interference in Internal Affairs' (2015) 15 (2) Ovidius University Annals, Economic Sciences Series 76.

48 DW Bowett, 'The Use of Force in the Protection of National' (1957) 43 Transactions of the Grotius Society 114.

49 ibid.

of the 1975 Helsinki Final Act, which reaffirmed the inviolability of the existing borders of European states, the non-use of force, and the peaceful settlement of disputes.[50]

Furthermore, the annexation of Crimea also violated the 1994 Budapest Memorandum, in which Ukraine, along with other states, gave up its nuclear weapons in exchange for security guarantees from the United States, United Kingdom, and Russia, including the commitment to respect Ukraine's territorial integrity.[51]

Treaties signed between Russia and Ukraine have been aimed at ensuring the territorial integrity and sovereignty of both nations. One of the most notable of these is the 1997 Treaty of Friendship, Cooperation, and Partnership between the Russian Federation and Ukraine.[52] This treaty reaffirmed the commitment of both countries to recognise the inviolability of existing borders, and respect for territorial integrity and mutual commitment not to use its territory to harm the security of each other.[53] Russia has also been accused of violating several other international treaties, such as the Intermediate-Range Nuclear Forces Treaty, the New Strategic Arms Reduction Treaty, the Open Skies Treaty, and the Incidents at Sea Agreement.[54] These examples demonstrate the serious nature of Russia's alleged treaty violations and the potential consequences for international security and stability. The Russian military intervention in Ukraine has been widely condemned as an act of aggression by the international community, including by the United Nations.[55] Representatives of various states and international organisations, such as the Council of Europe,[56] the OSCE,[57] NATO,[58] the EU,[59] the African Union,[60] the Economic Cooperation Organisation of Western African

50 Helsinki Final Act: Declaration on Principles Guiding Relations between Participating States (adopted at the Conference on Security and Co-operation in Europe, 1 August 1975) <https://www.osce.org/helsinki-final-act> accessed 6 March 2023.

51 Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Ukraine–Russian Federation–United Kingdom of Great Britain and Northern Ireland–United States of America) (5 December 1994) [2021] UN Treaty Series 3007/52241.

52 Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation (Ukraine–Russian Federation) (31 May 1997) [2021] UN Treaty Series 3007/52240.

53 ibid, art 2.

54 US Department of State, 'Russia's Violation of the Intermediate-Range Nuclear Forces (INF) Treaty' (*US Department of State Archived Content, 4 December 2018*) <https://2017-2021.state.gov/russias-violation-of-the-intermediate-range-nuclear-forces-inf-treaty/index.html> accessed 6 March 2023.

55 Aggression against Ukraine, UNGA Res ES-11/1 (18 March 2022) UN Doc A/RES/ES-11/1.

56 Situation in Ukraine 2.3 (CoE Committee of Ministers, 24 February 2022) CM/Del/Dec(2022)1426bis/2.3.

57 Zbigniew Rau and Helga Maria Schmid, 'Joint statement by OSCE Chairman-in-Office Rau and Secretary General Schmid on Russia's launch of a military operation in Ukraine: Press Release' (*Organization for Security and Co-operation in Europe (OSCE)*, 24 February 2022) <https://www.osce.org/chairmanship/512890> accessed 6 March 2023.

58 North Atlantic Treaty Organization, 'Statement by NATO Heads of State and Government: Press Release (2022) 061' (*North Atlantic Treaty Organization (NATO)*, 24 March 2022) <https://www.nato.int/cps/en/natohq/official_texts_193719.htm> accessed 6 March 2023.

59 Josep Borrell, 'Russia's aggression against Ukraine: Press Statement by High Representative/Vice-President Josep Borrell' (*European Union External Action*, 24 February 2022) <https://www.eeas.europa.eu/eeas/russias-aggression-against-ukraine-press-statement-high-representativevice-president-josep_en> accessed 6 March 2023.

60 Macky Sall and Moussa Faki Mahamat, 'Statement from Chair of the African Union, HE President Macky Sall and Chairperson of the AU Commission HE Moussa Faki Mahamat, on the situation in Ukraine' (*African Union*, 24 February 2022) <https://au.int/en/pressreleases/20220224/african-union-statement-situation-ukraine> accessed 6 March 2023.

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States,[61] and the Organisation of American States[62] have all strongly denounced the unlawful nature of the intervention and emphasised the importance of defending the basic principles of the international law.

The Russian military aggression against the internationally recognised sovereign state of Ukraine, including the annexation of Crimea, constitutes a blatant violation of fundamental principles of international law and the established system of international security. Such principles, as enshrined in customary and conventional international law, include the principle of state sovereignty and equality among states, as well as the principle of inviolability of state borders.[63] Under International law, all states have the right to exercise control over its domestic affairs without interference from other states. One of the key principles of international law is the sovereignty of states, which holds that each nation has the right to govern itself without external interference.[64] This principle is reflected in the United Nations Charter, which states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[65] Some authors argue that the Russian invasion was a clear sign of aggression.[66] Acts of aggression are a serious violation of international law. The prohibition of aggression is considered a peremptory norm of international law, also known as a *jus cogens* norm.[67] Art. 53 of the 1969 Vienna Convention on the Law of Treaties stipulates that peremptory norms already exist *de lege lata*, and that such norms were non-derogable legal rules.

Some argue that Russia's actions constitute a violation of Art. 2(4) of the United Nations Charter, which prohibits the threat or use of force against the territorial integrity or political independence of any state.[68] Again, grave breaches of the prohibition on the use of force, such as acts of occupation, have also been widely condemned in the past. Some of these situations are ongoing, such as the occupation of Nagorno-Karabakh by Armenia, and Palestine by Israel.[69] The UN Charter states a clear prohibition on the threat or use of force between states with a few exceptions. The most important of these exceptions is the right of self-defence as outlined in Art. 51 of the United Nations Charter. This article asserts that a state can use force to defend itself if it is the victim of an armed attack. In the Cold War era, the USSR and USA commonly used the concept of self-defence to legitimise their armed interventions. The Brezhnev Doctrine was employed by the Soviet Union to justify its suppression of the Prague Spring and invasion of Afghanistan.[70] On the other hand, the USA justified its interventions

61 Economic Community of West African States, 'Communique on the War in Ukraine' (*ECOWAS*, 27 February 2022) <https://ecowas.int/ecowas-commission-communique-on-the-war-in-ukraine> accessed 6 March 2023.

62 Organization of American States, 'Statement from the OAS General Secretariat on the Russian Attack on Ukraine: Press Release E-008/22' (*Organization of American States (OAS)*, 24 February 2022) <https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-008/22> accessed 6 March 2023.

63 Merezhko (n 8).

64 Kofi Annan, 'Two Concepts of Sovereignty' (*United Nations Secretary-General*, 18 September 1999) <https://www.un.org/sg/en/content/sg/articles/1999-09-18/two-concepts-sovereignty> accessed 6 March 2023.

65 UN Charter (n 23) ch I, art 2, para 4.

66 Marcin Marcinko and Bartosz Rogala, 'The Ukranian Crisis: A Test for International Law?' (2016) 5 (1) Polish Review of International and European Law 37.

67 Peremptory Norms of General International Law (jus cogens) [2019] ILC Rep A/74/10, ch V, paras 46-57.

68 John B Bellinger III, 'How Russia's Invasion of Ukraine Violates International Law' (*Council on Foreign Relations (CFR)*, 28 February 2022) <https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law> accessed 6 March 2023.

69 Anne Lagerwall, Robert Kolb and Olivier Corten, *Le principe ex injuria jus non oritur en droit international* (Bruylant 2016).

70 Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge Studies in International and Comparative Law, CUP 2009).

in Nicaragua and Grenada by citing self-defence. However, the state must prove that it was an armed attack and that the force used was necessary and proportional to the attack.

Another exception to the prohibition on the use of force is the authorisation of the use of force by the United Nations Security Council. The Security Council has the primary responsibility for maintaining international peace and security, and it may authorise the use of force in situations where peaceful means have been exhausted or would be ineffective. Due to its design, the Security Council has frequently been unable to reach a decision during the Cold War era and more recently. It has consistently proven ineffective in addressing incidents involving one or more of the P5 members, such as the United States or Russia. Nonetheless, if the United Nations Security Council decides to take action against a member state, its decision is binding on all 193 U.N. members. However, such binding decisions can be vetoed by the five permanent members of the council, which includes Russia. Therefore, if Russia chooses to veto a council resolution, the resolution would not be adopted.

As the crisis escalated, Russia used legal rhetoric to justify its intervention in a way that could be denied. Russia aimed to create ambiguity between legal and illegal actions, using uncertainty in international law to obscure its justifications and making false claims about threats to Russians and Russian speakers. These justifications exploited legal and normative grey areas and reflected western liberal discourse. Russia claimed to be protecting its citizens, intervening by invitation, and referenced the western focus on human protection and Kosovo's secession from Serbia to argue for remedial secession. These claims were weak and were not intended to convince most states of the legality of Russia's actions but rather to create enough uncertainty to limit punitive western responses and gather support from friendly CIS states.[71] The justification offered by President Putin for the Russian invasion of Ukraine, which included protecting Russia from NATO's alleged eastern expansion and protecting ethnic Russians from alleged oppression by the Ukrainian government, do not fall within the exception of self-defence as outlined in Article 51 of the United Nations Charter. Self-defence under international law is limited to the use of force in response to an actual armed attack, and it must be necessary and proportionate to the attack.[72]

Russia's justification for the annexation of Crimea and its involvement in the eastern Ukraine conflict, which were based on the protection of ethnic Russians and the alleged oppression by the Ukrainian government, do not meet the criteria of an armed attack and therefore, cannot be considered as a legal justification for the use of force. Even if Russia could provide evidence that Ukraine had committed or planned to commit attacks on Russian citizens in the Ukrainian regions of Donetsk and Luhansk, it would not be a valid justification for an action in collective self-defence under Art. 51 of the United Nations Charter. This is because Donetsk and Luhansk are not recognised as sovereign states by the UN, and therefore, the principle of collective self-defence, which allows a UN member state to take military action to defend another UN member state, would not apply. Also, Putin's statements that Ukraine was committing "genocide" against Russians in Donetsk and Luhansk, were a weak attempt to justify Russia's use of force by invoking international law. As we have already explained, neither the United Nations Charter nor the 1948 Convention on the Prevention and Punishment of the Crime of Genocide authorise parties or UN member states to use force as a response to acts of genocide or serious human rights abuses. According to international law, the use of force is only authorised in self-defence or by the UN Security Council.

71 Roy Allison, 'Russian "Deniable" Intervention in Ukraine: How and Why Russia Broke the Rules' (2014) 90 (6) International Affairs 1255.

72 UN Charter (n 23) ch VII, art 51.

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4 INTERNATIONAL LAW WILL PREVAIL

The ongoing conflict in Ukraine serves as a testament to the fact that international law is a framework that primarily recognises the principle of force. While the system of international law acknowledges the equality of states, it also implies that certain states possess a greater degree of equality and thus the right to use force to subjugate disobedient governments of sovereign nations. This is a clear indication of an attempt to undermine the principles of international law and reduce it to a concept where there is no differentiation between good and bad actions, but rather, a balance of power. The utilisation of unilateral force in such circumstances destabilises the international relations system and provides legitimacy to the use of force for achieving geopolitical objectives. This ultimately undermines the values and principles on which the framework of international law is founded.

In this regard, it is worth mentioning that the head of Russian diplomacy recently attempted to relativise the Russian aggression against Ukraine by comparing it to the brutal military operations carried out by the Israeli army in territories with a majority Palestinian population. It is imperative to note that the principle of justice must be universally accessible and impartial, regardless of the actors and location involved. The absence of justice for all implies the abuse of the principle of justice as it cannot be selectively applied. However, it is important to acknowledge that the violation of international humanitarian law provisions by one country cannot be justified or in any way relativised by the practices of other nations.

The effectiveness of international justice is contingent upon the voluntary cooperation of states. International justice institutions lack the means of compulsory enforcement as law enforcement agencies exist solely within the purview of national legal systems. This constitutes a significant ambiguity within the framework of international law, which has a pronounced impact on its efficiency. Specifically, the International Criminal Court is entirely dependent on the willingness of state law enforcement and military entities to carry out investigations and make arrests. Additionally, this international justice institution is not financially autonomous, as it relies on annual membership fees from member states and voluntary contributions for funding. These factors contribute to the reality that the scope and implementation of international justice is determined by the actions and efforts of international actors, who are considered subjects of international law and provide it with substance and meaning. As such, the functionality of international justice institutions is contingent upon the agreement and cooperation of the signatory states of the agreements that established them.

The use of force without proper legal justification can lead to the destabilisation of world peace and security. It can also lead to a violation of human rights and humanitarian law, displacement of civilians, economic sanctions and other forms of punishment by the international community. On October 16, 2022, the Foreign Ministers of Estonia, Latvia, and Lithuania issued a joint statement calling to close the 'legal loophole' and hold accountable those responsible for the crime of aggression against Ukraine.[73] The United Nations and the International Criminal Court are among the institutions that are responsible for upholding and enforcing international law, and can take action against states or individuals who violate it.

In the past, the International Criminal Court has shown reluctance to engage in conflicts involving major powers. However, some progress has been made. In 2016, the Office of the

73 'The Ministers of Estonia, Latvia and Lithuania Call to Establish a Special Tribunal to Investigate the Crime of Russia's Aggression: Joint Statement' (*Ministry of Foreign Affairs of the Republic of Lithuania*, 16 October 2022) <https://urm.lt/default/en/news/the-ministers-of-estonia-latvia-and-lithuania-call-to-establish-a-special-tribunal-to-investigate-the-crime-of-russias-aggression> accessed 6 March 2023.

Prosecutor of the ICC, after conducting an examination for nearly eight years, initiated investigations into individuals accountable for crimes committed during the South Ossetia and Georgia conflict.[74] In March 2022, arrest warrants were issued for three individuals, including the former Minister of Internal Affairs of the self-proclaimed Republic of South Ossetia.[75] Despite significant pressure from the administration of the United States, the Appeals Chamber of the ICC unanimously resolved to authorise the initiation of an investigation into war crimes and crimes against humanity perpetrated by coalition forces in Afghanistan since May 2003.[76]

The prosecution of individuals accused of committing crimes within Ukraine poses a significant challenge. The Ukrainian government holds primary responsibility for conducting investigations and holding perpetrators accountable within its territorial jurisdiction. Recent developments have shown progress in this area, with the conclusion of a trial in which a soldier of the Russian Federation pleaded guilty to the murder of a Ukrainian civilian during the onset of aggression. Additionally, two other soldiers were convicted of committing the offense of indiscriminately targeting civilians through the use of artillery. The Chief Prosecutor of Ukraine has acknowledged that there are currently 80 similar cases involving captured Russian Federation soldiers that are under investigation.[77] In the imminent future, an additional 34,000 reports of alleged crimes will be subject to further inquiry.[78] Additionally, an investigation has been launched into a recent ruling by the self-proclaimed Donetsk People's Republic court, in which two British nationals and one Moroccan national were sentenced to death.[79]

On March 2, 2022, the Office of the Prosecutor (ICC) announced that it was launching an investigation into crimes within its jurisdiction that were committed on Ukrainian territory, following a referral from several states regarding the situation in Ukraine.[80] The ICC prosecutor will now request authorisation from the ICC judges to open an official investigation.[81] Ukraine and Russia are not members of the International Criminal Court, which means that they cannot demand an investigation. However, the ICC has jurisdiction

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74 International Criminal Court, 'ICC Pre-Trial Chamber I Authorises the Prosecutor to Open an Investigation into the Situation in Georgia: Press Release' (*International Criminal Court*, 27 January 2016) <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-authorises-prosecutor-open-investigation-situation-georgia> accessed 6 March 2023.

75 *Situation in Georgia* ICC-01/15 (Prosecutor's application pursuant to article 58 for warrants of arrest against Mikhail Mindzaev, Gamlet Guchmazov and David Sanakoev ICC-01/15-34-Conf-Exp) (International Criminal Court, 10 March 2022) <https://www.icc-cpi.int/georgia> accessed 6 March 2023.

76 *Situation in the Islamic Republic of Afghanistan* ICC-02/17 (International Criminal Court, 5 March 2020) <https://www.icc-cpi.int/situations/afghanistan> accessed 6 March 2023.

77 'Ukraine Identifies 600 Russian War Crime Suspects: Prosecutor' (*Al Jazeera*, 31 May 2022) <https://www.aljazeera.com/news/2022/5/31/ukraine-has-identified-600-russian-war-crime-suspects-prosecutor> accessed 6 March 2023.

78 Julia Mueller, 'Ukraine Prosecutor Says it has Documented 34,000 War Crimes, Including Genocide' (*Yahoo news*, 18 September 2022) <https://news.yahoo.com/ukraine-prosecutor-says-documented-34-173655183.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAALKlTCHFYA_mNEl5KMp7oZBSZC1Ped9-zD6SsLM4pBsDeflhQ8pvRWz-JjZCh54RrXmz7QaXWU9cSbX9J9PFO0lLXIvkjdvBLnVMhC6Wohwy4rA2ZMeM87GGb0A8qFtNCelhc-GIJxOOnKPArJYunPsmMqEbKtsyNAcbv8pK0aL2> accessed 6 March 2023.

79 Ed Upright et al, 'June 9, 2022 Russia-Ukraine News' (*CNN*, 9 June 2022) <https://edition.cnn.com/europe/live-news/russia-ukraine-war-news-06-09-22#h_88bd17594808e126430e216f7b69c584> accessed 6 March 2023.

80 Karim AA Khan QC, 'Statement of ICC Prosecutor, Karim AA Khan QC, On the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (*International Criminal Court*, 2 March 2022) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> accessed 6 March 2023.

81 *Situation in Ukraine* ICC-01/22 (International Criminal Court, 2 March 2022) <https://www.icc-cpi.int/ukraine> accessed 6 March 2023.

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to investigate war crimes, crimes against humanity, and genocide but not the crime of aggression. The ICC's jurisdiction over the crime of aggression is subject to certain conditions. Both the state in which the act of aggression occurred and the state of which the individuals committing the aggression are nationals must be parties to the ICC's statute and must have ratified the amendment to the statute relating to the crime of aggression.[82] Since Russia and Ukraine have not done so, the ICC does not have jurisdiction over the act of aggression. The ICC can exercise jurisdiction over acts of aggression committed by a state against another state through a referral by the UN Security Council (UNSC) under Chapter VII of the United Nations Charter.[83] This referral bypasses the requirement for both states to have accepted the ICC's jurisdiction. However, it is unlikely for the UNSC to make such a referral due to Russian veto power.

The Ukrainian government has called for the establishment of a special international tribunal specifically for the purpose of determining individual responsibility for acts of aggression committed in Ukraine. Some scholars have already provided an analysis of such an idea, suggesting that it would be legally problematic. [84] However, they discussed two possible options. The creation and jurisdiction of a tribunal to prosecute war crimes and crimes against humanity in Ukraine could be based on Ukrainian domestic law. This would allow for the prosecution of Russian nationals for the crime of aggression. This legal foundation could be further supported by an agreement with the United Nations or another regional organisation, which would make the tribunal compliant with relevant human rights law instruments. This would make the tribunal be regarded as having been "established by law".[85] The crime of aggression is considered a "leadership crime" as it is typically committed by leaders or high-ranking officials of a state or organisation.[86] This refers to the main obstacle to holding individuals accountable for committing international crimes - immunity. In regard to respect for Russia's sovereignty, it would not be legally permissible to invoke any exceptions to immunities *ratione personae*, as such exceptions have been strongly rejected by the International Law Commission (ILC) and the International Court of Justice (ICJ) based on existing practice and *opinio juris*. As a result, the Russian President, Prime Minister, and Minister of Foreign Affairs are legally protected by immunities as long as they remain in office.[87] According to the authors, this option has several drawbacks. Firstly, it has a unilateral character, meaning it is done by one country or group of countries without the consent of other countries. Secondly, it carries a risk of abuse, as any number of states can create an international tribunal by concluding a treaty among themselves which would claim to bypass immunities and exercise jurisdiction on any incumbent or past Head of State for international crimes allegedly committed. Thirdly, even if immunities can be bypassed, the problem of cooperation remains unresolved. This would mean that the tribunal would still have difficulties in obtaining the cooperation of the state and its officials to carry out its mandate.[88]

The second option proposed seems more reasonable. It is based on the "Uniting for Peace" resolution as a basis for a broad interpretation of the United Nations General Assembly's

82 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) pt 2, art 5 <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en> accessed 6 March 2023.

83 ibid, pt 2, arts 5 para 2, 13 (b).

84 Olivier Corten and Vaios Koutroulis, *Tribunal for the Crime of Aggression Against Ukraine - A Legal Assessment: In-Depth Analysis Requested by the DROI Subcommittee* (European Parliament 2022) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf> accessed 6 March 2023.

85 ibid.

86 Rome Statute (n 82) pt 3, art 25, para 3 (b).

87 Corten and Koutroulis (n 84).

88 ibid.

(UNGA) powers.[89] This would allow the UNGA to create a special tribunal similar to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), or to defer the situation in Ukraine to the ICC, due to the inability of the United Nations Security Council (UNSC) to address the issue because of the veto of one of its permanent members, Russia. This would allow for the prosecution and judgement of the crime of aggression to be made not by a group of states but by a body representing the international community, which would provide maximum legitimacy to the process.[90]

On a different note, the civil and military officials responsible for committing crimes of genocide, war crimes, and crimes against humanity can be brought to justice because the International Criminal Court can have jurisdiction if such crimes are committed on the territory of a state that recognises the Court's jurisdiction. Ukraine has twice declared its acceptance of the Court's *ad hoc* jurisdiction.[91] On 20 May 2021, the Verkhovna Rada (Parliament of Ukraine) adopted Bill no. 2689 "On amendments to certain legislative acts on the Enforcement of International Criminal and Humanitarian Law".[92] Furthermore, 39 member states of the Court have already requested an investigation, which in a certain way accelerates the process, as the Prosecutor is no longer obligated to seek the Court's approval.

The ICC's role in investigating and prosecuting international crimes in Ukraine is an important step in ensuring accountability for those who have committed heinous acts. However, it is also important to note that the ICC is a court of last resort, meaning that it can only investigate and prosecute crimes when national courts are unable or unwilling to do so. Therefore, it is crucial that Ukraine continues to strengthen its own judicial system and take steps to ensure that those responsible for international crimes are held accountable at the national level as well.

5 CONCLUSION

The Russian Federation has invaded a fellow member state of the United Nations, forcibly separating territory belonging to that country, which no other member state had previously done, apart from that of Iraq against Kuwait. While Iraq's invasion and annexation of Kuwait was met with a strong international response and collective self-defence by other states, the situation with the Russian Federation, a nuclear power, is different. International law may be perceived as weak towards nuclear powers because the possession of nuclear weapons by a state can be seen as a deterrent to military action and intervention by other nations, as the potential use of nuclear weapons can result in devastating consequences. Additionally, the United Nations Security Council, where decisions on international actions are made, has five permanent members who possess nuclear weapons, which can make it difficult to act against them.

89 ibid.

90 ibid.

91 Embassy of Ukraine to the Kingdom of the Netherlands, Declaration of 9 April 2014, covering acts committed between 21 November 2013 and 22 February 2014. See, First Declaration by Ukraine (International Criminal Court, 9 April 2014) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf> accessed 6 March 2023; Ministry of Foreign Affairs of Ukraine, Declaration of 8 September 2015, covering acts committed since 20 February 2014. See, Second Declaration by Ukraine (International Criminal Court, 8 September 2015) <https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine> accessed 6 March 2023.

92 'Ukraine and the Rome Statute' (*Parliamentarians for Global Action*, 2023) <https://www.pgaction.org/ilhr/rome-statute/ukraine.html > accessed 6 March 2023.

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International law provides several mechanisms for addressing a violation of the territorial integrity of a sovereign state such as the invasion of Ukraine by Russia. These may include the prohibition on the threat and use of force by one state against another and the possibility of taking collective action to maintain international peace and security. The international community can impose economic and political sanctions against the offending state in response to its aggressive actions. Diplomatic pressure can be applied through the UN, regional organisations, and individual states to call for an end to the aggression and respect for the territorial integrity of Ukraine. The most important mechanism that this paper has put in focus is in the hands of the International Criminal Court (ICC), which has jurisdiction to prosecute individuals for international crimes.

The ICC has already opened a preliminary examination into the situation in Ukraine and is monitoring the situation in Crimea. It is an important step in ensuring accountability for those who have committed heinous acts, but national courts also have a crucial role to play in achieving justice.

As has been demonstrated, there is a legal basis for the prosecution of those responsible, however, the main reason why high-ranking Russian officials are unlikely to be prosecuted is that they are out of reach of the prosecution authorities. The Russian government is almost certain not to extradite them. A similar situation existed with Omar Al-Bashir, the former President of Sudan, who, despite being arrested in May of last year, has yet to be extradited. Instead, justice will be served to those who are caught. Regardless of these bleak predictions, it is important that the world unites in condemning aggression against independent countries. It is crucial that there is a critical mass of states that are willing, in one way or another, to stop or reduce the intensity of aggression, or to help the victims of aggression. It is important that the entire world sees that international law does indeed function, and that it is not worth being an aggressor.

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Research Article

CRIMINAL LIABILITY AND VIRAL HOMICIDE – CAN IT BE PROSECUTED AS A CRIME AGAINST HUMANITY?[1]

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Against Humanity. – 2.2.2. Mens rea in the Crime Against Humanity. – 2.3. Can Viral Homicide Be Prosecuted as a Crime Against Humanity of Murder? – 2.4. Can Viral Homicide Be Prosecuted as 'Other Inhumane Acts' under Art. 7. 1. (k) – Would It Violate the Principle of nullum crimen sine lege ? – 2.4.1 The Principle of nullum crimen sine lege under *Art. 22(2) of the Rome Statute. – 2.4.2. The lex certa Principle.* – 3. Does the ICC Have Jurisdiction over Non-party State Nationals? – *3.1. Art. 12(2) (a) Requires That the Conduct in Question, not the Consequence, Takes Place in any Part of the Territory of a State Party. – 3.2. The ICC Does not have Universal Jurisdiction – 3.3. The Customary International Law Principle of 'Effects Doctrine' is Inapplicable.* – 4. Concluding Remarks.

Keywords: COVID-19 pandemic, viral homicide, criminal responsibility, International Criminal Court, crimes against humanity, cyberattacks.

ABSTRACT

Background: *One of the current topics at the international level is the COVID-19 pandemic, which has changed the lives of all people globally and caused economic and human losses. In legal scientific discourse, there are repercussions.*

Methods: *To uncover scientific knowledge and results, the authors apply qualitative research methods such as content analysis, the legal dogmatic method, and methods of induction and deduction. Essential tools that authors use in this research are primary legal texts of the International Criminal Court (ICC) and other international treaties, as well as the case law of the ICC, the European Court of Human Rights (ECtHR), the International Court of Justice (ICJ),* ad hoc *and internationalised and mixed (hybrid) tribunals, and secondary legal sources.*

Results and Conclusions: *This paper is based on the hypothetical situation of the deliberate creation and spread of a pandemic that resulted in enormous human losses. The authors examine the central question, which is whether viral homicide could be prosecuted as a crime against humanity before the ICC. The authors conclude that existing provisions of Art. 7 of the Rome Statute could not be interpreted so broadly as to encompass viral homicide as a crime against humanity. Expanding the scope of Art. 7 of the Rome Statute to cover viral homicide would violate basic principles of criminal law such as* nullum crimen sine lege *and* lex certa.

1 INTRODUCTION

At a time of globalisation, technical and technological progress, and the desire for power in global politics, social relations are developing rapidly, thus creating new challenges for the legal system. In addition, the world has been facing a pandemic that has changed everyone's lives and posed new challenges. Given the number of victims and the socio-economic consequences of the pandemic, it is clear to everyone that we need a global response to the pandemic.[5]

This paper does not intend to enter into a discussion of the origin of COVID-19. Instead, the paper is based on a hypothetical situation wherein State X, being a non-party state to the Rome Statute, and the Head of State (or individuals acting in a more or less official capacity, such as government officials) ordered the creation of a deadly virus for research purposes in a laboratory that was not equipped for this type of research. Accordingly, a deadly virus escaped, causing a global pandemic and the death of over 250,000 people worldwide.

5 According to the World Health Organization, as of April 2023, there have been over 6 million confirmed deaths due to coronavirus infection. See 'WHO Coronavirus (COVID-19) Dashboard' (*World Health Organization*, 4 May 2023) <https://covid19.who.int> accessed 10 May 2023.

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Furthermore, this research is inspired by a hypothetical case introduced at the International Criminal Court Moot Court Competition for 2021 at the Grotius Centre for International Legal Studies of the Leiden University in The Hague, the Netherlands.

So far, no significant legal and scientific attention has been paid to the issue of criminal responsibility/accountability in international criminal law for deliberately creating and spreading a deadly virus.[6] In this regard, in our research, we used the existing literature on international criminal law, particularly the variety of academic papers that address some isolated issues of criminal responsibility, elements of crimes against humanity, cyberattacks, cyberspace and the jurisdiction of the International Criminal Court (ICC). On the other hand, in arguing and proving the hypotheses, we consulted and used the jurisprudence of the ICC as well as the case law of *ad hoc* tribunals, in the first place, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, respectively, and the views of the European Court of Human Rights (ECtHR), the latter representing one of the most effective and influential regional international human rights courts.

Regarding the above, the authors examine whether *contemporar*y international criminal law judicial bodies possess and could exercise jurisdiction over the deliberate creation and spread of a deadly virus and whether the ICC can functionally establish its jurisdiction over nationals of a non-party state (a country that is not a member of the Rome Treaty system). The general hypothesis set out in the paper is that contemporary international criminal law lacks an answer to the intentional creation and spread of a deadly virus. Therefore, the elaborating (collateral) hypothesis reads that creating and spreading a deadly virus cannot be treated and prosecuted as a crime against humanity under the provision in Art. 7.1. neither as a crime against humanity of murder under Art. 7.1. (a) nor as a crime against humanity or other inhumane acts set out in a provision in Art. 7.1. (k) of the Rome Statute.

In order to come to scientific knowledge and results, the authors apply qualitative research methods such as content analysis, the legal dogmatic method, and methods of induction and deduction. Essential tools that authors use in this research are primary legal texts (Rome Statute (treaty), Elements of Crimes (non-treaty based source), and Rules of Procedure and Evidence (non-treaty based document) of the ICC, other international treaties, the case-law of the ICC, the ECtHR, the International Court of Justice (ICJ), *ad hoc* and internationalised and mixed (hybrid) tribunals, and secondary legal sources (commentaries, books and law reviews).

2 INTERNATIONAL CRIMES *STRICTO SENSU* AND VIRAL HOMICIDE

The ICC is a permanently formed, structured and organised international criminal judicial body established by an international multilateral treaty, the Rome Statute, which was adopted on 17 July 1998 after long and sometimes unpromising negotiations and which entered into force four years later, on 1 July 2002. The aim of establishing the ICC was to punish individuals accountable for (grave) violations of international humanitarian law. *Ratione materiae*, the ICC is responsible for international crimes *stricto sensu*, i.e., genocide (defined in 1948), crimes against humanity (the International Law Commission (ILC) of the United Nations still works on an international treaty on the prevention and punishment of

6 For additional information referring to AIDS and biological weapons, the following sources can be recommended: Alan Whiteside, *HIV & AIDS: A Very Short Introduction* (2nd edn, OUP 2016) ch 1, doi: 10.1093/actrade/9780198727491.003.0001; Sandy R Primrose, Microbiology of Infectious Disease: Integrating Genomics with Natural History (OUP 2022) ch 27.

the named 'group' of crimes), war crimes (serious breaches of customary and conventional international humanitarian law), and the crime of aggression (defined in the Kampala Amendments from 2010). When it comes to applicable law, the ICC adjudicates based on the Rome Statute, the Elements of Crimes as well as the Rules of Procedure and Evidence, with the Rome Statute taking precedence in the event of a conflict of norms.[7]

Acts of ordering the creation of a deadly virus (viral homicide) in an unequipped laboratory and ordering the outbreak be kept from the World Health Organisation (WHO), which resulted in mass human devastation, cannot be linked with the most heinous crime of genocide via aggression (crime against peace) or a war crime. This is because the crime of genocide implies a list of acts that must be 'committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group'.[8] Thus, acting as viral homicide in this particular case cannot be properly linked to the intention to destroy any specific group of people.[9] Furthermore, the situation in question cannot be adequately linked to a war crime either since a war crime involves a list of unlawful acts committed during an armed conflict, which is not the case here.[10] Also, the situation in question cannot be coherent with the notion of the crime of aggression, which implies 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations' (Rome Statute, Article 8*bis*).[11]

But what about crimes against humanity? In this sense, Art. 7.1. of the Rome Statute prescribes that crimes against humanity mean any of the illegal acts enumerated in paragraphs (a)-(k), 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Considering the nature of all those acts listed in paragraphs (a)-(k), the case at hand could be brought into connection to the murder in Art. 7.1 (a) and other inhumane acts prescribed in Art. 7.1 (k).[12]

2.1 Viral Homicide and Cyberattacks

The focus of this paper is to discuss the possibility of prosecuting viral homicide before the ICC, but its importance is not restricted to this crime. The literature in the past decade has been discussing the possibility of a wider interpretation of the ICC Statute to include cybersecurity, and the results of these discussions are interconnected with the outcome of this paper.

7 Gilbert Bitti, 'Article 21 and the Hierarchy of Sources of Law Before the ICC' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) ch 18, 411.

8 The 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Article II Claus Kreß, 'The ICC's First Encounter with the Crime of Genocide' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) ch 27, 669.

9 For more, see: Enis Omerović, 'Zahtjev za znatno uništenje značajnoga dijela skupine: relevantnost kvantitativno-kvalitativnog kriterija' (2021) 13 (26) Anali Pravnog fakulteta Univerziteta u Zenici 13.

10 Michael A Newton, 'Charging War Crimes: Policy and Prognosis from a Military Perspective' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) ch 29, 732; Anthony Cullen, 'The Characterization of Armed Conflict in the Jurisprudence of the ICC' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) ch 30, 762; Enis Omerović, 'Ratni zločini kao sustavno kršenje ljudskih prava i zaštite osoba u uvjetima oružanih sukoba' (2021) 5 (5) Godišnjak Pravnog fakulteta 155.

11 Roger S Clark, 'The Crime of Aggression' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) ch 31, 778; Enis Omerović, 'Agresija u međunarodnom pravu: zločin države i krivična odgovornost pojedinca' (2022) 2 (19) Društvene i humanističke studije 417.

12 Darryl Robinson, 'Crimes against Humanity: A Better Policy on "Policy"' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) ch 28, 705.

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Using cyberspace has become crucial for both users and organisations due to its importance as a convenient instrument of social communication, commercial activities, and governmental service.[13] However, hackers and cyberattackers have taken advantage of this to conduct malicious activities against users.[14] Examples of hacking into business servers containing personal information have increased in recent years.[15] In 2013, cyberthieves invaded the servers, made headlines across the US, and accessed the data of 40 million customers and the personal data of up to 70 million individuals, such as addresses and phone numbers.[16] The target business faced lots of challenges because of this attack where class-action lawsuits, lost customers and stockholders, and damages to the reputation are all considered as damages of the malicious cyberattack.[17] In 2015, the US Office of Personnel Management was a target of a hacker who stole the information of more than 22 million job applicants and current employees from this office.[18] According to Hull, the average number of data breaches continues to increase, and the average cost per breach is 4 million USD.[19] These costs, in most cases, lead to loss of business due to the loss of consumer trust in the wake of a breach. Again, according to Ponemon Institute (cited in Statisa), the cost that a company victim incurs ranges from direct cost to indirect cost or loss, such as the impact of the data breach on the company's reputation, and so on.

It is undisputed that such cybercrimes committed by individuals may be prosecuted under national jurisdiction. But when it comes to cyberattacks, the traditional notion of territoriality in international law seems almost quaint.[20] At the same time, an international jurisdiction for a non-state or individual responsibility for a global or international cybercrime is currently difficult to establish. It has been suggested that the ICC has jurisdiction over certain cybercrimes.[21] According to the definition of the crime of aggression established at the Kampala conference in 2010, in order to prosecute a cyberattack as a crime of aggression,

13 Biswajit Tripathy and Jibitesh Mishra, 'A Generalized Framework for E-Contract' (2017) 8 (4) International Journal of Service Science, Management, Engineering, and Technology 1; Syrine Guerbouj, Hamza Gharsellaoui and Sadok Bouamama, 'A Comprehensive Survey on Privacy and Security Issues in Cloud Computing, Internet of Things and Cloud of Things' (2019) 10 (3) International Journal of Service Science, Management, Engineering, and Technology 32, doi: 10.4018/IJSSMET.2019070103; Mohamad Albakjaji et al, 'The Legal Dilemma in Governing the Privacy Right of E-Commerce Users: Evidence from the USA Context' (2020) 11 (4) International Journal of Service Science, Management, Engineering, and Technology 166, doi: 10.4018/IJSSMET.2020100110..

14 Christophe Feltus, 'Deriving Information System Security and Privacy from Value Cocreation Theory: Case Study in the Financial Sector' (2019) 10 (4) International Journal of Service Science, Management, Engineering, and Technology 1, doi: 10.4018/IJSSMET.2019100101; Radia Belkeziz and Zahi Jarir, 'An Overview of the IoT Coordination Challenge' (2020) 11 (1) International Journal of Service Science, Management, Engineering, and Technology 99; Dominik Krimpmann and Anna Stühmeier, 'Big Data and Analytics: Why an IT Organization Requires Dedicated Roles to Drive Sustainable Competitive Advantage' (2017) 8 (3) International Journal of Service Science, Management, Engineering, and Technology 79.

15 Yutaka Mizuno and Nobutaka Odake, 'A Study of Development and Formation of Personal Information Trust Service in Japan' (2017) 8 (3) International Journal of Service Science, Management, Engineering, and Technology 108.

16 R Chaudhary and M Lucas, 'Privacy Risk Management' (2014) 5 (37) Internal Auditor 71.

17 ibid.

18 Gary P Schneider, *Electronic Commerce* (12th edn, Cengage Learning 2016).

19 Gordon Hull, 'Successful Failure: What Foucault Can Teach Us about Privacy Self-Management in a World of Facebook and Big Data' (2015) 17 (2) Ethics and Information Technology 89, doi: 10.2139/ssrn.2533057.

20 KL Miller, 'The Kampala Compromise and Cyberattacks: Can There Be an International Crime of Cyber-Aggression?' (2014) 23 (2) Southern California Interdisciplinary Law Journal 217; Enis Omerović and Damir Imamović, 'Alternativni pristupi i prijedlozi za rješavanje jurisdikcijskih sukoba uzrokovanih sajber kriminalom' (Law and Digitalization: International Scientific Conference, Faculty of Law University of Niš, 2021) 75.

21 Omerović and Imamović (20) 83-8.

the prosecution must establish that there was a state action that rose to the level of armed force and traditional armed attacks committed by state actors would have to be interpreted widely.[22] The cyberattack could qualify as a 'use of armed force' if interpreted under a target-based or effect-based approach when the cyberoperation likely to cause the damaging consequence normally produced by kinetic weapons would be the use of armed force.[23] Examples of state-supported cyberattacks may be found in the malware 'Stuxnet', developed by the US in cooperation with Israel to disable the Iranian nuclear reactor in Natanz, as openly admitted by Obama, or paralysing Estonia's infrastructure and economy in 2007 for 22 days with the spring cyberattack.[24]

While cyberattacks would be typically analysed as possible crimes of aggression, viral homicide would potentially fall under crimes against humanity under Art. 7 of the ICC Statute. However, it is possible to qualify cyberattacks as crimes against humanity as well if the widespread or systematic cyberattack is directed against the civilian population with the knowledge of the attack as required by Art. 7 (1) of the ICC Statute. The criteria of widespread attack are not difficult to fulfil; for example, in 2016, Yahoo was a victim of a data breach where the hackers stole user information of at least 1 billion accounts.[25] Possible examples of an attack directed against humanity are an attack on the informational infrastructure of hospitals or cyberattacks on smart cars. However, they would not cover typical cyberattacks conducted with the intent to cause material damage.[26] It remains open whether widespread cyberattacks with the purpose of stealing data may be considered to be a crime against humanity as they target privacy as part of human dignity. In fact, the most vulnerable industries that suffer from data breaches are healthcare (31 million records were stolen in 2017) and financial organisations due to the sensitive data that are stored in their digital system. The WannaCry worldwide cyberattack that took place in May 2017 is a good example where the NHS online systems in the UK were paralysed by encrypting the stored data and demanding a ransom for activating and retrieving the data again. Providing cybersecurity in these cases became more difficult because of the use of 'cloud computing', where the individuals' information and customers' databases are installed on various servers located across geographical boundaries, with different jurisdictions, accessed by everyone who is capable of doing so and from anywhere in the world with no temporal boundaries.[27] The individuals do not have the ability to protect the information that is stored in the company or governmental system; instead, they have to rely on the protection that the company or organization offers.[28] Finally, it could be argued that the discussion on the international prosecution of cyberattacks as a potential crime against humanity contributes to the analysis of viral homicide and its potential perception and prosecution as the latter international crime, as will be the focus of this paper.

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22 David Weissbrodt, 'Cyber-Conflict, Cyber-Crime, and Cyber-Espionage' (2013) 22 (2) Minnesota Journal of International Law 347.

23 Anne-Laure Chaumette, 'International Criminal Responsibility of Individuals in Case of Cyberattacks' (2018) 18 (1) International Criminal Law Review 1.

24 Marcel Hendrapati et al, 'Qualifying Cyber Crime as Crime of Aggression in International Law' (2020) 13 (2) Journal of East Asia and International Law 397, doi: 10.14330/jeail.2020.13.2.08.

25 'Advertising & Marketing' (*Statista*, 2018) <https://www.statista.com/markets/417/topic/479/advertising-marketing> accessed 10 May 2023.

26 Chaumette (n 23) 20.

27 Albakjaji et al (n 13).

28 I Il-Horn Hann et al, 'Overcoming Online Information Privacy Concerns: An Information-processing Theory Approach' (2007) 24 (2) Journal of Management Information Systems 13; Robert J Kauffman et al, 'A Survey of Consumer Information Privacy from the Accounting Information Systems Perspective' (2011) 25 (2) Journal of Information Systems 47, doi: 10.2308/isys-10091.

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Nowadays, new technology has rapidly been used internationally and developed such that traditional international law is unable to be updated with technological development. This has created a challenge to the current legal frameworks.[29] The lack of precise legal rules that define what is permitted and what is prohibited has led to a weakness in curbing malicious practices globally.[30]

The rise of cyberattacks is considered a challenge for international law and its principles. An example of this is that Art. 2 (4) of the United Nations Charter provides that states are forbidden from using cyberattacks against other states. Moreover, Art. 51 of the United Nations Charter and customary international law has granted the right of states to use powers against armed attacks, including malicious cyberattacks that cause injury, significant damage, or death.[31] This is confirmed by the international judiciary that states have the right to respond to cybercrimes if they pose a serious threat to their essential interests.

In terms of cybercrimes, there are some areas of ambiguity in interpreting international legal rules. According to the ICJ's *Congo* ruling[32] and the *Wall* Advisory Opinion,[33] the Court limited the right to self-defence in the case of cyberattacks that fulfil the requirements of Art. 51, which provides that armed attacks, including cyberattacks, should cause significant harm to a victim state.[34]

The concept of an attack has been defined as an act of violence that results in physical injury or harm. Accordingly, a cyberattack is considered an attack that causes physical harm or injury. Hence, a victim state has the right to respond to such an attack. However, cyberattacks that only result in significant economic damages are not afforded under this definition.

Regarding the cyberattacks conducted by a group of people (proxies), international legal rules are uncertain about the determination of the identity of cyberattackers. In this regard, the right of a victim state to self-defence is also limited. The victim state should establish the relationship/connection between the proxy and a supporting state, which is very difficult.[35]

To raise international responsibility of a supporting state, Art. 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA from 2001) has adopted a very narrow approach where a state is responsible for the actions taken by private entities if these entities act under the state's supervision, direction, and guidance. Nowadays, most cyberattacks against a state are conducted by third parties or private entities which are supported by other states. However, to establish the liability of a supporting state, international law has a very strict perspective that allows states to indirectly conduct cyberattacks against other state by using private entities. According to the mentioned Art. 8, a conclusion can be driven that it is usually impossible to prove the connection between these entities and the states supporting them. Koh has stated that

29 Zlatan Meskic et al, 'Transnational Consumer Protection in E-Commerce: Lessons Learned from the European Union and the United States' (2022) 13 (1) International Journal of Service Science, Management, Engineering, and Technology 1, doi: 10.4018/IJSSMET.299972.

30 Albakjaji et al (n 13).

31 Jackson Adams and Mohamad Albakjaji, 'Cyberspace: A New Threat to the Sovereignty of the State' (2016) 4 (6) Management Studies 256, doi: 10.17265/2328-2185/2016.06.003.

32 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Rep 2005 (ICJ, 19 December 2005) 168.

33 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 2004 (ICJ, 9 July 2004) 136.

34 Mohamad Albakjaji and Reem Almarzoqi, 'The Impact of Digital Technology on International Relations: The Case of the War Between Russia and Ukraine' (2023) 6 (2) Access to Justice in Eastern Europe 1, doi: 10.33327/AJEE-18-6.2-a000203.

35 Jackson Adams and Mohamad Albakjaji, 'Cyberspace: A Vouch for Alternative Legal Mechanisms' (2016) 1 (1) Journal of Business and Cyber Security 10.

'these rules are designed to ensure that States cannot hide behind putatively private actors to engage in conduct that is internationally wrongful'.[36]

Regarding the concepts of direction and control, the ICJ has adopted a very restrictive approach. In the *Nicaragua* case, Nicaragua claimed that there had been a relationship between the cyberattacks conducted by rebel groups and the US. Although this group was provided with all kinds of military and financial support from the latter state, which is deemed as evidence of a connection between the rebel group and the US, the ICJ held that such support was not considered as the US's involvement or use of force against Nicaragua. The Court stated that such support did not go against Art. 2(4) of the United Nations Charter.[37]

In this regard, the Court claimed that Nicaragua should prove that there was an 'effective control' by the US over the rebellious group (The Contras). Hence, financial or military support was not considered an effective control by which Nicaragua could raise the US's international responsibility for violation of the international law principle of the prohibition of the use of force. Interestingly, this standard of proof was not completely confirmed or accepted by the International Criminal Tribunal for the former Yugoslavia (ICTY), which considered that establishing state responsibility for this particular type of attribution requires another form of the state's involvement in the preparation and control of military operations.[38] For instance, in the *Tadic* case,[39] the ICTY introduced the 'overall control' test.

2.2 Can Viral Homicide Be Prosecuted as a Crime Against Humanity?

2.2.1 Actus reus of crime against humanity

For a person to be prosecuted for a crime against humanity, the principles of Art. 7 of the Rome Statute have to be met. Therefore, his/her actions must be qualified as an attack. Furthermore, Art. 7 clearly states that the attack must be 'widespread or systematic' and directed against 'any civilian population, with knowledge of the attack'. Thus, the *actus reus* and *mens rea* requirements must undoubtedly be fulfilled.[40] The ICC articulated the following so-called contextual elements in the *Ruto* case, which must be met cumulatively: 1) The attack was directed against any civilian population; 2) there is a state or organisational policy; 3) the attack is widespread or systematic; 4) there is a nexus between the individual act and the attack; 5) there is knowledge of the attack.[41]

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36 Harold Hongju Koh, 'International Law in Cyberspace' (USCYBERCOM Inter-Agency Legal Conference on the Roles of Cyber in National Defense, Fort Meade, Maryland, 18 September 2012) 6 <https://harvardilj.org/2012/12/online_54_koh> accessed 10 May 2023.

37 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) ICJ Rep 1986 (ICJ, 27 June 1986) 14.

38 For comparison, see: Peter Margulies, 'Sovereignty and Cyber-Attacks: Technology's Challenge to the Law of State Responsibility' (2013) 14 (2) Melbourne Journal of International Law 496.

39 *Prosecutor v Tadic* IT-94-1-A (ICTY, Appeals Chamber, 15 July 1999).

40 *Exempli causa* – see: Kai Ambos, 'Crimes Against Humanity and International Criminal Court' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011) ch 13, 279, doi: 10.1017/CBO9780511921124.016; M Cherif Bassiouni, 'Crimes against Humanity: The Case for a Specialized Convention' (2010) 9 (4) Washington University Global Studies Law Review 575; Leila Nadya Sadat, 'Crimes against Humanity in the Modern Age' (2013) 107 The American Journal of International Law 334, doi: 10.2139/ssrn.2013254; Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 (1) American Journal of International Law 43, doi: 10.2307/2997955..

41 *Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* ICC-01/09-19 (ICC, Pre-Trial Chamber II, 31 March 2010) para 79.

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The notion and the concept of the attack can be perceived and defined as 'an unlawful act of the sort enumerated in Article 3 (a) to (I) of the Rome Statute'.[42] Such an attack, in this regard, does not need to involve armed forces and the military,[43] which means it can be nonviolent. However, 'applying pressure on the population to act' in a particular way 'may come under the purview of an attack' if performed 'on a massive scale or in a systematic manner'.[44]

Further, the acts of the accused must be 'part of the "attack" directed against the civilian population'.[45] The phrase 'directed against' specifies that 'the main object of an attack is the civilian population'.[46] Although the acts need to be committed amid the attack against the civilian population or away from it, they could still, if sufficiently connected, be part of that particular attack. Therefore, the crime must not be an 'isolated act'.[47] 'When it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot be reasonably said to have been part of the attack'.[48]

It is crucial to consider whether the civilian population was a 'primary object of the attack' since it 'cannot be an incidental victim'.[49] The Pre-Trial Chamber in the *Ruto* case determined that a group of civilian victims 'must be distinguished by nationality, ethnicity or other distinguishing features'.[50]

Further, under the Elements of Crimes, the policy to commit the attack 'requires that the State or organization actively promote/encourage attack against a civilian population'. In the *Ruto* case, the Pre-Trial Chamber determined that one of the circumstances that had to be considered was 'whether the group had explicitly articulated an intention to attack the civilian population'.

The Elements of Crimes provided with the explanation that 'such a policy may in exceptional circumstances be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such an attack, but the existence of such a policy cannot be inferred solely from the absence of governmental or organizational action'.[51] The *Muthaura* case[52] before the ICC also witnessed an 'organized nature'.[53] This was one of the critical elements of the attack, where it was stated that the attack might be considered organised if there was: 1) recruitment of new members specifically to participate in the attack; 2) provision of uniforms and weapons to the attackers; 3) precise identification of the targets of the attack.

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42 *Prosecutor v Akayesu* ICTR-96-04-T (ICTR, Trial Chamber I, 2 September 1998) para 581.

43 Chile Eboe-Osuji, 'Crimes against Humanity: Directing Attacks against a Civilian Population' (2008) 2 African Journal of Legal Studies 118.

44 *Prosecutor v Akayesu* (n 42) para 581.

45 *Prosecutor v Popović* IT-05-88-A (ICTY, Appeals Chamber, 30 January 2015) para 577.

46 *Prosecutor v Ongwen* ICC-02/04-01/15 (ICC, Trial Chamber IX, 20 December 2019) para 34.

47 The Drafters here used the term 'group', implying crimes of collective nature. According to the Trial Chamber in *Tadić*, such crimes exclude single or isolated acts which, although possibly constituting war crimes or crimes against penal legislation, do not rise to the level of crimes against humanity. Accordingly, it was the Prosecution's duty to prove the existence of such a group.

48 *Prosecutor v Kunarac* IT-6-23&IT-96-23/-1 (ICTY, Appeals Chamber, 12 June 2002) para 100.

49 ibid, para 90.

50 *Prosecutor v Muthaura et al* ICC-01/09-02/11 (ICC, Pre-Trial Chamber II, 23 January 2012) para 110.

51 Also, scholars have argued that 'state action or policy is essential to distinguish international crimes against humanity from domestic crimes punishable under domestic law'. See: Margaret M deGuzman, 'The Road from Rome: The Developing Law of Crimes against Humanity' (2020) 22 Human Rights Quarterly 335.

52 *Prosecutor v Muthaura et al* (n 50) para 158.

53 See also: M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 1999) 24; Mathias Holvoet, *The State or Organisational Policy Requirement within the Definition of Crimes against Humanity in the Rome Statute: An Appraisal of the Emerging Jurisprudence and the Implementation Practice by ICC States Parties* (Brief 2, ICD 2013).

Regarding the third condition, 'widespread or systematic', in the *Kunarac* case, the Appeals Chamber states that the word 'systemic' refers to 'the organized nature of the acts of violence and the improbability of their random occurrence'.[54] In the *Katanga* case, the Pre-Trial Chamber noted that 'the attack, even if carried out over a large geographical area or if it was directed against a large number of victims, must still be thoroughly organized and follow a regular pattern'.[55] In the *Bemba* case, it was stated that a 'State organizational policy' constituted groups of persons that are in control of a specific territory and can execute 'a widespread or systematic attack against a civilian population'. It is suggested that the attack should follow a regular pattern made by such policy or by any organisation.[56]

Regarding the fourth condition, the Appeals Chamber in the *Popović* case[57] stated that 'the "nexus" requirement is fulfilled by an act which is objectively a part of the attack, coupled with knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof'.

Having in mind these standards from the jurisprudence of the ICC, ICTY, and the International Criminal Tribunal for Rwanda (ICTR), in a particular hypothetical case, the Prosecution would have to prove that the act of ordering the creation of a virus (whether for research or otherwise) is part of a systematic/widespread attack directed against the civilian population. More specifically, the Prosecution would have to prove that the creation of the virus in an unequipped laboratory is an attack that is part of a broader systematic attack against the civilian population. Furthermore, the accused person must be the person who 'is (alongside other members) in control on a specific territory and can execute a widespread or systematic attack against a civilian population'. The 'widespread' criterion, in our case, was met since the creation and spread of the virus caused the deaths of over 250,000 people.[58]

2.2.2 Mens rea in the crime against humanity

Since *mens rea* in crime against humanity is nowhere clarified,[59] when determining the lowest threshold for enumerated acts, we must refer to the provision described in Art. 30 of the Rome Statute, where it has been limited to 'intent and knowledge',[60] leaving out other possible *mens rea* requirements such as, to a certain extent, recklessness (*dolus eventualis*). Art. 30 of the Rome Statute does not accommodate a lower threshold of intent than oblique intent. The Trial Chamber in the *Bemba* case was of the opinion that things that 'will occur in the ordinary course of events' means that a consequence is inevitably expected and is close to certainty. Consequently, *dolus eventualis* here does not apply since it implies foreseeing the occurrence of undesired and unwanted consequences as mere likelihood or possibility. The Chamber stated that if drafters wanted to include *dolus eventualis*, they would replace

54 *Prosecutor v Kunarac* (n 48) para 94.

55 *Prosecutor v Katanga* ICC-01/04-01/07-717 (ICC, Pre-Trial Chamber I, 30 September 2008) para 396.

56 *Prosecutor v Bemba* ICC-01/05-01/08 (ICC, Pre-Trial Chamber II, 15 June 2009) para 81.

57 *Prosecutor v Popović* (n 45) para 570; *Prosecutor v Mrkšić and Šljivančanin* IT-95-13/1-A (ICTY, Appeals Chamber, 5 May 2009) para 41.

58 ICC Moot Court, 'Case before the International Criminal Court (ICC): Prosecutor versus Dragon Goodrider of Wessos, Appeal from the Pre-Trial Chamber's Decision on Confirmation of Charges' (*IBA ICC Moot Court*, 2021) 10 <https://iccmoot.com/wp-content/uploads/2020/12/ICCMCC-2021-Case.pdf> accessed 10 May 2023.

59 For more about mens rea of crime against humanity, see deGuzman (n 51) 377.

60 Rome Statute, Art. 30, 'Mental element: Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'. See: Rome Statute of the International Criminal Court (as amended in 2010 and 2015) <https://iccforum.com/rome-statute> accessed 10 May 2023.

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'will' with 'may'. Advertent recklessness was abandoned by the Working Group on General Principles of Criminal Law in the Italian capital.

In *dolus directus* of the first degree, the Prosecution would have to demonstrate and prove that the accused actually knew his actions or omissions would cause objective elements of the crime, and there had to be concrete intent which could be done only where he explicitly expressed such knowledge and intent.

In the *dolus directus* of the second degree, an offender need not have actual intent or will but must be aware, applying the knowledge element, that those required elements will be almost an inevitable and unavoidable way a thing turns out of his acts/omissions. The definition of oblique intent was significantly narrowed in the *Katanga* case, where the Trial Chamber had a legal reasoning that 'a person must know that his/her actions will necessarily bring about the consequence in question'. To put it differently, it becomes nearly impossible for an individual to contemplate that a consequence will not occur.

2.3 Can Viral Homicide Be Prosecuted as a Crime Against Humanity of Murder?

According to the Elements of Crimes, the crime against humanity of murder contains the following elements: 1) The perpetrator killed one or more persons; 2) The conduct was committed as part of a widespread or systematic attack directed against a civilian population, and 3) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[61]

In a crime against humanity of murder, the Prosecution must prove that the accused has killed one or more persons, whilst the ICC provides that the term 'killed' is able to be interchanged with 'caused death'. Here we detect two problems. The first problem is the perpetrator – if a person merely ordered the virus to be created in an unequipped laboratory, and the virus escaped on its own, then that person did not physically cause the deaths of 250,000 people. However, on the other hand, if a person physically worked on creating a virus in an unequipped laboratory, then we can talk about a person who physically caused mass human devastation.

Another problem is the question of intent, which in the case of crime against humanity of murder covers the *dolus directus* of both the first and second degree. Accordingly, in the *Katanga* case, the ICC was of the determination that subjective elements of the crime of murder would be proven if 'where the perpetrator acted deliberately or failed to act (1) in order to cause the death of one or more persons or (2) whereas he or she was aware that death would occur in the ordinary course of events'. Considering this, it would be rather challenging to demonstrate that the accused, in this case, possessed the intention to kill civilians.

2.4 Can Viral Homicide Be Prosecuted as 'Other Inhumane Acts' under Art. 7. 1. (k) – Would It Violate the Principle of nullum crimen sine lege ?

The Rome Statute included 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health' in crimes against humanity. The Elements of Crimes provided a scanty explanation that 'character refers to the nature and gravity of the act', not clarifying what those include. Therefore, in this manner,

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61 *Prosecutor v Akayesu* (n 42) para 589; *Prosecutor v. Rutaganda* ICTR-96-3 (Judgement and Sentence) (ICTR, 6 December 1999) para 80; *Prosecutor v Blaškić* IT-95-14-T (ICTY, Trial Chamber, 3 March 2000) para 217.

we must refer to international case law. In the *Blaškić* case,[62] it was stated that this conduct constituted a 'severe violation of international customary law and human rights of a similar nature and gravity to the crimes referred to in Article 7(1)'.

Although similarity is the one which is obviously required, the Rome Statute used the word 'other', indicating that 'none of the acts constituting crimes against humanity according to Article 7(1) can be simultaneously considered as other inhumane acts'.[63] The Trial Chamber in the *Blaškić* case also emphasised that in determining whether an act meets the abovementioned requirements, 'consideration must be given to all factual circumstances', including the context in which it occurred.

2.4.1 The principle of nullum crimen sine lege under Art. 22(2) of the Rome Statute

Following Art. 22 of the Rome Statute, 'a person will not be held responsible if the conduct in question does not constitute a crime within the jurisdiction of the ICC'. In other words, an individual cannot be held responsible for an act that was not legally declared as criminal at the time the act was actually committed (*nullum crimen, nulla poene sine lege*).[64] The Rome Statute under no provision foresees spreading or creating of the virus nor any other kind of pandemic-mishandling as crimes against humanity. According to the historical interpretation of the Rome Statute, it could be fairly concluded that the drafters of this multilateral treaty did not intend to punish the creating and spreading of a virus as a distinct crime. There are no indications that such an act was incriminated as a crime against humanity in the Draft Statute.

Art. 22(2) explicitly forbids extending the definition of crimes by analogy whilst stating that all definitions are to be interpreted in favour of the accused. In the *Ntaganda* case,[65] the Chamber made a clear distinction between *analogia legis* and *analogia juris*, simultaneously prohibiting the use of analogy 'as a basis for imposing criminal responsibility in what amount to substantially new crimes'. The Chamber held that the 'use of analogy was allowed in the process of interpretation, in particular of a matter not covered by a specific provision or rule, by resorting to general principles of International Criminal Law, or general principles of criminal justice, or principles common to the major legal systems of the world'.

Presumably, the Trial Chamber's decision in *Katanga* case[66] most clearly testified to this, where it was stated that 'as opposed to ad hoc tribunals', the ICC must not under any circumstances resort to the creation of the law. Accordingly, the notions of crimes should not be defined and comprehensively determined by applying analogy. Thus, the bench must refer only to the existing law, noting that there is no room for the use of a method of interpretation that could abandon the narrow approach and therefore considerably expand and broaden the definition of the crimes to those conducted by the drafters who had no intention to criminalise.

It should be taken into consideration that the ICC had no grounds to deviate from the method of interpretation provided in the Vienna Convention on the Law of Treaties (VCLT). Instead, it had to rely on the General Rule, which allows interpretation in order 'to identify or

62 *Prosecutor v Blaškić* (n 61) para 239.

63 *Prosecutor v Katanga* (n 55) para 452.

64 'No crime without law, no punishment without law' – for more, see Aly Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects' (2005) 26 (1) Statute Law Review 41, doi: 10.1093/slr/hmi005; Beth Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 The Georgetown Law Journal 119; Aleksandra Rychlewska, 'The Nullum Crimen Sine Lege Principle in European Convention on Human Rights: The Actual Scope of Guarantees' (2010) 36 Polish Yearbook of International Law 163.

65 *Prosecutor v Ntaganda* ICC-01/04-02/06 (ICC, Pre-Trial Chamber II, 24 March 2014) para 184.

66 *Prosecutor v Katanga* ICC-01/04-01-07 (ICC, Trial Chamber II, 7 March 2014) para 52.

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confirm one of the ordinary meanings of the text and not to impart to it a meaning contrary to the terms employed by interpreting it to suit the desired result'.[67] The ICC also emphasised that although 'the Statute aimed to put an end to impunity for the perpetrators of the most serious crimes, it can under no circumstances be used to create a body of law extraneous to terms of the treaty'.[68]

This was also supported by the ECtHR case law. Furthermore, it has been widely stated that Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) constitutes a ban on overly broad construction of criminal provisions, particularly by analogy.[69]

2.4.2 The lex certa principle

Lex certa requires that the act in question be unmistakeably and undoubtedly defined, determined, and criminalised. It is clear that Art. 7(1) (k) does not meet the abovementioned requirements. Provisions must not be determinable but precisely defined and, as such, must give an individual precise and reliable information about what is and what is not punishable.[70] Given that crimes against humanity are base crimes that form crimes against humanity when committed as part of a widespread or systematic attack, para. (k) broadens the definition to an extent not acceptable in international criminal law. Even if Defendant's conduct could be considered the production/use of biological weapons, it would still not be a crime against humanity since drafters did not criminalize that kind of conduct under Art. 7. It is worth remembering that the Rome Statute originally included an immediate ban on weapons of mass destruction or, to be more precise, on chemical and biological weapons, but it was dropped as the ban on weapons was narrowed to apply only to weapons listed in an annexe. Parties never adopted one, but nevertheless, this guides us to the conclusion that the sole purpose of this narrowing was to avoid a provision too broad. It becomes clear that the negotiators wanted to exclude this, and their will must be taken into account since they alone have the right to *analogia legis*.[71]

In this hypothetical case, the ICC would have to assess whether the act not provided for by the Statute represents 'other inhumane acts' with great caution, considering that the Elements of Crimes emphasised that the provisions in Art. 7 'must be strictly construed'. Allowing this to proceed, the ICC would justify any subsequent prosecution of certain conduct as other inhumane acts even if conditions outlined in VCLT are not met. All of this would lead to a dangerous deviation from the principle of legal certainty, possibly resulting in a conviction of many that are innocent, which is impermissible given that the criminal law has in its very beginnings recognised the maxim: 'Better that ten guilty persons escape than that one innocent suffer'. Considering the above arguments, we conclude that existing international criminal law does not have an answer to the deliberate creation and spread of a deadly virus,

67 ibid, para 56.

68 ibid, para 55.

69 For example, the ECtHR in *SW v the United Kingdom* has stated that 'The guarantee enshrined in Article 7 (Art. 7), which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (Art. 15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment'. See: *SW v United Kingdom* App no 20166/92 (ECtHR, 22 November 1995) para 34. Inter alia, see: Baskaya and Okçuoglu v Turkey App no 23536/94 and 24408/94 (ECtHR, 8 July 1999); *Cantoni v France* App no 17862/91 (ECtHR, 15 November 1996); *G v France* App no 15312/89 (ECtHR, 27 September 1995).

70 *Prosecutor v Blagojević and Jokić* IT-02-60-T (ICTY, Trial Chamber I, 17 January 2005).

71 *Prosecutor v Al Bashir* ICC-02/05-01/09-1 (ICC, Pre-Trial Chamber I, 4 March 2009).

thus confirming our main hypothesis. The existing provisions of Art. 7 of the Rome Statute, it seems, could not be interpreted so broadly as to encompass viral homicide as a crime against humanity. Expanding the scope of Art. 7 of the Rome Statute to cover viral homicide would violate basic principles of criminal law such as *nullum crimen sine lege* and *lex certa*.

3 DOES THE ICC HAVE JURISDICTION OVER NON-PARTY STATE NATIONALS?

Here, we would like to remind the readers that our paper deals with a hypothetical situation in which the act of viral homicide occurred in a state that is not a member of the Rome Statute, and the virus spread to a neighbouring country that is a member of the Rome Statute and caused the death of 250,000 people on its territory. Therefore, the question arises whether the ICC has jurisdiction over a national of a non-Rome Statute state for an act whose consequence occurred on the territory of a Rome Statute member state. In cases where a state on which territory the (mis)conduct in question occurred is not a party to the ICC, this Court may exercise its jurisdiction only if that state or a state of which the person accused is national and accepts the jurisdiction of this international judiciary body.

3.1 Art. 12(2) (a) requires that the conduct in question, not the consequence, takes place in any part of the territory of a state party

The wording of Art. 12(2) (a) provides that the Court may exercise its 'jurisdiction when the conduct in question takes place in the territory of a State Party'. The drafters used 'crime' and 'conduct' in the Rome Statute, implying their distinct meanings. For instance, Art. 22 distinguishes the two terms stating that 'the conduct…constitutes a crime…'. Likewise, Art. 30 distinguishes 'consequence' from 'conduct' as two material elements. The analysis of the drafting history of the Rome Statute supports this claim considering there was a solid will to include a provision which would define conduct with a dual possibility: as an act or omission. The Draft Statute carefully prepared by the Preparatory Committee in 1996 (modified in 1997) defined 'conduct' under Art. 28 to 'constitute either an act or an omission, or a combination thereof'.[72] The provision was later deleted due to disagreement on the circumstances and conditions in which a person can incur criminal responsibility for an act of omission, but there was no disagreement about the meaning of the notion of conduct.

The Elements of Crimes suggest four elements: conduct, consequence, circumstances and *mens rea*, implying that conduct is merely an element of the crime and must not be interpreted as a crime in whole. Due to the way viruses spread, it is not very easy to control their movement. If this grew into a global pandemic, would it give any affected country the right to refer (to send) the case to the Prosecutor? If so, would that not be in collision with Art. 12?

