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AN EXAMINATION OF THE LEGITIMACY OF COPYRIGHT OWNERSHIP BY ARTIFICIAL INTELLIGENCE ON A GLOBAL SCALE

By Ominini Felix.¹

Abstract

The ever-evolving technological advancements have given rise to the field of Artificial Intelligence (AI). AI allows machines to perform tasks that were once reserved exclusively for human creativity, challenging conventional paradigms of creativity and authorship. The concept of artificial intelligence can be traced back to Alan Turing in 1950, with the term “artificial intelligence” coined by John McCarthy during a conference in Dartmouth in 1956. It is becoming increasingly clear that AI generative tools can replicate human creativity and generate original works which has posed legal challenges, particularly in the realm of copyright ownership. Copyright laws across the globe mandate that human authorship is a crucial aspect of obtaining copyright protection. At first, copyright ownership for AI-generated works was not a contentious issue, as the computer program was seen as a mere tool for human creativity. However, the increasing autonomy of modern AI, enabling independent creative decision-making, challenges the traditional notions of copyright ownership. This raises a pertinent legal question: can non-human entities, particularly AI generative tools, assert legitimate copyright ownership over the works they produce? Opponents argue that AI entities, being non-human, are incapable of being legitimate owners of copyright. Contrarily, proponents of AI copyright ownership assert that advanced algorithms and systems, despite being inanimate, should be recognized as legitimate creators. This dilemma calls for a resolution to ascertain the legitimacy of AI copyright ownership, setting the stage for a proposed general legal framework to regulate the field of Artificial Intelligence.

Keywords: A.I generative tools, Copyright Ownership, Authorship.

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1.0 Introduction

In today's digital age, technology is advancing at an unprecedented rate, and it's no surprise that artificial intelligence (AI) is becoming increasingly integrated into our daily lives. AI-driven virtual assistants like Siri and generative AI tools such as Open AI's ChatGpt and Google's Bard are continually learning from their interactions with human beings, steadily expanding their capabilities into realms once reserved exclusively for human creativity.

With the continuous advancements in the field of AI, a pertinent legal question arises: Can non-human entities, particularly AI generative tools, assert legitimate copyright ownership over the works they produce?

This research focuses specifically on AI generative tools and their legitimacy of copyright ownership from a global perspective taking into consideration the various approaches taken by legal systems around the world in response to this burgeoning issue.

It seeks to answer the question of whether AI generative tools can legitimately stake a claim to copyright, shedding light on the way forward in this dynamic field of legal scholarship and practice.

1.1 Background on Artificial Intelligence

Artificial intelligence (AI) is a field of computer science that focuses on creating computer systems and software that can perform tasks, such as learning from data, reasoning, problem-solving, understanding natural language, recognizing patterns, and making decisions that typically require human intelligence.² This concept can be traced to Alan Turing, a computer scientist, who in 1950 developed the Turing Test to determine a machine's ability to demonstrate human-like intelligence. According to the test, a machine can be considered as thinking like a human if a human judge cannot differentiate between the machine and another human.³

The phrase 'artificial intelligence' was first used by Mr John McCarthy during a conference in Dartmouth in 1956⁴ to describe the field of creating intelligent machines through science and engineering.⁵

² Techopedia, 'Artificial Intelligence' <<https://www.techopedia.com/topic/87/artificial-intelligence>>accessed on 18 September, 2023.

³ GeeksforGeeks, 'Turing Test in Artificial Intelligence' <<https://www.geeksforgeeks.org/turing-test-artificial-intelligence/>>accessed on 19 September 2023.

⁴ Prof. A. Lakshminath & Dr. MukundSarda, 'Digital Resolution and Artificial Intelligence- Challenges to Legal Education and Legal Research', (2011-2012) 2 *Chanakaya National Law University Patna Law Journal* 5.

⁵ John McCarthy, 'What is Artificial Intelligence?' (2007) <<http://www-formal.stanford.edu/jmc/whatisai.pdf>> accessed 18 September 2023.

AI machines, through the field of machine learning, can function and make decisions with little human intervention.⁶ This enables the computer to learn from data input, evolve, and make future decisions that may either be directed or independent. In the realm of art, music, and literary works, machine learning algorithms learn from the input of programmers to produce a fresh piece of work. These algorithms make their own decisions during the process to define the outcome.

It is becoming increasingly clear that AI generative tools can replicate human creativity and generate original works. At first, copyright ownership for AI-generated works was not a contentious issue, as the computer program was seen as a mere tool for human creativity. However, the increased autonomy of modern AI means that it can now make creative decisions independently, which raises important questions about who truly owns the rights to these works.⁷

1.2 The Scope of Copyright Ownership/Authorship

Copyright is one of the major aspects of intellectual property (IP) rights, providing legal protection to creators of literary and artistic works.⁸ This protection safeguards their creative efforts by prohibiting unauthorized use or duplication of their work.

Copyright embraces a wide variety of works, both published and unpublished such as literary or textual works of all kinds, pictorial, graphical, sculptural works, musical, dramatic, and choreographed works, sound recordings, computer programs, and various other digitized works.⁹

1.2.1. The Criteria for Eligibility

For a work to be eligible for copyright, it must meet two key requirements: originality and fixation.¹⁰ Fixation requires that the work is stored in a tangible format that can be perceived, reproduced, or communicated.¹¹ Therefore, the work should be accessible by someone other than the creator.

⁶ Flatiron School, 'Deep Learning vs. Machine Learning' <<https://flatironschool.com/blog/deep-learning-vs-machine-learning/>> accessed on 19 September 2023.

⁷ Andres Guadamuz, 'Artificial Intelligence and Copyright' WIPO Magazine <https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html#box> accessed on 19 September, 2023.

⁸ WIPO 'Copyright', <<https://www.wipo.int/copyright/en/>> accessed on 21 September, 2023

⁹ Mitchell Zimmerman, 'The Basics of Copyright Law' Fenwick & West LLP <<https://assets.fenwick.com/legacy/FenwickDocuments/2015-03-17-Copyright-Basics.pdf>> accessed on 21 September, 2023. This list is not exhaustive and can vary depending on the copyright laws of individual countries. In Nigeria, the Nigerian Copyright Act, 2022 outlines the works eligible for copyright under Section 2(1) of the Act.

¹⁰ Copyright Alliance, 'Requirements for Copyright Protection' <<https://copyrightalliance.org/education/copyright-law-explained/copyright-basics/requirements-for-copyright-protection/>> accessed on 22 September, 2023.

¹¹ Bitlaw, 'Obtaining Copyright Protection' <<https://www.bitlaw.com/copyright/obtaining.html>> accessed on 22 September 2023.

To satisfy the originality criterion, the work must be inherently unique, and not a copy of someone else's. It's important to emphasize that "originality" does not refer to an idea or thought's originality but the tangible work itself. In essence, a mere idea or thought alone cannot be protected by copyright. Section 8 of the Copyright Act 1987 provides for the protection of derivative works.¹² Thus, while the expectation is for each work to be unique, drawing inspiration from existing works does not automatically deny a copyright.

1.2.2. The Role of Human Creativity

The owner of a copyright has both moral and economic rights¹³, which typically encompass exclusive rights to reproduce, distribute, display, publicly perform, and create derivative works based on the original.¹⁴

Copyright legislation across the globe mandates that human authorship is a crucial aspect of obtaining copyright protection.¹⁵ This underscores the significance of human creativity in the development of original works.

For instance, only a qualified person can be granted copyright in Nigeria i.e. an individual who is a citizen or who is domiciled in Nigeria or an incorporated entity registered under Nigerian law.¹⁶ Although the Nigerian Copyright Act does not specifically mention AI-generated works, it can be deduced that only humans are capable of owning copyright over a work. Therefore, if a machine produces a work in Nigeria, the human inventor or programmer will hold the copyright in the work. Under U.S. law, the U.S. Copyright Office makes it a requirement for the author of a work to be human before such work is deemed copyrightable.¹⁷

Also, U.K. legislation provides for the copyright protection of computer-generated works under the Copyright, Designs, and Patents Act 1988. It provides that the author of a computer-generated work shall be taken to be the person who made arrangements necessary for the creation of the work.¹⁸ Thus, if an AI-generative tool, such as ChatGpt, possesses the capability to produce creative content, it is not considered

¹² United States Copyright Office, 'Copyright in Derivative Works and Compilations'

<<https://www.copyright.gov/circs/circ14.pdf>>accessed on 24 September, 2023. A derivative work is a work based on or derived from one or more already existing works.

¹³ WIPO 'Copyright' (n 7)

¹⁴ Copyright Alliance, 'Copyright Exclusive Rights'< <https://copyrightalliance.org/education/copyright-law-explained/copyright-owners-rights/copyright-exclusive-rights/>> accessed on 21 September, 2021.

¹⁵ Oluwafunmilayo Mayowa, 'Nigeria: Who Owns The Copyright In An AI Invention?' (2020) <<https://www.mondaq.com/Nigeria/Intellectual-Property/881214/Who-Owns-The-Copyright-In-%20An-AI-Invention>>accessed 24 September, 2023.

¹⁶ Nigerian Copyright Act, 2022 S.5

¹⁷ Compendium of U.S. Copyright Offices Practices (3rd edn, 2021) ch 302 para 4

¹⁸ S 9(3) Copyright, Designs and Patent Act, 1988

the author of the resulting work. Instead, authorship is attributed to the human entity or entities who configured and guided the AI in its creative endeavours.

1.2.3. The Emergence of AI-Generated Works

While the current global perspective emphasizes the significance of human authorship in copyright ownership, it's essential to recognize the evolving landscape of AI's creative capabilities. As AI's creative autonomy advances, so does the debate about its rightful place in the copyright framework. Some assert that AI remains a tool that amplifies human creativity, while others argue that its capacity for autonomous creation warrants a re-evaluation of copyright norms.

Having examined the fundamental principles governing copyright ownership and authorship, it's imperative to delve into differing viewpoints and debates regarding AI-generated content.

1.3 The Case for AI Copyright Ownership.

There is a growing discussion about recognizing AI-generative tools as eligible copyright holders. In 2019, the European Commission published a report titled “Intellectual Property Rights for the Development of Artificial Intelligence Technologies”, which included recommendations for the European Union’s approach to copyright ownership and exceptions. One of the recommendations was to consider the creation of a new legal status for “AI-generated works” that would allow for the attribution of copyright to a non-natural person entity. This proposal would provide clarity on the ownership of AI-generated works and potentially facilitate the commercialization of these works.¹⁹

Supporters of AI copyright ownership argue that advanced algorithms and systems, despite being inanimate, should be recognized as legitimate creators. They suggest viewing these AI entities as artificial persons with the capacity to hold rights, similar to how non-legal entity abstractions like companies can hold certain rights.²⁰ This perspective asserts that AI should be granted copyright ownership due to its capacity to independently generate original works, particularly through machine learning algorithms.

As aforementioned, machine learning algorithms can learn patterns and relationships within the data, allowing them to generate new content based on their acquired knowledge. For example, in natural language processing (NLP)²¹, machine learning models like GPT-3 can understand and autonomously generate

¹⁹ Alesia Zhuk, ‘Navigating the legal landscape of AI copyright: a comparative analysis of EU, US, and Chinese approaches’ < <https://link.springer.com/content/pdf/10.1007/s43681-023-00299-0.pdf?pdf=button> > accessed on 5 October 2023.

²⁰ Nonso Anyasi & Solomon Oho, ‘Copyright Ownership of AI-Generated Content in Nigeria’ *NBA Lagos Bar Journal* (2022) 2 (1). 48

²¹ Natural language processing is a function of artificial intelligence that focuses on the communication aspect of programming, specifically between computers and humans.

natural human language text.²² The creativity of these algorithms is often compared to how humans are influenced by their exposure to various forms of creative expression.²³

An illustration of AI's creative capabilities can be found in the case of Edmond de Belamy, the first-ever original artwork created using artificial intelligence²⁴, particularly Generative Adversarial Networks (GANs), a machine learning system. This artwork was generated by a two-part process involving the Generator and the Discriminator²⁵. The AI system was fed a dataset containing 15,000 portraits spanning from the 14th century to the 20th century.²⁶

The creation of Edmond de Belamy and similar AI-generated works highlights the potential for AI to produce unique and innovative content, providing compelling grounds for considering AI's right to copyright ownership.

Furthermore, Simon Colton, a Professor of Computational Creativity and inventor of "The Painting Fool", an AI software capable of producing original artworks, suggests that artificial intelligence should be recognized as the author of its creations.²⁷ He proposes that:

If artificial intelligence is not the material owner of the fruit of its work, then it will never be more than a tool, a means of production, that software is taken seriously as a creative entity is the ultimate goal of computer creativity.²⁸

Professor Ryan Abbott and Colin Davies have independently argued that computers should be recognized as legal authors and inventors under relevant IP law.²⁹ Notably, Professor Ryan, who holds the record for submitting the world's first-ever patent application for an invention autonomously created by artificial intelligence, strongly believes that treating nonhumans as inventors would stimulate the development of creative computers and provide incentives for the generation of new intellectual property.

²² This is achieved through processing a vast compilation of text data, enabling the model to learn and understand the nuances of human language.

²³ The Scholarly Kitchen (n 19)

²⁴ Eileen Kinsella, 'The First AI-Generated Portrait Ever Sold at Auction Shatters Expectations, Fetching \$432,500--43 Times Its Estimate' *ArtNet* (25 October, 2018) < <https://news.artnet.com/market/first-ever-artificial-intelligence-portrait-painting-sells-at-christies-1379902> > accessed on 4 October 2023.

²⁵ *ibid.* The Generator's role is to generate new images based on the dataset, while the Discriminator's task is to discern the difference between the human-made images and those produced by the Generator. The ultimate objective is to deceive the Discriminator into perceiving the newly generated images as real-life portraits.

²⁶ (n 21)

²⁷ Simon Colton and others, 'The Painting Fool Sees! New Projects with the Automated Painter' (An International Conference on Computational Creativity (ICCC) held at Utah, US in July 2015) 189-196.

²⁸ (n 18)

²⁹ See Ryan Abbott, "I Think, Therefore I Invent: Creative Computers and the Future of Patent Law", 57 B.C. L. REV. 1079 (2016); C R. Davis, An Evolutionary Step in Intellectual Property Rights—Artificial Intelligence and Intellectual Property, 27 Computer L. & Security Rev. 601 (2011).

Recognizing that computers can be inventors will achieve more than addressing an academic concern; it will provide certainty to businesses, fairness to research, and promote the progress of science.³⁰

1.4 The Case Against AI Copyright Ownership

While proponents of AI copyright ownership argue that AI be recognized as creators with the same rights as human creators, including copyright ownership, opponents assert that AI systems are non-human entities, merely tools used by humans, and therefore cannot be considered legitimate creators nor hold rights within the human-centric copyright framework. This was illustrated in *Burrow-Giles Lithographic Co. v Sarony*³¹ where the camera used to capture the image of writer Oscar Wilde by photographer Napoleon Sarony was considered by the court as a tool that aided the “author” in creating “an original work of art”.

In its landmark *Infopaq*³² decision, the Court of Justice of the European Union (CJEU) established that for copyright to subsist in a work, it must be original and manifest the “author’s own intellectual creation.” Thus, an original work must reflect the author’s personality, which means that a human author is necessary for a copyrighted work to exist.³³

Additionally, in the ‘*Monkey Selfie Case*’³⁴ it was debated whether the monkey could legitimately assert copyright ownership over the photograph it took, and if so, who would be the rightful copyright holder: the monkey, David Slater (the owner of the camera), or the public domain. The case raised questions about whether non-human entities, like animals or AI systems, can be considered legitimate creators and copyright holders. Ultimately, the U.S. Court of Appeals for the Ninth Circuit ruled that a non-human entity, in this case, a monkey, cannot have a standing in a copyright infringement case. This decision implies that copyright law, as it stands, is centred on human authors and does not extend to non-human entities, including AI systems.

Copyright protection laws require the ability to receive economic benefits from the work produced. In addition, moral rights, which protect credit and reputation, are beyond the comprehension of AI systems.³⁵

³⁰ *ibid* Ryan Abbott

³¹ 111 U.S. 53 (1884).

³² *Infopaq International A/S v Danske Dagbaldes Forening* (2009) C-5/08 ECR I-6569

³³ (n 6)

³⁴ *Naruto v Slater*, (9th Circuit 2018) No. 16-15469. The Monkey Selfie is one of a series of photographs (the “Monkey Selfies”) that Naruto, a six-year old crested macaque monkey, made using a camera left unattended by defendant David John Slater (“Slater”). The Monkey Selfies resulted from a series of purposeful and voluntary actions by Naruto, unaided by Slater, resulting in original works of authorship not by Slater, but by Naruto.

³⁵ Atif Aziz, ‘Artificial Intelligence Produced Original Work: A New Approach to Copyright Protection and Ownership’ *European Journal of Artificial Intelligence and Machine Learning* (2023) < <https://www.ej-ai.org/index.php/ejai/article/view/15/18> > accessed on 6 October 2023.

As a result, only human authors, such as the user or the programmer of the AI, can hold these rights if vested in an AI-generated work.

1.4.1 The User

The belief that copyright ownership should be attributed to the user is based on the idea that AI is a tool utilized to express the user's creativity³⁶. The user is the one who has transformed the creative work into a valuable form, rather than just an abstract idea. Allocating ownership rights to the user is fair because they have fulfilled the requirement of fixing the work in a tangible medium.

The concept of originality of the work further reinforces the position that the user is entitled to the ownership of copyright associated with the output of an AI generative tool. For example, when generating an essay using an AI generative tool like ChatGpt, it is the user who inputs the information and directs the AI to create the work. This is considered an original work because the user selected the words and directed the AI on how the work should be created.

Even if the user was not directly involved in the creative process, it is still appropriate to allocate ownership rights when considering the "work for hire"³⁷ concept. Just as in the case of someone who is employed to write a paper for their employer, the ownership rights will belong to the employer, even though the employee did not literally write the work. Similarly, the user can be said to employ the program from the programmer, but the creative effort is vested in the user.³⁸

While it is true that the programmer developed the program, the ownership right vested in the programmer will most likely be that of the program itself. However, some argue that the programmer can own the copyright in the work since they developed the program that generated the work.³⁹

1.4.2 The Programmer

³⁶ Ibid

³⁷ Circular 30, 'Works Made for Hire' < <https://www.copyright.gov/circs/circ30.pdf> > accessed on October 7 2023. Whether a work is made for hire is determined by facts in existence at the time the work is created. There are two situations in which a work made for hire is produced: (1) when the work is created by an employee as part of the employee's regular duties and (2) when a certain type of work is created as a result of an express written agreement between the creator and a party specially ordering or commissioning the work. When a work is produced under these conditions, the employer or the party ordering or commissioning the work is considered the author and copyright owner

³⁸ Pamela Samuelson, 'Allocating Ownership Rights in Computer-Generated Works' *University of Pittsburgh Law Review* [1985] (47) 1202-1204

³⁹ Tuomas Sorjamaa, 'I, Author – Authorship and Copyright in the Age of Artificial Intelligence' < <https://helda.helsinki.fi/server/api/core/bitstreams/db060f9-ee57-4d40-96b2-89d31d5ebc4a/content> > accessed on 7 October 2023.

The view that copyright ownership in an AI-generated work vests in the programmer is based on the premise that they are responsible for creating the program producing the work.⁴⁰ Developing such a program involves a significant amount of intellectual effort and creativity. Without the programmer, the work could not exist. For example, if ChatGpt generates an essay, it is only possible because of the programmer's code. If such an essay receives recognition, it would be fair to attribute partial credit to the programmer who developed the program. As Bridy suggests, the programmer is "the author of the author of the works."⁴¹

The programmer produces the crucial algorithm and makes creative choices in selecting the model, preparing the parameter, choosing and apportioning data, and determining and double-checking additional steps such as observing and adapting the algorithm after it has become operative.⁴² In *Nova Productions Ltd v Mazooma Games Ltd*⁴³, the court affirmed that the programmer who "devised the appearance of the various elements of the game and the rules and logic by which each frame is generated and [who] wrote the relevant program" was the author of the works.

Supporters of this view argue that the user's contribution to an AI-generated work, such as typing a single word, is insignificant compared to the programmer's written algorithms. Therefore, they contend that granting copyright ownership to the programmer is a fair recognition of their creative endeavours and serves as an incentive for them to produce new cultural products.⁴⁴

1.5 Global Perspectives on AI Copyright Ownership

The issue of copyright ownership in works generated by AI machines has been considered under various legal systems. This section examines AI copyright ownership in the United Kingdom, Australia, and Nigerian legal frameworks.

1.5.1 The United Kingdom

⁴⁰ (n 36)

⁴¹ Annemarie Bridy, 'Coding Creativity: Copyright and the Intelligent Author' (2012) Stanford Technology Law Review 5

⁴² *Nova Productions v Mazooma Games* [2007] EWCA Civ. 219.

⁴³ Bonadio, E. and McDonagh, L. ORCID: 0000-0003-2085-5404 (2020). 'Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity'. Intellectual Property Quarterly, 2, pp. 112-137.

⁴⁴ *ibid*

With the advancements in AI, the U.K. and European Union (EU), in 2017, put forward many legislative initiatives and proposals to address and consider the impact of artificial intelligence. These proposals covered questions of liability, legal personality, and other ethical and legal issues, including in the context of data processing.⁴⁵

To further understand how AI and IP rights can co-exist, the Intellectual Property Office (UK IPO) launched a call for views, which ran from 7 September – 30 November 2020. Most respondents agreed that AI cannot own the copyright in a design because it lacks legal personality.⁴⁶

The U.K. position on AI copyright ownership, emphasizing human authorship before a copyright will subsist in a work,⁴⁷ remains unchanged. However, the IPO will continue to monitor the impact of existing protection as AI develops and welcomes any new evidence from stakeholders.⁴⁸

1.5.2 Australia

In Australia, works are afforded copyright ownership where it is proved that a human author has contributed “independent intellectual effort”. Thus, where a work is solely generated by an AI machine, copyright ownership would vest in the human author as AI currently does not have legal status.⁴⁹

In the *Thaler v Commissioner* case⁵⁰, Stephen Thaler who invented the “Device for Autonomous Bootstrapping of Unified Sentience” (DABUS), an AI machine to generate new inventions, filed international and national patent applications naming the machine as the inventor. This challenged the traditional copyright position of human authorship and the practice that only humans can be named as inventors in a patent application. The Australian Patent Office refused to proceed with the application.

