

Challenges to the International Legal Order - Israeli and European Perspectives Berlin, Germany, 23 and 24 May, 2018

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The annual meeting of the Israeli-European Policy Network (IEPN) in Berlin, Germany focused on the role that International Law plays in the relations between Europe and Israel as well as its impacts on the Israeli-Palestinian conflict.

Global politics in recent years has been marked by a revival in ethno-nationalist policies that has followed a wave of populist leaders to markedly change the landscape of international relations. Israel has been at the forefront of this shift, with an increase in nationalist sentiments accompanying a push away from modern democratic ideals and towards an approach that highlights the importance of the state of Israel as the home for the Jewish people. This attitude has leaked into many aspects of Israeli politics, including the manners in which the Israeli-Palestinian conflict is addressed, the status of Israel-EU relations, especially as they relate to the legal standing of Israeli settlements in the West Bank, and even the ways in which the fundamentals of the Israeli political system are understood and interpreted.

This shift has forced many European states to address an issue that lacks a universally satisfactory solution. Do they state their position as one of unequivocal support for the actions of Israel, a state that maintains strong ties to many countries in Europe, as well as a continued prominence in Europe's collective mindset, or do they impose restriction on a state whose military actions are almost universally portrayed in the media as that of aggression against

an underfunded, under organized, and relatively helpless adversary. This dilemma has prompted many to ask what the role of international law might be as it pertains to the actions of Israel, both domestically and internationally, with the hope that a more explicit understanding of what is and is not permissible can be gained. This would enable many European states to take clearer stances on Israel, stances that would be dictated not by public opinion and political compromise, but rather by the adherence to the law.

The IEPN met as this topic remained pressing to many in the international community. With the conflict between Israelis and Palestinians continuing, many policy makers hope that progress towards a lasting solution can be made, or at least a more explicitly stated understanding of the roles and limitations of the different parties. The objective of this meeting, therefore, was to share Israeli and European views on the ways in which international law applies to both the Israeli-Palestinian conflict and the relations between Israel and the EU.

Minutes and Conclusions from the Conference

The meeting focused on three main topics. The first topic was the role of international law in the Israeli-Palestinian conflict. Among other things, discussions were held about the Palestinian strategy of internationalization, Israel's perspective on the International Criminal Court (ICC) and on the UN, and the implications of an international court ruling on the status of Israeli settlements. The second topic was the status of human rights in Israel and the EU focusing mainly on the reduction of civic freedoms in Israel and its implications for Israel-EU relations.

Discussions were also held on the status of law in securing human rights, and the extent to which human rights are presented as a threat to interests of national security. The third main topic in the meeting was the role of international law in Israel-EU relations and included a history brief of the relation between Israel and Europe and discussion about the European policy of differentiation as it relates to Israeli settlement activities.

The European Perspective:

European presenters at the conference highlighted the recent shift within Israel away from a liberal democracy and towards a more majoritarian system. This cultural shift has been accompanied by an increase in ethno-nationalist rhetoric, with the question if Israel's core values should be rooted in modern democracy or traditional Jewish ideals being posed as an extension of this. Furthermore, the complex history of relations between Israel and Europe has resulted in a very divided opinion within Europe. Some policy makers continue to hold on to the contested belief that resolution to the Israeli-Palestinian conflict will solve all of the problems in the Middle East. However, there are others who no longer share this belief, and are less determined to find a solution at any cost. Additionally, Israel is frequently portrayed in European media as a brutal aggressor, which has significantly hurt the credibility of the State of Israel in the eyes of the European public.

Resulting from this portrayal, the European policy of differentiation, whereby, amongst others, products and services originating from Israeli settlements in the West Bank are excluded from any preferential trade agreements, has shown Europe's ability to enact policies against the aims of the Israeli government.

However, while the opinion of the public dictates a clear need for differentiation policies, in particular the Israeli government has frequently equated the policy of differentiation with anti-Semitism, which has hurt its reputation. Therefore, an emphasis needs to be placed on separating actions taken by the government of Israel from the symbolic nature of Israel as the homeland for all Jews of the world.