3.2 ICC does not have universal jurisdiction

Art. 12 establishes that the ICC 'may exercise jurisdiction if the State in question is a party to the Rome Statute', and in regards to a non-party state 'only if that State accepts its

72 Mohamed Elewa Badar, 'The Mental Element in the Rome Statute of The International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 Criminal Law Forum 473, doi: 10.1007/s10609-008-9085-6.

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jurisdiction'.[73] Universal jurisdiction was quite directly, explicitly, and irrevocably rejected as a way of establishing the Court's jurisdiction in the Statute's drafting, which leaves little scope for misinterpretation.[74] The US, with other states following, emphasised that: 'Universal jurisdiction or any variant of it was unacceptable', which resulted in the Bureau Compromise and Art. 12 'combining preconditions for the exercise of jurisdiction by the ICC and State acceptance'.[75] The ICC's first president confirmed this in his lectures, stating that the ICC does not have universal jurisdiction, 'and its jurisdiction is limited' to two most firmly established bases of criminal jurisdiction – territory and nationality of the alleged perpetrator.[76]

The objective territoriality condition was not met in the present hypothetical case since it 'encompasses States upon whose territory a part of the crime is committed rather than States where no part of the crime is committed but which merely experience ill effects'.[77] The Prosecution could refer to the *Al-Bashir* case to confirm that the ICC has jurisdiction even over non-party States, but unlike the present case, the Darfur situation has formally been referred, in accordance with the existing rules, to the Prosecutor by the United Nations Security Council (UNSC).

The Prosecution might try to justify universal jurisdiction stating that an unorthodox approach leaves an excellent chance for the perpetrators to go unpunished. In our opinion, the Drafters did not make such an error. The Rome Statute left the possibility for the UNSC to refer to a very serious and severe situation in which one or more grave crimes under Art. 5 appear to have been committed (where there is abundant evidence) to the Prosecutor. This allows the ICC 'to exercise jurisdiction over crimes committed on the territory of a non-Party State when authorized by the UNSC'.[78] Our opinion is that this is a sufficient guarantee to avoid the alleged perpetrator not being punished since it does not require consent from any territorial state or any state of nationality of the accused. An interpretation contrary to this article would lead to excessive arbitrariness.

3.3 The customary international law principle of 'effects doctrine' is inapplicable

Under Art. 21 of the Rome Statute, the Court shall apply the main principles and existing rules of international law. Nevertheless, such an approach is reserved as a second resort and shall be used after the Rome Statute and other significant documents, such as Elements of Crimes and Rules of Procedure and Evidence, have been thoroughly exhausted. Accordingly, customary international law is to be applied only where: (i) there is a lacuna in the ICC's internal (domestic) law, and (ii) the lacuna cannot be usefully and successfully filled by an international treaty, such as VCLT, and 'internationally recognized human rights'.

The provision we have discussed here leaves no ambiguity, making customary international law unfounded. The Prosecution might argue that the *Taylor* case[79] witnesses the ICC's

73 Dapo Akande, 'The Jurisdiction of the ICC over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 (3) Journal of International Criminal Justice 623, doi: 10.1093/jicj/1.3.618.

74 Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck, 2016).

75 ibid 680.

76 Philippe Kirsch, 'The International Criminal Court: Independence in a Context of Interdependence' (Frederick K Cox Lecture in Global Legal Reform, Case Western Reserve University School of Law, Cleveland, Ohio, 7 November 2005).

77 *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* ICC-RoC46(3)-01/18-1 (ICC, 09 April 2018) para 32.

78 Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic E publisher 2017).

79 *Prosecutor v Taylor, Charles Ghankay* SCSL-03-01-A (SCSL, Appeals Chamber, 26 September 2013) para 6, 13.

jurisdiction based on the effects doctrine; however, that case is immaterial. As opposed to the situation in *Taylor*, where the charged acts occurred in their entirety in Sierra Leone, in the present case, all elements of the alleged conduct were committed in a non-party state, and only the effects were felt in other countries.

4 CONCLUDING REMARKS

Based on the analysis of primary and secondary sources of law, case-law, and the application of legal dogmatic methods and methods of induction and deduction, the authors believe that they have proved both the general and derived hypothesis from the introduction of the research paper, in the sense that contemporary international criminal law is silent regarding the deliberate creation of a deadly virus, that is to say, intentionally causing a pandemic. In addition, the ICC has no possibility of establishing jurisdiction in our hypothetical case – given that the perpetrator is not a citizen of the party to the Rome Statute, nor did the action occur in the territory of a state party. Therefore, it is proved that the effect-based doctrine is not applicable in this case.

As previously stated, this international judicial body establishes and exercises jurisdiction over four international crimes *stricto sensu*, none of which provides for incrimination for acts of intentionally causing a pandemic. The provision of Art. 7.1. (k) is not precisely defined and is intentionally left as a reserved category that is not exhaustively explained. As part of the examination of the derived hypothesis, it has been a question of whether the intentional provocation of a pandemic, i.e., the deliberate creation and spread of a virus, could be prosecuted as a crime against humanity or other inhumane acts. The case law of the ICC (and of other courts) to which we referred in proving the hypothesis of this research attempted to establish standards for the interpretation of, which is true, a very broad category of 'other inhumane acts'.

These legal standards are based on the provisions on the much-needed protection of human rights and fundamental freedoms laid down by the 1966 International Covenant on Civil and Political Rights (Art. 7), the 1950 European Convention on Human Rights (Art. 3), the 1969 Inter-American Convention on Human Rights (Art. 5) and the 1984 Convention against Torture (Art. 1) and are reduced to acts of torture, inhuman, or degrading treatment or punishment. Applying the above legal standards and using the rule of comparing the gravity and nature of prohibited acts prosecuted in judicial practice as a category of crimes against humanity – other inhumane acts – it would be challenging to prosecute intentionally causing a pandemic, from our hypothetical case, as a crime against humanity, given the *actus reus* of other inhumane acts as well as *mens rea* condition and standard required in the framework of crime against humanity. In light of the above, the authors consider that they have proved all three hypotheses set at the beginning of the research.

It is evident that the COVID-19 pandemic changed the lives of all people and caused enormous economic and human losses. This phenomenon certainly requires a global response. Considering the nature and gravity of such acts, one might add that international criminal law should answer such situations. Law is a social engineering tool; therefore, legal norms should follow the social context and events. One possible answer is an amendment to the Rome Statute. This process would criminalize these acts under some of the existing international crimes (given the nature, it could be a crime against humanity) and prescribe criminal responsibility for such acts that would incorporate gross negligence or recklessness.

It is certainly reasonable to ask how effective the Prosecution for such acts would be before the ICC, given that the ICC has limited jurisdiction. This may be an even more interesting question, especially given the fact of the problem of establishing jurisdiction over serious

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cybercrime in this digital age, particularly having in mind discussions about the possible establishment of the ICC jurisdiction over cyberattacks, which are a kind of transnational crime. Nevertheless, it remains to be very much seen whether future international criminal law will take this approach and would go in this direction.

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Research Article

THE GENERAL BUDGET IN THE KINGDOM OF SAUDI ARABIA: BETWEEN THE GOVERNANCE REQUIREMENTS AND FINANCIAL SUSTAINABILITY

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Summary: 1. Introduction. – 2. Governance of the General Budget: Principles and Mechanisms. – 3. The General Budget and Financial Sustainability. – 4. Conclusion: Results and Recommendations.

Keywords: governance, public budget, public spending, public revenues, financial sustainability.

ABSTRACT

Background: *The general budget is the essential mechanism for implementing the public policies of the state and thus for achieving sustainable development at all levels, especially economic and social. In view of this importance, the issue of governance is raised as the most effective way to achieve the desired goals.*

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In this context, the research seeks to highlight the role played by the public budget governance in the Kingdom of Saudi Arabia in reducing the fiscal deficit caused by the instability of financial revenues while controlling the public spending process and searching for non-oil resources.

Methods: *The research relied on the descriptive analytical approach to study the reality of the governance of the public budget management in the Kingdom through the analysis of national and international studies and reports, with the aim of preparing recommendations related to improving the state budgetary management.*

Results and Conclusions: *This article produced results and recommendations that are evident in the fact that the management of the general budget in the Kingdom, although it has witnessed some improvement in the past years, still needs more effectiveness, transparency, and good performance. These are all considered to be the principles of governance in general and the public budget in particular. Therefore, these principles must be applied according to a mechanism consistent with the national legal and institutional specificities, as well as according to a time period that depends on performance indicators.*

1 INTRODUCTION

The priorities of financial policies vary in different countries of the world, in particular, between promoting economic growth on the one hand and achieving social development on the other. Regardless of the priorities adopted by financial decision makers, work must be done to consolidate the governance of managing the general budget by applying its most important principles, as well as benefiting from best practices in this field in order to achieve the desired goal of Vision 2030, which is financial sustainability.

The general budget is an essential mechanism for implementing the general policies of the state and thus for achieving sustainable development at all levels, especially economic and social. This is why the research is of great importance, as it is derived from the Kingdom's Vision 2030,[2] which attaches great importance to governance in the field of public finances. The research seeks to highlight the role played by the governance of the public budget in the Kingdom of Saudi Arabia in reducing the fiscal deficit, supporting the effectiveness of public spending, and strengthening the chances of achieving financial sustainability,[3] by clarifying the principles of governance and its role in achieving optimal implementation of the public budget, while benefiting from pioneering international experiences in this field.

In this context, the research raises a fundamental problem related to the governance of the public budget in the Kingdom of Saudi Arabia by devoting its basic principles and mechanisms with the aim of achieving the stake of financial sustainability in line with the Kingdom's Vision 2030. Therefore, we consider the extent to which the measures and procedures taken by the public authorities enabled it to support the governance of the public budget and achieve financial sustainability.

2 Kingdom of Saudi Arabia, 'Vision 2030: An Ambitious Vision for An Ambitious Nation' (*Vision* 2030, January 2016) <https://www.vision2030.gov.sa> accessed 12 February 2023.
The Government of the Kingdom of Saudi Arabia promulgated its 'Vision 2030' plan through Council of Ministers Resolution No 308 of 18/7/1437 AH (25 April 2016). 'Vision 2030' is a strategic framework to reduce Saudi Arabia's dependence on oil, diversify its economy, and develop public service sectors. Key goals include reinforcing economic and investment activities, increasing non-oil international trade. The Council of Ministers has also mandated the Council of Economic and Development Affairs (CEDA) to define and monitor its mechanisms and procedures crucial to implementation.

3 ibid. We note here that the Financial Sustainability Program came to replace the National Transformation Program that was issued in conjunction with 'Vision 2030'.

To answer this question, the research relied on the descriptive analytical approach to study the reality of public budget governance in the Kingdom, with the aim of producing results and preparing recommendations related to improving the management of the public budget and achieving financial sustainability.

Moreover, the research is based on several resources, the most important of which consist of the work of the authors A. Barilari and M. Bouvier on 'The new financial governance of the state' (2002),[4] two other works by M. Bouvier on 'Good governance of public finances in the world' (2009)[5] and 'Which new public financial model for which new State' (2022).[6] Reference is also made to the book by W. Banafa and A. Ali 'Fiscal Policy Between Growth Priorities and Justice Requirements' (2020),[7] which is a field study on the efficiency and effectiveness of systems public fiscal governance in the Kingdom of Saudi Arabia and ways to develop it, and, also, the research of B. Al-Bassam on 'The governance of the public budget in the Kingdom of Saudi Arabia' (2020).[8]

According to the above and in order to answer the main problem, the research will be divided into two axes: the first deals with the governance of the general budget in the Kingdom of Saudi Arabia by devoting its most important principles and supporting its legal and institutional mechanisms, while the second axis analyses ways to achieve financial sustainability.

2 GOVERNANCE OF THE GENERAL BUDGET: WHICH PRINCIPLES AND MECHANISMS FOR WHICH GOVERNANCE?

The Kingdom's Vision 2030[9] has attached great importance to governance in the field of public finances and included it among the principles that must be taken into account by decision-makers. It also considered it a goal that must be achieved in order to reach financial sustainability, for which an entire program bearing its name has been allocated and includes approved strategic options with the aim of rationalising public spending. In order to achieve this goal, the principles of public budget governance must be devoted,[10] and its institutional mechanisms must be activated.

2.1 Consecration of the principles of governance

These are the principles that must be activated to achieve the best levels of governance in the public sector. In this context, emphasis will be placed on the standards directly related to the field of public finance, which have been strengthened since the start of the implementation of Vision 2030. These principles are manifested through effectiveness, transparency, quality, and control.

4 André Barilari and Michel Bouvier, *La Nouvelle Gouvernance Financière de l'Etat* (Systèmes: Finances publiques, LGDJ 2004).

5 Michel Bouvier, *La Bonne Gouvernance des Finances Publiques Dans le Monde* (LGDJ 2009).

6 Michel Bouvier, 'Quel Nouveau Modèle Financier Public Pour Quel Nouvel État?' (2022) 159 (1) Revue Française des Finances Publiques 123.

7 W Banafa and A Ali, *Fiscal Policy between Growth Priorities and Justice Requirements* (Center for Research and Studies; Institute of Public Administration 2020).

8 Bassam Abdullah Al-Bassam, 'The Governance of the Public Budget in the Kingdom of Saudi Arabia' (2020) 17 (2B) Journal University of Sharjah for Humanities and Social Sciences 175.

9 Vision 2030 (n 2).

10 Bassam Abdullah Al-Bassam, *Governance in the Public Sector* (Research Center and Studies at the Institute of Public Administration 2016) 197-206.

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2.1.1 Effectiveness

Effectiveness or good disposal of public money is a general goal that governments seek to achieve and is, at the same time, an indicator for measuring performance in the field of public finance. The level of good disposal of public money is determined by measuring the government's ability to rationalise the disposal of public money by setting a ceiling for public spending in the medium and short term and striving to reduce budget deficit levels, which would enhance financial sovereignty and strengthen the confidence of the international community in financial capacity to the state.

Referring to the data available on the website of government institutions concerned with implementing vision programs in the field of public finances, specifically the financial sustainability program, we can deduce several data confirming the relative success in disposing of public finances, especially in light of the Covid-19 pandemic, which confused the public budgets of most countries. The preliminary statement of the budget for the fiscal year 2022 shows a decline in the deficit rate from 311 billion riyals in 2016, the year in which the vision was issued, to 85 billion riyals in 2021.[11]

The data published on the Vision website and related to the financial sustainability program also show that the discrepancy between budget estimates and the total actual performance of expenditures went from 16% in the period between 2014 and 2016 to an average of 4% during the period between 2017 and 2019.[12]

2.1.2 Transparency

Transparency requires informing citizens of the content of financial decisions, the reasons that prompted the authorities to issue them, and the goals they seek to achieve. It also requires defining the structures and agencies responsible for formulating and implementing public policies accurately so that it is easier for the concerned authorities in the state to determine responsibilities. Transparency also requires the publication of data showing the level of progress in implementing its policy.[13]

Transparency places an obligation on the shoulders of financial decision-makers to provide the legal framework that achieves access to information, and it also requires the provision of open databases that allow citizens to familiarise themselves with financial information related to the public budget before its preparation and during its implementation while highlighting all the risks and variables that would push the public authorities to adjust its financial policy.[14] In the same direction, transparency requires the commitment of public authorities concerned with financial affairs to improve the readability and understanding of the budget law by citizens in order to support their legal financial culture.

During the first six years of implementing Vision 2030, the Saudi government worked to

11 Ministry of Finance of the Kingdom of Saudi Arabia, 'Pre-Budget Statement for Fiscal Year 2022' (*Ministry of Finance*, 2022) <https://www.mof.gov.om/pdf/Pre-Budget%20Statement%20for%20Fiscal%20Year%202022.pdf> accessed 12 February 2023.

12 Kingdom of Saudi Arabia, 'Vision 2030: Achievements 2016–2020' (*Vision* 2030, 2021) <https://www.vision2030.gov.sa/v2030/achievements> accessed 12 February 2023.

13 International Monetary Fund, 'Annual Report 2016' (*International Monetary Fund*, 26 September 2016) <https://www.imf.org/external/pubs/ft/ar/2016/eng/fin-budget-income.htm#transparency> accessed 12 February 2023.

14 Michel Bouvier, *La Transparence des Finances Publiques: Vers un Nouveau Modèle: Actes du 6e colloque international de Rabat* (LGDJ 2013).

support its transparency indicator, as shown through several data. The Ministry of Finance issues quarterly reports on the performance of the general budget and publishes the preliminary statement of the budget[15] before it is approved on its website. It also prepares and publishes a simplified version of the general budget for citizens. More broadly, the government provides reports on the level of progress in achieving Vision 2030 on its Vision 2030 website.[16] The National Center for Debt Management publishes on its website the annual borrowing plan, which includes guidelines for public financing. Its website also includes data related to the percentage of public debt in GDP and statistical reports that determine the development of indebtedness over the years and the percentage of borrowing from local financial institutions and from international financial institutions. These data are of paramount importance, as they affect the second criterion of governance represented in the indicator of good disposal of public funds.

2.1.3 Quality

The principle of quality is one of the important principles for achieving governance in general. However, the quality of legislation is of particular importance, specifically at the level of formulation and implementation in order to achieve governance in the field of public finances, and it requires the availability of a legal system that enables controlling the legal framework related to making decisions with a financial dimension and their proper implementation.

Here, this framework can be explored in a set of regulations in the Kingdom, such as the Basic Law of Governance, the Council of Ministers Law, and the Shura (legislative authority) Council Law, which stipulates that the budget be included in the form of a Law, after its approval by the Council of Ministers[17] and stipulated that no amendments be made to it in the revenue section, except by royal decree.[18] In addition, the Basic Law of Governance subjected the process of implementing the budget to subsequent control.[19]

This control system has been improved through the issuance of a set of regulations to rationalise spending and limit financial corruption, the most important of which is the government competition and procurement system (Arts. 83-87 Royal Decree No. M/128 dated 13/11/1440 AH).[20] In sum, it can be said that despite the development of rationing in the field of public finance, the latter needs further development and improvement.[21]

15 See, for example, the preliminary statement of the general budget for the year 2023. Ministry of Finance of the Kingdom of Saudi Arabia, 'Pre-Budget Statement for Fiscal Year 2023' (*Ministry of Finance*, 2023) <https://www.mof.gov.om/pdf/2023/Pre-Budget%20Statement%20for%20Fiscal%20year%202023.pdf> accessed 12 February 2023.

16 See the details of Vision 2030 (n 2).

17 Art. 26 of the Council of Ministers Law in the Kingdom of Saudi Arabia stipulates that the Council of Ministers 'studies the state budget and votes on it chapter by chapter and issued by Royal Decree'. See, Kingdom of Saudi Arabia, Royal Decree No A/13 'Law of the Council of Ministers' of 3/3/1414 AH (20 August 1993) <https://www.saudiembassy.net/law-council-ministers> accessed 12 February 2023.

18 ibid, Art. 27: 'Any supplement to the budget shall only be made by Royal Decree'.

19 Art. 79 of the Basic Law of Governance states: 'All state revenues and expenditures are subsequently monitored, and all movable and immovable state funds are monitored, and the proper use and preservation of these funds is ensured, and an annual report is submitted to the Prime Minister'. See, Kingdom of Saudi Arabia, Royal Decree No A/90 'Basic Law of Governance' of 27/08/1412 AH (1 March 1992) <https://www.saudiembassy.net/basic-law-governance> accessed 12 February 2023.

20 Kingdom of Saudi Arabia, Royal Decree No M/128 'Government Tenders and Procurement Law' of 13/11/1440 AH (16 July 2019) <https://laws.boe.gov.sa/Files/Download/?attId=62b99145-7a14-408f-a70f-adbb0123ee0f> accessed 12 February 2023.

21 Among the countries that have made significant strides in the process of legal codification, we refer to the countries of the European Union (Orsoni 2007) and the countries of the Maghreb, such as Morocco, which issued in 2015 the Organizational Law related to the Budget Law No 130-13 dated 2-6-2015.

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2.1.4 Control

Control of the general budget oscillates between *a priori* control, accompanying control, and a *posteriori* control. The latter, considered the most important type of control because it occurs after the actual execution of the budget, has been dispersed between administrative and judicial bodies, which could weaken its impact.

Officials are working to correct these shortcomings, thanks to the rapid acceleration of general law-making in recent years and the shift towards the framing of financial transactions by modern legal systems based on international best practices. We consider that the Kingdom of Saudi Arabia has been relatively successful in strengthening the principles of public finance by enshrining the principles of good governance but also its institutional mechanisms. This enabled it to strengthen the financial resources of the general state budget.

2.2 Activate the institutional-structural mechanisms

The Kingdom of Saudi Arabia has developed a time plan to achieve its current ten-year vision, the principle of gradual implementation, as we can distinguish between the stage of establishment of the foundations of the vision and the stage of progress in completion.

In the first one, the stage of establishing the pillars of the vision, the Council of Economic and Development Affairs,[22] in conjunction with the Kingdom's vision, issued a document entitled 'The Governance Framework for Achieving the Kingdom of Saudi Arabia's Vision 2030'. This document included a specification of government agencies involved in defining policies and setting programs and arrangements necessary to achieve the Kingdom's vision. It also identified the administrative agencies directly responsible for implementing them.[23]

Referring to this document, we conclude that the vision distinguished between the agencies charged with drawing the central financial directions of the vision and the agencies entrusted with the implementation of the programs emanating from it. The legally competent structures for drawing general directions for public finance are represented in the Council of Economic Affairs and Development, and the Finance Committee, which is concerned with determining the budget allocated to the executive programs of the Kingdom's vision, in line with the need to rationalise public money spending and improve governance mechanisms. According to the document on the governance framework for realising the Kingdom's Vision 2030, the Finance Committee is responsible for developing and updating mechanisms for approving programs and initiatives, including developing a framework for medium-term expenditures. The committee is also responsible for preparing and updating detailed mechanisms through which financial requirements for programs and initiatives are approved. This includes studying financial requirements programs and initiatives, planning their cash flows and reporting on them. Several agencies also intervene to implement policies, the most important of which are the Ministry of Finance, the Ministry of Economy and Planning, and The National Center for Performance Management.

In light of the outputs of this foundational phase, the Kingdom of Saudi Arabia passed into the stage of implementing the requirements vision in the field of public finance. It issued the 'Financial Sustainability' program, which included the development of three public

22 For reference, this council is organisationally linked to the Saudi Council of Ministers (Royal Decree No A/70 of 9/3/1436 AH (31 December 2014)).

23 Economic and Development Affairs Council, 'Governance Framework to Achieve "the Kingdom of Saudi Arabia Vision 2030"' (*Saudi Press Agency*, 2 June 2016) <https://www.spa.gov.sa/viewstory.php?lang=en&newsid=1507091> accessed 12 February 2023.

structures directly involved in the field of finance. It is represented by the Authority for the Efficiency of Spending and Government Projects, the National Center for Debt Management, and the Non-oil Revenue Development Center.[24] These bodies created within the framework of achieving the financial sustainability program enjoy legal personality and financial independence and carry out a set of tasks that all seek to achieve public financial governance.

More precisely, the Authority for Spending Efficiency and Government Projects is working to develop the financial planning process for government agencies in the medium term and to contribute to rationalising the disposal of budgets allocated to them by helping them not to exceed the spending ceiling set for them. The National Center for Debt Management is concerned with developing a policy for public debt, which ensures that the Kingdom secures its financing needs at the best possible costs in the short term and is keen to improve the Kingdom's credit rating with international rating agencies. As for the Non-oil Revenue Development Center, it is working on developing programs that seek to diversify the state's financial revenues, with the aim of disentangling the close link between the state budget and revenues from oil.

3 THE GENERAL BUDGET AND THE STAKE OF FINANCIAL SUSTAINABILITY

The public authorities within the Kingdom of Saudi Arabia considered the close delinking of the State budget between oil resources and the State's general revenues as a strategic goal included in Vision 2030, and government agencies worked to achieve it within the framework of the financial balance program that it adopted in 2016 and then replaced it with the financial sustainability program. And while the Kingdom has worked in this context to modernise and develop the tax system since 2017 through the introduction of new taxes, its efforts continued throughout the years that followed the issuance of the vision, and the financial repercussions of the Corona pandemic constituted an additional factor for reviewing the tax system with the aim of raising its efficiency and better governance. In addition, the public authorities in the Kingdom have adopted additional programs aimed at searching for other funds.

3.1 Continuous review of the tax system

Since the beginning of 2017, the Kingdom of Saudi Arabia has modernised its tax system by introducing new types of indirect taxes and applying what is known as 'immigrant fees' and fees on idle lands. These revenues have contributed to strengthening the solidity of public finances in the years between 2017 and 2020. However, the financial repercussions of the Covid-19 pandemic that appeared in mid-2020 led to a further review of the tax system in order to make it more consistent and contribute in a better way to achieving the financial sustainability of the Kingdom.

In this context, the tax system has gradually witnessed several transformations in order to achieve Vision 2030 in the period between 2017 and 2019. The Kingdom has known remarkable interest in taxes on consumption, as it considered these an important tool for financing the budget and implementing investment projects. What is meant by taxes

24 Kingdom of Saudi Arabia, 'Fiscal Sustainability Program' (*Vision 2030*, 2016) <https://www.vision2030.gov.sa/v2030/vrps/fsp> accessed 12 February 2023.
The National Debt Management Center was established in 1441 AH (Resolution of the Council of Ministers No 139 of 16/2/1441 AH (15 October 2019)), and the Government Expenditure and Projects Authority was established in late 1442 AH (Resolution of the Council of Ministers No 389 of 11/7/1442 AH (23 February 2021)), while the Non-Oil Revenue Development Center was established for the year 1439 AH (Decision of the Council of Ministers of 19/10/1439 AH (03 July 2018)).

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on consumption are the taxes that make consumption the event that creates them, so the taxpayer is subject to them when purchasing the product or when using the service. Value-added tax[25] and selective tax[26] are among their applications. In addition to these taxes, the Saudi public authorities introduced taxes on idle lands.[27] The value-added tax was applied during this period at a rate of 5%, while the tax on selective goods ranged between 50% and 200% of the price of the products subject to it, mainly sweetened drinks, energy drinks, and tobacco products. As for the taxes imposed on idle lands, they are collected annually at a rate of 2.5% on idle lands owned by one or more persons who have a natural or legal capacity from the value of the land.[28] In the same period, the tax was charged to working residents according to an upward scale determined according to the number of family members and the length of residence.[29]

In parallel with these new taxes, amendments have been made to the income tax system regarding residents who earn income from practicing in economic activity other than salaries and wages and every person working, for example, in the field of investing in natural gas or in the field of oil production.[30] The most important amendments relate to the widening of the scope of the application of income tax by subjecting it to shares held directly or indirectly by persons working in the production of oil and fuel, as well as taxable workers in the field of investment and transportation of natural gas, whether they are citizens or residents.

These tax amendments led to an improvement in the financial return of the state and its contribution to changing fiscal policy on the horizon of achieving the Kingdom's Vision 2030. In this context, taxes enabled, on the one hand, the financing of the state's general budget within the limits of 220.1 billion riyals in 2019 after it was in 2017 in around 87 billion riyals.[31] In doing so, it contributed to disentangling the close link between oil resources and the state budget.

Furthermore, the legislative interest in taxes has translated into a change in the fiscal policy of the state, as the tax system, which was characterised by its relative modesty compared to Western countries and most Arab countries, which witnessed the application of taxes on consumption several decades ago, today the tax system in the Kingdom is close in its characteristics to that of comparative tax systems.[32]

While the financial motive constituted the main incentive to enrich the tax system in the implementation of Vision 2030, we cannot deny that the amendments included in it enable the achievement of two additional objectives that confirm its importance in changing the features of the national economy and achieving sustainable development. On the one hand, the excise tax achieves a healthy goal through the high rate it imposes on products harmful to public health, and in this way, it expresses the social function of the tax and the role it may play in changing unhealthy habits in society. On the other hand, the amendments made to the tax system, especially those related to the consumption tax, reflect the Kingdom of Saudi Arabia's endeavour to join the international trends in the

25 This tax was established pursuant to Royal Decree No M/113 of 2/11/1438 AH (25 July 2017).

26 It was established by Royal Decree No M/86 of 27/8/1438 AH (23 May 2017).

27 This tax was established by Royal Decree No M/4 of 12/2/1437 AH (24 November 2015).

28 Art. 3 of the Idle Land Law issued by Royal Decree of 12/2/1438 AH (12 November 2016).

29 Council of Ministers Resolution No 197 of 23 Rabi al-Awwal 1438 AH (23 December 2016).

30 Art. 2 of the Income Tax Law issued by Royal Decree No M/1 of 15/1/1425 AH (6 March 2004).

31 Saudi Arabian Monetary Authority, 'Financial Stability Report 2020' (*Saudi Central Bank*, 29 May 2020) <https://www.sama.gov.sa/en-US/EconomicReports/Financial%20Stability%20Report/FSR_EN_V8_U.pdf> accessed 12 February 2023.

32 E.g., the issuance of several legal texts regulating various taxes, such as the Law of Value Added Tax and the Income Tax Law.

field of taxation, which are based on strengthening the principle of tax neutrality and working to strip it of incentives that may harm the competitiveness between countries in attracting foreign investment. In this regard, it can be said that the tax decisions taken in the implementation of Vision 2030 express the fusion of the Saudi government in these modern trends of public finance at the international level, as it was able to bring the tax system applicable to goods and services in the Kingdom closer to the tax systems to which these products are subject in other countries.[33]

Efforts continued in the Kingdom during the period between 2020 and 2021 to bring the tax system closer to the comparative tax systems, despite the fact that these years were marked by the effects of the Covid-19 pandemic on public finances, which necessitated the allocation of huge funds to confront them in most countries. In this context, the pandemic in the Kingdom of Saudi Arabia constituted a motive for the further development of the tax system, as the Kingdom has included three basic amendments represented in raising the value-added tax rate from 5% to 15% and adopting a tax on real estate disposals at a rate of 5% of the sale price. All these amendments aim at increasing tax resources and reducing tax evasion in the field of value-added tax, and achieving the requirements of tax justice. The list of taxes on idle lands has been amended, and the resources derived from them are used to finance housing programs. Amending the regulations aims to gradually expand the field of application of these taxes, with the goal of raising their financial returns and enabling them to achieve the social objective that justifies their establishment. In general, all the amendments included in the tax system contributed to improving the profitability of taxes in the general budget.

3.2 Find additional financial resources

In order to enhance the solidity of public finances, the Saudi government seeks to search for new financial tributaries added to tax revenues and, in turn, contributes to the development of the profitability of non-oil resources in the State budget in order to implement Vision 2030. The privatisation program adopted by the Kingdom and the program to stimulate governmental services to take initiatives aimed at developing their investment capabilities is included in this framework.[34]

Privatisation means a partnership between the public and private sectors or the transfer of ownership of assets.[35] Based on this legal definition,[36] we conclude that the Saudi regulator adopted a broad concept of privatisation, in which it combined two different legal mechanisms at the level of the results arising from them, in addition to contracts for the transfer of ownership of assets that are considered in its traditional form, privatisation includes public-private partnership contracts.

The first type of contract results in the forfeiture of public ownership of public services that were managed directly by the state, which means that they are removed from the financial responsibility of the state. As for the partnership contracts between the

33 In this regard, we point out that the new tax policy came as a result of coordination between the countries of the Gulf Cooperation Council, which resulted in the signing of the Unified Value Added Tax Agreement ratified by the Kingdom under Royal Decree No M/51 of 3/5/1438 AH (31 January 2017).

34 Kingdom of Saudi Arabia, 'Financial Sector Development Program' (*Vision* 2030, 2016) <https://www.vision2030.gov.sa/v2030/vrps/fsdp> accessed 12 February 2023; Kingdom of Saudi Arabia, 'Privatization Program' (Vision 2030, 2016) <https://www.ncp.gov.sa/en/Pages/Privatization_Program_ppp.aspx> accessed 12 February 2023.

35 The Privatization Law issued by Royal Decree No M/63 of 5/8/1442 AH (18 March 2021).

36 ibid, Art. 2.

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public sector and the private sector, they do not lead to the state's complete liberation from the management of public services. The state participates with the contracting company in financing the project and has the authority to monitor and supervise its implementation.

Privatisation is one of the public policies that have been adopted a lot in the last twenty years, whether in developed countries or in countries that are in the process of developing.[37] In this context, the Kingdom of Saudi Arabia has been involved in the policy of privatisation since the Council of Ministers issued a set of decisions that regulate its legal framework.[38] Then the privatisation system issued in 2021 came to abolish and replace it[39] and thus represents the main reference for the implementation of the privatisation program that was launched in 2018, in implementation of Vision 2030; While the National Center for Privatization[40] represents the structural apparatus for it and is charged with its implementation.

The privatisation program is one of the legal tools for financing public finances in the Kingdom of Saudi Arabia. It can provide financial funds for the state, either through reducing spending on public services in the form of a partnership between the public sector and the private sector or by transferring ownership of assets by transferring them to the private sector. In addition to its role in controlling public spending, privatisation aims to enhance the participation of the private sector in providing quality services to its beneficiaries while promoting governance values based on financial efficiency.[41]

It remains to be noted that the implementation of privatisation programs poses great challenges to the responsible authorities represented by the National Center for Privatization and the Ministry of Finance, as they represent the two bodies directly responsible for developing and implementing the necessary plans to implement the privatisation program in accordance with the requirements of financial sustainability, and at the same time without prejudice to the right to access and use public services.

In addition, the Non-oil Revenue Development Center[42] faces the same challenge, as it represents the institution responsible for developing a strategic plan to support investment initiatives for the public sector and follow up on their implementation. On the other hand, the Non-oil Revenue Development Center is one of the organisational structures for implementing the financial sustainability program in its aspect related to enhancing the investment capacity of government agencies. It works to transform these entities from mere administrative entities that provide public services to the public, whose financial burdens the state bears, within the operating expenses in the general budget, to an investment entity that values the expertise of its human cadres and employs its technical capabilities to offer services in return for the public or to conclude contracts with the private sector. Consequently, these entities become one of the engines of economic development.

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37 Organization for Economic Co-operation and Development, 'Annual Report 2009' (*OECD iLibrary*, 31 August 2009) <https://doi.org/10.1787/annrep-2009-en https://www.oecd.org/newsroom/43125523.pdf> accessed 12 February 2023.

38 Council of Ministers Resolution No 60 of 1/4/1418 AH (6 August 1997), Council of Ministers Resolution No 257 of 11/11/1421 AH (5 February 2001) and Council of Ministers Resolution No 219 of 6/9/1423 AH (11 November 2002).

39 Art. 2 of Council of Ministers Resolution No 436 of 3/8/1442 AH (16 March 2021).

40 Council of Ministers Resolution No 355 of 7/6/1438 AH (6 March 2017).

41 Frank Sader, *Privatization Public Enterprises and Foreign Investment in Developing Countries* (Occasional Paper (Foreign Investment Advisory Service), World Bank 1995).

42 We note here that the Oil Revenue Development Center was established on 3 July 2018, after converting the non-oil revenue development unit into a specialised centre.

The initiatives offered by government services to develop their financial revenues require approval of the Non-oil Revenue Development Center, where the latter studies the feasibility of the initiative according to criteria it has set, which are mainly represented in the expected financial impact of the initiative in the form of its implementation and its effects on economic indicators and the extent to which its objectives are linked to the goals of Vision 2030. The centre also follows up on the implementation of the initiative and makes sure of its achievement of specific objectives when proposed.

The initiatives offered by government services to develop their non-oil revenues fall within the framework of a comprehensive strategy aimed at stimulating public investment, which is defined as a set of financial interventions for the state to support investment and increase wealth. Thus, it supports the efforts of the private sector in raising the GDP indicators.

It is noted that public investment faces major challenges due to the accumulation of economic crises that the world is experiencing in this century, as it is considered one of the solutions to enhance the ability of public finances to deal with the various pressures it bears. Therefore, states are keen to devise new tools aimed at stimulating public investment and expanding their forms of intervention. In this section, the initiatives presented by government services in the Kingdom to develop their revenues in the implementation of Vision 2030 are mentioned as leading to diversifying the sources of financing their budget and helping them to achieve financial sustainability in the medium term.

4 CONCLUSION: RESULTS AND RECOMMENDATIONS

In conclusion, and in view of the above, the Kingdom of Saudi Arabia has experienced significant legal momentum in the area of public finance in the past seven years since the publication of Vision 2030, and public authorities have also made a considerable effort to issue legal regulations and formulate programs and decisions with a financial dimension, with the aim of achieving the objectives of the said vision, which consists more particularly of financial sustainability.

However, it should be emphasised that despite the efforts made in this area to ensure good governance of the general budget and therefore achieve the above-mentioned objective (financial sustainability), this requires even more effectiveness and efficiency in the management of the state budget. The achievement of this objective could not be real at the expense of the consecration of the principles and institutional mechanisms of governance. Moreover, this must be done in a manner consistent with the legal and regulatory environment prevailing in the Kingdom and according to a timetable based on clearer performance indicators.

Accordingly, we will present the following results and recommendations of this research. With the aim of achieving financial sustainability in the medium term, the financial sustainability program has been approved by the government of the Kingdom, in accordance with Vision 2030, through which it is intended to govern the general budget by carrying out a set of financial reforms in order to activate the principles of transparency and effectiveness (controlling public spending), control, and good performance.

1. Strengthening financial resources through two important measures: the first is the introduction of new taxes (2017-2019), the most important of which are the value-added tax and the selective tax, while the second relates to improving the tax system (years 2020 and 2021) by increasing its financial return and working

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to achieve tax justice by amending the value-added tax system and issuing a system for real estate disposal tax.

2. Strengthening the resilience of public finances by strengthening non-oil resources in the public budget to meet the fiscal deficit resulting from the instability of oil prices.
3. Supporting the privatisation policy to increase financial resources and enhance the role of the private sector in providing services, which improves its quality and contributes to reducing its cost.
4. The increase in non-oil resources in the general budget after the aforementioned reforms were implemented, as these resources amounted to 930 billion riyals in 2021, after they were in the range of 369 billion riyals in 2020, an increased rate estimated at more than 39% (Statement of the general budget for the year 2022).

Despite the importance of the reforms applied in the Kingdom to public finances for the governance of the public budget, it is important to continue the reform path by expanding the rationing process, as it seems necessary to complete the requirements of governance, further improving the quality of legislation through the adoption of an integrated legal system that frames all aspects the legal framework related to the preparation and implementation of the general budget, similar to the Basic Law of the budget in force in developed countries. While the fiscal motive of fiscal consolidation has prompted the government to expand the tax system, the requirements of tax justice (e.g., reasonable tax rates) deserve greater consideration in implementing these reform programs.

Increasing the rate of satisfaction *vis-à-vis* taxation requires strengthening communication efforts and raising taxpayers' awareness of the importance of taxation in achieving sustainable development. In this respect, sensitisation programs can be adopted that strengthen the tax culture, the clarification of the direct link between the tax revenues collected from the taxpayers, and the development projects carried out.

The application of the privatisation program requires high efficiency, taking into account the legal principles that govern the public service theory when choosing the approved type of contract for the implementation of the project. It also requires the adoption of an effective plan in which priority is accorded to the method of partnership between the public sector and the private sector in the implementation of projects so that the transfer of assets is not resorted to except in cases where the project does not provide basic utility services to the public.

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Research Article

LEGAL MECHANISMS FOR THE STIMULATION OF THE DIGITAL ECONOMY IN DEVELOPING COUNTRIES

***Alsamara Tareck*[1]**

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Keywords: Legal Mechanisms; Stimulation; Digital Economy; Developing Countries; Digital Transformation; Promotion of a Digital Economy.

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ABSTRACT

Background: *The digital economy has become a significant driver of economic growth in developing countries. However, to fully realise the benefits of the digital economy, legal mechanisms must be put in place to create an environment for its growth.*

Methods*: This article provides an overview of legal mechanisms that can be implemented to stimulate a digital economy in developing countries. These legal mechanisms include the development of appropriate legal frameworks for e-commerce, intellectual property rights protection, privacy and data protection laws, and cybersecurity laws. Additionally, legal mechanisms that promote innovation and entrepreneurship, such as tax incentives, venture capital financing, and business incubators, are also essential.*

Results and conclusion: *The implementation of legal mechanisms can help developing countries build a vibrant digital economy, create jobs, and improve the standard of living for their citizens.*

1 INTRODUCTION

The digital economy has a huge impact on the global economy and plays an increasingly important role in the daily lives of individuals and businesses. Here are some examples of the importance of the digital economy:

1) Contribution to GDP: The digital economy contributes significantly to the Gross Domestic Product (GDP) of many countries. According to the European Union, the digital economy represents approximately 4.8% of the European Union's GDP, and this proportion is expected to increase further in the future.[2]

2) Job creation: the digital economy generates many jobs in the technology, communication and innovation sectors. According to the European Union, the digital economy employs more than 10 million people in the European Union, and this proportion is expected to continue to grow.[3]

3) Improved productivity: information and communication technologies (ICT) can help companies improve their productivity by enabling them to work more efficiently and better communicate with their customers and employees.

4) Business growth: the digital economy enables businesses to grow by offering them new opportunities for trade and innovation. It also allows them to connect with customers and suppliers all over the world, which can contribute to their long-term growth.[4]

5) Access to new markets: the digital economy allows companies to connect with new customers and open up new markets by using online platforms such as

2 Hodžić, Sabina. «Tax Challenges in the Digital Economy: EU Perspective.» The New Digital Era: Digitalisation, Emerging Risks and Opportunities. (2022) Vol. 109. Emerald Publishing Limited, 191-211.

3 Oğuz Başol and Esin Cumhur Yalçin, 'How Does the Digital Economy and Society Index (DESI) Affect Labor Market Indicators in EU Countries?' (2021) 40 (4) Human Systems Management 503, doi: 10.3233/HSM-200904.

4 Mullabayev Baxtiyarjon Bulturbayevich and Mahmudov Baxriddin Jurayevich, 'The Impact of the Digital Economy on Economic Growth' (2020) 1 (1) International Journal of Business, Law, and Education 4, doi: 10.56442/ijble.v1i1.2.

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social networks and e-commerce sites. This can allow them to develop and grow significantly.[5]

In their article "Digital Economy Policy in Developing Countries", Rumana Bukht and Richard Heeks conclude that the digital economy is increasingly important to developing countries. But the realities of the digital economy in these countries are not living up to their potential. Digital infrastructure is sometimes incomplete, expensive and underperforming. The wider digital ecosystem suffers from a lack of human resources, weak funding and poor governance. The growth of the digital economy exacerbates digital exclusion, inequality and negative inclusion.[6]

Mention should also be made of Vinnyk et al's article titled "Economic and Legal Policy of the State in the Field of Digital Economy ", in which they discuss the legal aspects of the subject. They declared that digitalisation of the Ukrainian economic sphere is one of the priority areas of social development and should be reflected in the country's economic and legal policies.

Therefore, there are major gaps in the legal consolidation of the basic principles of such a policy, in particular the absence of relevant provisions in the Ukrainian Commercial Code on the digital transformation of the economy.[7]

Methodology: We have used the descriptive approach, which, involves describing and interpreting the legal ramifications of a subject or issue. This approach typically involves examining relevant laws, regulations, and legal precedents, as well as analysing the ways in which they apply to the specific subject or issue being studied. The goal of the descriptive approach is to provide a clear and accurate understanding of the legal landscape surrounding the subject, and to identify any potential challenges or issues that may need to be addressed.

2 STATUS AND CHALLENGES OF THE DIGITAL ECONOMY IN DEVELOPING COUNTRIES

2.1 The reality of the digital economy in developing countries

The digital economy can represent a significant opportunity for developing countries, but they can also face challenges in taking full advantage of it. Here are some examples of the reality of the digital economy in developing countries:[8]

a. Limited internet, information and communication technology (ICT) access:

In many developing countries, access to the internet and information technology may be limited due to factors such as the availability, cost, and quality of telecommunications infrastructure. This can make it difficult for businesses and individuals to fully participate in the digital economy. Limited access to the internet and to information and communication technologies (ICT) can be a challenge for developing countries wishing to participate fully

5 CLNg Irene, *Creating New Markets in the Digital Economy: Value and Worth* (CUP 2014).

6 Richard Heeks and Rumana Bukht, *Digital Economy Policy in Developing Countries* (Development Implications of Digital Economies, Centre for Development Informatics; University of Manchester 2018).

7 Oksana M Vinnyk et al, 'Economic and Legal Policy of the State in the Field of Digital Economy' (2021) 10 International Journal of Criminology and Sociology 383, doi: 10.6000/1929-4409.2021.10.46.

8 Vujica Lazović and Tamara Duričković, 'The Digital Economy in Developing Countries-Challenges and Opportunities' (2014 37th International Convention on Information and Communication Technology, Electronics and Microelectronics (MIPRO), Opatija, Croatia, 26-30 May 2014) 1580.

in the digital economy. Indeed, the internet and information technologies are key tools for accessing new business and communication opportunities, and their absence can make it difficult for businesses and individuals to participate fully in the digital economy.[9]

Several factors can contribute to the limited access to internet and information technologies in developing countries, such as the availability, cost and quality of telecommunications infrastructure. For example, in some developing countries, there may be a lack of a telecommunications infrastructure, which makes it difficult to access the internet. Similarly, in other countries, the high costs of internet access can make it difficult for individuals and businesses to connect. Finally, the quality of telecommunications infrastructure may be insufficient in some countries, which can lead to connection and data transmission speed problems.[10]

b. Low level of technology skills:

In developing countries, it can be difficult for individuals and businesses to acquire the technology skills needed to take full advantage of the digital economy. This may be due to a lack of training programs or limited access to higher education institutions. Low levels of technology skills can be a challenge for developing countries wishing to participate fully in the digital economy.[11] Indeed, technology skills are essential for working in the technology industry and for using information and communication technology (ICT) effectively. Several factors can contribute to low levels of technology skills in developing countries, such as a lack of training programs and limited access to higher education institutions. For example, in some developing countries, there may be a lack of vocational technology training programs, which can make it difficult for individuals to obtain the skills needed to work in the technology industry. Similarly, limited access to higher education institutions can make it difficult for students to pursue higher-level technology training programs.[12]

There are, however, initiatives to improve access to technology training programs in developing countries, such as the provision of online training programs that allows individuals to take courses remotely and at their own pace. Similarly, there are initiatives to improve access to higher education institutions in these countries, for example by setting up scholarships or creating cooperation programs with foreign universities.[13]

c. Regulatory barriers:

In some developing countries, there may be regulatory barriers that make it difficult for businesses to fully participate in the digital economy. For example, there may be restrictions on importing information technology, or licensing requirements which may be costly and complex to obtain. Regulatory barriers can be a challenge for developing countries wishing

9 Christian Fuchs, 'The Implications of New Information and Communication Technologies for Sustainability' (2008) 10 (3) Environment, Development and Sustainability 291, doi: 10.1007/s10668-006-9065-0.

10 SJ de Boer and MM Walbeek, 'Information Technology in Developing Countries: A Study to Guide Policy Formulation' (1999) 19 (3) International Journal of Information Management 207, doi: 10.1016/S0268-4012(99)00014-6.

11 Shabir Hussain Khahro et al, 'Digital Transformation and E-Commerce in Construction Industry: A Prospective Assessment' (2021) 20 (1) Academy of Strategic Management Journal 1.

12 Valentina Ndou, 'E-Government for Developing Countries: Opportunities and Challenges' (2004) 18 (1) The Electronic Journal of Information Systems in Developing Countries 1, doi: 10.1002/j.1681-4835.2004.tb00117.x.

13 Robert B Kozma and Wayan Surya Vota, 'ICT in Developing Countries: Policies, Implementation, and Impact' in J Michael Spector et al (eds), *Handbook of Research on Educational Communications and Technology* (Springer 2014) 885, doi: 10.1007/978-1-4614-3185-5.

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to participate fully in the digital economy. Indeed, certain regulations can make it difficult for businesses to procure the information and communication technologies (ICT) needed to work efficiently and innovatively.[14]

Regulatory barriers can take many forms, such as restrictions on the import of information technology, which can make it difficult for companies to obtain the equipment and software needed to operate effectively. Likewise, there may be licensing requirements that can be costly and complex to obtain, which can be a barrier for companies wishing to use certain information technologies. There are, however, initiatives aimed at reducing regulatory barriers in developing countries in order to facilitate access to information and communication technologies (ICT).[15]

2.2 Mechanisms for stimulating the digital economy

There are several ways to stimulate the digital economy:

a. Invest in information and communication technology (ICT) infrastructure:

This can include building data centers, improving telecommunications networks, and expanding internet access. Investing in information and communication technology (ICT) infrastructure is an important way to stimulate the digital economy. Building data centers can help support business growth by providing them with secure and reliable data storage. Improved telecommunications networks can also play a key role in making internet access faster and more reliable, which can help businesses be more competitive in the global marketplace. Finally, expanding internet access can help increase the participation of businesses and individuals in the digital marketplace, allowing them to connect and communicate with other people and businesses around the world.[16]

b. Encourage innovation:

This can be done by supporting research and development in digital technology, creating start-up incubators and accelerators, organising hackathons and encouraging collaboration between businesses and universities. Fostering innovation is another important way to stimulate the digital economy. There are several ways to support research and development in digital technology, such as providing grants and funding for research projects, creating scholarship programs for students and technology researchers, or the organisation of conferences and colloquia to promote the latest advances in this field.[17]

Start-up incubators and accelerators can also be an effective way to support innovation by providing workspace, advice and financial support to innovative start-ups.[18] Hackathons are

14 Jason Dedrick and Kenneth L Kraemer, 'Information Technology in India: The Quest for Self-Reliance' (1993) 33 (5) Asian Survey 463, doi: 10.2307/2645313.

15 Stephen P Magee, 'Multinational corporations, the industry technology cycle and development' (1977) 11 (4) Journal of World Trade 297, doi: 10.54648/trad1977033.

16 Rima Untari, Dominicus Savio Priyarsono and Tanti Novianti, 'Impact of Information and Communication Technology (ICT) Infrastructure on Economic Growth and Income Inequality in Indonesia' (2019) 6 (1) International Journal of Scientific Research in Science, Engineering and Technology 109, doi: 10.32628/IJSRSET196130.

17 Shiyue Luo et al, 'Digitalization and sustainable development: How could digital economy development improve green innovation in China?' (2022) Business Strategy and the Environment, doi: 10.1002/bse.3223.

18 Oonagh Murphy, 'Coworking Spaces, Accelerators and Incubators: Emerging Forms of Museum Practice in an Increasingly Digital World' (2018) 70 (1-2) Museum International 62, doi: 10.1111/muse.12193.

also a great opportunity to promote innovation, bringing together developers, designers, and other industry professionals to work on collaborative technology projects.[19] Finally, encouraging collaboration between businesses and universities can help highlight the latest advances in technology and foster the transfer of knowledge between the world of research and the world of industry.[20]

c. ICT education and training:

This can mean offering professional training programs online or face-to-face, or integrating technology into school curricula. Promoting ICT education and training is another important way to boost the digital economy. By providing career technology training programs, individuals can learn the skills needed to fill jobs in the technology industry and contribute to its growth. There are several options for delivering ICT training, such as online training programs, which allow individuals to take courses remotely and at their own pace, or face-to-face training programs, which allow live interaction with an instructor. Integrating technology into school curricula can also be an effective way to promote ICT education and training, giving young people the opportunity to learn basic technology skills from an early age and prepare for work in the technology industry in the future.[21]

d. Encourage the adoption of digital technologies by companies:

This can be done by setting up tax incentives to encourage investment in information technology, creating mentorship programs to help companies adopt new technologies, or organising awareness events to showcase the benefits of the use of digital technologies. Encouraging the adoption of digital technologies by businesses is another way to boost the digital economy. By providing tax incentives to encourage investment in information technology, governments can encourage businesses to adopt new technologies and improve their productivity.[22] Mentorship programs can also be useful in helping companies adopt new technologies, by providing them with the opportunity to work with experienced professionals who can provide advice and guidance on how to implement new technologies in an efficient manner. Finally, organising awareness events can help introduce companies to the benefits of using digital technologies and show them how they can help them be more competitive in the market. These events can be in the form of conferences, seminars or workshops, and can be organised by governments, professional associations or other organisations.

e. Facilitate access to venture capital:

This can be done by setting up venture capital funds dedicated to technology companies, by encouraging private investments in these companies, or by facilitating access to bank financing for start-ups. Facilitating access to venture capital is another way to stimulate the digital economy. Venture capital is a type of financing that is often used by start-ups to finance their growth and development.[23] There are several ways to facilitate access to venture capital,

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19 Fotis Kitsios and Maria Kamariotou, 'Digital Innovation and Entrepreneurship Transformation Through Open Data Hackathons: Design Strategies for Successful Start-Up Settings' (2023) 69 International Journal of Information Management 102472, doi: 10.1016/j.ijinfomgt.2022.102472.

20 Nataliia Kholiavko, Olha Popelo and Svitlana Tulchynska, 'Priority Directions of Increasing the Adaptivity of Universities to the Conditions of the Digital Economy' (2021) 14 (33) Revista Tempos e Espaços em Educação e16383, doi: 10.20952/revtee.v14i33.16383.

21 ibid.

22 Stephane Sorbe et al, 'Digital Dividend: Policies to Harness the Productivity Potential of Digital Technologies' (2019) 26 OECD Economic Policy Papers, doi: 10.1787/2226583X.

23 C Christopher Baughn and Kent E Neupert, 'Culture and National Conditions Facilitating Entrepreneurial Start-Ups' (2003) 1 (3) Journal of International Entrepreneurship 313, doi: 10.1023/A:1024166923988.

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such as the creation of venture capital funds dedicated to technology companies, which can provide financing to innovative companies in the field of technology. Encouraging private investment in these businesses can also be a way of providing them with the start-up capital needed to grow. Finally, facilitating access to bank financing for start-ups can also be useful, providing them with another source of funding that can help them start and grow. This can be done by setting up special loan programs for start-ups or by creating loan guarantees that can help start-up businesses obtain financing from banks.[24]

2.3 Role of the legal system in promoting the digital economy

A legal framework can help stimulate the digital economy in several ways:

a. Reinforcement of legal security:

A strong and predictable legal framework can help companies plan and invest with confidence, offering them protection against legal uncertainties and allowing them to focus on their core business. A strong legal framework can also foster entrepreneurship and innovation by creating an enabling environment for start-ups. For example, a legal framework that facilitates business creation and protects intellectual property rights can encourage people to start their own business and develop new products and services.[25] In addition, a legal framework that encourages transparency and accountability can help companies build trust with their customers and stakeholders. This can be particularly important in the area of the digital economy, where businesses often have to deal with sensitive data and where consumer trust can be crucial to their success.[26]

b. Intellectual Property Protection:

A legal system that protects intellectual property rights and encourages research and development can help businesses innovate and develop new products and services. Intellectual property is a key element of innovation because it allows companies to protect their ideas and creations from unauthorised use by others. A legal framework that protects intellectual property rights can thus encourage companies to invest in research and development, offering them protection against imitation and allowing them to profit from their investments.[27] In addition, a legal framework that encourages research and development can help companies to innovate and develop new products and services by offering them incentives to invest in research, for example in the form of tax credits or subsidies. This can encourage companies to embark on research and development projects that might otherwise be considered too risky or expensive.[28]

c. Trade facilitation:

A well-established legal framework and adequate regulations can indeed help to facilitate trade by offering legal certainty to companies and allowing them to better understand the

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24 Marijn van Weele et al, 'Start-EU-up! Lessons from International Incubation Practices to Address the Challenges Faced by Western European Start-Ups' (2018) 43 (5) The Journal of Technology Transfer 1161, doi: 10.1007/s10961-016-9538-8.

25 Andrew D Mitchell and Neha Mishra, 'Data at the docks: Modernizing international trade law for the digital economy' (2018) 20 (4) Vanderbilt Journal of Entertainment & Technology Law 1073.

26 Merit E Janow and Petros C Mavroidis, 'Digital Trade, E-Commerce, the WTO and Regional Frameworks' (2019) 18 (S1) World Trade Review S1, doi: 10.1017/S1474745618000526.

27 Baxrom Xaydarov, 'Impact of Intellectual Property Protection on the Digital Economy' (2022) 1 (11) Journal of Academic Research and Trends in Educational Sciences 163.

28 Andreas Wiebe, 'Protection of Industrial Data – A New Property Right for the Digital Economy?' (2017) 12 (1) Journal of Intellectual Property Law & Practice 62, doi: 10.1093/jiplp/jpw175.

rules and obligations to which they are subject. It can also help protect consumers by assuring them that the products and services they buy meet certain quality and safety standards, and providing them with a redress mechanism in the event of problems.[29]

d. Encouragement of competition:

A legal system that protects fair competition is also important for facilitating trade. Fair competition is key to ensuring businesses can compete fairly in the marketplace, which can help ensure that prices are reasonable for consumers and encourage innovation and efficiency. By protecting fair competition, the legal framework can prevent businesses from engaging in unfair trading practices or colluding to fix prices or exclude competitors from the market.[30]

It is also important to protect the digital economy by establishing a legal framework that regulates online activities and protects the rights of consumers and businesses in the digital world. This may include regulations on online privacy, data security and the fight against online fraud.

2.4 Role of judicial guarantees in the promotion of the digital economy

There is a close link between judicial guarantees and the digital economy. In the digital world, it is often difficult to assert one's rights and find a recourse mechanism in case of problems, especially when companies and individuals are located in different jurisdictions. Judicial safeguards are therefore essential to ensure that consumers and businesses have access to a fair and equitable system of justice in the event of disputes related to online activities.[31] In addition, judicial guarantees can also help protect businesses and encourage investment and growth in the digital economy by providing legal certainty and ensuring that intellectual property rights, such as patents and commercial trademarks, are protected. This can encourage innovation and the creation of new businesses and technologies, which can have a positive impact on the whole economy. There are several ways to ensure that individuals and businesses have access to a fair and equitable justice system in the event of disputes related to online activities:

a. The establishment of laws and regulations that govern online activities:

By establishing a clear legal framework and providing adequate protection for consumer and business rights, these laws and regulations can help ensure that disputes related to online activities are handled fairly. It can also help foster consumer and business confidence in the digital economy and encourage innovation and growth in the sector.[32]

Bureaucracy can certainly also pose a challenge to stimulating the digital economy in developing countries. This is because bureaucratic processes can be slow, complex, and difficult to navigate, which can discourage entrepreneurs and businesses from investing in digital technologies and conducting e-commerce activities. Furthermore, bureaucracy can also result in a lack of coordination among government agencies, which can lead to

29 Sinta Dewi Rosadi and Zahra Tahira, 'Consumer Protection in Digital Economy Era: Law in Indonesia' (2018) 7 (1) Yustisia Jurnal Hukum 81, doi: 10.20961/yustisia.v7i1.20144.

30 Hana Kováčiková and Ondrej Blažo, 'Slovakia' in D Mândrescu (ed), *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)evolution: The XXIX Congress in The Hague, 2020 Congress Publications* (Eleven 2020) vol 3, 469.

31 Shukhrat Nuralievich Ruzinazarov and Mokhinur Bakhramova Bakhramovna, 'Legal Regulation of E-Commerce Guarantees Digital Economic Development in Uzbekistan' (2022) 6 Spanish Journal of Innovation and Integrity 330.

32 Brittany A Martin, 'The Unregulated Underground Market for Your Data: Providing Adequate Protections for Consumer Privacy in the Modern Era' (2019) 105 (2) Iowa Law Review 865.

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fragmented policies and inefficient implementation. This can create uncertainty and risk for businesses, as they may not be able to predict the outcome of their investment decisions or plan for the long term.

b. The establishment of alternative dispute resolution mechanisms:

Establishing alternative dispute resolution mechanisms,[33] such as mediation and arbitration, can be an effective way to resolve disputes amicably and quickly, without having to go to court.[34] Mediation is a dispute resolution process in which a neutral third party, called a mediator, helps the parties reach a mutual agreement. Arbitration is a dispute resolution process in which the parties submit their dispute to one or more arbitrators who render a decision that has the force of law.[35] Alternative dispute resolution mechanisms can be particularly useful for disputes related to online activities, as they often resolve issues cheaper and faster than the courts. They can also be more flexible and more responsive to the needs of the parties than traditional court proceedings. However, it is important to ensure that these mechanisms are fair and just, and that the parties have the right to appeal the decision rendered.[36]

c. Training of judges and other legal professionals on legal issues related to online activities:

It is important to educate judges and other legal professionals on legal issues related to online activities so that they are able to make fair and just decisions in the event of disputes. Indeed, disputes related to online activities can often involve complex and emerging legal issues that require in-depth knowledge of the digital environment and its particularities. By providing continuing education to legal professionals, one can ensure that they are up to date on the latest developments in this field, and that they are able to make fair and just decisions in the event of related disputes in online activities. This can help build parties' confidence in the justice system and ensure that consumer and business rights are adequately protected.

d. Strengthening of international cooperation:

The establishment of international cooperation structures can be an effective means of facilitating the resolution of disputes that involve parties located in different jurisdictions. Indeed, disputes related to online activities can often involve parties located in different countries, which can make resolving them more complicated. International cooperation structures can include international treaties and bilateral agreements that establish rules and mechanisms for resolving international disputes. Establishing structures for international cooperation can help ensure that disputes related to online activities are handled fairly and justly, regardless of the jurisdiction in which the parties are located. It can also help build business and consumer confidence in the digital economy and encourage innovation and growth in this sector.[37]

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33 Zlatan Meskic et al, 'Transnational Consumer Protection in E-Commerce: Lessons Learned from the European Union and the United States' (2022) 13 (1) International Journal of Service Science, Management, Engineering, and Technology 1, doi: 10.4018/IJSSMET.299972.

34 Mohamad Albakjaji et al, 'The Legal Dilemma in Governing the Privacy Right of E-Commerce Users: Evidence From the USA Context' (2020) 11 (4) International Journal of Service Science, Management, Engineering, and Technology 166, doi: 10.4018/IJSSMET.2020100110.

35 Dona Budi Kharisma and Nadzya Tanazal E Ar, 'Online Dispute Resolution as an Alternative Model for Dispute Settlement in The Financial Technology Sector' (2022) 17 (1) Pandecta Research Law Journal 137, doi: 10.15294/pandecta.v17i1.25267.

36 Maria Claudia Solarte-Vasquez, 'Reflections on the Concrete Application of Principles of Internet Governance and the Networked Information Society in the European Union Institutionalization Process of Alternative Dispute Resolution Methods' in T Kerikmäe, *Regulating eTechnologies in the European Union: Normative Realities and Trends* (Springer 2014) 251.

37 Michael E Schneider and Christopher Kuner, 'Dispute resolution in international electronic commerce' (1997) 14 (3) Journal of International Arbitration 5, doi: 10.54648/joia1997019.

e. Strengthening the right of access to lawyers and other legal professionals:

It is important to ensure that all parties have access to lawyers and other legal professionals to enforce their rights in the event of disputes related to online activities. In fact, when a person or a company is involved in a dispute, it is often difficult to defend their rights and put forward their arguments without the help of a legal professional. It is therefore important to put mechanisms in place to allow parties to be represented by a lawyer or other legal professional, even if they cannot afford the usual fees. This may include setting up legal support programs for low-income parties or creating guarantee funds to cover legal costs. By providing affordable access to lawyers and other legal professionals, all parties are sure to have the opportunity to assert their rights and defend themselves adequately in the event of disputes related to online activities. This can help build parties' confidence in the justice system and ensure that disputes are resolved in a fair and just manner.[38]

3 CONCLUSIONS

From a theoretical perspective, legal mechanisms can be seen as a crucial element in creating an environment that fosters innovation, investment, and growth in the digital economy. A legal framework provides a stable and predictable environment for businesses, investors, and consumers, and it can help to build trust in online transactions. Moreover, legal mechanisms can help to address concerns around data privacy and intellectual property rights, which are key issues in the digital economy. In practice, the role of legal mechanisms in stimulating the digital economy requires a coordinated effort between different stakeholders, including governments, private sector organisations, and civil society. Governments have a key role to play in establishing legal frameworks that support the growth of the digital economy while ensuring the protection of consumer rights and privacy. They can do this by implementing policies and regulations that promote competition, encourage innovation, and facilitate cross-border e-commerce.

One main key lesson that can be cited about the role of legal mechanisms in stimulating the digital economy is that they play a critical role in creating an enabling environment for businesses, investors, and consumers. Legal frameworks provide the necessary certainty and predictability for these stakeholders to engage in e-commerce, innovation, and investment in digital technologies. Another lesson is that legal mechanisms need to keep up with the fast-paced nature of technological innovation in the digital economy. This requires a flexible and adaptable legal framework that can respond to new technological developments and business models.

One of the difficulties for researchers is that developing countries may not have robust data collection systems, which can limit the availability of data to analyse. This can make it difficult to draw conclusions about the effectiveness of legal mechanisms in stimulating the digital economy

The current article focuses on legal mechanisms that can stimulate the digital economy in developing countries, while a future article may explore financial instruments that can also be leveraged to support the growth of digital businesses and industries. Some potential

38 OECD, 'Report on Consumer Protections for Payment Cardholders' (2002) 64 OECD Digital Economy Papers, doi: 10.1787/233364634144; OECD, 'Resolving E-Commerce Disputes Online: Asking the Right Questions about ADR' (2002) 63 OECD Digital Economy Papers, doi: 10.1787/233468177136; George van Leeuwen, 'Linking Innovation to Productivity Growth Using Two Waves of the Community Innovation Survey' (2002) 8 OECD Science, Technology and Industry Working Papers, doi: 10.1787/620221544571.

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topics for a future article might include investment strategies, tax incentives, government subsidies, venture capital funding, and other financial tools that can help to drive innovation and economic growth in the digital sector. Finally, both legal and financial mechanisms are important for fostering a thriving digital economy in developing countries.

Developing countries are increasingly recognising the potential of the digital economy to drive economic growth, create jobs, and improve access to services such as healthcare and education. To realise these benefits, it is important for developing countries to combine legal and economic mechanisms that can effectively stimulate the growth of the digital economy. On the legal side, developing countries need to establish an appropriate legal framework that supports the development and growth of the digital economy. This includes regulations that provide protection for intellectual property, facilitate e-commerce, and protect consumer rights. In addition, countries need to establish data privacy and security regulations to build trust among consumers and businesses and promote the safe and secure use of digital technologies. On the economic side, developing countries need to create an enabling environment for the digital economy to flourish. This includes developing the necessary infrastructure, such as broadband internet and mobile networks, to support the growth of digital technologies. It also includes creating incentives for investment in the digital economy, such as tax breaks and other forms of financial support for startups and small and medium-sized enterprises. By combining legal and economic mechanisms, developing countries can create an environment that fosters innovation, attracts investment, and creates new opportunities for growth and development in the digital economy.

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Research Article

THE ROLE OF THE LEGAL FRAMEWORKS IN ATTRACTING FOREIGN INVESTMENTS: THE CASE OF SAUDI ARABIA

***Shahad Al-Qahtani*[1] *and Mohamad Albakjaji*[2]**

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Summary: 1. Introduction. – 2. Modern investment legal frameworks. – *2.1. The ideal legal frameworks for attracting foreign direct investment. – 2.2. Whether the effectiveness of the legal frameworks should be a determent factor in Foreign Direct Investment.* – 3. An overview of KSA legal framework governing foreign investments. – *3.1. Policy objectives of KSA. – 3. 2. Legislative landscape.* – 4. Preliminary matters. – *4.1 Investment law. – 4.2 Entry mechanism and Screening procedures. – 4.3. The GATS framework. – 4.4 Foreign Direct Investment Impact. – 4.5 Special Economic Cities.* – 5. Conclusion.