⁴⁵ Michael Butterworth, ‘The ICO and Artificial Intelligence: The Role of Fairness in the GDPR Framework’ *Computer Law & Security Review*, (2018), 257-268

⁴⁶ GOV.UK, ‘Government Response to Call for Views on Artificial Intelligence and Intellectual Property’ < <https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-call-for-views/government-response-to-call-for-views-on-artificial-intelligence-and-intellectual-property#ownershipauthorship> > accessed on October 14 2023.

⁴⁷ (n 17)

⁴⁸ Maria-Elena Cacace, ‘UK: ChatGPT—Can the AI Generated Content Output Be Protected by Copyright in the UK?’

⁴⁹ University of South Australia, ‘Artificial Intelligence’ < <https://guides.library.unisa.edu.au/copyrightforcreatives> > accessed on 15 October 2023. See S 32(1) (a) Copyright Act 1968. The use of the word “qualified person” establishes the importance of legal personhood.

⁵⁰ *Thaler v Commissioner of Patents* [2021] FCA 879.

Additionally, the Full Court of the Federal Court affirmed that “the origin of entitlement to the grant of patent lies in human endeavour”.⁵¹ The countries mentioned in the footnote also supported this decision.⁵²

Undoubtedly, Australian Copyright law does not grant copyright to works generated solely by an AI.

1.5.3 Nigeria

The Nigerian Copyright Act, 2022 specifically mentions the works which would be eligible for copyright⁵³. It does not make mention of software or AI machines nor does it account for the protection of these works. Copyright protection arguably only extends to the original documented expression of the software. The copyright protects the author and vests ownership rights in an individual who is a Nigerian citizen or a body corporate incorporated by or under Nigerian law⁵⁴ re-affirming the traditional notion of human authorship before copyright will subsist in a work.

1.6 Conclusion

From the examination of various jurisdictions, it is clear that, currently, an AI generative tool cannot assert legitimate copyright ownership over the works it produces because it lacks legal personhood. Copyright ownership would naturally flow to the person on whose behalf the AI was programmed or who made a substantial intellectual contribution to the work. Nevertheless, the dynamic nature of AI and its growing autonomy prompts consideration for updates in existing IP laws to recognize and grant certain rights to the AI for its role in generating the work. The question of AI copyright ownership will continue to evolve as AI technology advances. To address the ambiguities in this field, implementing a comprehensive legal framework specifically for the field of Artificial Intelligence could provide practical solutions to challenges related to the authorship of AI-generated works and the rightful ownership of these works.

⁵¹ IP Stars, Kingsley Egbuonu ‘The Latest News on the DABUS Patent Case’

<<https://www.ipstars.com/NewsAndAnalysis/The-latest-news-on-the-DABUS-patent-case/Index/7366> > accessed on 15 October 2023.

⁵²Ibid. In Germany, the German Patent Office refused to grant patent applications to DABUS. Similarly, Israel, New Zealand, South Korea and the United Kingdom, upheld the decision of the respective Patent Offices in each country, refusing to accept Thaler’s patent applications.

⁵³ See S 2 Copyright Act, 2022. The Act provides that literary works, musical works, audiovisual works, sound recordings, and broadcasts will be eligible for copyright protection. With respect to literary, musical or artistic work, it provides that such a work will not be eligible for copyright where it has not been fixed in any medium of expression that it can be reproduced or perceived from. Also, some effort must have been expended on the work to give it an original character.

⁵⁴ Nigerian Copyright Act, 2022 S.5

THE RIGHT TO FREEDOM OF RELIGION AND THE QUESTION OF ISLAMIC DRESSING CODES IN PUBLIC PLACES

By Ali Godwin Kelechukwu⁵⁵

ABSTRACT

The right to Freedom of thought, conscience and religion as enshrined in section 38 of the 1999 constitution of the Federal Republic of Nigeria is, and has been one of the crucial rights as long as Nigeria is concerned. This is as a result of the muliti-diverse ethnic groups in Nigeria, of which some, after the colonial era, adopted and accepted other religions (e.g Christianity) as their own, these various religions share different views about their deities, and how they ought to live their lives in accordance with the will of their deities. The mode of life adopted by each religion which is in accordance with the will of their God(s), has greatly affected their day-to-day activities such as, the food they eat, their social activities, educational activities, the way they go about their health treatment, and even their mode of dressing and grooming. This paper seeks to analyse the right to freedom of thought, conscience and religion as encapsulated in section 38 of the 1999 constitution of the Federal Republic of Nigeria vis-a-vis Islamic dressing codes in public places.

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1.0 Introduction

Religious freedom, and struggles has been a major part of the world's history, The early immigrants to North America were generally victims of religious persecution who sought for a place where they could practice their religion freely and without fetters or obstruction. Virginia Declaration of Rights of 12th June, 1776 was the first formal public statement and recognition of the right to religion. The early developments in international recognition of human rights have some bearing on the right to freedom of religion, as it is seen in the establishment of treaties which banned slave trade, and saved the lives of Christian minorities in some countries like Turkey. The international laws also recognises the right to freedom of religion, Article 18 of the Universal Declaration of Human Rights, Article 18 of the International Covenant on Civil and Political Rights, Article 8 of the African Charter on Human and People's Rights, and Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief are examples of international laws which provides the right to freedom of religion, and some of these international laws has been ractified and domesticated into our municipal laws. Coming down to the Nigerian legal firmament, section 38 of the 1999 constitution as already mentioned provides for the said right, the implications and purports of the said section which embodies this right vis-a-vis the diverse religions and ethnic groups in Nigeria are hereby marshalled out below.

1.1 The Implications and Purport of the Provisions of the Constitution Vis-à-Vis the Right to Freedom of Thought, Conscience, and Religion

For a better appreciation and overview of the right in question, section 38 is hereby reproduced:

38.(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) No person attending any place education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.

(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.

From the above section, it is clear that the right to thought, conscience and religion is guaranteed in Nigeria, and is a fundamental right. Section 10 of the same constitution provides that the government of the Federation or State shall not adopt any religion as State religion, this further reveals the secular nature of Nigeria government towards religion, though some scholars like Justice Bashir Sambo and S.H.A Maliki fronts the line of argument that through the provisions of sections 17(3), 18, 262, and 277 of the constitution, that Nigeria is not a secular state when it comes to religion but, from the community reading of the aforementioned provisions, it is vivid that Nigeria is a secular state and does not actually promote, propagate, and support a particular religion. It is also pertinent to note that some states in Nigeria, especially the Northern region has gone against the provision of section 10, as they've gone ahead to fully adopt and make the entire corpus of the Islamic law as part of the law of the state, this connotes or purports to show that such states has made Islam their state religion and thus the legal prescriptions, injunctions, and punishment under the Quran becomes enforceable and binding in such states; by doing this the religious freedom of other minority tribes and non-muslims who resides in such states are jeopardised and trampled upon for it is not the religion of their choice that they're been compelled by such state law to obey, for the sake of clarity section 10 is reproduced with emphasis:

10. The Government of the Federation ***or of a State shall not adopt any religion as State Religion.***

The above emphasis of section 10 definitely shows that no state within the shores of Nigeria shall adopt a particular religion as a state religion of which the states in the Northern region violated this particular law; *it is the humble submission of this writer that the National Assembly should abolish such state laws, and even if it is to be part of the corpus juris of such state, such laws should not be made binding on minority tribes and non-muslims whom definitely do not align their thoughts and conscience to the said religion, for allowing such laws to exist in some states in Nigeria will definitely deter some citizens who are non-muslims from moving or migrating to such states to reside, therefore violating their right to freedom of movement*⁵⁶.

Religious freedom has been defined as the right of every human being, of every region or culture, to follow the dictates of his conscience in matters of fundamental truth, worship and morality, within the due limits recognized by national and international norms. It embraces the right, either individually or in community with others, and in public or private, to manifest a religion or belief in worship, observance, practice and teaching⁵⁷. The foregoing definition of religious freedom is apt. For one to lay claim to his right to religion, it must be in concordance with the provisions of the Nigerian constitution so long as the person resides within the borders of Nigeria. Speaking of the provisions of the constitution, section 45 of

⁵⁶ Section 41(1) of the 1999 constitution of the Federal Republic of Nigeria.

⁵⁷ Farr, T. "Roots of the International Religious Freedom Report" Issues of Democracy, IIP Electronic Journals, Vol. 6 No. 2, November 2001, p. 9.

the 1999 constitution limits the fundamental rights (right to freedom of thought, conscience and religion) of a citizen; this means that a citizen is free to practice, profess, and propagate his religion so long as he's not at variance with any law justifiably made in the interest of defence, public safety, public order, public morality, public health, and for the purpose of protecting the rights and freedom of other persons.

The Nigerian courts has done its best in interpreting, and bringing clarity to this right in question. In *Adamu v. A.G Bornu State*⁵⁸, the court held void a local government (Gwoza) law which allowed the remuneration of Islamic teachers but did not allow for Christian teachers, it also held that the local government authorities violated the right of the appellant when they actually forced the appellants to attend Islamic classes. As regards to the observance of customs, especially when a person has decided to abandon his custom and follow another religion (such Christianity or Islam), the person is well within his right to religion to do so, this is giving force in the cases of *Onjonye v. Adegbudu*⁵⁹ and *Theresa Nwafor Onwo v. Oke*⁶⁰, in these cases the court held that the appellants' right to religion were violated by the respondents forcing them to observe customs that were against their religion. In the case of *Medical Practitioners Disciplinary Tribunal v. Okonkwo & Ors*⁶¹, the court held that the defendant respecting the right to religion of the deceased vis non transfusion of blood was not a crime, for the deceased acted and made decision not to be transfused based on her religious believes; it is pertinent to note that seven years later, the the Court of Appeal in the case of *Esabunor v. Faweya*⁶², held that the right to religion which allows an adult to refuse the transfusion of blood does not apply when a child's life is at stake, it further held that the Commissioner of Police was well within his right to obtain an order of court for blood to be transfused appellant's child. Again in the foreign cases of *Emmanuel Bijoe v. State of Kerala*⁶³, and *West Virginia State Board of Education v. Barnette*⁶⁴, the different courts in their different jurisdictions, held that the refusal to salute the flag and sing the national anthem is well within the right to religion of the parties who refused to do so. To lend force to the above decision section 24(1)(a) of the 1999 constitution of Nigeria provides for citizens to respect the national flag and the national anthem, it is to be noted that aforementioned section

⁵⁸ (1996) 8 NWLR 203

⁵⁹ (1983) 4 NCLR 492

⁶⁰ (1996) 6 NWLR

⁶¹ (2001) 5 NSCQR 6540

⁶² (2008) 12 NWLR (pt. 1102) 794 at 810

⁶³ AIR 1987 S.C 748; (1988) 14 CLB No. P. 43.

⁶⁴ 319 U.S. 624, 63 S.C

is non-justiciable and cannot be enforced in Nigerian courts, so automatically, the right to religion enshrined in section 38 supersedes section 24(1)(a).

1.2 The Question of Islamic Dressing Code in Public Places

The issue about the Islamic dressing code especially when it comes to the wearing of hijab in schools and places of work, whether or not it is constitutional? There are different views concerning this issue, some views are drawn from religious mindset, some are drawn from personal and rational mindset, whatever it is, it is very crucial to get our answers from the constitution and to understand the mindset of the drafters of the said provision of the constitution. In the foreign case of *Sahin v. Turkey*⁶⁵, in February 1998, Istanbul University informed students and faculty that students wearing headscarves and having long beards would not be permitted to enter lectures and examinations. Leyla Şahin was in her fifth year of medical school at Istanbul University at the time, and she was subsequently denied entrance to lecture halls and prohibited from taking exams because of her headscarf (hijab to be precise), which she wore according to her religious beliefs. Şahin brought a suit against Turkey, claiming it had violated her right to education by denying her the right to religious expression. Ultimately, Istanbul University was found to be within its right to enact a headscarf ban, and Turkey was found not to have violated Şahin's right to education when it upheld the ban.

From the above foreign case, it is clear that the abolition of the wearing of hijab is not the position of law in Nigeria, this is brought to light in the interpretation and pronouncement of law by the courts in the following cases; in *Kwara State College of Education Ilorin & Ors v. Basirat Saliu & Ors*⁶⁶, the Court of Appeal held that the lower Court's denial of the use of Hijab by a female Muslim Student of the College under the pretext of protection of public safety, public order and protection of the rights of others violates the free exercise of religion clause in S 38 of the Nigerian Constitution. The Court further held that any such restriction or derogation must be within the confines of the conditions stipulated under S 45 of the Constitution. In the appeal case of *Lagos State Government v. Asiyat Abdulkareem (through her father) & Ors*⁶⁷, before the Supreme Court, heard by a 7 man panel, the Supreme Court has upheld the rights of Students to wear hijab to Public and Secondary schools in Lagos State. The case was an appeal of the judgement of The Court of Appeal, Lagos Division on 21st July, 2016, where the Lagos state government appealed the decision of the Court of Appeal in holding that the Female Muslim Students had the

⁶⁵ [2005] ECHR 819 ³

⁶⁶ CA/IL/49/2009 (Unreported). This was cited with approval in C.C Ani's book, "Understanding Legal Concepts in Nigeria" vol 1 (CIDJAP press Ltd) p. 334.

⁶⁷ SC/910/16.

constitutional right in wearing hijab in Lagos Public and Secondary schools. After consideration of the evidence before the court and the argument of counsels of both sides, 5 Justices of the Supreme Court upheld the Decision of The Court of Appeal while dismissing the appeal, while 2 Justices gave dissenting opinions. Delivering the leading judgement of the Majority, *Hon. Justice Kudirat Kekere-Ekun JSC*, stated that it was the view of the Apex Court that the wearing of hijab was the Constitutional guaranteed rights of the Female Muslim Students in manifesting their beliefs and religion through practice and observed tenets. Thus, according to the Court, enforcing that the student wear their hijab only in specified period of times defeats the purpose of their belief and amounts to a breach of their fundamental rights as provided in Section 38 of the Constitution. On the 2nd issue, the Court held that the trial court was wrong in applying an European precedent on the interpretation of fundamental right when it was bound by the case of *Provost, Kwara College of Education, Illorin v. Bashirat & Ors. (C.A)* where the Court of Appeal decided that non-use of Hijab violated fundamental rights of students. According to the Supreme Court, the European case law was only persuasive and the Court of Appeal binding on the trial Court, and as such it upheld the decision of the Court of Appeal and dismissed the appeal for lack of merit.

The controversies attached to hijab also came up on December 12, 2017 when one Amasa Fidraus Abdusalam, was denied entrance to the International Conference Centre, Abuja for her call to bar ceremony. The Nigerian Law School had alleged that she was breaking its dress code but Amasa who was already wearing her gown insisted on wearing the wig on her hijab. After much tussle, which included public hearing by Nigerian Parliament, Amasa was finally called to the Bar⁶⁸. In light of the above facts, C.C. Ani is of the view that where a person voluntarily decides to become a member of an association or a particular profession, it is expected of such a person to comply and conform with the rules guiding such association or profession which includes the dress code⁶⁹. *With all due respect, it is humbly submitted that mere rules, or codes of conduct guiding a profession cannot be seen to override a fundamental right which is enshrined in the constitution, for the constitution is the fons et origo, the fons et culmen of other laws and professional rules or codes of conduct in Nigeria, therefore it is these other laws that depends on the constitution for its validity and existence; once a law or rules/codes of conduct which are enacted by the National Assembly are not consistent with the provisions of the constitution, especially when it stands to violate the fundamental rights of the people, then such laws or codes will amount to a nullity.* The above cases are the apt interpretation of the apex court of justice in Nigeria concerning the Islamic dressing code, and the

⁶⁸ This historical fact is recorded in C.C Ani's book, "Understanding Legal Concepts in Nigeria" vol 1 (CIDJAP press Ltd) p.336.

⁶⁹ (Supra) p. 336

interpretations are crystal clear as the wearing of hijab is well within the right to freedom of thought, conscience, and religion of the Muslims.

1.3 CONCLUSION

In all we've seen that the right to freedom of thought, conscience and religion is an intrinsic part of a person's fundamental rights which is not to be trifled with and should not be given wrong interpretation by the courts. From the express letters of section 38 of the 1999 constitution of the Federal Republic of Nigeria, it is crystal clear that the Muslims actually have the right to wear Hijab, and this is what the court has so interpreted.

AN ANALYSIS OF THE ROLE OF THE UNITED NATIONS IN PROMOTING AND PROTECTING HUMAN RIGHTS

By Atalor Gregory

Abstract

As a global structure aimed at protecting Human Rights as enshrined in the United Nations Charter and other legally binding treaties and non-binding declaration in a bid to promote Human Rights throughout the world, there is a need to critically examine the activities of the United Nations since its inception in 1945. This paper examines the historical aspect of the United Nations contributions to Human Rights promotion and protection as well as its threat and triumph in the advancement of Human Rights across the world. In a world bedeviled by arbitrary arrests, imprisonment without trial, attack on freedom, inhuman and humiliating punishment, mass killings, ethnic cleansing, enslavement, and other serious attacks on a person's physical and moral integrity, this paper is focused on an analysis of the United Nations activities in promoting and protecting Human Rights, its origin and evolution, as well as the challenges associated with this effort. Amongst all, this paper recommends that agencies of government must be adequately funded, trained and equipped for responsible use of firearms in consonance with International Human Rights standards. In addition, any officer found to have participated in the unlawful termination of life should not just be dismissed from service but also be prosecuted, and a system should be set up to cater to the needs of victims and their dependents.

Keywords: United Nations, Human Rights, UDHR, Promotion, Protection, ICESCR, ICCPR.

1.0 Introduction

The subject of Human Rights appears to occupy a foremost place of pride in both municipal and international forums with a special call for its promotion and protection all over the world. History was made on December 10th 1948 when the Universal Declaration of Human Rights (UDHR) was unanimously approved by the United Nations General Assembly (UNGA). Although not binding for it was not a treaty, this declaration received catholic acceptance across the globe toward the protection of Human Rights. It is pertinent to note that the Universal Declaration of Human Rights (UDHR)-1948, International Covenant on Economic Social and Cultural Rights (ICESCR)-1966, and International Covenant on Civil and Political Rights (ICCPR)-1966 make up the International Bill of Human Rights.

Furthermore, some of the clauses in the Universal Declaration of Human Rights (UDHR) forms part of our extant law which is aimed at the promotion and protection of Human Rights in Nigeria. A cursory look at Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria (As amended) shows that it is in tandem with the Universal Declaration of Human Rights (UDHR) provisions on Human Rights protection.

The question then arises: What are Human Rights? Several views have been canvassed on the definition of Human Rights. One of such views was put forward by *Emelouye*, who define Human Rights to:

‘Inhere in the nature of every human person and ensures that human life is held to be secret and guaranteed that every form of inhumanity and injustice are redress.’⁷⁰

In simple terms, Human Rights are rights which inhere in man by the very virtue of his humanity, bestowed on man by God right from creation, to make his existence on earth worthwhile and meaningful.⁷¹

The United Nations system on Human Rights is premise on three components. First, it established International Standards which is made manifest through its charter and legally binding treaties which borders on Human Rights promotion and protection, Second, there is a call to action for special rapporteurs, experts, and groups like working groups, committees and treaty bodies, to champion the course of Human Right promotion and protection by working in various manner to bring it to fruition. Third, Voluntary funds are made available for advisory services and technical assistance in the field of Human Rights.

⁷⁰ JN Aduba, ‘*An Introduction to Human Rights Law in Nigeria*’ (LAP LAMBERT Academic Publishing 2016).

⁷¹ Lloyd Megwara, ‘Understanding Human Rights 1.’ *DAILY CHAMPION* (Wednesday, August 18, 1999).

The United Nations is made up of six major organs which include; The General Assembly, The Secretariat, The Security Council, The International Court of Justice(ICJ), The Trusteeship Council and The Economic and Social Council.⁷²

1.1 Historical Background

Human Rights can be traced to the dawn of civilization, several historical events have shaped the course of Human Right development beginning with the Magna Carta (1215), the Habeas Corpus Act (1679), the Bill of Rights and the Glorious Revolution in England, the American Bill of Rights (1776), the French declaration of the Rights of Man and the Citizen (1798), the Communist Manifesto (1842) and the Russian Revolution. Hence, the League of Nations in 1919 after the First World War (1914-1918) never acquired a universal character, being handicapped from the outset as a result of the non-participation of the United States of America. The failure of the League of Nations led to the Second World War (1939-1945) which is recorded as the egregious violation of Human Rights masterminded by the Nazi regime of Hitler. To avoid a repeat of this nightmarish atrocities, the United Nations was formed after the Second World War in 1945. Soon after, the United Nations Commission on Human Rights was created by virtue of Article 68 of its Charter and established the Commission on Human Rights in 1946. It drafted two legal binding covenants- the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR). Both of which were adopted by the General Assembly in 1966 came into force in 1976.⁷³

Essentially, the most important impact of the UDHR which was adopted on December 10th, 1948, can be drawn from the angle that catapulted and inspired other Human Rights instruments both under the auspices and regional Human Rights regimes and National Constitutions of many Nation. Other conventions, declarations and resolutions under the United Nations and other regional organizations reaffirming and expanding the scope of Human Rights have been adopted over the years some of them include; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984, Convention on the Rights of the Child (CRC) 1989, International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW) 1990 etc. ⁷⁴

⁷² Ibid.

⁷³ TF Yerima, 'Internationalization of Human Rights; A Critical Appraisal and Comparison of Trilogy of Documents in the U.N System' [2004-2005] (8) *Property & Contemporary Law Journal* 74-77.

⁷⁴ Faith Allison-Kulo, 'International Protection of Human Rights: The United Nations System,' [2017] (9) (1) *Journal of Jurisprudence and Contemporary Issues* 295-312.