The foundation of the State of Israel is rooted in the values and makeup of a European democracy, and as such there are a number of similarities between the ideals and tenets of Israel and Europe. The inability of previous decision makers to explicitly define the manners in which international law applies to many actions taken by Israel has affected the viability of a clear stance on the actions by Europe. In order to continue a positive relationship in the years to come, efforts must be taken to clearly delineate the regulations that can be used to determine the legality of actions by all parties, therefore rooting policy not in public opinion, but in adherence to a defined set of laws.

The Israeli Perspective:

In recent years, despite maintaining economic and diplomatic relations with much of Europe, Israel has seen public opinion turn strongly against many of its actions. There is a sense within Israel that external obstacles are among the greatest faced by Israeli society, with many Israelis highlighting the disparity in reaction between military actions by Israel and by Palestinians, with Israel frequently depicted as an unstoppable force attacking a seemingly helpless adversary. This repeated criticism has often resulted in the revival of anti-Semitic sentiments, which are

becoming increasingly part of the conversation around Israel. Additionally, many Israelis consider security concerns to be a vital issue in contemporary society, and therefore often take action with this in mind. This mindset is integral to gaining an understanding of the rationale behind many Israeli decisions. As such, many Israelis feel that a greater examination of context would result in a reduction in the vilification of Israel that goes on in contemporary media.

Domestically, there is a large debate going on within Israel over whether or not the basis of government should be in liberal democracy or Jewish values. This debate has polarized politics within Israel, and has resulted in the marginalization of many minority groups as attempts are taken to create a more populist society. One area where this has manifested itself is in the regulation of NGOs, which is becoming increasingly strict. There is an argument to be made that European support for Israel should run largely through NGOs, as they are among the last truly democratic institutions in Israel.

Going forward, it is the view of many Israelis that a greater emphasis needs to be placed on exploring the context around many of the actions that are portrayed as ruthless Israeli aggression on the world stage. Furthermore, a reduction in anti-Semitic sentiment as a part of the conversation around Israel would likely produce a more level-headed discussion. Israel hopes to maintain and strengthen its ties with Europe, and hopes that increasing cooperation will be possible in the future. Below are three executive summaries of articles written by some of the distinguished participants of the meeting. The full articles can be found on the IEPN website.

Conclusion: Policy Recommendations

The discussion around the role of international law in the Israeli-Palestinian aspect should always focus on the gains from applying to it. When it comes to the EU's differentiation policy, if the EU chooses to use this tool in order to pressure Israel into a negotiation process with the Palestinians, it should put an extra emphasis on the difference between criticizing Israel's government policies and expressing antisemitic views, as many in Israel mix between the two. More specifically, if the EU would like to implement differentiation policy should make sure that it condemns any anti-Semitic views while publicly stating that they are using this move in order to achieve greater peace and stability in the region. In Israel on the other hand it is the view of many Israelis that a greater emphasis needs to be placed on exploring the context around many of the actions that are portrayed as ruthless Israeli aggression on the world stage.

EU Differentiation: Past, Present, and Future

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Executive Summary

Over the entire history of diplomatic relations between Israel and European nations, one topic has remained a point of contention for both sides, and is continually mentioned as both a hindrance to future progress and a problem that needs to be solved: differentiation. This issue stems from the results of the June 1967 War, where Israel conquered territory that is still seen by many in the international community as “occupied land”, and therefore carries all of the regulations that have been put in place for the treatment of occupied lands by international conventions. Yet, while the solution of who is the rightful owner of these lands is being solved, Israel has further complicated this problem by encouraging Israeli citizen to settle in the West Bank, where Israeli settlers now compromise a significant portion of the population. With the European Union having previously stated their support for the Palestinian right to self-determination, any acknowledgement of these settlements would lend them political validity, countering many of the stated aims of the EU. Therefore, as a way to continue diplomatic partnerships with Israel while holding true to their policy objectives of supporting the Palestinian campaign for a sovereign state, many European nations have formulated policy that has become known as “differentiation”. Broadly, differentiation refers to the process of enacting laws that separate any relationship with the government of Israel with those settlers living in occupied territory,

with the activities of these settlers being explicitly excluded from any agreement with Israel.