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ABSTRACT

Background: *Given the lack of regulatory studies on investment in Saudi Arabia and the recent adoption of the National Investment Strategy, the paper provides a comprehensive high-level assessment of the legal framewor¬¬k governing foreign investment in Saudi Arabia and its effectiveness in achieving its policy goals as a competitive regime. The purpose of the paper is to identify the legal framework that governs foreign investments in Saudi Arabia, under both a comparative lens and a policy-oriented one, while highlighting some of the most essential challenges facing foreign investors.*

Methods: *The approach adopted describes and analyses the legal framework governing foreign investment in Saudi Arabia under the general policies and goals of Vision 2030. Additionally, where appropriate, a brief comparison to the legal framework governing foreign investment in other jurisdictions is presented to provide an alternative approach to how similar issues are handled under a reputable regime.*

Results and Conclusions: *The National Investment Strategy issued in October 2022, the Investment Principles and Policies, and recent legislative reforms represent a major accomplishment and advancement for the Kingdom's investment regime. More importantly, the legal framework for foreign investment needs to be looked into to see if it is in line with Saudi Arabia's policies and goals and if it follows the structure of a modern investment framework by giving investors a regime that is effective, predictable, and reliable.*

1 INTRODUCTION

Foreign investments play an important role in improving the economic and social development of countries as well as in increasing the flow of capital. For these reasons, many countries have adopted legal frameworks to encourage foreign investment, including the Kingdom of Saudi Arabia, which is considered a major economic and investment center in the region. Despite the legal frameworks that support foreign investment, these investments still face many challenges. This research aims to identify the legal framework that governs foreign investments in Saudi Arabia and to study the role of legal frameworks in the Kingdom of Saudi Arabia in promoting foreign investments under both a comparative lens and a policy-oriented one, while highlighting some of the most essential challenges facing foreign investors.

Today's globalisation and the processes of state integration into the global economy depend directly on the variables of attracting investment into the economy and creating an attractive investment climate. To achieve this, it is vital to secure the stability of investment processes through the development of a legal framework governing foreign investment interactions. Worldwide flows of foreign direct investment have decreased significantly as a result of the COVID-19 pandemic. According to analysis,[3] these resources, which are vital to the economies of countries, dropped by $1.5 trillion compared to 2019. This is a blow to emerging economies as it significantly impacts investment projects in vital economic areas. The issues of maintaining an effective legal framework in Saudi Arabia, increasing

3 United Nations Conference on Trade and Development, 'World Investment Report 2020: International Production beyond the Pandemic: Key Messages and Overview' (*UNCTAD*, 16 June 2020) <https://unctad.org/publication/world-investment-report-2020> accessed 12 February 2023.

the proportion of private and direct investments, and attracting more private capital to investment and infrastructure projects are recognised as crucial aspects of Saudi Arabia Vision 2030 and the National Investment Strategy.[4] It is important to note that the growth of investment relations is directly related to the legal framework governing investment climate, as this is the prevalent factor for any investment decision.[5] Therefore, an analysis of the legal framework in relation to foreign investment is crucial for mitigating the negative effects of the pandemic, protecting the legitimate interests and rights of investors, and attracting investment in both large and small sectors of the economy to achieve Vision 2030 and NIS objectives. The research seeks to answer the question: how effective are the legal frameworks in the Kingdom of Saudi Arabia in securing a suitable environment for foreign investments, and what are the most main obstacles in this regard?

To answer this question, the research is divided into three parts. The first part provides an overview on the modern legal framework governing investments, including what is to be considered an ideal and effective legal framework for foreign investors, and whether such an ideal legal framework is a determining factor in attracting foreign investment. This is followed by an overview of the structure of the legal framework governing foreign investment in Saudi Arabia, as well as a discussion of the express policy goals stated in the legislation. After which, a discussion is provided of preliminary matters regarding investment law, entry mechanism and screening procedures, foreign ownership, screening or notification procedures, the GATS framework, foreign direct investment impact, and Special Economic Cities under the general policies of Saudi Arabia and a competitive investment legal framework. The choice of which matters are highlighted in the analysis is based on those most relevant from the perspective of an international lawyer representing a foreign investor in Saudi Arabia as a host country, as well as those that address certain features that are essential to an effective investment legal framework.

2 MODERN INVESTMENT LEGAL FRAMEWORK

Over the past few decades, governments around the world have increasingly come to recognise the importance of foreign direct investment (FDI) in attracting the capital, technological innovation, and to understand how it may be essential to economic growth. Commentators and development agencies suggest or imply that FDI flows are determined, at least in part, by the adequacy of the legal framework in the host state of the foreign investment. That is, it has been speculated that the way in which the laws of a state are carried out can either discourage or allure prospective foreign investors in that state. In this part, a discussion on the ideal legal framework for attracting foreign direct investment is provided, as is an answer to the question of whether or not the efficiency of a state's legal framework should be a factor in determining whether or not a state will be a destination for FDI.

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4 Kingdom of Saudi Arabia, 'Vision 2030' (*Arab National Development Planning Portal (ANDP)*, January 2016) <https://andp.unescwa.org/plans/1244> accessed 12 February 2023; Kingdom of Saudi Arabia, 'Saudi Arabia's National Investment Strategy' (NIS) (*National Investment Strategy*, October 2021) <https://nis.investsaudi.sa> accessed 12 February 2023.
More clarification is provided on the following pages.

5 Baxtiyor Qizi and Zaynobiddinova Farang, 'Modern Investment Legislation and Judicial Practice Are the Legal Guarantee of Effective Reforms' (2021) 3 (9) The American Journal of Political Science Law and Criminology 30, doi: 10.37547/tajpslc/Volume03Issue09-06.

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2.1 The ideal legal regime for attracting foreign direct investment

In order to receive FDI, many states now ask for help from development agencies to reevaluate their legal framework.[6] This help is based on the idea that investors are drawn to states with an adequate legal framework, and that an adequate legal framework is one that adopts legislation in an efficient and predictable sense, and that a state legal framework that doesn't function in this way will likely not attract FDI. The World Bank is one of the most well-known development organisations. It has helped bring back interest in the link between law and development. Regional development banks, like the Asian Development Bank, and bilateral and multilateral aid organisations, like the Organisation for Economic Cooperation and Development (OECD) and the U.K. Department for International Development (DFID), are committed, at least on a policy level, to providing funding and technical assistance for legal reform initiatives.

Due to its size and power, the World Bank continues to be the most important source of funding, development, policy, and law. Over the years, the World Bank has helped in setting the research and development agenda for discussing the role of law in economic development and has provided encouragement for states in their transition to develop their economies and attract foreign investment.

It is generally accepted that the effectiveness of economic policies is significantly impacted by governance, or the way in which economic policies are executed. From the standpoint of the state, it is stated that what the rules signify in practice is just as essential as what they say they signify. Sober investment legislation that is unknown, unadministered and unenforced is ineffective. The needs of the private sector should determine the form and behavior of the government. In the context of FDI, it is argued that foreign investors should generally get what they want, as their investment will ultimately benefit the entire economy. However, what is the foreign investor seeking? According to the prevailing notion, foreign investors seek two fundamental elements: efficiency and certainty.

Efficiency - An efficient legal system framework is thought to be advantageous for attracting FDI. A legal framework that is ineffective results in increases in business costs and expensive procedures for enforcing legal rights and responsibilities. When a host state's laws are modern and of excellent quality, and its courts and bureaucracies are equipped with enough infrastructure and adequately qualified and compensated workers, low transaction costs are ensured.

Certainty - Further, there is strong worldwide consensus that flaws in developing economies, the legislative process, public administration and law enforcement, and judicial interpretation of laws can all lead to uncertainty. Legal frameworks that fail to provide reliable information on the status of legal rights and responsibilities must be improved to strengthen the confidence of foreign investors.

The World Development Report is based on a survey of foreign and domestic investors that indicates connections between perceived credibility and investment levels; nations with high perceived credibility had high investment rates, and vice versa. The report concludes that the government's credibility, the certainty of its rules and policies, and the consistency with which they are enforced could be just as crucial in attracting FDI as the content of the legislation. To obtain certainty, according to the prevailing theory, a legal framework is most likely to be predictable when the legislation is stable, clear, and accessible; the discretionary powers of the state (including its bureaucrats) are restrained; corruption is minimal; and

6 OECD, *Middle East and North Africa Investment Policy Perspectives* (OECD Publishing 2021) doi: 10.1787/6d84ee94-en.

powers are separated among governmental entities, especially through the establishment of an independent judiciary. This type of legal regime is known as the «ideal legal framework».

2.2 Whether the effectiveness of the legal system should be a determent factor in Foreign Direct Investment

Foreign investors seek lower transaction costs and high predictability, which are best achieved in the context of an ideal legal framework but is this the signal for reforms? The answer is dependent on what foreign investors want. Commentators argue that even if the legal framework isn't appealing to foreign investors, that doesn't mean it won't keep them from investing; however, it still needs to be reformed. The reform of the legal framework must be done in a way that supports the state's economy rather than focusing on attracting FDI, as this will contribute to the bigger picture and ecosystem of the state, which will then attract FDI. This opinion is based on the fact that the investors who evaluate the legal framework of a state are mostly investors in that state, and although their assessment of the legal framework governing the state does not suggest that they view it as an ideal legal framework for foreign investment, this did not prevent them from investing in it. Neither did it prevent them from reinvesting in it or expanding their investments.

The question, then, is why is there this focus on the ideal legal framework for attracting foreign investment if it has a limited or even ineffective effect on attracting foreign investment. It can be answered that many development agencies and international organisations usually encourage legal improvements, governmental development programs, and initiatives in general and note that they provide them for the purposes of attracting more foreign capital inflows. This does not mean that such measures are ineffective, but it also does not mean that they guarantee the attraction of foreign investment. It can also be said that a foreign investor is more inclined to invest in a country interested in attracting foreign investment, and this interest appears through the adoption of ideal legal frameworks for foreign investment. The basic idea is that the process of attracting foreign investment is caused by the investor's decision and the degree of satisfaction with the legal risks, along with other risks, involved in the decision to invest in a state. Accordingly, the decision to choose a country as a host state for foreign investment varies from one investor to another. We find that many states whose legal frameworks are ideal for investment are, in fact, states that adopt open and continuous consultation processes with various foreign investors. Some of these states even have specialised government bodies to communicate with foreign investors and provide them with various types of assistance to facilitate the process of making a decision to host their investments. The literature has proved that the legal framework has a significant role in enhancing the mechanisms of attracting foreign investments in strategic areas such as the oil sector.[7]

In particular, this illustrates that if the objective of legal reform is to cater to the foreign investor, then the first step must be to determine what the foreign investor wants in order to create the ideal legal framework for FDI. In order to get a complete picture of the adequacy of Saudi legislation in attracting foreign investment it might be recommended to proceed based on the perceptions of the ideal legal system with the incidence of investor concern relating to each hypothetical characteristic of the legal system. It may be concluded that the highest priority should be given to improving the predictability of legal change, court delays, and bureaucratic independence; and the lowest priority should be given to resolving defects in the accessibility, clarity, and the verification of laws. Beside this, it should be noted

7 Ouarda Belkacem Layachi, 'The Role of the Legal System in Strengthening Mechanisms for Attracting Foreign Oil Investments: A Case Study of Algeria' (2021) 18 (1) Palarch's Journal of Palaeontology and Egyptology 55.

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that the ideal framework is predicated on the premise that legal reform should be directed by the private sector, particularly foreign investors. As a result, it might fail to consider the influence of such legal reform on the broader goals of the state and the community. Some scholars link the importance of the judicial reforms and its independence in attracting foreign investments.[8] Other studies raised the impacts of education and Financial Market Development in attracting foreign investment in a short term.[9]

There are two main takeaways from this. First, the role of the legal framework as a determinant of FDI is neither clear, proven, nor standard. Importantly, before undertaking legal reform, states must identify: the types of investors they hope to attract; the extent to which those investors actually take the legal framework into account; the types of legal framework, if any, that those investors are attracted to or deterred by; and the financial and social implications of reforming the legal system to attract those investors.

3 AN OVERVIEW OF KSA LEGAL FRAMEWORK GOVERNING FOREIGN INVESTMENTS

This section aims to clarify the legal framework governing foreign investments in Saudi Arabia, by clarifying Saudi public policies towards FDI and to identify the legislation that governs direct and indirect foreign investments in the Kingdom of Saudi Arabia, in addition to addressing some of the capabilities and guarantees provided by the Saudi legal system.

3.1 Policy objectives of KSA

The Seven Principles and Policies of Foreign Investment and the National Investment Strategy are the two key documents that guide Saudi Arabia's approach to FDIs.

The Seven Principles and Policies of Foreign Investment — Saudi Arabia has unveiled seven investment principles, issued by royal decree and based on international best practices, with the aim of supporting the development of a competitive investment environment in Saudi Arabia. The rapid pace of economic transformation in recent years is opening exciting investment opportunities, both in Saudi Arabia — a G20 economy opening up to international businesses — and in the broader Middle East.

The seven principles are: ensuring equality between Saudi and foreign investors; ensuring protection of investments; enabling sustainability of investments; providing access to equal investment incentives; implementing social and environmental standards; ensuring investor compliance with Saudi health, safety, and environmental regulations; facilitating access procedures for foreign workers and their families; and ensuring a solid transfer of knowledge, technology, and enhancement of local human capital. In light of the issuance of the royal order approving the investment policy principles in the Kingdom, it is expected that these principles and rules will be the infrastructure for re-drafting the investment law and the implemention of regulations in Saudi Arabia.

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8 Imen Khelil, Achraf Guidara and Hichem Khlif, 'Ethical Behavior of Firms and Foreign Direct Investments in African Settings: The Moderating Effect of Judicial Independence' (2022) Journal of African Business, doi: 10.1080/15228916.2022.2126591.

9 Haider Mahmood and Muhammad Tanveer, 'Role of Education and Financial Market Development in Attracting Foreign Direct Investment Inflows in Pakistan' (2021) 10 (3) TEM Journal - Technology, Education, Management, Informatics 1184, doi: 10.18421/TEM103-23.

As a result of the seven policy principles, it is clear that the legal framework will take on new characteristics and pathways, and current foreign investment law and the implementation of regulations need to be amended or enhanced in accordance with these principles to serve Saudi Arabia's pressing interests in attracting strategic investments. As evidence, a royal decree was issued to convert the General Investment Authority into a ministry known as the Ministry of Investment (MISA). This implies that Saudi Arabia is focusing on attracting investments and has chosen an organised approach by establishing a specialised body with a high degree of representation in the Cabinet; thus, a cabinet resolution was made authorising the Ministry of Investment's charter. This makes MISA one of the few ministries with a statute charter defining its competencies, and it confirms the MISA's role as a regulator of the investment legal framework, without prejudice to the mandates of other economic activity regulators, as the second article of the MISA's charter states that the Ministry is the competent authority and the main reference on any matters concerning regulating domestic and foreign investment in Saudi Arabia. Furthermore, part of the ministry's responsibility for creating the best investment environment and increasing competitiveness is to issue investment regulations and propose legislative reforms.

A royal decree was issued to form a committee to unify and coordinate efforts to market and attract investments to supplement the MISA's systematic coordination to ensure alignment with other regulators of economic activities. The committee is chaired by the Minister of Investment and includes high-level representatives from more than 40 government agencies. Its primary objective is to orchestrate the government's efforts to attract foreign investments by unifying communication messages and advertising strategies to promote Saudi Arabia as a global destination for foreign investment. The Royal Decree also established the «Invest in Saudi» platform as a unified national investment identity to market and attract investments in Saudi Arabia. This will contribute to enhancing support and diversity in economic growth, especially in the targeted sectors.

Additionally, Saudi Arabia's Cabinet has announced the establishment of the Saudi Investment Promotion Authority (IPA). According to the IPA's charter, it aims to upgrade all businesses and services related to investment promotion and achieve cooperation between government entities, highlight investment opportunities in all sectors, strengthen and unify the efforts of the public and private sectors in this regard, and ensure the presence of the necessary pillars and supports, such as programs, projects, and incentives, to encourage and facilitate investment in a way that benefits the national economy, in light of the general policies, plans, and investment development programmes set by MISA in accordance with its terms of reference. The IPA will be a strong driver for the investment system, in accordance with the National Investment Strategy that aims to lure and develop national and foreign investments. It's important to increase the synergy needed to implement the ministry's initiatives and achieve the vision goals. The authority was needed to get other entities involved and (held) accountable."

The National Investment Strategy - Under its newly launched National Investment Strategy (NIS), Saudi Arabia aims to attract more investments from abroad as it seeks to diversify its economy away from the oil sector. The NIS is a manifestation of the direction of HRH Prince Mohammed bin Salman bin Abdulaziz, the Crown Prince, Chairman of the Council of Economic and Development Affairs, to make the Kingdom a world-class investment destination. Building on Saudi Arabia's existing strengths, the overall objective of the NIS is to increase the quality and magnitude of investment in the Kingdom and across priority sectors with a stronger domestic and international private sector role, which will help drive economic development in line with Vision 2030. The size of investments needed and the gap between current and targeted performance will be supported by targeted interventions from government entities combining policies, institutional capacity, and capital attraction programs. The strategy seeks to achieve this objective through three overarching themes:

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(i) the growing contribution of the private sector to the economy and the Saudi balance of payments, (ii) Supporting the development of strategic sectors, and (iii) upgrading the investment ecosystem to spur innovation and help develop local content. These targets directly contribute to Vision 2030 objectives. NIS designed a comprehensive reform package for the national investment ecosystem that requires participation from relevant entities and is founded on four strategic pillars: investment opportunities, investors (with an objective to grow the contribution and harmony of various investors in the investment ecosystem), funding (with an objective to diversify funding options for investors by deepening capital markets), and competitiveness and enablers (with an objective to enhance the Kingdom's competitiveness for domestic and international investors by adopting best-in-class regulations and regulatory processes around private sector engagement and transparency). Each pillar has an overarching objective and links to initiatives and programmes that help deliver on that objective.

Aside from these four pillars, significant efforts have been made to identify and develop ecosystem enablers that will serve as a foundation for better serving investors and other relevant stakeholders. Saudi Arabia has set a goal of increasing international and private domestic investment in the country — a goal of unprecedented scope and magnitude. Saudi Arabia has done so with the understanding that increasing investment is critical to achieving Vision 2030's broader and more diverse economic and social goals. While there are some challenges, the Saudi government is committed to making the necessary changes and reforms to achieve this ambitious endeavor.[10]

3.2 Legislative landscape

Although it is not possible to say with certainty the role of the legal framework in its contribution to the process of attracting foreign investments, it is undoubtedly an influencing factor, whether directly or indirectly, especially if work is done to find reforms to the legal framework in line with the needs of foreign investors who are being targeted. In light of the recent policy changes and new directions that Saudi Arabia has adopted in response to Vision 2030, it is more important than ever to examine the current investment legal framework to ensure that it is being used to its full potential to facilitate the achievement of Vision 2030, the NIS, and the seven principles and policies of foreign investment. This section covers the legal framework governing foreign investments in Saudi Arabia by diagnosing the foreign investment law, the law's implementing regulations, prohibited economic activities, and finally the restrictions imposed on foreign investment.

Foreign Investment Law and Its Executive Regulation - Saudi Arabia was concerned with attracting and encouraging foreign investments as it was one of the countries to adopt a special law for regulating foreign investment, in addition to being a member of the World Trade Organization and concluding several bilateral agreements to promote liberalisation of the trading and business environment and accelerate integration with the global economy. The foreign investment law regulates foreign investment hosted in Saudi Arabia, including conditions, procedures, and guarantees. The law has a number of guarantees that give foreign investors peace of mind. For example, Art. 4 says that foreign investment activities get the same benefits, incentives, and guarantees as national investment activities. This includes the free flow of funds into and out of Saudi Arabia. The law emphasises respect for private property, as it states that investments may not be confiscated except by a court ruling or expropriated

10 Some scholars shed light on the role of the current KSA foreign investments regulations in attaining the 2030 vision. See, Ghafoon Alyami, 'Compliance of Saudi Arabia foreign investment regulation in attaining vision 2030' (2017) 14 (20) International Journal of Economic Research 397.

except for the public interest in return for fair compensation. The law allows access to funds and ownership rights of real estate related to the foreigner investment establishment. Also, there are available customs exemptions. The sixth article of the law indicates the conditions and controls for granting a license to foreign investment, as well as the application of these conditions and controls to requests for license renewal. In addition, to increase efficiency, the royal order issued to transfer SAGIA to MISA also included the establishment of a «One-Stop Shop» at the Ministry, which would operate as a unified window to obtain all necessary licenses and permits for the foreign investor to start investment activities.

It is clear from this that the law provides the basics for the ideal legal framework for foreign investment, as it provides elements that ensure the provision of an effective and credible legal framework. However, the mere existence of a foreign investment law does not guarantee equality between national and foreign investors. It also does not necessarily imply that these guarantees are implemented on the ground, especially since it is impossible to separate the regulation of foreign investment from the regulation of the foreign investor's economic activities, which are governed by different laws, procedures, and regulatory bodies.

List of Activities Excluded from Foreign Investment - The list of business areas where foreign investment is not allowed has been regularly updated by the Saudi Cabinet. Although the reason why there is a list of prohibited businesses is not known, the researchers think the reason behind it is to protect national enterprises in these businesses. In the beginning, there were 16 activities on the list. However, it has been reduced in recent years, with Saudi Arabia aiming to open the country to foreign investment and encourage investor entry and economic activity expansion. The businesses that still remain on the list are exploration, prospecting, and production of petroleum materials (not including services related to the field of mining); food security services for the military sectors; investigations and security; real estate investment in Makkah and Madinah; civil employment services; commercial agents on commission; and fishing for living aquatic resources.

This may contradict the message that Saudi Arabia wishes to send, namely that the Saudi legal framework is friendly to foreign investors and guarantees the application of the principle of equality between foreign and local investors as stated in the Seven Principles of Investment, which may harm the consideration of the framework as ideal because it is no longer credible. It should be noted that some reservations about foreign investments are justified and logical in the event that they are based on national security concerns, and international treaties and bilateral/multilateral investment agreements usually include such an exception. Accordingly, any discrimination against foreign investment should be due to the protection of the national security of the state.

Restrictions on Foreign Investment - There are many economic sectors in Saudi Arabia, and the authorities supervising these sectors need regulatory frameworks that allow direct alignment with foreign investment mechanisms, with the aim of developing the legal framework related to foreign investment in general. The Kingdom's Vision 2030 requires a review of the frameworks regulating the business environment, especially those directly concerned with foreign investment, in order to comply with the new economic ambitions of the Kingdom and to contribute to achieving economic development. This requires identifying the restrictions that limit the role of the legal framework in contributing to attracting foreign investments on the grounds that they constitute legal or procedural obstacles.

There are several authorities that impose restrictions on foreign investors' ownership on investments. This sub-section addresses the economic sectors.

Regulatory bodies, and rules restricting investment, listed according to economic sector:

- Agriculture, forestry, and fishing sectors: The Ministry of Environment, Water, and Agriculture supervises the agriculture, forestry, and fishing sectors, and

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it restricts a number of sector activities. Fishing, for example, is restricted to national investors. Flour mill investors must obtain approval before purchasing 5% or more of the shares or securities of any other licensed milling company (or any ownership stake) or purchasing an even smaller share if it could lead to the establishment of a dominant position in any part of the milling business.

- Manufacturing sector: The Ministry of Industry and Mineral Resources and the Ministry of Interior supervise the manufacturing sector, and they impose restrictions on manufacturing activities, such as that to begin commercial explosives manufacturing, the Saudi partner(s) must own at least 51% of the authorised company.
- Wholesale and retail trade sector: The Ministry of Commerce mainly supervises the wholesale and retail trade sectors. However, it occasionally intersects with the Ministry of Interior's competencies, and it restricts a number of activities, including the import, sale, and purchase of individual firearms, air rifles, and hunting weapons - as defined in the law - as well as their supplies, spare parts, and ammunition, which are restricted to Saudis only, for commercial agency. It is not permissible for non-Saudis, whether in the capacity of natural or legal persons, to be commercial agents in Saudi Arabia, and Saudi companies that carry out commercial agency business must be comprised of entirely Saudi capital, and the members of their boards of directors and those who have the right to sign in their name must also be Saudis. The wholesale or retail sale of civil protection devices such as special heavy machinery and equipment to intervene in building collapses and earthquakes, as well as individual protective equipment and means, is restricted to Saudi or GCC citizens.
- Transportation and storage: The public authority for transport supervises the transportation and storage sectors, and it intersects in some activities with the communications and information technology commission — an organisation for the postal sector — and with the general aviation authority. It restricts some of the sector's activities, such as the activities of transporting goods on the roads for a fee or for one's own account and the work of freight brokers and renting trucks that are carried out within the territory of the kingdom after obtaining a license from the general authority for transport for establishments. Individuals are restricted to Saudis in the activity of transporting goods. It is not permissible to carry out ground services for aircraft in the civil airports of the Kingdom except after obtaining a license to do so from the authority. This license is not issued to foreign air transport institutions or companies except on the basis of reciprocity.
- Information and Communications: The Communications and Information Technology Commission and the Ministry of Communications and Information Technology supervise the regulation of the information and communications sector, and they restrict some activities. Mobile telecommunication services may not be provided except through joint stock companies offering their shares for public.
- Real estate activities: The Ministry of Municipal and Rural Affairs and Housing, the Ministry of Investment, and the General Real Estate Authority supervise the regulation of the real estate sector in the Kingdom, and some activities of the sector are restricted, such as Real estate investment by foreigners is prohibited in Makkah and Madinah. A non-Saudi investor, who is a natural or legal person who is licensed to practice any professional, craft, or economic activity, may own the property necessary to practice any activity, including the property necessary for his residence and the residence of his workers, after the approval of the authority

that issued the license. It is also permissible to rent the aforementioned property. If the aforementioned license includes the purchase of buildings and lands for constructing buildings on them and investing them by selling and leasing them, the total cost must not be less than thirty million riyals. It is also required that the property be invested in within five years of being purchased. It is not permissible for a non-Saudi to acquire the right of ownership or the right of easement or usufruct on property located within the boundaries of the cities of Makkah and Madinah in any way other than inheritance, with the exception of the acquisition of the right of ownership if accompanied by the endowment of the property owned by Shariah rules on a specific non-Saudi entity. However, it is not permissible for non-Saudi Muslims to rent property within the boundaries of the cities of Makkah and Madinah for a period not exceeding two years, subject to renewal.

It is clear that the many restrictive impediments in the investment legal framework are inconsistent with Saudi Arabia's orientation towards openness to foreign investments and leveraging Saudi Arabia's potential as a competitive economy, not to mention it is difficult to prove that most of these restrictions protect national interests or security. The recent endeavors of Saudi Arabia came to focus on this aspect, as it established a permanent ministerial committee to review and regulate foreign investment limitations and restrictions based on the standard of protecting national security and the strategic and sensitive sectors of Saudi Arabia.

The Kingdom's Obligations Before the World Trade Organization - The World Trade Organization (WTO) puts legislative constraints on member countries, such as the adoption of specific laws to control intellectual property rights and other such matters. It also imposes a set of principles on members. First is the concept of non-discrimination in trade. This principle stresses the importance of establishing equality in rights and obligations among all member nations, as well as non-discrimination in international commercial transactions among members. There are, however, certain exceptions to this rule, namely exceptions based on national interests. The principle of national treatment means that the members must be obligated to give imported goods no less privileged treatment than that granted to goods of national origin, as once they cross the border, they must be treated the same as domestic products. Second is the principle of reciprocal customs obligations and reductions calls for freedom of trade and an increase in the degree of penetration in international markets. It is based on the principle of reciprocal reductions of customs duties between member states and the abolition of all non-tariff restrictions that impede trade between member states. Third, the principle of transparency is built on a basic rule, which is to know the schedules of commitments that belong to each member state of the agreement and what these schedules include in fixing the final customs tariffs that were explicitly agreed upon, so that it facilitates the process of following up on any procedure based on tariff restrictions, as opposed to procedures based on non-tariff restrictions, which are difficult to measure.

It is noted that the Kingdom is working to reform its legislation in compliance with the above-mentioned principles. The Kingdom, per its obligations before the organization, may not take restrictive measures related to foreign investment except based on protecting security and public order. This is consistent with the above-mentioned ministerial standing committee, as it is expected to redraw foreign investment restrictions to only be based on national security and security considerations, making it inconsistent with the international obligations before the WTO.

Bilateral Investment Treaties – The presence or absence of a bilateral investment treaty (BIT) will influence a foreign investor's decision to invest in the host country. As a result, countries update their BITs model to keep up with the latest developments and trends, as well as to reduce the legal risks associated with it, especially given the recent increase in BIT-based lawsuits filed against some countries.

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Saudi Arabia, through its current model of BITs, which it has been following since 2013, provides guarantees and assurances to investors from other contracted countries. The current model of the Saudi Arabian government provides a text that reduces legal risk, as the preamble in the Kingdom's agreement with Japan on the encouragement and mutual protection of investments includes that the Kingdom and the other contracting party desire to encourage and protect investment and strengthen economic ties and relations between the two countries in alignment with their economic priorities and their determination to create favorable conditions. That means greater opportunities for exchanging more investments between the investors of the two countries, and their belief in the increasing importance of encouraging and protecting investments to motivate investors to take more investment initiatives and achieve prosperity in both countries while acknowledging that each contracting party reserves the right to regulate foreign investment in its territory and to take the necessary measures to ensure that investment activities are in accordance with its national laws, policies, and development strategies.

The BITs fall within the ideal legal framework for attracting foreign investments, as they give targeted investors from one country an advantage over others, and therefore it can be said that they provide a detailed and directed framework for them, which makes it ideal for attracting foreign investment. However, BITs are usually accompanied by legal risks, as history testifies that many disputes between investors and the states take BITs' provisions as a basis. In addition, it depends on political and diplomatic relations between the states and the competence of negotiators, which makes it a cumbersome process and its results unpredictable. As for Saudi Arabia, it's not clear that there is a focus on BITs in relation to attracting foreign investments, and the number of BITs it has concluded is far less compared to the developed economies, which rely on such treaties to provide an ideal legal framework to attract foreign investments. It also, accordingly, does not have sufficient experience for negotiations and might lack expertise. The researchers believe there is much room for improvement to activate the role of BITs in attracting foreign investment.

4 PRELIMINARY MATTERS

As Saudi Arabia becomes more attractive to foreign investors, it is anticipated that FDI will boost the Saudi Arabian economy by creating jobs, advancing technological expertise, and funding new businesses. Foreign direct investment not only produces jobs directly, but it also typically supports further employment down the supply chain,[11] which will serve the kingdom's policy objectives stated in NIS. This part discusses some of the most important issues that are connected to the legal framework that governs foreign investment. These issues are considered major from the perspective of a legislator due to the magnitude of the effects they have and from the perspective of a practising international lawyer due to the significance they have for investment decision-making.

4.1 Investment Law

Presently, national FDI laws and policies are the most important sources to regulate the inflow of FDI.[12] Investment law is a piece of national legislation that determines key aspects

11 Andre van Heemstra, 'What Foreign Direct Investors Provide and What They Seek," in B. Herman, F. Pietracciand, and K. Shar (eds), Financing for Development: Proposals from Business and Civil Society (UN UP 2001), 55–6.

12 José E Alvarez, 'The Regulation of Foreign Direct Investment: Introduction' (2003) 42 (1) Columbia Journal of Transnational Law 2.

of the legal regime governing investment. Many states have adopted an investment law; others have adopted the BITs system; and in others, they rely on the legal framework of the ecosystem overall. States that have adopted investment laws follow a comprehensive approach rather than focus on foreign investment alone, as Saudi Arabia does, as nowadays many investment codes cover both foreign and domestic investments, and there is a trend towards reducing differences in the treatment applicable to the two. In addition to serving the principle of investor equality, this enables the investor to actually benefit from the existence of a comprehensive investment law, such as the Egyptian investment law. Examining the investment laws directed specifically at the foreign investor, such as the Jordanian, Emirati, Saudi, and Korean foreign investment laws, the researchers found that they primarily address the issue of the entry, licensure, and registration of the foreign investor (the pre-investment stage) and do not explicitly address the provisions associated with the foreign investor's investments in the host country (the investment establishment, investment initiation, expansion, or termination stage).

Accordingly, it is suggested to reconsider the approach of the current Saudi foreign investment law to provide more policy guidance in order to achieve certainty; in addition, it is recommended that the current law be revised in line with an agreed-upon national investment policy and best practices in investment law drafting. Revisions should aim to: (i) increase investor certainty by increasing transparency; (ii) eliminate or reduce the authority's discretion; and (iii) strengthen the dispute resolution regime.

4.2 Entry mechanism and Screening Procedures

Under customary international law, states have the sovereign right to regulate the admission of foreign investment within their territory. Therefore, countries have a free choice as to the degree of open admission of foreign investment: they can restrict entry or impose conditions, or they can liberalise it through unilateral measures. The admissions process is heavily influenced by national policy preferences. Restrictions are typically motivated by a variety of factors, including national security and the desire to protect local producers. Long ago, many states-imposed entry restrictions. Commonly employed controls included bans on foreign investment in particular sectors, screening processes that admitted foreign investment only with government authorisation, restrictions on foreign ownership of strategic businesses or assets, and performance requirements such as the requirement to source goods and services from local producers. Today, admission policies vary significantly in different countries.[13] This is a major restriction for foreign investors, especially since it does not suggest applying the principles of national and equal treatment. As mentioned earlier, the majority of countries that adopt investment laws specifically directed at foreign investors often include restrictions on the investor's entry. It has also been noted recently that the countries most open to foreign investment have begun to adopt special procedures to impose restrictions or checks on some categories of foreign investors, usually for geopolitical reasons or reasons related to national security.

In Saudi Arabia, the law governing foreign investment includes procedures that the foreign investor is required to comply with. This is in addition to complying with any other regulations issued by the Ministry of Investment. Further, the screening and registration procedures could become more or less complicated depending on the standing ministerial committee's decision in relation to screening foreign investment.

13 David Gaukrodger, 'The Balance Between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper' (OECD Working Papers on International Investment, 2017/2, OECD Publishing 2017) doi: 10.1787/82786801-en.

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Finally, entry policies are inherently political. Countries may adopt different approaches depending on their historical trajectory, socioeconomic conditions, and economic aspirations. Practical analysis can help make more informed decisions that consider not only economic factors but also social and environmental ones. It is important to consider the options for enforcing this policy. For example, stipulations requiring foreign investors to demonstrate economic benefits may raise the cost of entry and, as a result, discourage foreign capital inflows. Simple pre- or post-notification, on the other hand, is unlikely to have a significant impact.

4.3 The GATS Framework

The establishment of GATS was one of the most significant achievements of the 8th round of multilateral trade negotiations, the Uruguay Round - the results of which entered into force in January 1995. The GATS was inspired by the same goals as its merchandise trade counterpart, the General Agreement on Tariffs and Trade (GATT): establishing a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed policy bindings; and promoting trade and development through progressive liberalisation.

Saudi Arabia has generally followed the terms of the majority of its GATS commitments. Nonetheless, it has used its commitments to restrict certain service sectors to Saudi nationals. Certain domestic economic sectors may be shielded from competition, limiting their exposure to cutting-edge and transformational knowledge solutions. This approach will not allow the Kingdom to become a destination for efficiency-seeking investment, which requires not only capital and access to technology and intellectual property but also the competitiveness derived from a well-educated, highly skilled, motivated, and competitive (affordable) workforce. The GATS commitments of the Kingdom of Saudi Arabia provide ample policy space for increasing Saudization in this high-profile and prestigious sector. The GATS do not preclude the Kingdom from using incentives to promote education, such as training and internships, which are required for Saudis to enter this highly competitive market. Within the GATS commitments, the Kingdom retains significant discretion in using procurement to achieve its objectives. The Kingdom's procurement policies for the services sector must be more targeted, with the goal of incentivising Saudi service providers to improve their skill sets and competitiveness as well as their value proposition. As mentioned before, it should be emphasised that Saudi Arabia has been making persistent efforts over the last few years to develop a legal framework that is open to foreign investment.

4.4 Foreign Direct Investment Impact

The abundance of information and data is one of the country's most valuable assets. Indeed, in the context of attracting foreign investment, the regulatory agencies' most important function is to provide data and information and facilitate the foreign investor's access to them. The ideal legal framework for foreign investment is one that is easily accessible, and this includes not only laws and regulations but also technical information and investment statistics, given their significance in investment decision-making.

The current quality and utilisation of FDI data in Saudi Arabia are flawed. The thoroughness in data collection, investor response levels and capacity to analyse are deficient. The questionnaire being used also provides limited feedback – in particular in relation to investment climate issues and technology transfer objectives. A significant exercise in capacity building encompassing questionnaire(s) design, data collection, and analysis and reporting is essential. This should be an integral component of any monitoring and evaluation (M&E)

system designed to provide robust quantitative information to assess overall FDI impact on key policy variables such as technology transfer and job creation, as well as the performance of key agencies such as MISA and IPA.[7]

4.5 Special Economic Cities

An alternative way to deal with problems in the base economy is to set up special economic zones (SEZ), which offer a wider range of exceptions and exemptions and are usually attractive to foreign investors. Many SEZ economies in places like the United Arab Emirates and China have become fronts for foreign investment.

Based on the Special Economic Cities and Zones Authority (ECZA), the regulations of the Integrated Logistics Bonded Zone (ILBZ), and the recent establishment of the Economic Zones Center in Riyadh, it is apparent that the evolution of the Economic Cities model has moved away from its original conception. Very little about the current model aligns with international best practices for SEZs, and as such, there are grounds for Saudi Arabia to revisit its value proposition relative to other competing programmes in operation in Saudi Arabia. This is with the aim of defining the goal of the SEZs for Saudi Arabia in light of the strategies and policies that have been adopted recently. Although ECZA is supposed to play a role in developing SEZ policies, the situation remains vague and unclear. The researchers believe that the regions represent a significant area for research and development in Saudi Arabia, and MISA, ECZA, and regional authorities may consider conducting such research.

On this basis, a strategy can be developed to reposition the initiative to more effectively attract foreign investors for its ongoing development. Future decisions regarding the expansion of economic cities should be based on a thorough assessment of investor needs. The diagnostic work should focus on issues of (i) zone autonomy, facilitation services, and a de jure and de facto streamlined legal and regulatory framework; (ii) the scope of a private sector-led role with active governance participation; and (iii) site selection based on economic fundamentals with minimum recourse to public financing. Also, a customs-bound area should be defined.

5 CONCLUSION

In order to attract FDI, many states are now seeking assistance from development organisations to reform their legal systems. This assistance is based on the argument that investors prefer states with an effective legal framework, that an effective legal system implements laws in an efficient and predictable manner, and that reforming an inefficient and unpredictable (i.e., ineffective) legal framework can assist a state in attracting FDI. This argument is based on the micro-level transaction cost analysis advocated by neo-institutional economics. The claim that a legal system's effectiveness influences FDI flows appears to be based on the assumption that economic actors should and do structure their activities to reduce transaction costs. Saudi Arabia has much to offer investors, as current efforts to improve the FDI environment are not focusing enough on key choke points that are currently impeding larger flows of the type of FDI best suited to addressing national priorities. Saudi Arabia's investment legal framework, including its investment vision and policy, laws, and implementing regulations, must be better aligned to ensure more open and predictable entry processes for investors and increased investor confidence. however, attracting foreign investments necessitates balancing the transparency and flexibility required to encourage foreign investment on the one hand with the control required to maintain the balance of the national economy and national security on the other.

The key findings of our study have been identified. Most of the ministries do not have a charter that defines their competencies. The lack of clarity of mechanisms to ensure effective

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homogeneity between the enactment and amendment of legislation related to foreign investment contributes to the lack of appropriate solutions in this regard. There is not enough focus on exploiting the opportunities provided by international agreements and BITs. There are no clear and explicit policies regarding special economic zones or legal frameworks for them. While the Saudi legal framework provides a minimum of basic elements to consider it an ideal legal framework for attracting foreign investment, there are overlapping jurisdictions between the regulatory authorities without an effective coordination mechanism between them. Regulatory agencies are aware of the importance of providing predictability to foreign investors, as they seek to provide periodic reports on foreign investments and establish a specialised body to communicate with investors. However, there are no statistics related to other non-economic components. The Foreign Investment Law and its executive regulations do not conform to modern policies and trends as hoped. There have been few studies that deal with the analysis of the Saudi investment legal framework and its role in attracting foreign investment.

This paper recommends: international agreements and BITs as components of the ideal investment legal framework, and instead of enacting investment laws and their implementing regulations for foreign direct investment in Saudi Arabia, enacting a comprehensive investment law or repealing the current law and its implementing regulations; focusing on the charter of the Ministry of Investment; and ensuring effective regulations for various economic activites. Further, we recommend an adoption of an investment legal framework that does not differentiate between foreign and domestic investors, except where required by national security considerations; creating a clear incentive scheme that considers transparency and equality; and conducting a performance measurement indicator issued by the Governmental Agencies Performance Measurement Center with an indicator related to improving regulations and developing investment opportunities.

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Research Article

BUSINESS ETHICS IN E-COMMERCE – LEGAL CHALLENGES AND OPPORTUNITIES

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5.2. Ethical issues of data protection: big data as a challenge. – 6. Legal Frameworks for Violations in E-Commerce. – *6.1. general crimes that threaten data in e-commerce.* – *6.2. The crimes of electronic traders.* – 7. Conclusions.

Keywords: Ethical issues; challenges; e-commerce; data protection; legal framework; KSA.

ABSTRACT

Background: *This paper deals with the ethical limitations of e-commerce. The aim is to discover areas where the protection is not granted as users would expect and to make proposals for improvement. The authors will begin the paper by proposing the market of e-commerce and how it is directly linked to society's daily life. The method adopted for the legal perspective is case studies, where the Kingdom of Saudi Arabia's (KSA) legal context will be explored. In the end, the paper will answer two main questions: What are the ethical challenges facing the issue of data protection in electronic commerce? What are essential legal frameworks that regulate the subject of data protection in Saudi Arabia?*

Methods: *The normative method is applied to identify the main legislations used in e-commerce and data protection, especially regarding big data regulations. A case study analysis is also used where KSA legislation is investigated.*

Results and Conclusions: *The authors saw that e-commerce is an insecure place to protect customer data. This data is stored electronically, so it is very easy to steal it in addition to the use of this data by companies without the permission of the customer. Research proves that laws are unable to keep pace with technological developments and are unable to provide effective protection for data stored in the cloud.*

1 INTRODUCTION

This paper deals with the ethical limitations of e-commerce. The authors start from the premise of the growing market of e-commerce, which directly links elements of society in our day-to-day life, as the world has become a digital realm and consumers have adopted e-commerce services as part of their lifestyle. The need to establish clear ethical boundaries for e-commerce is rising with this growth. Users of e-commerce expect businesses to adopt strict business ethics to gain their trust. Still, eventually, there should be a legal regulation in place once this trust is broken. This paper aims to establish the correlation between the ethical concerns of businesses and users to the level of protection by regulatory frameworks. The aim is to discover areas where the protection is not granted as users would expect and to make proposals for improvement. The method adopted for the legal perspective is case studies, where the Kingdom of Saudi Arabia's (KSA) legal context will be explored.

This paper will attempt to answer the following questions:

1) What are the ethical challenges facing the issue of data protection in electronic commerce? What are essential legal frameworks that regulate the issue of data protection in Saudi Arabia?
2) What is the availability of criminal protection for the parties to the relationship in the electronic commercial contract, especially the protection of the electronic consumer?

2 METHODOLOGY

In this paper, the authors will use the normative method to identify the main legislations used in e-commerce and data protection, especially regarding big data regulations. A case study analysis is also used where KSA legislation will be investigated. To validate the data we study, the researchers will compare the KSA legislations with those in countries such as France. Finally, this paper will provide recommendations based on this research finding. This method will also be used to conclude the quality and effectiveness of such legislation. The dogmatic approach is involved here as it is the best way to interpret and explain how the KSA legislations govern the issue of consumers' protection in cross-border e-commerce.

3 E-COMMERCE: ETHICAL PERSPECTIVES

The nature of cyberspace (boundarylessness, timelessness, and statelessness) has created legal challenges in applying privacy protection laws to online activities conducted across national states. These activities have often compromised the confidentiality and security of the personal data of online customers in the area of e-business and e-commerce.

Online activity in general and e-commerce in particular is often debated and have acquired a cross-border dimension when the relevant laws and regulations have become null in disputes. Such activities and transactions occur outside the conventional boundaries of time and space that form the basis of tort laws and governmental authorities. In this regard, Wynn and Katz point out that cyberspace allows asynchronous communication, unlike the synchronous communication that occurs within real-time space, as confirmed by Matusitz:

> The cyberspace put an end to geography. Businesspeople are only a mouse click away from Web users in Vietnam or Guatemala. This also implies the death of the time. So, the era of three-dimensional public sphere may become passé.[6]

Over time, cyberspace, or the Internet, has become a virtual space for global business that relies on storing, storing, and transmitting data. Smart devices and cloud computing underpin this type of business. The business case for cyberspace activity has consistently been advantageous due to its features, such as reducing costs, using resources more efficiently, sharing information, growing customer bases, having unlimited time and space, and accelerating business processes. The most crucial factor for online businesses is the consumer's trust based on the security of online data to guarantee the protection of personal or private information. From an organisational and business perspective, the task of protecting the consumer's privacy seems almost elusive in the organisational behaviour where big companies specialising in processing and trading personal-related information conceive of the consumer's data as a commodity.

In effect, cyberspace has made it easier for businesses to carry out data breaches and consequently violate privacy protection rights according to their customers.[7] Companies have also compromised the privacy of their employees, using the Panopticon phenomenon or the electronic eyes in the workplace to control employees and their performance with the excuse of increasing business productivity. Additionally, such malpractices often claim to enhance the customers' trust and loyalty. Using new digital technology, companies have become more equipped to interfere with the private space and private rights of the individual. For

6 Jonathan Matusitz, 'Intercultural Perspectives on Cyberspace: An Updated Examination' (2014) 24 (7) Journal of Human Behaviour in the Social Environment 713, doi: 10.1080/10911359.2013.849223.

7 Andrew Joint, Edwin Baker and Edward Eccles, 'Hey, You, Get Off of That Cloud?' (2009) 25 (3) Computer Law & Security Review 270, doi: 10.1016/j.clsr.2009.03.001.

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example, using biometric data (e.g., face, fingerprints, eyes, and other body parts) to identify a specific individual could damage individual privacy. In this regard, Alterman[8] argues that using, storing, and processing personal information implies three kinds of concern about privacy. Firstly, an individual's data acquired for one purpose may be retrieved, purchased, or correlated with other data without their consent or agreement. The second concern stems from the legitimate access to the individual's information; this may justify the U.S. Federal Bureau of Investigation's (FBI) reasoning for security purposes. So, this may put individuals under pressure where this access can be utilised in a harmful way. The third concern comes from the traditional threat to privacy, where this information can be stolen by criminals who are eager to take advantage of the loopholes that the new technology includes and to hunt personal information. This can expose individuals to the risk of privacy invasion.[9]

Similarly, customers and their activities can be monitored by commercial companies by using loyalty or point cards from which personal information and buying behaviour can be inferred or retrieved to serve the company's purposes. This practice is often justified as necessary to collect marketing information to enhance the customer's experience and address their needs.[10] Yet, such approaches have put privacy at risk and threatened the security of personal information since businesses could transfer and export consumers' data to and from other countries.[11] This threat has affected people's perceptions of cyberspace activities and caused a sense of mistrust and discomfort when their personal information is processed internationally.[12] Recently, digital privacy has become the most focused topic for all news media after the recent revelation that political analysis firm Cambridge Analytica improperly accessed the data of 50 million Facebook accounts.[13] Of course, the scandal has triggered a published apology from Facebook CEO Mark Zuckerberg, admitting that: 'This was a breach of trust and I'm sorry we didn't do more at the time, I promise to do better for you'.[14] The incident has led to severe consequences, such as numerous lawsuits against Facebook, governmental inquiries, a Delete Facebook user boycott campaign, and a sharp drop in share price that has erased nearly $50 billion of the company's market capital.[15] For example, the Federal Trade Commission (FTC) has announced that it is investigating the company's data practices, stating: 'The FTC takes very seriously recent press reports raising substantial concerns about the privacy practices of Facebook. Today, the FTC is confirming that it has an open non-public investigation into these practices'.[16]

The investigation examines whether Facebook violated a consent decree the company signed with the FTC agency in 2011. The decree required that Facebook notify users and receive explicit permission before sharing personal data beyond their specified privacy settings.

8 Anton Alterman, '"A Piece of Yourself": Ethical Issues in Biometric Identification' (2003) 5 (3) Ethics and Information Technology 139, doi: 10.1023/B:ETIN.0000006918.22060.1f.

9 Zeynep Tufekci, 'Facebook: The Privatization of our Privates and Life in the Company Town' (*Technosociology: Our Tools, Ourselves*, 14 May 2010) <http://technosociology.org/?p=131> accessed 9 April 2023.

10 Anne Wells Branscomb, *Who Owns Information?: From Privacy to Public Access* (Basic Books 1994).

11 Nancy J King and VT Raja, 'Protecting the Privacy and Security of Sensitive Customer Data in the Cloud' (2012) 28 (3) Computer Law & Security Review 308, doi: 10.1016/j.clsr.2012.03.003.

12 Jan Henrik Ziegeldorf, Oscar Garcia Morchon and Klaus Wehrle, 'Privacy in the Internet of Things: Threats and Challenges' (2014) 7 (12) Security and Communication Networks 2728, doi: 10.1002/sec.795.

13 'Cambridge Analytica: Facebook Data-Harvest Firm to Shut' (BBC News, 2 May 2018) <https://www.bbc.com/news/business-43983958> accessed 9 April 2023.

14 Colin Lecher, 'California Just Passed One of the Toughest Data Privacy Laws in the Country' (The Verge, 28, Jun 2018) <https://www.theverge.com/2018/6/28/17509720/california-consumer-privacy-act-legislation-law-vote> accessed 9 April 2023.

15 Cambridge Analytica (n 13).

16 Peter Kaplan, 'Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices' (*Federal Trade Commission*, 26 March 2018) <https://www.ftc.gov/news-events/news/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection-regarding-reported-concerns-about-facebook> accessed 9 April 2023..

However, the Facebook scandal is the tip of the iceberg, as many other digital companies, such as Google, consistently gather valuable information about online users while surfing the web. Hence, it can be confirmed that there is a great deal of mistrust and uncertainty regarding the depth and breadth of the data that online firms collect for targeted advertising. For instance, in addition to personal information, they collect behavioural information such as web browsing history, search queries, and day-to-day movements in the real world to create individual profiles of online users. However, the most problematic is understanding the concept of privacy within the sphere of digital technology and cyberspace.

Target is just one example of privacy information becoming a significant right that needs serious addressing. Other than selling private data, hacking is another threat to privacy protection, and access was gained to the confidential credit and debit card data of as many as 40 million customers and the personal information, such as phone numbers and addresses, of up to 70 million individuals,[17] compromising the trust of customers. This was not the only damage done to Target's business. Target faces multiple class-action lawsuits, a severely damaged reputation, lost customers, and mounting expenses related to remedying the data breach and restoring stakeholder confidence. Similarly, in 2015, the U.S. Office of Personnel Management was a target of a hacker who stole the information of more than 22 million job applicants and current employees from this office. Hull has claimed that the average number of data breaches continues to increase, and the average cost per breach is 4 million USD.[18] These costs, in most cases, lead to loss of business due to the loss of consumer trust in the wake of a breach. Again, according to the Ponemon Institute,[19] the cost that a company victim incurs ranges from direct cost to indirect cost or loss, such as the impact of the data breach on the company's reputation and expenses of detection and discovery, escalation, notification, and finally, ex-post responses.

In general, e-companies should follow two ethical practices when conducting online commerce:

- Credibility, which means that e-commerce practitioners should avoid deception. In some cases, hackers design fake websites which mimic the original sites in order to deceive consumers and obtain consumers' credit card numbers or personal information about them.
- Honesty, which means that e-commerce practitioners avoid piracy on the Internet and any kind of violation of electronic intellectual property rights.

The challenging aspect of digital technology has become more aggressive with the introduction of 'cloud computing', where the individuals' information and customers' databases are installed on various servers located across geographical boundaries with different jurisdictions and accessed by everyone capable of doing so and from anywhere in the world with no temporal boundaries.[20] Thus, in choosing cloud computing, business companies may store their customers' information on servers and computer systems that they do not own. Hence, they have no control whatsoever over such servers and systems.[21]

17 Lecher (n 14).

18 B Hull, 'Recent Survey Shows Cost of a Breach has Climbed to $158 Per Record' (*Acuntix*, 4 July 2016) <https://www.acunetix.com/blog/articles/recent-survey-shows-cost-breach-climbed-158-per-record> accessed 9 April 2023.

19 'Total Annualized Cost of Cyber-Crime Targeting US Companies in 2014 and 2015' (Statista, 14 October 2015) <https://www.statista.com/statistics/193444/financial-damage-caused-by-cyber-attacks-in-the-us> accessed 9 April 2023.

20 Mohamad Albakjaji et al, 'The Legal Dilemma in Governing the Privacy Right of E-Commerce Users: Evidence from the USA Context' (2020) 11 (4) International Journal of Service Science, Management, Engineering, and Technology 166, doi: 10.4018/IJSSMET.2020100110.

21 Jawahitha Sarabdeen, Gwendolyn Rodrigues and Sreejith Balasubramanian, 'E-Government users' privacy and security concerns and availability of laws in Dubai' (2014) 28 (3) International Review of Law, Computers and Technology 261, doi: 10.1080/13600869.2014.904450.

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This can facilitate the transfer and selling of customers' personal information to other businesses worldwide by the owners of cloud servers. It should be remembered here that the degree of data protection varies from one firm to another and from one country to another as well.[22] Also, individuals do not have the ability to protect the information that is stored in the company system; instead, they have to rely on the protection that the company offers. Unfortunately, the most vulnerable industries that suffer from data breaches are healthcare (31 million records were stolen in 2017) and financial organisations due to the sensitive data stored in their digital system. The WannaCry worldwide cyberattack in May 2017 is a good example. The NHS online systems in the U.K. were paralysed when their stored data was encrypted, and a ransom was demanded to activate and retrieve the data again. This can affect consumer trust, where the data breach will diminish the confidence of current and future customers.[23] Thus, according to Gemalto, criminals shifted from attacking customers' credit cards to attacking and hacking personal information and identity theft,[24] which are very expensive and hard to remedy. For example, in 2016, Yahoo was a victim of a data breach where hackers stole user information from at least 1 billion accounts.[25] Again, the Ponemon Institute[26] has reported that the nature of organisation activities and their locations are the main factors that may determine the possibility of this data breach, with an average of 25.6 % probability. As far as the healthcare industry, Mandian[27] claims that the problem is not spending money to protect personal data or the medical report from leakage but the incorrect policies that are adopted to protect against a threat that may have a catastrophic impact on the business model. So, this industry needs to change its strategies and priorities from treating the breach effect to adopting the proper prevention control. The unfortunate problem is that these companies are spending all their security money to focus on the leakage of personal and medical records. However, they are still implementing the wrong controls to protect against a threat that impacts their entire business model.

4 BUSINESS ETHICS OF E-COMMERCE

From the perspective of businesses, the ethical considerations of e-commerce cannot be seen simply as limitations of their autonomy. They are an integral part of the business policy and strategy. There are several important reasons why a business would firmly integrate ethics into its e-commerce: building the trust of consumers and maintaining a good relationship with the consumers, which impacts consumers' intentions to purchase[28]

Four main principles guide the ethics of the e-commerce provider and user: responsibility and accountability, on the one hand, as business concepts of accepting duties; obligations and costs of the decisions made and determining the accountable persons within the organisation; and liability and due process, a legal concept determining the possibility of

22 Albakjaji et al (n 20).

23 Total Annualized Cost of Cyber-Crime (n 19).

24 'Gemalto Releases Findings of 2015 Breach Level Index' (*Thales*, 23 Febrary 2016) <https://www.thalesgroup.com/en/markets/digital-identity-and-security/press-release/gemalto-releases-findings-of-2015-breach-level-index> accessed 9 April 2023.

25 Total Annualized Cost of Cyber-Crime (n 19).

26 Ponemon Institute, 2017 *Cost of Data Breach Study: Global Overview* (Ponemon Institute LLC 2017).

27 *Mandiant M-Trends 2018 Report* (FireEye Inc 2018) 1-28.

28 Zhi Yang, Quang Van Ngo and Chung Xuan Thi Nguyen, 'Ethics of Retailers and Consumer Behavior in E-Commerce: Context of Developing Country with Roles of Trust and Commitment' (2020) 11 (1) International Journal of Asian Business and Information Management 107, doi: 10.4018/IJABIM.2020010107.

remedies in case of breach of contract; and a complete understanding of both society and business on how to ensure due process in achieving these rights[29]

The advent of e-commerce has created new opportunities for new businesses to emerge, such as selling digital products (videos, music, games). In addition, using the Internet for commercial purposes with the emerging mobile commerce devices and social commerce has helped companies extend their business and expand their activities. Notably, in populous countries like China and India, which have a high share of online B2C sales in Asia, for instance, the Pacific region, where it reached $1,057 billion, exceeding the United States in second place with $644 billion.[30] The Internet has also enabled new commercial communication methods based on smartphones and social networks that have powered e-commerce activity. Thanks to these tools, the number of online buyers has increased significantly. Online shoppers are expected to grow from 1.66 billion global digital shoppers in 2016 to around 2.14 billion in 2021.[31]

The importance of e-commerce as a convenient way to sell or buy items is always a source of concern to users and customers. However, conducting e-commerce activities is not always safe. One of these concerns is privacy. Currently, customers are concerned about providing their personal information online when they perceive that their personal information is easy prey for hackers roaming the cyber world. The privacy concern does not come from a vacuum; instead, many examples of privacy breaches, hackers, data thefts, and data misuse have raised customers' concerns and made them feel that e-commerce is unsafe. However, it is necessary for their lives.[32]

As a global network, the Internet enables people to communicate and conduct activities across geographical borders) and across different time zones.[33] In this regard, Wynn and Katz argued that cyberspace has enabled asynchronous communication, distinguished from the synchronous communication that occurs inside the real time-space. Accordingly, the physical world has been gradually replaced by the new technology-based virtual world, as confirmed by Matusitz.[34] Based on an environment densely populated with intelligent things, data acquisition has become easily facilitated and compromised,[35] especially in cloud-computing-enabled industries such as e-commerce, where consumers' data is stored and processed for commercial and other purposes.[36] The cloud industry allows businesses to transfer and share customers' data internationally.[37]

These businesses need to build consumers; trust by making their data private and secure to increase their revenue. This task seemed almost elusive in the light of the organisational behaviour where big businesses specialising in processing and trading personal information conceive of this information as a commodity. Also, the recent data breaches involving sensitive data are good evidence that the Internet still exposes consumers to privacy and

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29 Khanh Nguyen, 'Business Ethics in E-commerce' (thesis abstract, Seinäjoki University of Applied Sciences, School of Business and Culture 2016) 31.

30 Total Annualized Cost of Cyber-Crime (n 19).

31 Yang, Ngo and Nguyen (n 28).

32 Chris McGuffin and Paul Mitchell, 'On Domains: Cyber and the Practice of Warfare' (2014) 69 (3) International Journal 394.

33 Eleanor Wynn and James Katz, 'Hyperbole over Cyberspace: Self-Presentation and Social Boundaries in Internet Home Pages and Discourse' (1997) 13 (4) The Information Society 297, doi: 10.1080/019722497129043.

34 Matusitz (n 6).

35 Luigi Atzori, Antonio Iera and Giacomo Morabito, 'The Internet of Things: A Survey' (2010) 54 (15) Computer Networks 2787, doi: 10.1016/j.comnet.2010.05.010.

36 Omer Tene and Jules Polonetsky, 'Privacy in the Age of Big Data: A Time for Big Decisions' (2012) 64 Stanford Law Review Online <https://www.stanfordlawreview.org/online/privacy-paradox-privacy-and-big-data> accessed 9 April 2023.

37 Honor Mahony, 'EU Gets to Grips with Cloud Computing' (*EU Observer*, 5 April 2011) <https://euobserver.com/news/32048> accessed 9 April 2023.

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security threats on a global scale.[38] So, the peril that threatens information security is the global online activities that allow businesses to transfer and export consumer data to and from other countries.[39] This can become a significant threat to privacy by raising the risk of hackers or crackers who attack computer systems via Internet connections and cause data manipulation, loss, or theft. This threat has affected people's perception of the new technology and its importance to the extent that people feel uncomfortable when asked to provide their personal information on international platforms.[40] Actual data breaches across the world have justified these privacy concerns.

With the introduction of cloud computing, many companies store the personal information they have collected about their customers on servers that other firms own worldwide. The degree of data protection varies from one firm to another and from one country to another, with no ability for individuals to control their personal information stored on those servers; instead, they must rely on the protection offered by online companies.

It is worth mentioning that governing e-commerce activities significantly protects the user's and customers' privacy. This is closely linked to the power of the relevant regulations and legislations and their flexibility to change in line with e-commerce development and technological implementations. For instance, the absence of proper state regulation and lack of adequate laws allow companies to show signs of severe deviations and variations, which could pose threats and challenges to users' privacy. Thus, governing the e-commerce conducts is essential in securing the user's/customers' privacy and personal information stored online. This comes through establishing a new legal system that provides good management of e-commerce privacy issues that can reduce privacy breaches and threats. In recent years and with the advances of technology, establishing this legal system that should be more flexible to change according to these advances has become more necessary than ever. Also, as e-commerce activities are international conducts, there is a need in today's environment to provide a flexible legal system on the international level to harmonise the efforts made for this purpose.

5 LEGAL ANSWERS TO THE CHALLENGES OF DATA PROTECTION IN E-COMMERCE

Liability and due process of business ethics need to be ensured not just through accountability and responsibility of the business but through adequate legal regulation that ensures these principles.

Most scholars have argued that a lack of e-commerce regulations and the absence of strong national and international laws encourage companies to improve their business model rather than protect personal information as a priority.[41] This has become a national problem, where governments cannot implement their laws on disputed cases resulting from trans-border e-commerce interactions. The international characteristics of e-commerce transactions made it difficult for one state to apply its laws over such transactions. Again, on the international level, the issue of customers' privacy is not well protected or governed as there is no international consensus on the need for laws that regulate this issue. Different countries adopt different laws and approaches, and this makes it difficult to govern this issue globally.[42]

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38 Joint, Baker and Eccles (n 7).

39 King and Raja (n 11).

40 Ziegeldorf, Morchon and Wehrle (n 12).

41 Daniel Castro and Alan McQuinn, 'Cross-Border Data Flows Enable Growth in All Industries' (*Information Technology & Innovation Foundation*, 24 February 2015) <https://itif.org/publications/2015/02/24/cross-border-data-flows-enable-growth-all-industries> accessed 9 April 2023.

42 Zlatan Meskic et al, 'Transnational Consumer Protection in E-Commerce: Lessons Learned from the European Union and the United States' (2022) 13 (1) International Journal of Service Science, Management, Engineering, and Technology 1.

Activities conducted over the Internet may acquire a cross-border dimension, and potential legal disputes resulting from these activities may lead to a conflict of laws. Although some international laws and rules exist for resolving such disputes, they are not uniform. For instance, online privacy laws differ from country to country, with no proper and sufficient international consensus on the need for laws protecting online users' privacy. Thus, it cannot be said that cyberspace is a lawless zone as the traditional means are still applicable in cyberspace. Still, one may argue that international law has become outdated and invalid for cyber activities for various reasons.[43]

The gap between countries concerning the legal environment needs to be bridged to enhance commerce-privacy protection globally. Therefore, the importance of protecting personal information requires adopting new rules within actual time scope and across boundaries of geographical space. The process is not easily achieved and not without potential challenges to implementers and users of e-commerce. As e-commerce rapidly grows, the challenges of data privacy arise with it. This paper will mainly discuss the ethical issues of privacy and consumer big data protection.

5.1 Data protection

Electronic commerce is directly linked to society in our day-to-day life as the world has become a digital realm, and consumers have adopted e-commerce services as part of their lifestyles. As e-commerce rapidly grows, the challenges of data privacy arise with it.

Collecting data brings new opportunities to modern society and challenges data scientists. Its ethical implications for e-commerce remain empirically under-researched and misunderstood in the era of big data – there has been an explosive growth of information available, and countries have adopted many laws to serve this rapid change. Europe has taken a clear General Data Protection Regulation (GDPR) view on privacy and security, with more people entrusting their data to cloud services and data breaches becoming more common.[44] In Saudi Arabia, the Saudi Personal Data Protection Law and its executive regulations establish the legal foundation for protecting rights concerning the processing of personal data by all entities inside and outside the kingdom. This paper will mainly discuss the ethical issues of privacy and significant consumer data protection.

Consumers may not be aware of the various ways the service collects and analyses information. The electronic apps may collect location and other data, such as chats. In that sense, electronic apps leverage computational behaviour analysis and machine learning to analyse user information such as voice intonations, location data, and screen tips passively or actively collected via apps and wearables, cognitive and behavioural approaches. In ethics, data protection is guaranteed by the Human Rights Act Art. 8(1): Right to privacy: 'Everyone has the right to respect for his private and family life, his home and his correspondence'. Privacy also includes the right to establish an individual's identity and form relationships, such as the right to participate in essential economic, social, cultural, and leisure activities. In certain situations, authorities may need to assist in exercising their right to privacy, including their ability to participate in society. This right granted by the Human Rights Act means that you can prevent the media and others from interfering with your life, so your personal information (official records, photos, letters, diaries, medical records) is safe and not disclosed without permission except in limited circumstances. GDPR in Europe ensures

43 Ben Wolford, 'What is GDPR, the EU's New Data Protection Law?' (GDPR.EU, 2023) <https://gdpr.eu/what-is-gdpr/?cn-reloaded=1> accessed 9 April 2023.

44 ibid.

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data protection by collecting it for specified, explicit, and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing for public interest archiving, scientific or historical research purposes, or statistical purposes shall be permitted following Art. 89 of the GDPR law.

5.2 Ethical issues of data protection: big data as a challenge

Big data can be defined in many ways, but we can sum it up as follows: large datasets with larger, more diverse, and complex structures that are difficult to store, analyse, and visualise for different processes and results. Extensive data analysis explores large amounts of data to uncover the relationship between hidden patterns.[45]

Big data brings new opportunities to modern society and challenges data scientists. Its ethical implications for e-commerce remain empirically under-researched and ununderstood in the era of big data, which means explosive growth of information available. The movement of such big data will be driven by the fact that vast amounts of very high-dimensional or unstructured data are continuously generated and stored at a much lower cost than before.[46]

Ethics is an essential factor in all respects. However, computing is the development and provision of a required e-commerce system. In other words, information is transmitted and shared electronically through information communication technology. The role of e-commerce telecommunications is vast, making it accessible for users to save the data they need and improve their digital life lifestyle.[47] The right and protection of privacy should be formally granted to an individual, and if respecting the interests of confidentiality is not part of a clear and explicit institutional rule, it is sensitive to privacy interests. Therefore, the distinction between moral and legal rights to privacy depends on whether an individual's interest in confidentiality is significant to their lives and therefore exists. Under Privacy and Data protection, the system will eliminate your data as soon as the purpose of collecting it has expired.[48] However, it may retain such data after collecting it has expired if everything that leads to the specific knowledge of the owner has been removed following the controls specified by the regulations.