1.2 The United Nations Mechanism for the Promotion and Protection of Human Rights

The concept of Human Rights has been given Judicial Notice in the case of *Ransome Kuti v A.G of the Federation*.⁷⁵ Kayode Eso (J.S.C), as he then was, described Human Rights thus:

‘...a right which stands above the ordinary laws of the land and which, in fact, is antecedent to political society itself. It is a primary condition to a civilized existence...’⁷⁶

After the end of the World War II there was the ‘Nuremberg Trial’ which sought to address the infringement of Human Rights during the Word War II. The principle of the Universal of Declaration of Human Rights (UDHR) was incorporation by different governments of the world to form their extant law. For instance, under the UDHR, every person is entitled to the right to liberty, security, and life. The United Nations went further to secure this right in its quest to promoting them through various methods suc as:

- i. Monitoring of Human Rights: Different working groups, treaties, bodies and special rapporteurs adopt these mechanisms in the implementation of Human Rights. This mechanism can be categorized into two-conventional and non-conventional. For the conventional approach, there are committees such as Committee for Elimination of Women Discrimination, Economic Committee, Committee against Torture, Racial Discrimination Committee, Human Rights Committee, Social and Culture Rights, Committee for Child Rights, etc. On the other hand, the non-conventional mechanism incorporates assigned specialists with unique Human Rights enforcement knowledge are appointed as special reporters, it also incorporates non legislative offices and comparatives bodies.
- ii. Procedures for Individual Complaints: Victims of Human Rights violation can seek redress by making an appeal before the United Nation High Commissioner's Office for Human Rights which is situated in Geneva. This office primarily entertains political and civil rights. This helps keep an eye on Human Rights infringement by the government.
- iii. Examination of Existing Human Rights’ Enforcement: It help to assess the effectiveness of Human Rights protections and identifies areas for improvement. This is conducted by Human Rights bodies such as the United Nations treaty bodies or special rapporteurs. They also provide recommendations for addressing Human Rights concerns.⁷⁷ In 1993 the position of High Commissioner for Human Rights was

⁷⁵ (1985) 2. NWLR. (Pt.6) 211, 230.

⁷⁶ *Ransome Kuti v Attorney General of the Federation* (1985) 2 NWLR (Pt 6) 211-230.

⁷⁷ Ogbu Franklin, ‘Character of the United Nations in the Promotion and Protection of International Human Rights’ (2022) *Research Gate Journal* 1-9 <<https://www.researchgate.net/profile/Franklin-Ogbu/publication/381173271>> accessed 16 August 2024.

created to coordinate the activities of Human Rights' enforcement; advisory Services were also availed to the governments of various states to promote the enforcement of Human Rights.

In addition, the United Nations plays a pivotal role in international agreements that border on Human Rights and the Administration of Criminal Justice.⁷⁸

Accordingly, some of the major regional Human Rights regimes existing for the protection of Human Rights include: The European Convention for the Protection of Human Rights and Fundamental Freedoms adopted in 1950 entered into force in 1953, The Inter-American System which has two legal sources- the American Declaration of the Rights and Duties of Man (adopted in 1948); and the American Convention on Human Rights (adopted by the Organization Of American States (OAS) in 1969) and thirdly, African Union (AU) mechanism under the African Charter on Human and Peoples' Rights (adopted by the AU General Assembly on 28 June 1981, and which came into force on 26 October 1986.)⁷⁹

1.3 Successes of the United Nations

In the condemnation of apartheid as an International Crime which reinforces the problem of state guilt in international criminal law, the United Nations was instrumental through the United Nations Ad-Hoc Group of Experts to Southern Africa in 1981.⁸⁰

The United Nations has attempted, on numerous occasions, to try those responsible for war crimes against humanity. This was achieved in former Yugoslavia where an International War Crimes Tribunal was established by the Security Council in 1993 to try war crime suspects.⁸¹

In addition, the United Nations Human Rights body has adopted a resolution recently, condemning the alleged use of starvation of civilians as a method of warfare in Gaza while simultaneously calling for arms' embargo on Israel.⁸²

Similarly, the trial and prosecution of Charles Taylor (a murderous rebel leader) by the International Court of Justice, who is currently serving jail term, is a testament to the past successes of the United Nations. For Charles Taylor, among his numerous sins were the destruction of a generation of children, the destruction

⁷⁸ Ibid.

⁷⁹ Faith Allison-Kulo, 'International Protection of Human Rights: The United Nations System' [2017] (9) (1) *Journal of Jurisprudence and Contemporary Issues* 295-312.

⁸⁰ R Blackburn and J Busuttil, 'Human Rights for the 21st Century.' (1st end, A Cassel Imprint 1997).

⁸¹ Ibid.

⁸² Ziad Taleb, 'Gaza: Human Rights Council resolution urges arms embargo on Israel' UN News. <<https://news.un.org/en/story/2024/04/1148261>> accessed 2 September 2024.

of the tradition and culture of the people, and the sponsorship of an insurrection system in neighbouring countries like Sierra Leone.⁸³

Beyond this, the United Nations has also, on many occasions, made provision for shelter and relief materials to millions of refugees who were/ are victims of war and inhuman treatment in countries such as Syria, Ukraine, and many others. Finally, the United Nations has been at the forefront in the decolonization of countries under the grip of colonial rule. This was spearheaded by the United Nations Trusteeship arrangement.⁸⁴

1.4 Challenges

Primarily, a major challenge hindering the effectiveness of the United Nations in promoting and protecting human rights, amid peace-threatening occurrences, is the scourge of political insurrection in different parts of the globe.⁸⁵

Essentially, a problem could arise if the General Assembly passes a resolution on a matter related to international peace and the Security Council disagrees with the Assembly's approach which could lead to paralysis in addressing critical International issues.

1.5 Case Studies: A Critique

God created man free, but man bound man with law. God made man free but man put man in chains, using law. Man was made or born free and with equal rights with time and with the growth and the world population, man began to live in society, or community, and the need for government arose.⁸⁶

Following the Al-Jazeera TV footage of the heinous atrocities committed during the Boko Haram crisis, Fulani Herdsmen, Banditry and Jos crises, Nigeria's international standing is low in the protection of lives and property. The United Nations Human Rights council met at Geneva to address this concern. However, these problems are very much present, and perpetrators are walking free. There is need for the protection of the sanctity of human life. I vehemently believe, that with the strong presence of the United Nations in the World today and through the seventy-nine years of its existence, it needs to do more in terms of enforcement of Human Rights protection in uncharted territories of the World.⁸⁷

⁸³ Charles Onunaiju, Liberia: 'President Sirleaf and the Burden of Charles Taylor.' *Weekly Trust* (Lagos, February 4-10 2008).

⁸⁴ Faith Allison-Kolu, 'International Protection of Human Rights: The United Nations System' [2017] (9) (1) *Journal of Jurisprudence and Contemporary Issues* 295-312.

⁸⁵ DA Guobadia, 'Legal Dimensions of Peace Keeping Operation' [2001] *Nigerian Institute of Advanced Legal Studies Lagos*.

⁸⁶ E Malemi, 'The Nigerian Constitutional Law' (Princeton Publishing 2012).

⁸⁷ Funke Aboyade, 'If the Next AGF is Serious.' *THISDAY LAWYER* (April 6, 2010).

Bacre Waly N'Diaye who was a Senegalese lawyer and the United Nations representative on Human Rights reported to the United Nations Human Right Commission on the mass ethnic killings and the deterioration of Human Rights before the 1994 Rwanda Genocide between Hutu and the Tutsi. However, the commission did not act fast against an early warning which would have possibly prevented the scourge of the 1994 Rwanda Genocide. It was recorded that more than a million people perished in the Genocide.⁸⁸

The euphoria that marked the independence of many African countries have vanished and Africa is today caught up in a convergence of crisis in all sectors begging for attention. As rightly said, “In Africa politics there is only the choice between three evils- absolute power, violent death and dishonourable exile.”⁸⁹

1.6 Recommendations

In charting a course for the prospect of United Nations promotion and protection of Human Rights, it is imperative to take the following recommendations into cognizance:

- i. Agencies of government must be adequately funded, trained and equipped for responsible use of firearms in consonance with International Human Right standards. In addendum, any officer found to have participated in the unlawful termination of life should not just be dismissed from service, but also prosecuted. A system should be set up to cater for the needs of victims and their dependents.⁹⁰
- ii. It is important for the media and Human Rights crusaders to collaborate in exposing violations of Human Rights in all its ramification and these violations should be viewed beyond arrest and detention.
- iii. There is the need for timely and regular review of Human Rights records, and this should be anchored by the Universal Periodic Review (UPR). The Human Rights Council should be revamped to further increase its effectiveness and representation.

1.7 Conclusion

⁸⁸ R Blackburn and J Busuttil, ‘*Human Rights for the 21st Century.*’ (1st end, A Cassel Imprint 1997).

⁸⁹ Mathews, Kay Ibeanu, Okey, ‘Some Reflections on Human Rights and Refugees in Africa’ [1992] (18) *Property & Nigerian Journal of International Affairs* 12-17.

⁹⁰ Funke Aboyade, ‘If the Next AGF is Serious.’ *THISDAY LAWYER* (April 6, 2010).

As the United Nations continues its journey toward the protection and promotion of Human Rights at the global level, the significance of a well functional Human Rights enforcement mechanism cannot be overstated. To this end, the signing of the United Nations Charter in 1945 brought Human Rights into focus within the sphere of International Human Rights Law. However, Human Rights abuse has continued to occur in different parts of the world with impunity. It suffices that skilful diplomacy is needed to preserve every human being from the scourge of man's inhumanity to man orchestrated by Human Rights violators across the globe, this should not be treated with kid gloves. In addition, there must be political will on the part of the government to ensure the implementation of socio-economic and cultural rights, and respect for International treaties contained in the trilogy of documents (International Bill of Rights).

THE TERRAIN OF ARROGANCE AND NON-COMPLIANCE WITH COURT ORDERS BY GOVERNMENT OFFICIALS

By Said Salim Jillo⁹¹

Abstract

The Kenyan dream was founded on aspirations of a populace that longed for liberty of the land and the mind. All can be traced in the 2010 Constitution that sought to quench the thirst through both economic and political autonomy. The powers were finally reclaimed by the people who assumed ownership of the sovereignty⁹² upon validating it through a popular referendum. In the text, rule of law was proudly envisioned to hold the masses, their democratically elected shepherds and appointed public servants equal before the law and accountable to the people who possess the sovereign power.

The power was subsequently conferred on the three arms of the government which were to affect the people's ambitions. In the presence of a power-driven executive alongside a legislature that cannot express itself independently, the people have been subjected to unprecedented atrocities that cannot survive the scrutiny of the law. In the presence of an interest and fear led regime, the Kenyan society is left at the only choice of a burdened judiciary whose orders have been the subject of arrogance display.

In an era where the judiciary is at the brink of losing the trust of the people when senior government officials continuously trash its dignity, I would dwell into the ever-growing crisis. This paper would assess the possible reasons behind the wild culture of contempt of court orders by senior public officials in the presence of a just, open and a democratic society.

Keywords: arrogance, contempt of court, rule of law.

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⁹² Constitution of Kenya 2010, art 1 (1).

1.0 Introduction

The warm blood of our heroes and their foot prints while transcending into the deepest points of the forests are the foundation of the Kenyan cultural practices. The battle frontlines they took are reflected in the daily endeavour to uplift the living standards of the majority among the populace. Their tears while facing the wrath of the imperial power are still visible in the eyes of their off springs who keep on facing barriers towards true economical and political emancipation. Was true liberation ever granted at independence? Or had the alien devil been replaced by a friendlier looking monster? Was there independence in the first place?

The quest for justice derived the need of having a strong independent judiciary that could oversee the conduct of the executive and their trainees in parliament. The infamous culture and trend of abuse of office and overreaching mandate by the executive and their allies was to be mitigated by a powerful independent judiciary that could interpret the law without undue influence or threats⁹³. It was in public interests to be led by democratically elected servants who respect the rule of law and promote human rights to ameliorate the Kenyan society from the dungeon of miseries to a better society in the era of rights across the globe.

1.1 Problem Statement

In an attempt to cure the mischief, parliament enacted the Contempt of Court Act which was to mitigate and punish the arrogance associated with disregard of court orders⁹⁴. The crisis was ever growing threatening rule of law when the state assumes dictatorial traits in the phase of democracy. In the Uhuru led regime, the issue became rampant when the then cabinet secretary continuously violated human rights against orders of the court⁹⁵. The right to citizenship was under threat when popular opposition figure was subjected to unprecedented misery by being deported to alien lands deprived of his liberty right. Such occurrences were being witnessed for the first time following the promulgation of the 2010 Constitution in a country which was filled with high hopes with the dawn of a progressive era. The court proceeded to find the cabinet secretary and the head of police guilty for contempt of court thus convicted them accordingly⁹⁶. However, the sentencing was ineffective as the top officials roomed around freely.

Social movements have been on the front line to correct the mischief but with less success. Contempt of court was even further served to orders emanating from cases by good governance activists⁹⁷. Omtatah was

⁹³ Constitution (n 1) art 160.

⁹⁴ Act 46 of 2016.

⁹⁵ *Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others*[2018] eKLR.

⁹⁶ *Miguna* (n 4).

⁹⁷ Jillo Kadida, 'Omtatah wants Matiang'i jailed for disobeying court order' *The Star* (Nairobi, 11 March 2021) < <https://www.the-star.co.ke/news/2021-03-11-omtatah-wants-matiangi-jailed-for-disobeying-court-order> > accessed on 5 October 2024.

over the Kamiti Maximum Prison management for having a shadily conducted tenders. In an attempt to illuminate the ray of transparency, the court ordered the government to supply activist with the restricted documents which was utterly disregarded. The incident marked a growing frustration over the disregard of court orders by government officials thus offending the rule of law. It was not only injustice by holders of people power but also a setback on the progress made by the judiciary. It undermines the integrity of the judiciary thus subjecting its dignity into gutters.

The subsequent regime is not spared off the record of shame as they still implored on the use of the axe to disregard court orders in display of arrogance. Deputy Inspector General of the Police Service, Mr. Masengeli, had the headlines at his service when Justice Mugambi had enough of his open and utter disregard of his orders for him to appear in person and give an explanation over the whereabouts of three abducted persons⁹⁸. Such acts have been the face of the ruling class thus tattering the intended objectives of the Kenyan people. Despite having the conviction quashed after possible threats disguised as an apology, it still paints a picture of a fragile state that is yet to survive from impunity.

The national values and principles of good governance⁹⁹ were geared towards having a state governed in a just and accepted manner to prevent the past associated with both substantive and procedural irregularities from reoccurring. These deliberate acts beg the question on how best the Kenyan dream can be actualize in the presence of arrogant state machinery who always find the way into the system. Is the current structure inefficient to serve the interests of the people at best? Is the current ruling elite class the problem to our national trauma? Is change of the ruling class the solution? Do we need a change of the whole legal structure to restore faith of the citizenry in the judicial system.

Several scholars have similarly investigated the same issue with attempts of rectifying the mess but with little success to be proud of. Edward Rubin poses inquires in his article on the best way to be utilized by the judiciary in curbing the growing arrogance whose impact is on the rule of law¹⁰⁰. It is of importance that we channel our capabilities in restoring dignity in our judicial systems before a total collapse of the trust held by the people with the sovereign power.

This paper would revolve around the saga to explore the corrective measures that can possibly uplift rule of law in the face of arrogant state machinery that continuously subject the people into misery and sufferings. By use of table study method, I will be steering into the wilderness to unveil the possible saviour to the people of Kenya.

⁹⁸ Benjamin Muriuki, 'Acting IG Masengeli Sentenced [To 6 Months in Jail, Given Seven Days To Avoid Prison' (Nairobi, 13 September 2024) < <https://www.citizen.digital/news/acting-ig-gilbert-masengeli-sentenced-to-6-months-in-jail-given-seven-days-to-avoid-prison-n349442> > accessed on 5 October 2024.

⁹⁹ Constitution (n 2) art 10 (2)(d).

¹⁰⁰ Edward Rubin, *Should Courts Punish Government Officials For Contempt?* (JOTWELL 2018) < <https://juris.jotwell.com/should-courts-punish-government-officials-for-contempt/> > accessed on 5 October 2024.

1.2 Amendment to Election Laws on Candidate Approval

The executive arm of government in partnership with their political counterparts in parliament seek way into office through majority vote in every general election. Therefore, there arise a higher probability of obedience to court orders if any act to the contrary would automatically be a dis-qualifier. This calls for an immediate amendment to the election laws on additional disqualifications for nomination of candidates¹⁰¹.

The amendment should be geared to empower the Independent Electoral and Boundaries Commission to decline the nomination of any person who has been in any way associated with contempt of court either directly or indirectly. Such a harsh statutory provision would likely have the ruling party either refraining from acts that would attract litigation or compel its members to obey court orders.

In the presence of such a legal atmosphere, there would be less need to overburden the courts with prospects of being involved in political ruffles as arrogance gets to be wildly displayed on high national stages. Even though scholars such as the likes of Edward Rubin have weighed the need for the courts to punish government officials¹⁰², it is beyond their reach due to financial and structural constraints. If courts are made to go for the boxing ring with the other arms of the government every now and then, they are likely going to lose due to their naturally weak foundation that was definitely not crafted for such activities.

Of interest would be the issue of public servants who are not necessarily elected into office but they are appointed through other recognized lawful means. This can be an issue as some of these persons do not have any interests in the political arena yet they serve in a crucial position in running of the daily state affairs. They include but not limited to cabinet secretaries, head of parastatal and public institutions, security persons among others. It is also important at this stage to bring to your attention the familiar scenarios that I had introduced earlier were majorly acts committed by political elites through cabinet secretaries and senior security officers. The non-political persons are the face of the regime who are occupy the front line in realizing the policies set by the ruling class. If the amendment would have senior members loose their political right to participate in elections as candidates, most definitely, they would always compel their juniors to act as ordered.

The dignity of the courts should not be toyed with persons who are professing their personal desires and aspirations over and above the need of the society. If need be, individual rights can be limited for the purpose of realizing a societal need in an open and democratic society as it was reiterated by the European Court of Human Rights in *S and Marper v United Kingdom*¹⁰³. This finds support even within the Kenyan Constitution of 2010 which provides for conditions that can be satisfied to limit a human right within its

¹⁰¹ Election Act No. 24 of 2011, s 26.

¹⁰² Edward (n 9).

¹⁰³ Applications Nos. 30562/04 and 30566/04

context and other recognized instruments¹⁰⁴. it would serve retributive justice the people of Kenya if they do not have arrogant persons serving within the system after expressly undermining the concept of rule of law. It also serves as a reminder to the government officials that no one is above the law which is supreme, and it ought to be respected without qualifications.

Such a change in the legal structure would definitely earn the courts the true position that was intended by the drafters of our progressive constitution. The dignity of the courts is not a privilege to be subjected to political alms, but it ought to be a condition precedent in any democratic society that values justice. Failure to that, it will open ways of having backward civilian dictatorship who would create the privilege of do what you can and take what you want. If one can comfortably jeopardize the progress of millions of persons who have generously allowed you to actualize their dreams, then people have a subsequent right to hold back onto your aspirations.

1.3 The Boycott

The court is known as an avenue to resolve issues affecting the society, but the judiciary itself, can try to solve its own problems. Thousands of people walk in and out of the Kenyan courts as indicated by the statistics made by the Institute of Economic Affairs¹⁰⁵. In 2023, it was estimated that the judiciary closes 358,062 cases with an average of an approximate 231cases per judge in a year¹⁰⁶. This demonstrates the magnitude of operation conducted by the judiciary which deserves recognition by all persons within the state borders. If the judiciary boycotts the bench in retaliation to arrogant acts of disregards of its orders by the government, the impact would like hazardous.

In a united judiciary under the guidance of the chief justice, it can initialize a boycott of all court dealings until the government adheres to the court ruling. The general public that would definitely feel the ramification of the nation-wide boycott would compel their respective elected leaders to comply with the orders or face their wrath on the ballot box. Critics would subject the recommendation on a tough scrutiny to challenge the rationalism and logic behind it. However, in an attempt to secure goodness for the general public, the road can be rough as we try to attain highest level of respect for the institution that deliver justice. The crowded police stations and scenes of stranded litigants can be a temporary evil for a future of adherence to the rule of law.

The boycott can further be effected if the bar can join in support of the bench in instances where the ruling regimes attempt to rub mud on the law on extreme levels. Through the professional body, Law Society of Kenya, a national wide boycott can be effected until the government gets to understand the true position of

¹⁰⁴ Constitution (n 8) art 24.

¹⁰⁵ Leo Kipkogei Kemboi, 'Number of the Week: Case Resolution in Judiciary' (Nairobi, 30 October 2023) <<https://ieakenya.or.ke/blog/number-of-the-week-case-resolution-in-judiciary/>> accessed on 5 October 2024.

¹⁰⁶ Leo (n 14).

the law in Kenya. The bar has done it before¹⁰⁷, and it can do it now for the sake of the dignity of the Kenyan people and their respective courts which they empowered through the 2010 Constitution¹⁰⁸. Rule of law requires all persons, institutions, and organs to be accountable to the laws that have been publicly promulgated in an open, just and democratic society. The drafters of the Constitution of Kenya 2010 so it fit to have principles of rule of law and good governance as national values that guide the conduct of all persons.¹⁰⁹ In privy of the possible mischief, state and public officers were specifically targeted.

1.4 Conclusion

The people of Kenya have ever since been fighting since the days of our founding forefathers. The war has always been a constant act with the enemy as a variant. Different forms of war with different foes. Yesterday, we sought for our total liberation and today we have been faced with an internal ailment and no longer an alien with a gun and a bible in the hands.

¹⁰⁷ Nyaboga Kiage & Steve Owino, 'Lawyers threaten to boycott courts over Huduma plans' (Nairobi, 7 February 2024) <<https://nation.africa/kenya/news/lawyers-threaten-to-boycott-courts-over-huduma-plans--4516372>> accessed on 5 October 2024.

¹⁰⁸ Constitution (n 13) art 1(3) (c).

¹⁰⁹ Constitution (n 17) art 10 (2) (a) & (c).