However, differentiation has proven to be a controversial topic for decades, and is harder to implement every day. This is because the society and economy of mainland Israel is becoming increasingly entrenched in the society and economy of the settlements, making it harder to create a distinction between the two. Despite this, there have been many different efforts working with the aim of differentiation in the past, some of which include full non-recognition of occupied territory, agreements banning the trade of good manufactured in the settlements, funding guidelines, business advisories, charity limitations, and pension restrictions, among others. However, a major step forward in this process took place in December 2016, when Resolution 2334 was passed by the UN Security Council, which advocated for all nations to “distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.” This showed that there was international support for the previously European-dominated practice of differentiation. Furthermore, this statement brought attention to other regions in the world where practices of differentiation were being implemented, such as the United States, Brazil, and China.

Yet, despite the increase in pressure that has been applied to the differentiation campaign in recent years, the efforts of this campaign have not been met with universal success. Many of the agreements in place regarding differentiation have not fully excluded the activities and actions within the settlements. Furthermore, some 2013 changes to the Israeli postal code system made it so that the settlements could

once again export goods with preferential tariffs to the EU. Even within the UN, it can be shown that among the more than 350 agreements between Israel and other member nations within the UN database, only a small minority have appropriate clauses mandating the exclusion of the territories from the agreement.

Even with the practical result of the support for differentiation being underwhelming, Israel has recently fought back staunchly against these measures, with campaigns to undermine the legitimacy of these actions and discourage policy makers in Europe to support measures of differentiation. For example, following a November 2015 guideline from the EU that mandated the labelling of products made in the settlements, Israel responded by calling the policy anti-Semitic and likening it to historical periods of Jewish suffering, in which the labelling of Jewish products was a step in the systematic removal of their rights. This campaign received support from the entire Israeli government, with Prime Minister Netanyahu speaking on its behalf, as well as Justice Minister Ayelet Shaked. As a result of this campaign, in tandem with pressure put on the EU by Israel’s ally, the United States, the policy of labelling was repealed. Efforts such as these have significantly aided in the Israeli cause, dividing opinion within Europe on this policy and further impeding the progression of an overarching policy of differentiation. Another method utilized by Israel to garner support for the repeal of differentiation measures is to leverage geo-political rifts within the EU, pitting nations against each other as a means to divide opinion, often leveraging a sense of guilt within certain countries about the treatment of Jews during World War II, which still weighs heavy in some countries, particularly in Eastern Europe.

The result of these efforts has been a complete stall in differentiation talks within the EU, even as the future of a two-state solution is threatened through actions by both Israel and the US. However, while differentiation talks regarding Israel have halted, there are other regions of the world in which differentiation has remained as active piece of policy, such as Northern Cyprus, where the EU maintains a status of non-recognition of the Turkish-backed Turkish Republic of Northern Cyprus, Crimea, where the Russian occupation of the territory is largely not acknowledged, and Western Sahara, whose occupation by Morocco has been continually disputed.

For the full-text article: <https://bit.ly/2LhtpGj>



The Role of International Law and International Institutions in the Israeli-Palestinian Conflict: An Israeli Perspective

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Executive Summary

The Israeli-Palestinian conflict is among the most nuanced geopolitical conflicts in the world, and as such has avoided a mutually satisfactory solution for decades. This is partially due to the fact that, unlike many conflicts of this nature, it is not only political differences that drive the violence, but also ideological and spiritual ones, resulting in two sides who have overwhelmingly opposed any gain by the opposing side, even if it marks a step closer to peace. Both Israelis and Palestinians have ideals and beliefs that guide their positions in this conflict, and it is the job of international law to reconcile these conflicting desires as a part of the creation of an amicable solution for both parties.

For Israelis, the basis of the conflict centers around the State of Israel, which is seen by most to mark the spiritual home of the Jewish people and provides a homeland for the entire world's population of Jews through its very existence. Additionally, the Israeli argument sees Jerusalem as a crucial factor in the rift, with its status as the holy city for the Jewish people meaning that many want to see it remain in Israeli hands under any potential peace deal. As for the status of the West Bank, Israeli opinion is much more divided. Some see the removal of Israel from the West Bank as an unacceptable course of action unless Israel is assured that this would result in the absolute end of

security threats and a return to peace. However, with the two previous instances of Israeli withdrawal from occupied areas resulting in an increase in attacks on Israelis, many feel that the return of the West Bank to Palestinian control is unlikely to result in elimination, or even a reduction, of violence in the conflict.

