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Special Issue on International Law

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CONTENTS

International Law

RIGHTS OF PERSONS WITH DISABILITIES: CONTEMPORARY DEVELOPMENTS*

*Sh. Pranab Mukherjee***

1. At the outset, I congratulate the Vice-Chancellor and the Law Centre-II for initiating a discussion on the Rights of Persons with Disabilities. It gives me immense pleasure to inaugurate this National Seminar, which aims at spreading awareness about the rights of disabled persons in the society and to have a threadbare discussion on the National and international aspects of the topic.

2. Disability is a concept which is understood and interpreted by various social thinkers, jurists and social workers keeping in mind the inherent philosophy of the term in its actual sense. Though the term 'disability' carries with it the assumption of a deficiency whether physical, mental or sensory in respect of some people but there are ample examples of the persons with disability proving their mettle, inspiring by their intellectuality, positive attitudes and outlook towards life.

3. As the term disability carries with it the connotation of a lack or deficiency, it has been defined primarily in terms of medical deficit. However, it has to be acknowledged that the word disability is itself not a homogeneous category. It subsumes under it different kinds of bodily variations, physical impairments, sensory deficits and mental or learning inadequacies, which may be either congenital or acquired. Disability has been recognized as a human rights issue in the international arena, with the adoption of Convention on the Rights of Persons with Disabilities, 2007 by the United Nations.

4. Keeping in mind the different situation posed by the disabled persons, it is important that their rights need to be understood and studied from various perspectives including human rights and laws in India which will help mitigate the gap between the abled and the differently-abled persons in their attainment of persona and dignity in true sense of the term. Through this Seminar an endeavor should be made to understand various issues relating to the rights of persons with disabilities and the laws in existence in India.

5. The disability rights debate is not about the enjoyment of specific rights but about ensuring the equal effective enjoyment of all human rights, without discrimination, by people with disabilities. The primary responsibility for ensuring respect for the rights of persons with disabilities rests with the government. The Government of India has taken various steps to provide equal opportunities to persons with disabilities by enacting several Acts and implementing various policies and schemes for the empowerment of persons with disabilities.

6. Even though our Constitution guarantees equal rights to each individual of our country, and despite several enabling legislations for around 2.21% of our total population, spread across the country, the situation has been less than satisfactory. For them segregation, marginalization and discrimination are norms rather than exception. Faced with barriers put by stereotypical attitudes, they are generally viewed as objects of charity and welfare and often insensitivity from fellow citizens. To my mind, the answer to this lies in not only strict

*Speech of Shri Pranab Mukherjee at National Seminar on *Rights of Persons with Disabilities: Contemporary Developments*organised by Law Centre-II, University of Delhi on February 12, 2018.

**Former President of India.

enforcement of existing laws but simultaneous exposure and education of the people at large towards disability and how to deal with it.

7. As far legislations are concerned, in 1992, India became a signatory to the Proclamation on Full Participation and Equality of People with Disabilities in the Asia Pacific Region. The Proclamation brought an obligation upon the countries to enact legislation as per its solemn affirmations. In line with that commitment, Indian Parliament enacted "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act", 1995 which came into operation with effect from January 1, 1996. It was subsequently amended in 2010.

8. After India signed and ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2007, Parliament adopted a radically transformative piece of legislation, titled the "Rights of Persons with Disabilities Act, 2016" that addresses the concerns of arguably the most marginalized section of Indian society. This Act repeals the earlier law on disability i.e. Persons with Disabilities (Equal Opportunities, Protection of Rights, and Full Participations) Act, 1995 and institutionalizes a much-awaited robust rights regime in line with the principles of UNCRPD. It is worth mentioning here that the law emerged out of exemplary pre drafting consultations with various stake holders, most of all the target audience themselves. Between March 2014 when it was first introduced and till its passage in 2016, it underwent thorough Parliamentary scrutiny as well.

9. The Rights of Persons with Disabilities Act, 2016 explicitly envisages civil and political rights of persons with disabilities in addition to envisaging the economic, social, and cultural rights of such persons. It comprises a whole range of provisions including provisions in respect of equality and non-discrimination, women and children with disabilities, community life, protection from cruelty and inhuman treatment, protection from abuse, violence and exploitation, home and family, reproductive rights, accessibility in voting, access to justice, legal capacity, and provision for guardianship where and to the extent needed etc. It emphasizes on full and effective participation and inclusion in society and acceptance of disabilities as part of human diversity. It prohibits discrimination against persons with disabilities, unless it can be shown that such act is a proportionate means of achieving a legitimate aim. It reflects a paradigm shift in thinking about disability from a social welfare concern to a human rights issue. Thus, it is a milestone in struggle for equal opportunities for disabled people in India.

10. This seminar, I am informed, is intended to provide platform for disability researchers and activists to share their learning and perspectives oncontemporary developments and issues with respect to rights of disability in India. The intention is to not only to explore the process of accessing justice through litigations and procedural practices but also to explore matters concerning how law indirectly and often directly impacts the lives of people with disabilities in India. The platform also intends to discuss both national and international laws that concern people with disabilities. The Rights of Persons with Disabilities Act, 2016 has come in to force on 27th December, 2016 and the rules have also been notified by the Government. We feel that it is time to open up the discussion to include perspectives and experiences of people with disabilities in to issues concerning their everyday lives. With these words, I wish all the best to the organizers of the Seminar and students in all their future endeavors.

Thank You
Jai Hind

ROLE OF AALCO IN THE DEVELOPMENT OF INTERNATIONAL LAW: RECENT CONTRIBUTIONS*

*Kennedy Gastorn***

I. INTRODUCTION

In presenting the contributions of AALCO to the development of International Law, I have structured my presentation along the following major points:

a. Sources of International Law and the role of international organizations in the development of international law
b. The origin of Asian-African cooperation and the establishment of AALCO
c. The mandates and the functions of AALCO
d. Key recent contributions of AALCO to the progressive development of international law
e. Finally, before wrapping up, I will talk about internship opportunities available to law students at the Headquarters of AALCO.

II. SOURCESOF INTERNATIONAL LAWAND THEROLE OFINTERNATIONAL ORGANIZATIONS IN THE DEVELOPMENT OF INTERNATIONAL LAW

The sources of international law, have been codified in Article 38(1) of the Statue of International Court of Justice. International treaties and custom are termed as primary law making sources. So, Treaties are clearly a source of law and obligation for the parties to the treaty as well as the "international custom", is evidence of a general practice accepted as law. Custom, in a legal sense means something that is more than just habit and is obeyed because it brings with it a sense of obligation in the words of Article 38(1)(b), we must examine whether the custom constitutes a general practice accepted by law.

For that there are two elements:(a) state practice, which must be widespread, extensive and virtually uniform and (b)*opinio juris,* which means that the specific state must be acting out of a sense of legal obligation with an intention of conformity to the rule of law.

Evidence of custom can naturally be discerned through multifarious means such as through statements made by diplomats, Letters, acts of state legislation directions to counsels and the opinions of Law Officers.

A. The Role of International Organizations in the development of International Law

International Organizations, such as AALCO, can be said to perform variousfunctions in international law making. As stated by Mr. Stephen Mathias, the first as a"stage", second as an "actor" and third as "spectator". As I will explain over the course of my lecture, AALCO through the course of its various activities has played all these roles.

*Speech of His Excellency Professor Kennedy Gastorn on the *Role of AALCO in the Development of International Law: Recent Contributions* at Law Centre-II, University of Delhi on March 19, 2018.

** Secretary General, Asian-African Legal Consultative Organization (AALCO), New Delhi.

International organizations that are made up of their respective Member States, facilitate a consultative function where states meet to exchange ideas and agree on various issues of legal importance. The statements made at such forum certainly constitute evidence of state practice.

As the International Law Commission has noted, it is important to distinguish between state practice within the framework of the International organization and the practice of international organization itself when attempting to ascertain the evolution of custom. Resolutions adopted by International Organizations may not necessarily be reflective of the views of all Member Nations of the forum.

Of course, this concern is largely negated when considering resolutions passed by AALCO as all resolutions are passed by consensus. While the possibility of omission for the sake of consensus may arise in certain cases, by and large, we can consider these resolutions as reflective of the views of all Member States.

Draft Conclusion 12(2) of the 4th Report of the ILC Draft Conclusions on the topic of Identification of Customary International Law acknowledges that *"a resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law."* Draft Conclusion 4(2) provides that *"in certain cases, the practice of international organizations also contributes to the formation, expression, or creation, of rules of customary international law."*

In summation, therefore, AALCO does contribute to the development of international law in three ways:

Firstly: By serving a consultative function (forum), it enables Member States to incorporate both the research done by the Secretariat and the views of other Member States, as they embark on the negotiation of law-making treaties.

Secondly: The statements made by the Member states in forums such as the Annual Session of the Organization are indicative of customary international law (State Practice/customs).

In this context, it should be noted that in order to put into effect their mandate, International Organizations (IOs) like AALCO use a wide variety of instruments and various forms of decision making, varying widely in their function and normative status. Resolutions are one prominent example, while other forms comprise decisions, recommendations, declarations, regulations, directives, standards or guidelines.

However, an important indication, the nomenclature accorded to an act of an IO like AALCO is often not determinative of its legal status as binding or non-binding. Instead, the instruments on the authority of which the act has been adopted needs to be analyzed, as well as its actual contents. Hence an act named 'resolution' is not necessarily binding. Additionally, even within an otherwise binding resolution, there may be parts of a merely recommendatory or declaratory character. This shows that the effect of an international organization needs to be addressed according to various factors, its name just being one of many.

Finally, the AALCO Secretariat, in an advisory capacity, has conducted many workshops, training programmes and seminars and prepared many research briefs and Special Studies for the Member States which must also be considered.

These studies have often been commissioned by the Member States themselves and have served as a ready point of reference when entering into dialogue or negotiation between themselves or with the rest of the international community. They are submitted to the Member States as well as to the ILC.

III. THE ORIGIN OF ASIAN-AFRICAN COOPERATION AND THE ESTABLISHMENT OF AALCO

Founded on 15 November 1956 after the historic Bandung Summit of Asian-African States, the year 2018 marks the 62nd anniversary of the Asian African Legal Consultative Organization (AALCO). This year the Organization is prepared to hold its 57th Annual Session in Tokyo, Japan. Such legacy and heritage is maintained only by very few international organizations. Forty-seven countries comprising almost all the major States from Asiaand Africa are presently the Members of the Organization.

In 1955, 30 nations from Asia and Africa, most of them newly independent from colonial rule, seeking to forge their own path, met at the historic city of Bandung in Indonesia in an unprecedented exhibition of solidarity, kinship and cooperation— what came to be later known as "Bandung Spirit".

The Conference gave a unique message to the world-whatever may be the differences in political, economic or legal systems, the States of Asian-African region were inseparably linked together by an Asian-African identity. The Bandung Conference of 1955 had a profound effect on how Asian-African States saw the international legal order as well. Established a year after the Bandung Conference, the Asian-African Legal Consultative Organization (AALCO) was born in 1956, the organization that I serve, is considered to be a tangible outcome of this Conference.

Founded by seven Asian nations namely, Burma (now Myanmar), Ceylon (now Sri Lanka), India, Indonesia, Iraq, Japan and United Arab Republic (now Egypt and Syria), the Organization was earlier known as Asian Legal Consultative Committee (ALCC) during its formative years. Here, one must acknowledge the pioneering role of Pandit Jawaharlal Nehru, the first Prime Minster of India, in the organization of Bandung Conference and the formation of ALCC.

Thereafter, in order to include the participation from the continent of Africa, it was renamed to Asian-African Legal Consultative Committee (AALCC). Later, recognizing its international stature and increased relevance, the Organization was rechristened as Asian-African Legal Consultative Organization 2001. Its permanent headquarters is in New Delhi, India.

AALCO has currently 5 regional arbitration centres in Malaysia, Egypt, Nigeria, Islamic Republic of Iran and Kenya. The organization holds an observer status to the United Nations since 1980 (with our Permanent Observers based in New York and Vienna) and is the only intergovernmental organization of its kind embracing two continents of Asia and Africa - comprising almost all the major States from Asia (like India, P.R. China, Japan, I.R of Iran, Saudi Arabia etc.) and Africa (like Tanzania, Kenya, Uganda, Egypt, South Africa etc.)