DIPLOMATIC IMMUNITY: HISTORY, PURPOSE, AND CONTEMPORARY CHALLENGES

By Akanji Abdulafees Akanni¹¹⁰

Abstract

From early times, sovereign entities had always recognized and applied the concept of diplomatic immunity. Envoys, emissaries, and other representatives were treated with high regards and protected by their hosts to maintain hitch-free relationships with their parent countries. Owing to the significance of relations between states, this ancient culture has thus evolved to its contemporary form, officially recognized by nations and regulated by international conventions and treaties, most significantly the 1961 Vienna Convention on Diplomatic Relations. In international relations, official representatives of a country and to some extent, their family members, are granted a certain level of protection from legal action in their host countries. These privileges are further reinforced by some countries who enact particular legislations to ensure that diplomats are able to properly perform their functions. While diplomatic immunity is an age-old concept that is crucial for peaceful international relations, it has been subjected to criticisms as to how much it shields diplomats from being held accountable for criminal and civil wrongs. Critics also argue that some diplomats can exploit these privileges to conspire against their host countries. The aim of this paper is to analyse the concept of diplomatic immunity, its historical development, purpose, and the current challenges surrounding the concept. The level of immunity for different diplomatic representatives and available measures for mitigating the abuse of diplomatic privileges will also be evaluated therein.

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1.0. Historical Evolution of the Concept of Diplomatic Immunity

Diplomatic Immunity is an international law principle by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities for both their official and, to a large extent, their personal activities.¹¹¹ The principle of diplomatic immunity is one of the oldest elements of inter-state relations that can be traced back to the ancient civilizations of Egypt, India, China, Rome, and the Greek City-States. The formal sending of envoys and emissaries as representatives of a nation has been in existence for a long time and these envoys were regarded as universally inviolable. The Greek historian Thucydides records that the ancient Greek city-states would exchange officials who were courteously treated by their hosts.¹¹² Although there were no formal laws enforcing this principle in ancient times, harming emissaries of a foreign government were met with dreadful reprisals from the parent nation of the emissaries or envoys which in turn started a lot of wars.

Over time, this practice culminated in the modern codification of international treaties and conventions as the need for civilized diplomatic contacts between nations grew. The 1961 Vienna Convention declared in its preamble that the purpose of diplomatic immunity is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States; this is referred to as the functional necessity theory, the rationale upon which the aforementioned convention was formulated.¹¹³ Another purpose for extending diplomatic immunity to diplomatic agents and consuls is because their duties are very crucial in the conduct of international affairs of their states and maintain smooth relationship between their state and the host state; thus any attack on them can sever the connection. Also, because of the significance of international relations, all countries are both receiving states and sending states i.e. they host representatives of other governments and other governments also host their representatives. By virtue of this, each country will uphold the principle of diplomatic immunity so that the home countries of the diplomats that they host would also reciprocate; this is known as the reciprocity

¹¹¹ United States Department of State: Office of Foreign Mission, *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities*, (2019) 2 <https://www.state.gov/wp-content/uploads/2019/09/19-04499-DipConImm_v2_web.pdf> accessed 19 October 2024.

¹¹² Biswanath Sen, *A Diplomat's Handbook of International Law and Practice*, (3rd edn, Springer 1988).

¹¹³ Ademola Abass, *Complete International Law: Text, Cases, and Materials*, (2nd edn, Oxford University Press 2014) 409.

theory. For instance, Nigeria would grant diplomatic immunity to agents of the USA so that the latter would do the same for representatives of Nigeria in their country as well.

It suffices to say that the main purpose of diplomatic immunity is to maintain diplomatic, political, economic, and cultural relationship between countries by ensuring that official representatives are able to fully perform their functions by insulating them from the standard law enforcement of their host countries.

1.1 Legal Scope of Diplomatic Immunity

The 1961 Vienna Convention on Diplomatic Relations marked the commencement of a modern legal framework for the principles of diplomatic relations that had evolved for over three thousand years.¹¹⁴ This was followed by the 1963 Vienna Convention on Consular Relations¹¹⁵ and the 1969 UN Convention on Special Missions.¹¹⁶ Specifically, Articles 22, 23, 24, 29, 30 and 39-45 of the Vienna Convention on Diplomatic Relations provide a wide-range of immunity for diplomats, their families, premises, properties, and agents, protecting them from arrest and detention, criminal prosecution, civil and administrative jurisdiction, among others. It should also be noted that some diplomatic representatives also enjoy tax exemptions and unrestricted movement within the territory of their host countries per the provisions in Articles 23 and 26 of the Convention and equivalent provisions in other aforementioned conventions. By virtue of these conventions, diplomatic agents of foreign states enjoy personal inviolability, that is, they are shielded from any form of arrest or detention and their host country is under the obligation to keep them safe while they remain in the country. Also, their official premises, archives, documents, and private residence are also protected by the inviolability principle.¹¹⁷ However, while there is unanimity on diplomatic inviolability, there is yet to be a consensus with regards to entry into diplomatic premises by officials of the host state in emergency situations.

1.2 Persons Entitled to Immunity and their Levels of Immunity

¹¹⁴ Vienna Convention on Diplomatic Relations, adopted in 1961 (came into force on 24 April 1964) [VCDR] <https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf> accessed 19 October 2024.

¹¹⁵ Vienna Convention on Consular Relations, adopted in 1963 (came into force on 19 March 1967) [VCCR] <https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf> accessed 19 October 2024.

¹¹⁶ United Nations Convention on Special Missions, adopted in 1969 (came into force on 8 December 1969) [UNCSM] < https://legal.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf> accessed 19 October 2024.

¹¹⁷ (n5) art 22 and 24; (n6) art 31, 33, 41, and 61; (n7) art 25, 26, 29, and 30.

The major categories of persons entitled to immunity/privileges are: Members of Diplomatic Missions; Members of Consular Posts, and Officials of International Organizations. Although members of these three categories serve complementary functions, they are however distinct, hence the formation of an international legal framework for each of the three. Each category will therefore be analyzed in the subsequent lines as follows:

1.2.1 Members of Diplomatic Missions: Diplomatic missions are traditionally the principal communication link between the country that sends them and the host country.¹¹⁸ As a result of this, officials in this category are granted the highest level of privileges and immunities by their host countries to enable them to perform their duties effectively. There are also different levels of officials and the levels of immunities they are afforded in modern day international law mainly based on the functions they perform in the general operation of a diplomatic mission. The highest and most important of these are the diplomatic agents, who of course, enjoy the highest level of immunity. Diplomatic agents are the ambassadors and other officials that take part in dealing directly with the officials of the host countries. On account of their duties, diplomats themselves are as well protected as the embassies and consulates in general.¹¹⁹ They enjoy complete personal inviolability (this inviolability covers both official and private acts), they cannot be prosecuted for any criminal offence in their host country regardless of how extreme it is, unless their immunity is waived (see 4.1. below for details). Diplomatic agents also enjoy immunity from civil suits except in certain circumstances as provided in the Vienna Convention.¹²⁰

Additionally, diplomatic agents are also not obliged to present evidence as a witness and cannot be required to testify in the local jurisdiction of the host state per the provision of Article 31(2) of the VCDR. Family members of diplomats also enjoy the same privileges and immunities listed above, although the definition of who constitutes a family member according to the UN include spouses, children under the age of 21, and can be extended to other members based on circumstances. Another level of officials in diplomatic missions are members of administrative and technical staff (this includes secretaries, clerical personnel, managers, and others who take part in the inner workings of the embassy) and members of service staff (they perform tasks such as driving and cleaning). These two categories are afforded lesser immunities in comparison with the diplomatic agents. For instance, members of administrative and technical staff enjoy similar immunity to

¹¹⁸ (n2) 6.

¹¹⁹ Sherzod Toshpulatov and Nigina Khudayberganova, *Diplomatic Immunity under International Law: Legal Regulation and Current Challenges* (2021) 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3950704> accessed 20 October 2024.

¹²⁰ (n6) art 31(1).

agents in respect with immunity from criminal jurisdiction and personal inviolability, however this immunity is only functional¹²¹ with regards to civil jurisdictions. Members of service staff on the other hand, enjoy only official acts immunity and enjoy no form of immunity on actions that are not official.

1.2.2. Members of Consular Posts: Consular personnel, like diplomats, also represent their states in another state, but unlike diplomats, they are not concerned with political relations or communications between the two states.¹²² They are located both in the capitals and district locations of their host countries and their main functions include issuing of travel documents for people willing to visit their home country, advocating the commercial interests of their home country, attending to the difficulties of their own nationals in the host country, etc. provided in Article 5 of the VCCR. Consular officers, consular employees, and consular service staffs are the three categories of members of consular posts, with varying levels of immunity just like that of the members of diplomatic missions. Consular officers, like diplomatic agents are officially recognized by both the sending and receiving states, however their immunity from the criminal and civil jurisdictions of the host countries cover only their official acts and their personal inviolability is limited.¹²³ The other two categories enjoy even lesser privileges in that they both lack personal inviolability; the consular service staff also lack protection from being compelled to appear as witness in local jurisdiction of the host country; and families of both categories enjoy no immunity whatsoever.

It is worthy of note that there are also individuals referred to as honorary consuls who are citizens or permanent residents of the host state of the consul. Unlike career consuls, they work part-time as consuls and are allowed to have another work but only possess official act immunity.

1.2.3. Officials of International Organizations: Another category of individuals entitled to diplomatic immunity are International Organizations and their members in accordance with the provisions of treaties that created them.¹²⁴ Some international organizations such as the United Nations have headquarters or other offices in different countries and a large number of officials in those offices enjoy only official act immunity and no personal inviolability. However, in some

¹²¹ These are immunities that only cover the performance of their official duties; It is also known as official acts immunity.

¹²² Nnamdi Kingsley Akani, 'A Critical Analysis of Diplomatic Immunity in International Relations: Myth or Reality?' [2024] (4) (3) *The Journal of International Trade Law & Contemporary Issues* 13.

¹²³ (n6) art 40 – 44.

¹²⁴ (n10) 716-717.

situations, the most senior officials in these international organizations e.g. the Secretary-General of the United Nations, are granted the level of immunity afforded to diplomatic agents (See 3.1). In all, the level of immunity of each administrative and executive staff of the international organizations are enshrined in the treaties that created the organizations, for instance, the 1969 United Nations Convention on Special Missions.

1.3. Measures against Abuse of Diplomatic Immunity

Most people erroneously believe diplomatic immunity to mean total exoneration from the obligation to comply with the laws of a host state with no remedy whatsoever no matter how grave one's offence against the law is. However, immunity only precludes the local courts of the host state from exercising jurisdiction on cases involving persons entitled to it, this does not discharge such person from the obligation to respect the laws and does not shield them from prosecution in their home country. There are therefore different remedies in situations where the abuse of diplomatic privilege is too serious to be overlooked, they are discussed as follows:

1.3.1. Waiver of Immunity: One of the major ways of remedying a gross abuse of immunity is for the host state to request for the waiver of diplomatic immunity of such erring diplomat. This can of course be done only by the home country of such diplomat, consul or official of International Organization.¹²⁵ This is owing to the principle that diplomatic and consular immunities are not granted to benefit the individual to which it is granted, but for the benefit of the sending country. Once a diplomatic immunity of an individual is waived, such an individual is stripped of all protections and can therefore be arrested, detained, prosecuted, and tried in local courts of the host country.

1.3.2. Expulsion Procedure: This is a measure that can be taken in situations where a person enjoying immunity contravenes the law (perhaps a felony or violence crime) of his host country and the sending country fails to accede to the waiver of immunity requested by the host country. In this situation, the first process is for the host country to declare such offending diplomat or consul as a *persona non grata* (not acceptable). This is provided by Article 9 of the Vienna Convention for Diplomatic Relations as being totally discretionary and the host country does not have to explain its decision. Thus, the sending country would be forced to either recall the representative concerned or terminate his function with the diplomatic mission, with which he loses his immunity. The article further provided that if such sending state fails to perform any of the aforementioned, the host country can then refuse to recognize the concerned person as a member of the diplomatic mission.

¹²⁵ (n5) art 32.

A person declared *persona non grata* will either be forced to exit the host country or denied entry (if he was not in the country when declared). One of such recent occurrences was when Israel declared the United Nations Secretary-General, Antonio Guterres *persona non grata* and barred him from entering the country.¹²⁶

1.3.3 Termination of Immunity: This measure is different from waiver of immunity in the sense that criminal immunities (excluding official act immunity) are not perpetual, and they expire upon the termination of diplomatic or consular duty of the individual enjoying the immunity. Upon the termination of his function as a member of such mission, a diplomatic officer's immunities are terminated as well, and such individual can thus be properly prosecuted. Therefore, obtaining an arrest warrant of an individual currently enjoying diplomatic immunity could ensure prosecution on a later date (perhaps such individual visits the host country later in a private capacity).

1.4 Contemporary Challenges to the Concept of Diplomatic Immunity

There are multiplicities of challenges that have always faced the grant of diplomatic immunity to diplomatic representatives. One of these challenges is the misconception of diplomatic immunity and its objectives, by the citizens of receiving states. Many average citizens lack knowledge of diplomatic immunity and only perceive it as a weapon of impunity granted to representatives of other countries or international organizations. As a result of this, public attitudes might contravene the principles of diplomatic immunity or may aim to force the host country to contravene their obligations under the international treaties on diplomatic immunity without being aware of the implications of such actions on diplomatic relationships. This major challenge is further worsened by another major challenge which is the increase in the abuse of diplomatic privileges by individuals entitled to them. There have been several cases of diplomats exploiting their immunity to escape accountability for their actions or influence the due application of law of their host states. One of such cases occurred in 1984 when a British police officer, Yvonne Fletcher was killed by a gunshot that came from inside the Libyan Embassy. The British Police laid siege around the embassy for eleven days and could not enter because of the inviolability enjoyed by the premises. Eventually, all occupants of the embassy were allowed to leave the country without being searched

¹²⁶ Matthew Mpoke Bigg, 'Israel Declares U.N. Chief António Guterres Persona Non Grata' *The New York Times* (United States, 2 October 2024) <<https://www.nytimes.com/2024/10/02/world/middleeast/israel-guterres-un-ban-persona-non-grata.html>> accessed 20 October 2024.

or questioned based on the personal inviolability that they enjoyed.¹²⁷ Another similar case of immunity abuse happened in 2004 when an American diplomat in Bucharest, Romania, allegedly drunk, collided with a taxi and resulted in the death of a popular Romanian musician. However, nothing happened to the diplomat as he was protected by the Vienna Convention on Diplomatic Relations.¹²⁸ Civil laws are also not free of abuse by immunity as seen in the case of *Skeen V. Federative Republic of Brazil* where the defendant was accused of assault and shooting, and an action was instituted against him in the U.S. District Court for Columbia. However, upon revealing that the defendant was an ambassador's grandson, the court dismissed the suit.¹²⁹ The occurrence of cases similar to the aforementioned contributes predominantly to the public's perception of diplomatic immunity as a way of breaking laws without having to be held responsible.

Another impediment that cannot be overlooked is the law enforcement challenge. This challenge is ambiguous in the sense that, law enforcement officers in some countries may be unaccustomed to granting special privileges or concessions to individuals who break the law, by virtue of their oath and training.¹³⁰ However, in some other countries it could be interpreted to mean that law enforcement officers lack resources or trainings to properly enforce the provisions of the international conventions granting immunity.¹³¹ Also, the theoretical frameworks of diplomatic immunity are rather too narrow in some aspects such as the immunity of families of diplomats, the position of premises inviolability with regards to emergency situations, among others.

These foregoing challenges are however not exhaustive as there are other challenges hampering the true objective of diplomatic immunity, some of which might be jurisdiction specific. Although the conventions provide remedies for situations of immunity abuse, they are however highly limited, and countries are sometimes uncooperative in summoning erring diplomats to face the consequence of their actions.

¹²⁷ The Associated Press, 'More than 30 years after London cop shot dead in Libyan embassy, police make 'first significant arrest,' *National Post* (Canada, 19 November 2015) <<https://nationalpost.com/news/world/more-than-30-years-after-london-cop-shot-dead-in-libyan-embassy-police-make-first-significant-arrest>> accessed 20 October 2024.

¹²⁸ Rene Vark, *Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes* (Abdul Press 2012).

¹²⁹ (1983) 566 F. Supp. 1414 D.D.C.

¹³⁰ (n2) 3.

¹³¹ (n13) 22.

1.5 Conclusion

Contemporary principles of diplomatic relations derived their precedent from the ancient practices and based on the above challenges highlighted, there is no gainsaying the fact that the legal frameworks granting diplomatic immunities need to be reviewed with the intent to reflect realities associated with contemporary diplomatic practices.¹³² Countries should also be cooperative in ensuring that erring diplomats are held accountable for their actions and law enforcement resources and trainings should be provided to promote right implementation of diplomatic immunity. Regardless, it is incontrovertible that diplomatic representatives perform crucial tasks in maintaining peaceful international relations, and their duties warrant that they be accorded a certain level of protection in the foreign lands, hence the formation of international conventions to this effect.

¹³² Udeoji Ebele Angela, 'The Abuse of Diplomatic Immunities Among States: Issues And Challenges' [2023] (7) (1) *Wukari International Studies Journal* 282.

NAVIGATING COMPLEXITIES OF AUTONOMOUS WEAPONS SYSTEMS

By Anindo June Dezinavell

ABSTRACT

This article explores the challenges posed by Autonomous Weapon Systems (AWS) to International Humanitarian Law (IHL) in modern warfare. It traces a historical trajectory from early automated weapons in the 19th century through to cutting-edge developments like unmanned combat aerial vehicles and lethal autonomous robotics, providing context for the current state of AWS technology and its rapid evolution. The essay grapples with questions of how AWS can reliably distinguish between combatants and civilians in complex, dynamic battlefield environments, and how they can be programmed to make proportionality calculations that have traditionally relied on human judgment. The article wrestles with the thorny issue of attributing responsibility and maintaining accountability for actions taken by AWS. In a world where machines make autonomous decisions, determining liability for potential war crimes or IHL violations becomes incredibly complex. Additionally, the essay highlights the current legal gaps and uncertainties regarding AWS regulation.

It urges continued engagement from diverse stakeholders - including military strategists, ethicists, legal scholars, technologists, and policymakers - to navigate this complex landscape. By examining historical precedents, current developments, and future possibilities, this article aims to provide a comprehensive overview of the AWS landscape and contribute to the ongoing global conversation about how best to balance technological innovation with enduring humanitarian principles in the conduct of war. It underscores the urgent need for thoughtful, nuanced approaches to AWS governance that can adapt to rapid technological change while upholding the fundamental values enshrined in IHL.

1.0 Introduction

The evolution of warfare across the 19th to 21st centuries has been closely linked with rapid technological advancements that have transformed the means and methods of armed conflict. Throughout this period, the rules of International Humanitarian Law (IHL) have continually adapted to address the implications of these new technologies on the core principles of distinction, proportionality, and prevention of unnecessary suffering. However, the advent of autonomous weapon systems capable of independently selecting and engaging targets,¹³³ without meaningful human control poses a great challenge to the application of IHL.

Automation is a trend associated with advancements in robotics in which a machine is programmed to perform a task with little or no human intervention.¹³⁴ The extent of human involvement as well as the ability of the system or a system feature to adjust its functionality to the context of its use usually is what makes the system fall into the categories of remotely controlled, automated, or autonomous. For a system to be classified as fully autonomous it has to be able to adapt and make discretionary decisions and able to learn in changing environments when deployed,¹³⁵ it is however important to note that fully AWS does not mean that they are capable of arriving at their own goals as all these rests at the developers of the software.¹³⁶

The nineteenth century saw the creation of early autonomous weapons, such as the torpedo, which could propel itself towards a target after being launched. The twentieth century saw considerable developments, notably the widespread deployment of Unmanned Aerial Vehicles (UAVs) in World War II. The twenty-first century has seen the advent of sophisticated drone aircraft capable of remote targeted strikes¹³⁷ and Killer robots.¹³⁸

High Contracting Parties are inclining towards AWS due to the military advantage they possess as they operate more quickly and efficiently than human combatants. Furthermore, there is a reduced

¹³³ ICRC, "Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons," (2016), UNIDIR, "The Weaponization of Increasingly Autonomous Technologies: Considering how Meaningful Human Control Might Move the Discussion Forward," (2014)

¹³⁴ Mikell P. Groover, *Automation: the editors of the Encyclopedia Britannica*, (2024)

¹³⁵ ICRC, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects*, Expert Meeting Report (ICRC: Geneva, 2014), p. 62

¹³⁶ ICRC (note 2), p.62, *SIPRI Insights on Peace and Security, Implementing Article 36 Weapon Reviews in the light of increasing Autonomy in Weapon Systems* November 2015 p.8

¹³⁷ Military aircraft - UAVs, Drones, Autonomy | Britannica available at <https://www.britannica.com/technology/military-aircraft/Unmanned-aerial-vehicles-UAVs>

¹³⁸ Armin Krishnan, *Killer Robots: Legality and Ethicality of Autonomous Weapons* (Routledge 2016); Thompson Chengeta, 'Are Autonomous Weapon Systems the Subject of Article 36 of Additional Protocol I to the Geneva Conventions?' (2016) 23 University of California, Davis 66, 81.

risk to human soldiers by replacing human combatants in dangerous situations,¹³⁹ making it cost effective as once AWS is deployed it is cheaper maintaining. AWS, such as UCAV, allow people in charge of lethal force to turn it on when seated behind laptops in isolated areas, keeping them safe. AWS such as Lethal autonomous robotics (LARs) are adding a new layer to this style of warfare by allowing the robots to make their own targeting decisions.

The lack of meaningful human involvement in critical decisions concerning the use of force raises fundamental questions about compliance with core IHL principles such as distinction, proportionality, and precautions in attack. Moreover, the complexities surrounding attributing responsibility for violations and determining accountability for the actions of these systems strain existing legal frameworks.¹⁴⁰

Confronting these unique obstacles necessitates a comprehensive evaluation of autonomous weapons through the lens of IHL, with the exploration of potential solutions - whether through restrictive policies, enhanced human control measures, or the adaptation of legal frameworks to address this technological disruption and uphold the humanitarian principles that underpin the laws of armed conflict.

1.1 Challenges Posed by Autonomous Weapon Systems

a) Difficulty in attributing responsibility with Autonomous Weapon Systems

Traditionally the Laws of War and IHL traditionally attribute responsibility for violations to multiple parties within the military and civilian leadership structure. Individual combatants can be held personally accountable for war crimes they commit.¹⁴¹ Military commanders may be liable under the doctrine of command responsibility if they fail to prevent or punish crimes committed by their subordinates.¹⁴² Civilian leaders can also face charges for ordering war crimes or failing to prevent them when able.¹⁴³

Unlike traditional weapons, AWS operate autonomously, meaning they can make decisions without real-time human intervention. This lack of direct control poses challenges for accountability because it becomes difficult to attribute specific actions to individual humans.