Truth is a moral norm that provides the *de facto* accuracy of the information and guides information professionals to the accurate and *de facto* correct handling of personal information. It also expresses ethical virtues such as openness, honesty, and credibility. Freedom is more related to individual freedom of choice and freedom from interference. The Code of Human Rights for Privacy ensures that, as long as there is legal recognition and protection of the right to privacy of an individual, this right should be combined with the freedom of protection from illegal interference by others in an individual's private life. The main ethical issues with data protection and big data are that individuals do not know what happens to their data after it is collected.

Having customer data can benefit electronic apps, but it could lead to misunderstanding, false advertising, poor product quality, fraud, invasion of privacy, abuse of information, and

45 Sam Madden, 'From Databases to Big Data' (2012) 16 (3) IEEE Internet Computing 4, doi: 10.1109/MIC.2012.50.

46 Liu Yahui et al, 'Personal Privacy Protection in the Era of Big Data' (2015) 52 (1) Journal of Computer Research and Development 229, doi: 10.7544/issn1000-1239.2015.20131340.

47 Santosh Kumar Das et al, 'Ethics of E-Commerce in Information and Communications Technologies' (2013) 3 (1-8) International Journal of Advanced Computer Research 122.

48 Saudi Open Data website <https://data.gov.sa/en/PrivacynData> accessed 1 September 2022.

infringement of trust. As commonly acknowledged that the leading reason behind these issues is some retailers' faceless interaction and opportunism.[49]

After discussing the issue of e-commerce and big data, the authors will discuss the examples of new national regulations in comparison with Saudi law, which principles should be followed, and how it should be regulated. The issues of the legal framework and the sanctions for violating the e-commerce and data protection regulations will be covered in the next section.

6 LEGAL FRAMEWORKS FOR VIOLATIONS IN E-COMMERCE

This cyber-crime can be defined as unlawful behaviour in which the criminal – who is assumed to have knowledge of computer technology – uses a computer system or computer network to access data and programs with the aim of copying, altering, deleting, falsifying, sabotaging, rendering invalid, illegally possessing, or distributing them. This crime is characterised by a number of characteristics, such as it does not require violence to be committed, it takes only a relatively short time to commit, it can be committed remotely, it is so difficult to prove such a crime, and the public is unaware of this crime.

The boom of e-commerce during the past few years was not without risks of a criminal nature. In parallel, it was matched by significant growth in electronic crimes, and the e-commerce sector became the preferred sector and fertile ground for cybercriminals due to its breadth and association with other components such as intellectual property, personal data, etc. The studies have revealed that cybercrime rates have increased due to the quarantine in many countries and individuals' reliance on the Internet to secure their needs remotely. The European Police Agency, 'Europol', has announced that the Covid-19 pandemic has contributed to an increase in cybercrime across Europe, especially online fraud,[50] which 'has become the ideal strategy for cybercriminals seeking to sell products that they claim prevent or cure the novel coronavirus'.

The attacks that threaten e-commerce are diverse and expand to risk all its components, such as hacking e-commerce websites, attacking personal data and financial data, electronic payment tools, and third-party intellectual and industrial property rights. In addition, e-commerce has become a fertile field for organised crime and money laundering. In addition, there are violations and crimes that the two parties to an electronic contract may commit. Therefore, it is necessary to strengthen criminal prosecution for e-commerce and to establish criminal responsibility for all acts that threaten it because the declaration of criminal responsibility is of great importance in enhancing public confidence in the safety and health of e-commerce transactions and because of its significant impact on stimulating and developing the e-commerce market at the local levels and international.[51]

Crimes that threaten electronic commerce are of two types: Crimes that threaten electronic commerce in general and crimes between the parties to an electronic contract.

49 Yang, Ngo and Nguyen (n 28).

50 'Dubai police arrest Instagram "stars" behind Dh1.6bn international online fraud scam' (*Arabnews*, 26 June 2020) <https://www.arabnews.com/node/1695321/middle-east> accessed 9 April 2023.

51 HHA Mtwali, 'Criminal Protection of General Trust in E-Commercial Transactions as per UAE' (2014) 23 (4) Conditional Thought 41.

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6.1 Specific crimes that threaten data in e-commerce

These crimes are wide-ranging, including what threatens commerce, threatening the components of electronic commerce, and multiple laws of their own have regulated them. Their penalties are varied, including deprivation of freedom and financial fines in addition to confiscation; organised crime and money laundering are among the most dangerous, together with access to a merchant's website, e-mail, and components. E-commerce has become the easiest way to commit organised crime and money laundering. Where organised criminal groups conduct their commercial activities over the information network away from the direct control of law enforcement authorities, commercial websites are created on the dark web, and their products are offered under false conditions.

1. Organised crime and money laundering crime in electronic commerce.

Organised criminal groups adopt one of two methods of perpetrating organised crime in the context of e-commerce; either by engaging – using pressure and threats – in the activity of legal e-commerce companies, pumping dirty money into the financial assets of e-commerce companies to purify it and recycle it as clean money (legitimate,)[52] or by illegally practising electronic commerce by creating illegal commercial markets on the Internet, through which counterfeit products are offered,[53] the revenues of which are estimated at approximately 250 billion dollars annually, according to the report of the United Nations Office on Drugs and Crime. In this regard, Europol in Europe arrested a group of people running a market on the dark web as they pumped counterfeit banknotes estimated at 1.3 million euros into an illegal market called the 'Wall Street Market', the second largest electronic market for trade in the dark web.[54]

2. Illegal access to a merchant's websites and infringement of its components.

This type of attack is classified as a cybercrime, especially among the crimes of infringing the information systems of the commercial website and tampering with the data and data of the website. Comparative penal laws provide punishment of illegal entry to the site with imprisonment and a fine or one of them, as in the Saudi cybercrime law (Art. 3, n.3) and the UAE IT Crimes Law 2021 (Art. 2, n.1). The Syrian Information Crime Law of 2022 distinguished between illegal entry, punished by imprisonment and a fine (Art. 12), and overstepping the legitimate entry, penalised with a fine only (Art. 11). If the illegal entry in its various forms leads to damage to the components of the site, or infringement in any way whatsoever, it is considered in the Saudi and UAE laws as an aggravating circumstance for the penalty, incurring both types of imprisonment and a fine, as in Syrian law, which distinguishes between illegal entry and exceeding the limits of legitimate access.

6.2 The crimes of electronic traders

The e-merchant has many obligations, most of which are in the protection of the electronic consumer as the weakest party in the commercial electronic contract. In this regard, the e-merchant must provide adequate data about his store and the service or product he offers; otherwise, he will be subject to criminal liability.

52 Philippe Véry and Bertrand Monnet, 'Comment le crime organisé s'empare des actifs de l'entreprise' (2009) 2 (2) Securite et Strategie 4, doi: 10.3917/sestr.002.0004.

53 ONUDC, *Gros plan sur: Le trafi c illicite de biens contrefaits et la criminalité transnationale organisée* (ONUDC 2013).

54 'Europol Arrests 11 People who Run a Market on the Dark Web' (*Euronews*, 17 December 2019) <https://arabic.euronews.com/my-europe/2019/12/17/europol-arrests-11-people-who-run-a-market-on-the-dark-web> accessed 9 April 2023.

6.2.1 Failure of the e-merchant to fulfil its pre-contractual obligations

To varying degrees, e-commerce laws and consumer protection laws obligate the electronic merchant to provide a large set of pre-contract data to guarantee that the consumer will obtain as much information as possible to enable him to make his decision in the contract. French law is one of the most recent laws in this field, as by decree (Décret n° 2022-424 du 25 mars 2022),[55] which entered into force on 28 May 2022. It expanded the obligations of the electronic merchant stipulated in the Consumer Code (art, L. 111-1 et aux articles L. 111-2 et L. 111-3).

The most important obligations of the electronic merchant in comparative law:

a) Procedures to be taken to conclude the contract and to clarify the contracting steps.

b) Adequacy of data to define the service and product well in terms of its characteristics and type of quality.

c) A statement of the price, including all fees, taxes, or additional amounts related to delivery, if any. If there are discounts on the product, the old and new prices must be clearly displayed.

d) His name or the name of the company, the address of the company's headquarters, the entity with which he is registered, the country in which he is registered, his phone number and e-mail address, as well as the data related to his deputy, if any.

e) The available electronic means of communication while ensuring that the consumer is allowed to record all written communications exchanged with the merchant, as well as the cost of using remote communication technology to conclude the contract when this cost is calculated on a basis other than the basic tariff.

f) Payment methods and payment terms that can be included in the contract.

g) Data relating to guarantees and their duration.

Comparative laws punish breaching these duties with a fine and some administrative penalties. In Art. 18, the Saudi E-Commerce Law punishes the breach of obligations stipulated in the same law with the following sentences: A- Warning. B- A fine not exceeding (1,000,000) one million riyals. C- Temporarily or permanently suspending the practice of electronic commerce. D- Blocking the electronic store – in coordination with the competent authority – partially or entirely, temporarily or permanently. On the other hand, the penalty is an administrative fine in French consumption law, which does not exceed 3,000 euros for a natural person and 15,000 euros for a legal person. UAE law considers every condition that exempts the merchant from any obligations stipulated in the Consumer Protection Law as null (Art. 21).

6.2.2 The crime of deceiving and misleading the consumer.

Due to the specificity of remote contracting, which depends primarily on advertising and publicity through electronic media, comparative laws in electronic commerce have prohibited the electronic merchant (service provider) from including the electronic advertisement as an offer, statement, false claim, or phrases that may lead directly or indirectly to Deceive or mislead the consumer, such as exaggerating the description of the product inconsistent with

55 Décret n°2022-424 du 25 mars 2022 'Relatif aux obligations d'information précontractuelle et contractuelle des consommateurs et au droit de rétractation' <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045410578> accessed 9 April 2023.

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reality or placing any indication or indication of the application of a quality management system, or the advertisement containing a phrase that deludes the consumer that the product is about to run out, or a logo or trademark that the service provider does not have the right to use, or a counterfeit mark to induce the consumer to contract.

The French consumption law punishes misleading advertising with two years in prison and a fine of 30,000 euros (Art. L132-2 Modified par LOI n°2021-1104 du August 22 2021). If the misleading advertisements result in a decade or more, the penalty shall be three years in prison (Art. L132-2-1 Creation LOI n°2022-1158 du August 16 2022 – Art. 20). In the event that this crime is committed by an organised gang, the penalty shall be seven years imprisonment, (Art. L132-2-2 Creation LOI n°2022-1158 du August 16 2022 – Art. 20).

In Art. 18, the Saudi Electronic Commerce Law punishes merely misleading advertisements with a financial fine not exceeding (1,000,000) million riyals and some administrative measures. However, if the misleading advertisement contains the elements of the material element of the crime of fraud, such that the misleading advertisement includes, for example, lies or deception, or if it would delude in any way of fraud that the opportunity is suitable for contracting and the deal is undoubtedly profitable, what prompted the consumer to contract, then the one responsible for the advertisement shall be punished The misleader shall be liable for the fraud crime stipulated in Art. 1 of the Anti-Financial Fraud and Breach of Trust Law. The misleader shall get imprisonment for a period not exceeding (seven) years and a fine not exceeding (five) million riyals or one of these penalties. This penalty does not prevent the addition of another penalty mentioned in Art. 18 of the Electronic Commerce Law in a manner that does not conflict with imprisonment and fines.

6.2.3 The abuse of electronic consumer personal data

The completion of e-commerce transactions entails recording the personal data of the electronic consumer and keeping it within the information system of the electronic trader, who must respect this data and not be allowed to touch it in any way. Otherwise, he will expose himself to criminal responsibility.

The electronic merchant may not keep the personal data of the consumer or his electronic communications except for the period required by the nature of dealing in electronic commerce, and he shall be responsible for maintaining this information that is in his custody or under the control of the parties he deals with or with their agents. He must destroy it once its purpose has expired (Art. 18 of the Saudi Personal Data Protection Law, criminal law fr. art. 226-20)

The service provider may not use the consumer's data or electronic communications for unauthorised or permitted purposes or disclose it to a third party, with or without payment, except with the consent of the consumer to whom the personal data relates (Art. 5 of the Saudi E-Commerce Law, criminal law fr. art. 226-16 and next).

Saudi law punishes compromising the consumers' data with imprisonment for a period not exceeding (two years) and a fine not exceeding (three million) riyals or one of these two penalties. The Saudi legislator requires a special criminal intent to harm the data owner or achieve a personal benefit to apply this penalty (Art. 35 of the Personal Data Protection Act), while the liability in French law is five years imprisonment and a fine of 300,000 euros. There are special penalties for a legal person.

7 CONCLUSIONS

In the end, the world has become a digital empire, and consumers have embraced e-commerce services as part of their lifestyle; e-commerce is directly connected to society in our daily lives. As e-commerce multiplies, so does the data protection challenge; as such, it is necessary for countries to promote awareness of the moral and legal rights related to the processing of personal data. In particular, there is a necessity to identify a specific age for electronic consumers, as most laws do not set an age limit. The main ethical challenges are collecting data from individuals and needing to disclose how the electronic apps handle the data. It is necessary to strengthen international and regional cooperation to allocate special laws to protect personal data from abuse and hacking and to urge countries to develop their internal security systems similar to the Saudi regulator in the Personal Data Protection Law, its administrative regulations, and the Cybersecurity Law. It should be an obligation for electronic merchants to report any attack on consumer data. One of the significant ethical concerns is advertising based on big data since it might lead to false advertising based on consumer's data and research history, and it would lead to fraud, invasion of privacy, misuse of information, and infringement of trust and that would conflict with the guaranteed right to privacy for individuals. The authors believe in criminalising electronic commerce organised by criminal groups in the Saudi regulator of electronics in line with French law, enhancing international and regional cooperation in organising procedures for prosecuting e-commerce crimes.

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Research Article

COMBATTING HUMAN TRAFFICKING IN SAUDI ARABIA

***Samah Al Agha*[1]**

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Summary: 1. Introduction. – 2. The Nature and the Elements of the Crime of Trafficking in Persons in Saudi Arabia. – *2.1. Nature of the Crime of Trafficking in Human Beings*. – *2.2. The Elements of Trafficking in Persons. – 2.2.1. Actus Reus (Physical Element). – 2.2.1.1. The Acts of Trafficking in Persons. – 2.2.1.2. Culpable Omission. – 2.2.2. Mens Rea (Mental Element).* – 3. The Role of Anti-Trafficking in Persons Law 2009 in Minimising Trafficking in Persons. – *3.1. Wider Scale of Criminalisation. – 3.2. Discretionary Punishments. – 3.3. Harsher Penalties for Committing Trafficking in Persons with Aggravating Factors. – 3.4. The Same Punishment for The Perpetrators and Participants (Accessories, Accomplices) in Trafficking in Persons Crime. – 3.5. The Same Punishment for Completed Crime and Attempted Crime.* – 4. Protective Measures for Trafficked Persons (Victims). – *4.1. Enabling the Trafficked Persons to Know about Their Legal Rights. – 4.2. Referring the Trafficked Victims to Shelters.* – 5. Conclusion.

Keywords: Crime; trafficking in persons; criminal responsibility; law; imprisonment; fine; discretion; victim; legal protection.

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ABSTRACT

Background: *Trafficking in human beings is a crime that violates human rights. Recent years have witnessed an increase in human trafficking for the purpose of commercial sex exploitation, forced labour, and beggary, to name but a few. Globalisation and advanced technology have been exploited by perpetrators of trafficking in human beings. This phenomenon is becoming more difficult to discover and investigate due to its nature and complexity. The purpose of this research is to explore the legal response to the crime of trafficking in human beings in the Kingdom of Saudi Arabia.*

Methods: *This research uses a combination of primary and secondary resources such as the assigned laws, caselaw, academic books, journal articles, and reliable websites.*

Results and Conclusions: *After working out that this crime falls within the scope of Ta'zer Crimes but not Hudud and Qisas crimes, the paper examines the efficiency of the Saudi Anti-Trafficking in Persons Law 2009 from two aspects, the effectiveness of penalties imposed on the human traffickers and the feasibility of protective measures provided in the law for safeguarding the trafficked person (victims). Finally, the study concludes with some findings and recommendations.*

1 INTRODUCTION

The crime of trafficking in persons or human beings[2] represents a clear flagrant violation of human rights and human dignity. Usually, in the trade of things, the person is the owner of the commodity (buyer or seller), but for the crime of human trafficking, the human being is the commodity itself, which all religions, constitutions, and legislations have forbidden.

Trafficking in human beings is a revival of the phenomenon of slavery. Indeed, it is also identified as 'modern slavery'[3] today. This appalling crime is considered the third largest criminal activity and breeds billions of dollars after drug and arms trafficking. It is increasing in all parts of the world because of different factors, such as the prevalent poverty, the lack of employment in countries which have low economic conditions, the growing number of people displaced by wars in many regions, and the demands for cheap labour and services.[4] Given that globalisation has virtually rendered the world borderless and new technology has advanced the transportation system, business criminals have exploited these to make trafficking in human beings a lucrative profession. Preventing this crime seems to be impossible, but it is achievable to lessen the severity of the problem significantly by taking several measures, including but not limited to strengthening the laws, toughening penalties against traffickers in the countries of origin and destination, and enhancing protection for the victims and above all securing cooperation between governments since trafficking in human beings is mostly a global problem that needs a global solution. Therefore, all governments must pay attention to this dangerous phenomenon. Countries around the world

2 'The two terms are used interchangeably. In the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol) (UN Treaty Series 2237/39574), the term "trafficking in persons" is used, while in the Council of Europe Convention on Action against Trafficking in Human Beings (CoE Treaty Series 197) the term 'human trafficking' is used'. See: Riikka Puttonen, Martin Fowke and Marika McAdam, *Combatting Trafficking in Persons in Accordance with the Principles of Islamic Law* (UNODC 2010) 1 <https://www.unodc.org/documents/human-trafficking/Islamic_Law_TIP_E_ebook_18_March_2010_V0985841.pdf> accessed 22 March 2023.

3 A Yasmine Rassam, 'International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach' (2005) 23 (4) Penn State International Law Review 826.

4 Puttonen, Fowke and McAdam (n 2) 5-6.

and international organisations specialised in combatting human trafficking have sought to develop mechanisms and issue laws to deter crime and reduce its economic, psychological, and economic effects. Therefore, during the last few decades, the world has witnessed an important legislative movement in the field of combating trafficking in persons. Given that Saudi Arabia has not been immune to human trafficking, this paper addresses the county's position on combatting trafficking in persons in compliance with international norms and standards.

In doing so, the paper examines the legal response to the crime of trafficking in human beings in Saudi Arabia. It first clarifies the nature and the elements of this crime; then it moves on to examine the effectiveness of the Saudi legal response to deterring the perpetrators and protecting the victims.

2 THE NATURE AND THE ELEMENTS OF THE CRIME OF TRAFFICKING IN PERSONS

2.1 Nature of the Crime of Trafficking in Human Beings:

The primary source of laws in Saudi Arabia is Islamic Law (Shariah). According to the gravity of a crime in Islamic law, there are three categories of crimes. Huddud crimes that are specified by the text of the Holy Quran and Sunnah (sayings and practices of Prophet Muhammed peace upon him), such as theft and adultery.[5] Qisas crimes are crimes against persons, such as murder and bodily injuries, which either require retribution (qisas) or financial compensation (diya).[6]

Ta'zir crimes are the new crimes that were not mentioned in Quran or Sunnah, such as Cybercrime. Ta'zir crimes also refer to the acts that were found and prohibited in the time of the Quran and Sunnah, but there were no specified punishments for them in both Quran and Sunnah, leaving this task to the discretion of the ruler who is in charge of safeguarding the public order, public morality and safety, and tranquillity.[7] In fact, there was a prohibition for all kinds of exploitation of human beings in Islam, but there were no punishments mentioned for such kinds. This made the crime of trafficking in persons fall within the scope of Ta'zir Crimes and led to the enactment of anti-trafficking legislation in 2009, which fulfilled both the corresponding essentials[8] of Islamic law, as well as international law.[9]

2.2 The Elements of Trafficking in Persons

The crime of trafficking in persons consists of *Actus reus* (guilty act or guilty omission) accompanied by *Mens rea* (guilty mind).[10]

5 'As for female and male fornicators, give each of them one hundred lashes, and do not let pity for them make you lenient in ˹enforcing˺ the law of Allah, if you ˹truly˺ believe in Allah and the Last Day. And let a number of believers witness their punishment', see: Holy Quran, Verse 24:2 <https://quran.com/24?startingVerse=2> accessed 22 March 2023. 'As for male and female thieves, cut off their hands for what they have done–a deterrent from Allah. And Allah is Almighty, All-Wise', also see: Holy Quran, Verse 5:38 <https://quran.com/en/al-maidah/38> accessed 22 March 2023.

6 Holy Quran, Qisas, Verse 2:178 on Qisas <https://quran.com/en/2:178/tafsirs/en-tafsir-maarif-ul-quran> accessed 22 March 2023.

7 Puttonen, Fowke and McAdam (n 2) 45.

8 ibid 44. There are five essentials in Islamic Law (1) The practice of religion; (2) The development of the mind; (3) The right to procreation; (4) The right to personal security; and (5) The right to possess property and wealth.

9 ibid 45.

10 Nicola Padfield, *Criminal Law* (9th edn, OUP 2014) 22.

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2.2.1 Actus Reus (Physical Element)

2.2.1.1 The Acts of Trafficking in Persons

There are many acts of trafficking in persons. These acts are listed in Art. 2 of the Anti-Trafficking in Persons 2009, which states that:

> The acts of trafficking in persons, include: coercion, threat, fraud, deceit or abduction of a person, abuse of position or power or any authority thereon, taking advantage of the person's vulnerability, giving or receiving payments or benefits to achieve the consent of a person having control over another person for the purpose of: sexual assault, forced labour or services, mendicancy(beggary), slavery or servitude, or the removal of organs or for conducting medical experiments thereon.

The different acts mentioned in the article must be for different purposes, such as sexual exploitation, forced labour, mendicancy, servitude, removal of human organs, or for conducting medical experiments. In comparison with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2003,[11] it can be noted that the Saudi Anti-Trafficking Law of 2009 has outperformed the Protocol when it expanded the purposes of human trafficking to include begging and conducting medical experiments as a step to reduce the crime of human trafficking.

2.2.1.2 Culpable Omission

A person who – by their omission to act – contributes to the commission of a crime will be criminally responsible.[12] This can be justified if this person is under a legal duty to act but knowingly and wilfully failed to act. To explain, a person may work as a public officer whose duty is to verify and scrutinise the documents and credentials of travellers at a certain port; this person closed the eye on some paper's illegality and did not report (omitted to report) this illegality and let the travellers pass into the country.[13] Those travellers have been apprehended by the competent authorities because of committing trafficking in human organs, which constitutes one of the most dangerous acts of trafficking in persons crime.

Far more seriously, reading Art. 7[14] of the Anti-Trafficking in Person Law 2009 leads to the fact that if a person knows about committing or trying to commit any act of trafficking in human beings and does not inform the competent authorities, such a person would be subject of maximal imprisonment for two years and a fine of 100,000 riyals or both.

Omission – by someone who is not under a duty – to inform the competent authorities about a commission of a crime is not culpable in principle. Such omission is culpable in very few

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11 UNGA Res 55/25 'Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (15 November 2000) <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons> accessed 22 March 2023.

12 Michael Allen, *Textbook on Criminal Law* (12th edn, OUP 2013) 28.

13 Ilias Chatzis and Silke Albert, *Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal* (UNODC 2015) <https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf> accessed 22 March 2023.

14 Kingdom of Saudi Arabia, Royal Decree No M/40 'Anti-Trafficking in Persons Law' of 21/7/1430H (14 July 2009) <https://sherloc.unodc.org/cld/document/sau/2009/anti-trafficking_in_persons_law_2009.html> accessed 22 March 2023. Art. 7 states: 'Any person who becomes aware that any of the crimes provided for in this Law is committed or attempted to be committed, even if bound by professional confidentiality, or who receives information or leads related directly or indirectly to such crimes; and does not immediately notify the competent authorities thereof; shall be punished by imprisonment for a period not exceeding two years or a fine not exceeding 100,000 riyals, or by both penalties. The competent court may exclude parents, children, spouses, and siblings from the provisions of this Article.'

serious crimes; the trafficking in persons' crime is one of them. This constitutes a concrete step in the fight against trafficking in person.

2.2.2 Mens Rea (Mental Element)

The crime of trafficking human beings requires intention as *mens rea*. To explain, the previous prohibited acts must be compounded with a culpable state of mind[15] that constitutes the reason for the act, which is always exploitation of the victim, like sexual exploitation, forced labour, removal of the organs, etc.[16]

Mens rea is achieved by a general criminal intent and a specific criminal intent.[17] The general criminal intent is achieved by two elements; the first element is 'knowledge', where the accused knows that the act is culpable and focused on a living person. The second element is 'intent', which can be described as a psychological force and desire aimed at achieving an illegitimate purpose such as violation of honour through sexual assault, violation of contempt of liberty through begging, slavery, or practices like slavery, violation of one's physical integrity through the removal of organs or conducting medical experiments, etc., whereas the specific criminal intent is to exploit the victim.[18]

In some trafficking cases, in which the trafficked person gives their consent for the trafficking activities, the traffickers may defend themselves by the victim's acceptance of the trafficking activity. Nevertheless, the acceptance of the victim is irrelevant to the criminal liability of the traffickers, and this is clear in Art. 5 of the Anti-Trafficking in Persons Law 2009, which states: 'Consent of victims shall be deemed irrelevant in any of the crimes provided for in this Law'.

Accordingly, if the trafficked person (victim) agrees to any trafficking activity provided for in the Saudi Anti-Trafficking Law 2009, such as agreeing to work in the sex industry in return for money, the trafficker will still be subject to criminal liability.

3 THE ROLE OF ANTI-TRAFFICKING IN PERSONS LAW 2009 IN MINIMISING TRAFFICKING IN PERSONS

Legal systems in Saudi Arabia rely primarily on Islamic Law. There has been a great emphasis on disrupting the traffic of human beings to maintain human rights and human dignity protected as per Islamic law, the Basic Law of Governance, and international law.

> Islamic Law calls for the welfare and well-being of all mankind according to the principles of justice and mercy which are consistent with international human rights standards since Islam forbids subjugating any person to any trafficking activity for any purposes.[19]

The Saudi Basic Law of Governance clearly stresses the protection of human rights in several articles. Art. 8 states that: 'Governance in the Kingdom of Saudi Arabia is based on justice,

15 M Varn and Anoop Chandola, 'A Cognitive Framework for Mens Rea and Actus Reus: The Application of Contactics Theory to Criminal Law' (2013) 35 (2) Tulsa Law Review 385.

16 Ministry of Human Resources and Social Development of Saudi Arabia, 'Anti-Human Trafficking: Guide' (*Human Resources and Social Development*, November 2021) <https://www.hrsd.gov.sa/en/knowledge-centre/decisions-and-regulations/regulation-and-procedures/999875> accessed 22 March 2023.

17 Daryna Byelikova, 'The Notion of Criminal Intent: The Evolution of Mens Rea in Criminal Law' (Bachelor of Arts – Criminal Justice (Honours) thesis, Mount Royal University 2019) <https://core.ac.uk/download/pdf/322804681.pdf> accessed 22 March 2023.

18 Ministry of Human Resources and Social Development (n 16).

19 Puttonen, Fowke and McAdam (n 2) 6-7.

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shura (consultation) and equality according to Islamic Sharia'.[20] Art. 26 also states that: 'The State shall protect human rights in accordance with the Sharia'.[21]

In addition, in 2005, the Kingdom of Saudi Arabia ratified the United Nations Convention against Transnational Organized Crime 2000.[22]

In 2007, it ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime 2000.[23]

Finally, due to the sincere desire to eliminate human trafficking activities, Saudi Anti-Trafficking in Persons law was promulgated by Royal Decree number M/40, and it became effective in October 2009.[24] This law consists of 17 articles. Reviewing the articles of this law, several concrete aspects can be addressed as follows.

3.1 Wider Scale of Criminalisation

Art. 2 of the law details all acts of trafficking in persons that were mentioned earlier in this paper under the title 'Acts of Trafficking in Person'. This Article comes in alignment with Art. 3 of the 'protocol to prevent, suppress and punish trafficking in persons, especially Women and Children'.[25] However, the Saudi Law outperformed the protocol when it added to the purposes the 'begging' and the 'medical experiment' as mentioned earlier.

3.2 Discretionary Punishments

The United Nations Convention against Organized Crime 2000 requires state members to impose penalties that are proportionate to the gravity of the trafficking in persons crime and to give due regard to deterrence.[26]

In response, Art. 3 of Anti Trafficking in Persons Law 2009 says: 'Any person who commits an act of trafficking in persons shall be punished by imprisonment for a period not exceeding 15 years or a fine not exceeding 1,000,000 riyals, or by both penalties'.

Although Art. 3 of the Saudi law contains a maximum imprisonment which is 15 years, it does not determine the minimum imprisonment. In addition, the article determines a maximum fine which is one million riyals but does not put any minimum fine leaving this task to the discretion of the court. This evokes in one's mind the question, 'What is the minimum imprisonment year and the fine?' Reviewing the provisions of this law refers to the fact that not only Art. 3 does not have a minimum penalty, but all articles that include penalties do not have a minimum penalty too.

20 Kingdom of Saudi Arabia, Royal Decree No A/90 'The Saudi Basic Law of Governance' of 27/08/1412H (1 March 1992) <https://www.saudiembassy.net/basic-law-governance > accessed 22 March 2023.

21 ibid.

22 UNGA Res 55/25 'United Nations Convention against Transnational Organized Crime' (15 November 2000) <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> accessed 22 March 2023.

23 UNGA Res 55/25 Protocol (n 11).

24 Royal Decree No M/40 (14).

25 UNGA Res 55/25Protocol (n 11).

26 Anne T Gallagher and Nicole J Karlebach, 'Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice' (*United Nations Human Rights*, July 2011) <https://www2.ohchr.org/english/issues/trafficking/docs/BP_GallagherAndKarlebach.pdf> accessed 22 March 2023.

However, the fact that the Saudi legislator avoided putting a mandatory minimum penalty could be justified by the legislative insistence on meeting the required human rights and criminal justice standards in all cases. To explain, when a judge has the flexibility to choose the duration of imprisonment and the amount of fine, he will be able to use his discretion to make a fair decision.

For example, if the judge takes the motive of the offender into consideration, then he may reduce or intensify the punishment; he does so within the scope of his rights and does not go beyond the limits of his authority. Given the above-mentioned justification for not specifying a minimum penalty for a trafficking crime, it is still important to put a minimum limit for a penalty and to make such a limit as minimum as possible to maintain the flexibility and the discretion given to judges to choose the relevant dissuasive punishment on a trafficking crime. This is clear in the following case, which constitutes an example of how the court can impose a penalty according to their discretion.

Caselaw on Commercial Sexual Exploitation

In the city of Jeddah,[27] one resident (non-Saudi) prepared a house for receiving women and men for the purpose of commercial sexual exploitation. He also was sheltering a woman and procuring her in return for money. He was charged by the prosecution with committing the trafficking of persons according to Art. 2 of the Anti-Trafficking in Person Law 2009. The public prosecutor requested the Court of the First Instance to apply Art. 3.4.11 of the same law to him. The defendant admitted his guilt and acknowledged the validity of the case. The court found him guilty of what he was charged with and sentenced him to five years in prison, five hundred floggings, confiscating the mobile phone and the sums of money seized in his possession and deporting him to his country after the end of his five years' imprisonment. This verdict was upheld by the court of appeal.[28]

3.3 Harsher Penalties for Committing Trafficking in Persons with Aggravating Factors

Art. 4 of the law states that the punishment would be harsher in case of committing the crime in the existence of one or more of the aggravating factors, such as committing the crime against women and children, through an organised crime, or through using/threatening of usage of weapon, or the perpetrator is a law enforcement officer, or if the crime is committed by more than one person, etc.[29]

Given Art. 4 lists the aggravating factors and stresses imposing harsher punishments, yet it does not specify the maximum and the minimum of such harsh punishments leaving it again to the discretion of the judge who has the choice to impose a penalty in proportion to the gravity of the crime compound with the aggravating factors. It can be interpreted that punishments mentioned in Art. 3 can be applied to Art. 4.

27 Case No 3354123 (Court of the First Instance, 1433 Hijri) Code of Judicial Judgments 10/482.

28 ibid.

29 Art. 3 of the Anti-Trafficking in Persons Law states: 'Any person who commits an act of trafficking in persons shall be punished by imprisonment for a period not exceeding fifteen years or a fine not exceeding one million riyals, or by both'. Article 4: 'Penalties provided for in this Law shall be made harsher in the following cases: 1) If the crime is committed by an organized crime group. 2) If the crime is committed against women or people with special needs. 3) If the crime is committed against a child, even if the perpetrator is not aware of the fact that the victim is a child. 4) If the perpetrator uses or threatens to use a weapon; 5) If the perpetrator is the spouse, or guardian of, or has authority over the victim. 6) If the perpetrator is a law enforcement officer. 7) If the crime is committed by more than one person. 8) If the crime is transnational; 9) If the crime inflects severe harm on or results in permanent disability of the victim'. See: Royal Decree No M/40 (n 14).

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Caselaw on Beggary (Mendicancy)

A woman was arrested in the city of Al Jouf in Saudi Arabia while she was practicing beggary with her children. Her husband was arrested in the city of Tabuk while he was begging too. The husband admitted – upon interrogation – that he came with his wife and children to Saudi Arabia for the purpose of doing Omrah and begging. The husband was charged with committing beggary (mendicancy). In addition, the public prosecutor of the Court of the First Instance requested the court to apply the maximum imprisonment and fine on the defendant.[30]

Reviewing the indictment of the prosecution, it should be noted that the man was charged with committing trafficking in persons (he controls his family, taking advantage of the vulnerability of his wife and children), for the purpose of begging, according to Art. 2.

It should also be noted that two aggravating factors are provided in this case according to Art. 5 para. 2, the victim is a woman (the wife) and para. 5 that the husband is the guardian and has authority over all of them (wife and children). For these reasons, the prosecution requested the maximum imprisonment and maximum fine, according to Arts. 3 and 4[31] of the Saudi Anti-Trafficking in Persons Law 2009. However, at the Court of First Instance, the accused denied his statement before the Public Prosecution and claimed that he came to Saudi Arabia for Omrah only and that he was working in the vegetable market, but people used to help him because they knew that he had a big family and that his wife and children were doing shopping but not begging. The court found not enough evidence in his case and decided that it was sufficient to imprison him for twenty days.

Analysing the verdict, it can be noted that the court, to achieve justice, used discretion and conscience, taking into consideration the human situation of the accused along with the fact that there was not enough proof to convict him of the crime of trafficking in persons.

Caselaw on Forced Labour

In the city of Abha in 2013, a criminal investigation was conducted on seven non-Saudi residents suspected of trafficking in persons for the labour exploitation of ten women. An order was issued from the head of the Bureau of Investigation and Public Prosecution (currently called Public Prosecution) with permission No. (17842) dated 17/06/2013 in order to raid their residence. Upon raiding the residence, it was found that it consisted of two apartments, one of them on the second floor where the men lived and another on the third floor where the ten women lived.[32] Upon interrogation, the men admitted that they brought a group of non-Saudi women to work as domestic maids, a service that is in high demand, especially with the advent of the holy month of Ramadan, in exchange for money given by the women. The investigation concluded that the aforementioned seven men were charged with trafficking ten women to exploit their vulnerability to work as domestic servants. At the Court of First Instance, the public prosecutor requested the court to impose on the men penalties stipulated in Art. 3 of the law and paras. 2 and 7 stipulated in Art. 4 of the law. The public prosecutor also requested the court to impose the penalty of confiscation of the car they used to convey the women from one place to another as stipulated in Art. 11 of the same law. The court interrogated the seven accused men in the presence of a translator, but they denied the statements they gave in the public prosecution. They claimed that they did live in the same building in a different apartment from the women's one, but they had not arranged for them to work as domestic servants, and they did not receive any money from them. The

30 Case No 34159840 (Criminal Court in Sakaka, 1434 Hijri) Code of Judicial Judgments 13/41.

31 Royal Decree No M/40 (n 14).

32 Case No 34437444 (Criminal Court in Abha, 1434 Hijri) Code of Judicial Judgments 13/50.

ten women were also interrogated by the court, and they confirmed their statements in the public prosecution, stressing that they worked as domestic servants but had no relations with the accused men. The court freed all of them based on the fact that they did not have a history of imprisonment and based on the principle that states, 'the original is innocence'. This principle does not budge except with strong evidence, and it is non-existent in this case.

Reflecting on this case, it can be noted that although preventing trafficking in humans by imposing a dissuasive penalty is a priority, it is also a priority to avoid convicting people without hard incriminating evidence in criminal matters. It also shows that cross-investigation, such as hearing the accused again in court after being interrogated in the public prosecution, is extremely important in order to achieve justice through safeguarding the legal principle: 'the presumption of innocence until proven guilty'.[33]

3.4 The Same Punishment for The Perpetrators and Participants (Accessories, Accomplices) in Trafficking in Persons Crime

As mentioned earlier, the primary source of Saudi criminal law is Islamic law which differentiates between the main perpetrator (principal), the accessories and the accomplices.[34] The principal in a crime is the person who commits the crime alone. However, in many serious crimes, there may be more than one person who contributes to the execution of the crime. Those contributors could be one of two kinds. The first kind is called 'accomplices', and the second kind is called 'accessories'. Accomplices are the participants who are present at the crime scene and actively take part in committing the crime. Whereas accessories are the participants who are not present at the crime scene but knowingly and intentionally incite, assist, or agree with the principals on committing a crime. This accrues to the consequence that the punishment for the participants (accessories and accomplices) is less than the one for the principal.[35]

However, after analysing Art. 8[36] of the Saudi Anti-Trafficking in Persons Law 2009, it shows that this law treats all principals, accomplices, and accessories equally; it does not differentiate between them in regard to legal liability, and therefore, both receive the same punishments. Given that trafficking in persons is a complicated crime and it is difficult to be committed completely without the assistance of other parties, the Saudi legislator seeks to impose effective and dissuasive sanctions to deter all participants.

3.5 The Same Punishment for Completed Crime and Attempted Crime

More importantly, the Anti-Trafficking of Persons Law 2009 seeks to also achieve deterrence of offenders and potential offenders when it equates, in a penalty, the complete trafficking in persons with the attempted crime of trafficking in persons, which is emphasised in Article 10, that states: 'Attempts to commit any of the crimes provided for in Articles 2, 4, and 6 of this Law shall receive the penalties prescribed for completed crimes'. Criminalisation and penalisation of attempted trafficking in persons is a step forward in deterring the persons

33 Puttonen, Fowke and McAdam (n 2).

34 Abdel Qader Odeh, *Islamic Criminal Legislation Compared to Positive Law* (2nd edn, Dar Al-Kateb Al-Arabi 2018).

35 ibid.

36 Art. 8 of the Anti-Trafficking in Persons Law states: 'Any person who participates in trafficking in persons or takes part in any of the crimes provided for in this Law shall receive the same penalty as the perpetrator'. See: Royal Decree No M/40 (n 14).

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who attempt to commit the crime and in deterring the public, who will think many times before committing or attempting to commit such a crime to end the impunity for traffickers and attempted traffickers.

4 PROTECTIVE MEASURES FOR VICTIMS (THE TRAFFICKED PERSONS)

While prosecuting traffickers, sometimes the competent authority focuses on victims in order to obtain information that they can provide in the criminal justice system. Thus, the victim may be treated as a mere pawn rather than human needing protection and assistance.[37] Accordingly, for the rule of law to be effective and holistic, some issues need to be challenged and addressed efficiently, such as the issue of protecting the victims of trafficking in persons. This fact has been realised by national law in accordance with international law. For example, Art. 15[38] of the Saudi Law puts measures to safeguard trafficked persons.

4.1 Enabling the trafficked persons to know about their legal rights:

Such protective measures include making the trafficked victims aware of their legal rights. In doing so, competent authorities should provide translators for the victims who speak a different language. In response to such an important requirement, the Unified Translation Centre Initiative was activated in 2020. This Centre provides interpretation and translation services to help the victims of trafficking in persons who do not speak the Arabic language during prosecution, court sessions or through any judicial procedures in understanding their legal rights. According to the initiative, the Centre has 22 employees who work as translators and interpreters of 20 languages. For example, in 2021, the Centre provided services in 23 trafficking cases.[39]

Moreover, the Ministry of Human Resources and Social Development (MHRSD) established a Call Centre where its officials work 24 hours to receive calls in six major labour-source country languages: Arabic, English, Filipino, French, Hindi, and Indonesian. The MHRSD hotline was also included in a booklet given to all foreign workers who entered the Kingdom.[40] This, in return, resulted in it receiving around 280 calls every day in 2021-2022.[41] In addition, the Human Rights Committee (HRC) established a separate call centre staffed with operators experienced to recognise

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37 United Nations Office on Drugs and Crim, *Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings* (UN 2008) <https://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5B1%5D.pdf> accessed 22 March 2023.

38 Art. 15 of the Anti-Trafficking in Persons Law states: 'The following measures shall be adopted regarding victims of trafficking in persons during investigation or prosecution: 1. Informing the victim of his legal rights, using a language that he understands. 2. Availing the victim of the opportunity to set forth his status as a victim of trafficking in persons, as well as his legal, physical, psychological, and social status. 3. Referring the victim to the relevant physician if he appears to be in need of medical or psychological care, or if he requests such care. 4. Admitting the victim to a medical, psychological, or social rehabilitation center if so necessitated by his age, or his medical or psychological condition. 5. Admitting the victim to a specialized center if he needs shelter. 6. Providing police protection for the victim if necessary. 7. If the victim is non- Saudi and there is a need for him to stay or work in the Kingdom during investigation or prosecution, the Public Prosecution or competent court shall have the discretion to decide upon such need'. See: Royal Decree No M/40 (n 14).

39 Office to Monitor and Combat Trafficking in Persons, '2022 Trafficking in Persons Report: Saudi Arabia' (*US Department of State*, 2022) <https://www.state.gov/reports/2022-trafficking- in-persons-report/saudi-arabia> accessed 22 March 2023.

40 ibid.

41 ibid.

potential trafficked victims. They receive calls, text messages, and WhatsApp messages in Arabic and English languages.[42]

4.2 Referring the trafficked victims to shelters

In 2020 the National Referral Mechanism (NRM) was implemented. The mechanism 'specifies and coordinates the roles and responsibilities of all relevant Saudi authorities in the identification and protection of victims and the investigation and prosecution of trafficking-in-persons crimes'.[43] NRM has many aspects of achieving its objective of reducing trafficking in persons. It has phone lines to receive calls. It has also data collection and training workshops for officials to spot and stop trafficking in persons.[44]

In addition, the NRM is responsible for referring the victims of trafficking in persons to a shelter to receive care. In 2021, the NRM was amended and updated by the government, and a new procedure within the NRM has been initiated to require the police to allow the potentially trafficked person to stay a minimum of three days at a shelter before the start of a criminal investigation.[45]

The MHRSD also provided shelters for the victims of trafficking in persons. In 2021, the government allocated around 6.67 million dollars to support the victims of forced begging in different areas of the Kingdom. Additionally, 'welfare centers for vulnerable female domestic workers and trafficking victims in 13 locations throughout the Kingdom. Each shelter provided accommodation, social services, health care, psychological counseling, education, and legal assistance'.[46] The government offered these services to all 173 victims it referred to care in 2021.

In addition to the option of referral of the trafficked victims to a shelter, there are two other options – during the judicial proceedings – that are offered to the victims, which are transferring them to a new employer that they can work for or issuing an immediate exit visa. These two options do not require the victims to wait until the prosecution process is finished and does not require interference from law enforcement personnel.[47]

5 CONCLUSION

Trafficking in human beings is a heinous crime that is prevalent worldwide, but eliminating it is still a possible goal. This paper, after reviewing the nature and elements of the crime of trafficking in persons in the Kingdom of Saudi Arabia, examined the legislative efforts that culminated in the Anti-Trafficking in Persons Law that was enacted in 2009. The study proved, through analysis of the law's provisions and court's case laws, that Saudi law is holistic and efficient in criminalising and penalising the perpetrators committing such a crime. Such efficiency is mostly represented in the following aspects:

42 ibid.

43 National Committee to Combat Human Trafficking, 'National Referral Mechanism' (*National Committee to Combat Human Trafficking*, 2022) <https://www.ncct.gov.sa/en/national-referral-mechanism> accessed 22 March 2023.

44 Rachel Wolf, 'How Human Trafficking in Saudi Arabia Moved to the Online Black Market' (*The Borgen Project*, 12 July 2021) <https://borgenproject.org/HUMAN-TRAFFICKING-IN-SAUDI-ARABIA> accessed 22 March 2023.

45 Office to Monitor and Combat Trafficking in Persons (n 39).

46 ibid.

47 ibid. See also: 'Exploitation of children and women is human trafficking crime, says Saudi Public Security' (*Arab News*, 6 April 2022) <https://www.arabnews.com/node/2057621/saudi-arabia> accessed 22 March 2023.

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1. The purposes of the trafficking in persons' acts prescribed in Art. 2 of the Saudi law are not confined to those mentioned in the protocol but extended to include other forms, namely mendicancy (begging) and conducting medical experiments.[48]
2. The law applies the same penalty to the complete crime and the attempted crime.
3. There is criminal liability for any person even if he is not under a duty but knows about a commission or attempted commission of trafficking in persons' crime.
4. The same penalty is imposed on all the participants of trafficking in persons' crime, principal perpetrators, accomplices, and accessories.
5. There is protection for the victims of trafficking in human beings by providing them with shelters and legal, medical, and psychological assistance.

Undoubtedly, the enactment of Anti Trafficking in Persons Law 2009 is a step forward in the battle against trafficking in human beings, yet modifying it is of utmost importance in aligning with Vision 2030, of which legal reforms are one of the objectives. Therefore, some points need to be considered as follows:

1. All provisions in the Anti-Trafficking in Persons Law 2009 that contains the penalty of imprisonment and fine specify the maximum penalty but remain silent on the minimum penalty. This paper recommends modifying the law by adding a minimum penalty in all related provisions to avoid discrepancies in the sentences of similar cases in different courts.
2. All the provisions related to imposing penalties refer to imprisonment or fine or both as punishments. Looking at the purpose and heinousness of some crimes, such as trafficking in persons for the purpose of sexual exploitation, makes us suggest either abolishing the penalty of fines as an option and keeping imprisonment only or imposing both penalties, the imprisonment and the fine together.
3. There is no reference to the statutes of limitations in the current Anti-Trafficking in Persons Law 2009, so a provision on the statutes of limitations should be added. However, due to the heinousness and gravity of this crime, public prosecutions for trafficking persons' cases should not expire over time. This will send a deterrent message to the people who think of committing or trying to commit such a crime because they will know that there is no impunity. This idea is rooted in the Rome Statute of the International Criminal Court ICC, which says that all crimes within the jurisdiction of the ICC, including human trafficking, 'shall not be subject to any statute of limitations' (Art. 29).[49]
4. Saudi Arabia is a party to many international and regional treaties in the fight against trafficking of human beings. Yet, the current Anti-Trafficking in Persons Law 2009 does not include any reference to any kind of cooperation with the international community. This paper recommends modifying the law to also add provisions that require the international exchange of information and cooperation with other countries in confronting the perpetrators of human trafficking crimes because most kinds of such crimes are conducted through more than one jurisdiction.

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48 'Human Rights' (*GOV.SA Unified National Platform*, 2021) <https://www.my.gov.sa/wps/portal/snp/careaboutyou/humanright/?lang=en> accessed 22 March 2023.

49 Puttonen, Fowke and McAdam (n 2).

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Research Article

THE IMPACTS OF UNILATERAL ECONOMIC SANCTIONS

Fatima Abdulatef Halawani[1]

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Summary: 1. Introduction – 2. Literature Review. – 3. Impacts and Consequences of Imposing "Unilateral Economic Sanctions" on Disputing States. – *3.1 Effect of Unilateral Economic Sanctions on Human Rights. – 3.1.1 Poverty. – 3.1.2 Economic inequality. – 3.1.3 Healthcare. – 3.1.4 Access to Education. – 3.2 Effect of Unilateral Economic Sanctions on Economies. – 3.2.1 Economic Growth and GDP. – 3.2.2 Increase in inflation rate and currency devaluation. – 3.2.3 Effect on Agriculture, Rural Areas, Raw Materials and Resources. – 3.3 Effect of Unilateral Economic Sanctions on International Trade and Diplomacy. – 3.4 Determining the Effectiveness of Lawful Unilateral Economic Sanctions.* – 4. Conclusions.

Keywords: Unilateral Economic Sanctions, Human Rights, Economy, International Trade, Healthcare.

ABSTRACT

Background: *The term unilateral economic sanctions is defined as "economic measures taken by one State imposing it on another State, examples of such measures include trade sanctions." Economic sanctions are criticised for failing to accomplish their goal and for having destructive effects that cause poverty, human rights violations, healthcare inefficiency, and deprivation of*

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essential living standards. These subjects and their definitions will be thoroughly covered in this article, along with their connections to the effects of unilateral economic sanctions and their political and economic effects on the countries they are imposed against.

***Methods:** The approaches that have been used are the qualitative and analytical methods. The article gathered data regarding the impacts of unilateral economic sanctions on different levels, such as the effects on human rights and the economy, and international trade and diplomacy.*

***Results and Conclusions:** The effects of the imposed unilateral economic sanctions have shown that they were a failure and had a disastrous impact on a variety of areas, including human rights, the right to adequate healthcare and education, and the decline in the economy that increased unemployment rates.*

1 INTRODUCTION

Unilateral economic sanctions are defined as "economic measures taken by one State to impose a change in the policy of another State."[2] Economic sanctions are condemned for not achieving their intended outcome and for negatively impacting society, leading to poverty, human rights violations, ineffective healthcare, and the loss of basic living conditions.

The article will seek to demonstrate the consequences of the unilateral economic sanctions imposed on the sanctioned state which constitute human rights violations.

2 LITERATURE REVIEW

The author will mainly focus on utilising primary sources, such as statutes, rules, regulations, international treaties, etc. Moreover, the article will resort to secondary sources, for instance, legal books related to international trade, economics, commercial, and corporate law, legal scholars, legal articles, and research papers.

Iryna Bogdanova discussed the legality of unilateral economic sanctions under public international law and explained the legality of coercive economic measures imposed by individual states, also known as unilateral economic sanctions under public international law[3]. This study primarily focuses on which elements of public international law might be violated by the states that impose unilateral economic sanctions. Additionally, this work addresses the extent in which public international law constrains powerful states from overusing economic coercion.

The author focused mainly on debating the lawfulness of unilateral economic sanctions and how they cause human rights violations. In brief, unilateral economic sanctions will likely harm and violate Human Rights.

Anthony Arnove mentioned the example of Iraq in his book "Iraq Under Siege," where he tackled the level of breach caused in the healthcare system in Iraq and the economic state, which caused people to forgo education because they cannot afford it or they chose to work instead to raise their families' wages. All these examples fall under the scope of human rights.[4]

2 Iryna Bogdanova, *Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind* (Brill; Nijhoff 2022) 1-12, doi: 10.1163/9789004507890.

3 ibid.

4 Anthony Arnove (ed), *Iraq under Siege: The Deadly Impact of Sanctions and War* (2nd edn, South End Press 2003).

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Another article discussed the oil reserves in Venezuela that are used throughout the world. Venezuela imported practically all the food, medicine, medical equipment, and other supplies it needed for energy production and electricity generation using its foreign exchange reserves. Therefore, if Venezuela were prohibited from selling its oil reserves, Venezuela would also be prohibited from importing such vital and life-sustaining supplies. As a result, Venezuela lost nearly $6 billion in oil revenue that was utilized by the government to import necessities for its people.[5]

In this paper, different cases reflecting on each element (human rights, economy, and international trade) will be discussed, including, but not limited to, the sanctions on Iraq by UNSC that prevented medical aid for birth defects resulting from uranium depletion in Fallujah; affected health sector; affected economy (annual income fell from $2,450 per capita to $250 in ten years). Also, Syria has been under U.S. sanctions since 1979 and, therefore, other countries were unable to send aid and help following the earthquake in Syria. We will analyse and illustrate these consequences in the upcoming parts of the article.

We are going also to discuss the aspects that are being harmed: human rights, economy, and international trade (diplomacy). These topics will be covered intricately, defined, and their relation to the unilateral economic sanctions' consequences highlighted, demonstrating the economic and political repercussions on the sanctioned states' societies.

3 IMPACTS AND CONSEQUENCES OF IMPOSING "UNILATERAL ECONOMIC SANCTIONS" ON DISPUTING STATES

The Office of the United Nations High Commissioner for Human Rights' website defines unilateral coercive measures as the "economic measures taken by one State to compel a change in the policy of another State."[6] Examples of these measures include trade sanctions, defined as commercial and financial penalties applied by one or more countries against a targeted self-governing state.

The Universal Declaration of Human Rights (UDHR)[7] illustrates that there are 30 basic human rights that every human being should enjoy.

In this part of the article, we will tackle the impacts and consequences of imposing "unilateral economic sanctions" on the disputing states, including several case studies that reflect the accurate results of unilateral economic sanctions, then determine the extent of their effectiveness in establishing political change between the disputing states.

3.1 Effect of unilateral economic sanctions on human rights

Economic sanctions are criticised for failing to accomplish their goal and for having destructive effects that cause poverty, human rights violations, healthcare inefficiency, and

5 Mark Weisbrot and Jeffrey Sachs, 'Punishing Civilians: US Sanctions on Venezuela' (2019) 62 (5) Challenge 299, doi: 10.1080/05775132.2019.1638094.

6 *United Nations Human Rights: Office of the High Commissioner for Human Rights (OHCHR)* <https://www.ohchr.org/en/ohchr_homepage> accessed 20 April 2023.

7 UNGA Res 217A 'Universal Declaration of Human Rights' (10 December 1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 20 April 2023.

deprivation of essential living standards.[8] In this section, we will cover the human rights piece by highlighting its connection to the impact of unilateral economic sanctions. Human rights is a broad term as it is an umbrella that covers multiple elements falling under its scope. For instance, economic, social, and cultural rights, including the right to an adequate standard of living, are placed under this category. Additionally, so do civil and political rights, such as the prohibition of slavery and forced labour. All these elements fall under the umbrella of human rights that harmed by the enforcement of unilateral economic sanctions.

3.1.1 Poverty

This subsection examines the consequences that unilateral economic sanctions have on poverty, as well as topics that are strongly associated with poverty. Poverty is described as insufficient income to cover basic expenses like housing, clothing, and food.[9] The poverty rate tends to increase in sanctioned countries as a lack of access to resources and an increase in exploitation of a particular class of people causes poverty. This exploitation typically occurs through wealth accumulation by corrupt entities, whether foreign or domestic.[10] Unilateral economic sanctions tend to restrict those already exploited by the corrupt entities from accessing resources that could provide them with a better standard of living as defined by the *United Nations Development Program*.[11] This lack of access happens when all necessary aid supplies or resources to sanctioned countries are shut down and they are isolated economically. The purpose of unilateral economic sanctions is to utilise this economic isolation to enforce the country's political agenda, imposing them on the sanctioned state. However, on the contrary, unilateral economic sanctions have dire consequences. Unilateral economic sanctions lead to a notable decrease in GDP per capita, a clear indicator of deteriorating economic conditions in a country after sanctions are imposed.[12] Additionally, the severity of sanctions is directly proportional to the severity of the increase in sanctioned countries' poverty rates.[13] These examples will be further discussed in a later subsection, specifically regarding cases studied with testing of the effectiveness of unilateral economic sanctions. The examples in Iraq, Iran, Sudan, Syria, and Venezuela, etc., show that unilateral economic sanctions are inefficient and ineffective in delivering on their purpose. However, their consequences are reflected in the lives of sanctioned countries' citizens.

Unilateral economic sanctions deprive these citizens of access to their basic human needs, such as nutrition, shelter, healthcare, and, above all, their need for financial gain required to achieve a decent standard of living.[14] On the contrary, unilateral economic sanctions tend to increase poverty rates in sanctioned states instead of accomplishing regime change.

8 Dylan O'Driscoll, *Impact of Economic Sanctions on Poverty and Economic Growth: K4D Helpdesk Report* (Institute of Development Studies 2017) <https://gsdrc.org/publications/impact-of-economic-sanctions-on-poverty-and-economic-growth> accessed 20 April 2023.

9 ibid.

10 ibid.

11 United Nations Development Programme, 'Mongolia: Poverty Reduction' (*UNDP*, 2023) <https://www.undp.org/mongolia/poverty-reduction#:~:text=UNDP%20works%20in%20about%20170> accessed 20 April 2023.

12 Matthias Neuenkirch and Florian Neumeier, 'The Impact of UN and US Economic Sanctions on GDP Growth' (2014) 8/14 University of Trier Research Papers in Economics <https://ssrn.com/abstract=2417217> accessed 20 April 2023.

13 ibid.

14 Dursun Peksen, 'Economic Sanctions and Political Stability and Violence in Target Countries' in Peter AG van Bergeijk, *Research Handbook on Economic Sanctions* (Elgar 2021) ch 9, 187, doi: 10.4337/9781839102721.

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This increase in poverty rates occurs because corrupt regimes tend to exploit their citizens in times of economic prosperity while remaining active members of the international community. Thus, when sanctions are imposed, these regimes typically find an alternative to foreign income by further exploiting their citizens.[15]

Moreover, due to the deteriorating economic conditions of sanctioned countries, sanctions decrease job opportunities for the working class. Business owners in sanctioned economies tend to compensate for their losses by minimising their workforce. Therefore, many working-class citizens in sanctioned economies need a stable household income.[16]

The elements mentioned are direct consequences of unilateral economic sanctions on sanctioned states' citizens. The article attempted to show the correlation between unilateral economic sanctions and the economic conditions that could lead to a collective rise in poverty rates in sanctioned countries. The causation is due to citizens of sanctioned countries being unable to achieve the minimum standard of living due to their exploitation by corrupt governments, or the lack of economic and financial circulation in sanctioned states, all of which are directly linked to unilateral economic sanctions.

Therefore, unilateral economic sanctions can be ineffective, as shown by several examples, through their interconnected effects on sanctioned countries. In most cases, they do not deliver properly on their purpose of changing corrupt regimes or imposing a political change in a country. Instead, they weaken the countries' economies, which later reflects in the socioeconomic state of citizens and how they are led into poverty. On the other hand, the socioeconomic state of citizens could also result from corrupt regimes exploiting them to survive and compensating for the foreign income they suddenly lack due to being sanctioned.

3.1.2 Economic inequality

This part illustrates how income inequality is harmed and damaged by the imposition of unilateral economic sanctions as it remains a global issue. Based on studies made by the Organization for Economic Co-operation and Development, global wealth is drastically concentrated in the hands of a few wealthy elites.[17]

The income inequality attempts to show the contrast between developing and developed nations. The latter show typical wealth accumulation while the prior tend to be exploited states. This wealth accumulation through exploitation of sanctioned states is seen throughout Iraq, DRC, and Syria. Economic superpowers' exploitation of nations dates to the presence of colonial powers in the Middle East and Africa, having been a constant historical measure of wealth inequality between nations.[18]

Current political and corporate entities have continued the colonial exploitation of the past through the imposition of economic sanctions and the accumulation of wealth obtained

15 ibid.

16 Khamraev Mamur Rustamovich, 'The Impact of Economic Sanctions on Well-Being of Vulnerable Populations of Target Countries (2019) 1 (1) International Journal on Economics, Finance and Sustainable Development 17.

17 'The Organization for Economic Co-Operation and Development (OECD)' (*US Department of State*, 28 June 2021) <https://www.state.gov/the-organization-for-economic-co-operation-and-development-oecd> accessed 20 April 2023.

18 Sylvanus Kwaku Afesorgbor and Renuka Mahadevan, *The Impact of Economic Sanctions on Income Inequality of Target States* (Working Paper MWP/04, European University Institute 2016).

from developing countries.[19] Unilateral economic sanctions restrict developing countries from trading in their national natural resources and, eventually, the circulation of currencies in their respective economies.[20] Instead, sanctioned states' resources are either extracted through child labour or smuggled, or remain as unused reserves that a sanctioned state cannot sell or utilize due to their lack of an infrastructure, which could allow them to develop these resources further.[21] As a result, sanctioned states are exploited for their natural resources.[22] Consequently, elites in the states imposing sanctions accumulate the wealth gained from the illegally-obtained resources to strengthen their economies and increase their businesses' wealth.[23]

Unilateral economic sanctions pave the way for elites from states imposing sanctions to accumulate wealth obtained from developing nations which results in a disparity in the levels of wealth between both countries and, thus, the income inequality between them. The correlation between unilateral economic sanctions and income inequality lies in the environments created by the sanctions. Developing nations are robbed of their natural resources and states imposing sanctions accumulate wealth without compensating the sanctioned state. Unilateral economic sanctions create an environment where it is easier for international corporations to accumulate wealth from sanctioned states due to their citizens seeking cheap labour in the face of deteriorating economic conditions, which was the aim of the imposed sanctions. Moreover, the natural resources of sanctioned states tend to either be smuggled across their borders through a black market or are kept as unused reserves that do not provide the sanctioned states with revenue.[24] These consequences of unilateral economic sanctions deprive sanctioned states of revenue that could allow them to compete with other economies in the international community. Thus, they remain in a deteriorating economic condition that leaves them incapable of providing their citizens with a standard of living that matches a standard as seen in states that impose sanctions.

Sanctioned states suffer from exploitation and a lack of reparations that provide them with equity to reach the levels of their counterparts[25]. Unilateral economic sanctions tend to have dire consequences in economies that do not influence a political change in the sanctioned states, but on the contrary, affect a culture of accumulating wealth and leaving a significant disparity in national income, extending to a discrepancy between the sanctioned states and the states imposing sanctions.[26]

19 Arash Saghafian, 'Sanctions and Income Inequality: How Economic Sanctions Affect Income Inequality' (master thesis, Erasmus University Rotterdam, Erasmus School of Economics 2014).

20 ibid.

21 Filipe Calvão, Catherine Erica Alexina Mcdonald and Matthieu Bolay, 'Cobalt Mining and the Corporate Outsourcing of Responsibility in the Democratic Republic of Congo' (2021) 8 (4) The Extractive Industries and Society 1, doi: 10.1016/j.exis.2021.02.004.

22 Munoda Mararike, 'Zimbabwe Economic Sanctions and Post-Colonial Hangover: A Critique of Zimbabwe Democracy Economic Recovery Act (ZDERA) – 2001 a2018' (2019) 7 (1) International Journal of Social Science Studies 28, doi.org/10.11114/ijsss.v7i1.3895.

23 Calvão, Mcdonald and Bolay (n 21).

24 Jin Mun Jeong, 'Economic Sanctions and Income Inequality: Impacts of Trade Restrictions and Foreign Aid Suspension on Target Countries' (2020) 37 (6) Conflict Management and Peace Science 674, doi: 10.1177/0738894219900759.

25 Sylvanus Kwaku Afesorgbor and Renuka Mahadevan, 'The Impact of Economic Sanctions on Income Inequality of Target States' (2016) 83 World Development 1, doi: 10.1016/j.worlddev.2016.03.015.

26 Jeong (n 24).

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3.1.3 Healthcare

This section of the article will shed light on the damages caused by the unilateral economic sanctions placed on the healthcare system. Additionally, this segment will contend that sanctions should never be inflicted on medicine and medical equipment or on any other good or service that is required quickly, as it would have a direct negative impact on access to healthcare in the sanctioned state since it is a basic and fundamental human right that every single citizen deserves to obtain.[27] Furthermore, aside from the right to health, the ethical principle of justice requires access to equitable and affordable healthcare be guaranteed and secured at all times, regardless of who is in need or where the individual comes from.[28] Therefore, access to healthcare services is regarded as morally significant and a prerequisite for equality; it is right when it meets individual needs and there are no unfair, avoidable, or remediable health disparities between groups of people.

Several real-life incidents showcase the effect of unilateral economic sanctions on the healthcare system. In Iran, for example, raw materials required to manufacture medicines could not be easily imported from other states worldwide due to the restrictions enforced on the Iranian banking sector[29]. It led to the unilateral economic sanctions on Iran, exacerbated specifically during the COVID-19 pandemic, demonstrating how public health emergencies can amplify the damages caused by sanctions. Sanctions aimed toward non-health sectors can also indirectly impact access to healthcare if the sanctioned state reduces funds allocated to healthcare in order to continue other activities, including military activities, raising complex questions about responsibility for harm to the sanctioned state's civilian population and the role of humanitarian exemptions, or aid in conjunction with sanctions[30].

Another example that has proven unilateral economic sanctions destroy and damage sanctioned states is the National Survey on Living Conditions. The survey is usually conducted each year by three different Venezuelan universities. This survey has shown that the general mortality rate increased by 31% from 2017 until 2018, and this resulted in over 40,000 more deaths. Additionally, it was calculated that more than 300,000 people were at high health risk due to the deficiency of medicines and general medical treatment. This includes, but is not limited to, approximately 80,000 patients who were diagnosed with HIV and did not receive any antiretroviral treatment since 2017, around 16,000 dialysis and cancer patients, and 4 million people diagnosed with diabetes and hypertension, many of whom cannot obtain insulin or cardiovascular medicine[31].

Nutritional issues continue to be serious and widespread as there are severe cases of malnutrition, such as kwashiorkor or marasmus, in paediatric wards across the country.[32] Based on that account, the Food and Agriculture Organization launched three missions where they visited paediatric hospitals throughout Iraq. During the missions, they consulted doctors, visited wards, examined medical records, and observed the general state of the hospitals, including drug and medicine availability. Indeed, the results showed a need for greater access to medical equipment, medical services/care, and medicine (drugs).[33] Another mission focused primarily on adult malnutrition. The results of the survey administered

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27 Arnove (n 4) 161.

28 ibid.

29 ibid.

30 Adam Dubard, 'Why Sanctions Don't Work (Marcellus Policy Analysis)' (*John Quincy Adams Society*, 14 January 2022) <https://jqas.org/why-sanctions-arent-working-marcellus-policy-analysis> accessed 20 April 2023.

31 Weisbrot and Sachs (n 5).

32 Arnove (n 4) 159.

33 ibid 160.

by the Food and Agriculture Organization in 1997 showed that, in over a thousand adults in Baghdad and Kerbala that had their weight and height measured and their body mass index (BMI) calculated, significant levels of malnutrition were discovered among the Iraqi population, particularly among adults under the age of twenty five who had limited food availability and poor health conditions during their years of growth.[34] For instance, 26% of young men were significantly underweight, compared to less than 5% in a normally-fed population.[35]

Further missions were conducted related to water sanitation. Water is one of the essential sources a country needs for its citizens. However, the fundamental reason for having limited access to water in Iraq is the scarcity of spare parts for machinery and equipment that cannot be purchased without foreign exchange. Furthermore, many items, including chlorine for water purification, require specific sanctions' committee approval.[36] The results of these issues were reflected in the mortality rates data in Iraq, issued by UNICEF between 1960 and 1998, showing values for under five years of age and infant mortality rates (deaths per thousand live births) in Iraq.[37] The data clearly show that mortality rates fell steadily from 1960 to 1990 but then increased after 1990 due to the sanctions' effects throughout society.[38] For south-central Iraq, under-five mortality rates more than quadrupled, from 56 to 131 between 1994 and 1999, but in the autonomous northern area, it increased from 80 to 90 before falling to 72 between 1994 and 1999.[39] According to UNICEF, between 1991 and 1998, there may have been 500,000 more deaths of children under five than what is currently known.[40] In brief, the strict embargo on Iraq has significantly impacted food availability, nutrition, and health, particularly for young people.