AALCO has established close relations with the United Nations specialized agencies as well as other international organization and has concluded numerous Memorandum of Understanding and cooperation agreements. These include but are not limited to, ICRC, UNODC, The Hague Conference on Private International Law, UNHCR, Africa Union, International Criminal Court, International Law Commission, UNCITRAL and more.

The main objective behind the establishment of AALCO was the creation of a regional forum to bring about closer cooperation amongst its Member States which necessarily envisaged expansion of its activities in other areas of current relevance to meet the needs of its membership. Its work programme has also been suitably oriented to meet the needs of an expanding membership embracing the two continents of Asia and Africa. The growth in its membership was slow until the seventies when the Organization had begun to prove its utility as a forum for consultation and cooperation on some of the major issues before the United Nations and it had expanded its activities to include economic cooperation and trade law.

Notwithstanding the small membership of the Organization during the initial period, it gathered momentum in its work of formulation of legal principles and rendering advisory opinions to Member Governments which almost immediately attracted the attention of the international community. The Organization's activities as envisaged in its Statutes were primarily directed towards the progressive development of international law, consideration of legal problems referred to it by Member Governments, and follow up of the work of the International Law Commission and the United Nations.

Although the Organization is essentially a regional Organization committed to the service of its Member States it has never followed a policy of regionalism in isolation. This has been the unique feature in the growth and activities of the Organization. The Organization has welcomed the participation of observer delegations representing Governments and international organizations from all over the world.

The participation of other regions in the deliberations of the Organization has proved to be beneficial not only in drawing upon their expertise and experience but also in projecting the interest of the Asian-African region within the broad framework of the international community as a whole.

From time to time the Organization also conducts training programmes, workshops and conferences aimed at capacity building for the Member States. AALCO Secretariat also brings out periodic publications like the "AALCO Journal of International Law", "The Yearbook of AALCO" and Special Studies, the recent ones include "Marine Biodiversity Beyond National Jurisdiction: An Asian African Perspective"; "The Legality of Israel's prolonged Occupation of Palestinian Territories and Its Colonial Practices Therein"; and "International Law in Cyberspace".

A. Philosophy Behind the Establishment of AALCO

The establishment of AALCO can be discussed in the historical Paradigms and Typologies of Views on International Law. Allow me to quote Prof. Makau Mutua's historical truths about international law on Africa which the same can also be said about Asia.

Nearly all states in Afro-Asian are creation of international law which initially treated them as ‘tabula rasa’ - a blank slate on which colonizers the normative home of international law, could scribble its forms of logic hierarchies, and forms of social organization. International law was used as a means of ordering and organizing the exploitation of the globe for the benefit of the North Atlantic communities.

In the premises, the modern international law (a) was inimical to Afro-Asia's interests, (b) was used to cannibalize Afro-Asia's resources and people, and (c) was used to justify the "management" of Afro-Asia as indeed all of the Third World for the hegemonic interests of North Atlantic states. International law was a tool used to justify the exploitation of resources from the region for the benefit of others.

So the modern Afro-Asia region faces three historical traumas of slavery and colonialism, which international law recognized and or invented, and the trauma of the Cold War, in which the region was plundered by both the East and the West and used as a pawn in proxy wars of supremacy.

It was the Afro-Asian demand of more respect and equity in global affairs and contributing to the progressive development of international law that led to the formation of AALCO.

IV. THE MANDATES ANDTHE FUNCTIONS OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO)

AALCO’s evolution in terms of structure and functions, work programme and membership etc., can reflect the above paths. AALCO primarily is a knowledge based Intergovernmental Organization. In accordance with its constituent instrument, the Statutes of AALCO, the functions and purposes of the Organization are as follows:

(a) to serve as an advisory body to its Member States in the field of international law and as a forum for Asian-African cooperation in legal matters of common concern;

(b) to consider and deliberate on issues related to international law that may be referred to the Organization by the Member States and to make such recommendations to governments as deemed necessary;

(c) to exchange views, experiences and information on matters of common concern having legal implications and to make recommendations thereto if deemed necessary.

(d) to communicate, with the consent of the governments of the Member States, the views of the Organization on matters of international law referred to it, to the United Nations, other institutions and international organizations;

(e) to examine subjects that are under consideration of the International Law Commission and to forward the views of the Organization to the Commission; to consider the reports of the Commission and to make recommendations thereon, wherever necessary, to the Member States; and

(f) to undertake, with the consent of/or at the request of Member States, such activities as may be deemed appropriate for the fulfillment of the functions and purposes of the Organization.

The current work-programme of the Organization contains important issues of concern for the Asian-African States ranging from:

(a) The Work of International Law Commission (current topics) such as:

(i) Immunity of State officials from Foreign Criminal Jurisdiction,
(ii) Protection of the Atmosphere;
(iii) Crimes against Humanity
(iv) Protection of the Environment in relation to Armed Conflicts;
(v) Provisional Application of Treaties;
(vi) Peremptory norms of general international law (Jus cogens)

(b) Law of the Sea and Maritime Law,
(c) Refugees and Migrants,
(d) the Question of Palestine,
(e) Expressions of Folklore and its International Protection,
(f) International Criminal Court (Recent Developments),
(g) Environment and Sustainable Development
(h) International Law in Cyberspace,
(i) WTO as an Agreement and a Code of Conduct for World Trade:
(j) Violent Extremism and Terrorism (Legal Aspects), and
(k) Human Rights in Islam.

V. CONTRIBUTIONS OF AALCO TO THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

As mentioned earlier, AALCO will celebrate its sixty second anniversary this year. As envisaged by its founding fathers, it has made tremendous contributions in the codification and progressive development of many important topics of international law. I would now like to provide a brief summary of AALCO's key contributions including our recent engagements.

The organization has fulfilled this task by preparation of research studies on a variety of topics, and furthering participation in the law making process. AALCO has a secondary, advisory role and is statutorily bound to serve its Member States by providing legal assistance, in addition to providing a platform for nations to collectively raise their views in international fora. Pursuant to that, the organization is committed to extend to its Member States legal assistance in drafting model legislations and recommending draft principles and conventions.

Some of the important topics that AALCO has been deliberating are as follows:

A. The Work of the International Law Commission

The International Law Commission (ILC) was established by the United Nations General Assembly in 1948 for the "promotion of the progressive development of international law and its codification". This year the ILC celebrates its 70th Anniversary on the theme '*70 Years of the ILC-Drawing a Balance for the Future*' The Asian-African States have projected their viewpoints in the work of the ILC. The Work of the Commission has been facilitated first, by the presence of a fair number of Asian and African States, second, practice adopted by the Commission in seeking comments of all governments on the drafts procured by them, and third, by having official relations with other regional bodies like AALCO working in the field of international law.

The International Law Commission (ILC) and AALCO have shared a long-standing and mutually beneficial relationship such as one of the functions designated to AALCO under

its Statutes is to study the subjects which are under the consideration of the ILC and thereafter forward the views of its Member States to the Commission. In pursuance of this mandate, AALCO Secretariat prepares an annual brief on the latest work undertaken by the ILC and the viewpoints of AALCO's Member States on this work as stated in our Annual Session and UN General Assembly. It has also become customary for AALCO and the ILC to be represented during each other'ssessions.

Further, due to the immense importance that the topic of Customary International Law (CIL) holds for the Member States of AALCO, the Organization had established an "Informal Expert Group on Customary International Law"in 2014.

The group was envisaged to act as a technical expert group on Identification of Customary International Law, with a view to formulating responses to the work of the ILC, including that of the Special Rapporteur of the ILC on the topic. On March 2015 this Informal Expert Group adopted a set of comments on this topic and submitted it to the ILC for its consideration.

B. Law of the Sea

AALCO's contributions during the negotiations on UN Convention on the Law of the Sea (UNCLOS) are widely recognized. Not only did AALCO help prepare member countries in formulating their positions, it later became a negotiating forum and powerful bloc in UNCLOS III. Topics introduced in AALCO deliberations reflected concerns of developing countries and the views of largely landlocked Member States found their way into the final convention.

In 1971 AALCO Meeting in Colombo, most delegations, in principle, supported the right of a coastal State to claim exclusive jurisdiction over an adjacent zone for economic purposes. At this meeting, a working paper prepared by Kenya, was presented on "The Exclusive Economic Zone Concept". This concept finally found its way to the final text of UNCLOS.

Since the adoption of the UN Convention on the Law of Seas in 1982 the AALCO's Work Programme was oriented towards assisting Member States in their bid towards becoming functioning signatories to UNCLOS. With the entry into force of the UNCLOS in 1994, institutions envisaged by the legal regime began taking shape. The AALCO Secretariat prepared studies monitoring these developments.

Further, the Secretariat documents for AALCO's Annual Sessions continuously reported on the progress of work in the International Seabed Authority (ISA), the International Tribunal for the Law of the Sea (ITLOS), the Commission on the Limits of the Continental Shelf (CLCS), the Meeting of States Parties to the UNCLOS and other related developments. The agenda was discussed during the Fifty-Fourth Annual Session of AALCO held from April 13-17, 2015, in Beijing, People's Republic of China.

In consonance with United Nations activities on the law of sea, AALCO has provided impetus to ongoing contemporary works in law of the sea. It has successfully deliberated at the *UMT- AALCO Legal Expert Meeting On Law Of The Sea –"Marine Biodiversity Within And Beyond National Jurisdiction: Legal Issues And Challenges* on August 24, 2015, held in Malaysia which added more clarity to and promoted a more concrete understanding of key issues among Member States.

In pursuance of the mandate received from the resolution adopted on the law of the sea, at the Fifty-Fifth Annual Session held in 2016, the Secretariat prepared a Special Study entitled, "*Marine Biodiversity beyond National Jurisdiction: An Asian-African Perspective*".

While the UNCLOS does provide a comprehensive coverage to the law of the seas, it was primarily an international treaty instrument for demarcating maritime boundaries and regulating jurisdictional issues between States. The framework for protecting marine biological diversity, given its specialized focus was not given exclusive focus in its text.

With coastal states expanding their jurisdiction to wider domains with the emergence of concepts like Exclusive Economic Zones (EEZs), depletion of inshore resources and increase in interlinkages of trade and commerce all of which were the direct fallout of human activity, marine resources started facing an existential threat.

An exclusive convention for protecting marine biodiversity that would complement the UNCLOS was thus felt necessary. Recognizing this issue the United Nations is currently working to adopt an exclusive convention on Marine Biodiversity Beyond National Jurisdiction. AALCO, at its Secretariat closely follows developments at the United Nations and other forums in this regard.

C. Status and Treatment of Refugees

AALCO has been concerned with the issues relating to the Status and Treatment of Refugees ever since this topic was introduced in its agenda in 1964 at the behest of Arab Republic of Egypt. While working in pursuance of its mandate, AALCO has collaborated with the Office of the United Nations High Commissioner for Refugees (UNHCR), both formally as well as informally. This cooperation and mutual assistance was formalized by the Signing of the Memorandum of Understanding (MOU) between the two Organizations on May 23, 2002. The MOU provides for the undertaking of joint studies and envisages holding of seminars and workshops on topics of mutual interest and concern.

In this regard, among the achievements of AALCO which contributed to the progressive development of international law, include the "Principles Concerning the Treatment of Refugees" in 1966 at its Eighth Annual Session, which are commonly known as 'Bangkok Principles'.

Further study improved upon these principles by adopting two addenda. The first, which was adopted in 1970 at AALCO's Eleventh Session held in Accra, contained an elaboration of the 'right to return' of any person who, because of foreign domination, external aggression or occupation, has left his habitual place of residence.

Furthermore, in 1987 at the Twenty-Sixth Session held in Bangkok, AALCO had adopted 'Burden Sharing Principles' as an addendum to the Bangkok Principles of 1966.

The AALCO framework of 'burden sharing' is expected to complement with the international refugee treaty regime with a broader participative framework involving the international community along with emphasizing the role of non-state actors in the process.