¹³⁹ Arkin RC, 'Lethal autonomous systems and the plight of the non-combatant' (2013) *AISB Quarterly* 137:1–9 TY - CHAP

¹⁴⁰ Ibid

¹⁴¹ Rome Statute of the ICC, Article 25.

¹⁴² Additional Protocol I to the Geneva Conventions, Article 86

¹⁴³ Rome Statute, Article 28.

According to *Article 36*; a non-profit organization that aims to lessen the harm caused by firearms, The International Panel on the Regulation of Autonomous Weapons (IPRAW): a collection of independent specialists from different states and technical fields who offer the Convention on Certain Conventional Weapons (CCW) unbiased advice and the European Union identified accountability as one of the main characteristics of meaningful human control.¹⁴⁴

According to The International Committee of the Red Cross (ICRC), all autonomous weapon systems will experience some degree of unpredictability since they deal with an uncertain environment, regarding this: The European Union emphasizes that humans must make judgments about the use of force, exercise control over the weapons they use, and be held accountable for those actions. Another important aspect of meaningful human control is the ability to manage the context in which an autonomous weapon system operates¹⁴⁵

The development of AWS like the Sea Hunter (ACTUV), designed to operate with limited meaningful human control for extended periods, poses significant challenges to IHL principles and raises concerns about accountability. With the capability to detect, track, and potentially engage targets independently, the lack of direct human oversight and control over critical functions like target identification which requires protection of prisoners of War,¹⁴⁶ protected civilians in their own, enemy, or occupied territory;¹⁴⁷ wounded and sick on land; wounded and sick at sea,¹⁴⁸ and engagement makes it difficult to ensure compliance with IHL principles of distinction, proportionality, and precautions in attack.

The autonomy of these systems, combined with the ability to deploy swarms capable of independent attacks, raises the question of responsibility, as developers may argue that they cannot account for every scenario, operators may have limited real-time control, and the system itself may bear moral or legal responsibility.¹⁴⁹

The chain of responsibility with AWS is a complex one, involving multiple actors such as policymakers who set deployment guidelines, developers and engineers who design and program

¹⁴⁴ ICRC (n. 1)

¹⁴⁵ The ICRC addresses judgments that are context-specific; Sweden argues that context determines the proper degree of human control; and iPRAW highlights the dynamic and context-dependent nature of situational understanding.

¹⁴⁶ Art. 13 and 14, Second Geneva Convention.

¹⁴⁷ Fourth Geneva Convention, Article 4.

¹⁴⁸ First Geneva Convention, Article 13.

¹⁴⁹ International Committee of the Red Cross (ICRC). *Autonomous weapon systems: Technical, military, legal and humanitarian aspects*. Geneva, Switzerland 26 to 28 March 2014.

the systems, operators who deploy them in the field, and commanders who authorize their use during military operations. An example is when an AWS engages in a lethal action leading to violations of IHL, determining who is responsible becomes complicated; was it the programmer who wrote the code, the operator who deployed it, or the policymaker who authorized its use? It is essential to highlight that AWS rely on complex algorithms to process data and make decisions. These algorithms are often opaque, especially in machine learning-based systems, when an AWS takes action, understanding the exact reasoning behind its decision can be challenging¹⁵⁰. The mysterious nature of these algorithms makes it hard to trace responsibility. Determining ultimate accountability can be convoluted due to this intricate web of actors.

b) Adhering with the principle of Distinction and Proportionality

Distinction requires warring parties to discriminate between military and civilian objects and personnel during the course of combat and spare the latter from harm to the greatest extent possible.¹⁵¹ Proportionality on the other hand requires combatants to apply no more force than needed to achieve the intended objective, while sparing civilian personnel and property from unnecessary collateral damage.¹⁵² These principles aim to protect civilians from the effects of armed conflict as much as possible.

Ensuring compliance with the principle of distinction becomes increasingly challenging with the use of AWS. With no meaningful human control, these systems are armed and able to make decisions about combat and targeting on their own. An AWS runs the danger of breaching the principle of distinction if it is unable to accurately discriminate between combatants and civilians. Such may lead to indiscriminately injuring civilian population a violation of IHL that is greatly forbidden. This is especially critical in scenarios where people's status is unclear or liable to change such as of those who surrender (*hors de combat*), or in complicated operational areas where combatants and civilians may mix.

Another key component of IHL is the principle of proportionality, which mandates that parties to armed conflicts balance the expected military advantage of an attack against the possible harm it may do to people and civilian property.¹⁵³ This principle seeks to reduce needless pain and unintentional harm.

¹⁵⁰ Article 36 (n. 18)

¹⁵¹ Article 48 of Additional Protocol I to the Geneva Conventions, CIHL Rules 1 and 7

¹⁵² Additional Protocol I Article 51(5) (b) and 57(2)(a)(iii) and (b): CIHL, Rules 14, 18 and 19.

¹⁵³ Customary International Humanitarian Law Rule 4.

When it comes to the use of AWS, assessing proportionality becomes increasingly complex and challenging. These systems operate with a certain level of autonomy, making targeting and engagement decisions without meaningful human control or oversight; as such, AWS may not fully comprehend the broader context, cultural consequences, or the specific consequences of their actions, which could lead to violations of the proportionality principle.

Ensuring that AWS can precisely assess the likely collateral harm linked to an attack is nearly unachievable. This entails projecting and assessing how an attack may affect civilians, civilian infrastructure, and the environment in general.

1.2 Ethical Concerns

There is no requirement for machines to be ‘ethical’ or ‘humane’ the only thing is that they need to be proportional and respect humanity.¹⁵⁴ To better address the challenge of legal and ethical concerns, I’ll concentrate on Lethal Autonomous Robots (LARs),¹⁵⁵ which are robotic weapon systems that, once activated, can choose, and engage targets without the intervention of a human operator. The most important component of this system is that the robot has an autonomous option on target selection and the application of deadly force.¹⁵⁶ When it comes to armed conflict there has yet to be the use of LARs by belligerent parties.¹⁵⁷

As it is there is little to no adherence to IHL between belligerent parties, according to some scholars we can only achieve high compliance with IHL where there is no meaningful human interaction as humans bring emotional reactions to the battlefield which AWS such as LARs are immune to.¹⁵⁸

However, with the unpredictable nature of AWS, in an uncertain battlefield with other autonomous weapons it becomes highly challenging to predict the actions of LARs. This raises questions of how ethical it is for a lethal machine to decide who gets to live and who gets to die. Humans arguably have emotional intelligence and moral responsibility, robots on the hand do not. Armed conflicts and IHL require human judgment,¹⁵⁹ common sense, a grasp of intentions and values, and

¹⁵⁴ Noel E. Sharkey, ‘Saying — No! to Lethal Autonomous Targeting’, in *Journal of Military Ethics*, Vol. 9, No. 4, 2010, pp. 299–313.

¹⁵⁵ Secretary-General Antonio Guterres Statement on Killer Robots available at < [pax-booklet-killer-robots-what-are-they-and-what-are-the-concerns.pdf](https://www.paxforpeace.nl/pax-booklet-killer-robots-what-are-they-and-what-are-the-concerns.pdf) (paxforpeace.nl)>

¹⁵⁶ US Department of Defense, Unmanned Systems Integrated Road Map FY2011-2036, p. 50, available at < [DoD Unmanned Systems Integrated Roadmap FY2011-2036 | Public Intelligence](https://www.dodig.mil/reports-and-testimony/publications/unmanned-systems-integrated-road-map-fy2011-2036).>

¹⁵⁷ Ibid.

¹⁵⁸ Arkin RC. *Governing Lethal Behavior in Autonomous Robots*. Boca Raton: CRC Press; 2009. His analysis on AWS and critic on the immune nature of killer robots which are immune to human emotions.

¹⁵⁹ It is only through human judgement that some principles such as the principle of unnecessary suffering can be complied with as required by Art 35(2) of Additional Protocol I and CIHL, Rule 70.

the ability to anticipate future events. Compassion and intuition may be necessary while making life-or-death judgments during armed conflict.

Humans, despite their flaws, possess certain attributes that machines lack. Robots excel at quantitative tasks but struggle with qualitative assessments related to human existence. Conflicting combat choices can make machine computations complex.

In practice, proving non-combatant status is challenging due to robots' incapacity to understand context and the problem of converting IHL language into a computer program.¹⁶⁰ Undoubtedly robots may struggle to distinguish between injured soldiers and those who are likely to surrender and should therefore not be targeted.¹⁶¹ Allowing AWS, such as LARs, to make unchecked life-or-death choices goes against fundamental human dignity values. Even in the middle of an armed war, core human rights and moral ideals must be maintained. Human dignity is a fundamental and inalienable value that each human being possesses just by virtue of being human. It is a pillar of human rights.

c) Legal Concerns of AWS

So far, what seems to be regulating Autonomous weapons is the 1980 Convention on Certain Conventional Weapons (CCW). The aim of this convention is to prohibit or restrict the use of specified types of weapons that are thought to cause unnecessary or unjustifiable suffering to combatants or to harm civilians indiscriminately.¹⁶² The conversations around the CCW on Autonomous Weapons have been quite instrumental with formal discussions involving Governmental Experts on lethal autonomous weapons. In 2019 what seemed to be the main outcome of the Governmental Experts' work is the adoption by consensus of a non-binding instrument, that is, the 11 Guiding Principles on LAWS, which include broad recommendations on human responsibility (Principles (b) and (d)) and human-machine interaction (Principle (c)).¹⁶³ In 2020 the pandemic greatly slowed down the discussions around Autonomous Weapons, the following year-2021 there was no consensus for a report following that there was almost no

¹⁶⁰ Peter Asaro “*On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanisation of Lethal Decision-making*” p. 94

¹⁶¹ CIHL, Rule 47 available at <[Customary IHL - Rules \(icrc.org\)](https://www.icrc.org/customary-ihl/eng/rule/47)>

¹⁶² The Preamble of the CCW.

¹⁶³ Final Report of the 2019 Meeting of the high contracting parties to the CCW. UN Doc CCW/MSP/2019/CRP2/Rev1, Annex III 15 November 2019 available at <[CCW/MSP/2019/9 \(un.org\)](https://www.un.org/ccw/msp/2019/9)>

mandate for the following years. Article 36 of Additional protocol I tries to regulate Autonomous Weapons,¹⁶⁴ yet the two instruments are not conclusive in regulating Autonomous Weapons.

The challenge of applying Article 36,¹⁶⁵ is that it is not entirely applicable, for example Lethal Autonomous Robots are not systems despite the fact that they locate and target people but until they are armed, they are not autonomous systems therefore Article 36 is not applicable.

The CCW on the other hand is a convention which primarily focuses on existing conventional weapons, such as incendiary weapons, and blinding laser weapons its inadequacies are glaring as it lacks specific provisions tailored to Autonomous weapons. The fact that Autonomous Weapons operate without meaningful human control, making them distinct from traditional weapons that are not addressed by CCW.

1.3 Solutions to Challenges Faced by Autonomous Weapons

Finally, to find solutions to the challenges posed by armed conflict we must consider the purpose of war. Undoubtedly, the goal of combat is to gain and exploit advantages to the enemy's detriment. Aware of this reality, the law of armed conflict has never been about ensuring a just war rather, it consists of prohibitions, restrictions, and obligations designed to balance a state's interest in effectively prosecuting the war with its interest in minimizing harm to those involved in a conflict.¹⁶⁶

a) Preserving Human Judgment:

One prominent approach, advocated by Christof Heyns,¹⁶⁷ is meaningful human control. Heyns argues that maintaining human control over critical functions of Autonomous Weapons is the most practical way to address accountability concerns. According to Heyns a robot is unable to understand and apply IHL, giving an example of the almost impossible nature of a robot to establish whether someone is wounded and *hors de combat*, and also whether soldiers are in the process of surrendering. He suggests that humans, not computers and their algorithms, should ultimately remain in control of, and thus bear moral responsibility for, decisions about the use of lethal force.

¹⁶⁴ Which requires states to conduct a legal review of all new weapons, means and methods of warfare in order to determine whether their employment is prohibited by international law

¹⁶⁵ Article 36 of Additional Protocol I to the Geneva Convention.

¹⁶⁶ Dave Wallace, Shane r. Reeves Modern Weapons and the Law of Armed Conflict *U.S. Military Operations: Law, Policy, and Practice 41-66* (Corn, VanLandingham, & Reeves eds. Oxford University Press) 2015. Available at <[Modern Weapons and the Law of Armed Conflict by Shane Reeves, David A. Wallace :: SSRN](#)>

¹⁶⁷ Christof Heyns, The former UN Special Rapporteur on extrajudicial, summary or arbitrary executions. 2010-2016

Building on this approach, Rebecca Crootof proposes a responsibility-based approach to regulating AWS. She suggests that instead of focusing solely on banning AWS, international law should establish clear rules for state and individual responsibility for AWS-related violations. Crootof argues that by clarifying how responsibility will be allocated, a new treaty would create incentives for states to develop and use autonomous weapon systems in ways that minimize the likelihood of IHL violations.¹⁶⁸

It is important to note that scholars like Ronald C Arkin advocate for AWS due to their fast paced nature and capability of making decisions in a split second;¹⁶⁹ introducing meaningful human control in AWS takes away the capability of an AWS to make decisions in a split second taking away the characteristic of an AWS to make fast decisions in crucial situations.

b) Temporary moratorium until a treaty is explicitly allocated to AWS.

While the international community is coming up with a treaty specifically dedicated to AWS, Heyns suggests that a national moratorium should be in place, his suggestion that a high-level panel on LARs be formed, involving specialists from several sectors and the panel release its findings within a year; seem to have been adopted by the Governmental Experts on lethal autonomous weapons, they are yet to make any binding instrument on AWS. While the discussions are commendable the most suitable approach would be to have a moratorium in place until the CCW experts can ultimately have a binding instrument on High Contracting Parties on AWS.¹⁷⁰

This way instead of seeking an outright ban, the international community should focus on developing best practices and standards for the design, testing, and use of AWS. The most constructive approach for the international community is to develop internal state standards and best practices for the design and use of these systems,¹⁷¹ rather than pursuing an international prohibition as proposed by some scholars.¹⁷²

c) Should we have an Ethical Governor on Autonomous Weapons?

¹⁶⁸ Rebecca Crootof, *The Killer Robots Are Here: Legal and Policy Implications*, 36 Cardozo L. Rev. 1837 (2015) available at <[The Killer Robots Are Here: Legal and Policy Implications by Rebecca Crootof :: SSRN](#)>

¹⁶⁹ Ibid (note 18).

¹⁷⁰ Ibid footnote 21 paragraph 114 and 118.

¹⁷¹ Kenneth Anderson, Matthew C. Waxman *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can* 2013 available at <[Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can by Kenneth Anderson, Matthew C. Waxman :: SSRN](#)>

¹⁷² Noel E. Sharkey, *The evitability of autonomous robot warfare* Volume 94 Number 886 Summer 2012 available at <[COMMENTS AND OPINIONS: The evitability of autonomous robot warfare* \(icrc.org\)](#)>

When it comes to solutions of ethical concerns Peter Asaro's concept is the bench mark. He proposes an 'ethical governor' for AWS to act as a safeguard within the AWS ensuring that its actions align with the principles of IHL and the agreed upon ethical standards.¹⁷³ The ethical governor is intended to be a high-level control system incorporated into the Autonomous Weapon Systems against a predefined set of ethical rules and the core IHL principles. What the ethical governor is creating is an ethical filter before an action is taken by an Autonomous Weapon. According to Asaro the ethical governor would make real time evaluation as the AWS processes information and makes decisions, the ethical governor would be designed in such a way that it would continuously evaluate the processes against the ethical rules set. The ethical governor would exercise veto-power meaning it would have the ability to veto or prevent actions by an AWS that are found to be unethical or in violation of IHL by overriding targeting decisions in extreme situations it can initiate a system shutdown. The ethical governor being an AI based program I will be able to adopt and transform by learning from its experiences and refine its decision-making processes over time, always within the bounds of its core ethical programming.¹⁷⁴

1.4 Conclusion

Without a shadow of doubt the continuous development of Autonomous weapons poses a great challenge with compliance with IHL. It is quite easy on paper to call for a ban of these weapon systems but in practicality it is next to impossible. In war High Contracting Parties are always seeking for a military advantage and AWS provide this military advantage including reduced risks to human combatants.

The proposed solutions herein each has its advantages and limitations, moving forward it is crucial that experts engage in a dialogue: the conversations happening around the CCW in Geneva is quite commendable. However, the Governmental Experts need to ensure the discussions are productive with at least reports from every session until we get to a point where we have a binding instrument on AWS.

To classify the challenges around AWS as a military challenge would be a grave mistake: AWS is the future of warfare and humanity's role in it needs to be definitely defined. The future requires

¹⁷³ Peter Asaro, *on banning autonomous weapon systems: human rights, automation, and the dehumanization of lethal decision-making* Volume 94 Number 886 Summer 2012 available at <[On banning autonomous weapon systems: humanrights, automation, and the dehumanization of lethal decision-making \(icrc.org\)](https://www.icrc.org/eng/doc/assets/public/otherpublications/2012/94886/94886.pdf)>

¹⁷⁴ Ibid

striking a careful balance between military necessity and humanitarian considerations, as well as between innovation and regulation.

**LEGAL ANALYSIS OF SOVEREIGN STATES' LIABILITY FOR THE
CONTRACTUAL OBLIGATIONS OF COMPONENT UNITS IN INTERNATIONAL
LAW: THE ZHONGSHANG FUCHENG INDUSTRIAL INVESTMENT CO. LTD V THE
FEDERAL REPUBLIC OF NIGERIA'S CASE IN PERSPECTIVE.**

By Monday Chinaecherem & Danladi Christopher¹⁷⁵

Abstract

The issue of whether sovereign states can be held liable for the contractual obligations of their constituent units is a complex and evolving area of international law. This question gains particular relevance in federal systems where regional governments or states possess significant autonomy, including the authority to enter into contracts with foreign entities. In such scenarios, delineating the boundary between the obligations of these sub-national units and the responsibility of the sovereign state itself presents a legal challenge. The case of Zhongshang Fucheng Industrial Investment Co. Ltd v The Federal Republic of Nigeria offers critical insight into this issue, especially following multiple court rulings across different jurisdictions that rejected Nigeria's claim of sovereign immunity. After an arbitral award in favour of Zhongshang Fucheng, courts in France and England ordered the seizure of Nigerian state assets, including presidential jets and properties, as part of enforcement efforts. This paper will address these questions by exploring key legal principles, including state responsibility, the doctrine of state immunity, and the concept of attribution in international law. Additionally, it will examine the role of bilateral investment treaties (BITs) and the New York Convention in facilitating enforcement of arbitral awards across multiple jurisdictions.

Keywords: Liability, obligation, enforcement, sovereignty, Treaties.

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1.0 Introduction

On 14 August 2024, a French court ordered the confiscation of three Nigerian presidential jets in a significant enforcement effort following a \$70 million arbitral award against the Federal Republic of Nigeria¹⁷⁶. The award had been granted in favour of Zhongshang Fucheng Industrial Investment Co. Ltd, a Chinese construction firm, by an arbitration tribunal in London on 26 March 2021¹⁷⁷. This was not an isolated incident; in June 2024, two Nigerian properties in Liverpool, England, were similarly appropriated as part of enforcement proceedings¹⁷⁸. Prior to these developments, the United States Court of Appeals for the District of Columbia had denied Nigeria's sovereign immunity defence, rejecting the argument that Nigeria could not be sued in U.S. jurisdiction under the Federal Sovereign Immunity Act.¹⁷⁹ The court reasoned that since the arbitral award fell under the New York Convention, it triggered an exception to sovereign immunity under U.S. law, allowing enforcement to proceed.

The case of *Zhongshang Fucheng Industrial Investment Co. Ltd v The Federal Republic of Nigeria* showcases the complex legal question of whether, and to what extent, sovereign states can be held liable for the contractual obligations of their sub-regions.¹⁸⁰ The next part of this article will examine the legal challenges posed by this issue, focusing on the interaction between sovereign immunity, state responsibility, and the doctrine of attribution in international law. In particular, it traces the origins of the dispute between Nigeria and Zhongshang Fucheng, examining how the firm was able to successfully enforce its arbitral award across multiple jurisdictions, despite Nigeria's attempts to claim sovereign immunity. By doing so, it sheds light on the broader implications of this case for the international legal sphere, especially concerning the enforceability of arbitral awards and the liability of federal states for the actions of their sub-national entities.