For Palestinians, the conflict has its roots in history and ideological differences, stemming from the belief that the creation of the state of Israel in 1948 was merely an extension of European colonialism, with their forced exodus from Israel an injustice that many Palestinians feel is still not adequately recognized today. Many Palestinians feel that they have a right to self-determination and are largely opposed to giving up any land to Israelis.

The legality of the conflict itself is still being debated, with one of the most contentious points being the validity for the Israeli occupation of the West Bank and Gaza Strip, which were acquired in the June 1967 War. In the international community, the West Bank is largely seen as occupied territory, and therefore is governed by the laws of occupation as set forth in the 1907 Hague Resolutions and the Fourth Geneva convention of 1949, which establish the responsibility of an occupying power to ensure certain services and provisions to occupied territories and their residents. However, since Israel does not accept that this territory is occupied, and rather considers it a part of Israel, they are placed in a tough position, whereby if they refer to these territories as occupied; they accept the political implications that come with that designation. Therefore, the official position of Israel has been that, while they do not accept the application of the laws of occupation in these territories, the Israeli government is nonetheless

committed to providing humanitarian services in the region. Yet, Israel has seemed to be very selective over whom, exactly, these laws apply to, with previous decisions that confine the scope of the Human Rights obligations of Israel to possibly exclude the West Bank, a strongly contested position.

Another legal issue that is at the heart of the conflict is the location of the border between the two groups, which has become increasingly hard to define in recent years that's to the increase in Israeli settlements in the West Bank. A resolution signed at the end of the June 1967 War stated that a continuing peace in the Middle East must include the removal of Israeli forces from the land acquired as a result of the war, and the acknowledgement of the right of all nations to peacefully exist within their established borders. This was used as the basis for the Oslo accords, where settlements were stated as something that should be dealt with as a part of a permanent peace treaty. However, this problem has been complicated by the Israeli practice of creating settlements in the West Bank, where Israeli citizens have moved and set up significant populations of Israeli citizens that are littered about the Palestinian population, making a border nearly impossible to draw. Furthermore, these settlements are seen by many in the international community as against the law, while the Israeli courts have refused to pass a verdict on their validity. As for the Gaza Strip, despite Israeli withdrawal from the region in 2005, there is still debate as to whether or not it can be viewed as Israeli-controlled territory, due to the extensive patrolling of the border by Israel, as well as Israel's control of the surrounding airspace, maritime area, and the fact that Israel provides many of the essential services to Gaza, such as power

and water. However, due to the mismanaging of resources by Hamas, Gaza now is on the brink of a Humanitarian crisis, which it will be up to Israel to prevent, whereby the challenge will be to find a way to assuage the fundamental deficiencies of the region without strengthening Hamas.

Another legal debate regarding the conflict is the use of force in the relations between the two parties. While Israel has strong legal backing for the claim that an armed conflict is still ongoing, many legal scholars will argue that, in the case of self-defense, the force used must be proportional to the threat. So, while this conflict has resulted in far more Palestinian casualties than Israeli, this is not the legal basis that determined proportionality. However, this disparity does have an effect in that it hurts Israel's claims of legitimacy on the international stage. Furthermore, the practice of undertaking military operations within civilian locations by Hamas and other terrorist organizations within the Gaza Strip has repeatedly called Israel's justification for action into question, with collateral damage to civilians being targeted as evidence of the seeming ruthlessness and lack of care for civilian life that is a hallmark of the world's media coverage of the IDF. While Israel's actions have, to date, been legally defensible, it doesn't change the image of destroyed civilian structures that have been able to capture headlines worldwide, an image that is unlikely to be repaired, as the IDF, like most militaries, does not provide much information regarding its actions, out of concern for national security. Also, the issue of how to address demonstrations on the border with the Gaza strip has been a target for national and international debate recently, with no clear answer appearing. So, while the IDF is certainly not infallible in

its actions, the overarching claims of blatant disregard to international law by the IDF appear to ignore the nuance of the situation in which these actions occur.

On the international stage, many organizations have attempted to lend a hand to the process of finding a resolution to this conflict. The United Nations has perpetually monitored the situation with a plethora of advisory councils, agendas, and agreements proposals and discussed regarding this conflict. However, once again, while so of these efforts have resulted in meaningful progress, many of them have overlooked the complexities of the dispute and have chosen to paint the actions of both parties with a wide brush.