While AALCO is regarded as one of the initial forums that took up 'Burden Sharing Principle' in International Refugee Law, the UNHCR was mandated by the New York

Declaration to develop and initiate a multi-stakeholder approach that protects and promotes the rights of refugees as enshrined in International Law.

The Comprehensive Refugee Response Framework (CRRF) annexed in the New York Declaration of September 19, 2016 is a step in the effort to develop a Global Pact on Refugees by 2018. It is pertinent to mention that the Comprehensive Refugee Response Framework (CRRF) set out in the New York Declaration of September 19, 2016 gives high priority to the principle of 'burden sharing'. It is hoped that these initial efforts of AALCO laying the foundations of the concept of 'burden sharing' will now extend its reach globally by way of the Global Pact on Refugees, 2018.

In fact, it would be no overestimation to state that the international focus on 'burden sharing' owes a great deal to the fundamental groundwork of AALCO with its emphasis on equity and fair play in the regime of refugee protection. The concerns of Asia and Africa, two principal continents involved in refugee protectionism within the broader spectrum of economic development and resource mobilization was championed by AALCO at the international level.

Apart from the adoption of the 2001 Revised text of the Bangkok Principles, two other important initiatives of AALCO related to refugee protection need to be mentioned here; the "Concept of Establishment of Safety Zones for Internally Displaced persons" and the preparation of the "Model Legislation on Refugees".

As regards the concept of safety zone (an area within a Country to which Internally Displaced Persons (IDPs) and prospective refugees can flee to secure assistance and protection), AALCO had adopted "A Framework for the Establishment of a Safety Zone for Displaced Persons in their Country of Origin" in 1995. It incorporates some twenty principles that provide which are aimed at establishment of safety zone; the conditions for establishment; the supervision and management of the zone; the duties of the Government and of the conflicting parties involved; and the rights and duties of the displaced persons.

Besides, the AALCO Secretariat was mandated by the Thirty-First Session that took place at Islamabad, Pakistan in 1992, to prepare a draft model legislation on refugees to assist Member States in enacting national laws on refugees. Accordingly, the Secretariat had submitted "A Model Legislation on the Status and Treatment of Refugees" in the Thirty-Fourth Annual Session held at Doha in 1995. The draft emphasized on the need to provide for the rights and duties of refugees; rules for the determination of refugee status; mechanisms to address the refugee exodus etc.

It is also pertinent here to recall the special study that was undertaken by AALCO along with UNHCR on "The Problem of Statelessness: An Overview from the African Asian and Middle Eastern Perspective", which was released during the formers' Forty-Sixth Annual Session that took place at Cape Town, Republic of South Africa in 2007.

Most recently, at the Fifty-Sixth Annual Session held in Nairobi, Kenya, in May 2017 through its resolution (AALCO/RES/56/S3) on the topic "The Status and Treatment of Refugees" the Secretariat was mandated "to explore the possibility of organizing a joint seminar or workshop in collaboration with UNHCR, Member States and other relevant organizations or institutions".

In compliance with this mandate, on April 18-19, 2018 the Secretariat of AALCO jointly with the UNHCR, will hold anInternational Seminar on "Responding to Large Scale Refugee Movements".

The concerns of Asia and Africa, two principal continents involved in refugee protectionism within the broader spectrum of economic development and resource mobilization was championed by AALCO at the international level.

D. Legal Protection of Migrant Workers

The item entitled "Legal Protection of Migrant Workers" was included on the agenda of AALCO at the reference of the Government of Philippines during AALCO's Thirty-Fifth Annual Session held at Manila in 1996.

Ever since, it has been a subject of intense deliberations at various Annual Sessions of AALCO and occasionally in special meetings. The resolution adopted at the Thirty-Sixth Annual Session at Tehran in 1997 directed the AALCO Secretariat to study the utility of drafting a Model Legislation on the legal protection of migrant workers within the framework of the *1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* [the ICMW, 1990], international labor Conventions and Recommendations along with the relevant resolutions of the UN General Assembly.

Thereafter, at its Fortieth Session, the AALCO Secretariat was directed to explore the feasibility of drafting a "Model Agreement for Cooperation among Member States on Issues Related to Migrant Workers". Pursuant to that mandate, a *draft Model Agreement* was prepared by the Secretariat in collaboration with the International Organization for Migration (IOM). Useful input was also received from the Office of the High Commissioner for Human Rights (OHCHR).

E. International Trade Law

AALCO has dealt with the topic 'WTO as a Framework Agreement and Code of Conduct for the World Trade' from the time when the Uruguay Round negotiations were completed in 1994 and had culminated in the establishment of the World Trade Organization (WTO) in 1995. At the Thirty-Fourth Session of AALCO held at Doha, Qatar in 1995, the item "WTO as a Framework Agreement and Code of Conduct for the World Trade" was for the first time introduced in the Agenda of AALCO.

Thereafter, this item continued to remain on the agenda of the Organization and was deliberated upon during the subsequent sessions. At these sessions, the Secretariat was directed to monitor the development related to the WTO, particularly the relevant legal aspects of dispute settlement mechanism. At the Fifty-Fifth Annual Session of AALCO, in 2016, where the outcome of the 2015 Nairobi Ministerial Conference was discussed between Member States, the Secretariat was mandated 'to organize seminars or workshops to facilitate the exchange of views by Member States on issues currently under negotiation within the WTO and capacity building programs'.

Another noteworthy work of AALCO in following WTO's work in promoting multilateral trade includes the convening of a two-day seminar on 'Certain Aspects of the functioning of the WTO Dispute Settlement Mechanism and other Allied Matters' at New Delhi in 1998, in cooperation with the Government of India; and the publication of the

Special Study on 'Special and Differential Treatment under WTO Agreements' at the Forty-Second Session held in Seoul in 2003.

F.Work of UNCITRAL

AALCO and the United Nations Commission on International Trade Law (UNCITRAL) have maintained a close and fruitful relationship, especially in the matters of international commercial arbitration (ICA), where they share a common interest. ICA was included as a priority item in the UNCITRAL's session in 1968 on the suggestion of many Member States including the Members of AALCC (now AALCO). AALCO has been a regular observer at UNCITRAL sessions since 1970, and has been providing valuable inputs and suggestions. Similarly UNCITRAL has also participated in AALCO's sessions, including in the deliberations of AALCO's Trade Law Sub-Committee. Amongst the most prominent positive results produced by the interaction between the two institutions was the creation of Regional Centers for International Commercial Arbitration.

During AALCC's Tokyo Session in 1974 regionalization of arbitration centers was suggested by the UNCITRAL's Representative to AALCO. In his Report of March, 1972, on the "Problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters", Mr. Ion Nestor, UNCITRAL's Special Rapporteur for International Commercial Arbitration, stated that the establishment and improvement of, and the cooperation between arbitral institutions would lead to the progressive development of international commercial arbitration.

This would be coupled with the uniformity of arbitration laws and procedures as practical means towards the promotion and development of international commercial arbitration. That is, the main commercial arbitration centers around the world would have to encourage the reduction to one standard procedure and rules employed in arbitration practice.

AALCO continues to provide the necessary assistance and encourage active work in the regional arbitration centers formed under its patronage, many of which are within the African continent. Although in the beginning promotional activities of these Regional Arbitration Centres (RACs) were primarily carried out by AALCO, in view of the experience accumulated over the years such promotional activities are now mainly carried out by the Centres themselves.

Over the years there has been a considerable increase in the number of cases referred to these RACs. Further, the Directors of these RACs act as Appointing Authorities in such arbitrations. The Centres have been organizing international conferences, seminars and training courses in their respective regions. In addition the Directors have actively pursued Cooperation Agreements with other arbitration institutions.

AALCO envisaged the establishment of a network of Regional Centres for Arbitration functioning under the auspices of AALCO in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized, and these institutions could act as viable alternatives to the traditional institutions in the West.

In pursuance of this, AALCO in cooperation with its Member States has so far established five institutions namely, Asian International Arbitration Centre (AIAC) (formerly

Kuala Lumpur Regional Arbitration Centre) in Malaysia in 1978, Cairo Regional Centre for International Commercial Arbitration (CRCICA) in the Arab Republic of Egypt in 1979, Lagos Regional Centre for International Commercial Arbitration (LRCSCA) in the Federal Republic of Nigeria in 1980, Tehran Regional Arbitration Centre (TRAC) in the Islamic Republic of Iran in 1997, and the Nairobi Regional Arbitration Centre in the Republic of Kenya in 2016.

International arbitration is one of the foreign investors' preferred modes of dispute settlement. The advantages of international arbitration in promoting foreign investments in a country cannot be gainsaid.

As William Park and Alexander put it *"in a world lacking any neutral supranational courts of mandatory jurisdiction to decide cases or enforce foreign judgments, arbitration bolsters cross border economic cooperation by enhancing confidence within the business community that commercial commitments will be respected".*

AALCO Members through our Regional Arbitration Centres – must promote rule based international trade and investments and win the confidence of international investors by protecting their investments and business interests, abiding to rule based system, improve the investment regimes and incentives.

G. International Criminal Law

AALCO has been following the developments relating to the work of the ICC since its Thirty-Fifth Session at Manila (1996). The initial discussions relating to the establishment of the ICC were held at the two Special Meetings convened within the framework of the Thirty Fifth and the Thirty Sixth Annual Sessions. Thereafter, the agenda has been successively deliberated in many Annual Sessions, the last being 2017 Session held in Nairobi, Kenya. It may be noted that in 2008 a Memorandum of Understanding (MoU) was signed between AALCO and the ICC. This partly gave a thrust to the activities undertaken on this agenda item.

Apart from this, AALCO has conducted numerous Seminars and Work Shops on specific thematic concerns relating to the ICC. In 2009, a seminar on "International Criminal Court: Emerging issues and Challenges" was successfully conducted in collaboration with the Government of Japan. In 2010, prior to the Kampala Review Conference, a Round Table Meeting of Legal Experts was organized jointly by the AALCO and the Governments of Malaysia and Japan with a view to consolidate the position of the Member States. The Reports of these meetings have thereafter been published and circulated among the Member States.

Since review and analysis of the developments at the Kampala Review Conference is an important part of the work programme of AALCO, a three member delegation, led by Prof. Dr. Rahmat Mohamad, the former Secretary General participated at the Review Conference. Addressing the General debate on June 01, 2010, the Secretary General highlighted the specific concerns of the Member States of AALCO, which emerged at the Putrajaya Round Table Meeting.

He emphasized that expanding on the principles of universality, sustainability and complementarily were the major challenges that the ICC would have to face and look for solutions. The need for a clear and broadly accepted definition for 'aggression', the

relationship between peace and justice, issues on cooperation with the ICC and the principle of complementarity were the other topics that he reflected on.

On June 02, 2010, the former Secretary General hosted an informal Networking Meeting of the AALCO. During the course of this meeting, the "Report of the Round Table Meeting of Legal Experts on the Review Conference of the Rome Statute of the ICC" was also launched. The meeting was well attended and several high-level representatives of Members States, non-Member States and representatives of civil society organizations attended it. In 2011, AALCO also organized, in collaboration with the Government of Malaysia and the ICC, a two day meeting of legal experts on the topic "Rome Statute of the International Criminal Court: Issues and Challenges".

Recently, the topic was discussed in the 56th Annual Session held in 2017 and the Member States have mandated the Secretariat to hold a training programme on international criminal law meant for prosecutors and judges of the Member States of AALCO aimed at capacity building and familiarizing them with the work of the ICC.

H. Violations of International Law in Palestine

The item "Deportation of Palestinians in Violation of International Law, particularly the Fourth Geneva Convention of 1949 and the Massive Immigration and Settlement of Jews in Occupied Territories" was taken up, at the AALCO's Twenty-Seventh Session, held in Singapore (1988), at the initiative of the Government of the Islamic Republic of Iran. At the Thirty-Fourth Session held in Doha (1995) the Organization, *inter alia*, decided that this item be considered in conjunction with the question of the Status and Treatment of Refugees.

At subsequent Sessions, the scope of the item was enlarged, *inter alia*, to include, at the Thirty-Seventh Session, "Deportation of Palestinians and other Israeli Practices", and the item "Deportation of Palestinians and other Israeli Practices among them the Massive Immigration and Settlement of Jews in the Occupied Territories in Violation of International Law Particularly the Fourth Geneva Convention of 1949" was placed on the agenda of the Thirty-Eighth Session in Accra (1999).

