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TO AID OR NOT TO AID, SHOULD IT BE A QUESTION? : THE GEOPOLITICAL, LEGAL & ETHICAL CONCERNS IN PLANETARY DEFENCE MISSIONS

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**Introduction:**

*“The first condition of survival of any civilization is that it should win its wars.”<sup>1</sup>*

The recent geopolitical upheaval in the midst of the Russia-Ukraine war has again led to questioning of whether ‘Long Peace’ can actually be sustained. The atrocities being committed by war-mongering States, and the blatant flouting of human rights laws has had serious affects in creating a rules-based international order. This has also led to questioning whether States would be willing to co-ordinate their activities in fighting against dangers that shall impact us all and traverse geographical borders, such as climate change, or a potential NEO impact.

**What factors are essential to mitigate the impact of NEO?:** It has been widely accepted that to effectively mitigate the impact of NEOs, factors such as timely identification, discovering, monitoring, physically characterising, mitigation campaigns, advance planning, impact assessment of an asteroid damage, warnings and sharing of information, all play a huge role. Moreover, most scholars and researchers are of the view that all of these activities require mutual coordination amongst all the States, as a NEO may possibly impact anywhere on Earth.<sup>2</sup> Though mutual co-ordination activities may be undertaken as per the will of the States, due to certain geopolitical differences, conflicts or war-like situations, States may refuse to assist other States or deliberately fail to warn other States of a potential NEO threat.

**Legal Obligation of States in International Law, to Warn and Assist:** Therefore, firstly, it is crucial to determine if States are ‘legally’ even obliged under international law to assist other States in impact mitigation, or to warn them of any potential NEO threat. For analysing the same, the following questions need to be addressed:

1. Can the defence of veil of sovereignty be pierced in "extreme" natural threats - where human lives are at stake?
2. Do States have a legal obligation to warn of potential NEO threats?
3. Can States be held criminally responsible in international law for failure of duty to warn or refusal to assist States in need?

*Firstly*, it has been recognised by various scholars that the veil of sovereignty of a State can be pierced through Humanitarian Considerations, Right to Life, Duty to Co-operate, under principles of International Disaster Laws, International Environmental Laws, and under a State's Responsibility to Protect.<sup>3</sup> Most of these factors traverse geographical boundaries. Interestingly, some scholars have argued that a State may be ‘Responsible to Protect’ even citizens of other States, especially if the latter State itself is engulfed in wars, terrorism, or is itself engaged in gross human rights violations of its citizens.<sup>4</sup>

*Secondly*, regarding the question whether States have any legal obligation to warn other States of potential NEO threats, the cases of U.K. v. Albania - the Corfu Channel Case (1949),<sup>5</sup> and Tsunami Victims Group v. Accor N. Am. Inc. - the Indian Ocean Tsunami Case (2005),<sup>6</sup> may be relied upon. In the *Corfu Channel case*, the ICJ held that Albania had a duty to warn other States about presence of certain mines in its territorial waters. Some scholars have interpreted this decision to mean that if a State becomes aware of any impending threat, *anywhere*, it has a duty to warn other States, especially when human lives may be at stake. Next, in the *Indian Ocean Tsunami Case*, a class action suit was brought against the Pacific Tsunami Warning Center, the U.S. National Oceanic and Atmospheric Administration (NOAA), the Accor Group (Accor), a French hotel chain, and the Kingdom of Thailand for their failure to establish or properly use warning systems for natural disasters. Though the case was dismissed, in the aftermath of the case, States voluntarily assumed their responsibility of setting up the Indian Ocean Tsunami Warning and Mitigation System in 2007. Additionally, the Association

of Southeast Asian Nations (comprising of 10 members) also opened a center in 2011 to monitor all disasters across the region and coordinate humanitarian responses. Moreover, through financial support from Germany, Indonesia has now one of the most advanced warning systems in the region.<sup>7</sup>

Lastly, States may even be held criminally responsible in international law for failure of duty to warn or refusal to assist States in need, via the principle of 'commission by omission'. For instance, in some decisions rendered by the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), it was observed that, "*Committing also covers situations where the accused engenders a culpable omission in violation of a rule of criminal law.*" In some of these decisions, it was also noted that such violations may even fall under the category of 'crimes against humanity', "*if the State was aware of the fact that its act or omission will more likely than not result in the commission of a crime in the Statute.*"<sup>8</sup>

Some implicit confirmation was also received in certain ICC decisions regarding the possibility of carrying out criminal conduct through an omission. For instance, in the case of *Prosecutor v Lubanga Dyilo*, it was observed that, "*351. The cumulative reference to 'intent' and 'knowledge' requires the existence of a volitional element on the part of the suspect. This volitional element encompasses, first and foremost, those situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime (also known as dolus directus of the first degree).*"<sup>9</sup>