Currently, there is a preliminary examination regarding the situation between Israel and Palestine being conducted in the International Criminal Court. This investigation will encompass actions by both parties in the West Bank and the Gaza Strip in light of recent developments to the situation. More recently, a report has been published in which violence towards civilians was cited as a possible infringement upon the laws set forth and enforced by the ICC, and could be further investigated to determine their scope and severity. Because of statements such as this, as well as the Palestinian bias present in much of the media around the world today, the Israeli public is overwhelmingly very skeptical of the majority of international forces, with the exception of the United States. Subsequently, most of the world is not viewed within Israel as objective arbiters in the event of a peace process, and will be met with extreme scrutiny should peace talks commence. However, if these talks are to be successful, it is of the utmost importance that the support of the general public be

won, both for Israelis and Palestinians. The solution lies within the two groups, and it is they who have the potential to ensure lasting peace in the region, not the international community.

For the full-text article: <https://bit.ly/2uVyFEQ>



Israel on its Way to a Majoritarian System? The Current Government's Fight against principles of Liberal Democracy, the "Constitutional Revolution" and the Supreme Court

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Executive Summary

The current Israeli government coalition, which has been in power since 2015, has been described as the most "right wing government" in Israeli history. Yet, while this seems like an instance of clear hyperbole, this notion is not entirely unfounded. The right-wing nature of this government can be clearly observed through their position on two of the key issues facing contemporary Israeli society: the Israeli-Palestinian conflict and the integration of Jewish ideals into a modern society. As for the former, this government has been shown to oppose the idea of a two-state solution, while for the latter there has been a clear embrace of what could be seen as traditional Jewish values, which have begun to supersede modern democratic principles.

Since it assumed power in 2015, this government has had an undoubtedly populist and Israeli-centric outlook on policy. This has been evidenced by the repeated creation of policy objective that are clearly aimed to define and marginalize groups that are seen as "other", and delegitimize the political viewpoints and ideologies represented therein. The result of this effort is that political disagreement has been increasingly equated with hostility towards the

state, placing deep suspicion on those that speak out against the regime. One example of the steps that have been taken to marginalize fringe groups within Israel include the 'NGO Bill', which mandates NGOs, which are often funded by states, governments and initiatives, to publicize themselves. This opens up many left-leaning NGOs to open criticism from right-wing nationalist groups, discrediting them in the public eye. Another example is the "Muezzin Bill", which aims to limit the volume of the Muslim call to prayer. These efforts, among many others, have created a clear divide within Israel, where those that are not aligned with the beliefs of the ruling coalition are marginalized and denied acceptance by the cultural institutions of Israel.

However, these efforts are not the only mechanism used by the ruling party to consolidate their power within Israel, as there have been clear efforts to alter the underlying political processes of Israel in a manner that departs from its modern democratic foundation and towards a majoritarian one. The end goal of this campaign is two-fold: to strengthen the nationalist legal basis of Israel and to elevate the Parliament and the expense of the Judiciary, which is currently seen as having too much power. The current system can trace its roots to the 1992 "Constitutional Revolution", in which the basic laws of "Human Dignity and Liberty" and "Freedom of Occupation" were established as cornerstones for the Israeli political system. Additionally, it was this restructuring of the political system that first granted the High Courts of Israel with the increased power that it possesses to this day. However, there is now much criticism of the Judicial system by the ruling coalition, who feel that a system based in humanitarian sensibilities infringes

on the ability of a government to enact the will of the people, with some feeling that the need to adhere to Jewish values trumps the need for a truly democratic government. Yet, among the methods taken by the government in this direction, two stand out as prime examples of the seismic shift that is being proposed in the Israeli government: the “Nation-State Law” and the “Override Clause”