The item has since been discussed at the successive Sessions of the Organization as part of its Work Programme and the Organization has examined the violations of international law committed by the State of Israel against the Palestinian People.

The issue relating to the Statehood of Palestine once again gained international attention in 2012. The Fifty-First Annual Session of AALCO held in Abuja (2012) mandated the Secretariat, *vide* resolution RES/51/S 4, to, *inter alia*, conduct a study to examine and establish the legal requirements and principles that would determine the status of Palestine as a State, and to submit the outcome of the study for the further consideration of Member States. In compliance with this mandate, the AALCO Secretariat published a Special study entitled "The Statehood of Palestine under International law".

In light of the grave violations of international law by the State of Israel in Gaza, the issue was once again deliberated at the Fifty-Fourth Annual Session held in Beijing, (2015) and AALCO/RES/54/S 4 was passed which changed the title of the agenda item to "Violations of International Law in Palestine and Other Occupied Territories by Israel" to "International Legal Issues related to the Question of Palestine."

At the Fifty-Sixth Annual Session held in May 2017, a Special Study on "Legality of Prolonged Israeli Occupation of the Occupied Palestinian territory and its Colonial Practices under International Law and International Humanitarian Law" was released to the Member States. At the said session, the Secretariat has been directed to closely follow the developments in occupied territories from the perspective of relevant legal aspects.

I. Violent Extremism and Terrorism (Legal Aspects)

The item entitled "International Terrorism" was placed on the agenda of AALCO early during its Fortieth Session held in New Delhi from June 20-24, 2001, upon a reference made by the Government of India. It was felt that consideration of this item at AALCO would be useful and relevant in the context of the negotiations on this topic in the Ad Hoc Committee of the United Nations on elaboration of the Comprehensive Convention on International Terrorism.

During its Forty-First Annual Session held in Abuja, Nigeria in 2002, AALCO organized a comprehensive Special Meeting on "Human Rights and Combating Terrorism" with the assistance of Office of the High Commissioner for Human Rights (OHCHR). Pursuing the matter further, the AALCO Secretariat has monitored the progress that the UN Ad Hoc Committee on elaboration of the Comprehensive Convention on International Terrorism has made till date, and as an important milestone in its endeavors published a paper in this regard entitled, "A Preliminary Study on the Concept of International Terrorism" in 2006.

The recent escalations in acts of violent extremism committed by non-state actors are closely intertwined with transnational terrorism. It is in furtherance of this realization that the Member States agreed to deliberate on the legal implications of violent extremism and its manifestations in the Fifty-Third Annual Session held in Tehran in 2014. At the Fifty-Fourth Annual Session (2015), AALCO Member States discussed the scourge of violent extremism and the havoc that this phenomenon is wreaking across Asia, Africa and the Middle East. In particular, violent extremist groups such as ISIL, Boko Haram and Al Qaeda were denounced, along with their activities and other terrorist attacks in Kenya, Pakistan and Somalia.

There was consensus among States that measures must be taken at the regional level to enhance cooperation in combating violent extremism and violent extremist groups, in addition to bilateral measures, capacity building and information sharing. To this end, the importance of UN Security Council Resolution 2178 of 2014 was also emphasized.

This UN Resolution, at a historic meeting held at the levels of State or Government, calls upon member states to prevent and suppress recruiting, organizing, transporting or equipping, prevent and suppress financing, and prevent travel of foreign terrorist fighters.

Most importantly, pursuant to the discussion on Plan of Action (PoA) in the UNGA's seventieth session, AALCO has formulated a 'Draft Resolution on AALCO Principles and Guidelines to Combat Violent Extremism and Manifestations, 2016, which has been presented before all its Member-States, at its 55th Annual Session, for them to co-operate and work together in this regard.

After the conclusion of the second Inter-Sessional Meeting on May 16, 2016 and the Fifty-Fifth Annual Session, the AALCO Secretariat was directed, *vide* resolution

AALCO/RES/55/S9, to prepare a report on the ongoing discussions on the topic of Violent Extremism at the United Nations level which was presented at the Fifty-Sixth Annual Session in 2017 and discussed by a Working Group convened for this purpose during the 2017 Session.

Additionally, the Secretariat was directed to prepare a draft resolution in line with comments received from AALCO Member States at the Inter-Sessional Meeting, which is also to be discussed by the Working Group. Constructive discussions took place in this regard at the meeting of the Working Group on Violent Extremism and Terrorism, on May 01, 2017.

The Secretariat is committed to continue following developments at the global and regional levels to counter violent extremism and prevention of violent extremism, in addition to discussions on the matter at the international level.

J. International Law in Cyberspace

In the past decade many AALCO Member States increasingly recognized the need for comprehensive legislations to combat cybercrimes. In tandem with national developments, AALCO Member States have joined various international and regional instruments aimed at countering the proliferation of cybercrimes and improving international cooperation for the harmonization of cyber-laws.

However, differences between Member States regarding the mechanism for such harmonization still continue to persist. While some States advocate for the formulation of a comprehensive global convention, others are in favor of harmonizing domestic laws to the standards of existing international instruments. Further, a few AALCO Member States have not been in favor of a more universal ratification of the Budapest Convention.

Recognizing *inter alia* the importance of an intergovernmental deliberation to enhance cooperation in this area, People's Republic of China, in accordance with AALCO Statutory Rules, proposed "International Law in Cyberspace" as an agenda item to be deliberated at the Fifty-Third Annual Session of AALCO held in Tehran in 2014 and it was accepted by consensus. The Agenda Item was thereafter discussed at the Fifty-Fourth, Fifty-Fifth and Fifty-Sixth Annual Sessions, in 2015, 2016 and 2017 respectively.

The resolution on the agenda item adopted in the 2015 AALCO Annual Session directed the Secretariat to study this subject based on deliberation and progress made in the UN framework and other forums, with special attention to international law pertaining to State Sovereignty in cyberspace, peaceful use of cyberspace, rules of international cooperation in combating cybercrimes, and identification of the relevant provisions of the UN Charter and other international instruments related to cyberspace. The "Special Study" was published by the Secretariat in 2017.

Further, an Open-ended Working Group on International Law in Cyberspace was constituted in 2015 to discuss the aforementioned topics in-depth. This Group met for the first time at the Fifty-Fifth Annual Session in 2016. The second meeting was held at the AALCO Headquarters in New Delhi in February, 2017.

AALCO was also invited to the Global Conference on Cyberspace 2017 (November 23-24, 2017, New Delhi, India) hosted by the Ministry of Electronics and Information

Technology of the Government of India under the theme Cyber for All: A Safe, Secure and Inclusive Cyberspace for Sustainable Development.

AALCO was invited and attended the 4th World Internet Conference (WIC) held at Wuzhen International Internet Exhibition and Convention Centre in Wuzhen, China from December 03-05, 2017. I presented a paper on "Relevance of International Law in Combating Cybercrime: Current Issues and AALCO's Approach" at the session on "International Cooperation in Countering the Use of Cyberspace for Criminal and Terrorist Purposes".

AALCO, as a multilateral forum representing such divergent interests and positions on the topic, holds immense potential for its Member States to be used as a platform to further deliberate on outstanding issues that come in the way of institutionalization of effective cooperation mechanisms.

VI. JOURNALAND INTERNSHIPAT AALCO

AALCO Secretariat also maintains periodic publications like the "AALCO Journal of International Law" since 2012.

AALCO offers opportunities for undergraduate and graduate students to intern at its headquarters in Chanakyapuri, New Delhi. It provides students a chance to observe the functioning of an intergovernmental organization up-close. AALCO has employees from Asian and African nations. So it also gives interns a glimpse of what it is like to work in a multicultural environment.

The internship programme at AALCO is designed to:

- Give students and young professionals the opportunity to assist AALCO experts in undertaking research and analysis on a wide variety of international legal issues that have a bearing on the legal interests of the Member States of AALCO;
- Allow them to gain experience and to deepen their knowledge and understanding of the way international law affects the legal interests of the Member States of AALCO; and
- Help them develop their analytical skills.

During the internship, students are expected to:

- Provide assistance in research and data collection;
- Draft papers and briefing notes under the supervision of the Legal Officers;
- Study and report on any of the topics of AALCO Work Programme;
- Provide assistance in the organization of events;
- Perform administrative tasks such as updating calendar of meetings, drafting letters, filing etc.; and
- Proof reading various documents.

AALCO's Internship Programme is a full-time programme and normally begins in the first week of every month. Internships usually cover a period of one month. However, in special cases, the duration of internships may be extended. For details on application procedure, eligibility criteria and selection procedure, visit the AALCO website www.aalco.int.

VII. CONCLUSION

Going by the track record of the Organization in the last 62 years, it is evident that AALCO has made invaluable contributions not only towards the field of international law as such but also played a vital role in strengthening intercontinental solidarity, regional governance and safeguarding the common rights and interests of Asian-African States.

In summation, therefore, it may be stated that AALCO has immensely contributed to the progressive development of international law, by assisting the developing countries of the Asian-African region to participate effectively in the negotiations, by preparing research briefs and serving as a consultative forum where members could share their difficulties and challenges, and building consensus among them on several issues of international concern. This so far, has been made possible by the extraordinary dedication and intellect of generations of legal experts from Asia and Africa.

It is in this spirit that I urge you to consider studying international law further and pursue a career in an international organization or academia geared towards ensuring international peace and cooperation, making this world a better place to live.

RULE OF LAW IN INTERNATIONAL RELATIONS: THE PRODUCT OF INTERNATIONAL INSTITUTIONS AND INTERNATIONAL LAW

Sreenivasa Rao Pemmaraju[*]

I. INTRODUCTION

As we turn another year and enter a new year 2019, any assessment of current trends in international law would better commence with an overview of the role of international institutions as representatives of the international community and international law in sustaining and strengthening the rule of law in international relations. This note would accordingly first identify some essential elements of rule of law and follow through with a review of the structure and substance of the same in international relations. As part of this exercise, the note would map out in broad terms some significant aspects of international law that underpin the current world order. It also underscores some current challenges to the global rule of law and emphasizes the need for sustaining the rule of law on the basis of common interests of the international community to preserve the earth-space environment for sustainable development in the interest of present and future generations of mankind.

II. THE RULE OF LAW: SOME ESSENTIAL FEATURES

Aristotle once famously said that it is better to be ruled by law than by men.[1] Rule of law could however mean different things to different persons and could even lightheartedly be dismissed as 'meaningless', given its 'ideological abuse and general over-use' as a " bit of ruling class chatter."[2] However, in so far it actually came to be symbolized by supremacy of law, equality before law and constitutional system of governance sanctifying separation of powers, independence of judiciary, judicial review, enshrining and ensuring human dignity and fundamental human rights is an ancient and evolving theme.[3] Most importantly, rule of law presumes and is based on centralization of force; and prohibiting individuals from taking law into their own hands. There are several other attributes of rule of law: equality before law; due process of law; prohibition of retrospective penal laws or no crime or punishment

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[1] According to one translation, Aristotle said: It is better for the law to rule than one of citizens, so even the guardians of the law are obeying the laws". See Tom Bingham, *The Rule of Law* 3 (Penguin Books, 2010).

[2] See for the comment of Judith Shklar, quoted in *Lord Bingham's Sixth Sir David Williams Lecture at Cambridge on Rule of Law* (November 16, 2006), reproduced in Francis Neate, *The Rule of Law: Perspectives from Around the Globe* 244 (Lexis Nexis, 2009).