Similarly, in the case of *Prosecutor v Katanga and Ngudjolo Chui*, it was observed that, "*287. Pursuant to article 8(2)(a)(i) of the Statute, the war crime of wilful killing occurs when it is committed by someone who, by action or omission, causes the death of one or more persons... 310. This crime requires, first and foremost, the destruction, by action or omission, of property belonging to an "enemy" or "hostile" party to the conflict... 357. Article 8(2)(a)(ii)-2 of the Elements of Crimes establishes as a war crime a conduct which is committed by one who causes - by action or omission - severe physical or mental pain or suffering of one or more persons... 369. The types of actions or omissions which could constitute a crime under article 8(2)(b)(xxi) were left undefined. As a result, the core element of this war crime is the humiliation, degradation, or violation of the person's dignity.*"<sup>10</sup>

Since, however, not a lot of judgments have been rendered by ICC regarding the same, a lot of

jurisprudence is not available on this issue. Still, theoretically, a case for criminal offence may also be made out through the principle of commission by omission, for crimes against humanity, war crimes, and even genocide.

However, *even though* legal obligation of States to assist and warn may be found in international law, non-alignment of geopolitical considerations shall always hinder implementation and enforcement of such legal liability, especially during times of war or conflict.

***Illusion of a Rules-Based Global Order:*** In 2016, an international arbitration tribunal set up by the Permanent Court of Arbitration (PCA) unanimously held that China's territorial claims in the South China Sea were void of any legitimacy under international law. However, China disregarded the ruling, and labeled it as being "*farce*".<sup>11</sup> In contrast, a PCA-ruling pertaining to awarding nearly 80% of disputed territory in the Bay of Bengal in favour of Bangladesh and against India, was readily accepted by India, even though the decision was not unanimous.<sup>12</sup> An inference may be drawn from these examples that for large and influential countries, respecting a rules-based order is often a matter of choice.

#### ***What has the Russia-Ukraine conflict taught us?:***

Though Russia signed the Rome Statute (the Treaty that established the International Criminal Court) in the year 2000, it never ratified the same. Therefore, it never brought itself under the jurisdiction of ICC. In 2016, however, it formally withdrew its signature from the Treaty. It was done a day after ICC published a report classifying the Russian annexation of Crimea as an occupation.<sup>13</sup> Though withdrawal of the signature was symbolic, it made Russia's stance clear on its non-acceptance of ICC's jurisdiction.

Then in 2022, Russia vetoed Security Council's resolution condemning 'attempted' annexation of Ukraine regions.<sup>14</sup> It is, therefore, also worthwhile to consider whether legal obligations in international law can actually be enforced against any States having a permanent seat on the Security Council, especially where non-aligning geopolitical interests are involved.

Thereafter, in March 2023, ICC issued arrest warrants against Russian President Vladimir Putin and Russia's commissioner for children's rights, for unlawful deportation of children and unlawful transfer of people from the territory of Ukraine to the Russian Federation. However, in the following statements made by the Russian Ministry of Foreign Affairs, Russia's stance on the matter was made clear - "*The decisions of the International Criminal Court have no meaning for our country, including from a legal point of view... Russia is not a party to the Rome Statute of the International*

*Criminal Court and bears no obligations under it.”* An Ex-Russian President went further ahead and proceeded to make a missile threat against the ICC.<sup>15</sup>

**Exemplary Examples of Mutual Coordination:** There are some great examples which show how States may be willing to coordinate their activities, especially when mutual benefits are involved:

1. *The International Telecommunication Union:* Currently, ITU has 193 Member States. The reason as to why it has reached almost a global consensus, is because States are well aware of the mutual benefits that are involved in coordinating their actions via such an organisation. They know that they need ITU (inter alia) for ensuring interference-free use of Radio Frequencies, and for reporting in case of any harmful interference.<sup>16</sup>
2. *The Chicago Convention (1944) and the International Civil Aviation Organisation:* The entire international civil aviation is being run on co-ordinated efforts of 193 Member States. In fact, infractions by Member States are rare events. It is due to the fact that States realise that without laying out general principles of aviation and Rules of the Air, the entire civil aviation industry would crumble.<sup>17</sup>
3. *The Montreal Protocol on Substances that Deplete the Ozone Layer (1987):* The Montreal Protocol is hailed as the most successful treaty in UN history for achieving universal ratification (198 parties) and meeting its targets ahead of schedule. In 2023, it was reported that the ozone layer is on track to recover within four decades due to the successful implementation of the Protocol.<sup>18</sup>

**Suggestions and Conclusions:** Though geopolitical differences cannot be undermined, especially during times of conflict and war, it can be seen that States are often willing to co-ordinate *despite such differences*, if mutual benefits are involved. All States should be made aware of the possible ripple effects that a large NEO impact may have on all nations alike. Therefore, it is essential that all States are made aware of the mutual benefits that may be involved in laying out advance coordinated mitigation plans, and setting up warning network systems. A possible arrangement can be made under the confines of the current voluntary arrangements, like IAWN and SMPAG, which can garner support for provision of mandatory sharing of information and mitigation efforts. It may also be brought into practice via a Treaty or Multilateral Convention or MoUs,

which may, however, take longer to draft and put to action.