The negative impact of unilateral economic sanctions on the healthcare sector is most clearly seen through a rise in mortality rates, specifically of children, in sanctioned states. The embargoes placed on states deprive them of medication and medical equipment, hindering the necessary protocols that must be taken to treat patients and ultimately decreasing the life expectancy in the sanctioned country.[41] Furthermore, sanctioned states' already deteriorating economic conditions do not allow them to allocate their resources to the healthcare system or invest in expanding the sector to provide treatment and care to patients.[42] Instead, sanctioned states, which tend to be governed by tyrannical regimes, accumulate their limited resources and allocate fractions of the nation's GDP to sectors that provide healthcare to citizens or other services internationally deemed to be human rights.[43] Most notably, between 1990 and 2003, Iraq's government only allocated 2.8% of its GDP to the healthcare sector.[44]

In contrast, after the sanctions were lifted in 2009, the rate increased to 8.4% of the country's GDP[45]. Iraq's example proves that unilateral economic sanctions are a means of soft warfare

34 ibid 161.
35 ibid.
36 ibid 160.
37 ibid.
38 ibid.
39 ibid.
40 ibid.
41 Weisbrot and Sachs (n 5).
42 ibid.
43 ibid.
44 ibid.
45 Federico Germani et al, 'Economic Sanctions, Healthcare and the Right to Health' (2022) 7 (7) BMJ Global Health e009486, doi: 10.1136/bmjgh-2022-009486.

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against states to restrict their economies.[46] Still, the repercussions are always inflicted upon citizens by harming vital sectors, such as healthcare, thus having similar consequences to warfare by increasing mortality rates and decreasing life expectancy.[47]

The United Nations Office of The High Commissioner for Human Rights released its recommendations by a Special Rapporteur on unilateral coercive measures, outlining several recommendations to banks and other financial service providers, requesting that they make certain exemptions during embargoes to ensure the delivery of human rights in a sanctioned state, yet maintaining a certain degree of political and economic leverage against a sanctioned state when necessary. The fourth recommendation encourages financial service providers to ease the free flow of payments on necessary goods and services to maintain the basic needs of a sanctioned population and ensure the respect of their human rights[48]. This recommendation supports the correlation between unilateral economic sanctions and their negative impact on the healthcare sector in sanctioned states. Moreover, it supports the causal link between the two as it has established a guideline to prevent future violations of human rights during the imposition of sanctions, as well as to ensure the sanctioned population's access to goods and services necessary to support basic human life, such as medication, medical equipment, and a healthcare system that can deliver and utilize them.

We would like to show the correlation between unilateral economic sanctions and the healthcare system, and how they lead to inequitable and unaffordable healthcare in sanctioned countries. Unilateral economic sanctions can be ineffective and damaging by preventing sanctioned countries from accessing the resources to maintain the efficiency of their healthcare system, thus seeing the decrease in life expectancy and the increase in mortality rates. Theoretically, and in most cases that happen around the world, they do not achieve their main objectives but, rather, deprive the citizens of their fundamental right: access to healthcare.

3.1.4 Access to education

Unilateral economic sanctions harm and affect the educational system in a sanctioned state. The Iraq case is important to understand as it shows the harmful impacts of unilateral economic sanctions enforced on such states. The crash of the Iraqi economy, as a consequence of the sanctions, has caused a high unemployment rate in addition to hyperinflation and devaluation of the local currency. Therefore, in many cases when children drop out of school to support their families financially, and often seen with increasing price rates and the shortage of adequate jobs, families tend to resort to the extreme when earning an income.[49] However, in April 1999, a sponsor was granted by the American Friends Service Committee (AFSC) with a mission to examine the consequences and impacts of sanctions on Iraq's educational system. Based on the observations and assessments, it has been concluded that the sanctions have seriously jeopardised Iraq's ability to provide fully subsidised, high-quality education to all children. Moreover, due to the war with Iran, Iraq's educational system began to deteriorate in the 1980s.

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46 ibid.

47 ibid.

48 Alena Douhan, 'Guidance Note on Overcompliance with Unilateral Sanctions and Its Harmful Effects on Human Rights' (*United Nations Human Rights (OHCHR),* 28 June 2022) <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/resources-unilateral-coercive-measures/guidance-note-overcompliance-unilateral-sanctions-and-its-harmful-effects-human-rights> accessed 20 April 2023.

49 Arnove (n 4) 145.

Additionally, the 1991 Gulf War and the ensuing sanctions accelerated this decline and precipitated the current crisis. Nevertheless, after almost thirteen years of sanctions, the aspiration to learn remains within the spirits of the Iraqi citizens.[50] Additional assessments and observations have been done, and the results prove that the Iraqi teachers, who were once highly-respected and well-paid professionals, now earn $3 per month on average. In the past, the salary was approximately $450.[51] Furthermore, teachers received benefits and cash advances to help them buy land. Nowadays, teachers must either change professions or work a second job to supplement their income.[52]

Unilateral economic sanctions also deprive people of accessing online information databases, which could hinder research in universities and institutions seeking to develop technology, civil society, and education. In addition, the sanctions deny individuals opportunities for personal development through access to resources that could lead to collective progress by access to information of companies and universities. An example of this deprivation would be the United States' sanctions on Sudan. The U.S. sanctions on Sudan triggered a severe cycle that led to the children dropping out of schools due to sanctions, leading to high unemployment rates and worsened financial status. On a larger scale, U.S. sanctions led to universities, schools, and companies suffering from a lack of access to information due to sanctions closing the resources, such as the Massive Open Online Courses (MOOC), provided by websites like Coursera that deliver classes from top universities, thus leading to a lack of personal growth in Sudan as well as a collective lack of any access to resources that provide information used for research by universities and companies. The consequences of this lack of access to information resources are reflected in Sudanese universities publishing little to no research, and the worsening educational infrastructure as the sanctions continue. Moreover, it affects citizens individually by preventing access to personal development resources and abandoning their education due to their economic conditions.[53]

The imposed unilateral economic sanctions impact the education system. High unemployment rates, hyperinflation, and devaluation of local currency drive this effect on education. It has been proven that enforced unilateral economic sanctions are ineffective and cause more damage to the sanctioned states, specifically, and among other areas, in the education sector. Unilateral economic sanctions affect sanctioned states' education institutions on a collective scale and citizens on an individual scale.

3.2 Effect of unilateral economic sanctions on economies

This section tackles the features of the economy by emphasising and correlating them to the impacts of unilateral economic sanctions. The economy is defined as the system of interrelated production and consumption activities that ultimately determine the allocation of resources within a group. The need for goods and services in society is being fulfilled by production and consumption.[54] The economy has an essential role and impact on both domestic and international levels as it affects governments, households, families, businesses,

50 ibid.

51 ibid.

52 ibid.

53 Mohamed Malik and Malik Malik, 'The Efficacy of United States Sanctions on the Republic of Sudan' (2015) 1 Journal of Georgetown University-Qatar Middle Eastern Studies Student Association 7, doi: 10.5339/messa.2015.7.

54 OECD/Eurostat, 'Consumer Goods and Services' in *Eurostat-OECD Methodological Manual on Purchasing Power Parities* (OECD Publishing 2012) ch 5, 89, doi: 10.1787/9789264189232-8-en.

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and the world's resources.[55] States imposing unilateral economic sanctions harm and damage the economy of the sanctioned country and other countries worldwide. This will be further discussed in the upcoming parts of the article.

3.2.1 Economic growth and gdp

Unilateral economic sanctions can cause abrupt declines in economic growth and the GDP of the sanctioned country. *Economic growth* is defined as the increase in a society's production and consumption of financial products and services in quantity and quality.[56] Whereas gross domestic product (GDP) is the standard measurement of the value added produced by the production of products and services in a country over a specific period.[57] Both elements support the flow by maintaining a stable economy in the country. However, when unilateral economic sanctions are inflicted, they cause a decrease in economic growth and in the GDP, leading to an economic crisis. Sanctions may negatively impact the economic performance of the target state that is being sanctioned through several means. The most prominent of these are a decline in exports and imports, the subsequent loss of negotiating leverage on global markets, and the contraction of international capital flows, or the cessation of foreign direct investment, foreign aid, and financial awards[58]. These negative impacts could still happen even without formal trade embargoes or international aid and financial flow stoppage. Often, political regimes are demonised symbolically with economic penalties[59]. The associated reputational damage may isolate the target nation within the international community and discourage aid and investments from by donors.

In Africa, the U.S. imposed economic sanctions on Sudan in 1993. Sudan's economy has undergone several deteriorations for thirty years due to sanctions, a civil war, and a tyrannical regime. Most notably, the U.S. sanctions constricted Sudan from social, political, or financial development. The constraint caused by sanctions is reflected in the country's GDP and economic state. Sudan's GDP contracted by 0.6% within less than a year, meaning a negative GDP led the country into recession, and a fiscal deficit of 4.4%. These are indicators of an economy going through a recession, and economic sanctions that imposed international and domestic borrowing constraints on Sudan have deprived the country of competing in the international market with its North African neighbours[60].

Moreover, unilateral economic sanctions on Sudan caused inflation rates to rise to 36%. The highest acceptance rate is 3%. This caused the country to lose 76% of its revenue sources. Thus, a deficit in Sudan's revenues, in addition to a contraction in its GDP and GDP per capita, pushed the country into a recession, an occurrence that is directly linked to the sanctions

55 Tim Callen, 'Gross Domestic Product: An Economy's All' (*International Monetary Fund*, 2012) Finance & Development 14 <https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/gross-domestic-product-GDP> accessed 20 April 2023.

56 Charles Potters and Katrina Munichiello, 'What Is Economic Growth and How Is It Measured?' (*Investopedia*, 1 January 2021) <https://www.investopedia.com/terms/e/economicgrowth.asp> accessed 20 April 2023.

57 Jason Fernando, Michael J Boylen and Pete Rathburn, 'Gross Domestic Product (GDP): Formula and How to Use It' (*Investopedia*, 30 March 2023) <https://www.investopedia.com/terms/g/gdp.asp> accessed 20 April 2023.

58 Gary Clyde Hufbauer et al, *Economic Sanctions Reconsidered* (3rd edn, Peterson Institute for International Economics 2009); Simon J Evenett, 'The Impact of Economic Sanctions on South African Exports' (2002) 49 (5) Scottish Journal of Political Economy 557, doi: 10.1111/1467-9485.00248.

59 Taehee Whang, 'Playing to the Home Crowd? Symbolic use of Economic Sanctions in the United States' (2011) 55 (3) International Studies Quarterly 787.

60 Lawrence K Freeman, 'Sudan at the Crossroads: Sanctions Are Killing off Africa's Breadbasket' (2014) 41 (27) Executive Intellgience Review 33.

imposed on Sudan since there was an absence of an international investment climate that could foster the growth of the sanctioned economy. Granted, the recession was also due to Sudan's misallocation of resources[61]. However, more stimulation was required in the private economic sectors through foreign direct investments to promote long-term economic growth[62].

Economic penalties imposed on states through unilateral economic sanctions have dramatically affected the overall GDP and GDP per capita. Individuals are affected by the deterioration of economic conditions on different scales, and the working class suffers the direct consequences. A lack of international capital flows and foreign direct investments deprives states of stabilizing their GDP and, thus, deprives individuals of access to the wealth generated by capital flows and foreign investments. This deprivation has been shown in many examples, such as in Venezuela where unilateral economic sanctions have deprived the state from partaking in international trade and generating revenues, despite having the world's largest oil reserves. Consequences of this reflected on the state's GDP and GDP per capita as individuals suffered from an inability to engage in commercial transactions due to the Venezuelan Bolivar losing its value in the international market, considering its direct link to the state's oil reserves (which the GDP was reliant on). The Venezuelan government's revenue from oil export receives almost every vital foreign exchange to import products necessary for healthcare and energy.[63]

3.2.2 Increase in inflation rate and currency devaluation

Unilateral economic sanctions impact the inflation rates and simultaneously attempt to find direct causation. The sanctions are directly linked to increasing inflation rates and losing a currency's value. Such a correlation is seen to have further consequences on food security. It becomes a penalty imposed on civilians, as is the case of the Caesar Act's effect on inflation in Syria.[64] Sanctions also show an impact on already deteriorating economies, that could otherwise recover from inflation, by leading them into a state of hyperinflation, as was the case in Venezuela following the sanctions imposed by the U.S. in August 2017.[65] Unilateral economic sanctions inevitably lead to rising inflation rates, considering the result occurs regardless of a state's economic condition before the sanctions. However, the consequences seem more severe when implemented in states suffering from an unstable economy due to warfare or inflation rates preceding the sanctions. The rationale behind sanctions leading to an increase in inflation rates refers to the process of states imposing an 'Inflation Tax' to fill in the gaps left by an increase in spending while revenues remain the same; thus, states impose the inflation tax by printing money as revenue raised by governments to its deficit.[66] The government of the former Republic of Yugoslavia used the inflation tax mechanism following sanctions and has been repeatedly replicated by other governments suffering from inflation due to unilateral economic sanctions.

In Yugoslavia's example, the inflation tax was a method by which the state sorted out its deficit between the state's access to liquidated assets (cash currency) which was not covered,

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61 ibid.

62 Abdulkadir Abdulrashid Rafindadi and Zarinah Yusof, 'Revisiting the Contention of the FD/GDP Nexus of the Northern Sudanese Economy: A new Startling Empirical Result' (2013) 28 (13) World Applied Sciences Journal 182, doi: 10.5829/idosi.wasj.2013.28.efmo.27025.

63 Weisbrot and Sachs (n 5).

64 DuBard (n 30).

65 ibid.

66 Jakub Hejsek, 'The Impact of Economic Sanctions on Civilians: Case of the Federal Republic of Yugoslavia' (2012) 4 (2) The Science for Population Protection 1 <http://www.population-protection.eu/prilohy/casopis/eng/11/54.pdf> accessed 20 April 2023.

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and the provision of cashless loans, such as bonds, that were received by both the public and corporate sectors at permanently higher rates in order to preserve its revenues' real purchase power and maintain a balance through their decrease due to growing prices. The state then collects the margin between the money's value during the time of its allocation in the public and private sectors and the decreased value of the same money applied later (during payment for goods and services), therefore, the revenue of the state equals the inflation which occurred between the two points. The inflation tax successfully controls inflation rates in more stable economies. However, in larger scales and unstable economies, an inflation tax could lead the economy to hyperinflation. Yugoslavia's implementation of the inflation tax was in a hyperinflation setting while the country was undergoing extreme economic and political shifts, as well as an armed conflict that led to the imposition of economic sanctions on the former Republic of Yugoslavia[67]. The consequences of an inflation tax while the country was being sanctioned under severe conditions caused the inflation rate to rise to an extreme due to people reducing their actual holdings of liquidated assets and money, in turn, the monetary base becomes increasingly costly to hold. Eventually, the actual monetary base falls to extreme measures, and, simultaneously, so do the inflation tax revenues accumulated by the government to parallel levels. In 1993, the Yugoslav government reached a staggering monthly inflation rate of 4667%, thus reaching an extreme case of hyperinflation due to its sanctioned economy during unprecedented conditions[68].

These examples reflect a clear correlation and causation between unilateral economic sanctions and an increase in inflation rates due to trade restrictions inducing inflation. In contrast, trade openness decreases it[69]. A state restricted from freely trading with other countries will be met with a lack of capital flow that results in higher spending than revenue, which leads to currencies losing their value and, eventually, sanctions will lead these states to resort to printing money through imposing an inflation tax to recover from inflation. However, if sanctions continue to be imposed, states' economies tend to suffer higher rates of inflation because the money printed is not circulated or utilized in international markets and, therefore, lose the value they once held. Consequently, a host economy's inflation rates are fuelled by unilateral economic sanctions until they reach hyperinflation. It is more difficult to recover from hyperinflation as it can have dire consequences on a country's GDP and GDP per capita.

Unilateral economic sanctions show a negative impact on inflation rates in host economies. The consequences of sanctions can be seen in the changes inflation rates go through in a host economy and how they reflect on public financial policies taken by host economies. For example, inflation taxes are imposed to recover from sanctions and rising inflation rates to fill the deficit between spending and revenue. Still, such a tax can only succeed if the state can trade freely to compensate for such a deficit, so sanctions hinder the countries from reaching a point of recovery and could lead them into hyperinflation.

3.2.3 Effect on agriculture, rural areas, raw materials, and resources

We are going to observe the consequences of unilateral economic sanctions on a sanctioned state's resources, including agriculture, raw materials, and energy sources such

67 Milica Delevic, 'Economic Sanctions as a Foreign Policy Tool: The Case of Yugoslavia' (1998) 3 (1) International Journal of Peace Studies 183.

68 ibid.

69 Hamidreza Ghorbani Dastgerdi, Zarinah Binti Yusof and Muhammad Shahbaz, 'Nexus Between Economic Sanctions and Inflation: A Case Study in Iran' (2018) 50 (49) Applied Economics 5316, doi: 10.1080/00036846.2018.1486988.

as oil. Unilateral economic sanctions generally prevent a sanctioned state from trading its resources because a trade embargo is meant to cut economic ties between a sanctioned state and the international market. In precedence, unilateral economic sanctions are a reason a state's GDP is highly affected. They possess a massive reserve of resources yet need to obtain profit or revenue from selling them to other states. Certain countries rely heavily on their agricultural output for international trade, whilst others rely on natural resources, such as oil and natural gas.

In most cases, developing countries only possess a few alternatives to their trade resources and a state's income is strictly reliant on one resource. Unilateral economic sanctions constrain a sanctioned state from trading in its limited variety of resources. As a result, they restrict the state from gaining any revenue that could aid in its economic development. Thus, the consequences of unilateral economic sanctions are later reflected in a state's GDP decreasing due to a deficit in revenue from a lack of engagement in international trade.

Sudan, known as Africa's breadbasket, was a significant exporter of agricultural goods. For example, Sudan was a major exporter of sugar in the region, the third biggest producer in Africa, until the imposition of sanctions in 1997. Studies show that Sudan's production fell from 365,395 tons in 2009 to 271,077 tons in 2014, a 25% decline in production due to the sanctions affecting the country's trade in sugar. This decline in production rate also occurred because farmers needed help to purchase farming equipment since the 1997 sanctions were imposed. Between 2012 and 2014, Guneid farms, a major Sudanese producer of sugar, saw its production rate fall by 20% due to the sanctions restricting farmers from purchasing new equipment to run an efficient farming process. As a result, the sanctions affected 80,000 Sudanese families in the area surrounding Guneid who relied extensively on farming as a source of income[70].

Sudan also had oil reserves, one cause behind the civil war with the south. It could industrialise its reserves and engage in foreign exchange to increase its revenue through oil reserves that were extracted from oil fields in South Sudan. The North African country's industrial production rose from 7% in 1956, when Sudan gained independence from the British Empire, to 24% until the 1990s. Only after the sanctions were imposed on Sudan in 1997 did the country's production fall to a rate of 16-17%[71]. Following the south gaining independence from Sudan in 2012, South Sudan emerged as a new state, and (North) Sudan lost the foreign exchange and revenue of 350,000 barrels of oil per day from the South Sudanese border. More specifically, Sudan lost 10% of its GDP, 75% of its foreign exchange, and 50% of its budget revenues. This impact on the Sudanese economy primarily came from the economic sanctions imposed on the state. Its industrial and agricultural production rates were already affected by the sanctions and the lack of any foreign exchange, but losing a third of its land only accelerated Sudan's fall to an extreme recession by losing a considerable portion of its resources. The unilateral economic sanctions imposed by the U.S. on Sudan had dire consequences as they prevented the country from profiting from its resources and hindered its rate of industrial and agricultural production, thus constricting the country's economy and harming its GDP and GDP per capita[72].

In another example, Venezuela possessed the world's largest oil reserves. Venezuela relied on the foreign exchange of their reserves to import almost all medicine, food, medical equipment, and equipment needed for electricity generation and energy. Therefore, a restriction on trading Venezuela's oil reserves would naturally become a restriction on Venezuela importing such essential and life-saving goods. In 2017, the U.S. imposed sanctions on Venezuela, restricting the country from trading in its oil reserve. The sanctions

70 Freeman (n 60).

71 ibid.

72 ibid.

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briefly adversely impacted oil production; however, in August 2017, an executive order from the U.S., introduced by the Trump Administration to pressure the Venezuelan government, led Venezuelan oil production to crash, falling to rates below three times the production rates of the previous twenty months. As a result, Venezuela lost over $6 billion in oil revenue that the state used to import essential goods for its citizens.

This section has covered the consequences of unilateral economic sanctions on a country's agricultural and industrial production, as the sanctions harm citizens by either depriving a state of engaging in foreign exchange and hindering the production process, which could lead to citizens losing their jobs, or by harming a country's revenue used for the importation of essential and life-saving goods. This impact that unilateral economic sanctions hold to restrict states from international trade and impose a constraint on their economies ultimately leads to the consequences on a civilian level and essentially infringing their human rights[73].

3.3 Effect of unilateral economic sanctions on international trade and diplomacy

International trade and diplomacy are intertwined with the impacts and consequences caused by the enforcement of unilateral economic sanctions. They tend to have dire consequences on international trade and a state's foreign trade, specifically. Thus, the article will attempt to identify how unilateral economic sanctions halt a globalised mission of international trade while simultaneously hindering a sanctioned state's ability to trade in its resources and goods with foreign partners, therefore, having severe effects on its economy, GDP, GDP per capita, currency, and revenue generated from traded national resources. The political aspect, or legal concept, tackles the relations between states, for instance, as seen in international trade and diplomacy. Unilateral economic sanctions directly influence a sanctioned state's relations with other countries through blacklisting and secluding its economy, making it an isolated state with a reserve of resources that it cannot trade in because of sanctions affecting the country's international status in the market and, at times, threatening to impose sanctions on the sanctioned state's trade partners as well, such as the case in Syria, which the article will elaborate on further. Additionally, the article will research a correlation between unilateral economic sanctions and the severing of diplomatic ties between a sanctioned state and its trade partners.

3.4 Determining the effectiveness of lawful unilateral economic sanctions

The purpose of unilateral economic sanctions varies depending on each case. Unilateral economic sanctions could be enforced to place a trade embargo on a state due to its political allegiance, agenda, or economic decisions, or to enforce a regime change when faced with dictatorial governments. By studying the effects of unilateral economic sanctions, we find that countries are affected in severe ways that harm their infrastructure and economy due to isolation from the international community, marginalisation, and economic constraints. The article has displayed materialised consequences of unilateral economic sanctions, such as declines in GDP, GDP per capita, inflation, and lack of access to healthcare, education, and other resources deemed to be a human right. Moreover, unilateral economic sanctions affect countries diplomatically within their foreign trade. This is because unilateral economic sanctions ultimately place a trade embargo on a country, thus secluding it from other nations. The paper has shown how Venezuela's oil reserve lost almost its entire value due to the state being incapable of trading its oil with trade partners after the sanctions were imposed, as

73 Weisbrot and Sachs (n 5).

well as how the Sudanese infrastructure continued deteriorating after the sanctions were imposed, thus affecting the country's agricultural and industrial production. Unilateral economic sanctions' consequences seem more dire when they affect a population's access to human rights, such as education and healthcare, where foreign diplomacy is necessary to secure a decent life for the population, and when ensuring they are provided with the minimum standard of living. Sanctioned states are deprived of such standards when the sanctions imposed on them remove their relations with other countries, thus severing their economic and diplomatic ties with all states and completely isolating the country from foreign aid or trade to provide citizens with any form of improvement in the sanctioned state's economic conditions. The Caesar Act imposed on Syria by the Trump Administration is a prime example of a state's isolation. The sanctions were not only imposed on Syria and the Syrian regime, but on any trade partners that had relations with Syria, meaning the sanctions would also be imposed on Syria's trade partners, individuals and entities, for any trade or form of diplomatic relations maintained with Syria. The Caesar Act's consequences are further reflected in the lack of foreign aid received by Syria even in times of natural disasters[74]. This year, Syria suffered an earthquake that destroyed significant cities and it was necessary to supply Syria with foreign aid to save the victims' lives. However, following the earthquake, a question arose whether the Caesar Act should be lifted to supply Syria with humanitarian aid, even if it meant dealing with the Assad regime[75]. The mere questioning of whether humanitarian aid should be sent to a country to combat a dictatorial regime has been criticised as a sign of the ineffectiveness of unilateral economic sanctions. Syria is a prime example. After twelve years of an internal armed conflict, with foreign intervention, the Assad regime remains in power, yet the people suffer from natural disasters, dictatorial oppression, and deteriorating economic conditions caused by the sanctions constraining the country's economy. This state of the civilian population within a completely politically-isolated state, while the dictatorial regime continues to enjoy the privileges of healthcare and accumulating wealth, reflects the ineffectiveness of unilateral economic sanctions and proves that the consequences are rarely inflicted upon the regime that should be subject to change, but the already oppressed population by an exploitative regime suffers.

4 CONCLUSION

Unilateral economic sanctions harm the civilian population of a sanctioned state severely and fail to achieve their goals and are ineffective when imposed on target states. Access to essential resources is a fundamental human right; any deprivation of these rights could be life-threatening. Unilateral economic sanctions lead to human rights' violations without fulfilling their political goals, and, instead, they punish civilians for the actions of corrupt governments. Unilateral economic sanctions also have dire consequences on a target country's GDP, which is later reflected by the civilian population and the target state's revenues from international trade. Finally, unilateral economic sanctions isolate a target state from the international community and deprive it of engaging in international trade, thus, ruining a target state's diplomatic relations.

74 Samir Aita, *The Unintended Consequences of US and European Unilateral Measures on Syria's Economy and its Small and Medium Enterprises* (The Carter Center 2020).

75 Joseph Daher, *The Aftermath of Earthquakes in Syria: The Regime's Political Instrumentalisation of a Crisis* (RSC Research Project Report, Syrian Trajectories Project/04, European University Institute 2023) doi: 10.2870/167974.

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Research Article

THE IMPORTANCE OF SHARIAH GOVERNANCE IN THE BANKING INDUSTRY IN SAUDI ARABIA AND THE CASE OF SHARIAH COMMITTEE MEMBERS AS RELATED PARTIES

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Authorisations for Shariah Committee Members' Contracts and Businesses. – 8. Shariah Committee Related Party Transaction Disclosures. – 9. Concluding Remarks.

Keywords: Corporate Governance, Shariah Corporate Governance, Related Parties, Shariah Committee Members.

ABSTRACT

Background: *Saudi Arabia has become an important economic player in the world. Based on this strategic importance, the banking sector had to keep pace. As a result, the Shariah Governance Framework was put in place in February 2020, as banks in Saudi operate in accordance with the requirements of Islamic laws. Therefore, shariah governance is important in the Islamic banking industry, The Shariah Governance framework was issued to control the growth in financial assets, and the first issuance of such a framework needed comprehensive studies. Therefore, due to the lack of local and international research focused on the Saudi corporate governance infrastructure, specifically related parties, the significance of this paper lies in the academic impact and the impact it has on the field practitioners, as it will try to identify the concept of shariah committee members and their re-addition as related parties and disclosures. This research paper aims to study a key principle in corporate governance, that is, the conflict of interest that can be defined under Related Parties Transactions. Specifically, this study will focus on the Shariah Committee Members as Related Parties in the Banking sector in Saudi Arabia.*

Methods: *The researchers used primary and secondary resources.*

Results: *This paper concludes with some findings related to the Shariah Governance Framework and the narrowed topic of this paper, which is the Shariah committee members as related parties. Although it was an important step to re-add the members, there is a need to improve the current regulatory structure.*

1 INTRODUCTION

The Islamic banking system in Saudi Arabia is very important. Ten banks are listed on the Saudi stock exchange, and all of them provide products that meet Shariah requirements.[3] Shariah corporate governance is important in the Islamic banking industry because not only is our legal system based on shariah, but our banks also offer products that comply with it.

This means that we need a strong shariah system to control the whole process and make sure it is effective. Additionally, it is important to note that the Basic Law of Governance, which is equivalent to and considered to be the Saudi Constitution, states in its first article that the Holy Quran and the sunnah are the constitution of the Kingdom of Saudi Arabia (KSA) religion, which indicates that shariah is the essence and the foundation for KSA. Therefore, shifting the focus of this paper to shariah governance in Saudi is beneficial to academics, practitioners, and our regulators.

Among dual banking jurisdictions, the Kingdom's Islamic banking industry is the largest globally. Islamic banking assets reached $544 billion in 2020, making up around 65% of the major components of Islamic finance assets.[4]

3 'Main Market Watch: An overview of activity across Saudi Exchange's Main Market' (*Saudi Exchange*, 2023) <https://www.saudiexchange.sa/wps/portal/saudiexchange/ourmarkets/main-market-watch?locale=ar> accessed 25 January 2023.

4 Islamic Financial Services Board and Saudi Central Bank, *Excellence and Leadership: Saudi Arabic Islamic Finance Report* (SAMA 2021) 9 <https://www.sama.gov.sa/ar-sa/Documents/Saudi_IF_Report_2021_Final_DIGITAL_v3.pdf> accessed 7 February 2023.

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As part of Saudi legislative infrastructure initiatives, the Shariah Governance Framework was put in place in February 2020 by the Saudi Central Bank.[5] This was due to the enthusiasm of the Saudi Central Bank to issue regulations for Islamic financial institutions in the banking sector, and IFSB10 was used as a benchmark for these regulations,[6] which shows that the Saudi government wants to make shariah governance a requirement and make the Islamic banking industry more mature and effective. Further, and to summarise the regulatory changes that are related to this paper, in January 2023, the Saudi Central Bank regulated and mandated the composition and classification of shariah committee members, the updated related parties rules for banks were issued, and the shariah committee members were re-added as related parties.[7]

This paper seeks to provide insight into shariah corporate governance regulations and the re-addition of shariah committee members as RPs. We will explore the above regulations and how they ensure the independence of the shariah committee members from conflict of interests and identify shariah committee members as related parties and the impact of this.

The current paper aims to answer the following questions:

1. What are the regulations that had the function of identifying shariah committee members as related parties?
2. How effective are the shariah corporate governance regulations and the re-addition of shariah committee members in providing a good level of governance?
3. What are the contradictions between regulations identifying related parties and regulations identifying the independency criteria for shariah members?
4. Could these regulations ensure the independence of the shariah committee members from conflicts of interest?

To answer these questions, the researchers divided this paper into core ideas. The paper will discuss shariah governance applications in Saudi Arabia, shariah committee members as related parties, shareholder's authorisations for shariah committee members' contracts and businesses, and shariah committee related party transaction disclosures. Finally, a conclusion and list of findings and recommendations will be provided.

2 CORPORATE GOVERNANCE: AN OVERVIEW OF THE MAIN PRINCIPLES ADOPTED BY SAUDI REGULATIONS

The Saudi Capital Markey Authority has defined corporate governance as 'The framework that determines the rights and responsibilities among various parties, such as the manager, board of directors, shareholders and other stakeholders in the company'.[8]

The Saudi Central Bank did not issue its definition of corporate governance but did nevertheless define some main principles for an effective governance system: the importance

5 SAMA Circular No 41042498 of 18/06/1441H.
For information about the SAMA Circulars, visit www.sama.gov.sa/en-us.

6 Saudi Central Bank, *57th Annual Report 2021* (SAMA 2021) <https://www.sama.gov.sa/en-US/EconomicReports/AnnualReport/ANNUAL_Report_57th_2021.pdf> accessed 7 February 2023.

7 SAMA Circular No 43095743 of 17/11/1443H.

8 Capital Market Authority, 'Corporate Governance Regulations: Pursuant to Resolution No 8-16-2017 of 16/5/1438H (corresponding to 13/2/2017G)' (*Capital Market Authority*, 2017) pt 1 <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/CorporateGovernanceRegulations.pdf> accessed 7 February 2023.

of having independence and separation between the chairman of the Board of Directors positions and the CEO (this requires clear powers and responsibilities among stakeholders), as well as effective organisational and administrative structures, in addition to establishing an effective internal control system by having a risk management framework, internal audit, compliance division, internal control procedures, and an external auditor.[9]

The Economic Co-operation and Development Organization has set out six main rules for corporate governance. First, to lay the groundwork for a strong and stable corporate governance structure. Second, all shareholders should be treated equally and fairly, no matter how much they own, and all shareholders should be able to use their rights, even if they are foreign shareholders. The third principle is that all shareholders should be treated the same. Insider trading should be illegal, and transactions by board members and top executives should be limited and stopped during the blackout period.[10] The fourth principle is the roles and responsibilities of stakeholders within the corporate governance concept. This means that rights set out by lawmakers and regulations must be recognised and respected, and the owner of those rights must be able to freely exercise them. It also means that protections for those rights and punishments for violations must be set out, and stakeholders' participation and contributions to the governance process must be recognised and rewarded. The fifth principle, which relates to our main focus in this research, is transparency and disclosure. Effective corporate governance should ensure full, accurate, clear, and non-misleading disclosure. Companies are required to disclose any transactions between their board of directors, one of their top executives, or other related parties. This is to make sure that all shareholder rights are respected. The last principle is that the organisation's corporate governance framework should set out the duties of the board of directors.[11] The most important principle that should be followed by the board is 'noses in and fingers out',[12] which means that the board shall oversee and monitor company operations and strategic initiatives, and "nose in" by asking the right and insightful questions directed to the management to provide guidance, however, the directors shall "fingers out" by not interfering in the operations of the company and making decisions on behalf of the executive management and provide them with the necessary powers and authorities and allowing the management to make the business decisions.

Implementing good corporate governance in banks and striving to meet the standards required by regulatory entities like the capital market authority or the Saudi central bank and seasoning it with the best practices that are supported by recognised organisations will eventually increase the confidence and trust of investors and shareholders, minimise the potential risks that banks may be exposed to, and increase their competitiveness not only in the Saudi market but globally as well.

'Shariah governance' is not a commonly used term these days compared to corporate governance, but in our Islamic region, it is considered a widely used term, as the Islamic banking system is in continuous development and enhancements. There is a recognised international body that shifts all of its focus to improve the Islamic financial system, which

9 Saudi Central Bank, *Key Principles of Governance in Financial Institutions under the Control and Supervision of the Saudi Central Bank* (3rd edn, SAMA 2021) ch 2 <https://www.sama.gov.sa/en-US/RulesInstructions/BankingRules/Key_Principles_of_Governance_in_Financial_Institutions-En.pdf> accessed 7 February 2023.

10 OECD, *G20/OECD Principles of Corporate Governance* (OECD Publishing 2015) doi: 10.1787/9789264236882-en.

11 ibid.

12 Julie Garland-McLellan, 'Nose in, Fingers Out?' (*Australian Institute of Company Directors*, 1 December 2015) <https://www.aicd.com.au/board-of-directors/performance/structure/nose-in-fingers-out.html> accessed 7 February 2023.

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is the Islamic Financial Services Board (IFSB),[13] which is an important international organisation that we can benefit from its directions to lead and guide us towards the best practices in shariah governance, all of their attempted efforts are aimed to accomplish financial system stability, the organisation issued standards in shariah governance which is IFSB-10 in December 2009, to help stakeholders better understand sharia governance concerns and how to ensure that a suitable and efficient sharia governance framework is in place.[14]

Moreover, IFSB has the term 'shariah governance system', a definition which is 'it is the set of institutional and organisational arrangements through which an institution – other than insurance institutions – offering only Islamic financial services ensures that there is effective independence oversight of shariah compliance over certain processes'.[15]

The IFSB is aware that the market is expanding and subject to continuous growth, and all of its issued standards are deemed fit and subject to updates and changes to meet the market demands. In accordance with IFSB-10, the shariah governance structure that is adopted by the financial institution that provides financial services and products shall be relevant to the complexity and nature of the institution.[16]

Furthermore, each institution shall establish its own shariah committee or, as some call it, shariah board, with clearly defined roles and competencies in its charter, which is similar to the Saudi provisions that we shall examine in the next section. This committee may be connected via a reporting line with the board and/or the shareholders to create more independence and ensure that there is a code of conduct to manage appropriate behaviour within the committee.[17] The shariah committee members must fulfil certain membership conditions to be able to do the required roles and must possess leadership skills and certain academic qualifications, not be convicted of any criminal offence, especially if it is related to fraud or any financial crime, and they must acquire the required competencies and capability to ensure the effectiveness of shariah governance and supervision.[18]

3 SHARIAH GOVERNANCE APPLICATION IN SAUDI

Firstly, it is important to state that the first entity within Saudi that issued a provision regulating shariah governance is the Saudi Central Bank 'SAMA', under the aforementioned government entity fall several sectors which are banks, insurance companies, finance companies, fintech companies, and all financial companies.

The Saudi Central Bank issued the 'Shariah Governance Framework for Local Banks Operating in Saudi Arabia' in February 2020[19] (hereinafter the framework), which contains articles that are mandatory and for guidance application. It is an important step

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13 'Islamic Financial Services Board (IFSB)' (*Islamic Financial Services Board*, 2023) <https://www.ifsb.org/background.php> accessed 7 February 2023.

14 'The IFSB Publishes French Version of Standards on Sharīʻah Governance (IFSB-10) and Supervisory Review Process (IFSB-16)' (*Islamic Financial Services Board*, 5 April 2015) <https://ifsb.org/press_full.php?id=425&submit=more> accessed 25 January 2023.

15 Islamic Financial Services Board, *Guiding Principles on Shariah Governance System for Institutions offering Islamic Financial Services (Shariah Governance System (IFSB-10))* (IFSB December 2009) 2 <https://www.ifsb.org/download.php?id=4366&lang=English&> accessed 7 February 2023.

16 ibid 5, 7.

17 ibid 9-10.

18 ibid 11-12.

19 SAMA Circular No 41042498 of 18/06/1441H.

for the banking industry as our constitution is shariah, and recently, the CMA issued the Instructions for Shariah Governance in Capital Market Institutions, although this does not apply to banks, only financial institutions.[20]

As a result of the researcher meeting with the Saudi Central Bank team, SAMA's motive to issue this framework was mainly due to the large growth of Islamic banking activities and Islamic banking assets. In accordance with SAMA's fifty-third annual report, in 2015, the total Islamic banking assets reached USD 1.5 trillion, and 19% of the total assets were in Saudi,[21] and it grew to reach USD 2.1 trillion of total Islamic banking assets, of which 20.4% was in Saudi in 2017.[22] Further, in 2018, the total Islamic banking asset was USD 2.2 trillion, with Saudi's acquisition of 20.2%.[23]

3.1 The Shariah Governance Framework

The framework has focused on developing an important standard in shariah within the Islamic banking industry and ensuring that we have a robust and effective shariah governance system in banks that issues shariah-compliant products. The framework has been determined to regulate the following: the formation and composition of the shariah committee; membership conditions of the shariah committee; shariah committee meetings and their roles and responsibilities; the board of directors' responsibilities; executive management's responsibilities; internal control provisions; shariah products.[24]

As we said above, Saudi has ten listed banks in the Saudi exchange, all of them issue shariah-compliant products and services, and all of them have established a shariah committee. Moreover, in accordance with the shariah framework, all banks must establish their own shariah governance framework, which must include, among other requirements, the structure of all business lines that are involved in the process, the mechanism to ensure that all products and services are appropriately accredited and in line with the internal policies and the regulatory instructions.

Each bank shall have a formal reporting line and channels among the relevant functions to ensure that the reporting is effective. In due course, as banking activities are associated with a lot of risks, it is critical to have strong control systems to achieve the objectives of Islamic banking along with the role of the compliance function, which shall conduct a continuous assessment of the bank's compliance with the shariah principle to manage and identify the potential non-compliance and risks issues. Even the audit has a role in this process, as it is part of the three lines defence that they must verify the level of compliance

20 Capital Market Authority 'Instructions for Sharia Governance in Capital Market Institutions: Pursuant to Resolution No 3-77-2022 of 23/11/1443 H (corresponding to 22/6/2022 G)' (*Capital Market Authority,* 2022) <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/The_Instructions_for_Shariah_Governance_in_Capital_Market_InstitutionsEN.pdf > accessed 7 February 2023.

21 Saudi Arabian Monetary Authority, *53rd Annual Report 2017* (SAMA 2017) <https://www.sama.gov.sa/en-US/EconomicReports/AnnualReport/Fifty%20Third%20Annual%20Report.pdf> accessed 7 February 2023.

22 Saudi Arabian Monetary Authority, *54th Annual Report 2018* (SAMA 2018) <https://www.sama.gov.sa/en-US/EconomicReports/AnnualReport/Fifty%20Fourth%20Annual%20Report.pdf> accessed 7 February 2023.

23 Saudi Arabian Monetary Authority, *55th Annual Report 2019* (SAMA 2019) <https://www.sama.gov.sa/en-US/EconomicReports/AnnualReport/Annual_Report_55th-EN.pdf> accessed 7 February 2023.

24 Saudi Arabian Monetary Authority, 'Shariah Governance Framework for Local Banks Operating in Saudi Arabic' (*Saudi Central Bank*, February 2020) <https://www.sama.gov.sa/ar-sa/RulesInstructions/BankingRules/Banking-KSA.pdf> accessed 7 February 2023.

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with the shariah instructions and make sure that the bank's activities and operations are well in place.[25]

The board holds the primary responsibilities for the overall shariah governance framework, which shall:

- Make sure that the shariah governance framework matches and fits with the bank's size, complexity, operations, and business
- Ensure compliance with the shariah rules and continuously oversee the effectiveness of the shariah structure and the implementation
- Approve all policies that the bank is determined to issue and that are related to shariah to enable the board to do its work effectively if the senior executives do not cooperate sufficiently, and that eventually may and will affect the work of the board.[26]

Banks in Saudi are determined and committed to providing their shareholders with true value in investment and products over the long term to achieve sustainable growth through the formulation of strategic objectives and translation of them into an appropriate implementation step. One of the listed banks in Saudi is Bank Albilad. Since it was established, they have been keen to apply Islamic principles in all of their transactions as part of the bank strategy. These are implemented through a well-built structure where the board holds the overall and monitoring responsibilities, and the shariah committee, which started working in 2004, performs the issuance of the decisions related to shariah compliance, related policies and procedures, and the Islamic banking collaboration with other business lines, focusing on the role the bank that is playing among other banks in the Islamic services sector and its growth.[27]

The structure of the shariah committee is one of the subjects that is regulated by SAMA. Further, one of the board of directors' roles is to have a nomination and rumination committee. One of this committee's responsibilities is to recommend to the board of directors the members that should be appointed to the shariah committee. They also consider how the number of appointed members should fit the size of the bank and its nature. In order for SAMA to conduct its due diligence and ensure appropriateness, all members must obtain a no-objection from Saudi Central Bank before becoming a member.[28]

The framework suggested as a guiding article that the shareholders shall approve the appointment of shariah committee members, which shall enhance the independence level of responsibility performance. It also touched on the independence of the committee members, which shall not be less than two-thirds of the appointed committee members.[29] Only recently most shariah committee members are members in more than one committee, which could eventually create tremendous cases of conflict of interest because if you are a member, for example, of bank A and a member of bank C, and you approve a certain Islamic product or services, but the bank did not announce as they still need to obtain SAMA's approval, that might affect their independence and the business of the bank, which is very critical, and the competitiveness of the banks between and, most importantly, the loyalty and honesty with which the committee member must act. The cause of misrepresentation

25 ibid, ch 2.

26 ibid, ch 3.

27 'Shariah Committee in Bank Albilad' (*Albilad Bank*, 2023) <https://www.bankalbilad.com/ar/about/sharia/Pages/role.aspx> accessed 7 February 2023.

28 Shariah Governance Framework (n 24) ch 4.

29 ibid.

and repetition in the banks' shariah committee membership is discussed in Section 4 of this paper.

Moreover, SAMA has added different parameters to the independency of the members, such as:

- If the member owns a certain percentage of the bank's shares
- When the member is a legal representative of a company that owns a certain percentage in the banks, and this criteria still applies to the shariah committees members, even with the Saudi new Companies Law that was published on 22 July 2022, effective from 19 January 2023, which requires that all members must be natural persons, as it does not apply to shariah members
- When the member has a relative of a defined degree in the board of directors or the senior management
- If the nominated member is a board member in one of the bank's subsidiaries, which by this point means that if the member becomes a member in one of the bank subsidiaries after becoming a member not at the election duration, it shall not affect his/her independence because of the language used
- If the member has direct or indirect business or transactions that are executed for the bank – this point is related to our paper and will be analysed in depth in Section 5; SAMA has defined eleven issues that might affect the independence of the shariah member, but it was a guiding article, which was enforced starting from 1 January 2023, as it is crucial for the member to be able to make decisions with objectivity and without being influenced by other persons or entities.

In ensuring the independency and confidentially of floating information, the framework has dedicated a whole section to that subject, where it is the board of director's responsibility to verify the independence of the shariah committee members and their freedom from any influence that might affect their performance of their duties. Additionally, to help the board to execute their work, the committee should be committed to reporting to the board of directors periodically and updating them with their work and achievements along with any obstacles they are facing.

The internal control subject in banks is vital and critical, as banks hold a lot of responsibilities to their shareholders, society, government, regulatory authorities, and other stakeholders. Thus, the shariah committee members' transactions should be captured properly.

4 SHARIAH COMMITTEE COMPOSITION

There was a study that concluded a definition for the shariah supervisory board, which is equivalent to the shariah committee in Saudi:

> [A] comprehensive organ whose functions include review, investigation, and evaluation of all products, transactions, activities and businesses conducted by the Islamic Financial Institutions to ensure Shariah compliance; and this responsibility is performed by qualified experts and Shariah scholars who possess appropriate tools and vested knowledge.[30]

The shariah committee was defined under the framework as well as the body in charge of ensuring that the laws and regulations of Islam are followed in Saudi banks, and the

30 Abdulrahman Alnofli and Engku Rabiah Adawiah Engku Ali, 'The Role of Key Functions of Shariah Governance in Islamic Financial Institutions (IFIs)' (2020) 4 (1) International Journal of Fiqh and Usul Al-Fiqh Studies 98, doi: 10.31436/ijfus.v4i1.173.

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framework has dedicated a full chapter for the shariah committee regulating its composition, formation, appointment, and membership qualification, but with no adequate provision of the termination of membership.

Notwithstanding the issuance of the framework in 2020, in accordance with SAMA's circular, it issued a new instruction on 9 October 2017 for the banks' new products. In light of these instructions, in order for SAMA to issue its no-objection on one of the shariah-compliant products, it must be approved by the shariah committee of the bank; hence, all banks that issue such products must form this committee, and it can be understood from these instructions that obtaining an opinion from an external party/entity is not allowed, as it is a condition to obtain an approval from the committee be formed within the bank. Therefore, starting in 2017, banks must form a shariah committee, and such formation is not regulated in terms of compositions, characteristics, responsibilities, and liabilities until the issuance of the framework. As a result of this gap, the members of most of the shariah committees in all banks were the same, which created conflicts of interest. This can be attributed to many reasons, but the main one is that there were no regulations for banks to follow and a limited number of available individuals with the requisite knowledge of Islamic laws and Islamic banking transactions.

Additionally, and with respect to the above, the following two paragraphs will demonstrate some of the gaps that the Shariah Governance Framework for Local Banks Operating in Saudi Arabia covers and regulates. According to the framework, it states that the bank board of directors holds the primary responsibility for the overall shariah governance systems and the compliance of the bank's Islamic banking activities. The composition of shariah committee members shall be determined and appointed by the bank board of directors based on the nomination and remuneration committee recommendations or as an optional method to obtain approval on the appointment by the shareholder, and this is as per the framework.

As for the article that governed the formation of the committee and its compositions, which is the focus of this section, all members must obtain SAMA's no-objection before appointing and must not pursue the role of a member before approval from SAMA. The composition was a guiding article and was enforced starting from 1 January 2023. As for the number of members, the shariah committee (hereinafter – SC) should not be less than two and not more than five members. However, it must be suitable for the size and nature of the banking business and activities.

The classification of members as per the framework is divided into three: the independent members, the non-executive members, and lastly, the executive members. Notwithstanding the classifications, the framework only had a definition and requirements for independent members and was silent on the other classifications, in which banks, as a practice, could appoint an executive member to the committee.

One of AAIOF's 2005 recommendations was that the SC should not work independently from the board of directors and should be allowed to freely discuss and voice their concerns relating to shariah matters in board meetings.[31] AAOIFI GS-1 also states that the SC must include at least three shariah scholars.[32] The framework was silent on the scholars' qualifications and only required that the members should have adequate shariah knowledge in addition to experience in shariah. As to the relationship between the SC and the board of directors, the framework states the opposite, where the SC is independent in the performance of its duties, and the board of directors recognise the independence of the committee and ensures its freedom from any

31 Nazrul Hazizi Noordin and Salina Kassim, 'Does Shariah Committee Composition Influence Shariah Governance Disclosure? Evidence from Malaysian Islamic Banks' (2019) 10 (2) Journal of Islamic Accounting and Business Research 158, doi: 10.1108/JIABR-04-2016-0047.

32 Alnofli and Engku Ali (n 30).

influence that would hamper the committee when issuing their decisions. Here, there seems to be no difference, as the framework did not prohibit the committee from contacting the board. On the contrary, its reporting line is connected to the board, and the board shall approve its decisions. That said, the decisions that are issued by the committee should not be modified or set aside without the committee's consent and approval.

Further to the connection between the board of directors and SC members, one of the studies recommended that one way to fill the gap between the SC and the board of directors is to appoint one of the shariah committee members to the board of directors.[33] This suggestion seems very sensible and relevant in Saudi for banks that only conduct Islamic activities. As per Saudi exchange public information, as of 11 December 2022, none of the Islamic banks in Saudi has SC members that serve on the board of directors of the bank. The shariah framework is silent on this matter, neither permitting nor prohibiting the possession of these two memberships. That said, banks might encounter issues with SAMA's no-objection, but if there is no membership conflict, the member can serve on the board of directors and the SC.

Now, regarding the independency classification of shariah members, in the Saudi system, the chairman has to be classified as an independent member, and no less than two-thirds of the committee members should be independent, as per the framework.

Regarding the mechanism on how the SC members, including the chairman, must be classified as independent if none of the issues affecting the independency has accrued to the member, the issues that are invalidating the independency will be analysed in depth in Section 5 of this paper.

The framework did not regulate one critical subject, which is remuneration, for which there is no cap for the shariah members, and it can reach and exceed the remuneration cap for the board and board sub-committees – excluding audit committee members – which is 500,000 SAR.[34] It seems that the SC is considered to be among the board sub-committees, and the same restriction should be applied, but the authors do not believe this is the case given the following:

1. The nature of the SC's activities, roles, and responsibilities
2. Its fully independent decision-making authority and the nature of its fatwa decisions
3. Banks are obliged to disclose the remuneration of the board sub-committees, but no banks disclose the remuneration of their shariah committee members.

Additionally, when the framework is read, after each mention of one of the board committees in the Key Governance principles, it is always followed by 'board sub-committee', and there is a definition for the committee in the framework. There is nothing that indicates that the SC is considered to be a board sub-committee, only that it shall report to the board. Considering all of the above factors and the nature of the members in the board sub-committees, as most of the committee members are board members, we can conclude that it is not a board sub-committee and their remuneration is not regulated, and this might create risk for the banking industry.

33 Mohammad Azam Hussain, Rusni Hassan and Alias Azhar, 'The Procedures of Appointment and Cessation of the Shariah Committee Member of the Islamic Banks and Takaful Companies in Malaysia: Legal Analysis' (2016) 6 (S7) International Journal of Economics and Financial Issues 266.

34 SAMA Circular No 38100006370 of 14/06/1438H.

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5 SHARIAH COMMITTEE INDEPENDENC AFFECTING ISSUES

Art. 7 point 3 of the framework, which was effective from 1 January 2023, has regulated the issues affecting independence, which are as follows:

- If the member holds at least five per cent of the bank's or one of its subsidiaries' equity
- If the member is a representative of a corporation that holds at least five per cent of the bank's or one of its subsidiaries' equity
- If the member is related to any of the bank's board members or senior executives or any of the bank's subsidiaries
- If the proposed member serves on the board of directors of one of the banks' subsidiaries
- If the member is a current or former employee of the bank, a party that does business with the bank, or a subsidiary, such as an accounting auditor or a major supplier, or owned a controlling stake in any of these parties over the preceding two years
- If the member has a direct or indirect financial interest in the bank's operations and contracts – if an SC member has either direct or indirect transactions with the bank, it will be affecting his/her independence
- If the member receives additional compensation from the bank in addition to their compensation for committee participation
- If the member has a credit connection with the bank in excess of three hundred thousand Saudi riyals under his/her name or the name of a family member
- If the member participates in a business that competes with the bank or engages in any of the bank's sub-activities
- If the member serves on the committee for more than six consecutive years or nine non-consecutive years.

Lastly, the business and contracts mentioned under the sixth point, which serve a personal interest of a committee member and require a license from the ordinary general assembly, shall not be considered as an interest invalidating the independence of that committee member if such business and contracts are carried out according to the same terms and conditions adopted by the bank with all contractors and customers and are part of the bank's normal activities unless the nomination and remuneration committee of the board determines otherwise. This point will be analysed in Section 7 of this paper.

With relation to independence, there was a study in Bahrain that revealed that there are some members in the shariah supervisory boards of Islamic banks in Bahrain who sit on the board of directors for several Islamic banks around the world, which might imply a threat to the independence of the member due to multiple representations.[35] The same scenario is found in Saudi, where SC members serve as members of another SC for another bank, which puts their independence in question, as it might create a conflict of interest and affect the competitiveness between banks. Under the framework, starting from 1 January 2023, members are prohibited from being a member in another SC for another bank working in Saudi.

35 Sutan Emir Hidayat and Ali Khaled Al-Khalifa, 'Sharia Governance Practices at Islamic Banks in Bahrain from Islamic Bankers' Perspective' (2018) 10 (1) Al-Iqtishad: Jurnal Ilmu Ekonomi Syariah (Journal of Islamic Economics) 53. doi: 10.15408/aiq.v10i1.5991.

In addition, regarding the ninth point of the above affecting issues, SC members does not have clear competing standards notwithstanding that CMA has mandated listed companies including banks to issue competing standards that shall be approved by the shareholders[36], however, it shall apply to the board and its committees members, and what is suggested to this point is that banks shall expand the applicability of the competing standards to be applied to SC members as well, and the regulator shall take this into consideration in the next update of the framework, this is to ensure that independency criteria are well governed and clear to apply.

6 SHARIAH COMMITTEE MEMBERS AS RELATED PARTIES

Walking through the history of banks' related parties and when and how SC members are added, on 09-01-1441H, SAMA issued the first rules regulating the Related Parties Transactions for banks[37] as separate rules from the large exposures rules, and the SC members were not among the related parties in this version of the rules. However, it was included in the related parties definition in the Large Exposure Rules that was issued on 22/05/1439H[38] and in the Large Exposure Rules issued on 14/10/1439H.[39]

Recently, SAMA issued an update on the Related Party Rules for Banks on 17/11/1443H and re-added the SC members within the definition of related parties, all transactions of which should be captured appropriately. In cases where was a transaction with the bank in which the member has a direct or indirect interest, the member has invalidated one of the independence requirements and will be classified as non-independent to be a non-executive director.

The re-addition of the SC members as a related party was very rational from SAMA, as members have significant influence in the bank and should act with independence and efficiency to ensure the compliance of the bank's products and services with the Islamic rules and principles. Besides, the SC plays a vital role in shariah governance by providing insights and approvals and, issuing decisions, supervising the operations of the bank in accordance with Islamic principles.[40]

7 SHAREHOLDER'S AUTHORISATIONS FOR SHARIAH COMMITTEE MEMBERS' CONTRACTS AND BUSINESSES

Section 5 of this paper discussed the issues affecting independence, and one of the points under the framework mentioned that if the member has business or contracts that serve a personal interest of the SC member, which require authorisation from the shareholders, this shall not be considered as interest that invalidates the independency of the member. It was conducted in the same terms and conditions adopted by the banks with all parties and contractors unless the nomination and remuneration committee deems otherwise.

The issue with the above point is its vagueness, as it is the only article and point within the framework that mentions the authorisation of the businesses and contracts of the SC members. However, it was mentioned under the issues that could invalidate independence; therefore, it is not very clear whether banks have to obtain approval from shareholders for

36 ibid, (8)
37 SAMA Circular No 67/1607 of 09-01-1441H.
38 SAMA Circular No 391000059150 of 22/05/1439H.
39 SAMA Circular No 41/45201 of 14/10/1439H.
40 Hidayat and Al-Khalifa (n 35).

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all related party transactions of the SC members and if it was a specific transaction. This is because, at the beginning of the point, it stated that 'The business and contracts that serve a personal interest of a committee member, which requires a license from the ordinary general assembly', which might imply that there is a specific transaction requiring approval, and if that was the case, then what are the transactions that must be approved by the general assembly?

8 SHARIAH COMMITTEE RELATED PARTY TRANSACTION DISCLOSURES

An SC with a larger number of members who have extensive knowledge of shariah and relevant experience is effective for overseeing and controlling the disclosures of Islamic banking activities, according to a study that found that the composition of the SC was a significant factor influencing the extent of shariah governance disclosures, for example, non-halal income, charity, and Zakat in Malaysian Islamic banks.[41]

According to the paragraph above and Section 7 of this paper, disclosures are important, and the SC members' related transactions will be captured and disclosed in accordance with the Related Parties Rules for Banks issued by SAMA and as per IFRS IAS 24 requirements,[42] starting from 1 September 2022 as per SAMA's instructions and the effectiveness date of the subject rules. However, specific disclosure to the public, particularly within the agenda of the general assembly meetings to acquire the shareholders' approval, is yet to be clarified by the competent authorities in Saudi.

Moreover, there is an inconsistency between dates related to the disclosures. SC member transactions are to be captured as related party transactions from 1 September 2022 onwards, and as per the framework Art. 7 point 6, there was a reference to the direct and indirect transactions as one of the issues affecting independence. Therefore, if the SC members are not compliant with the SAMA requirements on composition that will come into effect in 2023, and one of the members has a transaction with the bank that ended on December 2022, will it affect his/her independence or not? Furthermore, according to point 11 from the same article, we must assume that there is a requirement to disclose the transactions that ended in 2022 and obtain the shareholders' approval.

9 CONCLUDING REMARKS

In conclusion, it can be summarised that within this paper, we determined the regulations that identified SC members as related parties, how they were re-added, and where and when they were originally identified. We also analysed the inconsistency between regulations that identified shariah members' criteria and regulations, which provided conditions for the members' independence and the related disclosures.

The findings from this paper are based on SAMA's Shariah Governance Framework and suggest ways we can enhance it and have a better control environment to ensure we have a robust system in place the govern, regulate, and control the Islamic banking system.

The Shariah Governance Framework caused a huge shift and shows that this activity is regulated and controlled, but revision is needed to fill in the gaps.

41 Noordin and Kassim (n 31).

42 'IAS 24 Related Party Disclosures' (*IFRS Foundation*, 2023) <https://www.ifrs.org/issued-standards/list-of-standards/ias-24-related-party-disclosures> accessed 7 February 2023.

The framework was silent on the SC classifications for non-executive and executive members and the composition of these two classifications, but since the composition is constituted by two-thirds of independent members, it leaves a small number of seats to the other classifications, which can be executive and non-executive, and, as such, it is open for banks to choose other classifications, which leads us to the next finding of this paper.

The framework was silent on the requirement of a minimum number of shariah scholars possessing membership in the SC to ensure shariah compliance. This could be seen as positive or negative. The positive point of view is that the SC can have members with professions such as lawyers and economists, with some shariah knowledge, which can enrich the discussions and the decisions of the committee. However, to maintain the SC's independence and not weaken its decisions as those issued by members who are trained for these types of activities, his/her decision shall not be considered in the decision quorum if such a member only brings a business perspective without a deep understanding on the Islamic commercial laws. Lastly, this is as per the standards used by the IFSB.

The framework did not clearly regulate the dismissal and resignation of SC members, as it mentions that membership cannot be terminated except with acceptable justification but does not define acceptable justification – shall it be acceptable for the Bank, SAMA, the board, or the shareholders, if their appointment was approved by the shareholders/

The framework was silent on the possession of membership of both the board of directors and the SC and did not prohibit the possession of these two memberships – it seems sensible in Saudi for banks that only conduct Islamic activities to have SC members that serve on the board of directors of the bank.

The remuneration of the SC members is not regulated, and there is no cap for this committee. Following the new companies law effective from 19 January 2023 and the new corporate governance regulations issued by CMA, there is no cap for the board of directors, but since banks fall under the supervision of SAMA, the cap of 500,000SAR still applies. However, it does not apply to the SC members; therefore, it is suggested to have either a cap or to disclose the remuneration of the SC members for transparency.

The competing standards for SC members are not clear, as SC is not among the board committees, therefore, the board and the board committees competing standards that are mandated by CMA does not apply, but the suggestion here is that banks can expand the applicability of their competing standards that is approved by the shareholders in the General Assembly and include SC members, and the regulator shall take this into consideration in the next update of the framework, this is to ensure that independency criteria are well governed and clear to apply.

Among the recommendations related to the narrowed paper topic are the following.

It is a fact that the board of directors holds the primary responsibility of the shariah governance, but the SC plays a vital role in performing and monitoring with regard to the Islamic operation and activities. Therefore, the re-addition of SC members in the definition of the related parties for banks is a rational step taken by the Saudi Central Bank.

It is important to focus on the independence of the SC members, as the framework is mandating from 1 January 2023 a specific composition of independent members, stating that shariah members cannot be a member in another working bank in Saudi, being silent on international banks or the membership of another SC in another sector that might create a conflict of interest between the two memberships, and putting a cap on the number of memberships to maintain the member's focus. However, considering the limited qualifications of members who acquire shariah knowledge flavoured with the banking industry in Saudi, as the banking industry is associated with numerous risks, this finding

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could be implemented in the Saudi jurisdiction after we reach a certain level of maturity where we have proper programs, proper associations, universities who produce experts in shariah in the banking industry.

The vagueness that surrounds Art. 7, point (k) in the framework regarding the requirement of obtaining the shareholders' approval might create confusion between practitioners, and the competent authority within Saudi shall issue a circular or other instruments to clarify what is required by banks in this matter and what banks shall acquire shareholders' approval.

The inconsistency between dates related to the disclosures of SC member transactions in relation to the related parties rules and the shariah governance framework should be clarified by the competent authorities to avoid any misleading or poor implementation by the banks. However, this gap might be a transitional period for banks. That said, considering the maturity of banks and the concept of related parties within banks that started back in 1994 with the "Limits of Credit Exposures to Non-bank Counterparties and banks and financial institutions", we believe that the sector is mature enough and already has a proper understanding of related parties.

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Research Article

THE CONSEQUENCES OF LEGAL CHALLENGES FOR OIL AND GAS INDUSTRY: GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION AND MANAGEMENT

Shahad Ahmed Al-Nasser[1]

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Keywords: oil and gas industry, environment, international legal challenges, climate change, data collection methodology, legal framework, development opportunities.

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ABSTRACT

Background: *Globally, there is mounting concern regarding climate change, which scientific consensus confirms through the undeniable rise in global temperatures. The blame for this unwavering trend can be attributed to anthropogenic activities, specifically non-renewable resource combustion like oil and gas usage. Consequently, there is an urgent need to curb greenhouse gas emissions and make the transition towards more eco-friendly energy sources. In recent years, the oil and gas sector has come under scrutiny and faced numerous legal challenges due to its role in perpetuating greenhouse gas emissions. Climate change litigation has emerged as an effective instrument for enforcing corporate accountability and promoting the adoption of sustainable energy alternatives.*

Methods: *A thorough examination was carried out using a multi-faceted strategy that took into account legal, environmental, economic, and social aspects. The study encompassed an exhaustive assessment of both domestic and international laws and regulations relevant to climate change and the oil and gas sector. Moreover, various secondary sources concerning emission standards governing bodies, carbon pricing mechanisms, as well as other climate-related policies impacting the industry were also taken into consideration. Furthermore, pertinent case law records and dispute resolution systems were examined to evaluate the efficacy of existing legal frameworks.*

Results and conclusion: *It has been noted that there has been a notable escalation in the number of legal disputes regarding climate change worldwide in recent times. These legal actions are intended to determine corporate accountability and encourage the implementation of ecologically sustainable sources of energy. The petroleum and natural gas industry is a significant contributor to the emission of greenhouse gases, which causes detrimental ecological effects both locally and globally. The key cause of climate change is the release of greenhouse gases, and it is crucial for this sector to limit these emissions if it is to effectively tackle the challenges posed by climate change.*

1 INTRODUCTION

The matter of climate change is an urgent concern that requires attention not only from individuals but also from institutions and governing bodies worldwide. The utilisation of fossil fuels, particularly by the oil and gas sector, is a major cause of the discharge of greenhouse gases, which have been implicated as a principal factor in the onset of global warming and climate change. Recent years have seen a marked increase in litigation cases filed globally regarding climate change-related issues. These legal actions are aimed at holding corporations responsible for their actions and accelerating the shift towards more sustainable sources of energy.[2]

The current global trend towards carbon neutrality has created a demand for alternative sources to replace traditional fossil fuels. Investing in renewable energy technologies, such as wind and solar power, can help the oil and gas industry diversify its revenue streams while positioning itself to thrive in the future of the energy market.[3] Through the implementation of various measures, companies can significantly improve their environmental performance

2 Keohane RO and Victor DG, 'The Regime Complex for Climate Change' (2011) 9 (1) Perspectives on Politics 7, doi: 10.1017/S1537592710004068.

3 Ilyssa O Gordon et al, 'Life Cycle Greenhouse Gas emissions of Gastrointestinal Biopsies in a Surgical Pathology Laboratory' (2021) 156 (4) American Journal of Clinical Pathology 540, doi: 10.1093/ajcp/aqab021.

and reduce carbon emissions produced during manufacturing operations. These measures may include the adoption of technology that captures and stores carbon, optimising energy consumption, and minimising flares. Additionally, organisations can pursue new business models suitable for a post-carbon era, invest in carbon offsetting initiatives, and take part in emissions trading programs. Moreover, exploring innovative technologies such as hydrogen fuel cells presents an eco-friendly alternative to conventional fossil fuels. Despite the challenges brought about by climate change on the oil and gas industry's legal front, companies that can innovate and adapt to this changing landscape will secure a more promising future in the energy market.[4]

The transition towards achieving carbon neutrality on a global scale has prompted the need for alternative sources of energy to substitute fossil fuels. The oil and gas industry can significantly contribute to this movement by allocating resources to support renewable energy solutions like wind and solar power. Incorporating clean energy options offers additional advantages, such as diversifying revenue streams and preparing for changes in the energy market's future. Companies can potentially improve their ecological efficiency by reducing carbon dioxide emissions from their production methods through carbon capture and storage technology, as well as optimising energy consumption and minimising flares. Organisations can explore new business models that are more suitable for a post-carbon era, invest in projects that offset carbon emissions, and engage in trading programs related to emissions. Hydrogen fuel cells provide an environment-friendly substitute for traditional fossil fuels that companies can pursue further. Even though climate change poses legal challenges for companies in the oil and gas sector, those who adapt according to changing environments will position themselves strategically for long-term success in the energy market. Businesses that embrace renewable energy transitions, enhance operational efficiency, and innovate new business models will ultimately prosper. The future of the energy market entails lower carbon emissions; therefore, firms that respond effectively to this reality by developing novel approaches will thrive over time.

In recent times, there has been a discernible surge in the aggregate number of instances associated with climate change. As of 2017, a report released by the United Nations Environment Programme revealed that over a thousand lawsuits pertaining to climate change had been filed across 24 nations.[5] The preponderance of these legal actions was initiated within the jurisdiction of the United States.[6] Furthermore, the survey findings indicate a steady rise in the number of legal cases filed on a yearly basis since 2014, with a notable surge observed in 2016 and 2017, correspondingly.[7] The present piece will emphasise that climate change litigation is becoming an increasingly significant trend on a global basis, with the oil and gas industry facing significant legal challenges aimed at promoting accountability and decreasing greenhouse gas emissions. In this regard, this paper will highlight that climate change litigation is becoming an increasingly important trend on a global scale.