[3] For a history of the evolution of the concept of rule of law, see Francis Neate, "Introduction: A brief History of the Development of the Concept of the Rule of Law", *Id*. at 1-7; for commentary on the Council of the International Bar Association Resolution on Rule of Law (September 2005), *Id*. at 8-17. On the foundations of the rule of law, it is noted that it is 'the only mechanism so far devised to provide impartial control of the use of power by the state' (p.no. 9); no specific definition of rule of law is attempted because it is still an evolving concept, and it took centuries even for those countries which 'now claim to adhere to it' (p.no. 9). Accepting that it is not necessary to rule on what the rule of law meant in any given context, Lord Bingham nevertheless suggested that the core of the principle is "that all persons and authorities within the state, whether public or private should be bound by and entitled to the benefits of law publicly made taking effect (generally) in the future and publicly administered in the courts". Tom Bingham, *supra* note 1 at 8.

except in accordance with law; honoring rights of the accused including right to be silent, entitlement to a counsel, prohibition against self-incrimination and presumption of innocence.[4]

Rule of law in any society is directly dependent upon the values and traditions, culture and beliefs that shape its substantive content. But values and traditions may change from time to time and vary from community to community. A comprehensive and universally accepted definition of the rule of law is therefore not feasible or considered essential. Another reason for the lack of comprehensive or universally acceptable definition of rule of law is that the structure and powers of institutions entrusted with its promotion and protection vary from country to country, depending on the system of governance, levels of social integration and economic growth. Broadly speaking, the essential purpose of a democratic form of government is to promote the rule of law, though in reality no one form of government, without a culture of compliance, guarantee the same or can claim exclusive credentials to sustain and support it. Transfer of power through ballot box or elections conducted on the principle of universal adult suffrage is yet to become a universal phenomenon, only began to be practiced in the US since 1920 and U.K. since 1928. Palace coups or revolutions still operate in some parts of the world, with 'orange' revolution and the Arab spring being the recent examples, for change of regimes and governments. The slow and steady pace at which rule of law and democratic form of government is universally accepted is therefore understandable.

III. THE CONTEMPORARY WORLD ORDER BASED ON THE UN CHARTER

At the international level, the beginning of a world order based on the concept of sovereign equality and the associated principles of inviolability of borders and non-intervention in internal affairs can be traced to the conclusion of 1648 treaties of Westphalia. Conquest and use of force was considered a legitimate means until 1945 to acquire title to territory and consolidate sovereignty over people and resources. Following the World War I, the community of States attempted to rein in use of force and create a legal community of mankind. The League of Nations which epitomized this experiment did not last long. The United Nations Charter established by the San Francisco Treaty of 1945, following the World War II, not only prohibited the use of force as an instrument of national policy but reaffirmed some of the principles that formed the core of the League of Nations and promulgated a number of new principles- sovereign equality, right of self-determination, non-intervention in internal affairs of a State, promotion and protection of fundamental human rights and peaceful settlement of disputes on the basis of international law. The UN Charter also established a framework to promote and protect the world order. The UN General Assembly composed of all the member States, now numbering 193, operates as the conscience of the international community. The center piece of the UN Charter however is the Security Council which is endowed with enforcement powers under Chapter VII of the Charter to maintain

[4] On these and other themes constituting the core of the rule of law, see Tom Bingham, *Id*., sec. 1 on the importance of Rule of Law and chapter 7 on protection of human rights. For an endorsement of these basic elements of rule of law by the United Nations, see the Report of the Secretary General to the Security Council on "The rule of law and transitional justice in conflict and post-conflict societies", where he noted that "The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency". Security Council doc. S/2004/616 (August 23, 2004) para. 6, p.no.4.

international peace and security "to save the succeeding generations" of mankind "from the scourge of war."[5]

As part of its system the UN Charter also established the International Court of Justice as its principal judicial organ, with jurisdiction to settle disputes on the basis of international law between States. Its jurisdiction however is not compulsory and is subject to the consent of States parties to dispute. States could confer compulsory jurisdiction upon the ICJ by filing a declaration, "recognizing as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all disputes concerning the interpretation of a treaty or any question of international law or the existence of any fact which if established would constitute a breach of an international obligation or the nature or extent of the reparation to be made for the breach of an international obligation."[6]

The ICJ can also exercise jurisdiction over disputes concerning the interpretation and application of any treaty if it so provides.

IV. THE BASIC MISSION OF THE UN: PROMOTION AND PROTECTING RULE OF LAW

Given the universal membership of the UN and the structure and substance of the Charter, with its distinct powers to promote and defend rule of law in international relations, it is the closest thing we have by way of a constitution of the world. The UN Secretary General highlighted this basic mission of the UN as follows:

> "[T]he rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[7]

Once established as the guardian of rule of law in international relations, the UN promptly set out to codify and progressively develop international law to serve the aspirations and needs of the international community.

V. INTERNATIONAL LAW IN THE 'MIDDLE AGES': AN ARTIFACT TO SERVE EUROPEAN INTERESTS AND COLONIALISM

Development of the 'law of nations' was initially based on the principles of natural or moral law. Major interaction among States was limited to manage war which was a legitimate means to expand their borders and conduct trade, exchange of diplomatic or consular agents. Europe witnessed years of conflict between different States, with brief periods of peace as

[5] See Charter of the United Nations, Preamble, *available at*: http://www.un.org/en/sections/un-charter/un-charter-full-text/ (last visited on October 20, 2018).

[6] United Nations, Statute of the International Court of Justice, art. 36(2), *available at*: https://www.icj-cij.org/en/statute (last visited on October 20, 2018).

[7] See the Report of the Secretary General to the Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", Security Council doc. S/2004/616 (August 23, 2004) para. 6, p.no. 4.

interlude. Following the establishment of the Westphalia system of world order in 1648, international law in Europe was founded on more secular or positivist notions, and based on treaties and uniform and consistent practice accepted by States.[8] The European concept of international law, applicable only among the European powers constituting the privileged club of 'civilized nations' and a few others like Japan and Turkey they admitted to the club became the norm during the Middle Ages. Colonization and exploitation of Africa and Asia by the European Powers was the most dominating feature of the middle Ages, their main objective being to feed on the bountiful supply of raw materials of these continents to sustain their industrial revolution[9] and to capture markets for their international trade. Accordingly, not only the European Powers dominated and exploited the African and Asian continents but their conception of international law became the basis around which modern international law began to be build up. International law as we now know in international relations may be traced back to the "second-half of the Middle Ages", though as a "systematized body of rules it owes much to the Dutch Jurist Hugo Grotius, whose work, *De Jure Belli ac Pacis, libri iii*, appeared in 1625."[10] Its role was limited to regulate relations among States governing diplomatic and consular relations, international trade, law of war, law of treaties, general characteristics of States, and freedom of the high seas. The function of codification and progressive development was aided and assisted by two important professional international law institutions, the *Institut de Droit International*[11] and the International Law Association,[12] both established in 1873.

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[8] For a brief review of the history concerning the need for and attempts at a codified and progressively developed international law in promoting and defending rule of law in international relations, see Christiane Ahlborn and Bart L. Smit Duijzentkunst, "70 Years of the International Law Commission: Drawing a Balance for the Future"(May 3, 2018).The authors credit the thoughts and work of Bentham as the father of the movement on codification of international law and promoter of 'positive law':If Hugo Grotius is the "father" of international law, the progenitor of the codification movement is Jeremy Bentham (1748-1832). A lawyer, philosopher and social activist, Bentham strongly believed in the importance of positive law: "to be without a code is to be without justice", as he put it (*Letter to Daniel O'Connell, Works of Jeremy Bentham,* vol. X, p.no. 597). In his view, a comprehensive, written code would remove legal gaps and inconsistencies and make the law accessible to all. It would also guard against judge-made rules and – even worse in Bentham's eyes – natural law ("nonsense upon stilts") (*Anarchical Fallacies, Ibid,* vol. II, p.no. 501)).
Bentham's codification efforts extended to the international sphere. Like many later codifiers, he hoped that a set of written rules could prevent war and establish a lasting peace. His desire to rid international rules of the vestiges of natural law went so far that he proposed to replace the commonly used term "law of nations", which encompassed an array of moral principles, with a new term: "international law" (*An Introduction to the Principles of Morals and Legislation, Ibid.*,vol. I, p.no. iii*)*". *Available at*: https://www.ejiltalk.org/70-years-of-the-international-law-commission-drawing-a-balance-for-the-future/ (last visited on October 20, 2018).

[9] For a brief review on the stages of industrial revolution, see https://en.wikipedia.org/wiki/Fourth_Industrial_Revolution (last visited on October 20, 2018).

[10] Jennings and Watts (eds.), I *Oppenheim's International Law* 4 (Longman, 1991): Introduction and Part I. For a very comprehensive account of history surrounding the development of international law and for a very persuasive conclusion that 'what most international lawyers have called international law during the sixteenth to the eighteenth century was just one of many normative systems which existed in various regions of the world'. See OnumaYasuaki, "When was the Law of International Society was Born?- An Inquiry of History of International Law from an Intercivilizational Perspective" 2 *Journal of the History of International Law* 63 (2000).

[11] For the history and the work of the Institut de Droit International, and the resolutions it adopted on judicial review of Security Council Resolutions and on mass migration, provisional measures, human rights and private international law, at its latest Session of Hyderabad, India, from September 3-9, 2017, *available at*: http://www.idi-iil.org/en/ (last visited on October 20, 2018). Membership of this body is conferred on professional international law specialists by invitation from the Institut De Droit International, following election by the current membership.

[12] The work and programs of the International Law Association (ILA) is *available at*: http://www.ila-hq.org/. Membership can be sought by anyone interested in international law, for example national judges, advocates, professors, who could be part of national branches.

With the defeat of the Axis Powers (Germany, Italy and Japan), and the conclusion of World War II, a new world order emerged, symbolized by the UN. Maintenance of international peace and security was entrusted to the collective security system under the UN. Any decision of the Security Council composed of 15 members in this regarded required the consensus[13] among the five permanent Members, the USA, the Russian Federation (as the successor to the former Soviet Union), the United Kingdom and France and the People's Republic of China (taking over the UN seat as the sole legal China in 1971, since the adoption of the UN General Assembly Resolution 2758). The permanent membership and the power of veto accorded to the five powers was an inevitable price to be paid by the rest of the members of the UN for the creation of the UN, given their dominant role as part of Allied Powers in securing the defeat of the Axis Powers.[14]

VI. THE NEW WORLD ORDER: UN'S ROLE IN UNIVERSALISATION OF THE FOUNDATIONS OF INTERNATIONAL LAW

Accordingly, a major function of the UN has been the reorientation of the foundations of international law and enlarging its reach to cover different aspects of international relations. Significant achievements of the UN legislative process include the Declaration on Granting of Independence to Colonial Countries and Peoples,[15] recognizing the inalienable rights of States to permanent sovereignty over natural resources spelling out its implications for the right of newly independent States to expropriate foreign assets and determine the amount of possible compensation, and the obligation to settle disputes in this regard by peaceful means.[16]

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[13] Five powers were given the special privilege of veto over any enforcement powers of the Security Council as part of the UN Collective Security system. It is noted that "After much debate, the smaller and medium-sized nations succeeded in restricting the Big Five's use of the veto in the Security Council. Herbert V. Evatt, then deputy prime minister of Australia, who was in the forefront of that fight, declared: "In the end our persistence had some good effect. The Great Powers came to realize that the smaller powers would not accept a Charter unless certain minimum demands for restriction of the veto were accepted, viz., that there should be no veto upon the placing of items on the [Security Council] agenda and no veto on discussion [in the Security Council] …. If this vital concession had not been won, it is likely that discussion of matters in the open forum of the Security Council would have been rendered impossible: If so, the United Nations might well have broken up. "Another major change resulted from the desire of the smaller nations to give the world organization more responsibilities in social and economic matters and in colonial problems. Accordingly, the Economic and Social Council and the Trusteeship Council were given wider authority than was provided for in the Dumbarton Oaks draft, and they were made principal organs of the UN". *Available at*: https://www.nationsencyclopedia.com/United-Nations/The-Making-of-the-United-Nations-THE-SAN-FRANCISCO-CONFERENCE-25-APRIL-26-JUNE-1945 .html.

[14] Allied Powers consisted of China, the USSR, the UK, and the US together with 46 other States which declared war on the Axis powers (Germany, Italy and Japan). The Four powers, the USA, the U.K., the USSR and China also acted as the sponsoring Powers for the San Francisco Conference, attended by all 50 States which earlier signed a Declaration by United Nations of 1January 1942. It took two months for the UN Charter to be adopted unanimously onJune 26, 1945, involving some important changes in the draft agreement prepared earlier at Dumbarton Oaks meeting. For a brief account of the making of the United Nations, see https://www.nationsencyclopedia.com/United-Nations/The-Making-of-the-United-Nations-THE-SAN-FRANCISCO-CONFERENCE-25-APRIL-26-JUNE-1945.html.