¹⁷⁶ Atake, A & Uka O.A, 'French Court Authorises Chinese Firm to Seize Three ...' (TEMPLARS, 16 August 2024) <<https://www.templars-law.com/app/uploads/2024/08/Zhongshan-Fucheng-Vs-Nigeria.pdf>> accessed 21 October 2024

¹⁷⁷ Adebayo T et al 'The Zhongshan Fucheng Industrial Investment Co.Ltd. v. Federal Republic of Nigeria Arbitral Award –Analysis of The Issues' (Mondaq) <<https://www.mondaq.com/nigeria/arbitration-dispute-resolution/1519804/the-zhongshan-fucheng-industrial-investment-co-ltd-v-federal-republic-of-nigeria-arbitral-award-analysis-of-the-issues>> accessed 22 October 2024

¹⁷⁸ Ugwu F, 'US Court Authorises Chinese Investors to Seize Nigeria's Assets' (Daily Post Nigeria, 15 August 2024) <<https://dailypost.ng/2024/08/15/us-court-authorises-chinese-investors-to-seize-nigerias-assets>> accessed 21 October 2024

¹⁷⁹ Ibid

¹⁸⁰ Zhongshan Fucheng Industrial Investment Co. Ltd v. Federal Republic of Nigeria, No. 23-7016 (D.C. Cir. 2024) (Justia Law) <<https://law.justia.com/cases/federal/appellate-courts/cadc/23-7016/23-7016-2024-08-09.html>> accessed 21 October 2024

1.1 The Relationship between Sovereign Immunity and State Liability in International Law

The concept of sovereignty incorporates a fundamental aspect of a state's power to be supreme in its existence. It encompasses a state's authority to maintain absolute control within its own borders (internal sovereignty) and to remain independent from external influence or authority in its relations with other states (external sovereignty).¹⁸¹ A critical component of state sovereignty is the doctrine of state immunity—a crucial principle of international law that protects sovereign states from lawsuits, including, in some cases, enforcement proceedings. This principle posits that one sovereign state cannot be sued before the courts of another sovereign state without its consent. States often rely on this doctrine to challenge the jurisdiction of foreign courts or tribunals and to prevent the enforcement of an award or judgment against any of its assets.¹⁸²

Interestingly, the concept of sovereign immunity has sparked extensive scholarly debate regarding its applicability in the enforcement of foreign arbitral awards. Proponents of sovereign immunity argue that a sovereign state should not be compelled by any court outside its jurisdiction to submit to the enforcement of a foreign arbitral award, as such an obligation fundamentally violates its sovereignty. They maintain that a state should only be held accountable for its actions through its own domestic courts and not through foreign courts or tribunals.¹⁸³

Conversely, other scholars contend that the enforcement of foreign arbitral awards is crucial for the development of international trade and commerce and should therefore be permitted. They argue that the principle of sovereign immunity should not shield a state from its contractual obligations, particularly when it has voluntarily agreed to arbitrate disputes with private parties. This argument aligns with the classical exposition by **Lord Denning** in the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*¹⁸⁴, where he articulated:

"A foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a government department goes into the marketplaces of the world and buys boots or cement—as a commercial transaction—that government department should be subject to all the rules of the marketplace."

¹⁸¹ 'Sovereignty | The Princeton Encyclopedia of Self-Determination' (Princeton University) <<https://pesd.princeton.edu/node/671>> accessed 21 October 2024

¹⁸² 'Sovereign Immunity and Enforcement' (TEMPLARS) <<https://www.templars-law.com/app/uploads/2017/01/Sovereign-Immunity-and-Enforcement.pdf>> accessed 21 October 2024

¹⁸³ Adebayo T, 'An Appraisal Of Defence Of Sovereign Immunity In The Enforcement Of Foreign Arbitral Awards' (Mondaq, 15 May 2024) <https://www.mondaq.com/nigeria/trials-appeals-compensation/1465722/an-appraisal-of-defence-of-sovereign-immunity-in-the-enforcement-of-foreign-arbitral-awards>

¹⁸⁴ [1977] 2 W.L.R. 356

Similarly, **Section 3(1) of the UK's State Immunity Act 1978** provides that:

*"(1) A State is not immune as respects proceedings relating to—
(a) a commercial transaction entered into by the State; or
(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."*

A critical examination of the foregoing suggests that the principle affording protection to a sovereign state from lawsuits, including enforcement proceedings of awards without its consent, is now a precarious balancing act. For an arbitration award to be issued, there must be an arbitration agreement or an underlying contract with an arbitration clause executed by the parties capable of enforcement.¹⁸⁵ Thus, it is important to note that the arbitration agreement invokes the principle of consent, often based on the existence of an arbitration clause in the base contract, allowing the parties to submit to the jurisdiction of an arbitral tribunal, whether domestic or international.

1.2 Sovereign State Liability for the Contractual Obligations of their Component Units In International Law

Without doubt, a sovereign state can potentially be held liable for the contractual obligations of its component units under international law, even if the state itself has not expressly entered into the contract. This will be fully evaluated in subsequent sections.

1.2.1 Obligations under International Agreements and Bilateral Investment Treaties (BITs)

Under international law, many contracts, especially those involving foreign investment, are governed by bilateral or multilateral treaties. These treaties may contain clauses that help determine whether the obligations of component units or subnational entities can be attributed to the federal or national government, depending on the system of government in operation.¹⁸⁶ Intriguingly, some BITs and investment treaties explicitly extend the liability of the central government to cover the obligations of the subnational entity, particularly when the contract or treaty states that the federal government guarantees the obligations of the component units.

1.2.2 Principle of State Responsibility

¹⁸⁵ Dautaj Y, 'Enforcing Arbitral Awards Against States and the Defense of Sovereign Immunity from Execution: A US. Perspective' (2023) 11 Penn State Journal of Law & International Affairs

¹⁸⁶ Sacerdoti G, bilateral treaties and multilateral instruments on investment protection https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants'%20documents/CL%20-%20Exhibits/CL-0276.pdf accessed 22 October 2024

According to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), a sovereign state may be held internationally responsible for breaches of contract or wrongful acts committed by its component units, particularly under the direction of the federal government. If the component unit acts independently or outside the authority of the federal government, the sovereign state may contend its immunity against liability for the actions of the contracting entity (in this case, the component unit). Ultimately, the determination of the sovereign state's liability hinges on whether the actions of the component unit can be considered actions of the state itself. This doctrine is closely related to the internationally recognized principle of attribution.

1.2.3 International Principle of Attribution

Attribution is defined as a legal operation whereby an internationally wrongful act or omission can be linked to a state, rendering that state liable for such wrongful act or omission, even if it was not committed by the central or federal organ of that state. Investors can invoke this principle to hold a sovereign state accountable for certain actions by its components before an arbitral tribunal. In *Jan de Nul N.V. & Dredging International 11 N.V. v. Arab Republic of Egypt*¹⁸⁷, the court held that: “In order for an act to be attributed to a State, it must have a close link to the State. Such a link can result from the fact that the person performing the act is part of the State's organic structure¹⁸⁸, or exercises governmental powers specific to the State in relation to this act, even if it is a separate entity, or if it acts under the direct control (on the instructions of, or under the direction or control) of the State, even if being a private party.¹⁸⁹

Moreover, it is important to note that when a component unit of the government or a subnational entity is authorized to exercise governmental authority and exceeds or contravenes that authority, the conduct of such a unit or entity will be regarded as an act of the federal state itself under international law. This indicates that an ultra vires objection from a state before a tribunal will not absolve the state of its obligations and liabilities. However, such ultra vires conduct must be distinguished from the private acts or omissions of individuals who may represent the state. Therefore, only ultra vires official conduct is attributable to the state. For further clarity, **Article 5 of the ILC** Articles provides:

“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be

¹⁸⁷ ICSID Case No. ARB/04/13, Award (Nov. 6, 2008).

¹⁸⁸ Article 4 of the ILC

¹⁸⁹ Article 8 of the ILC

considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”.

1.3 Contextual Case Analysis: Zhongshang Fucheng Industrial Investment Co. Ltd V The Federal Republic of Nigeria.

The dispute arose when Zhongshang Fucheng, a Chinese construction firm, initiated arbitration against Nigeria over a contract that had been entered into by one of Nigeria's regional entities. The contract was tied to a construction project, and following disagreements on the performance of the contract, Zhongshang Fucheng sought to enforce an arbitration clause¹⁹⁰. The arbitration tribunal in London issued an award in favour of Zhongshang Fucheng on March 26, 2021, amounting to \$70 million.¹⁹¹

When Nigeria refused to honour the arbitral award, Zhongshang Fucheng began enforcement proceedings in various jurisdictions, including the United States, England, and France.¹⁹² As part of the enforcement effort, Nigerian state assets—including three presidential jets—were confiscated in France, while two properties in Liverpool were seized in June 2024.¹⁹³ The central legal issue in this case is the extent to which a sovereign state can invoke sovereign immunity to shield itself from the enforcement of an arbitral award involving contractual obligations undertaken by a component unit.¹⁹⁴

Nigeria argued that the arbitration award could not be enforced due to its sovereign immunity under international law, particularly invoking the Federal Sovereign Immunities Act in the United States.¹⁹⁵ However, the courts in various jurisdictions, notably the U.S. Court of Appeals for the District of Columbia, rejected Nigeria's claim of sovereign immunity. The court ruled that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁹⁶, which Nigeria is a party to, created an exception to sovereign immunity in this case. Since Nigeria had

¹⁹⁰ Liu E, 'Chinese Investor Succeeded in Investment Arbitration against Nigeria: Zhongshan Fucheng Industrial Investment Co. Ltd -V- Federal Republic of Nigeria' (*Lexology*, 4 March 2022) <<https://www.lexology.com/library/detail.aspx?g=22ad75cf-7719-486a-b488-c9685fbbee72>> accessed 20 September 2024

¹⁹¹ Ibid

¹⁹² Tunde-Olowu A, Gomes A and Siyaidon E, 'Seizure Of Nigeria'S Presidential Jets By A Chinese Firm The What And The Why?' (*AELEX*) <<https://www.aelix.com/seizure-of-nigerias-presidential-jets-by-a-chinese-firm/>> accessed 20 September 2024

¹⁹³ Chibelushi W, 'Nigerian Presidential Jets Seized in France amid Dispute with Chinese Firm' (*BBC News*, 16 August 2024) <<https://www.bbc.com/news/articles/cdjwlr8n8xo>> accessed 20 September 2024

¹⁹⁴ Ibid

¹⁹⁵ Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1604

¹⁹⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Article 3.

agreed to submit to arbitration under the contract, it effectively waived its sovereign immunity in relation to the enforcement of the arbitral award.

A key question in this case is whether the contractual obligations undertaken by Nigeria's regional entity could be attributed to the Nigerian federal government. According to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)¹⁹⁷, a state can be held liable for the actions of its component units if those actions can be attributed to the state itself. This principle of attribution is crucial in determining whether Nigeria can be held accountable for the conduct of its regional entity.

In this case, the contractual obligations that gave rise to the dispute were entered into by a regional unit of Nigeria. Under international law, acts by regional entities that exceed their authority or contravene federal policy can still be attributed to the state if the entity was acting under the authority of the national government. The New York Convention and bilateral investment treaties (BITs) also support the attribution of such actions to the sovereign state, especially when the state has benefited from the underlying contract or allowed the regional entity to act on its behalf.¹⁹⁸

The legal arguments around sovereign immunity in this case rest heavily on the distinction between sovereign and commercial activities. International law, as well as various domestic statutes, recognizes that when a state engages in commercial activities, it can no longer claim absolute immunity from the jurisdiction of foreign courts. This principle is reflected in the U.K. State Immunity Act 1978¹⁹⁹ and was also central to the decisions in the U.S. and French courts, which ruled that Nigeria's defense of sovereign immunity could not extend to commercial transactions like those involving the contract with Zhongshang Fucheng.

Lord Denning's judgment in *Trendtex Trading Corporation v Central Bank of Nigeria*²⁰⁰ also plays a significant role in interpreting the limits of sovereign immunity in cases where a sovereign state engages in commercial transactions. The rationale is that when a government or its agencies engage in the marketplace, they should be treated like any other commercial actor and subjected to the same rules, including the enforcement of arbitral awards.²⁰¹

¹⁹⁷ Article 4

¹⁹⁸ Many Bilateral Investment Treaties (BITs) include "umbrella clauses which require the host state to honor its contractual obligations with foreign investors. These clauses can attribute the actions of regional entities to the central government, holding the state accountable for breaches that occur at the regional level. See Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights*, 39 *Denv. J. Int'l L. & Pol'y* 483 (2011).

¹⁹⁹ Section 3(1)

²⁰⁰ *Ibid*, n.3

²⁰¹ Comment by Lady Hazel Fox Honorary Fellow of Somerville U of O, 'Chapter 53 Lord Alfred T. Denning, Judgment, *Trendtex Trading Corporation v Central Bank of Nigeria*, 1977' (*Brill*, 4 November 2020)

Zhongshang Fucheng's success in enforcing the award across multiple jurisdictions showcases the global nature of arbitration under the New York Convention. The Convention allows for the recognition and enforcement of arbitral awards in any of its 170 contracting states, provided that the award complies with the Convention's standards. This mechanism enables creditors to pursue state assets in multiple jurisdictions, as was seen in the seizure of Nigerian properties in England and jets in France.

The English courts emphasized the right of the creditor to take enforcement actions across jurisdictions, underscoring the broader implications for states like Nigeria. The fact that Zhongshang Fucheng was able to successfully trace and seize Nigerian assets in different countries illustrates the power of the Convention and the importance of asset-tracing mechanisms in international arbitration.²⁰²

The rejection of Nigeria's immunity defense in multiple jurisdictions signals a growing trend in international law toward holding states accountable for their commercial activities, especially when they voluntarily enter into arbitration agreements. Going forward, Nigeria and other states must ensure stronger oversight of their regional entities and a clearer understanding of the international legal frameworks governing arbitration and enforcement.

1.4 Role of Bilateral Investment Treaties (Bits) and the New York Convention in International Arbitration and the Enforcement of Arbitral Awards

Undeniably, Bilateral Investment Treaties (BITs) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards play a pivotal role in facilitating international investment and arbitration.²⁰³ While BITs provide assurances against expropriation and grant investors access to international arbitration in the event of disputes, the Convention on the other hand aims to promote the enforcement of arbitral awards across borders, thereby enhancing the predictability and reliability of international arbitration as a dispute resolution mechanism. The synergy between the duo creates a robust framework that protects foreign investments and enforces related arbitration awards. Below is the list of their significance.

<<https://brill.com/display/book/edcoll/9789004386242/BP000053.xml?language=en>> accessed 20 September 2024

²⁰² Aderoju T, *Cross-border enforcement of judgments against States - Nigeria* <<https://www.ibanet.org/document?id=cross-border-enforcement-Nigeria>> accessed 21 September 2024

²⁰³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Available at <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf>> accessed September 21, 2024

- A. Protection Against Expropriation:** BITs typically include provisions that protect foreign investors from expropriation without compensation. This assurance encourages foreign investments by providing a safeguard against arbitrary state actions.
- B. Access to International Arbitration:** it is instrumental in granting foreign investors the right to access international arbitration for dispute resolution, thus ensuring that they can seek redress without being subjected to the host country's domestic courts, which may be biased. An illustrative example is the case of *Metalclad Corporation v. Mexico*²⁰⁴, where a Canadian company Metalclad sought to build a hazardous waste facility in Mexico. When the local government denied the necessary permits, Metalclad invoked the NAFTA (North American Free Trade Agreement) BIT provisions, resulting in a favorable arbitral award that recognized its right to compensation for the losses incurred.
- C. Streamlining Enforcement Procedures:** The Convention simplifies the enforcement of arbitral awards by minimizing procedural hurdles for recognition and enforcement, making international arbitration a preferred dispute resolution mechanism. A notable example is the **Chevron v. Ecuador**²⁰⁵ arbitration under the US-Ecuador BIT, which involves Chevron and Texaco Petroleum Company (TexPet) seeking relief from a US\$18 billion judgment awarded by Ecuadorian courts to local citizens for environmental damages caused by Chevron's affiliates. This case illustrates the complexities of arbitration within a multi-forum context, where significant financial stakes and various stakeholders are involved.²⁰⁶

1.5 Conclusion

This paper has illustrated the circumstances under which a sovereign state can be held liable for the contractual obligations of its component units under international law. It is therefore imperative for states, particularly Nigeria, to exercise great caution regarding the actions and inactions of its governmental entities or any individuals exercising governmental authority. These actions may be attributed to the state in the event of an arbitral claim under Bilateral Investment Treaties (BITs),

²⁰⁴ ICSID Case No. ARB(AF)/97/1

²⁰⁵ PCA Case No. 2009-23

²⁰⁶ 'Chevron and Texpet v. Ecuador (Ii): Investment Dispute Settlement Navigator: UNCTAD Investment Policy Hub' (Chevron and TexPet v. Ecuador (II) | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/341/chevron-and-texpet-v-ecuador-ii->> accessed 21 October 2024

potentially leading to liability for breaches of contract or other obligations. To mitigate this risk, Nigeria must ensure that all governmental entities strictly adhere to both national and international legal standards, while maintaining stringent oversight to prevent actions that could expose the country to international liability.

THE HASHTAGS AND HUMAN RIGHTS: HOW SOCIAL MEDIA MOVEMENTS ARE RESHAPING GLOBAL JUSTICE.

By Jakes Teddy Oloo²⁰⁷

Abstract

In this digital age, the timeless quest for human rights has found a new stage: social media. Platforms like Twitter, Instagram, and TikTok have become the modern-day town criers, where hashtags transform into rallying cries and viral posts spark global movements. This paper explores the vibrant intersection of social media and human rights advocacy, showing how ordinary people wield extraordinary power in the fight for justice. From the #MeToo movement's profound impact on gender equality to the climate crusade led by #FridaysForFuture, we delve into the stories that have reshaped our world, one post at a time.

Yet, this digital revolution is not without its shadows. We navigate the murky waters of misinformation, digital surveillance, and the debate over 'slacktivism'—the idea that online activism may lack real-world impact. Balancing these challenges with the undeniable power of social media, this paper offers a nuanced perspective on the future of human rights in the digital era. As Shakespeare might muse, "the entire world's a stage," and today, social media is the spotlight. Or as Rumi would whisper, "Raise your words, not voice. It is rain that grows flowers, not thunder." Join us as we unravel the threads of online activism, celebrating its triumphs and scrutinising its trials, all while envisioning a more just and connected world.

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1.0 Introduction

“Be the change you wish to see in the world,” Gandhi urged, a phrase that, in our digital age, finds its modern expression in the countless movements sparked by a simple hashtag. Social media has revolutionized the way we advocate for human rights, propelling local grievances onto the global stage in real time. From the rise of #BlackLivesMatter to the global momentum of #MeToo, social media platforms have given birth to movements that not only amplify marginalized voices but also challenge institutions and governments. But with this rise in digital activism come questions about the effectiveness, challenges, and ethics of these movements.

Therefore, In this paper, I seek to explore the transformative power of social media activism within the human rights framework, addressing its unique strengths and vulnerabilities, while reflecting on how these platforms are reshaping global justice. In the words of Voltaire, “It is dangerous to be right when the government is wrong,” but with social media, millions can unite to challenge that danger.

1.1 Background and Context

1.1.1 History of Social Media Activism

To appreciate the role of social media in human rights activism, we must first understand its origins. Early examples of digital activism can be traced back to the late 2000s, but it was during the Arab Spring (2011) that the power of platforms like Twitter and Facebook came into full focus. Citizens of Tunisia, Egypt, and Libya used these platforms to rally for political change, coordinate protests, and bypass state-controlled media. What distinguished the Arab Spring was its ability to transcend geographical and political barriers, uniting protesters across borders. It provided a glimpse into how social media could serve as a conduit for revolution and collective action on an unprecedented scale.

However, this was just the beginning. Movements such as #BlackLivesMatter (2013) and #MeToo (2017) further demonstrated the reach and potential of digital activism. Both movements brought attention to deeply entrenched issue, racial injustice, and gender-based violence, respectively, spreading awareness globally and pressuring institutions to respond²⁰⁸.

²⁰⁸ UN News, ‘UN Human Rights Chief Says Social Media Platforms Must Curb Harmful Content, Without Undermining Free Speech’ (UN News, 22 February 2021) <https://news.un.org/en/story/2021/02/1085272> accessed 23 October 2024.

1.1.2 Human Rights Framework

The bedrock of social media activism lies in the principle of freedom of expression, encapsulated in international human rights law. Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees the right to “seek, receive and impart information and ideas through any media and regardless of frontiers.” Similarly, the International Covenant on Civil and Political Rights (ICCPR) enshrines these rights in Article 19. Traditionally, these freedoms were exercised through traditional media, civil society organizations, and courts. Today, however, social media has democratized the process, allowing individuals to advocate for human rights in ways previously unimaginable.²⁰⁹

1.2 Impact of Social Media on Human Rights Advocacy

1.2.1 Amplification of Marginalized Voices

One of the most profound impacts of social media is its ability to amplify marginalized voices, offering a platform to those historically silenced by mainstream media or authoritarian regimes. In the past, advocacy was often limited by access to resources or platforms controlled by powerful institutions. Today, anyone with a smartphone and internet connection can become an advocate. This democratization of voice is particularly crucial for marginalized groups such as women, the LGBTQ+ community, and racial minorities.

MeToo: The #MeToo movement, which started in the United States, quickly went global, giving women across cultures a platform to share their experiences of sexual harassment and assault. What made #MeToo so powerful was the collective force behind it—millions of women, many of whom had never spoken out before, found strength in solidarity. The movement led to high-profile legal cases, including the conviction of Harvey Weinstein in 2020, marking a watershed moment in the fight against sexual violence²¹⁰.

BlackLivesMatter: Similarly, #BlackLivesMatter began as a protest against police brutality and systemic racism in the United States but soon gained international traction, sparking protests in

²⁰⁹ United Nations General Assembly, ‘Universal Declaration of Human Rights’ (10 December 1948) UN Doc A/RES/217(III); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

²¹⁰ *People v Weinstein*, No. 3514-2018 (NY Sup Ct 2020)

over 60 countries. The movement highlighted issues of racial inequality that transcended borders, from police violence in the U.S. to the plight of Indigenous peoples in Australia and Canada²¹¹.

1.2.2 Case Studies

Beyond the well-known movements, there are numerous other examples of how social media has shaped human rights advocacy. The #FridaysForFuture movement, spearheaded by Greta Thunberg, transformed what started as a solo protest into a global climate movement. Social media allowed Thunberg's message to reach millions, leading to climate strikes in over 150 countries and forcing governments to reconsider their environmental policies. Her protest, magnified through social platforms, has been instrumental in placing climate justice firmly on the global agenda.

Another case is the #BringBackOurGirls campaign in Nigeria, which drew international attention to the abduction of over 200 schoolgirls by Boko Haram. The campaign successfully pressured governments and international organizations to take action, highlighting how local issues can be propelled onto the global stage through digital activism²¹².

Social media's ability to transcend borders makes it a unique tool for human rights advocacy. While traditional human rights mechanisms often rely on state cooperation or international legal frameworks, social media allows grassroots movements to bypass these limitations. Local movements can quickly gain international attention, attracting solidarity from global audiences. The spread of #JusticeForGeorgeFloyd, for instance, shows how a local issue, police violence in Minneapolis, can spark protests and policy discussions worldwide.