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4 RS Abate, *Climate change and the voiceless: protecting future generations, wildlife, and natural resources* (Cambridge University Press 2019).

5 Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate due Diligence"' (2021) 6 (1) Business and Human Rights Journal 93, doi:10.1017/bhj.2020.25.

6 F Biermann, N Kanie and RE Kim, 'Global governance by goal setting: the novel approach of the UN Sustainable Development Goals' (2017) 26 Current Opinion in Environmental Sustainability 26-31.

7 Nicolas Gaulin and Philippe Le Billon, 'Climate Change and Fossil Fuel Production Cuts: Assessing Global Supply-Side Constraints and Policy Implications' (2020) 20 (8), Climate Policy 888, doi: 10.1080/14693062.2020.1725409.

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2 THE OIL AND GAS INDUSTRY'S CONTRIBUTION TO GREENHOUSE GAS EMISSIONS

Climate change is largely attributed to the discharge of substances such as greenhouse gases, and the oil and gas industry plays a significant role in this occurrence.[8] The fossil fuel sector, involving various functions like exploration, retrieval, synthesis, conveyance, and usage of oil and gas products, exerts a significant influence on worldwide emissions of greenhouse gases.[7] The subsequent segment aims to examine the scale of greenhouse gas discharges stemming from the oil and gas sector, the repercussions these discharges bring upon the nearby habitats, together with the challenges and impediments that hinder the mitigation of such emissions.

2.1 The Scope of Emissions: Statistics and Data

The oil and gas industry is a major contributor to the global production of greenhouse gases. According to the International Energy Agency, the industry was responsible for approximately 2,345 million metric tons of carbon dioxide equivalent (CO2e) emissions in 2020.[9] This constitutes approximately one-fourth of global emissions. The emissions primarily stem from producing, transporting, and consuming oil and gas-derived products.

The global shift towards renewable energy sources to meet energy demands has pressured the oil and gas sector to curtail their greenhouse gas (GHG) emissions. The challenge of oil production has been addressed by Saudi Arabia and Qatar, both of which are significant producers of oil, through the implementation of various policies. The National Renewable Energy Program and Vision 2030 initiative in Saudi Arabia aims to augment the utilisation of renewable energy sources and broaden the economy's scope beyond its reliance on oil. The government of Saudi Arabia has implemented carbon pricing mechanisms, such as a carbon tax on fossil fuels, in order to incentivise corporations to decrease their greenhouse gas emissions. Several challenges, such as inadequate infrastructure, restricted technical proficiency, and insufficient investment in clean energy, impede the transition to renewable energy sources in Saudi Arabia. Qatar has implemented the Qatar National Vision 2030 to diminish the nation's reliance on hydrocarbons and broaden its energy portfolio.[10] The primary objective of the National Program for Conservation and Energy Efficiency in Qatar is to enhance energy efficiency and curtail emissions in the industrial and commercial domains, encompassing the oil and gas sector. Qatar encounters obstacles in its endeavour to shift towards a more sustainable energy portfolio owing to its dependence on the oil and gas sector and the absence of a designated mechanism for carbon pricing.

It can be said that the escalating worldwide energy demand, in conjunction with the imperative to tackle the pressing concern of climate change, has resulted in a proliferation of creativity and financial backing in the field of renewable energy technologies. Governments and corporations globally are currently investigating alternative energy sources, including

8 Yeye Liu et al, 'Life Cycle Assessment of Petroleum Refining Process: A Case Study in China' (2020) 256 Journal of Cleaner Production 120422, doi: 10.1016/j.jclepro.2020.120422.

9 Mu-Hao Sung Wang, Lawrence K Wang and Nazih K Shammas, 'Glossary of Climate Change, Global Warming and Ozone Layer Protection' in Yung-Tse Hung, Lawrence K Wang and Nazih K Shammas (eds), *Handbook of Environment and Waste Management: Acid Rain and Greenhouse Gas Pollution Control* (vol 3, World Scientific 2020) 689, doi: 10.1142/11470.

10 Sayeed Mohammed, Cheryl Desha and Ashantha Goonetilleke, 'Investigating Low-Carbon Pathways for Hydrocarbon-Dependent Rentier States: Economic Transition in Qatar' (2022) 185 Technological Forecasting and Social Change 122084, doi: 10.1016/j.techfore.2022.122084.

solar, wind, and geothermal energy, as a strategy to mitigate greenhouse gas emissions and limit environmental consequences. The renewable energy industry is experiencing swift growth, presenting novel prospects for employment and stimulating economic advancement while mitigating dependence on non-renewable energy sources. Achieving a successful shift towards renewable energy sources necessitates consistent endeavours and financial commitment, with the oil and gas sector assuming a crucial responsibility in facilitating this transition. In light of the global shift towards sustainable energy, it is crucial to ensure equitable access to clean and cost-effective energy for all individuals, without exception.

The production of natural gas and its use as fuel contributes to emissions of greenhouse gases. This is especially true of the release of methane, which can contribute to global warming that is 28 times higher than that of carbon dioxide over one hundred years.[11] Leaks of the greenhouse gas methane can happen at several points along the supply chain for natural gas, including during drilling, extraction, transmission, and distribution of the gas.

Furthermore, a significant amount of greenhouse gases is generated as a result of the refining procedure that converts crude oil into various commodities, including but not limited to gasoline, diesel, and aviation fuel. According to the United States Environmental Protection Agency, the refining process accounts for 6% of the overall greenhouse gas emissions generated by the oil and gas sector.[12]

The oil and gas industry has recently implemented several initiatives to lower greenhouse gas emissions. These measures include the utilisation of carbon capture and storage technology, the development of renewable energy sources, and the deployment of energy efficiency measures.[13] On the other hand, their initiatives have been criticised for being insufficient and constrained due to the scope of the problem they are attempting to solve. Many political and economic issues, including the policies of various governments and the competitive pressures of markets, significantly influence the sector's strategy to lower emissions. The oil and gas business is responsible for considerable greenhouse gas emissions, and a wealth of information is available to measure the industry's influence on the surrounding environment. The CO2e metric is the one that is used to assess greenhouse gas emissions the most frequently.[14] This metric accounts for all of the primary greenhouse gases, including carbon dioxide, methane, and nitrous oxide, and quantifies the climate impact of these gases in terms of CO2.

In essence, although the oil and gas industry has made considerable efforts to mitigate its greenhouse gas emissions, there still needs to be a significant gap in achieving a state of net-zero emissions. Governments, corporations, and individuals must acknowledge the pressing nature of the issue and implement measures to mitigate emissions. A plausible resolution entails the implementation of a carbon pricing mechanism, such as a carbon tax or cap-and-trade system, that would provide inducements for corporations to curtail their carbon emissions and allocate resources towards renewable energy. Furthermore, it is

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11 Kirsten Rosselot, David T Allen and Anthony Y Ku, 'Global Warming Breakeven Times for Infrastructure Construction Emissions are Underestimated' (2022) 10 (5) ACS Sustainable Chemistry & Engineering 1753, doi: 10.1021/acssuschemeng.1c08253.

12 Sharaf AlKheder and Ali Almusalam, 'Forecasting of Carbon Dioxide Emissions from Power Plants in Kuwait Using United States Environmental Protection Agency, Intergovernmental Panel on Climate Change, and Machine Learning Methods' (2022) 191 Renewable Energy 819, doi: 10.1016/j.renene.2022.04.023; Maocai Shen et al, '(Micro) Plastic Crisis: Un-Ignorable Contribution to Global Greenhouse Gas Emissions and Climate Change' (2020) 254 Journal of Cleaner Production 120138, doi: 10.1016/j.jclepro.2020.120138.

13 Gabriel David Oreggioni et al, 'Climate Change in a Changing World: Socio-Economic and Technological Transitions, Regulatory Frameworks and Trends on Global Greenhouse Gas Emissions from EDGAR v.5.0' (2021) 70 Global Environmental Change 102350, doi: 10.1016/j.gloenvcha.2021.102350.

14 Gordon et al (n 4).

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imperative to increase the allocation of resources towards the exploration and innovation of novel technologies aimed at mitigating emissions during the refining process, as well as augmenting energy efficiency in the domains of transportation and industry. The successful implementation of a low-carbon economy necessitates the collaborative endeavours and unwavering dedication of all parties involved to alleviate the consequences of climate change and ensure a viable future for posterity.

The International Energy Agency (IEA) has reported that the energy sector, which encompasses the production and consumption of coal, oil, and gas, is accountable for approximately 72% of the global emissions of greenhouse gases. Roughly 50% of the emissions can be attributed to the oil and gas sector. The total amount of global CO2 emissions from energy consumption in 2020 was 33.1 gigatons (Gt). Among these emissions, those associated with the utilisation of oil and gas accounted for 20.5 Gt of the aforementioned total. Furthermore, the oil and gas sector bears accountability for the discharge of supplementary greenhouse gases, including methane, that exert a more substantial impact on the Earth's temperature rise than CO2.

The industry is responsible for around 20 per cent of the world's total methane emissions, according to the Environmental Defense Fund (EDF).[15] The activities of the main oil and gas businesses in the globe strongly impact the emissions of greenhouse gases. According to a report that the Carbon Majors Database published in 2017, 100 businesses, such as ExxonMobil, Shell, and BP, are accountable for 71% of the total greenhouse gas emissions worldwide since 1988.[16] As an illustration, conventional oil produces around 18 kilograms of CO2 per barrel, whereas oil from oil sands releases approximately 78 kg of CO2 per barrel.[17]

Even though natural gas is frequently considered a more environmentally friendly alternative to coal and oil, the production of natural gas and usage of natural gas still result in considerable emissions of greenhouse gases. According to the information provided by the IEA, natural gas-related emissions, including methane leaks and flaring, accounted for around 20%[18] of the total greenhouse gas emissions connected to energy in 2020.

The energy industry's significant role in greenhouse gas emissions highlights the urgent requirement for comprehensive and efficacious measures to alleviate the consequences of climate change. Collaboration between governmental and corporate entities is imperative in mitigating emissions stemming from the oil and gas industry. This can be achieved through the implementation of carbon pricing mechanisms and the allocation of resources toward the development of clean energy alternatives. The aforementioned situation necessitates a fundamental alteration in energy production and consumption methods, coupled with a heightened focus on energy efficiency and conservation. Ensuring transparency and accountability within the oil and gas sector is of utmost importance, particularly concerning the major corporations that bear the primary responsibility for the bulk of greenhouse gas emissions. In addition, implementing novel technologies, such as carbon capture, utilisation, and storage (CCUS), can substantially impact mitigating emissions from the oil and gas industry. Through collaborative efforts to tackle the obstacles presented by climate change, it is possible to establish a sustainable future that future generations can enjoy.

15 Nick Ash and Tim Scarbrough, *Sailing on Solar: Could Green Ammonia Decarbonise International Shipping* (Environmental Defense Fund 2019).

16 Marco Grasso, 'Oily Politics: A Critical Assessment of the Oil and Gas Industry's Contribution to Climate Change' (2019) 50 Energy Research & Social Science 106, doi: 10.1016/j.erss.2018.11.017.

17 Steve Griffiths et al, 'Decarbonizing the Oil Refining Industry: A Systematic Review of Sociotechnical Systems, Technological Innovations, and Policy Options' (2022) 89 Energy Research & Social Science1 02542, doi: 10.1016/j.erss.2022.102542.

18 Robert L Kleinberg, 'Methane Emissions from the Fossil Fuel Industries of the Russian Federation' (*EarthArXiv*, 30 Oktober 2022) doi: 10.31223/X57D13 <https://eartharxiv.org/repository/view/3342> accessed 8 May 2023.

The release of methane into the atmosphere is another substantial source of emissions from the oil and gas industry. Over 100 years, the warming effect of methane has been 28 times larger than carbon dioxide, making it one of the most potent greenhouse gases.[19] Leaks, venting, and flaring are three ways methane can escape from oil and gas production facilities, all contributing to climate change. According to research conducted by the Environmental Defense Fund in 2015, the oil and gas industry was responsible for the emission of around 80 million metric tons of methane, approximately equivalent to 1.6 billion metric tons of CO2e.[20]

The oil and gas industry is responsible for much more than only carbon dioxide and methane emissions when it comes to greenhouse gases. The extraction of oil and gas results in the discharge of additional pollutants such as sulphur dioxide, nitrogen oxides, and particulate matter, all of which have the potential to have a considerable negative impact on both the environment and human health. The presence of said contaminants can result in the development of smog, acid rain, and air pollution, which can have adverse effects on both human well-being and the welfare of flora and fauna. The oil and gas sector bears a significant responsibility for generating colossal amounts of greenhouse gases that greatly affect the adjacent ecosystem.[21]

2.2 Environmental Impacts: Global Consequences and Local Effects

The petroleum and natural gas sector is a significant contributor to the discharge of greenhouse gases, which possess substantial unfavourable impacts on the environment at both regional and global levels. The primary emissions, namely carbon dioxide and methane, envelop the atmosphere, leading to its retention of heat and augmenting climate variation and global warming. This situation results in widespread and severe repercussions on a worldwide basis as far as greenhouse gas emissions by this industry are concerned.[22]

At the community level, areas close to oil and gas operations may be subject to significant environmental impacts. Air pollution caused by emissions can contribute to various health concerns, including those affecting the respiratory system. The contamination of water sources, such as those caused by oil spills and fracking, can harm ecosystems and affect local water supplies. Noise pollution and light pollution caused by oil and gas operations can have an impact not only on human communities but also on the surrounding animals.

The government of the United Kingdom has instituted monetary incentives and subsidies in order to promote the development of renewable energy initiatives. Nevertheless, the pace of progress has faced criticism for its perceived sluggishness, and the nation remains heavily dependent on non-renewable energy sources. The Climate Change Act of 2008 is the predominant legislation that sets forth obligatory objectives for mitigating emissions

19 John L Black, Thomas M Davison and Ilona Box, 'Methane Emissions from Ruminants in Australia: Mitigation Potential and Applicability of Mitigation Strategies' (2021) 11 (4) Animals 951, doi: 10.3390/ani11040951.

20 William Cline, 'Carbon-Equivalent Taxes on US Meat' (2020) Economics International Inc Working Paper 20-03, doi: 10.2139/ssrn.3852166.

21 Jingjing Jiang et al, 'Two-Tier Synergic Governance of Greenhouse Gas Emissions and Air Pollution in China's Megacity, Shenzhen: Impact Evaluation and Policy Implication' (2021) 55 (11) Environmental Science & Technology 7225, doi: 10.1021/acs.est.0c06952.

22 Lin Zhang et al, 'Globalization, Green Economy and Environmental Challenges: State of the Art Review for Practical Implications' (2022) 10 Frontiers in Environmental Science 199, doi: 10.3389/fenvs.2022.870271.

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of greenhouse gases.[23] Saudi Arabia, Kuwait, and Qatar are currently working to tackle the challenges posed by climate change and its impact on the oil and gas industry.[24] These nations have implemented policies and programs to mitigate greenhouse gas (GHG) emissions, foster energy efficiency, and enhance the adoption of renewable energy sources. The oil and gas industry, including Saudi Arabia, faces an elevated risk of litigation as a result of climate change. This is attributable to the adverse effects of climate change, such as biodiversity loss, extreme weather events, and rising sea levels. The implementation of sustainable energy strategies and policies can serve as a means of mitigating these aforementioned risks. The passage provides an overview of the persistent obstacles the oil and gas sector encounters as it endeavours to shift toward sustainable energy alternatives.

In recent years, there has been a growing inclination towards holding the oil and gas industry accountable for its contribution to the worsening of climate change.[25] The noted occurrence can be ascribed to the dominant function fulfilled by non-renewable energy sources in propelling the phenomenon of climate alteration. The present predicament pertains to the lawful and administrative facets of climate change, wherein diverse interested parties, such as citizens, societal groups, and government entities, strive for legal remedies to tackle the detrimental outcomes of greenhouse gas emanations traced back to commercial activities. This event takes place within the territorial confines of the United States.

Possible legal obstacles faced by the oil and gas sector could potentially entail significant consequences for the industry.[26] They can potentially result in monetary penalties, a loss of reputation, and increasing pressure to adopt more environmentally friendly methods. Nevertheless, they have the potential to open up new avenues for creative problem-solving and collaborative work toward a more sustainable future. It can be said that the environmental impact of greenhouse gas emissions from the oil and gas industry is a massive problem with global and local repercussions.[27]

The release of greenhouse gases is the primary driver of climate change, and one of the significant contributors to this problem is the oil and gas industry.[28] To effectively address the issues posed by climate change, it is essential to cut back on these emissions. However, the sector must overcome many scientific, economic, and political hurdles and constraints to accomplish this objective.

23 T Ahmad, D Zhang, C Huang, H Zhang, N Dai, Y Song and H Chen, 'Artificial intelligence in sustainable energy industry: Status Quo, challenges and opportunities' (2021) 289 Journal of Cleaner Production 125834.

24 Osamah A Alsayegh, 'Barriers facing the transition toward sustainable energy system in Kuwait' (2021) 38 Energy Strategy Reviews 100779.

25 Peter Newell et al, 'Toward Transformative Climate Justice: An Emerging Research Agenda' (2021) 12 (6) WIREs Climate Change e733, doi: 10.1002/wcc.733.

26 Anirbid Sircar et al, 'Application of Machine Learning and Artificial Intelligence in Oil and Gas Industry' (2021) 6 (4) Petroleum Research 379, doi: 10.1016/j.ptlrs.2021.05.009.

27 Mahesh Kumar, 'Social, Economic, and Environmental Impacts of Renewable Energy Resources' in Kenneth Eloghene Okedu, Ahmed Tahour and Abdel Ghani Aissaou (eds), *Wind Solar Hybrid Renewable Energy System* (IntechOpen 2020) ch 11, doi: 10.5772/intechopen.89494.

28 Anna Maria Driga and Athanasios S Drigas, 'Climate Change 101: How Everyday Activities Contribute to the Ever-Growing Issue' (2019) 7 (1) International Journal of Recent Contributions from Engineering, Science & IT 22, doi: 10.3991/ijes.v7i1.10031.

3 LEGAL CHALLENGES AND IMPACT ON THE INDUSTRY: DISCLOSURE, REGULATION, AND TRANSITION TO SUSTAINABLE PRACTICES

The oil and gas business has long been a significant contributor to global energy production, with many economies strongly relying on its revenue.[29] However, mounting worries about climate change and the need to shift to more sustainable practices present the business with increasing legal obstacles that force it to re-evaluate its operations.

Disclosure is one of the most significant obstacles facing the industry. Given the potential impact of these emissions on the environment and human health, numerous stakeholders, including investors, governments, and the general public, are advocating for greater transparency regarding the industry's carbon emissions.[30] Many businesses are now voluntarily declaring their greenhouse gas emissions in response to this demand, but there is still a need for increased uniformity and mandated reporting requirements.

In recent years, there have been several legal challenges in regulating business methods. The Dutch judiciary rendered a significant verdict in 2015, mandating that the government curtail its greenhouse gas emissions by a minimum of 25 per cent by 2020,[31] citing a sense of obligation to its residents. According to the International Energy Agency, the sector has made substantial progress in recent years in decreasing methane emissions, and many companies are investing in new technologies and infrastructure to help the transition to a low-carbon future.[32]

The activities of big firms like BP, which has vowed to attain net-zero emissions by 2050 and is investing extensively in renewable energy sources, illustrate this transformation in the business.[33] Another example is Royal Dutch Shell, which has committed to investing up to $2 billion per year in renewable energy projects and has set a goal of decreasing its carbon footprint by 20% by 2030.[34]

29 Alamoush, Ölçer and Ballini (n 7); Michael Grubb et al, 'Consumption-Oriented Policy Instruments for Fostering Greenhouse Gas Mitigation' (2020) 20 (sup1) Climate Policy S58, doi: 10.1080/14693062.2020.1730151.

30 Arthur A van Benthem et al, 'The Effect of Climate Risks on the Interactions Between Financial Markets and Energy Companies' (2022) 7 (8) Nature Energy 690, doi: 10.1038/s41560-022-01070-1.

31 Margaretha Wewerinke-Singh and Ashleigh McCoach, 'The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation' (2021) 30 (2) Review of European, Comparative & International Environmental Law 275, doi: 10.1111/reel.12388.

32 Elisa Asmelash and Ricardo Gorini, *International Oil Companies and the Energy Transition* (IRENA 2021). The International Renewable Energy Agency (IRENA) serves as the principal platform for international co-operation, a centre of excellence, a repository of policy, technology, resource and financial knowledge, and a driver of action on the ground to advance the transformation of the global energy system. An intergovernmental organisation established in 2011, IRENA promotes the widespread adoption and sustainable use of all forms of renewable energy, including bioenergy, geothermal, hydropower, ocean, solar and wind energy, in the pursuit of sustainable development, energy access, energy security and low-carbon economic growth and prosperity.

33 Mei Li, Gregory Trencher and Jusen Asuka, 'The Clean Energy Claims of BP, Chevron, ExxonMobil and Shell: A Mismatch Between Discourse, Actions and Investments' (2022) 17 (2) PloS One e0263596, doi: 10.1371/journal.pone.0263596.

34 Ensieh Shojaeddini et al, 'Oil and Gas Company Strategies Regarding the Energy Transition' (2019) 1 (1) Progress in Energy 012001, doi: 10.1088/2516-1083/ab2503.

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4 GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: EXAMPLES AND STATISTICS

Individuals and organisations have taken legal action against governments and corporations for their role in global warming, with the number of climate change-related lawsuits rising in recent years.[35] This trend has also affected the oil and gas industry, the subject of several legal challenges regarding its role in climate change. Here are some examples and global trends in climate change litigation statistics.

4.1 Common Climate Change Litigation Examples

Several lawsuits have been launched in the United States against oil and gas firms, such as Chevron and ExxonMobil, for their part in climate change.[36] These cases allege that the defendants were aware of the risks associated with climate change but misled the public and stockholders by downplaying the dangers. In the Netherlands, the Urgenda Foundation launched a lawsuit against the Dutch government for failing to reduce greenhouse gas emissions adequately.[37] In 2019, the Dutch Supreme Court favoured Urgenda and ordered the government to reduce emissions by 25 per cent compared to 1990 levels by the end of 2020.[38] Environmental Defenders Office New South Wales filed a lawsuit in Australia against Commonwealth Bank for neglecting to mention climate risks in its 2016 annual report.[39] The issue was resolved in 2018, with the bank agreeing to include climate risk information in future reports.

4.2 Statistics Regarding Climate Change Lawsuits

It has been found that since 1986, the Climate Change Litigation Database indicates that over 1,800 climate change cases have been filed in 36 countries.[40] More than 1,200 climate change-related lawsuits have been filed in federal and state courts in the United States.[41] Over fifty per cent of climate change-related lawsuits are filed against fossil fuel businesses in the oil and gas industry.[42]

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35 Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot' (LSE, 30 June 2022) <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022> accessed 8 May 2023.

36 Dario Kenner and Richard Heede, 'White Knights, or Horsemen of the Apocalypse? Prospects for Big Oil to Align Emissions With a 1.5°C Pathway' (2021) 79 Energy Research & Social Science, 102049, doi: 10.1016/j.erss.2021.102049.

37 'State of the Netherlands v. Urgenda Foundation: Hague Court of Appeal Requires Dutch Government to Meet Greenhouse Gas Emissions Reductions by 2020' (2019) 132 (7) Harvard Law Review 2090.

38 Douglas Maxwell, '(Not) Going Dutch: Compelling States to Reduce Greenhouse Gas Emissions Through Positive Human Rights' (2020) 4 Public Law 620.

39 Laura Melrose, 'Emerging Trends in Australian Climate Change Litigation: Bringing the Heat' (2022) 47 (3) Alternative Law Journal 187, doi: 10.1177/1037969X221112515.

40 Shaikh M Eskander, Sam Fankhauser and Joana Setzer, 'Global lessons from climate change legislation and litigation' (2021) 2 (1) Environmental and Energy Policy and the Economy 44, doi: 10.3386/w27365.

41 W Seth Cook, 'Standing for the Lorax: Augmenting an Ill-Suited Standing Doctrine to Allow for Justice in Novel Climate Change Litigation' (2022) 41 (3) The Review of Litigation 407.

42 Shraddha Gupta, 'Oil Industry's Pro-Climate Agenda: Fifty Shades of Green' (2021) 20 (2) Washington University Global Studies Law Review 491.

Climate change lawsuits can potentially cause considerable financial and reputational harm to the oil and gas industry.[43] In light of the growing number of climate change litigation, some oil and gas firms have developed measures to mitigate the related legal risks.[44] These techniques aim to minimise the legal risks connected with climate change. For instance, several businesses have upgraded their climate-related disclosure and reporting to improve the information they provide to shareholders and other stakeholders regarding the threats and possibilities posed by climate change. The growing number of lawsuits filed against oil and gas firms, which attribute responsibility for climate change to the operations of the companies, highlights the necessity of accountability. Different businesses have shown their dedication to reducing their impact on the environment by taking measures such as instituting carbon pricing mechanisms and establishing emission reduction objectives.

Despite these efforts, the oil and gas industry is still facing a substantial obstacle in the form of climate change litigation. The results of lawsuits related to climate change might be challenging to foresee, and the associated expenses can be high.[45] In recent years, the oil and gas sector has been increasingly impacted by legal disputes pertaining to climate change. Moreover, in the Netherlands, the Urgenda Foundation successfully sued the government to reduce emissions by at least 25% compared to 1990 levels. Similarly, in the United States, several cities have filed lawsuits against oil and gas companies, alleging that they knew about the risks of climate change but failed to disclose them to investors.

Various instances illustrate how such legal actions can significantly affect these corporations' financial and reputational standing. In 2018, the cities of San Francisco and Oakland initiated legal proceedings against BP, Chevron, ExxonMobil, and other entities involved in the petroleum industry, alleging that they had deliberate knowledge of their contribution towards the phenomenon of climate change.[46] The plaintiffs have requested that said corporations reimburse the costs associated with adjusting to the escalating sea levels. The present case has garnered substantial media coverage and has the potential to establish a legal precedent for forthcoming litigations on climate change.

Environmental organisations in Norway instigated a noteworthy legal action against their government for authorising oil exploration in the Arctic area, contending that their fundamental right to a sound environment was being infringed upon.[47] In the event of a favourable outcome, this case has the potential to yield significant implications within the Norwegian context and throughout the broader industry. In 2017, New York initiated legal proceedings against five prominent oil companies, contending that they were complicit in climate change and thus should assume accountability for mitigating its consequences.[48] Despite being dismissed by a federal judge in 2018, the city is contesting the ruling through an appeal process. This underscores the ongoing legal difficulties that oil and gas companies face concerning climate change concerns.

43 Climate change lawsuits can potentially cause considerable financial and reputational harm to the oil and gas industry.

44 K Pouikli, 'Editorial: A Short History of the Climate Change Litigation Boom Across Europe' (2021) 22 (4) ERA Forum 569, doi: 10.1007/s12027-022-00700-1.

45 Walter V Reid, Mariam K Ali and Christopher B Field, 'The Future of Bioenergy' (2020) 26 (1) Global Change Biology 274, doi: 10.1111/gcb.14883.

46 Albert Lin and Michael Burger, 'State Public Nuisance Claims and Climate Change Adaptation' (2018) 36 (1) Pace Environmental Law Review 49, doi: 10.58948/0738-6206.1821.

47 Christina Voigt, 'The First Climate Judgment Before the Norwegian Supreme Court: Aligning Law with Politics' (2021) 33 (3) Journal of Environmental Law 697, doi: 10.1093/jel/eqab019.

48 Brooke Jarvis, 'Climate change could destroy his home in Peru: So he sued an energy company in Germany' (*The New York Times*, April 9 2019) <https://www.nytimes.com/interactive/2019/04/09/magazine/climate-change-peru-law.html> accessed 8 May 2023.

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5 CLIMATE CHANGE OPPORTUNITIES

Global trends in climate change litigation demonstrate that legal challenges are becoming increasingly important in promoting environmentally responsible growth and the transition to sustainable practices in the oil and gas industry. Many lawsuits focus on disclosure and regulation, demanding that companies provide more transparency regarding their greenhouse gas emissions and adopt measures to reduce them. The following are some of the possibilities presented by climate change.

Renewable Energy. Renewable energy sources, such as solar, wind, and hydro power, provide a huge possibility to decrease emissions of greenhouse gases while simultaneously satisfying the need for energy on a worldwide scale.[49] The use of renewable energy sources has seen tremendous expansion over the course of the last decade, and it is anticipated that this market will continue to see expansion in the years to come.[50] Because of this increase, possibilities for investment, innovation, and the creation of new jobs have arisen.

Efficiency in Energy Use. Measures that improve energy efficiency provide the possibility of lowering overall energy use while either preserving or enhancing the existing level of service. Upgrades to insulation, lighting, and heating systems, as well as the installation of intelligent building controls, are all examples of potential energy-saving improvements. Taking steps to improve energy efficiency may cut down on both energy expenses and emissions of greenhouse gases.

Agriculture that is Sustainable. While the changing climate poses substantial difficulties for agricultural operations, it also gives new potential for agriculture that is environmentally responsible. Sustainable agricultural techniques have the potential to enhance the health of the soil, decrease the amount of water used, and significantly cut down on the use of artificial fertilisers and pesticides. Food security and rural development are two more areas that might benefit from sustainable agriculture.

Reduced Emissions of Greenhouse Gases Through Transportation. The transportation industry is a major contributor to the emissions of greenhouse gases. The creation of alternative modes of transportation that produce less carbon dioxide provides an opportunity to lower emissions of greenhouse gases while still satisfying the requirements of the global transportation market. Electric automobiles, public transit, and cycling infrastructure are three examples of potential low-carbon modes of transportation.[51]

The concept of a circular economy refers to a kind of economic model that works towards the elimination of waste and the establishment of a closed-loop system. With the elimination of waste and the encouragement of more environmentally responsible manufacturing and consumption methods, the circular economy offers a chance to cut down on emissions of greenhouse gases. Moreover, chances for innovation and the development of new jobs may be made available by the circular economy.

The term 'climate finance' refers to investments made in initiatives that aim to either adapt to or mitigate the effects of climate change. Climate financing gives an opportunity to fund development that is low in carbon emissions and climate-resilient while also giving

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49 Norain Ismail et al, 'From Innovation to Market: Integrating University and Industry Perspectives Towards Commercialising Research Output' (2020) 8 (4) Forum Scientiae Oeconomia 99.

50 Jiang et al (n 21).

51 Thomas A Fox et al, 'A Review of Close-Range and Screening Technologies for Mitigating Fugitive Methane Emissions in Upstream Oil and Gas' (2019) 14 (5) Environmental Research Letters 053002, doi: 10.1088/1748-9326/ab0cc3.

opportunities for financial gains.[52] Investments in renewable energy, energy efficiency, environmentally responsible agriculture, and low-carbon transportation are all potential areas of focus for climate financing.

The transition towards renewable energy sources such as wind and solar power is one of the most significant opportunities made available by climate change. Countries and corporations are progressively investing in the infrastructure for renewable energy sources as part of their efforts to decrease their respective carbon footprints. Because of this, there has been a considerable increase in the number of possibilities available to companies that are engaged in the conception, production, assembly, and upkeep of renewable energy systems.[53]

Developing new technology and coming up with innovative solutions to the problem of climate change is yet another opportunity. This encompasses anything from methods of carbon capture and storage technology to methods of environmentally responsible agriculture. Several corporations, as well as scholars, are making investments in these fields, which is helping to create new markets and propel economic development.

In addition, there are several chances for companies to enhance their sustainability practices and lessen the negative effects they have on the environment. This may include a wide range of activities, from cutting down on waste and making use of environmentally friendly products to adopting energy-saving measures and lowering emissions. By doing so, companies have the opportunity to enhance their reputations and appeal to consumers who are becoming more aware of the influence they have on the environment.

Last but not least, the effects of climate change give an opening for cooperative endeavours and group efforts. Businesses, governments, and organisations that do not seek financial gain are collaborating with one another to share their expertise and resources as the global community tries to tackle climate change. This partnership has the potential to result in more efficient solutions and to contribute to the advancement of work towards a more sustainable future.

6 CONCLUSIONS

The oil and gas business must implement efficient legal procedures if it is going to traverse the legal obstacles presented by climate change successfully. As long as it obtains sufficient money and keeps its robust governance structure, the United Nations Framework Convention on Climate Change (UNFCCC) has the potential to become an efficient instrument for minimising the detrimental effects that climate change will have on the industry. The environmental impact of greenhouse gas emissions from the oil and gas industry is noteworthy and presents significant challenges to emission reduction. Recent legal hurdles related to disclosure, regulation, and transitioning towards sustainable practices have further emphasised the importance of accountability and energy sustainability. A worldwide increase in climate change litigation underlines the pressing necessity for establishing corporate responsibility and promoting environmentally friendly alternatives. To meaningfully address climate change challenges, it is imperative that the oil and gas industry initiates measures aimed at reducing greenhouse gas emissions while transitioning towards sustainable practices. The potential for liability claims, increased government regulation, and brand damage are some of the legal challenges that the industry is likely to face as a direct result of climate change.

52 Cook (n 41).

53 Joseph Curtin et al, 'Quantifying Stranding Risk for Fossil Fuel Assets and Implications for Renewable Energy Investment: A Review of the Literature' (2019) 116 (4) Renewable and Sustainable Energy Reviews 109402, doi: 10.1016/j.rser.2019.109402.

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Establishing a World Climate Change Court or negotiating an international treaty on climate change is one of the solutions that might be considered. Either of these options could give a standardised approach to the resolution of legal disputes and consistency across the various countries. The most important thing to take away from this study is how important it is to tackle the issue of climate change using a strategy that draws from a variety of disciplines and involves legal procedures. Given the global scale of this problem, it is essential that all parties involved work together to build effective legal frameworks that can reduce the effects of climate change on the oil and gas business as well as on the world.

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Research Article

SUBSTANTIVE AND PROCEDURAL CHALLENGES IN INTERNATIONAL INVESTMENT LAW

Lamya Alfaify[1]

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Summary: 1. Introduction. – 2. International Investment Law Development. – 3. Critical Issues Affecting the International Investment Regime. – *3.1. The purpose of the international investment regime. – 3.2. The scope of the international investment agreements. – 3.2.1. The meaning of foreign 'investment'. – 3.2.2. The circumstances in which an investor is a 'foreign'. – 3.2.3. Coverage of state-controlled entities (SCE). – 3.2.4. Temporal scope of treaties. – 3.2.5. Express exclusions from the scope of IIAs. – 3.3. The substantive content of investment disciplines. – 3.3.1. The controversial meaning of investment-protection standards. – 3.3.2. The interlink between investment protection and the right to regulate. – 3.3.3. Investment liberalisation commitments. – 3.3.4. Disciplines on host state and foreign investors. – 3.4. International investment arbitration. – 3.4.1. The 'process' and 'outcome' of investment arbitration. – 3.4.2. The principal users of investment arbitration and any other stakeholders. – 3.5. Managing multiple legal sources. – 3.6. The institutional structure of the international investment regime.* – 4. Recommendations to Resolve Current Issues in the International Investment Regime. – 5. Conclusions and Recommendations.

Keywords: International investment law, international investment treaties, international investment agreements, unified law, global convention.

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ABSTRACT

Background: *Given the lack of development in the International Investment Law (IIL) and its increase of substantive and procedural challenges, this paper identifies those issues and challenges and provide suggests solutions to these challenges.*

Methods: *The procedures to be followed in obtaining information concerning the adequacy of IIL and its effectiveness. The article will look at the logical method, comparative method, and historical method. After data collection using these methods, the data will be analysed; accordingly, a comparison will be carried out between different international investment legal instruments to establish the gaps and development opportunities. A logical method will be applied to data collection. It is an analysis methodology that combines concepts and ideas. A historical method will be used to collect data and facts from records, to investigate the competence of international investment legal instruments over time. The researcher will explain the history of international investment legal instruments to show the importance of law development.*

Results and Conclusions: *The development of a unified global convention that is formatted to provide a uniform and neutral set of substantive and procedural rules to regulate international investments would, in fact, meet the optimal objectives of the state and investor in the most appropriate manner according to the current legal investment instruments.*

1 INTRODUCTION

For their populations to live to reasonable standards, many countries need large sums of funding. Local savings are essential for providing capital, yet they are insufficient.[2] Consequently, foreign capital is essential for economic growth. A significant portion of foreign capital is derived through public resources (donations, loans, technical assistance), but these are insufficient in quantity, and their use is frequently constrained by political, economic, and administrative factors that lessen their efficacy.[3] Foreign private investment, as a complement to state assistance and an element that injects flexibility, therefore, contributes significantly to development.

In light of the aforementioned, international investment rules were created to encourage investment by safeguarding investors' assets from political risks, which include acts of discrimination, expropriation, nationalisation, violation of agreements, and damages, among other things.[4] Moreover, international investment treaties, customary IIL protecting aliens' rights, local legislation, prior awards and judicial decisions, and other guiding international investment legal instruments are also included in the IIL mentioned above.

The existing 2,850 international investment agreements (IIAs) serve as the primary definition of investor rights.[5] This paper argues for the development of a unified global convention that is formatted to provide a uniform and neutral set of substantive and procedural rules to

2 Martin Feldstein and Charles Horioka, 'Domestic Saving and International Capital Flows' (1980) 90 (358) The Economic Journal 314.

3 SC Vetrivel and S Chandra Kumarmangalam, 'Role of Microfinance Institutions in Rural Development' (2010) 2 (2) International Journal of Information Technology and Knowledge Management 435.

4 Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford International Law Library, 2nd edn, OUP 2015) doi: 10.1093/law/9780198703976.001.0001.

5 'International Investment Agreements Navigator' (*UNCTAD Investment Policy Hub*, 2022) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 6 December 2022.

regulate international investments to meet the optimal objectives of the state and investor in the most appropriate manner.

This paper aims to explore IIL development and the purposes associated with it, along with the potential substantive and procedural challenges in IIL, and to investigate the development of a unified global international investment convention that could potentially provide a uniform and neutral set of substantive and procedural rules to regulate international investments to meet the optimal objectives of the state and investor in replacement of existing international investment legal instruments. This paper will look at the form of legislation best for international investment and examine each existing international legal instrument. This paper will also be very effective in providing development forums for in IILs, thus reducing the challenges faced by states and investors towards international investments.

2 INTERNATIONAL INVESTMENT LAW DEVELOPMENT

The General Agreement on Tariffs and Trade (GATT) was signed by a number of nations in 1947 to reduce trade barriers and establish treaty safeguards for foreign investment.[6] With regard to 'trade and'-related problems, the GATT experienced crises and conflicts. As a result of globalisation, this significant worldview underwent a change in the 1990s and into the 21st century. Similar legitimacy issues are already plaguing IIA for the same reasons, notably in relation to BIT and investor-state arbitration.

The IIA was derived from the traditional economic rights of aliens connected to property under international law.[7] To elucidate, the host state's activities truly posed a threat to foreign investors' interests, necessitating a petition on the investor's property to support the allegation. In any subsequent trade between the investor's property and the host state, this technique offered little to no mechanism for the investor to act on their own behalf. Hence, the investor would not carry any influence on the political changes of the host country's domestic laws, which would potentially have had an influence on the investment. Modern foreign investment emerged to remedy this mismatch, albeit inadequately.

Bilateral Friendship, Commerce, and Navigation (FCN) Treaties, the forerunners of today's Bilateral Investment Treaties (BITs), were initially developed to regulate and rectify such deficiencies as a legal mechanism.[8] FCN was initially focused on commercial instruments but eventually expanded to include other sectors. Despite its efforts, FCN did not establish a private right of action for the citizens of its signatories.

Modern IITs were created when independent governments became keen to impose the authority of their own laws and drive away the influence of their previous colonisers in politics and the economy.[9] This dilemma raised concerns for foreign investors. IITs addressed these issues with its expropriation regulations and measures ensuring fair and equal treatment for foreign investment.

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6 General Agreement on Tariffs and Trade (GATT 1947) <https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm> accessed 26 April 2023.

7 Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in PM Dupuy, EU Petersmann and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (International Economic Law Series, OUP 2009) 45, doi: 10.1093/acprof:oso/9780199578184.003.0002.

8 Frank J Garcia et al, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18 (4) Journal of International Economic Law 861, doi: 10.1093/jiel/jgv042.

9 Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) ch 1.

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IITs were first concluded in the 1950s to 1970s, but not many IITs entered into force after that. Since then, the number of IITs has dramatically increased as developing nations surmounted initial reluctance and engaged in IIA with other nations,[10] which led to the conclusion of over 265 IITs by the late 20th century. Some constraints were encountered by developing countries, who found IITs as a means of capital resource growth. These pressures, along with the fear of the potential damages to be encountered, mean that developing countries showed more interest in IITs. The fact that more IITs were signed in the last decade is evidence of the growing interest of developing nations in IITs. Today, around 2,850 IITs are in force.

The development of the IIL over the centuries provided several outputs, but notwithstanding the IIT influence on the economic development of in-need countries in promoting stability via the replacement of proper laws and functioning courts and providing minimum protection for foreign investors in those countries, there is no proof to support such conclusion.[11] Investors do not make investment decisions based upon IIA – in fact, most often, investors are not aware of the IITs but invest in developing countries due to different reasons. The lack of proof to support such a conclusion could lead host countries to potentially lose their sovereignty via new, legally binding IITs.

Despite the unawareness of the investors of the IITs, countries face multi-million-dollar arbitral awards for violating IITs. For instance, Argentina encountered approximately fifty arbitrations, including billion-dollar claims, while recovering from an economic crisis. Such arbitral awards for violating IITs undertake sufficient damages that undermine the countries' economic plans and stability.

The Philippine parliament had attempted to calculate the legal costs of meeting such disputes by using the *Fraport v. Philippines* case as an example.[12] The Philippine parliament found that the estimated cost of meeting the arbitration exceeded a total of fifty million dollars, noting that the investor in the dispute had not been able to receive back his USD 400 million investment.

Investment managers still need to invest in global markets, even with the risk of high legal costs of meeting the arbitration of disputes that could result from the IIAs. If investment managers avoid entering those markets, their competitors will assume their place.[13] The home markets will be impacted by the rivals' revenues since they will be utilised for innovation and expansion. This leads us to the reasoning for the economic benefits behind the development of the IITs. Many scholars argue that the economic benefit the IIAs bring is for the arbitrators interpreting those treaties and bringing them before the arbitral tribunal. This system, though it has many challenges and negative consequences, tremendously profits the arbitrators – so much so that vulture funds have emerged to fund arbitrations.

States' economic benefits are not necessarily based upon IITs. This is proven as states with no IITs, such as Brazil, have successfully progressed in their economic position. This is due to the national legal framework, which has attracted foreign investments to implement their investments instead of basing their investment regulatory policies on underdeveloped IITs. Many other states have withheld their treaty programmes and withdrawn from participation

10 Stephen M Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 American Society of International Law Proceedings 27, doi: 10.1017/S0272503700060699.

11 Stephan W Schill, Christian J Tams and Rainer Hofmann, *International Investment Law, and Development: Bridging the Gap* (Frankfurt Investment and Economic Law series, Edward Elgar Pub 2015) doi: 10.4337/9781784711351.

12 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* (I) (ICSID Case No ARB/03/25) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/125/fraport-v-philippines-i-> accessed 26 April 2023.

13 Schill, Tams and Hofmann (n 11).

in the ICISD system (e.g., South Africa and several Latin American states), as they consider the involvement of arbitration a threat to the public interest.

The case of *Tokios Tokeles v. Ukraine*[14] is a solid case of the law in the hands of arbitrators. It was possible to transfer a secure investment consisting of the host country's original assets to another treaty state. This perspective contradicts the purpose of the IIT, which is to promote economic growth by attracting new capital. Moreover, the so-called 'Dutch Sandwich' – a corporate arrangement that enables subsidiaries of large multinational firms to benefit from enhanced protection provided by an IIT – is an additional instance of the deceptive manipulation of IITs.

That being said, and in reference to the above-mentioned development of IIL, the following chapters will discuss the objective and purpose of IIL, along with its development, explore the substantive and procedural challenges of IIL, and propose recommendations to address such challenges.

3 CRITICAL ISSUES AFFECTING THE INTERNATIONAL INVESTMENT REGIME

As acknowledged in Strengthening the IIL and Policy Regime, there are a number of crucial concerns influencing the international investment regime, as identified by Karl Sauvant and Federico Ortino. The critical issues related to matters on the purpose of the regime *(3.1)*, the scope of IIAs *(3.2)*, the substantive content of investment disciplines *(3.3)*, investment arbitration *(3.4)*, managing multiple legal sources *(3.5)*, and the institutional structure of the regime (*3.6)*. This section will elaborate on the above-mentioned issues in further detail.

3.1 The purpose of the international investment regime

Due to the variety of international investment legal instruments and sources, the purpose of the IIL is not clear. This includes the purpose of the 2,850 investment treaties that are in force today. There is a distinct disagreement regarding the intent of these agreements.[15] The identification of the treaty objective constitutes a vital factor in giving meaning to those criteria, given the broadness and vagueness of the substantive requirements provided in IITs. Tribunals frequently use what they define as a treaty's objective or purposes to interpret its provisions.

Alternatively, other than the actual interpretation of the IIAs, the purpose of the IIL plays a crucial element in future lawmaking. If the purpose of the IIL is clearly identified, then the interpretation of the IIAs will also be clear.[16] Furthermore, by explicitly defining the objective of future IIAs, the contracting parties will be able to construct the substantive elements of an agreement in a way that will ensure that those aims are genuinely and successfully realised.

14 *Tokios Tokelés v Ukraine* (ICSID Case No ARB/02/18) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/78/tokios-tokel-s-v-ukraine> accessed 26 April 2023.

15 Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries'(1990) 24 (3) The International Lawyer 655.

16 Andres Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty* (Hersch Lauterpacht Memorial Lectures, CUP 2012) 7-8, doi: 10.1017/CBO9781139136792.

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3.2 The scope of the international investment agreements

Generally, IIAs provide protection for 'investors' who have made 'investments'.[17] Despite this, the meaning of 'investors' and 'investments' remains ambiguous.

3.2.1 The meaning of foreign 'investment'

It is believed that the broad interpretation of 'investment' has a very high attraction power in terms of drawing investment flows; it protects all kinds of assets.[18] This broad interpretation is a predictable method for determining the subject-matter application scope of IIAs since it is also clear. In contrast, newly developed IIAs have enacted tougher meanings of the term 'investment' that exclude speculative and short-term investments. The conventional components include the commitment of funds, the duration of the contract, the acceptance of risk, and the hope of profit, among other factors. Although there are no disagreements over which factors are to be taken into consideration or whether these factors are found to be 'tough' criteria or merely identifying characteristics, this method is a mere stipulation on what investments are to be protected within the newly developed IIAs based on a number of economic characteristics.

3.2.2 The circumstances in which an investor is a 'foreign'

Given that the standard approach in IIAs is to consider the location of parties as the optimal criterion for defining legal persons, the controversy surrounding the applicability of IIAs has circulated around the perception of the 'foreignness' of investors. This method encourages 'nationality planning' and 'forum shopping', but it also provides clarity and expectedness. As a result, the following two basic scenarios are plausible: First, by incorporating on the soil of one of the contracting parties, an investor from a third country can benefit from the protections provided by an IIA. A person of one contracting party may benefit from the protection provided within the IIA in regard to the other contracting party by incorporating within the territory of the other contracting party.

3.2.3 Coverage of state-controlled entities (SCE)

SCEs are becoming more prevalent as foreign investors, which draws attention to the changing global FDI landscape.[19] To elucidate, countries that have historically been host states are now actively participating through these SCEs in industries with economic, political, and strategic significance, despite the fact that SCEs with headquarters in countries that are well-developed carry significant roles in their nations' outward FDI. Presently, the majority of IIAs provide both state-owned and privately managed enterprises operating

17 Lukas Vanhonnaeker, 'International Investment Agreements' in JA VanDuzer and P Leblond (eds), *Promoting and Managing International Investment: Towards an Integrated Policy Approach* (Routledge Research in International Economic Law, Routledge 2020) 200.

18 Mavluda Sattorova, 'Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond' (2012) 2 (2) Asian Journal of International Law 267, doi: 10.1017/S2044251312000112.

19 Nilgün Gökgür, 'Are Resurging State-Owned Enterprises Impeding Competition Overseas?' in KP Sauvant and J Reimer (eds), FDI Perspectives: Issues in International Investment (2nd edn, Vale Columbia Center 2012) 26.

within the same jurisdiction the same degree of protection. A few treaties specifically grant this protection to government-owned or -controlled businesses. Yet, there is a discrepancy in the rules for investment protection for state-owned and privately held firms because of certain domestic authorities' responses to the rise of FDI by state-controlled entities that may pursue political goals.[20] On the other hand, whether state-controlled enterprises have the authority to seek dispute settlement under the ICSID Framework remains disputable, and arbitral rulings have not yet offered a well-defined direction. As was already indicated, the exclusion of state-controlled organizations from the ICSID framework would lead to these entities looking for other dispute resolution venues, which would eventually reduce the importance of ICSID.

3.2.4 Temporal scope of treaties

In light of growing unsatisfaction with the results of existing IIAs, several countries' decisions to 'opt out of ICSID dispute settlement in their legal international investment instruments, whether partially or wholly, have raised doubtfulness on the effectiveness of this matter in regards to when and how such 'opt outs' should be applied.[21] The impact of 'survival clauses' and the capacity of state parties to agree to override a treaty's 'survival clause' are important considerations. If governments decide to leave the ICSID Convention, it is conceivable that an IIA's agreement to ICSID arbitration would become void.

3.2.5 Express exclusions from the scope of IIAs

State parties are presently seeking exclusions from the scope of IIAs for certain sectors.[22] Furthermore, renegotiations, limitations, or expropriations of investments in extractive industries are common in the most contentious state actions of recent years. The scope of IIAs may exclude policies such as taxation, public procurement, and subsidies. IIAs may also exclude actions taken by the host country in regard to their scope of application due to the potential effects they may have on state decision-making.

In addition, there have been some concerns regarding whether the state's commitments specified in an IIA should include the protection of foreign investors from actions taken by municipal or provincial authorities.[23] While local governments are allowed to take non-conforming measures without adhering to national treatment or national standards, host states are obligated to extend to any entity exercising delegated regulatory or governmental authority.[24] If an IIA does not declare differently, it complies with customary law on state accountability and is applicable to all state actions. Express exclusions can be used to solve temporary or unique issues, but enacting exclusions that are too broad could defeat the goal of IIAs.

20 Salacuse (n 15).

21 Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' (2021) 59 (1-4) Indian Journal of International Law 173, doi: 10.1007/s40901-020-00111-2.

22 Peter T Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 (3) The International Lawyer 1033.

23 Anne Debevoise Ostby, 'Will Foreign Investors Regulate Indigenous Peoples' Right to Self-Determination?' (2003) 21 (1) Wisconsin International Law Journal 242.

24 Karl P Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future* (Ministry for Foreign Affairs of Finland 2013).

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As a result, there are a number of significant issues within the IIL, notably the application scope of IIAs. States have access to a variety of intricate and connected alternatives to make sure that IIAs are successful in attaining those objectives, even if deciding the proper scope will primarily rely on the ultimate objective(s) of a treaty signed by the contracting parties.

3.3 The substantive content of investment disciplines

There are four main substantive investment norms are; the controversial meaning of investment-protection standards *(3.3.1),* the appropriate balance between investment protection and states' right to regulate in the public interest *(3.3.2)*, the controversial of substantive matters and the extent of investment liberalization in IIAs *(3.3.3)*, and dispute on IIAs disciplinary rights directed at home countries and foreign investors in order to strengthen the promotion of foreign investment and compliance with international norms *(3.3.4)*.

3.3.1 The controversial meaning of investment-protection standards

The IIA's principles and rules were developed over time as 'standards' that, in contrast, fostered less political and administrative costs of development and, on the other hand, allowed implementation flexibility to take into account a range of circumstances.[25] The democratic legitimacy of these standards is thus poor since a less representative group determines their interpretation and execution, but these norms have little predictability and strong enforcement. For instance, distinguishing the distinction between a compensable indirect taking and a regulatory action pursuing a legitimate public aim that negatively impacts foreign investors' properties have been the focus of expropriation-related disputes.[26]

The so-called origin-neutral policies, which do not expressly differentiate between foreign and local investors, are likewise subject to the national treatment clause.[27] If a national treatment provision is violated by an origin-neutral measure, it will be determined by identifying the domestic investor treatment in comparison with the treatment given to an investor, identifying the differences between those treatments, and determining if such differences are justifiable for a public policy reason.

Some courts have either taken a much tighter interpretation or a wider meaning (for example, comparing a local flower exporter to an international oil exporter), and many tribunals have thought about whether the measure under review is the least restrictive option that may be used to accomplish the public policy goal; yet, many tribunals have just asked that there be a non-discriminatory rationale for the unequal treatment.

The fair and equitable treatment (FET) provision typically mandates governments to treat investments fairly and equally, which is the IIT norm that has generally served as a standard. There is minimal controversy on the two fundamental aspects of this criterion, even though there have been several formulations of it and numerous interpretations of the universal responsibility of 'equal and fair treatment'. First, the FET standard is considered broad and

25 Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 (3) Duke Law Journal 557.

26 Andrew Paul Newcombe, 'Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid?' (Master of Laws thesis, University of Toronto 1999).

27 Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP 2010) 377.

ambiguous.[28] Second, it is 'very fact and context sensitive' to determine if a FET standard breach has occurred remains unclear. So, as with any other standard, it takes a lot of work to determine whether this standard applies to a given instance; this work is essentially the task of the dispute-settlement tribunal.

Despite the aforementioned, recent IIAs do not seem to have greatly increased clarity and predictability; therefore the majority of conventional investment protection criteria are still under discussion.[29]

3.3.2 The interlink between investment protection and the right to regulate

Giving foreign investors the most protection possible and defending the right of host states to regulate the public good are two fundamental ideals that are at the centre of the argument over the present investment system.[30] Governments must ensure that all investors and investments made in their territory are treated fairly and protected to the fullest extent possible from discrimination, arbitrary decision-making, and other forms of unfair or detrimental treatment. While being prominent across the whole investment regime, the issue over the authority to regulate is most relevant to the actual content of investment rules (i.e., obligations of states to exercise their regulatory functions).

3.3.3 Investment liberalisation commitments

In the signed IIAs, only a small number of nations have outlawed (obligations placed on investors by host nations to run their company in a certain way).[31] While some believe that performance standards are in opposition to the concept of open markets, others find that they play a component part in the domestic development strategy. Theoretically, states are permitted to establish requirements pertaining to things like employment, local ownership, technology transfer, and research and development. Nevertheless, a special WTO agreement prohibits the implementation of some trade-related investment policies. Even so, many industrialised nations have implemented trade policy measures with comparable goals, including voluntary export restrictions, rules of origin, screwdriver controls, and anti-dumping laws. Yet, performance standards have typically been phased out in wealthy nations.

3.3.4 Disciplines on host state and foreign investors

Another concern is whether these agreements may be used as vehicles to encourage investment and/or sustainable development since their original emphasis was on addressing the imbalance in the substantive substance of existing IIAs (which historically placed

28 Federico Ortino, 'Refining the Content and Role of Investment "Rules" and "Standards": A New Approach to International Treaty-Making' (2013) 28 (1) ICSID Review 152, doi: 10.1093/icsidreview/sit002.

29 Art. 92 (and Annex 10) of the 2011 Japan-India Economic Partnership Agreement (EPA); art. 9.12 (and Annex 9B) of the 2011 Korea-Peru Free Trade Agreement; and art. 6 (and Annex B) of the 2012 United States Model BIT.

30 Howard Mann, International *Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (International Institute for Sustainable Development (IISD) 2008).

31 Dani Rodrik, 'The Economics of Export-Performance Requirements' (1987) 102 (3) Quarterly Journal of Economics 633, doi: 10.2307/1884221.

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responsibilities solely on host countries).[32] Therefore, there is a case for imposing a set of restrictions on both the host state and foreign investors.[33]

IIAs could contain clauses mandating, for instance, that the host state provide investors with financial and/or insurance systems. Although many nations provide such 'host state measures' unilaterally, they are seldom bound by IIA commitments. For this reason, the 'neutrality of competition' among investors has lately come under increased scrutiny due to these host state restrictions. IIAs disciplines may be used to prevent host state laws from interfering with the fair playing field between investors of various nationalities.

The inclusion of foreign investor sanctions in IIAs is a much more sensitive topic, mainly because doing so would go beyond the agreements' initial goals but also because doing so is technically more challenging.[34] The jurisdiction and breadth of dispute resolution between host states and investors may expand along with the complexity of governing law concerns if the categories of duties included in treaties are expanded. One of the most controversial issues in the debate over the future of the investment regime is the necessity to incorporate investors' obligations (in addition to investors' rights) and the business community's scepticism of the use of IIAs as a regulatory tool.

Several options have been suggested, from best-effort clauses to legally obligatory requirements to adhere to accepted international norms or standards.[35] A shareholder's compliance with (predetermined) corporate standards may be a requirement for certain protections or advantages. For instance, only investors who abide by such corporate standards would be eligible for the investment-protection assurances granted by the applicable IIA. Similar to this, under IIAs, host states may be obligated to link investor incentives and processes to adherence to best practices, human rights standards, or obligations connected to impact assessments.[36] IIAs might also include provisions requiring host states to provide foreign investors who meet the aforementioned standards, requirements, and commitments priority entry treatment. This includes identification of the particular business standards and envisioning the implementation of enforcement and/or monitoring measures present challenges. These methods could call for more complex treaties or the creation of an institutional structure that can implement these numerous clauses.

3.4 International investment arbitration

The dispute resolution process is one of the few topics that international investment negotiations pay greater attention to (if any).[37] Investment arbitration is viewed as the most significant investment protection guarantee by its ardent supporters, whereas investment arbitration is seen to fall short of the essential requirements of accountability, openness, and independence.

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32 Zeng Huaqun, 'Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice' (2014) 17 (2) Journal of International Economic Law 299, doi: 10.1093/jiel/jgu019.

33 Michael Waibel et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

34 Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 (2) Lewis & Clark Law Review 461.

35 Michael Blowfield and Jedrzej George Frynas, 'Editorial Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World' (2005) 81 (3) International Affairs 504-6, doi: 10.1111/j.1468-2346.2005.00465.x.

36 Thomas Walde and Abba Kolo, 'Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty' (2007) 35 (8-9) Intertax 424, doi: 10.54648/taxi2007049.

37 'Statistical Reports' (*International Chamber of Commerce* (ICC), 2022) <https://jusmundi.com/en/icc-dispute-resolution-library> accessed 6 December 2022.

3.4.1 The 'process' and 'outcome' of investment arbitration

Participation, openness, and due process in investment arbitration processes, along with the choice, impartiality, and independence of the arbitrators, are among the first category of process-related issues.[38] The capacity of third parties to be informed of the proceedings and take part in those proceedings is the specific focus of these concerns. These worries also revolve around (the impression of) arbitrator conflicts of interest and the creation of a group of people who act as counsel arbitrators and investment arbitration specialists, commonly being appointed again. Also, there is a dearth of variety among investment tribunal arbitrators in terms of gender, country, and area of specialisation.

There are also continuing arguments over the acceptable scope and standards for rescinding ICSID awards, which likewise pertain to the calibre of the legal reasoning. Process- and outcome-oriented issues are closely related to one another. A decision may be more (or less) fair and accurate as a consequence of a more (or less) open and inclusive adjudicative procedure.

3.4.2 The principal users of investment arbitration and any other stakeholders.

One may distinguish between internal and external issues about legitimacy by concentrating on the parties who voice doubts about investment arbitration. Internal concerns about legitimacy are canted on the viewpoints and objectives of investors and governments, who are the main recipients of investment arbitration. Investors and governments alike have expressed concerns about the efficacy and predictability of investment arbitration in this setting.[39] Governments, especially those of developing and least developed nations, and investors, including small businesses, must all have equal access to and involvement in the dispute settlement system.

Several nations have renounced their duties due to worries about the system's overall equality.[40] For instance, nations must defend themselves against investor claims because of the structure of dispute settlement on investment matters. A decision in the state party's favour is nearly a 'success', despite the fact that it may subject the state to a large fine if the investor wins. In most cases, the state party is responsible for paying at least some of the expenses associated with a dispute.

The management of mass claims, in which several investors are similarly impacted by a host state's activities, such as via substantial regulatory change or financial crises, is a related topic. After an ICSID panel decision during quarter three of 2011 that it has the power to consider significant litigation about Argentina's defaulted debt, with an estimated 60,000 plaintiffs, this topic has gained attention.[41] The question of whether to classify claims as

38 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 152.

39 Charles N Brower and Sadie Blanchard, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2013) 52 Columbia Journal of Transnational Law 689.

40 Thakur (n 21).

41 *Abaclat et al v Argentine Republic* (ICSID Case No ARB/07/5) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/284/abaclat-and-others-v-argentina> accessed 26 April 2023. See Decision on Jurisdiction and Admissibility, 4 August 2011 – a dissenting opinion, written by Professor Georges Abi-Saab, was issued on 28 October 2011.
Hans van Houtte and Bridie McAsey, 'Abaclat and Others v Argentine Republic: ICSID, the BIT and Mass Claims' (2012) 27 (2) ICSID Review 231, doi: 10.1093/icsidreview/sis020; Karen Halverson Cross, 'Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims Against Argentina' (2011) 15 (30) ASIL Insights <https://www.asil.org/insights/volume/15/issue/30/investment-arbitration-panel-upholds-jurisdiction-hear-mass-bondholder> accessed 26 April 2023.

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large-scale litigation, how to evaluate consent, and how to handle such mass claims legally and technically are among the issues at hand.

The second main issue in this context is the worry that the verdicts of investment tribunals would make it more difficult for governments to successfully carry out their duties.[42] For instance, investment arbitration has come under fire for emphasizing damages awards almost exclusively as the best form of relief.

A more complicated concern is the relationship between internal and external legitimacy issues.[43] While the interests of the major parties involved in investment arbitration may sometimes overlap, these interests typically disagree significantly. The selection of arbitrators is a clear reason for this tension: Several interested parties think that arbitrators chosen by an institution or pursuant to a specified roster will produce more coherence and impartiality than arbitrators chosen by a state (or investors).

Several different approaches are taken to deal with matters of legitimacy in investment arbitration.[44] For instance, the UNCITRAL arbitration rules have recently been changed to incorporate elements unique to investor-state arbitrations on openness, despite the seeming lack of excitement shown by a number of state representatives. However, states like the US and Canada have decided to incorporate public disclosure obligations in each of their IIAs signed, and the NAFTA parties have utilized the FTC's mechanism to issue a note of interpretation on the subject of openness in Chapter 11 proceedings. It is crucial to preserve a distinct separation between efforts to improve public (and third-party) engagement and measures to increase openness of investment-treaty arbitration, even though both might support the external legitimacy of the international investment system. The latter might have a more significant structural influence on how investor-state (and perhaps also state-state) issues are now resolved.

3.5 Managing multiple legal sources

Two concurrent situations highlight the present issue, which is related to the general coherence of the IIL regime. First off, the present structure, which comprises more than 2,800 IIAs, has as its primary objective the protection of foreign investment. As a result, there are many troublesome problems brought on by the proliferation of IIAs. It is challenging to construct a well-defined international investment legal and policy framework, for example, due to the many unique instruments with sometimes strong similarities but also frequently large variances (even if only in significant nuances). As a result, it is problematic for governments to evaluate the full breadth of their obligations, how they relate to or conflict with one another, and any possible liabilities.[45] It might be challenging to provide both predictability and transparency for overseas investors to make long-term investment choices.

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42 Carole Malinvaud, 'Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration' in AJ van den Berg (ed), 50 years of the New York Convention (Wolters Kluwer 2009) 209; Christoph Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 20 (4) Arbitration International 325, doi: 10.1093/arbitration/20.4.325; Anne van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 721, doi: 10.1093/acprof:oso/9780199589104.003.0023.

43 Federico Ortino, 'External Transparency of Investment Awards' (Society of International Economic Law (SIEL) Inaugural Conference, Geneva, 14 July 2008) doi: 10.2139/ssrn.1159899.

44 Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 139.

45 ibid.

The status of IIAs and present foreign investment are also out of sync. Although bilateral connections make up the bulk of IIAs, international investment often includes firms that have control over economic assets across many countries and are subject to centralised regulation.[46] Due to the fact that the regulatory reach of the majority of IIAs is less than the operational extent of many multinational investors, there may be jurisdictional 'underlaps'. The existing method has led to 'nationality planning' and 'forum shopping', as was previously illustrated.

Second, in a wider context that goes beyond the scope of conventional IIAs, the problem of the general coherence of the IIL regime is equally relevant.[47] Governments are, nevertheless, prepared to address certain difficulties relating to some unfavourable externalities of global investment in voluntary instruments. As previously stated, governments typically do not go beyond the protection of investors in IIAs. The same goes for international organisations, which have produced documents that may act as recommendations. There are published standards for corporate behaviour abroad.[48] The efforts of non-governmental groups to advance and rebalance investment legislation are also noteworthy. As a result, the problem of the investment regime's coherence may be assessed in a wider framework, calling for coordination across numerous legal organisations and tools that have a significant influence on global investment.

Encouragement of harmonisation, whether via a multilateral investment agreement or a model international investment treaty, is one way to deal with the issues brought on by the proliferation of IIAs.[49] It could be necessary to include 'human rights' or 'sustainable impact evaluations' in IIAs to achieve a better degree of global cooperation.[50] States may need to take into consideration their obligations under international agreements or domestic constitutional limits when investments may negatively affect the local population's access to needs like water. The European Commission has included 'sustainability impact evaluations in a number of trade programs and agreements. Such *ex ante* evaluations offer a policy tool for quantifying the social, economic, and environmental effects of treaty obligations (particularly when combined with widespread public engagement). By the implementation of IIAs' sustainability impact evaluations, states may include sustainability issues at an earlier stage in developing their foreign investment policies.

3.6 The institutional structure of the international investment regime

As was previously mentioned, the traditional IIA did not consider a permanent institutional structure, including (regular) meetings of the contracting parties, a permanent secretariat with specific duties, or the creation of a permanent dispute-settlement body.[51] Due to the institutional vacuum, dispute resolution is essentially responsible for all treaty interpretation and implementation. Yet, a growing number of IIAs have started to contain clauses for long-

46 Suzanne A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 (4) Journal of International Economic Law 1037, doi: 10.1093/jiel/jgq048.

47 Juri Suehrer, 'The Future of FDI: Achieving the Sustainable Development Goals 2030 through Impact Investment' (2019) 10 (3) Global Policy 413, doi: 10.1111/1758-5899.12714.

48 ibid.

49 Sebastian Perry, 'Arbitrators and Human Rights' (*Global Arbitration Review*, 13 June 2011) <https://globalarbitrationreview.com/article/arbitrators-and-human-rights> accessed 26 April 2023.

50 Pierre Thielbörger, 'The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?' in PM Dupuy, EU Petersmann and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (International Economic Law Series, OUP 2009) 487, doi: 10.1093/acprof:oso/9780199578184.003.0020.

51 Stephan W Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 12 (5) German Law Journal 1083, doi: 10.1017/S2071832200017235.