[15] UN Resolution 1514 (XV) of December 14, 1960.

[16] UN Resolution on *Permanent Sovereignty Over Natural Resources* 1803 (XVII) of December 14, 1962; 2158 (XXI) of November 25, 1966; 2386 (XXIII) of November 19, 1968; 2625(XXV) of October 24, 1970; 2692 (XXV) of December 11, 1970; 3016 (XXVII) of March 21, 1973; and 3171 (XXVIII) of December 17, 1973. On the background and importance of this set of resolutions setting out the "concept economic self-determination", see Ian Brownlie, *Principles of Public International Law* 516 (Oxford University Press, 2003).

The adoption of the Universal Declaration of Human Rights[17] followed by the conclusion of the two international covenants, one on political and civil rights (1967)[18] and the other on economic or social rights (1966)[19] provided a basic framework for developing international standards for the protection of human rights in the national and international affairs. The UN also took some early and historic steps in reserving the frontier areas, like the outer space and the deep oceans, exclusively for peaceful purposes. It also prohibited national appropriation of these frontier areas by claims of sovereignty on the basis of claims of occupation or use or by other means. The conclusion of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,[20] following the example of the 1959 Antarctica treaty,[21] which earlier reserved access to Antarctica only for peaceful purposes, freezing national claims of sovereignty, greatly contributed to consolidate the interests of the international community, distinct from national interests based on sovereignty. The Declaration of Principles governing seabed and the ocean floor and subsoil thereof beyond the limits of national jurisdiction as the common heritage of mankind and the creation of the International Seabed Authority under the 1982 UN Convention on the Law of the Sea has further strengthened the identity of the international community and enlarged the sphere of the rule of law,[22] The 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States[23] and the adoption of the definition of aggression,[24] and other UN declarations, adopted with near unanimity constitute a new basic structure of the now well-established global rule of law.

VII. ROLE OF THE ASIAN- AFRICAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW

The UN membership by 1960s was largely composed of a vast majority of countries which emerged from the yoke of colonialism. They contributed to the process of development of international law with great unity and common purpose. The Bandung Conference and the creation of the Asian-African Legal Consultative Committee in 1958 with headquarters in New Delhi, India provided a forum for the legal advisors of the Asian-African States to come together to forge common positions on the various subjects or declarations of international law reflecting their interest as equal and sovereign States in the world order. As members of the non-aligned movement they succeeded to bring out great changes in field of trade, commerce and economic development. As Group of 77, a negotiating group of developing countries, actually numbering about 100 and more countries, succeeded in fashioning a new constitution for the oceans that takes into account not only the legitimate interests of all

[17] UN GA Resolution 217 A (III) of December 10, 1948.

[18] UN GA like the outer space and the deep oceans exclusively for peaceful purposes. Resolution 2200 (XXI) of December 16, 1966.

[19] UN GA Resolution 2200 (XXI) of December 16, 1966.

[20] *UN Treaties and Principles on Outer Space*: Text of treaties and principles governing the activities of States in the exploration and use of outer space, adopted by the United Nations General Assembly 3-8 (UN, New York, 2002).

[21] For the text of the 1959 Antarctica Treaty, See https://www.ats.aq/documents/keydocs/vol_1/vol1_2_AT_Antarctic_Treaty_e.pdf (last visited on October, 2018).

[22] UN Resolution 2749 (XXV) of December 17, 1970. For a discussion on the resolution, see P. Sreenivasa Rao, *The Public Order of the Ocean Resources* 84-88 (MIT Press, 1975). For the text of the UN Convention on the Law of the Sea, 1982, Part XI in particular, *available at*: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited on October 20, 2018).

[23] UN GA Resolution 2625 (XXV) of October 24, 1970.

[24] UN GA Resolution 3314 (XXIX), of December 14, 1974.

seafaring nations but also the interests of developing countries in ensuring a fair and equitable share of the benefits arising from the exploration and exploitation of the resources of the sea.[25] The 1982 Convention on the Law of the Sea is perhaps the last most advanced and comprehensive global compact that took care of both the exclusive interests of the States and their inclusive interests as well to develop a regime of global governance under international rule of law. Their long fight to achieve a new international economic order and getting universal support for a right to development was however remained largely unfulfilled.

One hallmark of the universal rule of law is its success to a great extent in weaning away the development of international law from its 'Eurocentrism'. Some positive features of the evolving rule of law are: value attached to the practices of all 'peace-loving nations', as opposed to only those of the self-styled 'civilized nations' in the development of customary international law, rejection of the concept of *terra nullius*, which denied the rights of native tribes and indigenous population over territories they traditionally inhabited, outlawing 'unjust, unequal or unfair treaties', signaling the demise of traditional colonialism.[26] This marked progress towards the establishment of rule of law at the global level is notable, even if the world order is still best by power politics, super-power hegemony over politically and economically weaker States, operation of spheres of influence, and imbalances in international trade, and denial of human dignity and equal opportunity to millions of poor and impoverished people across and within States.

VIII. THE RULE OF LAW: A SOURCE OF HUMAN DIGNITY AND POLITICAL AND ECONOMIC SELF-DETERMINATION

Similarly, thanks to the UN and many specialized agencies that work in tandem with the UN, the economic, social and cultural goals of the world order are constantly addressed creating ever widening network of universally applicable legal rights and obligations. Fields covered in this regard include conservation of Antarctic marine living resources, international trade in endangered species of wild fauna and flora, long-range transboundary air pollution, regulation of whaling, climate change, and Sustainable Development Goals as part of 2030 Agenda for sustainable development (consisting of 17 goals and 169 associated targets) building upon the earlier Millennium development goals.[27]

The world community has also come a long way in establishing international standards building upon the Universal Declaration of Human Rights and as part of promotion and implementation of the International Covenants on political and civil rights on the one hand and the economic, social and cultural rights on the other, along with a host of other conventions addressing slavery, elimination of all forms of racial discrimination, elimination of all forms of discrimination against women, torture, rights of children, and protection of the rights of all migrant workers and members of their families.[28] By now several principles

[25] See the statement of the President of the Third UN Conference on the Law of the Sea, Ambassador Tommy T.B. Koh of Singapore, "A Constitution for the Oceans" in *International Seabed Authority, The Law of the Sea: Compendium of Basic Documents* lx-lxiv (International Seabed Authority, Caribbean Law Publishing Company, Kingston, Jamaica, 2001).

[26] For these and other developments in international law disengaging it from its colonial foundations, see Abdulqawi A. Yusuf, *Pan-Africanism and International Law* 102-114 (Pocketbooks of the Hague Academy of International Law, 2014), generally Ch.2 and 3.

[27] Many of the themes mentioned are analysed outlining the contribution of the UN and its specialized agencies in short and recent monograph, Nico Schrijver, *Development without Destruction: The UN and Global Resource Management* (Indiana University Press, Bloomington, Indiana, 2010).

[28] For a list of various core international human rights instruments, see https://www.unfpa.org/resources/core-international-human-rights-instruments. See Abdulrahim P. Vijapur, "No Distant Millennium: The UN Human

setting out international human rights standards have been recognized as having achieved the status of customary international law. The International human right norms are increasingly invoked by domestic or municipal courts: in cases involving the interpretation of ambiguous statutes and, possibly, in the review of administrative action. As John Dugard, an authority on international human rights law, noted that the:

> "municipal courts of states that have signed or ratified, but have not incorporated, human rights conventions such as the European Convention on Human Rights or the International Covenant on Civil and Political Rights, may prefer to use these treaty obligations as a guide to the interpretation of statutes—rather than the less precise principles of customary international law".[29]

He suggested further that:

> "a municipal court, faced with lacunae in its own common law in the field of fundamental rights is entitled to enlist the aid of treaties reflecting generally recognized rights, either on the ground that these rights have become part of customary international law or because they provide evidence of widely accepted principles of law, worthy of incorporation into a fertile common law."[30]

IX. THE WORK OF THE INTERNATIONAL LAW COMMISSION: ENLARGING THE SPHERE OF RULE OF LAW

The work of the UN and declarations adopted by the General Assembly provided further strength to the work of the International Law Commission which was created in 1949 under Article 13 of the UN Charter. Together the ILC and the ICJ rendered valuable service to the process of universalization of the foundations of international law and enlarging its sphere of operation in international relations. Thanks to the work of the ILC, several landmark international conventions dealing with the law of the sea, law of treaties, succession of States, relations and treaties between States and International Organizations and between international organizations, diplomatic and consular relations, crimes against internationally protected persons, non-navigational uses of international watercourses, and on jurisdictional immunities of States and their Property were concluded. Most of these treaties codified and progressively developed international law, and are considered as reflecting customary international law in respect of many substantive provisions they incorporated, if not in totality. The concept of *jus cogens*[31] or the peremptory norms came to be recognized as part

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Rights Instruments and The Problem of Domestic Jurisdiction" in M.S. Rajan, *The United Nations at Fifty and Beyond* 103-122 (Under the auspices of the Indian Society of International Law, Lancer Publishers, New Delhi, 1996), for a brief exposition on this matter.

[29] John Dugard, "The Application Of Customary International Law Affecting Human Rights By National Tribunals", Proceedings of the American Society of International Law Annual Meeting, vol. 76 (1982), p.no. 246-247. Judge Dugard noted some of the human rights norms that are regarded as part of customary international law: "the right not to be discriminated against on grounds of race; freedom from torture; and freedom from arbitrary imprisonment". Furthermore, he suggested that, there are other, "long-recognized, customary rules not generated by modern human rights conventions, that may be utilized to secure a benevolent statutory interpretation in favor of human rights; for example, the rule that the police of one state may not exercise their powers of arrest in another state has often been invoked to obstruct the abduction of political refugees". *Id.* at 247.

[30] *Id.* at 251.

[31] The ICJ in its advisory opinion on the legality of the threat or use of nuclear weapons noted that the "question whether a norm is part of the *jus cogens* relates to the legal character of the norm". See I.C.J. 1996, p.no. 226, para. 83.

of the new law of treaties, prohibiting any treating commitments or acts of State in derogation of such norms. Reservations and declarations made concerned mostly with the method and means of compulsory settlement of disputes on the application and interpretation of their provisions.

The work of the ILC in the field of international criminal law and jurisdiction, following the Nuremberg and Tokyo trials, and in developing a draft code of international crimes is also noteworthy. The Rome Statute on the establishment of the International Criminal Court adopted on July 17, 1998, which entered into force on July 01, 2002, was based on a draft prepared and finalised by the ILC in 1994. The International Criminal Court and several other ad hoc or special criminal tribunals established by or in consultation with the United Nations serve a major objective of the rule of law in international relations, that is denying impunity to perpetrators of crimes and restoring dignity of and providing justice to victims of grave crimes, such as genocide, crimes against humanity, war crimes including rape as a war crime. The work of these tribunals is complimented by the exercise of universal jurisdiction in a select few cases and under specified conditions "made a global contribution by developing a rich jurisprudence in the area of international criminal law, thereby expanding and reinvigorating this key pillar of the international legal regime."[32] In the process, "they reflect a growing shift in the international community, away from a tolerance for impunity and amnesty and towards the creation of an international rule of law. Despite their limitations and imperfections, international and hybrid criminal tribunals have changed the character of international justice and enhanced the global character of the rule of law."[33]

In addition, the ILC during the last 70 years of its work was able to finalize declarations, recommendations or draft Articles on a variety of important subjects. For example, we may note its work on State responsibility, diplomatic protection and liability for transboundary harm involving hazardous activities, otherwise considered as not wrongful, issues concerning nationality of natural persons in relation to State succession, unilateral acts, fragmentation of international law, transboundary acquifers, reservations to treaties and responsibility of international organizations, and the effects of armed conflicts on treaties. More recently it completed draft Articles on Expulsion of Aliens (2014), finalized its study report on the most favored nations clause (2015), draft Articles on protection of persons in the event of disasters (2016),Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (2018); and Draft conclusions on identification of customary international law, with commentaries (2018).