The ‘Nation-State Law’ (Hok HaLeom) has been seen by many as one of the most dramatic shifts to have been proposed in recent memory and, if passed, will become a hallmark of the current coalition for decades to come. The bill proposes that the State of Israel, as was intended upon its founding, be defined as the nation for the Jewish people of the world, rather than the “state of all its citizens”. This would be practically implemented in that any laws passed in Israel would have to first be considered in the context of the Jewish foundation of the state, rather than the modern democratic nature that guides Israel today. Furthermore, there is shockingly no mention of any “principle of equality” in the bill whatsoever, opening the potential for a disparity in rights between different groups within Israel. The argument behind this is that the extent to which rights will be given to fringe groups within Israel is a matter to be decided by the courts, which raises a lot of questions regarding who will be on the court and the fairness of that idea. However, after years of debate, this bill is finally making progress. In May 2018, a significantly watered-down version of the bill passed its first reading, moving it along to the next level of discussions. The fact that this effort is being aggressively promoted by the ruling party highlights the effort to remove the democratic nature of Israeli society and replace it with a majoritarian foundation.

While the Nation-State Law is certainly a dramatic departure from the existing norm, the “Override Clause”, which has also been recently proposed, possibly has even more potential to fundamentally change Israeli politics. This bill, if passed, would make it possible for the Parliament to vote and override a decision by the Supreme Court that says that a proposed law is unconstitutional. In this way, there is the potential for laws to be passed that starkly oppose the stated aims of the constitution, and they would be unable to be subject to judicial review should they be back by a sufficient majority. The passing of this bill would therefore effectively mark the end of the system of checks and balances that holds all branches of the Israeli government accountable to each other, elevating the Knesset to be able to do essentially whatever it wanted, assuming it possessed a sufficient majority. This would therefore likely result in the passing of many political topics that were previously struck down by the courts, as Israeli coalition agreements mandate that the parties in the coalition vote with one another, enabling certain items on the agenda to be passed regardless of their constitutionality. However, it is unclear if this bill will pass in its current state. But, if it does not, it will certainly be on the agenda for right-wing parties for years to come.

This shift in Israeli politics is not a recent development, though, and is actually the result of many changes stretching back decades. It is this transformation within the political climate that has made measures such as these conceivable, and therefore provide context to the entire shift in ideology. One event that drove this change was the constitutional revolution of 1992, which was never

actually entirely democratically sanctioned, with the interpretation of the clause “Jewish and Democratic” by a single justice as pertaining to the human values of Judaism, rather than its religious basis, single-handedly setting the tone in Israeli politics for years, which has delegitimized recent development in the eyes of some from the moment these changes were implemented. Additionally, internal conflict has driven this shift to the right, with tensions with Palestinians and the seeming failure of democratic institutions to adequately address them prompting this shift to the right. This a change that has also been mirrored and encouraged by the international community, in which right-wing populism has become increasingly prevalent in countries all around the world. All of these factors have combined to produce an Israeli government that is hard at work to undo the democratic foundation laid down in 1992 as the basis for government.

As it relates to relations between the EU and Israel, this shift complicates many facets of the agreements between the two parties. Much of the historical cooperation between Israel and the EU was centered around an idea of a shared belief in democratic ideals, human rights, and equality. But, while the removal of power of the courts does make the government more democratic in the strictest sense, it is the departure from the egalitarian spirit of modern democracy that has the potential to create a rift between Israel and the EU. Furthermore, it would seem that the EU itself has been divided in recent years regarding its relationship with Israel, with certain EU member states ignoring an EU statement condemning the move of the US Embassy from Tel Aviv to Jerusalem, with some going as far as to attend the opening

ceremony. Subsequently, as relations between Israel and the EU progress, two steps need to be taken to ensure a productive relationship in the years to come. First, there needs to be a clear distinction between the factors driving the shift towards a more ethno-nationalist political climate and the very people driving this shift. While the factors have undeniable created general support for the assertion of Israel as a Jewish state, the discriminatory tactics utilized by those in the name of this goal should be assessed fairly and separately from the goals of the national as a whole. Secondly, in regard to the Israeli-Palestinian conflict, there must be a clear and defined position of the EU that is stated. This should promote a two-state solution, while still remaining sensitive to Israeli concerns. So, even if differentiation policies are to continue, they must not tarnish the legitimacy of Israel as a whole. If this is not done, the EU will lose much of the credibility and influence it had built up in recent years, and contribute to the feeling that many Israelis have of being constantly under attack from almost the entirety of the world.

For the full-text article: <https://bit.ly/2ucpLmx>





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