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term institutional arrangements that fulfil a number of different roles. For instance, accepted interpretation may help to maximise the effectiveness of IIAs and ensure uniformity in arbitral rulings. Deliberations may also help decision-makers make well-informed choices on IIA extensions, modifications, and further investment liberalisation. Strengthening the institutional framework entails expenses, particularly in light of the fact that the bulk of IIAs are signed on a bilateral basis.

Due to its scant and disjointed institutional structure, the IIL regime is insufficiently effective. To improve the regime's capacity to carry out its core objectives, full consideration should be given to improving its institutional architecture (whatever the stakeholders determine they should be).

4 RECOMMENDATIONS TO RESOLVE CURRENT ISSUES IN THE INTERNATIONAL INVESTMENT REGIME

According to Tai-Heng Cheng,[52] decision-makers may help international investment legislation overcome its flaws. Analysing the complex power and authority dynamics of international investment law reveals both its advantages and disadvantages. Four structural changes will be made moving forward to improve international investment law: (1) more careful analysis of which investment protections are necessary to attract capital and which are not; (2) careful calculation of immediate and hidden costs of investment agreements before entering into an investment project; (3) increased power and authority of international investment law, and authority should be exerted over both powerful and weak decision-makers; and (4) increased enforcement of international investment law. These four recommendations ought to direct the development of international investment law.

In order to maintain legal clarity, predictability, and the promotion of the flow of foreign investment sustainably and responsibly, it is recommended that the World Investment Organisation (WIO) be formed with permanent procedures for resolving investment disputes. The World Trade Organization was used as an example because it is frequently referred to as a 'rich man's club', as it places the interests of developed nations above those of less-developed ones. Additionally, N. Butler and S. Subedi argued that none of the existing institutions is focused on handling investment-related issues.[53] Its decision-making process is impeding its capacity to reach swift, strong judgments. Considering this, the WIO will tackle these challenges on its own.

Unfortunately, the legislative and regulatory framework of international investment laws was not addressed in the WIO's suggestion.[54] Its emphasis was transferred from the interpretation and wording of the Law itself to decision-making and conflict settlement. Even if the benefits of reform appear to outweigh the costs of implementing it, reform may be thwarted due to information issues, public choice, or network-related costs.

52 Tai-Heng Cheng, 'Power, Authority and International Investment Law' (2005) 20 (3) American University International Law Review 465.

53 Nicolette Butler and Surya Subedi, 'The Future of International Investment Regulation: Towards a World Investment Organisation?' (2017) 64 Netherlands International Law Review 43, doi: 10.1007/s40802-017-0082-5.

54 ibid.

5 CONCLUSIONS AND RECOMMENDATIONS

The purpose of the international investment regime is vague and ambiguous, which leads to uncertainty in its interpretation. The scope of IIAs is also unclear. This paper explored the main substantive and procedural challenges faced in IIL, which were illustrated above. These challenges relate to the vagueness and ambiguity of investment disciplines' substantive content, the crucial issues in the interpretation of IIAs, and other issues. This paper explored various recommendations proposed by different scholars and recommends that we resolve all the challenges set out in this paper and reflect Tai-Heng Cheng's way of overcoming IIL shortcomings via decision-makers. Henceforward, international investment law will improve through five structural adjustments – it is not enough to develop WIO as suggested by N. Butler and S. Subedi as they do not address the policy and regulatory framework of international investment laws. However, this paper proposes the development of a unified global convention that is formatted to provide a uniform and neutral set of substantive and procedural rules to regulate international investments, and that would, in fact, meet the optimal objectives of the state and investor in the most appropriate manner according to the current legal investment instruments.

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Research Article

THE EFFECTIVENESS OF GREEN BANKING IN SAUDI ARABIA

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Summary: 1. Introduction – *1.1 The concept and definition of green banking. – 1.2 The concept of an eco-friendly bank. – 1.3. The importance of green banking. – 1.4. The main features of green banking. – 1.5. Advantages and disadvantages of green banking. – 1.5.1 Benefits of green banking. – 1.5.2 Limitations of green banking.* – 2. Policy and Regulatory Framework of Green Banking System. – *2.1 Green banking guide. – 2.2 The role of regulators in promoting green banking. – 2.3 The rise of sustainable finance regulations. – 2.4 Countries with sustainable finance regulations. – 2.5 Issues and cases on the green banking system.* – 3. Conclusion and Recommendations.

Keywords: Green banking, sustainability, eco-friendly bank, Saudi Arabia.

ABSTRACT

Background: *Saudi Arabia is one of the countries in the world to launch ESG and Sustainable finance with the aim of not only contributing to global SDGs but also toward the achievement of the Kingdom's Vision 2030. The need for sustainable financial practices has appeared as green finance and funding renewable energy projects as well as implementing sustainable*

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Author, solely responsible for research and writing. **Competing interests:** The author declares no conflict of interest. **Disclaimer:** The findings and conclusions reported in this publication are purely based on the authors' research. The authors accept no liability for any potential mistakes or inaccuracies that may exist. The material supplied is intended solely for academic purposes and should not be construed as professional advice or guidance.
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practices in operations and services. This paper analyses the concept of green banking, its importance, and advantages and disadvantages to achieve sustainability for the financial sector in Saudi Arabia.

Methods: *The paper utilises legal frames and documents to conduct a legal analysis of green banking as a new concept in Saudi Arabia. The secondary data is also used to support the analysis, and the qualitative approach is employed to discuss the significance and features of green banking.*

Results and Conclusions: *Saudi Arabia continues to face substantial obstacles in adopting green banking. These difficulties include the absence of explicit regulations and recommendations from the regulatory bodies and the high cost of implementing green banking practices in a market that is primarily dependent on oil-based sectors. It is, therefore, important the regulatory bodies shed more focus on green banking and must enact a regulatory framework to encourage financial institutions to support projects that uphold sustainability.*

1 INTRODUCTION

Green banking has become increasingly important in Saudi Arabia and other countries worldwide due to global efforts to reduce greenhouse gas emissions and preserve the environment. Being a significant player in the global oil business, Saudi Arabia has made efforts to make banking more environmentally friendly[2]. It has acknowledged the significance of the transition to a low-carbon economy. These programs cover a wide variety of activities, including incorporating green finance and funding renewable energy projects, as well as implementing sustainable practices in operations and services, such as paperless banking and electronic statements.[3]

Notwithstanding attempts, Saudi Arabia continues to face substantial obstacles in adopting green banking. These difficulties include the absence of explicit regulations[4] and recommendations from the government, the low level of public awareness of environmental sustainability, and the high cost of implementing green banking practices in a market that is primarily dependent on oil-based sectors.

The Saudi Arabian Monetary Authority (SAMA) serves as the central bank of Saudi Arabia. This institution has been implementing some strategies to encourage financial institutions to adopt sustainable banking practices.[5] The move is expected to foster the promising green bond market in the KSA, giving investors transparency and reassurance around the environmental authorisations of investments. Green bond has become popular, and it is used as debt instrument given to financial institutions to help in supporting sustainable projects.[6]

Several financial institutions in Saudi Arabia have also focused on green initiatives. For example, Al Rajhi Bank has launched a sustainable finance framework with assistance from Standard Chartered Bank. The framework sets out Green Loan Principles to be followed in

2 Shah Md Ahsan Habib, *Green Recovery Approach of Islamic Banks in COVID-19 Regime* (Greentech Foundation 2020).

3 Ravi Meena, 'Green Banking: As Initiative for Sustainable Development' (2013) 3 (10) Global Journal of Management and Business Studies 1181.

4 Adeboye Oyegunle and Olaf Weber, *Development of Sustainability and Green Banking Regulations: Existing Codes and Practices* (Papers Series no 65, CIGI 2015).

5 Hamzeh F Assous, 'Saudi Green Banks and Stock Return Volatility: Gle Algorithm and Neural Network Models' (2022) 10 (10) Economies 242, doi: 10.3390/economies10100242.

6 Echo Kaixi Wang, 'Financing Green: Reforming Green Bond Regulation in the United States' (2017) 12 (2) Brooklyn Journal of Corporate, Financial & Commercial Law 467; Nathan Bishop, 'Green Bond Governance and the Paris Agreement' (2019) 27 (3) NYU Environmental Law Journal 377.

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financing sustainable projects.[7] As the concept of green banking takes shape, it is expected that other banks will also adopt similar initiatives to promote sustainable finance and reduce the environmental impact of their operations. This may include investing in green technologies, offering eco-friendly products and services, and supporting sustainable projects in the community. Eventually, green banking can benefit both the environment and the bank's bottom line by attracting socially responsible customers, reducing operational costs, and mitigating environmental risks.

This paper discusses the concept and definition of green banking. Precisely, it will discuss how banks incorporate environmental and social factors into their operations. In addition, the concept of eco-friendly banking and the importance of green banking in promoting sustainable development will be discussed. Furthermore, it will highlight the advantages and disadvantages of this approach. Lastly, this paper will draw a conclusion based on the main points discussed.

1.1 The concept and definition of green banking

Green banking is a banking concept that promotes environmentally friendly and sustainable operations and investments.[8] It is a term that acknowledges banks' responsibility in supporting environmental sustainability via the incorporation of environmental, social, and governance (ESG) aspects into their operations, goods, and services.[9] Green banking has gained popularity in recent years as people become more concerned about climate change, pollution, and other environmental challenges.

Green banking has its roots in the broader concept of sustainable finance, which seeks to promote sustainable economic growth and development while also taking into account environmental and social factors. The concept of sustainable finance began in the 1980s as a response to growing concerns about environmental degradation and the social impacts of economic development. The idea of green banking was pioneered by Triodos Bank, a financial institution founded in 1980 in the Netherlands, which focused on environmental sustainability from the outset.[10] They recognised the importance of upholding sustainable practices in the banking industry and developed a unique model that incorporated social and environmental responsibility into their financial operations. In the United States, Reed Hundt and Ken Berlin developed the concept of green banks during the 2008 Obama-Biden Transition Team as a means to promote the development of clean energy.[11] Over time, sustainable finance has evolved into a more specialised field that includes green banking as a key component.

Green banking dates back to the early 2000s, when a few forerunner banks saw the need to include environmental considerations in their operations. For example, HSBC was the first big bank to declare its commitment to carbon neutrality in 2005. Several other institutions have since followed suit, and green banking is becoming an increasingly common way to banking globally.

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7 'Al-Rajhi Bank concludes landmark $1bn sustainable Shariah-compliant financing facility' (*Arab News*, 20 September 2022) <https://www.arabnews.com/node/2166276/corporate-news> accessed 25 April 2023.

8 Taslima Julia and Salina Kassim, 'Green Banking' in R Haron, M Md Husin and M Murg (eds), *Banking and Finance* (IntechOpen 2020) ch 6, doi: 10.5772/intechopen.93294.

9 T Gavrilko and L Pobochenko, *Green Banking as a Tool for Implementing the Model of a Socially Responsible Banking Institution* (Baltija Publishing 2021).

10 Suborna Barua, *Principles of Green Banking* (De Gruyter 2020) 39, doi: 10.1515/9783110664317.

11 Mir Mahmudul Haque Chowdhury, 'Sustainable Environment: Necessities of Green Banking' (*Daily Sun*, 18 August, 2018) <https://www.daily-sun.com/printversion/details/330334/Sustainable-Environment:-Necessities-of-Green-Banking> accessed 25 April 2023.

Green banking is founded on the understanding that banks play a vital role in fostering long-term economic growth and development. Banks may contribute to encouraging sustainable investment and mitigate the negative environmental and social repercussions of economic activity by incorporating ESG elements into their operations, products, and services. Green banking methods have recently been implemented in order to match the concept of socially responsible investing (SRI).[12] SRI seeks to make a monetary profit while simultaneously providing social and environmental advantages in order to promote constructive societal change.[13] SRI dates back to the 1950s when investors began to look out for investments in businesses that did not align with their religious beliefs. Over time, SRI has evolved into a distinct investment strategy that takes into consideration environmental, social, and governance factors when making investment decisions. SRI uses both negative screening techniques, which are based on values, and positive screening techniques, which consider risk and return, to maximise financial returns.[14] Ultimately, SRI embraces the concept of the 'Triple Bottom Line', which incorporates ecological, social, and economic criteria.

The aspects of green banking are numerous. The assistance that green banking provides to sustainable initiatives is one of its best qualities. This entails urging clients to concentrate on green initiatives, including sustainable food production, renewable energy, and energy efficiency. Banking institutions can contribute their own cash to these initiatives as well, encouraging long-term economic expansion.

The implementation of environmentally friendly methods inside the bank's own operations is another crucial component of green banking. This might involve lowering energy use and waste, supporting ecologically friendly transportation, and employing eco-friendly goods and materials. Banks may lessen their own environmental impact and encourage sustainable business practices by implementing these strategies. An essential step in encouraging sustainable economic growth and development is the idea of 'green banking.' Banks may support sustainable investment and lessen the unfavourable environmental and social effects of economic activity by incorporating ESG elements into their operations, products, and services. The significance of green banking is projected to increase as long as the globe faces mounting environmental problems.[15]

1.2 The concept of an eco-friendly bank

An eco-friendly bank is a financial organisation that stresses environmental responsibility and sustainability in its operations and policies.[16] This may take many forms, including investments in renewable energy and clean technologies, funding environmentally friendly initiatives, and lowering the bank's carbon footprint through energy-efficient facilities and transportation. Eco-friendly banks also place a premium on openness and accountability, informing clients about where their money is being invested and the beneficial environmental

12 Broto Rauth Bhardwaj and Aarushi Malhotra, 'Green Banking Strategies: Sustainability through Corporate Entrepreneurship' (2013) 3 (4) Greener Journal of Business and Management Studies 180, doi: 10.15580/GJBMS.2013.4.122412343.

13 Ali Saleh Alshebami, 'Evaluating the Relevance of Green Banking Practices on Saudi Banks' Green Image: The Mediating Effect of Employees' Green Behaviour' (2021) 22 (4) Journal of Banking Regulation 275, doi: 10.1057/s41261-021-00150-8.

14 Barua (n 10) 39.

15 Fatema Khairunnessa, Diego A Vazquez-Brust and Natalia Yakovleva, 'A Review of the Recent Developments of Green Banking in Bangladesh' (2021) 13 (4) Sustainability 1904, doi: 10.3390/su13041904.

16 Kern Alexander, *Greening Banking Policy: In support of the G20 Green Finance Study Group* (GFSG 2016).

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impact of their financial decisions. Individuals and corporations may help to mitigate climate change and promote a more sustainable future by supporting eco-friendly banking. Amalgamated Bank, Green Century Capital Management, and Triodos Bank are some examples of environmentally responsible banks.[17]

Eco-friendly banks acknowledge that their lending and investment decisions might have a detrimental impact on the environment and take steps to prevent funding for damaging initiatives. Some eco-banks not only refuse to finance projects that degrade the environment but also actively sponsor renewable energy or climate-positive projects.[18] There is no standard benchmark for eco-friendly banking since banks do not consistently report the environmental consequences of their loans or reveal fossil fuel funding. Yet, there are initiatives and organisations dedicated to promoting sustainable banking solutions.

The growing concern about climate change and environmental damage has given rise to an increased interest in the idea of eco-friendly banking. Today, customers are searching for methods to match their beliefs with their banking selections as they become more conscious of the effects their spending choices have on the environment. It has been shown that some banking decisions may have a negative effect on the environment. Customers have the chance to consider their decisions and opt for banks that are environmentally friendly. Promoting sustainable investing is one of the key ways eco-friendly banks do business. These banks provide investments in businesses that adhere to high environmental, social, and governance (ESG) criteria.[19] This indicates that the businesses being backed are dedicated to minimising their negative effects on the environment, treating their workers fairly, and practicing open and honest commerce. Through investments in these types of firms, financial institutions that operate under a sustainable business model encourage other institutions to operate under the same framework.

Eco-friendly banks offer products that encourage environmental sustainability in addition to investing in sustainable businesses.[20] There are a number of financial institutions that provide green loans to fund initiatives that minimises energy usage, for instance, solar panel installations or energy-efficient home improvements. It is also worth noting that some financial institutions offer green mortgages, which give discounts or other incentives to homeowners that satisfy specific environmental requirements. In addition, eco-friendly financial institutions prioritise their own operations to minimise their environmental impact. This can include using renewable energy sources, implementing recycling programs, reducing paper usage, and promoting remote work to reduce carbon emissions from transportation. The main aim of eco-friendly banks is to support well-being through projects that are environmentally friendly. It has emerged in the recent past that many eco-friendly banks prioritise partnerships with organisations that align with their values, such as environmental non-profits or social justice groups.

It has been shown that banking with an environmentally friendly bank can also provide societal advantages. Eco-friendly banks have a direct positive impact on society in many ways. These banks contribute to a more sustainable and fair economy by encouraging sustainable investing and ecologically responsible operations. They are also leading by example for other financial institutions, urging them to follow suit and driving systemic

17 Francisco Climent, 'Ethical Versus Conventional Banking: A Case Study' (2018) 10 (7) Sustainability 2152, doi: 10.3390/su10072152.

18 'Sustainable Banks in the US: What they are and a list of eco-friendly options: Mighty Deposits Guide' (*Mighty Deposits*, 22 February 2023) <https://mightydeposits.com/posts/environmentally-friendly-banks> accessed 25 April 2023.

19 Gavrilko and Pobochenko (n 9).

20 Nigamananda Biswas, 'Sustainable Green Banking Approach: The Need of the Hour' (2011) 1 (1) Business Spectrum 32.

reform. Eco-friendly banks reflect a developing trend in the financial industry that promotes sustainability and ethical standards.[21] By offering clients options to participate in and support sustainable business practices, eco-friendly banks are creating positive change and inspiring others to follow suit.

Eco-friendly banks are a good trend in the financial industry that stresses sustainability and ethical principles. These banks provide products and services that encourage sustainable investment and help in the establishment of a cleaner environment. Individuals may contribute to a more sustainable and fair economy by aligning their financial decisions with their principles by banking with an eco-friendly financial institution. It is worth noting that if climate change and environmental degradation remain important global challenges, the significance of these banks will only expand.

1.3 The importance of green banking

The necessity to transition to a more sustainable economic model has spurred the growth of green banking. In many countries, the current economic model is not environmentally friendly because it is mainly fuelled by fossil fuels and unsustainable initiatives. To begin with, green banking has been at the centre stage in encouraging and supporting investments that protect the environment. According to Tara et al. (2015), green banking plays a significant role in minimising greenhouse gas emissions and encouraging renewable energy investments.[22] Banks can offer loans, grants, and other types of financing to facilitate ecologically friendly projects, for example, renewable energy, energy efficiency, and sustainable crop production. From these findings, financial institutions contribute directly towards the reduction of carbon footprint and foster a low-carbon economy.

Green banking could play a role in mitigating environmental concerns as well as encouraging responsible financial operations. It has been demonstrated that the banking industry is more prone to a variety of environmental hazards, including climate change-related risks, natural catastrophes, and water scarcity. These environmental hazards can have a huge impact on practices and financial performance in financial institutions. The financial institutions have the option to decrease their exposure to these risks and support responsible banking practices by implementing sustainable operations and investing in environmentally friendly projects. Doing so can help financial institutions establish a great reputation in the market with consumers and investors, thus building trust and loyalty. This will also help in fighting the fierce competition that is currently being experienced in the banking industry. In a study by Ibe-enwo et al. (2019), green banking practices can significantly improve client loyalty, which can result in better profitability and competitive advantage.[23]

By supporting charitable organisations and tackling social problems, green banking may aid in the advancement of social sustainability. Social sustainability involves the implementation of projects and programs that protect the well-being of the organisation.[24] By lending

21 Abin P Jose, 'A Study on Issues and Challenges of Green Banking Services in Kerala' (The COVID-19: Business Trends, Challenges and Opportunities: Virtual National Conference, Kristu Jayanti College, Bengaluru, 23 October 2020) 134.

22 Kanak Tara, Saumya Singh and Ritesh Kumar, 'Green Banking for Environmental Management: A Paradigm Shift' (2015) 10 (3) Current World Environment 1029, doi: 10.12944/CWE.10.3.36.

23 Grace Ibe-enwo et al, 'Assessing the Relevance of Green Banking Practice on Bank Loyalty: The Mediating Effect of Green Image and Bank Trust' (2019) 11 (17) Sustainability 4651, doi: 10.3390/su11174651.

24 Han Lin et al, 'An Indicator System for Evaluating Megaproject Social Responsibility' (2017) 35 (7) International Journal of Project Management 1415, doi: 10.1016/j.ijproman.2017.04.009.

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money to and giving grants to initiatives that deal with social problems like eradicating poverty, advancing education, and enhancing healthcare, financial institutions may assist social sustainability. This will improve the well-being of society and bring social inclusion. A study by Aubhi (2016) noted that through funding projects that deal with social issues, green banking might significantly contribute to the promotion of social sustainability.[25] Also, through supporting sustainable investments and practices, green banking may help accomplish Sustainable Development Goals (SDGs).[26] The SDGs are a list of objectives the UN adopted to encourage sustainable development on a global scale. By funding initiatives that address issues like poverty, hunger, health, education, clean water and sanitation, and other social problems, green banking can help to achieve these goals. According to a study by Sachs et al. (2019), the strategies used by green financial institutions can contribute to the achievement of SDGs through the promotion of sustainable investments and projects.[27]

Another benefit of green banking is that it can draw in new investors and consumers who are concerned about the environment and society. Consumers and investors have an increasing need for sustainable financial goods and services, according to a study by Dalia and Vitaly (2021).[28] Financial institutions may draw in these clients and investors as well as develop a devoted clientele by implementing green banking practices. As a result, the bank may experience more profitability and a competitive edge. Also, while making investment decisions, investors are increasingly taking environmental, social, and governance (ESG) considerations into account. Financial institutions may leverage a burgeoning market for sustainable financing and draw in ESG-conscious investors by showcasing a commitment to these concerns.

In conclusion, green banking is crucial for advancing sustainability in the social, economic, and environmental spheres. It is important to improve the sustainability of society through better financial practices. By implementing sustainable practices and funding initiatives that uphold social and environmental responsibility, banks may contribute hugely to the promotion of sustainable development. Several studies have provided data that emphasises the value of green banking in fostering sustainable growth and fulfilling the SDGs. Thus, promoting green banking practices and developing a sustainable economy require cooperation between politicians, regulators, and financial institutions.

1.4 The main features of green banking

Green banking is becoming increasingly popular due to its focus on promoting sustainability and environmentally responsible lifestyles. One of the most appealing aspects of green banking is its range of green products and services, which are designed to help customers lead a more eco-friendly life.[29] These include green car loans, green mortgages, energy savings accounts, and socially responsible investment accounts. For instance, green car loans are specifically intended to finance the purchase of environmentally friendly vehicles such as

25 Rezwan Ul Haque Aubhi, 'The Evaluation of Green Banking Practices in Bangladesh' (2016) 7 (7) Research Journal of Finance and Accounting 93.

26 Julia and Kassim (n 8).

27 Jeffrey D Sachs et al, 'Importance of Green Finance for Achieving Sustainable Development Goals and Energy Security' in JD Sachs et al (eds), *Handbook of Green Finance* (Springer 2019) 3. doi: 10.1007/978-981-13-0227-5_13.

28 Dalia Streimikiene and Vitaliy Kaftan, 'Green Finance and the Economic Threats During COVID-19 Pandemic' (2021) 19 (2) Terra Economicus 105, doi: 10.18522/2073-6606-2021-19-2-105-113.

29 Abdulrahman Abdullah Alsughayir, 'Does Green Product Innovation Affect Performance of Saudi Chemical Industrial Firms?' (2017) 11 (2) Journal of Social Science Research 2355, doi: 10.24297/jssr.v11i2.6057.

electric cars or hybrids. On the other hand, green mortgages provide financial assistance to customers who are looking to buy or renovate energy-efficient and environmentally friendly homes. Typically, these products come with lower interest rates and more favourable terms than traditional loans and mortgages, as customers who opt for these products are deemed less risky, considering their commitment to environmental sustainability.

In contrast to other financial institutions, green banks are highly committed to supporting sustainable and environmentally conscious practices. They put great emphasis on minimising negative environmental impacts and cultivating a culture of sustainability. To ensure that their investment and funding decisions align with their environmental guidelines, green banks have implemented Environmental Due Diligence (EDD) – a strategy used to evaluate a company's environmental impacts before deciding to provide funding.[30] Overall, green banking is a promising approach towards achieving a more eco-friendly future, and it is commendable to see that the financial industry is taking steps to promote sustainability.

Supporting sustainable practices is an important feature of green financial institutions. In order to lessen their impact on the environment, green banks also support sustainable practices within their own practices. These activities include using recycled materials, cutting carbon emissions, and encouraging paperless transactions that involve the use of electronic platforms. Green banks also employ renewable energy sources like solar, wind, and hydropower to lessen their influence on the environment and their energy expenses. In order to lower energy usage in their premises, green banks are also putting into place energy-saving measures, including deploying more effective cooling and heating systems and installing LED lighting. Green banks support environmental sustainability and the battle against climate change by lowering their energy footprint.[31]

Another important feature of green banking is automation and online banking. Green banks are adopting the latest technologies to make banking easier for their customers while reducing their environmental footprint. Customers can bank online, view their balances, pay bills and make transfers without having to go to the bank in person. This reduces the costs and environmental impact of car travel, reducing greenhouse gas emissions and conserving natural resources.

Responsible investing is a feature that all green banks are associated with. Green banks can help clients invest responsibly by offering them ethical and sustainable investment funds.[32] These funds are made up of stocks and bonds from companies that have sustainable environmental, social responsibility, and governance (ESG) practices. Clients can thus contribute to the transition to a more sustainable economy while obtaining a financial return.

Green banks can offer green microcredits to help customers finance sustainable projects. These microcredits can be used to install solar panels, improve the energy efficiency of buildings or buy electric vehicles. Customers can thus carry out projects that contribute to the protection of the environment while benefiting from financial support. In addition, green banks can offer green credit cards that offer benefits to customers who adopt green behaviours. For example, a green credit card can offer discounts on purchases of environmentally friendly products or cash back for purchases made from eco-friendly merchants.[33]

30 Raad Mozib Lalon, 'Green Banking: Going Green' (2015) 3 (1) International Journal of Economics, Finance and Management Sciences 34, doi: 10.11648/j.ijefm.20150301.15.

31 Hyoungkun Park and Jong Dae Kim, 'Transition Towards Green Banking: Role of Financial regulators and financial institutions' (2020) 5 (1) Asian Journal of Sustainability and Social Responsibility 1, doi: 10.1186/s41180-020-00034-3.

32 Biswas (n 20).

33 Huidong Sun et al, 'CSR, Co-Creation and Green Consumer Loyalty: Are Green Banking Initiatives Important? A Moderated Mediation Approach from an Emerging Economy' (2020) 12 (24) Sustainability 10688, doi: 10.3390/su122410688.

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Green banks are associated with offering carbon offset programs to help customers reduce their carbon footprint. Customers can offset their greenhouse gas emissions by financing emission reduction projects, such as planting trees, developing renewable energy sources, or improving the energy efficiency of buildings. Supporting sustainable businesses is another feature of green banks. They offer loans at preferential rates or by investing in green projects. Banks can thus encourage companies to adopt sustainable practices in terms of the environment and social responsibility.

1.5 Advantages and disadvantages of green banking

1.5.1 Advantages of green banking

Supports Sustainability – By funding ecologically friendly enterprises, green banking encourages sustainable development. Banks may aid in lowering the carbon footprint of companies, promoting renewable energy, and protecting natural resources through funding green initiatives. Green banking is another strategy for encouraging consumers and the general public to act sustainably.

Attracts Millennial Customers – Green banking practices can draw in millennial clients who are more concerned with the environment and social responsibility. Younger generations are becoming more and more interested in doing business with banks that promote sustainability and share their values. Banks may draw in this crucial client segment by implementing green banking practices.

Fosters Partnerships – Partnerships between financial institutions, governments, and other stakeholders may be facilitated through green banking. When various stakeholders come together, a greater output is achieved. To assist the implementation of green policies and finance initiatives for sustainable development, banks might work with governments and environmental organisations.[34] These collaborations have the potential to increase the effect of green banking practices and build a more sustainable future.

Enhances Reputation – Green banking may improve banks' standing as socially conscious businesses. Consumers and investors are getting more and more interested in working with banks that have a solid history of supporting environmental projects.[35] Banks may boost their reputation and draw in new clients by adopting green banking practices.

Mitigates Risks – Climate change and environmental risks may be reduced with the use of green finance.[36] Banks can lessen their exposure to lending to and investing in businesses that produce a lot of greenhouse emissions or engage in other ecologically harmful practices. Banks can lower the default and loss risks related to these businesses by refraining from making such investments.

Generates Revenue – By establishing new markets and products, green banking may help in generating revenue that can be further used for green projects. It is worth noting that banks can create new goods and services to meet the rising demand for green products and services. In the recent past, the world has shifted to sustainability, and this includes sustainable banking. Banks might, for instance, provide green credit cards, green loans, and

34 Julia and Kassim (n 8).

35 Aftab Alam, Mohammad Almotairi and Kamisan Gaadar, 'Green Marketing in Saudi Arabia Rising Challenges and Opportunities, for Better Future' (2012) 8 (11) Journal of American Science 144.

36 Park and Kim (n 31).

green mortgages to reward clients for practicing environmental responsibility. For example, reward credit and debit cards offered by The Sierra Club and Defenders of Wildlife to customers who contribute towards environmental protection.[37]

Promotes Innovation – By supporting the creation of new technologies and methods that assist sustainable development, green banking encourages innovation. Today, innovation is a thing that every institution strives to achieve. It has been noted that innovation is possible where there is financial and human capital.[38] Banks may help the development of innovative technologies that lessen the industry's environmental effects and encourage sustainable practices by investing in research and development. Continuous innovation in every sector would lead to environmental sustainability.

1.5.2 Disadvantages of green banking

Higher Costs – There is a significant difference in terms of costs between conventional and green banks. Comparing green banking to conventional banking, costs may be greater.[39] To implement green banking practices, banks might need to make investments in new technologies, train staff in new procedures, and hire specialist experts. Customers may be charged more fees or pay higher interest rates as a result of these charges.

Limited Scope – Green banking has a limited scope and impact on the overall banking industry. Green banking practices are often adopted by a small number of banks that are committed to sustainability. This limits the impact of green banking practices on the overall banking industry.

Lack of Standards – It has been shown that a consistent approach to sustainability is lacking in green banking. It can be challenging to compare bank practices since various banks may have different ideas of what constitutes sustainable development. Customers find it difficult to compare the environmental effect of various banks due to the absence of guidelines.

Potential for Greenwashing – Greenwashing is a risk associated with green banking, in which financial institutions overstate or make misleading claims about their environmental operations in an effort to boost their public perception.[40] It is possible to deceive customers into believing that their bank is more environmentally conscious than it actually is.

Risk Management Challenges – Banks may face difficulties managing risk as a result of green banking. Funding green initiatives can be hazardous since the methods and technology employed could be cutting-edge and unproven. If the projects they sponsor receive bad press or if their green investments do not provide the desired outcomes, banks may also suffer reputational concerns.

Lack of Expertise – It has been reported that specialised knowledge and experience are needed for green banking, which may not be easily accessible inside banks. Banks may need to spend money on staff training and recruiting who have experience in renewable energy, sustainability, and other relevant disciplines. Banks may find it challenging to efficiently integrate green banking practices due to a lack of such knowledge.

37 Meena (n 3).

38 Alsughayir (n 29).

39 Biswas (n 20).

40 Sofia von Cotzhausen Modin and Vanessa Linde, 'Green Banking: A Qualitative Study on how Nordea Bank Avoids Greenwashing' (Master's thesis, Uppsala University 2023).

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Competitive Disadvantage – According to Miah et al. (2021), green financial institutions might put conventional banks at a competitive disadvantage.[41] This is because conventional banks, in most cases, do not place a high priority on sustainability. It is important to note that financial institutions that place a strong priority on sustainability may face competitive disadvantages if adopting green banking practices results in greater costs or worse profits. As a result, this may prevent banks that place a higher priority on profitability than sustainability from adopting green banking practices.

2 POLICY AND REGULATORY FRAMEWORK OF GREEN BANKING

Financial institutions may choose to participate in green projects voluntarily or as a condition of compliance. The duty of central banks in tackling ecological threats and promoting the growth of green banking has come under scrutiny over the past few years due to growing public awareness of the dangers presented by climate change and the political will to solve the issues. However, central banks might not be the only ones responsible for overseeing and regulating banks; banks also have an autonomous obligation to green their operations. The involvement of central banks in relation to green banking differs to an extent as a result of variations in mandates, fundamental goals, and levels of inter-agency collaboration. Due to these variations, various regulatory and policy frameworks exist in a number of countries and are currently being developed in several more.[42] The Sustainable Banking Network (SBN) and the Central Banks and Supervisors Network for Greening Financial System (NGFS) were both born out of this insight.

Incorporating social responsibility and environmental sustainability into banking operations is known as 'green banking'. A policy and regulatory framework are required to guarantee that banks support environmentally friendly activities. There are broad standards that may be followed, although this framework may differ based on the nation or location. Governments have the authority to enact rules and regulations requiring banks to support sustainable business practices. Green investments, green bonds, and incentives for the use of renewable energy sources can all fall under this category. The central bank can create regulations that support green finance objectives and sustainability risk management in the banking sector. Through awareness campaigns, training in green finance, and voluntary rules of behaviour, banking sector groups may also advance green banking.

Financial institutions can interact with their customer base to learn about their desires and worries regarding environmental and social concerns. The establishment of sustainable practices and policies can benefit from this involvement. In order to promote energy-efficient purchases, environmentally friendly transportation, and renewable energy projects, banks can also provide green banking products, including green loans and green mortgages. Finally, sustainability reports, which offer transparency about a company's environmentally friendly procedures, environmental effects, and social responsibility, may be used by banking institutions to report on their ESG performance.

41 Mohammad Dulal Miah, Syed Mahbubur Rahman and Mahreen Mamoon, 'Green Banking: The Case of Commercial Banking Sector in Oman' (2021) 23 (2) Environment, Development and Sustainability 2681, doi: 10.1007/s10668-020-00695-0.

42 Barua (n 10) 65.

2.1 Green Banking Guide

The Green Banking Guide (GBG) includes a collection of rules and concepts intended to support ethical banking procedures. The GBG outlines procedures or guidelines and practices that financial institutions may use to lessen their carbon footprint, manage environmental risks, and aid in the shift to a low-carbon economy. Green banking aims to persuade banks to match their business operations with economic growth, social responsibility, and environmental sustainability.

Financial regulators, political entities, non-governmental organisations (NGOs), and trade groups are among the stakeholders accountable for the development of the GBG. The regulatory environment supporting green banking practices is shaped in large part by financial regulators. They establish criteria and rules that banks must adhere to in order to guarantee that their operations are socially and ecologically responsible. Governmental organisations offer incentives and assistance to entice banks to use sustainable practices. NGOs and trade groups support sustainable banking practices by offering resources and data to assist banks in putting them into effect. In the end, it is up to banks to embrace and put into practice green banking methods that are consistent with their beliefs and corporate goals.

The GBG addresses environmental and social risks in lending, providing funding for environmentally friendly initiatives, and lowering banks' carbon footprints. The goal of the GBG is to make financial institutions and development finance institutions (DFIs) less vulnerable to environmental risk, to uphold their environmental protection obligations, and to offer to finance for the transformation of the economy into one that is resource- and climate-efficient.[43] As organisers of economic activity, banks and DFIs are directly exposed to environmental concerns due to the decisions of their customers. While it is ultimately the borrower's obligation to ensure compliance with regulations pertaining to the environment, banks are urged to put in place the proper systems to recognise, evaluate, and reduce environmental risks in order to avoid unjustified financial losses.

The GBG is the initial in a series of activities destined to create a banking industry with a sustainable economic environment. Every upcoming step will complement the GBG by progressively adding elements like social issues or green lending stages, giving banks the time to make necessary adjustments prior to the GBG becoming legislation. In Pakistan, GBG has been developed, and it has helped in creating a sustainable environment by banks. The 2013 recommendations from the Securities and Exchange Commission of Pakistan (SECP), such as the Code of Corporate Governance and the Corporate Social Responsibility (CSR) Voluntary recommendations, operate concurrently with the GBG. The second set of recommendations is aimed at all firms and, in contrast to the GBG, is a larger notion that encompasses social and economic responsibility (climate change).

Two sets of voluntary guidelines were recently created for the green bond market to foster openness and standardisation: the Green Bond Principles (the 'GBPs') provided by the ICMA;[44] and the Climate Bonds Standard issued by the Climate Bond Initiative (the 'CBI'),[45] which is an NGO. The Climate Bonds Standards, which expand on the GBPs to give a more comprehensive set of conditions to be implemented by a green bond issuer, are in keeping with these recommendations. This means the two sets of criteria strongly

43 State Bank of Pakistan, Green Banking Guidelines: IH&SMEFD Circular No 08 of 9 October 2017 (Infrastructure, Housing & SME Finance Department 2017).

44 International Capital Market Association, Green Bond Principles: Voluntary Process Guidelines for Issuing Green Bonds (ICMA June 2018).

45 Climate Bonds Initiative, Climate Bonds Standard, Version 3.0: International best practice for labelling green investments (CBI December 2019)

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emphasise openness and issuer disclosure with regard to the initiatives which may be funded with revenues from bond issues.[46]

One of several recommendations designed to encourage sustainable business operations is the GBG. While the GBG concentrates mainly on the banking industry and environmental sustainability, other standards, for instance, the Code of Corporate Governance and Corporate Social Responsibility (CSR) Voluntary Guidelines released by the Securities and Exchange Commission of Pakistan (SECP) in 201,3 focus on a broader spectrum of concerns, for example as social and economic obligations, climate change, and sustainable growth.[47] The Code of Corporate Governance offers an architecture for corporate governance procedures that support transparent, accountable, and moral behaviour. It lays down guidelines and recommended procedures for board duties, rights of shareholders, board composition, and accountability and openness. The Corporate Social Responsibility Voluntary Guidelines, In the meantime, offer recommendations on how firms should contribute to social accountability and sustainable growth, comprising promoting community growth, environmental preservation, rights for workers, and the safeguarding of human rights.

2.2 The role of regulators in promoting green banking

Climate change is anticipated to increase and is no longer regarded just as a danger to the natural world because it impacts every sector of the economy. In addition, threats that come up as a result of climate change pose physical and transitional issues to the financial system. To counteract the undesired effects, central banks, regulators, and policymakers have started to implement numerous green banking programs; however, the strategy used thus far differs slightly across industrialised and developing nations.[48]

Climate change financial losses have grown more visible and important to the banking industry, and an increasing number of central banks and banking regulators have begun to take them seriously.[49] Affiliates of the Networking for Greening the Financial System (NGFS) also accept that risks associated with climate change have grown into financial concerns and that managing risks associated with climate change is, therefore, the responsibility of central banks and regulators.[50] Before the introduction of the NGFS, the Task Force on Climate-related Financial Disclosure (TCFD) and the G20 Sustainable Finance Study Group, previously referred to as the G20 Green Finance Study Group, were formed to achieve the same goals.[51]

The public sector, specifically central banks as well as financial regulators, have to take an instrumental part in integrating green banking and ensuring that threats related to climate change are appropriately determined, examined, and reported, even though systems of the same types and efforts led by industries are important drivers of creativity and risk mitigation. Many central banks, nevertheless, are still hesitant to loosen the capital thresholds for green financing in the absence of conclusive proof that green finance actually entails reduced risks.

46 Edana Richardson, 'Standardising Responsible Islamic Finance: A Review of Green, Social and Sustainability Sukuk' (2020) 8 (8) Kilaw Journal 189.

47 'Green Banking Guidelines' (*Green Finance Platform*, 2017) <https://www.greenfinanceplatform.org/policies-and-regulations/green-banking-guidelines> accessed 25 April 2023.

48 Park and Kim (n 31).

49 Pierre Monnin, *Central Banks and the Transition to a Low-Carbon Economy: Discussion Note 2018/1* (Council on Economic Policies 2018) doi: 10.2139/ssrn.3350913.

50 Network for Greening the Financial System, *First Progress report* (NGFS October 2018).

51 Park and Kim (n 31).

The responsibility of central banks and banking regulators in addressing climate change and environmental issues is currently the subject of intense discussion.[52]

Policymakers have a role to play in promoting green banking. Policy actors can significantly contribute to the expansion of sustainable banking. First, policy actors may encourage the use of sustainable financing by, for example, increasing the supply aspect of such money by providing incentives for investment. Second, policymakers should encourage the creation of investment tools and fund designs that are especially appropriate for sustainable financing. Third, regulatory agendas for standardising ESG performance measurements can be established by policy actors. In addition to these three goals, policy actors may help grow the pipeline of investable initiatives and transactions by fostering information exchange and capacity building. This will help increase the demand for investable ESG initiatives. Governments may additionally make investments directly in sustainable financing approaches by using their own commissioning money.[53] Lastly, policy actors may make investments in intermediary funds in addition to funding solid research to support the growth of the sustainable finance market, helping to construct the necessary facilities for sustainable markets more broadly.

It is worth noting that a number of central banks in developing nations today, for instance, the People's Bank of China, Bangladesh Bank, and Banco Central do Brazil, are taking steps to implement green financial practices and expressly include sustainability into their mandates.[54] Additionally, the Financial Services Authority (OJK), Indonesia's financial market regulator, has established preserving the equilibrium of the financial system as a component of its corporate goals. As a result, in 2014, it released a plan of action for sustainable banking, and in 2017, it published regulations on the subject.[55] Even so, for individuals living in wealthy nations, such responsibility for environmental sustainability is somewhat vague.

Green banking has a long way to go before it becomes widely accepted in the financial industry. To increase its reputation in the public, both bottom-up and top-down engagement have been concurrently initiated. Policy actors and regulators have become conscious of how important it is to embrace green finance policies so as to transform the banking industry and hugely help countries to attain their environmental objectives and goals. Since they have the capacity to change and control the dynamics and environment of the banking industry, central banks and banking policy actors play an important role.

2.3 The rise of sustainable finance regulations

The past few years have seen a rise in interest in sustainable banking legislation as societal and environmental concerns have grown. Banks are required by these rules to take long-term sustainability risks and opportunities into account when making investment choices.

52 Ulrich Volz, *On the Role of Central Banks in Enhancing Green Finance* (INQUIRY working paper 17/01, UN Environment Inquiry, CIGI February 2017).

53 Alex Nicholls, *Policies, Initiatives, and Regulations Related to Sustainable Finance* (Asian Development Bank 2021). This background paper was prepared for the report Asian Development Outlook 2021: Financing a Green and Inclusive Recovery.

54 Simon Dikau and Josh Ryan-Collins, *Green Central Banking in Emerging Market and Developing Country Economies* (New Economics Foundation 2017).

55 Otoritas Jasa Keuangan, *Roadmap for Sustainable Finance in Indonesia 2015–2019* (OJK December 2014); Regulation of Financial Services Authority No 51/POJK.03/2017 'On Application of Sustainable Finance to Financial Services Institution, Issuer and Publicized Listed Companies' <https://www.ifc.org/wps/wcm/connect/bab66a7c-9dc2-412f-81f6-f83f94d79660/Indonesia+OJK+Sustainable+Finance+Regulation_English.pdf?MOD=AJPERES&CVID=lVXU.Oy> accessed 25 April 2023.

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They also attempt to motivate businesses to conduct their operations more sustainably. The Paris Climate Change Agreement, the Sustainable Development Goals of the United Nations, and increasing understanding of the effects of human activities on the environment have all contributed to the rise in sustainable finance regulations. Globally, sustainable banking policies are being introduced, with the EU, Canada, and Japan among those setting the bar. Financial firms who disregard these restrictions risk penalties and harm to their image. Nevertheless, these laws are projected to expand in the upcoming years since they are thought to be crucial for establishing a future that is more environmentally friendly.

Sustainable finance-related policy goals may be viewed within a broader, historical framework of policy innovation and development. Globally, there has been a trend moving away from interventionist, Keynesian forms of policymaking during the 1980s and toward a number of breakthroughs in policymaking founded on the idea of New Public Management[56] and, subsequently, New Public Governance.[57] The restructuring of public expenditure frameworks on new privatisation and partnership between the public and private sectors paradigms is a key component of these advances. A new market for independent providers of public services was opened up as a result of this substantial regulatory change, and more lately, outcomes-based expenditure and contract frameworks were used to refocus public expenditure more broadly on effectiveness and efficiency. These agreements fall under the pay-for-success (in the US) or payment-by-results (in the UK) categories. In both instances, a substantial amount of private cash has been invested in the delivery of public goods as a sustainable financing method intended to expand the market for hybrid, 'social enterprise' firms.[58]

The primary goals of banking regulation, along with the broad objectives of economic policy like fostering effectiveness, competition, inventiveness, and eventually growth in the economy, have long been accepted by legal scholars studying financial regulation. These goals involve guaranteeing the stability and integrity of markets and protecting customers. They would normally concur that the stability aims should, in theory, take precedence over the other two in the event of a dispute. After the European Commission's Sustainable Finance Action Plan was published in March 2018, the topic of sustainable banking has taken centre stage in discussions about financial regulation in the EU. Numerous new legislation and modifications to already-existing regulatory structures have been made in order to carry out the Action Plan. It is reasonable to wonder if sustainable banking is altering the fundamental essence of financial regulation given the speed and scope of these regulatory developments, which incorporate sustainable banking into every aspect of the financial rules.[59]

The United Nations Conference on Trade and Development 2022 published a report on the rise in regulations in the finance industry as a result of climate change. The paper emphasises the expansion of national rules that came after a period of innovation and capital markets' adoption of voluntary norms and initiatives. The UNCTD noted that in the previous five years, almost 40% of policy measures and regulations devoted to sustainable banking had been enacted, and 13% of them were

56 Ewan Ferlie, 'The New Public Management and Public Management Studies' (*Business and Management*, 29 March 2017) <https://doi.org/10.1093/acrefore/9780190224851.013.129> accessed 25 April 2023.

57 Helen Dickinson, 'From New Public Management to New Public Governance: The Implications for a "new public service"' in JR Butcher and DJ Gilchrist (eds), *The Three Sector Solution: Delivering public policy in collaboration with not-for-profits and business* (ANU Press 2016) 41, doi: 10.22459/TSS.07.2016.03.

58 Paulami Mitra et al, 'The Rise of Hybrids: A Note for Social Entrepreneurship Educators' (2019) 17 (2) International Review of Entrepreneurship 107.

59 Veerle Colaert, 'The Changing Nature of Financial Regulation: Sustainable Finance as a New EU Policy Objective' (2022) 59 (6) Common Market Law Review 1633.

adopted only in 2021, demonstrating the quickening speed of sustainable finance policymaking. Compulsory environmental, social, and governance (ESG) reporting has been more prevalent at the corporate level in recent years with backing from exchanges and securities market authorities. In the last five years, the total number of exchanges where issuers are presently subject to obligatory ESG disclosure standards, or 30, has more than quadrupled.[60]

2.4 Countries with sustainable finance regulations

Sustainable finance policies are being implemented in an increasing number of nations to address environmental, social, and governance (ESG) challenges. With the EU's Sustainable Finance Action Plan and China's Green Finance Initiative, the European Union and China are leading the way. Other nations, like Canada, Australia, and Switzerland, are enacting sustainable finance legislation, whereas the US has been slower to do so. These restrictions can take different forms, including reporting requirements, tax breaks, and green bond requirements. The goal of such rules is to direct private money toward more sustainable investments, increase openness and disclosure, and reduce financial risks connected with climate change and other ESG variables. More nations are likely to implement sustainable finance legislation as a method of supporting a more sustainable economy as environmental and social concerns develop.

The strongest message from China's banking and insurance regulators is that financial institutions and insurance companies must promote a green economy. It provides a new level of engagement for Chinese banks, boosting their capacities and duties in moving the economy towards zero emissions with attention to real-world outcomes and an increased emphasis on sustainability. In accordance with a new set of regulations released by the China Banking and Insurance Regulatory Commission (CBIRC), financial institutions and insurance organisations must develop plans, procedures, and resources to help with the move to a future that is sustainable.[61] It is worth noting that China's financial authority has laid down regulations for financial institutions, (re)insurance firms, and insurance asset management organisations with regard to green finance and ESG. Green financing has often been promoted rather than mandated prior to its issue. The new regulations also provide strong implementation and evaluation procedures to guarantee conformity. The regulations are assumed to be binding, notwithstanding the lack of formal enforcement by law. The outcomes of execution will influence how CBIRC rates banks, makes judgments on whether to provide access to markets and evaluates top managers' performance.

The extent and the speed of environmentally friendly finance regulation grew globally in 2022. This is according to research issued by the ISS ESG, Institutional Shareholder Services' responsible investing division. According to Global Trends in 2022, efforts that have already been proposed or put into action are analysed and broken down by area and nation. While Asia has accelerated the pace of new efforts and North America and Australia have greatly boosted regulatory activity, EU nations continue to dominate in terms of both the scope and

60 United Nations Conference on Trade and Development, 'Regulation Rising as Financial Markets Tackle Climate Risks: An UNCTAD report shows that adoption of policy measures and regulations dedicated to sustainable finance accelerated in 2021' (*UNCTAD*, 9 June 2022) <https://unctad.org/news/regulation-rising-financial-markets-tackle-climate-risks> accessed 25 April 2023.

61 Junru Liu, 'China Raises the Bar on Investor Regulations to Promote Green Finance' (*PRI Blog*, 19 October 2022) <https://www.unpri.org/pri-blog/china-raises-the-bar-on-investor-regulations-to-promote-green-finance/10659.article> accessed 25 April 2023.

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depth of regulatory measures. The UK has the most comprehensive regulatory system of any non-EU nation.[62]

The UK has been cited as the lead in the move towards a low-carbon economy. The UK made a legal obligation to attain net zero GHG emissions by 2050 in 2019, making it the first large economy to do so. In 2021, the government went a step further by passing the most aggressive climate change objective ever, which calls for a 78% reduction in emissions by 2035[63] in comparison with the 1990 levels. It will need a complete economic revolution to meet these goals, along with a considerable shift in funding in favour of environmentally friendly initiatives and green technologies. The need for such investments is great, as 70% of UK citizens prefer their earnings to be used to improve the quality of life or the environment.[64]

The UK has put in place a variety of programs to emphasise how crucial it is for the financial markets to aid in the move to a carbon-neutral economy and to promote increasing net zero investment. In 2019, it released the Green Finance Strategy, which outlines two important lines of action for coordinating UK banking transactions with a low-carbon world: 'financing green', which involves mobilising private capital at scale to promote environmentally friendly and resilient development, and 'greening finance', which supports the financial services sector in conforming to the UK's net-zero dedication and broader sustainability objectives.[65]

2.5 Issues and cases on the green banking system

In view of the present global climate problem in particular, the idea of green finance is gaining popularity. As a result, a number of problems and incidents have surfaced in recent years. The absence of precise definitions and guidelines is one of the primary problems with green banking. Despite many banks making a claim to be environmentally friendly, there is no agreed-upon definition of what makes a green bank. Consumers are now likely to be confused and sceptical about whether banks are genuinely devoted to sustainability as a result of this.[66] There have been suggestions for the creation of industry-wide standards and certifications for green banks in order to solve this problem. Some groups have already developed standards and recommendations for sustainable banking practices, such as the Global Alliance for Banking on Values.[67] However, the sector still requires more transparency and lucidity.

The possibility of greenwashing is another problem with green banking. 'Greenwashing' is the act of making false or misleading information about the environmental benefits of

62 Hazel Bradford, 'Sustainable Finance Regulation Grew Around the World in 2022 — Report' (*Pensions & Investments*, 3 October 2022) <https://www.pionline.com/regulation/sustainable-finance-regulation-grew-around-world-2022-report> accessed 25 April 2023.

63 UK Department for Work & Pensions and Department for Business, Business, Energy & Industrial Strategy, *Greening Finance: A Roadmap to Sustainable Investing* (HM Government 2021).

64 UK Department for International Development, *Investing in a Better World: Understanding the UK public's demand for opportunities to invest in the Sustainable Development Goals* (HM Government 2019) 7 <https://www.impactinvest.org.uk/resources/publications/investing-in-a-better-world-understanding-the-uk-publics-demand-for-opportunities-to-invest-in-the-sustainable-development-goals> accessed 25 April 2023.

65 Anna-Marie Slot and Eileen Kelly, 'The Sustainable Finance Law Review: United Kingdom' (*The Law Reviews*, 6 January 2023) <https://thelawreviews.co.uk/title/the-sustainable-finance-law-review/united-kingdom> accessed 25 April 2023.

66 Dong Jae Lim, Nara Youn and Hyo Jin Eom, 'Green Advertising for the Sustainable Luxury Market' (2021) 29 (4) Australasian Marketing Journal 288, doi: 10.1177/1839334921999488.

67 Park and Kim (n 31).

a good or service.[68] This can happen in the context of green banking when banks make environmental claims without really taking action to lessen their environmental effect. Some groups have created tools and services to assist customers in identifying really sustainable banks in an effort to counteract greenwashing. For instance, the Banking on Climate Chaos study assesses the fossil fuel financing practices of the biggest banks in the world, while the Rainforest Action Network has developed a scorecard that ranks banks according to their social and environmental policies.[69]

There have also been a number of noteworthy examples in the field of green banking in addition to these problems. The Dutch central bank penalised ING Bank for its lax anti-money laundering and counter-terrorism funding measures in 2018, which was one of the most well-known examples. Although this case was unrelated to ING's sustainability efforts, it did serve to demonstrate the value of solid governance and risk management in the green banking industry.[70] Another noteworthy incident happened in 2019 when a group of investors petitioned Barclays Bank to gradually stop financing fossil fuel firms. The Barclays board of directors eventually rejected the motion, but it triggered a wider discussion about the part that banks play in funding activities that harm the environment.

There have been instances of green bonds being utilised more recently to finance initiatives that do not adhere to recognised sustainability requirements. For instance, the Swiss investment bank UBS came under fire in 2021 for issuing a green bond to finance a Texas natural gas project, which some claimed went against the business's declared commitment to sustainable financing.

Despite these difficulties, there have been a lot of good things happening in the field of green banking. For instance, several banks are now providing green loans and mortgages, encouraging customers to invest in houses that are sustainable and energy-efficient.[71] Several banks have also made commitments to fund renewable energy programs or to achieve carbon neutrality.

An important development in the banking sector is the growth of 'green banking', which represents a rising understanding of the need to move toward a more sustainable economy. To guarantee that green finance actually fulfils its potential, several obstacles still need to be overcome. Banks may be key players in accelerating the shift to a more sustainable future by creating clear standards and certifications, enhancing transparency and accountability, and taking proactive measures to lessen their environmental effects.

3 CONCLUSION AND RECOMMENDATIONS

This paper analyses past findings and makes helpful recommendations to regulators, legislators, and banking institutions on how to enhance their green banking practices. The fundamental goal is to guarantee that the banking industry promotes environmental sustainability while performing its primary function of financial intermediation. The key

68 Magali A Delmas and Vanessa Cuerel Burbano, 'The Drivers of Greenwashing' (2011) 54 (1) California Management Review 64, doi: 10.1525/cmr.2011.54.1.64.

69 Rainforest Action Network, 'Stop Banks Funding Climate Chaos' (*Rainforest Action Network*, 16 May 2022) <https://www.ran.org/campaign/stop-banks-funding-climate-chaos> accessed 25 April 2023.

70 Toby Sterling and Bart H Meijer, 'Dutch bank ING fined $900 million for failing to spot money laundering' (*Reuters*, 4 September 2018) <https://www.reuters.com/article/us-ing-groep-settlement-money-laundering-idUSKCN1LK0PE> accessed 25 April 2023.

71 A Annadurai, 'Effectiveness of Green Banking Technology of the Commercial Banks in India' (2014) 5 (12) International Journal of Research in Commerce & Management 98.

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conclusions are discussed in detail previously, which include the role of green banking in fostering sustainability, policy and regulatory frameworks, and the rise of sustainable finance regulations. The recommendations that are presented seek to ensure that stakeholders make informed decisions aimed at decreasing the negative environmental effect of banking activities and promoting sustainability.

The recommendations advocate for a shift toward sustainable practices in the banking sector through structural measures, such as the introduction of incentives to promote sustainable lending, investment, and risk management practices. To guarantee that environmental policies are implemented and correspond to national and international standards, regulators and policymakers should also take into account the significance of monitoring and evaluating them. Moreover, it is important to encourage environmental sustainability by including stakeholders in green banking practices, such as consumer education and awareness campaigns. The guidelines are meant to give stakeholders the tools they need to advance sustainability in the banking industry and further the larger cause of minimising harmful environmental effects. Stakeholders may strive to create a sustainable future for future generations by taking a multifaceted approach to green finance.

Green banking has gained traction as a concept that promotes environmentally friendly and sustainable operations and investments. It acknowledges banks' responsibility in supporting environmental sustainability via the incorporation of environmental, social, and governance (ESG) aspects into their operations, goods, and services. This has become increasingly important in Saudi Arabia and worldwide due to global efforts to reduce greenhouse gas emissions and preserve the environment. However, despite attempts, Saudi Arabia faces substantial obstacles in adopting green banking due to the absence of explicit regulations and recommendations from the government, low public awareness of environmental sustainability, and the high cost of implementing green banking practices in an oil-based market.[72] The importance of sustainable practices in the financial sector was stressed in this study. The study discussed the importance of green banking in reaching the SDGs and how it is a vital component of sustainable financing. Banks and other players in the financial sector as a whole have a significant part to play in accomplishing sustainable objectives.

It was noted that one approach to green banking is eco-friendly banking, which stresses environmental responsibility and sustainability in its operations and policies. The value of green banking rests in its capacity to promote and support initiatives that lessen environmental risks and safeguard the environment. In addition, it can attract new investors and customers who care about the environment and society and enhance social sustainability.[73] A variety of green goods and services are available from green banking, demonstrating the company's dedication to sustainable and eco-friendly methods. Green banking is accessible and practical for users because of features like automation and Internet banking. Additionally, all green banks have the trait of responsible investing, highlighting the significance of taking ESG aspects into account when making investment decisions.[74] This study also revealed that the degree to which central banks are involved in green banking varies depending on their mandates, overarching objectives, and degrees of interagency cooperation. Because of these differences, different regulatory and policy frameworks are in place in some countries and are being established in others.

Due to the need to cut greenhouse gas emissions and protect the environment, the idea of 'green banking' is becoming more and more popular everywhere, including in Saudi Arabia. Although there are obstacles in the region to the implementation of green banking practices,

72 Oyegunle and Weber (n 4); Gavrilko and Pobochenko (n 9).
73 Streimikiene and Kaftan (n 28).
74 Julia and Kassim (n 8).

the value of green banking in promoting environmentally friendly activities and luring new customers and investors cannot be understated. A few distinguishing characteristics of green banking that make it a significant contribution to the banking sector are the variety of green goods and services, automation and internet banking, and responsible investment.

These findings have an implication that adopting green banking methods can result in a society that is more concerned about the environment. Banks that place a high priority on sustainability can help to allay environmental worries by bringing in new investors and customers who care about the environment. The banking industry has a key role to play in the subject of environmental preservation, and green banking has the potential to significantly facilitate sustainable development.

The results also show that although academics have given the notion of 'green banking' many different labels, its fundamental purpose has remained the same: creating financial institutions that emphasise economic development while encouraging ecologically friendly activities.[75] With problems like pollution, technology waste, and global warming afflicting the earth, green finance may play an important part in tackling these concerns. In recent years, there has been a rising emphasis in Saudi Arabia on green banking and sustainability, with the Kingdom working with the UK to strengthen collaboration on sustainable finance.

Promoting local governance and encouraging both public and private stakeholders to assume responsibility for leading action is necessary for achieving the Sustainable Development Goals (SDGs).[76] This calls for collaborations between the governmental, private, and civil sectors as well as sufficient funding for the SDGs' implementation. Loans, credit lines, and other financial instruments are a few examples of green banking products that may be useful tools to encourage people and businesses to adopt more ecologically friendly behaviours.[77]

Green banking, which refers to financial institutions adopting environmentally friendly practices, is a promising solution for most environmental issues. This strategy has gained momentum, and it is likely to be adopted by nearly all financial institutions across the world. However, it faces obstacles that need to be addressed to make it a viable option. This study has noted a number of challenges that should be addressed. One of the major challenges is the time it takes for these banks to become profitable – sometimes up to four years. Additionally, there is disagreement among stakeholders about the importance of green banking. Furthermore, embracing green lending can lead to higher operational costs and risks to reputation, as well as limited access to capital. To solve these challenges, a comprehensive approach that includes various stakeholders, such as the private sector, research institutions, and media, is necessary.[78] In addition, managers, executives, employees, and shareholders of the banks need to be supportive of the idea. Through collaboration and a concerted effort to address these challenges, green banking can contribute to a sustainable future.

According to the study, environmentally friendly activities may be prioritised while supporting economic growth through green banking and sustainable financing. But there are a number of challenges to be solved, including a lack of consensus among interested parties, rising prices, and restricted funding options. Diverse parties, including private businesses, research institutes, media outlets, and financial institutions, must be involved in order to address these issues. Green banking services can also be successful in motivating people and businesses to embrace environmentally friendly practices. In order to ensure a

75 Lalon (n 30).

76 ibid.

77 Do Hoai Linh and Tran Van Anh, 'Impact of Stakeholders on the Performance of Green Banking Products and Services: The Case of Vietnamese Banks' (2017) 165 (5-6) Economic Annals-XXI 143, doi: 10.21003/ea.V165-29.

78 Lalon (n 30).

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sustainable future for everybody, these findings imply that fostering sustainable finance and green banking needs coordinated effort from all stakeholders.

As was mentioned previously, there is a rising interest in sustainable finance and green banking. The absence of exact definitions and norms, on the other hand, has been noted as a serious concern. This has raised worries about the possibility of 'greenwashing' or presenting inaccurate or misleading information about a product or service's environmental advantages.[79] To address these concerns, banking authorities, political bodies, NGOs, and trade associations united to create the GBG. This guidance explains processes and policies that financial institutions may implement to decrease their carbon footprint, manage environmental risks, and contribute to the transition to a low-carbon economy.

Another significant result is that central banks play a critical role in supporting green finance goals and risk management in the banking industry. Their engagement, however, varies among nations because of differences in mandates, core aims, and levels of inter-agency coordination. Nonetheless, financial authorities and politicians in both industrialised and developing countries have begun to implement a variety of green banking initiatives.[80] Sustainable finance legislation is becoming more prevalent in nations such as the United Kingdom and China, reflecting rising societal and environmental concerns about sustainable financing.

Despite efforts to establish green banking laws and regulations, challenges have nonetheless arisen in the sector. One of the major issues is the lack of exact definitions and norms, which can lead to greenwashing. Furthermore, some notable cases have occurred, such as the use of green bonds to finance programs that do not meet accepted sustainability standards. Nonetheless, legal and regulatory frameworks must be established to guarantee that banks promote ecologically responsible activity. A well-defined GBG and sustainable finance rules, in conjunction with stakeholders, can help the banking sector to move to a greener and more sustainable future.

Saudi Arabia, one of the world's largest oil producers, has long faced criticism for its environmental practices. However, in recent years, the government has taken significant measures to lessen its environmental effect and encourage sustainable practices. The Saudi government is committed to fulfilling the 2030 Agenda's Sustainable Development Goals and has made green economic growth a cornerstone of its strategy. To help achieve this goal, the government launched a green financing program in 2019 through National Commercial Bank (NCB), with the purpose of encouraging sustainable behaviour among NCB clients and promoting and supporting green initiatives in Saudi Arabia. Furthermore, the Saudi Green Initiative, which will be launched in 2021, demonstrates the government's commitment to environmental sustainability.

Several Saudi financial institutions have also made considerable initiatives to safeguard long-term viability. Being one of the largest oil exporters in the world, its contribution towards environmental sustainability is expected across the world to be significant. This might not be the case because the financial sector in the country has not fully adjusted towards sustainability. However, several banks have started implementing sustainable strategies. For example, the Saudi National Bank has made significant advances toward ensuring sustainable banking practices that benefit society and the environment. The government has also been working around the clock to ensure that institutions in all sectors comply with guidelines. The government's efforts have resulted in the promotion of environmental initiatives and the attraction of investors to the renewable energy industry. For example, in 2017, the Ministry

79 Delmas and Burbano (n 68).

80 Park and Kim (n 31).

of Finance launched a sukuk financing scheme. This was aimed at attracting investment and advancing the Saudi Riyal capital market.

According to the results, green banking methods have been increasingly popular in China, with high-level authorities' mandates setting the framework for market development. However, when the notion of 'green banking' penetrated the banking industry in Indonesia, there was a clear lack of awareness and action from banks toward environmental and social problems. Colombian leaders have pledged to strike a balance between development and environmental, climatic, and social sustainability goals. Colombia has adopted sustainable infrastructure efforts, integrated environmental, social, and governance issues into finance sector rules, and built a local marketplace for green bonds and a green taxonomy to achieve this aim.

Based on the facts presented above, governments and financial institutions throughout the world should prioritise green banking practices in order to achieve long-term economic growth while minimising environmental effects. Saudi Arabia's lead in developing a green finance program and supporting sustainable banking practices can serve as a model for other countries. Banks such as the Saudi National Bank's efforts to ensure sustainability demonstrate that financial institutions may play a critical role in attaining sustainable development goals. Other nations can benefit from Colombia's strategy to integrate environmental and social concerns into the financial industry and create a green bond market. The promotion of green banking practices should be a priority for all stakeholders in the financial sector to ensure a more sustainable future for all.

According to the findings stated above, financial institutions should emphasise the formulation and implementation of laws and regulations that promote environmentally friendly activity. This involves following the GBG's rules and processes, as well as adhering to recognised sustainability criteria in funding activities. Finally, rules and regulations that support sustainable finance and green banking practices are critical for the banking sector and the larger economy's long-term viability. Financial institutions may contribute to a greener and more sustainable future while also giving value to their clients and stakeholders by implementing these practices.

Furthermore, it is recommended that financial regulators, political entities, NGOs, and trade groups continue collaborating to establish well-defined policies and regulations that promote sustainable finance and green banking practices. From this study, it has been identified that there is a gap in terms of knowledge on green banking by most financial institutions as well as other players in the sector. Developing clear policies and laws will not only mitigate potential issues such as greenwashing but also facilitate the shift towards a low-carbon economy. In addition, collaboration with various stakeholders in grafting these policies and regulations is crucial to achieving the SDGs. To achieve these goals, financial institutions should encourage collaboration between various stakeholders to drive action towards sustainable finance. There are a number of stakeholders that can help in advocating for sustainable practices in the finance sector. Establishing partnerships with other organisations, such as research institutions and media, will help in promoting green banking. Further, it is important to foster collaboration between stakeholders to develop a well-defined GBG that will enable the players in the banking industry to transition towards a greener and more sustainable future.

The sustainability risk management model can also be adopted by banks. If financial institutions aspire to achieve sustainability goals, they also need to invest in sustainability risk management and embrace sustainable finance regulations. Sustainability risk management (SRM) is a business approach that tries to match an organisation's financial goals with its environmental policies. SRM's goal is to make this link successful enough to support and build a business while also safeguarding the environment. Setting green financial objectives,

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keeping an eye on environmental threats, reporting on them, and incorporating them into decision-making processes are all part of sustainability risk management.

The results of this study show that there is a need to promote awareness of green banking practices. The numerous stakeholders do not all agree on the benefits of green banking. Therefore, it is essential to disseminate information and training across many stakeholders, including bank employees, executives, and customers. Financial institutions may launch awareness campaigns and training programs to educate the public about the benefits of green banking.