The topics thus finalized by the ILC with draft Articles and recommendations, with some of them awaiting adoption as international treaties or conventions, have since entered the stream of international law decision-making both as a matter of inter-State discourse and as elements constituting the judgments and awards of international tribunals.

Currently, the ILC is considering topics on: Crimes against humanity; immunity of State officials from foreign criminal jurisdiction; provisional application of treaties; protection of the environment in relation to armed conflicts; protection of the atmosphere; peremptory norms of general international law (*jus cogens*); Succession of States in respect of State responsibility and general principles of law.

[32] See for an analysis of the role of international criminal tribunals in advancing the cause of global rule of law, the Report of the Secretary General to the Security Council on "The rule of law and transitional justice in conflict and post-conflict societies, *supra* note 4 at 14, para. 41.
[33] *Id*., para. 40.

X. THE INTERNATIONAL COURT OF JUSTICE: SAFEGUARDING THE RULE OF LAW

The contribution of the International Court of Justice to the rule of law in international relations is valuable for the peaceful settlement of disputes between States, an important objective of the UN and an essential means to maintain international peace and security. The function of the Court to contribute to the maintenance of international peace and security becomes much more enhanced in times or in cases where the Security Council is unable to take action for lack of consensus among its permanent members.[34]By its work the ICJ showed time again that no matter how complex a political dispute is, it is competent to deal with them on the basis of international law.[35] For one thing, the Advisory Opinion on the Reparation for Injuries suffered in the service of the United Nations,[36] established that the UN has a legal personality of its own, distinct from its member States under international law. Second, it declared that under international law the UN "must be deemed to those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[37]

The significance of the findings of the Court lies in establishing the Charter as a dynamic instrument, a living document possessing the characteristics of a constitutional instrument constantly evolving to meet the challenges of an ever changing world order. It thus identified and specified the powers of the General Assembly, the plenary organ of the UN, to address urgent matters concerning the maintenance of international peace and security, particularly when the Security Council is blocked from taking any action in pursuance of its primary responsibility because of veto. The Court thus paved the way for the UN to engage in peace-keeping, peace-making and peace building operations,[38] distinguished from peace enforcement operations, to become standard features of the UN in field of maintenance of international peace and security.[39]

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[34] The Nicaragua case between Nicaragua and the USA was one of the most telling examples. Most recently, the State of Palestine filed a complaint against the USA in respect of the latter's decision to move its Embassy in Israel to Jerusalem on the ground that it violated its rights under the Vienna Convention on Diplomatic Relations of April 18, 1961. For this purpose the State of Palestine deposited a "Declaration Recognizing the Competence of the International Court of Justice" on July 04, 2018 accepting "with immediate effect the competence of the International Court of Justice for the settlement of all disputes that may arise or that have already arisen covered by the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, 1961, art. I, to which the State of Palestine acceded on March 22, 2018". See the Order of the ICJ of November 15, 2018, https://icj-cij.org/files/case-related/176/176-20181115-ORD-01-00-EN.pdf. The US decision in this case could also be questioned on the ground that it is in violation of the United Nations 1967 resolution, which asks Israel to vacate all the occupied territories of Palestine and work toward building peace in the region.

[35] For a short but a succinct discussion on the role and procedures of the ICJ in promoting rule of law and peaceful settlement of disputes, A Dialogue at the Court, Proceedings of the ICJ/UNITAR Colloquium held on the occasion of the Sixtieth Anniversary of the International Court of Justice at the Peace Palace on April 10 and 11, 2006 (UNITAR, UN Sales No.918).

[36] I.C.J. Reports, 1947, p.no. 174.

[37] See *Id*. at 182. For a review of the contribution of the ICJ to the effective functioning and enlarging the membership of the UN, see Shabtai Rosenne, "The Contribution of the International Court of Justice to the United Nations" in M.S. Rajan (ed.), *supra* note 28 at 131. See also Ian Brownlie, *supra* note 16 at 657.

[38] On peacekeeping operations and observer missions, the differences between peacekeeping operations on the one hand and preventive diplomacy, peacemaking, peacebuilding and on, peace enforcement on the other and for some notable citations on these matters, see M. N. Shaw, *International Law* 1100-1118 (Cambridge University Press, 5th edn., 2003).

[39] There are currently 15 peacekeeping operations and one special political mission – the United Nations Assistance Mission in Afghanistan (UNAMA). As for the special UN mission in Afghanistan, it is a political mission, mandated by the Security Council in 2002 to help Afghanistan in laying the foundations for sustainable peace and development in the country. On March 17, 2014, the 15-member UN Security Council unanimously adopted resolution 2145 (2014) renewing the mandate of the United Nations Assistance Mission in Afghanistan

The recognition of UN's legal personality paved the way for it to assume a variety of powers and functions over the years, which we now take as granted and inherent in its capacity, such as: conclusion of treaties, enjoying privileges and immunities, capacity to espouse international claims, functional protection of agents and associated persons, bear international responsibility for its acts or of its agents, such as peacekeeping or technical assistance or authorization of the use of force, and administration of territories.[40]

The Court in the Barcelona Traction case (second phase) (Belgium/Spain),[41] introduced for the first time into the discourse of international law the concept of *erga omnes* obligations. These are obligations, according to the Court, a State owes to the international community as a whole, as opposed to obligations it owes to any other State in the field of diplomatic protection, which it noted "are neither absolute nor unqualified."[42] The Court noted that:

> "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.*"[43]

"Such obligations", it added, "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and

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(UNAMA) and set out the scope and range of activities it must undertake over the coming 12 months, as Afghanistan continues its political and security transition. Overall, the resolution calls for UNAMA, led by the Secretary-General's Special Representative, JánKubiš, to continue leading and coordinating international civilian efforts in assisting the South Asian nation with its transition – within the mandate and guided by the principle of reinforcing Afghan sovereignty, leadership and ownership.

In all, the UN was engaged in nearly 56 peace-keeping operations over the years. The approved budget for UN Peacekeeping operations for the fiscal year July 01, 2013 to June 30, 2014 is about $7.83 billion.

See UNGA document, A/C.5/68/21. By way of comparison, this is less than half of one per cent of world military expenditures (estimated at $1,753 billion in 2012). The top 10 providers of assessed contributions to United Nations Peacekeeping operations in 2013 [A/67/224/Add.1] are: United States (28.38%), Japan (10.83%), France (7.22%), Germany (7.14%), United Kingdom (6.68%), China (6.64%), Italy (4.45%), Russian Federation (3.15%), Canada (2.98%), and Spain (2.97%). Many countries have also voluntarily made additional resources available to support UN Peacekeeping efforts on a non-reimbursable basis in the form of transportation, supplies, personnel and financial contributions above and beyond their assessed share of peacekeeping costs. For details see the UN website on peace-keeping operations.

[40] Ian Brownlie, *supra* note 16 at 651-656. Brownlie referred to the attributes of legal personality of international organizations: "1. a permanent association of states, with lawful objects, equipped with organs; 2. a distinction in terms of legal powers and purposes, between the organization and its member states; 3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states" (p.no.649). While several international organizations are thus conferred under their constituent instruments an international legal personality, there could be differences in "their particular capacities" in respect of its relations to members, third states, and other organizations. Moreover, it is the constituent instrument of an international organization that determines the nature of powers it possesses, whether expressly stated or implied in it, to perform a variety of functions (p.no.650, 651).

[41] *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, at 3.

[42] *Id*. at 32, para.33.

[43] *Ibid*.

Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p.no. 23); others are conferred by international instruments of a universal or quasi-universal character."[44]

The Court thus contributed to the emergence of *erga omnes* obligations in international law and in doing so, as the President of the Court noted "it enabled all States parties to multilateral conventions containing such obligations to serve as guardians of the compliance with those rules."[45]

The development of the law concerning the peremptory norms and individual and State responsibility associated with its violations achieved further strength following the adoption Articles 40 and 41 in Chapter III by the ILC of the draft Articles on State responsibility in its second reading in 2001.[46]

The Court's contribution to the world order is significant in an area in which the interests of the international community as a whole have been seeking recognition in law since 1969 as distinct from the interests of States and even the interests of the 'international community of States'. The interests of the 'international community as a whole' now could be said to encompass the interests of States, international organizations, and institutions like the ICRC which is the trustee of the promotion and implementation of the international humanitarian law.[47]

The Advisory Opinion on the Legality of threat or use by a State of nuclear weapons, of July 08, 1996,[48] made some important observations on the matter: *First*, it noted that there is no specific authorization in international law for the threat or use of nuclear weapon.[49] However it is of the view that the " emergence, as *lexlata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinion juris* on the one hand, and the still strong adherence to the practice of deterrence on the other."[50].*Second*, it affirmed that threat or use of nuclear weapon

[44]*Id*., para. 34. This was a case which was mainly concerned with the right of Belgium to sponsor by way of diplomatic protection the claims of its nationals in respect of damage or injury they suffered, at the instance of Spain, as shareholders of the company registered in Canada. The Court rejected the right of Belgium in this regard, noting that it was for Canada to take the necessary action.

[45] See the Statement of the President of the ICJ of November 09, 2018, para.12, *available at*:https://icj-cij.org/files/press-releases/0/000-20181109-PRE-01-00-EN.pdf (last visited November 20, 2018).

[46] See James Crawford, *The International Law Commission's Articles on State Responsibility*35-38 (2002). See also James Crawford, Jacqueline Peel, *et.al.*, "The ILC's Articles on the Responsibility of States for Internationally Wrongful Acts: The Completion of the Second Reading" 12(5) *European Journal of International Law*963-991 (2001). On the relationship between peremptory norms (*jus cogens*) and obligations to the international community as a whole (*erga omnes*), see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, Oxford, 1997). See also, the work of the *Institut de Droit International* on "Obligations and Rights Erga Omnes in International Law" and "the First and Second Reports of Giorgio Gaja as Rapporteur" and the comments of members, Annuaire De L'Institut de Droit International, Session de Cracovie, vol. 71-I (2005), p.no. 117-212. For a discussion on the question whether States have a duty under international law to ensure compliance with obligations ErgaOmnes by other States, see Pemmaraju Sreenivasa Rao, " The Concept of International Community in International Law: Theory and Reality" in I. Bufford et.al (ed.,) *International Law between Universalism and Fragmentation: Festschrift in honor of Gerhard Hafner* 94, 95 (2008).

[47] See Crawford, Peel and Olleson, *Id*. at 973. Reference to the 'international community', however does not mean, according to the authors, that there is a legal person. It only means "that there is only one international community to which all States belong but that it is no longer limited to States (if ever it was)" .

[48]I.C.J. Reports 1996, p.no. 226.

[49]*Id*., para. 52.