1.3 Challenges of Social Media Activism

1.3.1 Misinformation

However, with great power comes great responsibility. One of the primary challenges of social media activism is the rampant spread of misinformation. Activists must contend with the fact that false narratives can undermine their efforts and confuse the public. During the COVID-19 pandemic, misinformation about the virus and vaccines spread like wildfire, causing widespread panic and

²¹¹ Black Lives Matter: Global Protests as George Floyd Laid to Rest' BBC News (9 June 2020)

²¹² A Brock, 'Social Media Activism in Africa: The Role of Digital Networks in Human Rights Advocacy' (2021) 32 J Digital Rights 45

distrust in public health initiatives. Misinformation within human rights movements can similarly dilute the credibility of legitimate causes, leading to skepticism about the validity of online advocacy²¹³.

1.3.2 Digital Surveillance and Privacy

Another significant challenge is the risk of digital surveillance. While social media provides activists with a platform to speak out, it also exposes them to state surveillance, particularly in authoritarian regimes. Governments have increasingly used digital tools to monitor activists, track their movements, and stifle dissent. In China, human rights lawyer Pu Zhiqiang was imprisoned for his social media posts criticizing the government. This raises concerns about the safety and privacy of activists, especially those living under repressive governments²¹⁴.

1.3.3 Slacktivism: Real Impact or Illusion?

A further challenge is the phenomenon of “slacktivism,” where individuals engage in superficial forms of activism, liking, sharing, or retweeting posts, without taking any meaningful offline action. Critics argue that social media can create the illusion of engagement, with users feeling that they have contributed to a cause simply by using a hashtag. However, proponents of digital activism argue that online engagement can build momentum and inspire real-world action, as evidenced by movements like #MeToo and #FridaysForFuture.

1.4. Balancing the Pros and Cons

1.4.1 Positive Outcomes

Despite these challenges, social media’s ability to generate awareness and mobilize support for human rights causes cannot be overstated. Online activism has resulted in tangible outcomes, from legislative changes to corporate accountability. For instance, the #LoveWins campaign played a crucial role in shifting public opinion on same-sex marriage in the U.S., culminating in the Supreme Court’s landmark ruling in *Obergefell v Hodges* (2015). Similarly, the #EndSARS movement in Nigeria pressured the government to disband a notorious police unit responsible for human rights abuses.²¹⁵

²¹³ J Harris, ‘The Impact of Social Media Misinformation on Human Rights Advocacy’ (2020) 47 J Global Communications 210.

²¹⁴ Pu Zhiqiang v China, UN Working Group on Arbitrary Detention 2016, UN Doc A/HRC/WGAD/2016/9

²¹⁵ *Obergefell v Hodges*, 576 US 644 (2015)

1.4.2 Negative Outcomes

However, the drawbacks of social media activism are equally significant. Performative activism, where brands or individuals engage in cause-based marketing without genuine commitment, has diluted the authenticity of some movements. Furthermore, the relentless pace of social media heightens the risk of burnout among activists, where issues are often reduced to sound bites, leaving little room for nuanced discussion.

1.5 The Future of Social Media and Human Rights

1.5.1 Technological Advancements

Looking ahead, advancements in technology will likely continue to reshape the landscape of human rights advocacy. Emerging technologies such as artificial intelligence (AI) and blockchain hold promise for improving transparency and accountability. AI could be used to detect human rights violations in real-time, while blockchain could provide a secure and transparent platform for documenting human rights abuses. These technologies, when integrated with social media platforms, could significantly enhance the effectiveness of digital activism by ensuring that information is both accurate and secure²¹⁶.

However, these advancements also bring challenges. As AI and machine learning become more prevalent, there is a risk that authoritarian regimes will use them for surveillance and censorship, targeting activists more efficiently than ever before. The need for stronger regulations to protect digital spaces and the privacy of users will be essential in safeguarding human rights advocacy in the future.

1.5.2 Policy Recommendations

To support the positive outcomes of social media activism while mitigating the risks, policymakers need to implement protective measures. Firstly, international human rights law must evolve to include robust digital rights frameworks, ensuring that activists are protected from surveillance and harassment. Secondly, platforms must be held accountable for the spread of misinformation, with stricter regulations on fact checking and the removal of harmful content. Lastly, greater emphasis

²¹⁶ A. Chowdhury, 'AI in Human Rights Advocacy: Opportunities and Risks' (2023) 28 J Artificial Intelligence Ethics 13.

should be placed on digital literacy programs, equipping users with the skills to discern accurate information from falsehoods²¹⁷.

Governments should also encourage collaboration between human rights organizations and tech companies to create safer online environments for activists. Transparency reports, where platforms disclose data on content removals and government requests, should become the norm, ensuring that social media remains a space for free expression rather than repression.

1.6 Conclusion

Social media has undoubtedly transformed the landscape of human rights advocacy, providing a powerful platform for marginalized voices, raising awareness of injustices, and connecting global audiences. Movements like #MeToo, #BlackLivesMatter, and #FridaysForFuture demonstrate the capacity of digital activism to spur tangible change, from legal reforms to shifts in public opinion.

Yet, as with any tool of revolution, social media presents both opportunities and challenges. While it amplifies voices and democratizes activism, it also exposes activists to digital surveillance, misinformation, and the potential for superficial engagement. In balancing these pros and cons, it is essential to remember the words of Voltaire: “Liberty is nothing but a word unless it is taken.” The fight for human rights in the digital age requires vigilance, innovation, and the continual refinement of both policy and technology.

As we look to the future, the role of social media in human rights advocacy will continue to evolve, shaped by new technologies and legal frameworks. By harnessing its potential responsibly, we can ensure that social media remains a force for justice, equality, and lasting change.

²¹⁷ M O'Connor, 'The Future of Social Media Policy and Human Rights' (2023) 35 J Human Rights Law 88.

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BEYOND FORCE: THE NEED TO INCORPORATE ABSENCE OF CONSENT AS AN ELEMENT OF RAPE, A REFLECTION ON ETHIOPIAN LAW

By Kidist Dessalegn Ejigu²¹⁸

Abstract

In recent years, the global perception of sexual violence has shifted with greater emphasis on consent as a defining element rather than physical force and resistance. However, the definition of rape in different legal systems including Ethiopia continue to remain focused on violence, coercion or the victim's incapacity to resist. Despite being comprehensive, the Ethiopian criminal code lacks explicit recognition of the absence of consent as a defining element of rape. In addition to compromising the autonomy and dignity of victims, such omission creates significant loopholes making it challenging to prosecute non-consensual sexual acts that do not entail overt intimidation or physical violence. This paper argues that a consent-based definition of rape is crucial to ensure that all forms of sexual violation, regardless of the presence of force are adequately addressed within the Ethiopian legal system. Such change would enable the legal system to better protect the rights of the victims, align itself with international human rights standards, and advance a society that is just and equitable.

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1.0 Introduction

Consent is defined by the Oxford English Dictionary as “voluntarily acquiesce in what another proposes or desires.”²¹⁹ Similarly, Black’s Law Dictionary defines consent as “voluntarily yielding the will to the proposition of another.”²²⁰ In the framework of criminal law, consent establishes a privilege. The need to abstain from an activity is lifted when someone gives their assent to another's actions which would otherwise be illegal. The traditional understanding of consent stipulated that the woman had to be coerced into resisting the sexual approach as much as possible, that her resistance had to hold throughout the meeting, and that she had to be overcome. These then evolved into a demand for earnest or reasonable resistance.²²¹

In 1994, the United Nations established the mandate of special rapporteur on violence against women, the first international mechanism that is dedicated solely on the issue. The following year, Special Rapporteur Radhika Coomaraswamy proposed to the Human Rights Commission that the definition of rape be based on the lack of consent rather than resistance, as is done in traditional definitions, so as to make all rape instances penalized by law. The report highlighted the issues with courts requiring proof, which was frequently expected to be evidence of force or physical resistance from the victim. After almost twenty years the 2011 Istanbul Convention defined rape as any intentional sexual act carried out without the free consent of the person involved. The convention established a new global norm by emphasizing that consent is the primary component that separates consensual sexual relations from rape. This ensured that rape cases may be successfully prosecuted by extending the legal scope to cover a greater variety of circumstances.

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This shift raised the question of what constitutes consent. In effort to answer the question different models were presented. The “No Model” which was introduced by Susan Estrich in 1987 stated that “consent should be defined so that no means no”. Estrich argues that in situations where the defendant's intent is obvious, women should not be required to risk harm in order to establish responsibility for rape—rather, verbal denial should be sufficient. The No Model is better than a conventional force-resistance strategy when considering sexual autonomy from a negative sexual autonomy perspective. Since women who verbally refuse sex are equally protected by the

²¹⁹ Oxford English Dictionary (3rd ed, 1989) 760.

²²⁰ Black’s Law Dictionary (6th ed, 1990) 805; (10th ed, 2014) 368

²²¹ Tsehay Wada, *Rethinking the Ethiopian Rape Law* (2010) 197.

²²² Lika Gegenava, ‘The Evolution of the Legal Definition of Rape’ *Columbia Undergraduate Law Review*, 22 August 2021 <<https://www.culawreview.org/journal/the-evolution-of-the-legal-definition-of-rape>>accessed 10 October 2024.

legislation, it is more inclusive of possible rape victims. Demanding that victims engage in more difficult physical resistance when verbal rejection will also demonstrate nonconsent and purpose seems unreasonable. However, The No Model is limited in scope, even though it protects negative sexual autonomy more effectively than a standard force-resistance regulation. It offers no defense to someone who is being taken advantage of while intoxicated, high on drugs, mentally ill, or mentally disabled.²²³ Scholars propose requiring affirmative consent before engaging in sexual activity as a preferable way to resolve such concerns.

From the perspective of sexual autonomy, a model based on affirmative consent which states explicit, informed, and voluntary agreement is required to participate in a sexual act is better than one based on verbal or physical resistance because it requires to wait for positive verbal or behavioral cues before engaging in sexual activity rather than allowing them to move forward without an indication that they are welcome or until they encounter resistance. There is a rebuttable presumption of nonconsent in a model requiring affirmative consent. As it is reasonable to wait to initiate sexual contact or penetration until the other person indicates that such behavior is acceptable.²²⁴

The affirmative consent model also safeguards victims that are intoxicated or under the influence of drugs. Passivity is typical after heavy alcohol consumption, and the requirement of affirmative consent means that the passive victim does not, in reality, express consent. According to McGregor, a person cannot give their legally recognized consent if they are unable to perform basic tasks like getting up or conversing. Additionally, the affirmative consent model offers protection to victims of rape through fraud.²²⁵

A model by McGregor proposes distinguishing between aggravated and non-aggravated rape. In cases of aggravated rape, there is an involvement of weapons, physical assault, or threats of physical abuse. Through the differentiation of offences, the model recognizes that sexual offences committed using violence are more serious than those committed through other ways, even though the latter are nonetheless considered serious enough to be subject to criminal penalties. In situations where the perpetrator violates the victim's negative sexual autonomy and the right to be free from violence, the state is justified in punishing aggravated rape more harshly. Furthermore, there is a greater likelihood of conviction for unaggravated rape because the jury or court has the option of

²²³ Sofia Gårdving, *Consent in Rape Law – A Comparison of Three Models* (Master's thesis, University of Lund 2010) 29–32.

²²⁴ Ibid, 36

²²⁵ Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Ashgate 2005) 146–147

not only acquitting the offender or classifying the offence in the same category as the most brutal rapes. While acknowledging that consent is a distinguishing characteristic of rape, the model offers a clever method of penalizing rape that involves the use of force.²²⁶

1.1 The Ethiopian Legal System

Article 620 of the Ethiopian Criminal Code defines rape to be an act of compelling a woman to engage in sexual intercourse through violence, grave intimidation, or by rendering her unconscious or incapable of resisting. The law recognizes force, intimidation, and incapacity to resist as core elements but does not directly address consent as a determining factor. According to Tsehai Wada, the code's requirements regarding violence, grave intimidation, etc., seem to indicate that there must be a very high degree of coercion and that the victim should resist the rapist's force as much as possible or earnestly, using physical force as necessary. Therefore, saying "no" alone could not be interpreted as a sign of resistance.²²⁷ Furthermore, Wada states that Article 620(1) requires the use of extrinsic force. This is because, to commit a rape, the perpetrator must first employ violence, severe intimidation, or render the victim incapable of resisting.²²⁸

The restricted scope of rape creates serious legal loopholes that make it more difficult to prosecute cases involving violations of women's rights. One major shortcoming is the failure to safeguard persons who are incapacitated due to intoxication or other reasons. The current view of gender-based violence holds that people who are heavily intoxicated or under the influence of drugs are not capable of giving their consent. By neglecting to safeguard such individuals, Article 620 may allow offenders who prey on the weak to continue doing so without worrying about facing prosecution. Furthermore, the code does not identify sexual violences that do not entail physical resistance; yet studies suggest that many victims may believe they are powerless to resist due to fear of retaliation or emotional pressure. Therefore, in the event that there is no tangible proof of force, perpetrators may avoid legal action, leaving survivors with no other options and ensuring the culture of silence. Relying too much on physical resistance could also cause irregularities in court cases. Judges may prioritize physical resistance over consent, which can result in arbitrary rulings and the possibility of dismissing cases that don't show signs of traditional force.

Moreover, focusing on resistance and intimidation undermines the widely held notion that rape is a crime against bodily autonomy. If a law does not expressly recognize that for a sexual relationship

²²⁶ Gårdving (n 6) 43

²²⁷ Wada (n 4) 216

²²⁸ Ibid, 209

to be legitimate, it must be predicated on-going, free, and voluntary consent, victims may be forced to physically resist, putting themselves in even greater danger. Furthermore, victims may feel pressed in situations to continue with a sexual relationship they initially consented to, particularly if the law supports the antiquated view that force and intimidation are required, and consent is not regarded.

In addition, there is a tendency in society to place the blame on the victims of sexual violence, particularly on those who were unable to resist because of fear, trauma, or confusion, as well as on those who were not conscious. This, combined with the law's restriction that requires physical resistance even in cases where there is no indication of consent, will serve to further foster a climate of fear and stigma. Because they fear being stigmatized or disbelieved, victims—especially those who don't fit the traditional picture—may be discouraged from reporting, which will complicate the prosecution of rape. The emphasis on intimidation and violence runs the risk of fostering an environment where a victim's worth is determined by how much they resist rather than by the validity of their consent.

Moreover, the lack of a consent-based definition of rape may give the impression that the state does not completely respect bodily autonomy. It is widely recognized that everyone should have the ability to make decisions regarding their bodies. Ethical difficulties may also arise when a state, through the machinery of judicial authorities, decides the level of force or intimidation that qualifies a rape.

1.2 Ethiopia's Sexual Offense Laws vis-a-vis International Standards on Consent

National criminal law heavily relies on human rights principles, and the international legal system serves to uphold those rights. Legislation that criminalizes violence like rape is considered to be the most preventive measure. However, a restricted definition of rape such as those that focus solely on force, resistance and incapacitation risk violating international human rights standard and allow little space for the development of further preventive measures. There is a growing consensus that rape is a violation of sexual autonomy, and that lack of consent should be a defining element of rape.²²⁹ The Committee on the Elimination of Discrimination Against Women (CEDAW)'s general recommendation and jurisprudence provide that sexual offences should be defined in accordance with the absence of freely given consent and take coercive conditions into consideration.

²²⁹ Nora Scheidegger, 'Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception' (2021) 22 *German Law Journal* 769–783 <<https://doi.org/10.1017/glj.2021.41>> accessed 20 October 2024.

Additionally, the general remarks from various organs and officials from the United Nations advocate for reform of restrictive rape laws. The United Nations Special Rapporteur on Violence Against Women highlights situations in which consent is either not possible or shouldn't be required, such as when drug or alcohol abuse renders the victim temporarily or permanently impaired.²³⁰ Similarly, the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa emphasizes the need of free and informed consent and establishes guidelines for how legislation should respect the concepts of consent and bodily autonomy.

The usage of consent-based definitions in many legal systems, including those in Canada, the United Kingdom, most of the Nordic countries, and parts of the United States, is another example of this shift in domestic law. These systems specify that, regardless of the use of force, rape occurs when there is a lack of explicit, voluntary, and informed consent.

Yakin Ertürk further asserts that the duty of governments to stop and punish violence against women has become customary international law, based on the practice and *opinio juris* derived from international human rights courts and committees.²³¹ While a universal definition of rape cannot be claimed to have been reached, certain trends indicate the development's specific element as growing *opinio juris*. It is acknowledged by both international criminal law and human rights law that a person's choice to engage in sexual relations is ultimately an expression of their autonomy and that this autonomy stems from the preservation of human dignity.²³²

The UN Special Rapporteur on the Elimination of Violence against Women, the International Criminal Court for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Council of Europe, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the European Court of Human Rights (ECtHR) have all held that the focus on non-consent rather than force or the threat of force when defining the crime of rape is the standard that most fully captures the sexual autonomy of the individual. A similar conclusion has thus been reached in different international legal systems and situations. Furthermore, a non-consent-based criterion is promoted by the Inter-American Commission's reports and recommendations under

²³⁰Equality Now, 'Legal Frameworks on Sexual Violence: Consent' (2021) <https://equalitynow.storage.googleapis.com/wp-content/uploads/2021/09/20062312/EN-Americas_rpt_ENG_-_Consent_fact_sheet_03.pdf> accessed 20 October 2024.

²³¹ Yakin Ertürk, 'Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, The Due Diligence Standard as a Tool for the Elimination of Violence against Women, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences' (20 January 2006) UN Doc E/CN.4/2006/61, cited in Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Brill 2011) 365.

²³² Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Brill 2011) 531.

CEDAW, as well as by the Council of Europe's 2009 Draft Convention on Preventing and Combating Violence Against Women and Domestic Violence. A definition, acknowledged as the most accurate by the ICTR and ICTY in their respective bodies of jurisprudence, holds that non-consent is the best criterion for rape.

1.3 Cases Illustrating the Need for Reform

1.3.1 M.C. v. Bulgaria (2003) – European Court of Human Rights (ECHR)

In 2003, M.C. v. Bulgaria challenged the Bulgarian legal definition of rape, arguing before the European Court of Human Rights (ECHR) that M.C. was not adequately protected by Bulgarian law. The 14-year-old M.C. claimed that two males had raped her, but the Bulgarian court had determined that there was no proof of force being employed and that the rape had not occurred. In her case to the ECHR, she argued that she was not protected by Bulgarian legislation, including the definition of rape in use at the time. Citing Articles 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR determined that Bulgaria had not complied with its duties as a member-state of the Convention. The ECHR established in this judgement that the state has an obligation to investigate and punish rape in accordance with international standards.²³³ The court ruled that the best way to safeguard sexual autonomy is through consent. The boundary that distinguishes between acceptable and inappropriate action is consent. As a result, the focus of all inquiries ought to be "any non-consensual sexual act" and "the issue of consent" ²³⁴

1.3.2 Veritido V. The Philippines (2010)- CEDAW committee

In 1996, Karen Tayag Vertido, an employee at the Davao City Chamber of Commerce and Industry in the Philippines, filed a rape claim against the former Chamber President. The defendant was found not guilty by the Davao City Regional Court in 2005. Vertido's testimony was scrutinized by the court with "extreme caution," and her credibility was questioned since "an accusation of rape can be made with facility." In particular, the court refused to apply precedent cases from the Filipino Supreme Court that establish that a victim's inability to flee does not preclude a rape from occurring citing Vertido's ample opportunities to do so.²³⁵

²³³ 'M.C. v. Bulgaria' (Legal Information Institute, Cornell Law School)
<https://www.law.cornell.edu/women-and-justice/resource/mc_v_bulgaria > accessed 23 October 2024.

²³⁴ Gårdving (n 6) 12

²³⁵ 'Karen Vertido v. The Philippines, Communication No. 18/2008, CEDAW Committee' (2010)
<<https://pcw.gov.ph/assets/files/2020/04/cedaw-op-karen-vertido-case.pdf> > accessed 14 October 2024.

Vertido argued in her complaint to the Committee on the Elimination of Discrimination Against Women that the court's actions subjected her to revictimization and violated articles 2(c), 2(f), and 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women, as well as CEDAW General Recommendation 19, which requires a State to modify or abolish existing laws, regulations, and practices that discriminate against women. The committee emphasized that there should never be a presumption in law or practice that a woman gives her consent when she has not physically resisted unwanted sexual conduct, holding that the State Court erred in relying on gender-based myths and stereotypes about rape and rape victims. The committee recommended the following actions: the state should pay Vertido the appropriate compensation; it should review the definition of rape under current law to make sure that the absence of consent is an essential component of the crime of rape; it should eliminate any requirement that sexual violence must be committed by force or violence; and it should mandate that judges, attorneys, and law enforcement officers receive the necessary training on rape and other sexual offences.²³⁶

1.3.3 Mukesh & Anr v. State for NCT of Delhi (2017) – India

In Delhi on December 16, 2012, a horrifying gang rape claimed the lives of a 23-year-old female paramedical student and her friend.²³⁷ The Criminal Amendment Act, 2013 was enacted in response to the horrific Delhi gang rape and murder case. The Indian government established the Justice Verma Committee to propose changes to sexual assault laws. The committee recommended defining consent as an unequivocal voluntary agreement when the woman communicates willingness to participate in the specific sexual act by words, gestures, or any other verbal or non-verbal communication.²³⁸

These aforementioned cases demonstrate that using obsolete frameworks can result in injustice and may have larger implications concerning Ethiopia's commitment to uphold women's rights in several international instruments.

1.4 CONCLUSION

²³⁶ 'Karen Tayag Vertido v. The Philippines' (Legal Information Institute, Cornell Law School) <https://www.law.cornell.edu/women-and-justice/resource/karen_tayag_vertido_v_the_philippines> accessed 14 October 2024.

²³⁷ Daniel Drache and Jennifer Velagic, 'A Report on Sexual Violence Journalism in Four Leading Indian English Language Publications Before and After the Delhi Bus Rape' (ICA Pre-Conference Workshop on South Asian Communication Scholarship, London, 16–17 June 2013) accessed 16 October 2024.

²³⁸ N Kulshreshtha, 'A Critical Analysis of the Standard of Consent in Rape Law in India' (2023) 13(4) *Oñati Socio-Legal Series* 1428 <<https://doi.org/10.35295/osls.iisl/0000-0000-0000-1398>>.

Ethiopia's current rules against rape, which mostly focus on coercion and resistance, leave room for legal interpretations, do not adequately protect victims, and fall short of international human rights standards. Therefore, to ensure justice and safety and to reinforce Ethiopia's commitment to ensuring that human rights are upheld, it is imperative that the law be changed into one that incorporates non-consent as a defining element, as demonstrated by the experiences of India, Canada, and the *M.C. v. Bulgaria* case.