To conclude, there is a need to deliberate whether we all would be willing to join hands to fight against a threat to humanity, regardless of all geopolitical differences on Earth. It is essential we realise soon enough that all of us need to come together to fight our biggest fights against such natural disasters, which is the biggest war against the survival of our beloved species.

#### References:

1. Elmer Davis, *But We Were Born Free* (Indianapolis, Indiana: The Bobb-Merrill Company Inc., 1952), p. 220.
2. Mohamad Y. Mattar, State Responsibilities in Combating Trafficking in Persons in Central Asia, 27 LOY. L.A. INT'L & COMP. L. REV. 145, 212–13 (2005); Walling, Carrie Booth. “Human Rights Norms, State Sovereignty, and Humanitarian Intervention.” *Human Rights Quarterly* 37, no. 2 (2015): 383–413. See also INT'L COMMISSION ON INTERVENTION & STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT 7, ¶ 1.33 (Int'l Dev. Res. Centre) (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> [hereinafter THE RESPONSIBILITY TO PROTECT].<http://www.jstor.org/stable/24518323>
3. Michael L. Burton, Note, Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention, 85 GEO. L. J. 417, 435–36 (1996) (noting that “a [S]tate is endowed with a defeasible right of sovereignty, contingent upon some minimum standard of treatment of its subjects. Should [S]tate action fall below this threshold—for example, by flagrantly violating the human rights of those within its borders—the [S]tate forfeits its sovereignty entirely and thus becomes subject to external intervention.”)
4. Elizabeth E. Ruddick, The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced, 77 B.U. L. REV. 429, 462 (1997) (quoting FRANCIS M. DENG, PROTECTING THE DISPOSSESSED 135 (1993)); see also Tyra R. Saechao, Natural Disasters and the Responsibility to Protect: From Chaos to Clarity, 32 Brook. J. Int'l L. (2007), available at: <https://brooklynworks.brooklaw.edu/bjil/vol32/iss2/9>.
5. *Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), 15 December 1949, available at:

- <https://www.refworld.org/cases,ICJ,402398c84.html>.
6. Tsunami Victims Group v. Accor N. Am. Inc., No. 05-CV-2599 (S.D.N.Y. filed March 4, 2005)
  7. “Tsunami 10 years later: Is the world better prepared for disaster? - CBS News”, online: <<https://www.cbsnews.com/news/tsunami-10-years-later-is-the-world-better-prepared-for-disaster/>>.
  8. “A Word on Criminal Omission and its Prominence in International Criminal Law”, (26 July 2022), online: *Opinio Juris* <<https://opiniojuris.org/2022/07/26/a-word-on-criminal-omission-and-its-prominence-in-international-criminal-law/>>.
  9. *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, available at: <https://www.refworld.org/cases,ICC,4f69a2db2.html>.
  10. *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, International Criminal Court (ICC), 25 September 2009, available at: <https://www.refworld.org/cases,ICC,4ac9dd592.html>.
  11. “Beijing rejects tribunal’s ruling in South China Sea case | South China Sea | The Guardian”, online: <<https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>>.
  12. Ankit Panda, “International Court Rules in Favor of Bangladesh on Maritime Dispute With India”, online: <<https://thediplomat.com/2014/07/international-court-rules-in-favor-of-bangladesh-on-maritime-dispute-with-india/>>.
  13. “Russia withdraws signature from international criminal court statute | Russia | The Guardian”, online: <<https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute>>.
  14. “Russia vetoes Security Council resolution condemning attempted annexation of Ukraine regions | UN News”, (30 September 2022), online: <<https://news.un.org/en/story/2022/09/1129102>>.
  15. “Dmitry Medvedev makes missile threat against The Hague”, online: <<https://nypost.com/2023/03/21/ex-russian-president-makes-missile-threat-against-the-hague/>>.
  16. “Radio Interference”, online: <<https://www.itu.int/en/mediacentre/backgrounders/Pages/radio-interference.aspx>>.
  17. “Dossier: Fit for purpose—The Chicago Convention | Airlines.”, online: <<https://airlines.iata.org/analysis/dossier-fit-for-purpose%E2%80%94the-chicago-convention>>.
  18. “Ozone layer recovery is on track, helping avoid global warming by 0.5°C”, (9 January 2023), online: *UN Environment* <<http://www.unep.org/news-and-stories/press-release/ozone-layer-recovery-track-helping-avoid-global-warming-05degc>>.