In order to create green financial products, significant work is required. Green banking solutions can inspire people and businesses to embrace more eco-friendly behaviours. To encourage sustainable financing, financial institutions should provide green financial products, including loans, credit lines, and other financial instruments. Strengthening research and development will ensure that more green products and services are developed, and this will create a sustainable future.

As was mentioned earlier, starting and maintaining green banks can be expensive. Addressing operating expenditures is thus recommended. For financial institutions, the higher operating expenses incurred by green financing might be difficult. They can use cutting-edge technology and procedures to save operating expenses to overcome this difficulty. For instance, they may use technology to streamline procedures, use less paper, and increase productivity.

In addition, the results indicate that access to capital is required. Another difficulty for green banks is the lack of capital availability. To secure access to money, financial institutions should investigate other funding possibilities, such as green bonds and other sustainable finance products.

It is also recommended to promote sustainable practices within the financial institutions. Internal stakeholders, such as managers, executives, employees, and shareholders, play a crucial role in promoting green banking. Therefore, financial institutions should promote sustainable practices within the organisation, such as reducing carbon footprint, conserving energy and water, and minimising waste.

The key players identified earlier are important in ensuring that financial institutions operate sustainable businesses. Based on the findings of this, recommendations can also be made for policymakers, financial regulators, and financial institutions. These players should develop clear and precise definitions and guidelines for sustainable finance and green banking to avoid the potential for greenwashing. Such guidelines should be applicable across the banking sector globally. The central banks, as key regulators, are encouraged to take an active role in promoting green finance objectives and sustainability risk management in the banking sector. They should also collaborate with other agencies to ensure that their efforts are integrated and aligned.

Other than developing stringent policy and regulatory frameworks to ensure that banks support environmentally friendly activities, it is critical to support the implementation of green banking programs across the banking industry, with a special emphasis on developing countries that are still in the early stages of sustainable finance development. It is worth noting that financial institutions in developing nations are lagging behind in terms of operating sustainably. Implementation of green banking programs in these countries will see a significant reduction in greenhouse emissions.

Financial institutions should be encouraged to employ green bonds and other forms of sustainable finance to fund programs that fulfil established sustainability standards. Encouraging financial firms to employ green bonds and other forms of sustainable finance

can have a number of advantages. For example, it can aid in the mobilisation of additional money for long-term programs that address environmental and socioeconomic issues. It may also boost financial institutions' reputation and visibility while demonstrating their commitment to sustainable development. Furthermore, it has the potential to generate new green jobs and stimulate innovation in sustainable technology.

Green banking is becoming increasingly popular not only in Saudi Arabia but also in nations beyond the Arab world. This sort of banking has grown in popularity as a result of worldwide initiatives to minimise greenhouse gas emissions and preserve the environment. According to this report, Saudi Arabia confronts significant challenges in embracing green banking due to the lack of defined government laws and guidelines. Green banking is significant because of its capacity to stimulate and support investments that safeguard the environment and reduce environmental challenges. This report recommended a wide range of activities, including encouraging green investments, reducing carbon emissions, funding renewable energy projects, and employing responsible lending practices. Green banking aims to enhance social responsibility and environmental sustainability in addition to helping banks generate money.

Regulators have a significant role to play in promoting green banking. It has been noted that the public sector, specifically central banks as well as financial regulators, must take an instrumental role in integrating green banking and ensuring that threats related to climate change are appropriately determined, examined, and reported, even though these kinds of systems and industry-led efforts are important drivers of creativity and risk mitigation.

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Research Article

AUTONOMOUS WEAPON SYSTEMS: ATTRIBUTING THE CORPORATE ACCOUNTABILITY

Jinane El Baroudy[1]

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Summary: : 1. Introduction. – 2. Lack of Mechanisms: Respecting the Principles of International Law. – 3. Alternative International Complaint Mechanisms to Corporate Actors. – 4. Conclusions.

Keywords: autonomous weapons system (AWS); corporations; ICC; war crime; accountability; manufacturer.

ABSTRACT

Background: *The use of autonomous weapon systems (AWS) in armed conflict has been rapidly expanding. Consequently, the development of AWS worries legal scholars. If AWS were to operate without 'meaningful human control', the violation of international law and human rights would be unpreventable.*

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***Methods**: This paper indicates that the most important problem arising from the use of AWS is the attribution responsibility for the violation of corporate actors. Nevertheless, it is ambiguous who is legally responsible for these international crimes, thus creating an accountability gap. The main problem regarding corporate responsibility that covers the process of employing AWS is determining who exercises causal control over a chain of acts leading to the crime's commission. The paper proposes a more optimistic view of artificial intelligence, raising two challenges for corporate responsibility. First, the paper maps the framework of the use of AWS regarding corporate actors. Second, the article identifies the problem of accountability by presenting some possible scenarios linked to the AWS context as a solution to this problem.*

***Results and Conclusions:** The results have exposed ambiguity in international law and the absence of essential laws regarding the attribution of responsibility for AWS and the punishment of the perpetrator – international law needs to be improved and regulated.*

1 INTRODUCTION

Several aspects of human existence have recently begun to be dominated by artificial intelligence (AI). The power of AI has undeniably been growing along with technology and has redefined what the future holds. What once was thought to be a concept out of a science fiction movie has now become a reality with the creation of autonomous weapon systems (AWS). The states' power depends on the power of their technologies, which are led by corporations representing 'shadow sovereigns'. [2]Now, the reality is that warfare technology could cause the state to consider waging war. AWS places humans in charge of the targeting decision-making process in warfare technology, and states have presumably begun giving more tasks to AWS on the battlefield. Note that issues not only appeared regarding the use of AWS but also due to the lack of conventions or treaties concerning preparing for any future conflicts in respect of international law. Selecting military targets without human involvement is one of the biggest problems in holding AWS criminals accountable for their violations. [3]

Despite the fact that states have not listed any reservations about the legality of AWS, the paper intends to search for a possible scenario for imposing accountability on corporations involved with AWS that commit war crimes. Using historical and contemporary cases, Part I presents the inadequacy of substantive international criminal law and the enforcement mechanisms to manage corporate misbehaviour or malfunctioning related to AWS. Part II argues that the exploration of a legal way to enforce corporate accountability for the actions of AWS demands that we study all the difficulties in attributing responsibility to states. That said, it is indisputable that the responsibility of corporations should be where AWS would be produced to violate international law in terms of domestic laws.

2 LACK OF MECHANISMS: RESPECTING THE PRINCIPLES OF INTERNATIONAL LAW

It is critical to understand the nature of the current legal status of AWS in order to analyze how autonomous weapons have been handled within it. It is important to consider that domestic law and international law could be applied to the frameworks controlling the

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2 Jackie Smith, 'Challenging Corporate Power: Human Rights Globalization from Above and Below' (2021) 64 Development 63, doi: 10.1057/s41301-021-00292-2.

3 Mariarosaria Taddeo and Alexander Blanchard, 'A Comparative Analysis of the Definitions of Autonomous Weapons Systems' (2022) 28 Science and Engineering Ethics 37, doi: 10.1007/s11948-022-00392-3.

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legality of the use of force, including the use of weapons systems.[4] Even according to the classical approach,[5] only states are subjects of international law, while non-state actors might incur international responsibility for the state only in particular acts. This indicates that for some actions committed by non-state actors or corporations, the state might be responsible.[6] To start, it is important to notice the absence of international conventions that directly regulate autonomous weapons. While there may be no particular convention-based prohibitions, autonomous weapons must be employed by applicable customary international law. Moreover, if the IHL is not respected, these types of weapons will be deemed illegal under the IHL framework.[7]

Subsequently, this section will examine the weaknesses of the current international enforcement procedures with regard to corporate actors in the context of AWS. After analyzing the reasons behind the limitations in enforcing international criminal law on corporate actors, we must explore another alternative. Because a corporation's activities might be a trigger for breaching human rights, civil claims for redress for human rights abuses will be taken into account.

2.1 The framework related to corporations for the AWS action at the international level

Following customary international law,[8] any state that studies, develops, acquires, or adopts a new weapon, means, or method of warfare must conform with Additional Protocol I (API) to the Geneva Conventions of 1949.[9] Furthermore, the IHL concentrates on analysing whether a weapon is explicitly banned by an international treaty or if it is essentially incapable of adhering to the two 'cardinal principles' stated in the texts defining humanitarian law. These are the only two criteria that can be used to determine whether a weapon is legitimate.[10] The ICJ affirmed in its advisory opinion that the first rule to respect is the principle of distinction between combatants and civilians.[11] The ICJ also confirmed the second cardinal concept of the IHL framework that any state's first duty is to outlaw any weapons that would result in superfluous injury or unnecessary suffering.[12] Also, according to the ICRC's study, these criteria, under this norm, should apply strictly to any persons or groups acting by following the instructions. In addition, these studies make it clear from the second criterion that any act by a person or group operating on its instructions, under its direction, or control, as well

4 Emily L Drake, 'Evaluating Autonomous Weapons Systems: A Dichotomic Lens of Military Value and Accountability' (2021) 53 (1) Columbia Human Rights Law Review 308, doi: 10.7916/xc1f-n417.

5 Jonathan I Charney, 'Transnational Corporations and Developing Public International Law' (1983) 32 (4) Duke Law Journal 753, doi: 10.2307/1372465; Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenge' (2008) 6 (2) Northwestern Journal of Human Rights 233.

6 Arts 5 and 9 of the 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001* (UN 2007) vol 2, pt 2, 26. The text of the Articles and the commentaries thereto are reproduced in Report of the International Law Commission on the Work of its 53rd session, UN Doc A/56/10 (2001).

7 Jack M Beard, 'Autonomous Weapons and Human Responsibilities' (2014) 45 Georgetown Journal of International Law 635.

8 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Rules* (CUP 2005) vol 1, rule 139.

9 Beard (n 7) 635.

10 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (ICJ, 8 July 1996) para 78 <https://www.icj-cij.org/case/95> accessed 31 May 2023.

11 ibid: "states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets".

12 Henckaerts and Doswald-Beck (n 8) rule 70, 238-9.

as by its own armed forces using the weapons, should be controlled by the state. This is a consequence of Rule 149[13] and supported by the ICJ,[14] which holds states accountable for the actions of these individuals or corporations.

One might deduce that there is no reason to exclude armed conflict involving the use of AWS from the state's obligation. Also, there is the obligation of a state to 'ensure respect', which provides an element of ambiguity in determining whether the actions violate the law of armed conflict. We agree with some scholars that the problem with AWS is not so much a lack of legal basis as it is a lack of precision of what 'due diligence to ensure respect' means.[15] In the context of military operations using AWS, there is a concern with risk management and state accountability resulting from any violations of this legal framework because accidents can occur with any form of weapon, even those that have broad testing. It is clear that AWS that is unable to adhere to the laws of armed conflict, should not be deployed. When examining these points, the issues with AWS include the fact that, despite considerable testing, it is unclear how exactly they will operate in a conflict. There will always be some level of risk and unpredictability.[16]

Focusing on state practice, most domestic legal systems and numerous military manuals include a rule prohibiting the methods of warfare that cause superfluous injury or unnecessary suffering and restrict the use of lethal force in certain situations.[17] Moreover, international human rights law also defends the right to life, which restricts police on the use of lethal force by police officers.[18] Several state laws consider violations of this rule to be crimes, and their domestic courts have applied it as a rule.[19]

2.2 The necessity for states to impose the corporate obligations

To respect the concept of state sovereignty, regardless of the technology that will be used during wars, each deployed state gives guidance on IHL to its armed forces, specifically to its military commanders.[20] Moreover, commentators have long observed that Art. 57(2)(a) of the API charges 'those who plan or decide upon an attack' to adopt a number of preventative actions to avoid or minimise the killing of civilians when preparing to conduct attacks. These requirements demonstrate the necessity for states to have military leaders who are charged with planning and selecting an attack exercising 'constant care', as well as 'all feasible precautions in the choice of means and methods of attack' in order to prevent harm to innocent civilians (Art. 57 (2)(a)(ii) of the API).[21] To clarify this ambiguity, Art. 31(1) of the Vienna Convention on the Law of Treaties[22] requires the rule to be applied in

13 ibid 237.

14 ibid, rule 139, 496; *Legality of the Threat or Use of Nuclear Weapons* (n 10) para 238.

15 Robert Geiss, 'Autonomous Weapons Systems: Risk Management and State Responsibility' (Third CCW Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), Geneva, 11-15 April 2016) para 7.

16 ibid 1-2.

17 Henckaerts and Doswald-Beck (n 8) rule 70, 238. This rule includes the military manuals of the United Kingdom, United States, Australia, Spain Sweden Switzerland Belgium, Bosnia, and Herzegovina, Canada Croatia France Germany, and Yugoslavia.

18 Beard (n 7) 636.

19 Henckaerts and Doswald-Beck (n 8) rule 70, 238: Japan.

20 *Case of the SS "Lotus" (France v Turkey)* (PCIJ, 7 September 1927) <https://www.icj-cij.org/pcij-series-a> accessed 31 May 2023.

21 Afonso Seixas-Nunes, 'Autonomous Weapons Systems and Deploying States. Making Designers and Programmers Accountable' (2022) 161 Nação e Defesa 79.

22 Vienna Convention on the Law of Treaties (done at Vienna on 23 May 1969) (2005) 1155 UN Treaty Series 331.

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good faith in its framework and in light of its object and purpose. [23] So, it is wrong to assume that 'those who plan or decide upon an attack' refers only to human beings. The state practice[24] applies to military commanders who are in charge of launching any attack, as well as to all those who have the ability to control any attack.[25] State practice could be extended to require further instruction for the corporate actors in order to avoid any mistake or malfunction in the use of AWS. In addition, the 'parties to the conflict,' which include states and organised military forces, are the ones responsible for the protection of IHL duties. In this instance, the action of their agents by military forces and their soldiers could be attributed to the parties to a conflict.[26] One must also provide an interpretative extension of Art. 57 of the API, which makes clear that 'plan or determine' is intended to include all decision-makers at all levels of command. Consequently, it should be remarked that those who control autonomous systems in war would belong to this category.[27] Additionally, military operators must make sure the autonomous system can exercise 'constant care'.[28] If weapon systems utilising machine learning and artificial intelligence prove to be more capable of LOAC compliance or have the potential to become so, and the legal requirement is the 'best application possible', states may have a legal obligation to develop and employ such systems.[29] In doing so, it is stated that the state's obligation to make sure that AWS complies with IHL criteria differs from its obligation to use 'due care' placed on autonomous systems. For example, the DoD 3000.09,[30] in line with existing treaties, the law of war, weapon system safety regulations, and applicable rules of engagement, specifically states that anybody using, directing the use of, or operating autonomous weapons must do so with 'appropriate precautions'(ROE)'.[31] What occurs if ROE is inadequately constructed and leads to IHL violations on the battlefield? The answer to this issue may be found by considering situations like the Horizon controversy in the UK and the Robodebt crisis in Australia. Both times, the consequences of IT programs that were improperly and badly designed produced a significant amount of public indignation due to erroneous results.[32] Given the nature of computers and software, it is appropriate to state that an autonomous software entity's behaviour ultimately depends on decisions made by those in key roles, particularly designer and operator. The system of control[33] comprises a

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23 ibid.

24 Henckaerts and Doswald-Beck (n 8) ch 5, 51.

25 Tim McFarland, 'Minimum Levels of Human Intervention in Autonomous Attacks' (2022) 27 (3) Journal of Conflict and Security Law 398, doi: 10.1093/jcsl/krac021.

26 Marco Sassóli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions And Legal Issues to Be Clarified' (2014) 90 International Law Studies 308.

27 Eric Talbot Jensen, 'Autonomy and Precautions in the Law of Armed Conflict' (2020) 96 International Law Studies 589-90.

28 ibid 587.

29 ibid 585-6.

30 DoD Directive 3000.09 'Autonomy in Weapon Systems' (21 November 2012) <https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/300009p.pdf> accessed 31 May 2023. However, It Is Our Understanding That This Definition Leaves Creates More Problems than Solution'.

31 Seixas-Nunes (n 21) 79.

32 'Post Office and Horizon IT Scandal – Government and Post Office Must Take Urgent Action on Compensation for Sub-Postmasters' (*UK Parliament*, 17 February 2022) <https://committees.parliament.uk/committee/365/business-energy-and-industrial-strategy-committee/news/161072/post-office-and-horizon-it-scandal-government-and-post-office-must-take-urgent-action-on-compensation-for-subpostmasters> accessed 31 May 2023; Peter Whiteford, 'Robodebt Was a Fiasco with a Cost We Have yet to Fully Appreciate' (*The Conversation*, 16 November 2020) <https://theconversation.com/robodebt-was-a-fiasco-with-a-cost-we-have-yet-to-fully-appreciate-150169> accessed 31 May 2023.

33 McFarland (n 25) 400.

range of measures applied in multiple stages.[34] In essence, autonomous software entities are collections of human-written instructions implemented by human-constructed. As a result, in programming, using AWS will surely require extra caution and attention to the degrees of significant risk associated with a mission. Only military leaders should be trusted with that kind of responsibility. Demanding that military leaders possess information about AI that is inherent to neural networks would be unreasonable. Therefore, corporate actors like designers and programmers should be held responsible for illegal consequences brought about by a lack of care in the assessment of the risks associated with the task given to AWS.[35] Regardless of how much care a state takes in deploying AWS, it is impossible to rule out scenarios where the system can malfunction and provide results that violate IHL standards. Beyond the requirements for controlling weapons during armed conflict, it is expected that a hypothetical state's overall system of control will ensure that the conduct of the weapon system complies with the state's IHL duties.[36]

Therefore, it is strongly recommended that all operators who are involved in the design and development of an AWS for a particular mission be subject to the duties of states according to Art. 57 of the API.[37] In order to avoid mistakes that might result in losses and damage to civilians, states have a responsibility to consult with specialists in the use of AWS. It follows that military training for the use of AWS may be taken into account in determining whether the state complied with the principle of precaution in a conflict.[38]

Finally, for corporations, it is essential to understand the distinction between direct and indirect responsibility. If international law imposes indirect obligations on corporations, then the corporate actors only have to worry about domestic law in the states in which they operate.[39] But, if the international responsibility is direct and a corporation violates IHL, it may be taken before an international court or before an international tribunal *ad hoc*.[40]

Although it would not be a conceptual change from the traditional paradigm, states are being recognised as having the right to impose responsibilities on corporations. International law has recognised for a long time that a state may decide to impose a responsibility to stop or correct harm caused to civilians by other private parties.[41]

3 ALTERNATIVE INTERNATIONAL COMPLAINT MECHANISMS FOR CORPORATE ACTORS

The most pertinent alternative criteria for evaluating how well corporations uphold their obligations to protect human rights are the Conventions of the International Labor

34 Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, 'Australia's System of Control and applications for Autonomous Weapon Systems' (26 March 2019) CCW/GGE.1/2019/WP.2/Rev.1 <https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_(2019)/CCWGGE.12019WP.2Rev.1.pdf> accessed 31 May 2023.

35 Seixas-Nunes (n 21) 85.

36 McFarland (n 25) 400.

37 Seixas-Nunes (n 21) 80.

38 ibid 81.

39 Ole Kristian Fauchald and Jo Martin Stigen, 'Corporate Responsibility before International Institutions' (2009) 40 The George Washington International Law Review 1031.

40 ibid 1037.

41 Carlos M Vázquez, 'Direct vs Indirect Obligations of Corporations Under International Law' (2005) 43 Columbia Journal of Transnational Law 980.

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Organization (ILO),[42]the Guidelines for Multinational Enterprises of the Organization for Economic Co-operation and Development (OECD)[43] on bribery of foreign public officials,[44] the Convention on the financing of terrorism,[45] and the convention on transnational organised crime, which give states the opportunity to prosecute legal persons. More specifically, there are treaties that prohibit the development, transfer, and stockpiling of certain weapons that extend to the private sector, which includes corporations.[46] For instance, Art. 9 of the 1977 Convention[47] is founded on the idea that corporations must uphold specific social and environmental norms and protect human rights. Although these processes do not explicitly aim to hold corporations liable for their violations through AWS, several of these criteria are supplemented with non-legal complaint mechanisms. These mechanisms incorporate aspects of factual and legal analysis and provide a platform for examining corporate activity.[48]

3.1 Violation of human rights by the corporation: potential accountability

The accountability of corporations for breaching human rights that qualify as international crimes is presently the subject of intense debate, though undoubted that states generally have the onus of responsibility to provide effective human rights protection, and this duty includes the responsibility to prosecute criminals when necessary.[49] The UN Security Council[50] and General Assembly[51] have long recognised that the state's obligation to prosecute[52] is related to the victim's right to justice.[53] Although there are few established mechanisms that allow victims to hold such corporations responsible, intergovernmental organisations are commonly known to have obligations that respect human rights compared to those of states and actors comprised of states.[54] Moreover, neither corporate legal entities nor specific business actors are subject to the jurisdiction of regional human rights courts.[55]

42 ILO Declaration on Fundamental Principles and Rights at Work (adopted in 1998, amended in 2022) <https://www.ilo.org/declaration/lang--en/index.htm> accessed 31 May 2023.

43 OECD, *Guidelines for Multinational Enterprises* (OECD Pub 2011) doi: 10.1787/9789264115415-en.

44 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by the Negotiating Conference on 21 November 1997) art 2 <https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf> accessed 31 May 2023.

45 International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999 UNGA Res 54/109) art 5 <https://undocs.org/en/A/RES/54/109> accessed 31 May 2023.

46 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) (Geneva, 3 September 1992) <https://treaties.unoda.org/t/cwc> accessed 31 May 2023.

47 ibid.

48 Wolfgang Kaleck and Miriam Saage-Maaß, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges' (2010) 8 Journal of International Criminal Justice 711, doi: 10.1093/jicj/mqq043.

49 Thompson Chengeta, 'Accountability Gap: Autonomous Weapon Systems and Modes of Accountability Gap: Autonomous Weapon Systems and Modes of Responsibility in International Law' (2016) 45 (1) Denver Journal of International Law & Policy Denver Journal of International Law & Policy 9.

50 Khmer Rouge Trials (adopted 22 May 2003 UNGA Res 57/228 B) <https://undocs.org/en/A/RES/57/228B> accessed 31 May 2023.

51 Extrajudicial, Summary and Arbitrary Executions (adopted 25 February 2003 UNGA Res 57/214) <https://digitallibrary.un.org/record/482001?ln=en> accessed 31 May 2023.

52 ibid.

53 Chengeta (n 49) 11.

54 Megan Burke and Loren Persi-Vicentic, 'Remedies and Reparations' in Stuart Casey-Maslen (ed), *Weapons under International Human Rights Law* (CUP 2014) 545, doi: 10.1017/CBO9781139227148.024.

55 Kaleck and Saage-Maaß (n 48) 710.

Because of the potential violations of the right to life that might result from the unlawful use of weapons, the subject of accountability is crucial to international law. The use of a legal weapon in an illegal manner or in the wrong circumstances can both constitute violations.[56] Regarding remedies for breaches brought on by the use of specific weapons, no one can omit that the illegal use of a weapon will give the right to get reparation or restitution for both civilian and military casualties.[57]

The difficulties with AWS accountability[58] need to be taken seriously since they endanger a number of victims' claim compensation for violations of human rights.[59] Following the Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law,[60] in addition to failing to uphold human rights, the state also has a responsibility to protect human rights under its authority from the use of weapons unlawfully. In these instances, the state must search for a remedy.

In the case of AWS, in situations when the state is directly responsible for actions perpetrated by non-state actors, it is the obligation of governments to offer victims remedies.[61] Thus, states must protect human rights by implementing a number of new regulations,[62] although this duty has been repeatedly reaffirmed by the state.[63] In addition, courts like the European Court of Human Rights[64] and the African Commission on Human and People's Rights have also ruled that states have a duty to ensure that victims have access to justice,[65] information, and redress as a result of this obligation[66] by investigating human rights violations and prosecuting the perpetrators.[67] In order to pursue an effective remedy, which requires having all knowledge by whom the violations were committed, victims should have access to information[68] about the violation of their rights.[69] To that end, states have a responsibility to tell the victims and the general public the truth in order to achieve this.[70] Since AWS may leave a digital trail of every occurrence, getting access to information about what happened may be simple in this situation.[71] Hence, in the AWS case, the UN Human Rights Committee has confirmed that the victims have a right to identify the person who deployed the device,

56 Burke and Persi-Vicentic (n 54) 542.

57 ibid, 554.

58 ibid, 543.

59 Chengeta (n 49) 5.

60 Burke and Persi-Vicentic (n 54) 544.

61 Draft Articles (n 6) arts 5, 9.

62 Chengeta (n 49) 6.

63 Draft Articles (n 6) art 34.

64 *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996) <https://hudoc.echr.coe.int/eng?i=001-58003> accessed 31 May 2023.

65 Chengeta (n 49) 6.

66 *X and Y v The Netherlands* App no 8978/80 (ECtHR, 26 March 1985) <https://hudoc.echr.coe.int/eng?i=001-57603> accessed 31 May 2023.

67 *Aksoy v Turkey* (n 64).

68 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted 15 December 2005 UNGA Res 60/147) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation> accessed 31 May 2023.

69 Chengeta (n 49) 7.

70 J*uan Humberto Sanchez v Honduras* (Inter-American Court of Human Rights, 7 June 2003) <https://legal-tools.org/doc/32445c> accessed 31 May 2023.

71 Christof Heyns, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (UNGA Human Rights Council, 23rd ses, 9 April 2013) UN Doc A/HRC/23/47 para 52 <https://digitallibrary.un.org/record/755741?ln=en> accessed 31 May 2023.

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their collaborators, and their motivations.[72] Despite the fact that this is a beneficial side, victims would not be pleased to learn, for instance, that a robot wrongly believed their relative to be a valid target and killed him or her. The robot cannot apologise for being affronted after being injured.[73] The ECtHR, for example, has imposed sanctions on many states for failing to bring charges for human rights violations.[74] Hence, the process of accountability continues to be significantly influenced by corporate responsibility through state responsibility.[75] Governments would recommend a minimum level of behaviour for corporations that could be observed by interested parties; the recognition of obligations on corporations under international law might motivate them to do so.[76]

3.2 Enforcement mechanisms at the national level to corporate actors for AWS actions

From a conceptual standpoint, there are primarily two methods to address the issue of who must be held accountable when it comes to AWS. The first option is to set up a 'strict liability' or reverse the burden of proof of 'presumed liability' for AWS. Second, the emphasis might be moved to state liability resulting from failing to uphold risk mitigation and damage reduction duties at the pre-deployment stage.[77]

In accordance with international law, corporate actors can be held accountable at four different points: design, production, sale and transfer, and the use of the weapon.[78] It could be easier to assign corporate responsibility when the structural flaws in AWS lines are clearly attributable to their manufacturers.[79] In addition, it is not complicated to hold accountability to the corporate actors when a corporation commissions for the sale of AWS violates international law or domestic laws[80] to supply such weapons to those parties. Similarly, the corporation may be held liable if AWS's designer wilfully breaks international law[81] when the system is unable to distinguish between civilians and combatants or causes unnecessary suffering.[82] Because international law bans the production or stockpiling of that specific weapon, it is possible to prove that weapons are being produced illegally. The manufacturer is solely responsible for this.[83] Moreover, the manufacturer should respect customary international law[84] in their product due to the absence of any international agreement over

72 Chengeta (n 49) 10.

73 ibid 11.

74 *X and Y v The Netherlands* (n 66).

75 *DeShaney v Winnebago County Department of Social Services* (US Supreme Court, 22 February 1989) <https://supreme.justia.com/cases/federal/us/489/189> accessed 31 May 2023.

76 Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 (3) The Yale Law Journal 463, doi: 10.2307/797542.

77 Geiss (n 15) para 12.

78 Ralph G Steinhardt, 'Weapons and the Human Rights Responsibilities of Multinational Corporations' in Stuart Casey-Maslen (ed), *Weapons under International Human Rights Law* (Cambridge University Press 2014) 531-2, doi: 10.1017/CBO9781139227148.023.

79 Swati Malik, 'Autonomous Weapon Systems: The Possibility and Probability of Accountability' (2017) 35 (3) Wisconsin International Law Journal 630.

80 Steinhardt (n 78) 531.

81 Geneva Academy of International Humanitarian Law and Human Rights, *Autonomous Weapon Systems under International Law* (Academy Briefing no 8, Geneva Academy 2014) 22.

82 Peter Asaro, 'On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making' (2012) 94 (886) International Review of the Red Cross 693, doi: 10.1017/S1816383112000768.

83 Chemical Weapons Convention (n 46).

84 ICRC, 'Practice relating to Rule 74: Chemical Weapons' (*International Humanitarian Law Databases,* November 2022) <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule74> accessed 31 May 2023.

whether or not AWS is forbidden under customary international law. It is important to note that AWS can be used unlawfully even when it is legal to manufacture it. If the perpetration via planning, assisting, and abetting is demonstrated,[85] this will not 'trigger liability' unless the corporation has considerable knowledge of the illicit usage of AWS, at which point the corporation is accountable for aiding and abetting under international law. [86]

The victims' only option is to file civil cases, and many domestic legal systems strongly emphasise the necessity to include accountability for the failure of machines. Manufacturers' liability is a common term used to describe corporate liability in the context of the accountability of AWS.[87]

It is possible in some jurisdictions for claimants to file product liability cases in civil lawsuits. It would be against corporate manufacturers of AWSs[88] for harm caused by the product's manufactured liability regime, including various forms of negligence, failure to take proper care of guide product or prevent anticipated risks, and failure to inform reasonable instructions.[89] Manufacturers would be obligated to cover any damages and provide victims' or their families with compensation under this option, which might consider any AWS crime as a legal accident.[90]

AWS opponents have pointed out a few issues with a strict liability strategy because the weapon is apparently not intended to conduct such violations.[91] First, it is uncommon for weapon manufacturers to be held liable for design defects, [92]particularly when they notify customers that the AWS might be inaccurate.[93]

Furthermore, it becomes challenging to invoke product liability in order to bring a claim based on the manufacturer's liability. It is impossible to prove negligence[94] if the manufacturer of the product informed the buyer of the potential nature and extent of impairments that might happen while the product is being used. [95] In fact, the idea of autonomy as a whole assumes that AWS will operate in ways that are different from those that their designers anticipated or planned[96] for several reasons, from simple malfunctions and software bugs to more complicated system failures, [97] shifting environmental conditions, hacking, and human mistake.

85 Steinhardt (n 78) 531.

86 Chengeta (n 49) 41.

87 Daniel Hammond, 'Autonomous Weapons and the Problem of State Accountability' (2015) 15 (2) Chicago Journal of International Law 665-7.

88 Human Rights Watch, *Losing Humanity: The Case Against Killer Robots* (Human Rights Watch 2012) 44 <https://reliefweb.int/report/world/losing-humanity-case-against-killer-robots> accessed 31 May 2023.

89 Beard (n 7) 647.

90 Human Rights Watch (n 88) 43-4.

91 Robert Sparrow, 'Killer Robots' (2007) 24 (1) Journal of Applied Philosophy 69, doi: 10.1111/j.1468-5930.2007.00346.x.

92 Hammond (n 87) 666.

93 Sparrow (n 91) 69.

94 Human Rights Watch (n 88) 43.

95 Even if this is an example of US domestic law, it does exemplify the kind of arguments that can be used in other jurisdictions to restrict manufacturer liability. It also goes on to show that instituting civil suits against non-domestic manufacturers may prove to be even more difficult.

96 Sparrow (n 91).

97 Rebecca Crootof, 'War Torts: Accountability for Autonomous Weapons' (2016) 164 (6) University of Pennsylvania Law Review 1374.

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Human operators can take certain restrictions into account when these failures can be predicted in advance.[98] However, when failures are unforeseen, the result may be uncontrollable autonomous systems.[99] Evaluating the risk of using autonomous systems is crucial to comprehend the possibility and effects of a loss of control.[100] AWS decisions could be influenced by much more than just the original programming as they learn from their experiences.[101]

We must address the problem that as long as the design and production of the weapons are legal,[102] corporations' private weapons manufacturers will not be held accountable for the use of the AWS by individuals or governments, especially when manufacturers are vigilant[103] to disclose any uncertainties of malfunctions to military consumers. [104]

A stronger controlling principle for evaluating the presence of a 'substantial conflict' is provided by the discretionary function exception to the Federal Tort Claims Act (FTCA).[105] The Court determined that the armed services might choose the best design for military equipment by using their discretion under the terms of this clause.[106] Nevertheless, at least one American court has determined that a weapon's manufacturers are not obligated to take reasonable precautions to avoid harming any potential adversary combatants or individuals connected to enemy forces. As a result, manufacturer liability in tort for defective products cannot be based on the effects of employing weapons during an attack.[107] However, attempting to sue a manufacturer could be challenging to bear for the reason that the manufacturer or other parties might not have been responsible for the victim's damages. More importantly, as a primary hypothesis, it is submitted that product liability laws are largely untested in robotics.[108] This indicates that it will be difficult for AWS victims to file a successful civil lawsuit unless it is evident that the corporation acted dishonestly with *mala fides*.[109]

Without anticipating the question of whether or not these requirements are too firm, the victim must deal with a number of jurisdictional technicalities and challenges in addition to financial expenses. Even if there are legal provisions in place that would permit them to claim damages, it is absurd to anticipate that the disadvantaged and geographically[110] displaced civilian victims of conflict will be able to file a lawsuit against a manufacturer in a foreign jurisdiction.[111] Therefore, the strict liability paradigm would be unable to hold manufacturers accountable or provide retribution for victims.[112]

98 Paul Scharre, *Autonomous Weapons and Operational Risk : Ethical Autonomy Project* (Center for a New American Security 2016) 9.

99 ibid 13.

100 ibid 9.

101 Sparrow (n 91) 70.

102 *Boyle v United Technologies Corp* 487 US 500 (1998) (US Supreme Court, 27 June 1988) <https://supreme.justia.com/cases/federal/us/487/500> accessed 31 May 2023.

103 Beard (n 7) 647.

104 Human Rights Watch (n 88) 44.

105 28 US Code § 1346(b) - United States as defendant, 2680(a) – Exceptions <https://www.law.cornell.edu/uscode/text/28/1346> accessed 31 May 2023.

106 *Boyle v United Technologies Corp* (n 102).

107 Koohi v United States, 976 F.2d 1328 (1992) (United States Court of Appeals for the Ninth Circuit, 8 October 1992) <https://cite.case.law/f2d/976/1328> accessed 31 May 2023; Malik (n 79) 629.

108 Geneva Academy of International Humanitarian Law and Human Rights (n 81) 24.

109 Chengeta (n 49) 39-40.

110 Human Rights Watch (n 88) 44.

111 Geneva Academy of International Humanitarian Law and Human Rights (n 81) 24.

112 Human Rights Watch (n 88) 44.

4 CONCLUSIONS

Although there is no agreement on whether it is legal to give autonomous robots the ability to kill innocent civilians, it should be kept in mind that states should include their perspective when deciding the commands of public conscience[113] and principles of humanity introduced in the Martens Clause and IHL.[114]

Holding a corporation accountable for negligence in any given situation may be hard in reality due to lack of control or proximate cause, which would deliberate 'impunity for all AWS use', despite the fact that AWS are specifically designed for independent decision-making. Evidently, the core problem is not located only in how AWS works without human intervention because the mistake could be made by a person, AWS, or any weapon. Remarkably, there is an assumption that AWS analysis is reliable, but the key issue here is that humans are held more accountable than AWS.

To conclude, in the lack of a convention that governs the use of AWS, corporate roles are defined as a by-product of automation. Presumably, there are no present indicators that the development of AWSs will be banned. According to Harold Koh,[115] the former US State Department Legal Advisor, there is no limitation on the employment of technologically sophisticated weapon systems in armed conflict under the laws of war, and the type of the weapon should not affect the rules of controlling the intervention as long as they are used in accordance with the relevant rules of war.[116]

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113 ibid 35.

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116 Beard (n 7) 639.

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Research Article

MARRIAGE OF MINORS: IMPLICATIONS FROM NIGERIAN AND TUNISIAN LEGAL SYSTEMS FRAMEWORK

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Summary: – 1 Introduction. – 2 Literature Review. – *2.1 Marriage of Minor Cases*. – 3. International and domestic legal framework. – *3.1 Convention on the Rights of the Child. – 3.2 Domestic legal framework. – 3.3 The Tunisian legal framework for the marriage of minors – 3.4 Similarities and differences in Nigerian and Tunisian laws on the marriage of minors*. – 4 The implications of child marriage in both countries. – *4.1 Health implications. – 4.2 Educational implications.* – 5 Recommendations. – 6 Conclusion.

Keywords: Marriage, Minor, Legal System, Nigeria, Tunisia

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Background: *Despite all the international agreements and national laws that ban and against the marriage of minors, it is increasingly commonplace in many countries across the globe. Child marriage is a human rights violation which denies girls from acquiring proper education and gaining the required knowledge and sound health that could help them to conveniently navigate the future for their dream or perceived ambition in life so that they can play an amazing role with their peers in nation building. People engage in a marriage with a minor for different reasons and motivations. Still, the majority believe in sexual pleasure derived from marrying someone young, l far different from that of an older woman. The implications of the marriage of minors are vividly addressed in this paper. The marriage of minors is rampant in the world, but this study limits its scope to the implications of the marriage of minors from the legal framework in Nigeria and Tunisia.*

Methods: *This article uses content analysis (CA) and systematic literature review (SLR) as methodological approaches. The methodology provides theoretical and practical foundations for Marriage of Minors: Implications from Nigerian and Tunisian Legal Systems Framework.*

Results and Conclusions: *The results from the literature review and content analysis demonstrate cases of the marriage of a minor in both countries explored in this study. The paper also demonstrated that there are international and domestic legal frameworks in addressing the challenges of marriage to minors, and the paper specifically analysed the Convention on the Rights of the Child. It also illustrated the Tunisian legal framework for the marriage of minors and highlighted the similarities and differences in Nigerian and Tunisian laws regarding the issue. The health and educational implications of child marriage in both countries are also elucidated in the paper. The paper recommends valuable suggestions to the policy maker and the need for the National Assembly of both countries to reform their family law and take note of the differences in both customary and Islamic laws. This paper also recommends more respect for civil law, enacted unanimously.*

1 INTRODUCTION

Without a doubt, the world is witnessing different kinds of crimes that always harms the people concerned. The marriage of a minor is undoubtedly one of the crimes some people commit . The reason for engaging in such action differs , but the research shows that the majority of them are engaging in child marriage for sexual satisfaction. There is a general belief that children below 18 years perform better sexually than older women. The consequences of such action (health, education etc.) on children involved are not taken seriously as long as the marriage has been done. Thus, according to UNICEF, the early marriage or marriage of minors is defined as the marriage between two people in which one is over 18 years of age and the other party is less than 18 years, respectively. Marriage of minors is an ancient worldwide custom. It compromises a girl's development that may end up in early pregnancy, affecting her educational achievement, restricting her chances for career and vocational advancement and making her vulnerable to the risk of domestic violence. Marriage of minors impacts not only girls but also boys, though the latter marriage has not been widely studied . It exposes them to unnecessary financial pressure to carry out their responsibilities and meet the family's needs. This may curtail their opportunity to continue their education and deny them career development.

Marriage of minors has been problematic in some countries where several efforts have been put in place to end the injustice. Many agreements have been made internationally and domestically in fighting the injustice of child marriage in Africa. Countries have signed the agreements entirely or partially. Such an agreement includes the Child Right Act (CRA)

in Africa which condemns and rejects the marriage of minors[3]. Another agreement is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[4] Tunisia is one of the two countries that have signed the agreement so far. Nigeria and Tunisia are not exempted; it has been rampant in some parts of Nigeria where the act has been associated with religion more than civil. Though, the Nigerian constitution alligns with the international stand by rejecting the act. Although Tunisia is an Arab country, a series of uprisings have been carried out against child marriage . Its constitution does not support child marriage but partially agrees to the marriage of any minor who was impregnated by who impregnated her. Certain acts and practices are implemented in the culture of all countries in the world . This may be purely cultural or affiliated to a specific religious belief. Therefore, due to cultural diversity, cultures and practices in some areas contradict the practices in other places. But as far as the marriage of minors is concerned, no country adopts it in totality as the law of the land but is associated with the belief of some religions. Despite all international and national rejection of the marriage of minors, people are still practising it.[5]

In Nigeria, it has become a rampant act among reach people, particularly among the politicians, mainly in Northern Nigeria. The perspective of Islam law regarding the marriage of whom to consider as minor in customary law influenced the practice of marriage of minors in Northern Nigeria. It is reported that more than 48% of Hausa-Fulani girls got married at the age of 15, while about 78% married at the age of 18[6]. The practice contradicts the Child Right Act. Though Islamic law is recognized in Nigeria as part of Nigerian law, none of those practising marriage of minors that claimed that Prophet Muhammad practised it can give a precise analysis and reason why such action is practised. It is known that Prophet Muhammad is a role model in Islam, and everything he does has a basis in line with God's directive. Looking at the statistics of girls married before the age of 18 in Nigeria, it is realised that Nigeria Demographic and Health Survey (NDHS) reported in 2013 that 58.2 per cent of Nigerian girls become brides before 18.[7] The implications of marriage of minors in Nigeria are enormous; as a result, the victims (girls or boys) face many problems. Among the recorded implications are issues in health by getting older than their age, being unable to handle the challenges of married life, continuing education to desired stage, and failing to pursue a future career.

In Tunisia's case, as in Nigeria law, the legal marriage age is 18 years or above for both man and woman, though the marriage of minors is permitted in Tunisia subject to the consent of their parents and guardians and special approval from the judge[8.] According to Tunisian law, the judge is the only person permitted to give the go- ahead for any minor marriage only in case of "grave reasons", and it has to be "in the interest of the spouses"[9] This contributes

3 Act of the Federal Republic of Nigeria No 26 'Child's Rights Act' of 2003 <https://www.refworld.org/docid/5568201f4.html> accessed 14 May 2023.

4 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979 UNGA Res 34/180) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> accessed 14 May 2023.

5 UNICEF, 'Child Marriage is a Violation of Human Rights, but is all too common' (UNICEF Data, May 2022) <https://data.unicef.org/topic/child-protection/child-marriage> accessed 14 May 2023.

6 Tim S Braimah, 'Child Marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the Protection Children against Child Marriage' (2014) 14 African Human Rights Law Journal 475 <https://www.saflii.org/za/journals/AHRLJ/2014/24.html> accessed 14 May 2023.

7 National Population Commission [Nigeria] and ICF International, *Nigeria: Demographic and Health Survey* 2013 (NPC, ICF International 2014).

8 Décret de la République Tunisienne 'Code du Statut Personnel' du 13 août 1956 (6 moharem 1376) arts 5, 6 <https://www.refworld.org/docid/3ae6b5510.html> consulté le 14 May 2023.

9 ibid, art 5.

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significantly to the widespread of child marriages in the country. Many citizens in Tunisia capitalise on the law regarding the marriage of minors that partially allows the marriage of minors . It is reported that a court in Tunisia approved the marriage of a 13-year - old girl to a 20-year old relative who impregnated her.[10] This caused an uproar among organisations dealing with children's rights in the country. Believing that the judgment totally contradicts the international agreement on child marriage. The judge was relying on an article in the Tunisian Criminal Code which stipulates that:

> "While sex with a girl under 15 without the use of force is punishable by six years in prison, the culprit can halt proceedings by marrying the victim".[11]

The article in the Tunisian criminal law is enacted for nothing but to maintain peace in the Tunisian society, not to cause more chaos or problem . The law realises problems may occur in the future as a result of unwanted pregnancy of a minor girl in society. It is generally believed in Tunisia and most of the Arab world that any girl who has slept with a man out of marriage might not be able to get another serious-minded man. As a result of the above problems, the study ready discusses the legal framework for the marriage of minors in Nigeria and Tunisia. Thus, the research relies on the following objectives.

1. Understanding the marriage of minors and the view of both countries
2. Perusing legal proceedings and courts' decided cases on the marriage of minors in Nigeria and Tunisia
3. Implications of the marriage of minors in Nigeria and Tunisia societies

2 LITERATURE REVIEW

The discussion of the scholars towards the marriage of minors is based on related and relevant literature . Understanding the marriage of minors in its concept differs as it is determined by the ideology and beliefs of a given society. Scholars affirm that some communities agreed that there is no specific age for getting married in as much the girl can talk, walk, and of course, has started menstruating. As it is reported by the NDHS 2013, Nigerian girls get married before the age of 18[12]. This clearly illustrates that a large number of Nigerian girls are involved in early marriage. Based on this, Idayat Hassan approves the report that it highlights the challenges faced by the Nigerian girl-child regarding early marriage. She also emphasises the stagnant growth and improvement despite the availability of laws like the constitution of Nigeria and the Child Rights Act in 2003, which has been adopted in 24 out of 36 states in Nigeria. On the determinant of early marriage in Nigeria, Envuladu researches Plateau state, using indicators such as the level of education of parents and guardians, the environmental contribution, religious attainment, the father's type of job and the number of people they have to cater for. The author conducts research by sharing questionnaires with school girls. More than 46% of the girls believe that one of the major causes of early marriage is an order from parents to marry before 18 years[13]. He added that those girls forced in

10 Basma Atassi, 'Tunisian Court Approves Marriage of Pregnant 13-year-old' (*CNN news*, 14 December 2016) <https://edition.cnn.com/2016/12/14/middleeast/tunisia-court-child-marriage/index.html> accessed 14 May 2023.

11 Décret de la République Tunisienne 'Code Penal' du 9 juillet 1913 (5 châbane 1331) art 227 bis <https://www.refworld.org/docid/3ae6b5590.html> consulté le 14 May 2023.

12 Nigeria: Demographic and Health Survey 2013 (n 7).

13 EA Envuladu et al, 'Determinants and Effect of Girl Child Marriage: A Cross Sectional Study of School Girls in Plateau State, Nigeria' (2016) 5 (3) International Journal of Medicine and Biomedical Research 125, doi: 10.14194/ijmbr.5.3.3.

to early marriage are to be cared for, not to be caring for children. This can lead to more problems for the young mother who gave birth in the early years of her life and may also cause problems for the child born as she has no experience of how to care for a newborn baby The age of the first sexual intercourse is also another determinant of early marriage. This is relevant to research conducted in the Democratic Republic of Congo (DRC) where the researcher confirms that any girl who reported that her first sexual intercourse was when she was before 16 is about 73 times more likely to get married before the age of 18[14].

Avogo and Somefun affirm that the marriage of minors in West Africa is regarded as the highest in the world; therefore, researchers need to conduct more research on under age marriage there. Avogo and Some fun ch ose Niger, Nigeria and Burkina Faso as the focus of their case study on the marriage of minors and the formation and childbearing in West Africa. Statistically, at 60%, Niger has the highest number of marriages of minors in Africa, followed by Nigeria with 28% and Burkina Faso with 25%.[15] Perusing the law of those countries, there is a similarity in some of the provisions of laws and the influence of Islamic law . That may contribute to the rise of the occurrence of early marriage in their countries. Though, Tunisia does not share the same idea with them regarding Islamic law. Still, civil law in Tunisia has a provision for the legality and acceptability of the marriage of minors (with condition).

Envuladu view on the causes and effects of early marriage in Nigeria is associated with the individual characteristics - women's education, place of residence, economic status and public indicators are strong determinants of early marriage and child bearing[16]. Thus, most scholars address the determinant and childbearing, but this paper will focus more on the legal framework to stop or minimise the widespread of child marriage.

2. 1 MARRIAGE OF MINOR: CASES

A Nigerian senator, Ahmad Yerima, married a 13-year-old Egypt girl after paying a dowry of $100,000. Although the marriage generated an uproar as it contradicts Section 21 of the CRA, his argument relies on religious grounds and affirms that: Prophet Muhammad (SAW) married Aisha at the age of nine. Therefore, any Muslim who marries a girl of nine years and above is following the teaching and practices of the Prophet Muhammad (SAW). If there is anybody who will tell me that what I did contradicts Islam, I will say I will submit, and I will do whatever they ask me to do.[17] Below is a Hadeeth on the age of Aisha when she married Prophet Muhammad and the story behind the marriage:

> Al-Amash narrates from Ibrahim, who narrates from al-Aswad that Aisha said: "The Messenger of God married her when she was six years old and consummated the marriage when she was nine [years old], and he passed away when she was eighteen".[18]
>
> – It is reported that a court in Tunisia approved the marriage of a 13-year- old girl to a 20-year old relative who impregnated her. This caused an uproar among

14 Jacques Elengemoke Mpilambo et al, 'Determinants of Early Marriage among Young Women in Democratic Republic of Congo' (2017) 52 (1-3) Journal of Social Sciences 82, doi: 10.1080/09718923.2017.1322393.

15 Winfred A Avogo and Oluwaseyi D Somefun, 'Early Marriage, Cohabitation, and Childbearing in West Africa' [2019] Journal of Environmental and Public Health 1, doi: 10.1155/2019/9731756.

16 Envuladu et al (n 13).

17 Braimah (n 6) 485-7.

18 Sahih Muslim, *The Book of Marriage*, ii 1038 no 1422 <https://sunnah.com/muslim:1422a> accessed 14 May 2023.

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organisations dealing with children's rights in the country, declaring that the judgment contradicts the international agreement on child marriage. The judge relied on an article in the Tunisian Criminal Code stipulating that while sex with a girl under 15 without the use of force is punishable by six years in prison, the culprit can halt proceedings by marrying the victim.[19]

According to Human Rights Watch,[20] it is worrying that the Child Rights Act has been passed in Nigeria, closing on two decades; still, small girls are being forced into marriages. The organisation urged Nigerian states to quickly adopt the CRA at least to minimise the early and forced marriage prevailing in the Nigerian environment. Human Rights Watch interviewed 16 married girls between the ages of 14 and 19. As Nigerian states differ slightly in adopting the type of legal system in Nigeria's constitution, the interview focuses on the legal, tradition and demography of two different states: Kano (the northern part of Nigeria) and Imo states (Eastern part of Nigeria). Based on the view of some scholars that child marriage is majorly happening in the northern part of Nigeria, this interview disproves them by citing examples of forced and child marriage cases across Nigeria. Imo state, a majority Igbo and Christian state in Nigeria, has adopted Child Rights Act since 2004; still, child marriage is still occuring in the state.

– Unwanted early pregnancy is often considered a great shame for the family in the Imo state. In the Igbo customary law, a child born out of wedlock is regarded as an illegitimate child. If the parent of the impregnated girl can find a man older and richer who agrees to take the responsibility of marrying her, it saves her from the shame she has caused the family. She said:

I was just thrown out of the house [then] due to fear of the pregnancy; if I stayed in my family house, the persecution would be too much for me. So, it was better for me to marry.[21]

– A case of Rachel K. from Imo state; when interviewed, she was 15 years old when her parents discovered that she was five months pregnant with her then- school boyfriend. She was sent out of her family house to save her family from shame.

– Another case of Obioma O. from Imo state, a 15 years old girl impregnated by her 60- year- old teacher. Her parent chased her out of the family house and later lived with her teacher who had impregnated her and was previously married . She was forced to marry the man for the unwanted pregnancy.

– A case of a 14-year-old girl forced into marriage and ran away from her husband's house six times in three years. Every time she left her husband, her family always forced her to return . This shows that her family dictated the marriage, and it was against her will.

– In Kano state, Human Rights Watch discovered in Kano state that families often arrange marriages for girls and young women without informing the girls or even knowing whom to marry them to. This will not give them a choice over when or whom to marry. In a state like Kano state, Sharia law is installed and the marriage of minors is accepted on religious and traditional grounds .

19 Atassi (n 10); Code Penal (n 11) art 227 bis.

20 Human Rights Watch, 'Nigeria: Child Marriage Violates Girls' Rights: States Should Urgently Adopt Laws to Enforce Child Rights Act' (*Human Rights Watch*, 17 January 2022) <https://www.hrw.org/news/2022/01/17/nigeria-child-marriage-violates-girls-rights> accessed 14 May 2023.

21 ibid.

Nafisatu a 12-year-old girl forced into marriage with a 27-year-old man, said that:

> ...my family had no money to provide for my basic needs and education after my father died. Instead, they planned for me to leave school and marry a man they chose. She added that: when I told him that I am not interested in marriage, [He] went back to my family members, and they told him to just forget about my decision, it's not that important if he actually loved me and wanted to marry me.[22]

She was out of school due to forced marriage at an early age.

Based on the above cases and interviews conducted by Human Rights Watch in Nigeria, it is clear that the marriage of minors is a general problem. In Nigeria for example, the Human Right Watch carried out interviews across Nigeria to indicate that the marriage of minors is not only practised in the northern part of Nigeria but is also happening in some southern parts of the country . Kano state was chosen in the North and Imo state in the South ; this shows that despite the CRA signed by some Southern states, very few states in the northern part of the country signed it yet. The marriage of minors is still practised in the South. For the case of Ahmed Yerima, a 13-year-old Egyptian girl, it is believed that her husband based his argument on religious grounds that it is permissible in Islam to marry a girl that has started menstruating regardless of her age. Though Nigeria's legal system is based on three laws, civil , customary and Islamic law, the Yerima case is in line with both customary and religious laws.

Looking at the Tunisia case of a 13-year-old impregnated, the judge ordered the rapist to marry her after serving his punishment according to the law. Despite the judge's pronouncement that the rapist should marry the victim, which may be considered as an opportunity for Tunisian men to continue to be involved in the marriage of minors in the country, the marriage of minors remains minimal in Tunisia, with only two per cent recorded for Tunisia.

3 INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK

3.1 CONVENTION ON THE RIGHTS OF THE CHILD

The first international instrument that deals with the rights of children is the Convention on the Rights of the Child (CRC), where rights of children were adopted. This was later opened for signature on 20 November 1989.[23] Woodhouse describes the CRC as a charter that encompasses children's rights.[24] This shows that all the conventions' agreements are binding and worth following majorly for all African countries. He believes that CRC has comprised the cases like child marriage and child abuse. However, Warner and Askari oppose Woodlouse's acceptance of the CRC as an inclusive agreement. Warner confirms that CRC does not have a provision for child marriage.[25] He accepts that the subject of marriage of minor had been discussed in the Convention on Consent to Marriage, the minimum age for marriage and of course, registration of marriages . Therefore, there won't be any need for

22 ibid.

23 Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25) <https://undocs.org/en/A/RES/44/25> accessed 14 May 2023.

24 Barbara Bennett Woodhouse, Hidden in Plain Sight: The Tragedy of Children's Rights from Ben Franklin to Lionel Tate (Princeton UP 2008) 32.

25 Ladan Askari, 'The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages' (1998) 5 (1) ILSA Journal of International and Comparative Law 123.

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CRC to address child marriage. Askari makes the gender bias in CRC known and argues that CRC discusses more violence against boys (involving child soldiers), which fails to give similar attention to girls who are in more vulnerable and precarious situations than boys.

3.2 DOMESTIC LEGAL FRAMEWORK

The Child Rights Act (2003) indicated Nigeria's domestic action against child abuse generally. The bill spelt out the interests of Nigerian children in all aspects of life. Duties and obligations of parents, the government and organisations towards the children are also included in the bill.[26] This confirms that the CRA comprises full legal rights of children in Nigeria. These rights include; putting an end to the use of children in criminal activities, child labour, sexual abuse of children. The CRA also includes caring for the children's supervision and custody.

According to the African Child Forum:

> "Early marriage is criminalised Child's Right Act, 2003 Article 23: a certain Punishment is set for child marriage and betrothal A person who married a child, or to whom a child is betrothed or who promotes the marriage of a child or who betroths a child commits an offence and is liable on conviction to a fine of N500,000 or imprisonment for a term of five years or both such fine and imprisonment".[27]

Although the Child Rights Act (CRA, 2003) is against marriage under 18 years, the stand of Islamic and civil law contradicts the position of CRA.

Nigerian constitution comprises three legal systems: civil, customary and Islamic law, which operate simultaneously . The perspectives of the Islamic and customary law regarding the marriage of minors, or marriage generally, are different from the civil law. That is why the government only controls marriage conducted in civil law and has no control over customary or Islamic law. Thus, the 1999 Constitution of Nigeria, Part 1 Section 61, provides that:

> "The federal government cannot interfere with Islamic and customary marriages, which weakens and fails to give effect to the CRA to protect children against a social evil such as child marriage".[28]

Therefore, in Northern Nigeria, if any one marries an under age girl that marriage conducted in accordance with Islamic law, such a marriage cannot be challenged or prosecuted because it has legal backing for it. Undoubtedly , accepting the marriage of a minor in line with Islamic law in Nigeria has automatically rendered the provision in CRA useless.

3.3 THE TUNISIAN LEGAL FRAMEWORK FOR THE MARRIAGE OF MINOR

In Tunisia, the legally accepted minimum marriageable age for both sexes is 18 years, while that of a minor is permitted if the guardian or the birth mother gives their consent and including special approval of the judge. The law of Tunisian gives autonomy to the judge to grant marriages of minors in case of "grave reasons" for the advantage of the spouses. This law was enacted in reaction to a judgment passed by one Tunisian judge on a pregnant 13-year-old girl , where the court ordered the offender to marry the victim after facing the law. In addition, child marriage is void under Article 21 of the code even though no

26 Human Rights Watch (n 20).

27 Child's Rights Act (n 3) arts 23.

28 Constitution of the Federal Republic of Nigeria of 1999, pt 1, s 61 <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> accessed 14 May 2023.

penalties are specified against those who may have facilitated or knowingly been involved in such marriages.[29] On the issue of the 13-year-old impregnated, some organisations protested to see that government called for the reverse of the judgment, grant protection to the pregnant girl, and ensure the continuation of her education. The Ministry of Women's Affairs, Family and Children in Tunisia released a statement saying it was deeply concerned by the decision, adding that it had been trying to annul the marriage "for the sake of the child's interest". Following the unprecedented marriage of a minor, the ministry called on the Tunisian parliament to adopt and pass a bill based on countering violence against women. According to a Population Reference Bureau report (2013), child marriages are now rare cases in Tunisia, despite legal exceptions to the age of marriage.[30]

3.4 SIMILARITIES AND DIFFERENCES IN NIGERIAN AND TUNISIAN LAWS ON MARRIAGE OF MINOR

Both Nigeria and Tunisia adopted many international treaties and agreements on protecting women and children. The domestic law of each country has also enacted laws that protect child abuse, protection of women and children, the marriage of minors etc. There are similarities in the laws of both countries. Although there are slight differences in their domestic laws regarding child marriage. Nigeria's legal system has three concurrent classes: civil , customary and Islamic laws. Despite being a signatory to many international agreements on women's and children's rights, it is not easy to stop child marriage as part of the Nigerian legal system accepts child marriage.[31] Tunisian law on the other hand, signed the UN-CRC, similar to the Nigerian constitution; article 46 of the constitution of Tunisia shows a dedication to the abolition of all types of violence against women and the defence of women's rights in all spheres.[32] In the Middle East and North Africa, Tunisia was the first nation to ratify and remove all doubts about the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It is one of the only two countries that adopted the Optional Protocol in the North African countries. In addition, Tunisia is one of the sponsors of the following Human Rights Council resolutions: the 2013 resolution on the marriage of minors in or forced marriage, the 2017 resolution on the need to address = the marriage of minors and forced marriage in the humanitarian platform, the 2019 resolution on the consequences of the marriage of a minor.[33] But despite all these agreements and laws that Tunisia has signed to protect women and children, a court can still approve a marriage between a 13-year-old child and her rapist.[34] This is relatively similar to Nigerian law on the marriage of minors, as civil and Islamic laws in Nigeria approve and overrule the marriage of minors.

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29 Code du Statut Personnel (n 8) art 21; World Bank, Women, Business, and the law 2016: getting to equal (World Bank Publ 2015) 233.

30 Farzaneh Roudi-Fahimi and Shaimaa Ibrahim, 'Ending Child Marriage in the Arab Region' (Population Reference Bureau (PRB), 17 June 2013) <https://www.prb.org/resources/ending-child-marriage-in-the-arab-region> accessed 14 May 2023.

31 Constitution of the Federal Republic of Nigeria (n 28) pt 1, s 61; Child's Rights Act (n 3) arts 21-23.

32 Tunisia's Constitution of 2014 <https://www.constituteproject.org/constitution/Tunisia_2014?lang=en> accessed 14 May 2023.

33 Child, Early and Forced Marriage (adopted 18 December 2013 UNGA Res 68/148) <https://digitallibrary.un.org/record/764369> accessed 14 May 2023; Child, Early and Forced Marriage in Humanitarian Settings (adopted 22 June 2017 UNGA Res 35/16) <https://digitallibrary.un.org/record/1302329> accessed 14 June 2023; Consequences of child, early and forced marriage (adopted 11 July 2019 UNGA Res 41/8) <https://digitallibrary.un.org/record/3832174> accessed 14 May 2023.

34 Code du Statut Personnel (n 8) arts 5, 6, 21; Code Penal (n 11) art 227 bis.

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4 THE IMPLICATIONS OF CHILD MARRIAGE IN BOTH COUNTRIES

4.1 HEALTH IMPLICATION

Like other cases of child abuse, the marriage of a minor has several implications for victims. Thus includes health implications. Generally, any law enacted in a given society is for better living and maintaining safety in that society. The marriage of minors is undoubtedly a violation of human rights, mainly the violation of child rights by preventing them from enjoying sound health. It particularly affects the girl's health, such as increasing the risk of sexually transmitted diseases (STD), cervical cancer, death during childbirth, and obstetric fistulas.[35] Child marriage is not prevalent in Nigeria and Tunisia alone, but other African Countries share in its widespread. Mali, one of the West African countries, confirms the effects of a marriage of a minor more on young girls, although the generation to come is at risk for illness and premature death. In Mali, "adolescent mothers have a 35% - 55% higher risk than older women for delivering preterm infants and low birth weight. Mortality rates are 73% higher for infants born to mothers under 20 years of age than for those born to older mothers".[36] The implication of the marriage of minors cannot be over-emphasised . Many young mothers are in the stage of being cared for medically, not yet mature to look after others. Having a baby and finding herself in marriage will compel a young mother to care for babies, even with her lack of knowledge on many things relating to childbearing. Thus, childbearing by young girls can lead to obstetric fistulas and the mother's death.[37]

Over 2 million adolescents are living with fistulas. It develops in 100,000 each year.[38] Without a doubt, "girls between 10-15 years are vulnerable because their pelvic bones are not actually ripe for childbearing and delivery. Their risk for fistula is as high as 88%. Once a fistula is formed, faecal or urinary incontinence and personal nerve palsy may lead to humiliation, ostracism and resultant depression. Unless the fistula is surgically repaired, these girls have limited chances of living a normal life and bearing children".[39] The health consequence of child marriage is serious, as it is associated with the life of the victim and wide spread of deadly diseases.

4.2 EDUCATIONAL IMPLICATION

Education is essential in the life of a human being. It is the key to success in life, as education serves as a guide to a better life. Achieving certain educational standards requires a certain number of years and commitments. Involving in child marriage is a one of the impediments to achieving more in education. It is believed that education is an important step to attaining a higher position in life. Many girls married after the age of 18 take time to achieve more in education, through which they comprehend marital life before involving in it.

Therefore, low educational attainment affects girls' life trajectories in many ways. Girls who are forced to drop out of school early are more likely to marry or have children early before they may be physically and emotionally ready to become wives and mothers. This may affect their health and their children. For example, children of mothers younger than 18 face

35 EO Osakinle and Olufunmilayo Tayo-Olajubutu, 'Child Marriage and Health Consequences in Nigeria' (2017) 30 (1) American Scientific Research Journal for Engineering, Technology, and Sciences 351.

36 ibid 353.

37 Siné Bayo et al, 'Risk Factors of Invasive Cervical Cancer in Mali' (2002) 31 (1) International Journal of Epidemiology 202, doi: 10.1093/ije/31.1.202.

38 United Nations Population Fund, 'Obstetric fistula' (*UNFPA*, 6 September 2021) <https://arabstates.unfpa.org/en/topics/obstetric-fistula-5> accessed 14 May 2023.

39 Osakinle and Tayo-Olajubutu (n 35) 355.

higher risks of dying by age 5 and being malnourished. Other risks for girls and women associated with a lack of education include intimate partner violence and a lack of decision-making ability in the household. Low educational attainment for girls may also weaken community solidarity and reduce women's participation in society. Lack of education is associated with a lower predisposition to altruistic behaviours , and it curtails women's voice and agency in the household, at work and in institutions. Fundamentally, a lack of education husband disempowered women and girls in ways that deprived them of their basic rights. Many girls speak out about their experiences with their husbands regarding the continuation of education after getting married. It robs girls of their educational opportunities, with their husbands often left to decide whether they can continue their education. Rachel said that:

> "I discussed going back to school with my husband, but the way he is feeling, he is not interested in that" Rachel added. "He says that if I find anything good for me [in the job market], I should go ahead and do it. He thinks that if I am educated or if I have degrees, I will start to insult him. I don't know"[40]

Despite the free and compulsory education in Nigeria for ages 6-15, many girls still dropped out for one reason or other. Also, many girls get pregnant or have been forced into marriage and pulled out of school to work to earn a living. Surely, education will not count seriously as the girl has started participating in the responsibilities of the house.

5 RECOMMENDATIONS

More respect must be given to civil law to end the marriage of minors in Nigeria and Tunisia. Without a doubt, civil law enacted with the unanimous agreement of the populace needs to be respected. Though Part 1, section 61 of the Nigerian Constitution required a little bit of modification to both customary and Islamic laws. This also applies to Tunisian law, where a court passes judgment on rapists and victims that rapists should marry the victim. Despite the court order, the marriage of a minor in Tunisia is very low in comparison to Nigeria. Still, in order to stop it completely in Tunisia, the judgment needs to be reviewed in accordance with 18 years as the official marriage age.

It is also important for the National Assembly and the Parliament of both Nigeria and Tunisia to reform the family law of each country and address the differences in both customary and Islamic laws. By doing so, both legal systems will correspond to each other, and there will be no hiding place for anyone who commits crimes by marrying a minor.

6 CONCLUSION

This paper discusses the implications of child marriage in Nigeria and Tunisia and the legal framework to stop or minimise it. The study pays particular attention to the meaning of child marriage or the marriage of minors as defines each term for better understanding. Despite Nigeria's approval of the Child Rights Act (CRA), the rights of women and children regarding marriage remain unprotected . Despite the international, regional and domestic agreements signed by Tunisia to put an end to child marriage in Tunisia, cases of child marriage are being recorded. Nigeria's legal systems run on three classes: civil , customary and Islamic law. Any legal case has to be treated by taking it through the window of each law in the country. No doubt, these laws are sometimes contradicting as the sources of each law

40 Human Rights Watch (n 20).

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differ from the other. That is the case in the marriage of minors , in which customary law affirms the minimum age for marriage is 18 years which is not necessarily the case in Islamic law. Tunisia law states that any marriage be low 18 years of age is void, except in the case of rape, which allows the rapist to face the law and marry the victim. The implications of the marriage of minors as discussed in this paper, include Health and Education implications . It has been recommended that more respect needs to be given to civil law as all provisions in the constitution were unanimously agreed upon by the citizens of the country. It is also recommended that the National Assembly of both countries take the reformation of family law more seriously. By incorporating both Islamic and customary law, there would not be a problem between civil and customary as it always is in the case of the marriage of a minor.

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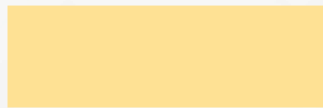

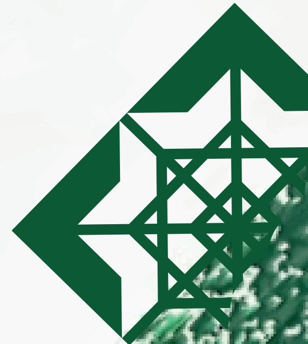

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