TECHNOLOGY AND IMMIGRATION LAW: THE ROLE OF ARTIFICIAL INTELLIGENCE IN IMMIGRATION ENFORCEMENT

By Caleb Kipkoech²³⁹

Professional Profile

Caleb Kipkoech is a dedicated legal professional with a robust academic foundation in law. He holds a Bachelor of Laws (LL.B Honours) degree from Kenyatta University and has furthered his legal education with a Postgraduate Diploma in Law, currently awaiting admission to the Bar.

Throughout his academic journey, Caleb has demonstrated a profound understanding of legal principles and practices. His expertise spans legal research, drafting, and analysis, with a particular interest in Technology law. Caleb's education has equipped him with critical thinking and problem-solving skills for effective legal practice.

Caleb is committed to applying his knowledge and skills in a professional setting. He aims to contribute to the success of a dynamic legal team and leverage his academic achievements and practical training to advocate for justice and uphold the rule of law.

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Abstract

Migration is an intrinsic part of human history. This phenomenon is informed by different motivations, ranging from seeking work or economic opportunities to studies, family reunions, escaping conflicts, or large-scale human rights violations. While some migrate out of choice, others do so out of necessity. This phenomenon's prevalence has shifted because of modernisation. Technological advances have greatly influenced the migration of people from one Country to another. The 2030 Agenda for Sustainable Development recognises the positive contribution of migrants to sustainable development and inclusive growth. The central core principle of this Agenda is the "leave no one behind" principle, which includes migrants.

The data on migration by the Population Division of the United Nations Department for Economic and Social Affairs shows that the latest estimates for 2020 show that the number of international migrants worldwide, people residing in a country other than their Country of birth, reached 281 Million. What then is the role of Artificial intelligence in immigration enforcement? Different countries have adopted various forms of artificial intelligence, including facial recognition systems at the border crossing and algorithms designed to predict the potential outcomes of asylum claims. This has consequently reduced the backlog of cases in immigration courts and agencies. However, Criticisms exist regarding the operational efficiency of Artificial Intelligence tools and the risks they pose to immigrants' privacy rights and civil liberties. Human rights concerns about privacy infringements have been raised. Thus, the governments and sectors responsible should seek to establish a regulatory framework that harnesses the potential of Artificial Intelligence while mitigating its risks.

KEYWORDS: Migration, Artificial Intelligence, Privacy

1.0 Introduction

Modern solutions and inventions are intriguing and offer great satisfaction to people globally. Different aspects of technological advancements have been witnessed in the modern day. Life would be difficult without technological advancement at this age. John McCarthy is regarded as the father of artificial intelligence and was the first to introduce it in 1956. AI is regarded as a tool that provides a 'Humanlike' approach to problems.²⁴⁰ The rise of AI has seen it become a key tool in many new applications. These include software systems that respond to issues and offer appropriate solutions.²⁴¹

The rise in technological advancement has seen a significant transformation in migration. The discovery, development, and establishment of Artificial Intelligence (AI) have positively impacted several sectors, with no exception to immigration. Technology has simplified the legal process of migration. Examples include Artificial Intelligence Chat boxes that can answer and offer solutions to common immigration-related questions.²⁴² AI-powered systems have also been developed to analyse and accurately represent vast data.

Artificial Intelligence is one of the most significant tests, and it has consistently proven to simplify immigration in different countries. Rachel Brandenburger suggests that we must recognise the importance of fostering a climate that encourages innovation and that technological change has significantly changed lives.²⁴³ Among others, AI has simplified the legal process in immigration law. AI-powered systems can also extract and analyse large volumes of data for instance, in visa applications, these systems can extract important information such as personal details, employment history, and other requirements during visa reviews.

AI systems have also seen a reduction in errors and increased accuracy an advantage which has been observed in the analysis of complex immigration regulations. Systems such as Ross

²⁴⁰ L Moran, 'Professor John McCarthy, Father of Artificial Intelligence, Dies Aged 84' (Daily Mail, 22nd August 2024) <<http://www.dailymail.co.uk/news/article-2053617/Professor-John-McCarthyFather-artificial-intelligence-dies-aged-84.html>> accessed 22nd August 2024.

²⁴¹ D L Waltz, *Artificial Intelligence: Realising the Ultimate Promises of Computing* (NEC Research Institute and the Computing Research Association 1996) <<http://homes.cs.washington.edu/~lazowska/cra/ai.html>> accessed 19th August 2024.

²⁴² Douglas Kouffie, 'How AI is Changing the Immigration Law Landscape' <<http://nulawreview.org/forum-posts/how-ai-is-changing-the-immigration-law-landscape>> accessed 22nd August 2024.

²⁴³ Justin C. Sanchez et al, 'Innovations in Climate Resilience' (2024) 12 *Frontiers in Environmental Science* 1401203.

intelligence and Kira systems have been utilised to interpret rules, contracts, or other legal documents. They have the potential to identify pitfalls and highlight relevant information.

Despite the numerous advantages of AI, ethical concerns have been raised. There are potential drawbacks that we must be aware of. These drawbacks range from the possible bias of the AI systems to privacy concerns of migrants and citizens of the countries utilising these systems. Bias in AI systems can result if these systems are not trained adequately and correctly. This may lead to discrimination against migrants on diverse grounds, leading to unfair treatment. Further, human integration may be lost to a 'humanlike' as migrants may perceive to be dealing with an impersonal system rather than a human being.

1.1 AI in Border Security and Surveillance

As AI and technology increase, a potential risk is posed in immigration enforcement practices.²⁴⁴ The use of digital border control technologies in Immigration has increased, and AI efficiently handles vast immigration cases. Case in point: The United States has adopted Artificial Intelligence as its border management and control tool because it grapples with immigration challenges.²⁴⁵ Proponents have maintained that adopting these systems has seen a potential decrease in vetting and processing immigration cases.

The George W. Bush administration launched an early and unsuccessful automated surveillance program along the U.S.-Mexico border. The goal was to broaden the vision for a secure Border Initiative Network (SBInet), which would integrate personnel, technology, and infrastructure to secure the border. The project was cancelled in 2011 after spending an approximate \$1 billion.²⁴⁶

Canada, on the other hand, is the best illustration of the changes in its immigration system. The terrorist attacks in 2001 saw much investment and attention on the U.S.-Canada border within both countries' immigration systems. The 9/11 tragedy simmered a heated debate on immigration policies, with fingers pointing at Canada's policies which were seen as lax.²⁴⁷ The attacks were

²⁴⁴ Mengesha S, Dunn K, Luangrath N, 'The Rise of AI and Technology in Immigration Enforcement' (23rd March 2024) <<https://www.theregreview.org/2024/03/23/the-rise-of-ai-and-technology-in-immigration-enforcement/>> accessed 22nd August 2024.

²⁴⁵ Department of Homeland Security, 'FACT SHEET: DHS Deploys Pilot Programs, Expands Efforts to Leverage AI to Secure Nation's Critical Infrastructure' (26 July 2024) <<https://www.dhs.gov/news/2024/07/26/fact-sheet-dhs-deploys-pilot-programs-expands-efforts-leverage-ai-secure-nations>> accessed 22nd August 2024.

²⁴⁶ GlobalSecurity.org, 'SBInet - Implementation' (14 January 2011) <<https://www.globalsecurity.org/security/systems/sbinet-cancellation.htm>> accessed 22nd August 2024.

²⁴⁷ H Adelman, *Canadian Borders and Immigration Post-9/11* (International Migration Review 2002) 36(1) International Migration Review 15, 30.

further suspected to have resulted from porous borders. Concerns about border safety and security continue to receive numerous arguments from different personnel, political lobbyists, scholars and government officials.

As technology evolved, so did the efforts to secure the border; for instance, the U.S. Customs and Border Protection has deployed a system of autonomous surveillance towers. These include a combination of radar and cameras that can communicate with each other and track objects that move within their range. Such systems are helpful in stretches of remote land between ports of entry.

Notably, AI systems have facilitated authorities' more effective allocation of resources which aims at ensuring border safety. The U.S. has relied extensively on AI for border and immigration control. Resource allocation and budgeting are paramount to ensuring the effectiveness of personnel employing AI systems. Reports indicate that the U.S. Department of Homeland Security received over \$780 million for technology and surveillance at the border.

Border-focused AI technologies take multiple forms which include algorithms trained to evaluate migrants' or travellers' nuanced and imperceptible emotional expressions, facial recognition, biometric analysis of fingerprints, and scanner software. The scanner software can differentiate between humans and animals in remote border sections. These surveillance systems have been automated so that computers can determine preliminary possible threats and how these threats should be responded to.

AI promises to revolutionise this surveillance which makes these tools more powerful and capable of processing and interpreting more data. Several AI systems have been rolled out globally. Facial recognition technology has found its usage in airports and other border zones. Case in point: Dubai International Airport has begun piloting a smart tunnel to scan travellers' faces and irises.²⁴⁸ This allows pre-registered passengers to verify their identity faster without presenting their passports or other documents.

However, deploying these tools has been considered faster than the legislation and frameworks governing them and regulating their usage. This has caused a fear of dragnet. The major concerns ranges from privacy concerns , discrimination and bias, and lack of transparency. Civil liberties

²⁴⁸ Emirates, 'Emirates unveils world's first integrated "biometric path", raising the bar for airport customer experience' (29 October 2018) <<https://www.emirates.com/media-centre/emirates-unveils-worlds-first-integrated-biometric-path-raising-the-bar-for-airport-customer-experience> > accessed 22nd August 2024.

and human rights activists have argued that the use of facial recognition and drones could infringe on the human rights of migrants and citizen populations.²⁴⁹

Critics fear that the adoption and use of the technologies could result in endless surveillance and a vast dragnet. This is because as the technology is deployed to patrol borders, it can also be used in the Country's interior by the local authorities. Evidence shows that local authorities from the border are employing these AI technologies. These include facial recognition technology, cell phone tracking systems, license-plate cameras, drones and spy planes. Additionally, there have been reports of immigration authorities sharing information for non-immigration purposes. This raises ethical questions as to the Data safety of individuals.

Mayowa Oluwasanmi observes that automated immigration decisions can reinforce existing biases and incorrectly categorise people from a particular group as of higher risk or eligible for further vetting. He further notes that automated decisions can infringe on privacy rights because they require mass amounts of data accumulated through surveillance. This mainly targets marginalised communities. Such practices violate the Country's and International human rights Laws.²⁵⁰

Karolina La Fors and Fran Meissner question whether using AI in border enforcement can be ethical. They note the guidance-ethic approach to consider the feasibility of dialogue between stakeholders in technology development. This is to evaluate the ethics of border AI from the perspective of migrants. They suggest that policymakers develop alternative approaches in collaboration with migrants impacted by these AI tools.²⁵¹

1.2 Ethical and Legal implication of AI in Migration

As time and the world revolve, AI technology becomes more sophisticated. The legal landscape needs to follow the same trajectory. The current legal landscape offers little to no protection to developing technologies. It is worth noting that people constantly move from one place to another. This calls for countries to adopt the most efficient tools and systems to manage people's movement. As countries do this, various ethical and legal implications are felt on the same limb.

²⁴⁹ Human Rights Watch, 'Time to Ban Facial Recognition from Public Spaces and Borders' (29 September 2023) <<https://www.hrw.org/news/2023/09/29/time-ban-facial-recognition-public-spaces-and-borders>> accessed 23rd August 2024.

²⁵⁰ Mayowa Oluwasanmi, 'Algorithms and Border: The Human Rights Implications of Automated Decision Systems in Canadian Immigration' (2021) 22(1).

²⁵¹ K La Fors and F Meissner, 'Contesting Border Artificial Intelligence: Applying the Guidance-Ethics Approach as a Responsible Design Lens' (2022) 4 Data & Policy e36 doi:10.1017/dap.2022.28.28.

Additionally, AI is everywhere and its continuous development and adoption contributes rapidly to the economy.²⁵² The Royal Society report highlighted that more evidence is needed on how AI is used and how workers' tasks have significantly changed where this has been adopted. The report further highlighted the debate on how existing institutions, policies, and social responses are shaping the evolution of AI and its adoption.²⁵³

(a) Privacy and data protection

Immigration involves sharing vast amounts of personal data. The legitimate expectation is that a framework is necessary to ensure maximum personal information and data protection. Data protection enforcement authorities pose colossal privacy and data protection challenges.²⁵⁴ Privacy and data protection laws do not address all AI issues which include algorithm transparency, autonomy and consent of the data subject, surveillance and security, and the overall regulation lag.²⁵⁵

Understanding and resolving the scope of data protection law and principles in the rapidly changing AI landscape is not easy. It is paramount to avoid overburdening AI with unnecessary regulatory requirements. This also prevents uncertainty about whether or not regulatory requirements would apply.²⁵⁶ These concerns range from informed consent to infringement of individuals' data protection rights and surveillance. An individual's rights that might be infringed include the right to access personal data, the right to prevent automated processing of personal data, and the right to prevent processing it in a way that is likely to cause distress or damage.²⁵⁷

Individuals are granted minimal control and oversight over how their data is used to infer about them. This raises concerns about algorithm accountability. Immigration laws are silent on the right to reasonable inferences using AI. The laws only offer protection from discrimination on different grounds, such as gender, race, or religious affiliations. Most immigration laws are silent on discrimination, which AI systems may pose.²⁵⁸

²⁵² Margaret A Boden, *AI: Its Nature and Future* (Oxford University Press 2016).

²⁵³ Frontier Economics, *The Impact of Artificial Intelligence on Work: An Evidence Review Prepared for the Royal Society and the British Academy* (2018).

²⁵⁴ S Gardner, 'AI Poses Big Privacy and Data Protection Challenges' (Bloomberg Law News, 2016).

²⁵⁵ European Union Agency for Fundamental Rights, 'Getting the future right – Artificial intelligence and fundamental rights' (14 December 2020) <<https://fra.europa.eu/en/publication/2020/artificial-intelligence-and-fundamental-rights>> accessed 22nd August 2024.

²⁵⁶ A T T O R E S I Massimo, 'Opinion 5/2018-Preliminary Opinion on Privacy by Design' (2018).

²⁵⁷ Miles Brundage et al., *The Malicious Use of Artificial Intelligence: Forecasting, Prevention, and Mitigation* (arXiv preprint arXiv:1802.07228, 2018).

²⁵⁸ Sandra Wachter and Brent Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) 2019 *Colum. Bus. L. Rev.* 494.

The main question remains: How will we bridge these systems' accountability gaps? Watcher and Mittelstadt observe that privacy-invasive inferences that can damage one's reputation have very low verifiability regarding predictability or the ability to form an opinion.²⁵⁹ Additionally, the EDPS, *Artificial Intelligence, Robotics, Privacy and Data Protection Background document for the 38th International Conference of Data Protection and Privacy Commissioners 2016* noted the potential increase of privacy infringements due to the use and adoption of powerful and sophisticated surveillance technologies.

Most countries have adopted data protection laws that offer suitable safeguards and protection against data subject infringement. For instance, the General Data Protection Regulation (GDPR) highlights the rights of data subjects, which include transparency, access to their information, and the right to object to automated decision-making, which is the primary use of AI systems.

The right to be informed of how and where personal information will be used is essential. When using AI, developers should consider each data processing stage's ethical and regulatory restrictions.²⁶⁰ Brundage propose secure multi-party Computation, which refers to protocols that allow multiple parties to jointly compute functions while keeping each party's input to the function private.²⁶¹ Further, other measures that must be adopted are anonymisation, privacy impact assessment, privacy by design, and ethical principles.²⁶²

(b) Compensation for damage

AI and legal Liability are essential aspects that need to be addressed. AI systems that have not been trained well or suffer from malfunction may damage an individual. Liability issues of AI could be addressed under civil or criminal Liability. Kingston questions whether criminal Liability could ever apply and to whom it might apply in the criminal context.²⁶³ Under civil law, he questions whether an AI is a product subject to product design legislation or a service to which the tort of

²⁵⁹ Ibid.

²⁶⁰ Michael J Rigby, 'Ethical Dimensions of Using Artificial Intelligence in Health Care' (2019) 21 *AMA Journal of Ethics* 121, 124.

²⁶¹ Brundage, Miles, Shahar Avin, Jack Clark, Helen Toner, Peter Eckersley, Ben Garfinkel, Allan Dafoe et al. "The malicious use of artificial intelligence: Forecasting, prevention, and mitigation." *arXiv preprint arXiv:1802.07228* (2018).

²⁶² Michael Butterworth, 'The ICO and Artificial Intelligence: The Role of Fairness in the GDPR Framework' (2018) 34 *Computer Law & Security Review* 257, 268.

²⁶³ John K C Kingston, 'Artificial Intelligence and Legal Liability' in *Research and Development in Intelligent Systems XXXIII: Incorporating Applications and Innovations in Intelligent Systems XXIV* (Springer International Publishing 2016) 269, 279.

negligence applies. This poses a question of whether immigration agencies and authorities should be held liable or the companies offering AI systems.

Hallevy elucidates that liability issues could be addressed under consumer protection law. He suggests that the imposition of criminal Liability upon AI entities for committing intellectual property offences is feasible and proposes the sentencing of AI entities.²⁶⁴ Further, Rachum-Twaig proposes supplementary rules and liability models to provide a better legal structure and framework that fits AI-based robots and systems.²⁶⁵

However, in most civil law jurisdictions, strict liability is the avenue to handle most liability issues. Strict liability is a poor solution for modern problems because if one cannot foresee the solutions an AI may reach or its effects, one cannot claim strict liability.²⁶⁶ States should therefore reinforce the liability regimes to ensure the essential protection of victims of damage caused by these technologies and their applications.²⁶⁷

(c) Inadequate accountability for Liability

Accountability is paramount as it offers transparency to those who seek to migrate to other countries. Mechanisms should be implemented to ensure responsibility for deploying and using AI systems. There should also be mechanisms for risk management and mitigating these risks transparently that can be explained to and audited by third parties.²⁶⁸

Accountability in AI systems requires a guiding function and an explanation function. A guiding function operates by forming beliefs and making decisions, while a function of explanation operates by placing those decisions in a broader context by classifying them alongside moral values.²⁶⁹

²⁶⁴ Prof Hallevy, 'AI v. IP-Criminal Liability for Intellectual Property IP Offenses of Artificial Intelligence AI Entities' (17th November 2015).

²⁶⁵ Omri Rachum-Twaig, 'Whose Robot Is It Anyway?: Liability for Artificial-Intelligence-Based Robots' (2020) 2020 U. Ill. L. Rev. 1141.

²⁶⁶ Yavar Bathace, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2017) 31 Harv. JL & Tech. 889.

²⁶⁷ Ryan Abbott et al., Liability for Artificial Intelligence and Other Emerging Digital Technologies (Report from the Expert Group on Liability and New Technologies–New Technologies Formation European Union 2019).

²⁶⁸ Nathalie A Smuha, 'Trustworthy Artificial Intelligence in Education: Pitfalls and Pathways' (2020) SSRN 3742421.

²⁶⁹ V Dignum, 'The ART of AI-Accountability, Responsibility, Transparency' (Medium, March 2018).

The *Privacy International Article 19* reports that even when potential harm or damage is found, it is difficult to ensure accountability for violations of those responsible.²⁷⁰ How can these issues be addressed? Wachter, Mittelstadt, and Floridi suggest that legal accountability mechanisms for AI systems may take a right to explanation. This is done by explaining how it happened, when, and the steps that should be taken to address this issue.²⁷¹

1.3 What next with migration and Artificial Intelligence?

People continue to move from one Country to another in search of better conditions and a better life. This wave includes technological advancements, including deployment. AI has been deployed in communication and connectivity. There is widespread availability of the internet and mobile phones which has seen many people connected. AI issues will continue to be experienced unless a framework is implemented.

This intersection of migration and AI is an evolving landscape with significant and potential advancements for the future. The future is exceptional as the predictive analytics is now possible. Predicting migration patterns and potential crises will increase a country's preparedness to handle the expected challenges. Additionally, the automated AI-driven systems can streamline visa applications, asylum requests and other immigration process. This reduces administrative burdens, costs, and the waiting period.

Despite the advantages of AI-driven systems, this efficiency comes with a legal cost. There is a growing need to conform them ethically to prevent infringement and widespread violation of human rights. Biasness in these systems need to be addressed to prevent any form of discrimination in the future.

AI legal issues that need to be addressed include lack of algorithmic transparency, cybersecurity vulnerabilities, legal personhood, subjecthood, moral agency, intellectual property issues, privacy, and data protection issues. Additionally, accountability for harms caused by AI needs to be addressed.

Further, migration involves communication and the cross-border transfer of personal information from one Country to another. Despite this cross-border transfer, countries still lack data protection

²⁷⁰ Matt Bartlett, 'Solving the AI Accountability Gap' (Medium, 2019) <https://towardsdatascience.com/solving-the-ai-accountability-gap-by-matt-bartlett-cc1d9f9aaf3f> accessed 10th August 2024.

²⁷¹ Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Transparent, Explainable, and Accountable AI for Robotics' (2017) 2 *Science Robotics*: eaan6080.

laws to address and protect their citizens' data misuse. Additionally, nations employing AI systems in their Immigration should establish procedures to ensure safe data transfer.

1.4 CONCLUSION

As AI technologies develop, more study and monitoring will be necessary to address new and even more pressing legal concerns, vulnerabilities, and effects on human rights. Data-driven innovation and intelligent machines that supplement or replace human talents will propel technological advancements; migration included. AI is currently the main topic of discussion, but we anticipate that this will change when technologies converge, and breakthroughs occur. As a result, new and original problems for the law and our cultural values will arise, necessitating new talks.

Artificial intelligence (AI) technologies will have cross-over and multiplicative effects when they interact closely with large amounts of data, aggravating associated legal and human rights issues and individual impact. Suppose industry creates systems and applications without considering the possible effects of these technologies earlier on in the design and development process, whether on human rights, ethical principles, or societal values. In that case, these problems will only become worse.

Numerous topics under examination have broad societal and human rights ramifications. They affect data protection rights, equality, freedoms, human autonomy and self-determination, human dignity, safety, informed consent, integrity, justice and equity, non-discrimination, privacy, and self-determination.

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