[50]*Id.*, para. 73.

not in conformity with Article 2(4) and the requirements of Article 51 as unlawful. *Third*, even where it is considered lawful, the threat or use of nuclear weapons must be compatible with the requirements of international humanitarian law,[51] adding however that, in view of "the unique characteristics of nuclear weapons … the use of such weapons in fact seems scarcely reconcilable with respect for such requirements."[52] The Court nevertheless stopped short of pronouncing on the illegality of the threat or use of weapons, noting that "in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."[53]

For all the disappointment it caused to all those who actively work for a nuclear-free world, the opinion of the Court, an apt example of judicial caution, is not without its blessings and benefits. First it is now clear that the threat or use of nuclear weapons is not above rule of law in the world order and any such threat or use should respect and be in conformity with applicable principles of international environmental law,[54] in addition to the principles governing the use of force and right of self-defence laid down in Articles 2(4) and 51 of the UN Charter and the law governing international armed conflict including international humanitarian law.[55]Second, it emphasized that there was an obligation on the part of nuclear weapon States to pursue in good faith and to conclude negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.[56] It may be noted that Issues concerning the good faith obligations in this regard indeed were recently raised, albeit unsuccessfully,[57] in an application filed by the Marshall Islands against the U.K,[58] India,[59] and Pakistan.[60]

The survey of some limited case law and advisory opinions of the Court reveals that it has exercised its jurisdiction with dynamism and pronounced on matters of crucial importance to world order without undermining its own credibility and future promise.[61]It is discharging its role as the principal legal organ of the UN with great success and asserted itself even on politically sensitive issues. It contributed to enlarge the competence of the General Assembly and the UN through creative interpretation of the provisions of the Charter. It pronounced on issues as fundamental as use of force and self-defence in the context of acts of non-State actors, the principle of non-intervention distinguishing it form general aid and assistance. Even on the issue of the legality of the nuclear weapons, it reiterated several settled principles. It came close but stopped short of pronouncing in favor

[51] For an elaboration of the applicable principles of international humanitarian law, see *Id.*, para. 78-84.
[52]*Id.*, para. 95.
[53]*Id.*,para. 97.
[54]*Id.*, para. 33.
[55]*Id.*, para. 42.
[56] For a reference in this connection to the Treaties, such as the Treaty on the Non-Proliferation of Nuclear Weapons, as well as Security Council resolutions 255 (1968) and 984 (1995), see *Id.*, para. 61.
[57] According to the Court, "no dispute existed between the Parties prior to the filing of the Application, and consequently it lacks jurisdiction to consider these questions".
[58] I.C.J. Reports 2016, p.no. 833.
[59] I.C.J. Reports 2016, p.no. 255.
[60] I.C.J. Reports 2016, p.no. 552.
[61] Only once in the 60s the Court did not live up to the expectations of developing third world countries when it refused to rule upon the violation of the League of Nations mandate by the then South African government. See P. Sreenivasa Rao, "The South-West Africa Cases"6 *Africa Quarterly*236-253(1967). With the result the Court had a sparse case load during 1960-78. The tide again got turned with Niacaragua succeeding in establishing the jurisdiction of the Court in its case against the USA in 1980s when it succeeded in getting some declaratory judgments in its favor.

of prohibition of nuclear weapons only in deference to the current political realities. It thus hinted that certain problems are better solved elsewhere than taking recourse judicial forums.[62]

XI. INTERNATIONAL TRADE AND RULE OF LAW WITH WTO AS THE PIVOT

Contemporary trends in international relations are significantly characterized by the globalization of trade, digital and information technology, increasing spheres of regional economic and political unions as well as security arrangements following the example of the European Union and the NATO. Since 1991, with breaking up of the former Soviet Union and the ending of the cold war that gripped international relations since 1945, the world order controlled by a select few super-powers gave way to a multi-polar world. The global economy also got diversified with several emerging economies playing an important role in the world economy along with the US, West Europe and other States as well as Japan, with China and India occupying a pre-eminent role in the process.

The World Trade Organization (WTO), established since 1995, built on the earlier global arrangement on trade and tariffs, known as the 1947 General Agreement on Trade and Tariffs (GATT), occupies a central role in regulating international trade, with a compulsory settlement of disputes mechanism settling hundreds of trade disputes.[63]The WTO agreements[64] are based on some basic principles: non- discrimination, lowering trade barriers, providing for a stable, predictable and transparent legal regime to govern international trade, discouraging unfair practices, according greater flexibility and special privileges to developing countries and countries in transition to market economies, and protection of environment. In sum, these WTO agreements are aimed at promoting free trade and discouraging protectionist policies or measures, with a view to let consumers enjoy the benefits of competition, such as increased choice and lower prices.

The dispute settlement mechanism of the WTO was built upon the principles and procedures which were evolved informally but on the basis of the principle of consensus during the operation of the 1947 GATT arrangement for over 50 years since 1948. This system though made useful contribution to the settlement of trade disputes between States was not strictly a rule based system and avoided dealing with politically sensitive issues like unilateral sanctions or adopting panel reports that might be politically unacceptable.[65]The

[62] In this the Court appear to have followed the wise observation of Jennings: "It is important to appreciate that there are large and important areas of international relations where what is wanted is not a decision based on law, but a decision based upon political wisdom, or even expediency, and the lessons of political and administrative experience". See Connie Peck and Roy S. Lee (eds.), *Increasing the effectiveness of the International Court of Justice*, Proceedings of the ICJ/UNITAR Colloquium to celebrate the 50th Anniversary of the International Court of Justice 78 (Martinus Nizhoff, 1997).

[63] For a summary of 316 disputes settled by GATT during the period between 1948 to 1995, see World Trade Organization, GATT disputes: 1948-1995,vol. 1: Overview and one-page case summaries. www.wto.org/GATTdisputes. According the WTO Annual Report for 2018,dispute settlement activity intensified in 2017, with the monthly average of panel, appellate and arbitration proceedings increasing to 38.5 compared with 32.3 in 2017. The WTO currently has 164 members, representing 98 per cent of world trade.

[64] These agreements include the General Agreement on Tariffs and Trade 1994, the Anti-Dumping Agreement, the Subsidies and Countervailing Measures Agreement, the Safeguards Agreement, the Sanitary and Phytosanitary Measures Agreement, the Technical Barriers to Trade Agreement, the General Agreement on Trade in Services, the Trade-related Aspects of Intellectual Property Rights Agreement and the Agreement on Agriculture.

[65] It may be recalled that the 1947 GATT arrangement did not provide for a detailed dispute settlement procedure, as it was not conceived as an international organization. Instead, it contained only two brief provisions relating to dispute settlement: art. XXII and XXIII. Under this system, a dispute, which parties failed

Dispute Settlement Understanding adopted at the Uruguay Round of Negotiations remedied the situation by providing for:

> "(1) the quasi-automatic adoption of requests for the establishment of a panel, of dispute settlement reports and of requests for the authorization to suspend concessions; (2) the strict timeframes for various stages of the dispute settlement process; and (3) the possibility of appellate review of panel reports. The latter innovation is closely linked to the quasi-automatic adoption of panel reports and reflects the concern of Members to ensure high-quality panel reports."[66]

The DSU and its ability to resolve scores of disputes essentially on the basis of consultations, good offices and mediation and conciliation procedures, combined with political and pragmatic considerations, without however compromising in the final analysis on the legal rights and obligations States parties enjoy under the WTO Agreement is truly a jewel in the crown of the WTO system from the perspective of rule of law in international trade relations.[67]

XII. FOREIGN DIRECT INVESTMENTS AND INVESTOR-STATE ARBITRATION IN A GLOBALIZED WORLD

Simultaneously, globalization also encouraged foreign direct investment. Both developed and developing countries attach high value to FDIs as one of the primary driver their economic growth. While developing countries during the early post- colonial phase depended on expropriation of foreign assets as a tool to nationalize their assets, they soon realized the value of FDIs and transfer technology as essential for their long-term growth. Several bilateral or multilateral investment treaties and regimes now provide a basis for investments and the settlement of disputes between host States and foreign investors through international arbitral proceedings.[68]The Convention on Settlement of Investment Disputes concluded under the auspices of the World Bank, in force since October 14, 1966 and operated by the International Center for Settlement of Disputes is one such mechanism.

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to resolve through consultations, was in the early years of the GATT "handled" by working parties set up pursuant to art. XXIII:2. These working parties consisted of representatives of all interested Contracting Parties, including the parties to the dispute, and made decisions on the basis of consensus. The practice of settling disputes was soon replaced by a panel system whereby disputes are handled first by three to five experts chosen from GATT Contracting Parties not involved in the dispute. Panel reports and recommendations were then submitted to the GATT council consisting of all the members and would have to be adopted by consensus for them to be legally binding.

The major drawback of the 1947 GATT system of settlement of dispute was that the decision on the establishment of a panel, the decision on the adoption of the panel report and the decision to authorize the suspension of concessions were to be taken by the GATT Council by consensus. Accordingly, panels were often tempted to arrive at a conclusion that would be acceptable to all parties, whether that conclusion was legally sound and convincing or not. For an analysis of the 1947 GATT system of settlement of disputes, see UNCTAD, Dispute Settlement: World Trade Organization, 3.1 Overview (UN, 2003), UNCTAD/EDM/Misc.232/Add.11, p.no.39-54.

[66]See *Id*. at 41.

[67] For the reference to the DSU as the crown jewel in the WTO system, see A.K. Koul, *The General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO): Law, Economics and Politics*45 (Satyam Books, Delhi, 2005).

[68] The traditional methods of settlement of disputes in the case of foreign investors through diplomatic protection or through recourse to domestic forums of the host State, the normal mode available were considered unsatisfactory. For an examination of the different methods of settlement of investment disputes, see Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International BV, The Netherlands, 2009).

Beginning with the *Maffezini* case (*Argentina* v. *Spain*)[69] bilateral investment treaties concluded between two States to promote and protect investment made in the territory one party by the nationals of the other party also are invoked as a basis for foreign investors to sue the host State for any claims concerning their investment. The jurisdiction of the arbitral tribunal which is often at issue was in most of these cases settled over the objections of the host State through a liberal interpretation of the clauses of the treaty, particularly the most favored nation treatment. The tribunals also enlarged the scope of protection in favor of the foreign investors by interpreting key concepts like, 'investor', 'investment' and the umbrella clauses dealing with the national treatment and most-favourednation treatment principles, the meaning and extent of fair and equitable treatment.[70]

This mode of investor-State arbitration has since been the subject of intense review by several developing countries, which in the main, are hosts to foreign investors and their investments.[71] From the perspective of rule of law, it is also important to reconcile the protection of foreign direct investments with the public policy objectives of the host State to protect the rights of their indigenous population, environment, and scarce resources. Given the lack of human and financial resources needed on the part of the developing countries to adequately "navigate"within the investor-State dispute settlement system, due to lack human, financial and technical expertise, it is also necessary for the international community to provide necessary help to promote capacity building. Towards this end, "Strengthening international institutional capacities to help developing countries manage better investor-State disputes could provide an additional, and probably cost-effective, option in this area."[72]

XIII. GLOBALIZATION AND MULTILATERALISM UNDER ATTACK: THE RULE OF LAW IN JEOPARDY

The global economic melt-down that occurred in 2008 was a wake-up call on the ill effects of globalization, raising "important questions about our global-governance architecture". It is suggested that in today's world, where "the challenges associated with the Fourth Industrial Revolution (4IR) are coinciding with rapid emergence of ecological constraints, the advent of an increasingly multipolar international order and rising inequality"; and 'globalization 4.0' which has only just begun requires us to "draft a blueprint for a shared global-governance architecture" and "avoid becoming mired in the current moment of crisis management."[73]

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[69] See for analysis of the case and its significance for the issue of jurisdiction of the international arbitral tribunals as well as for enlargement of the scope of obligations of the host State under the agreement, see UNCTAD, "Investor-State Disputes Arising From Investment Treaties: A Review", UNCTAD Series on International Investment Policies for Development, United Nations 35-37 (New York and Geneva, 2005).

[70] For a review of the investment treaties and related procedural and substantive issues, see *Id.*, chap. I and II.

[71] For example, India and many countries have been engaged in a review of their policy in this regard: Prabhash Ranjan, "National Contestation of International Investment Law and the International Rule of Law" in Machiko Kanetake and André Nollkaemper (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference*115-142 (Hart Publishing, 2016), ch.5.

[72] See UNCTAD, "Investor-State Disputes Arising From Investment Treaties: A Review", note 24, p.no. 61.

[73]See Klaus Schwab, "Grappling with globalization 4.0", *Gulf Times* (Doha, Qatar), Nov. 13, 2018, p.no. 22.Klaus Schwab, founder and executive Chairman of the World Economic Forum notes that it is important to clearly distinguish between "globalization" and globalism": "Globalization is a phenomenon driven by technology and the movement of ideas, people and goods. Globalism is an ideology that prioritizes the neoliberal global world order over national interests". The former, he suggests, is a fact we have to accept and the latter is a debatable policy choice.

Added to the demands raised by globalization, is the increased flow of refugees, not merely the political refugees, seeking to escape from the armed internal conflicts and economic crises that are gripping large parts of Asia, Africa, and the Latin America. The problem of migration and migrants is today one of the most complex issue faced by the world order. A new class of political activists referred to as 'extreme rightists', demand closing off economies through protectionism and 'nationalists'[74]politics, besides opposing migration and migrants from Asia, Africa and the Latin America. These trends have now succeeded in putting the much cherished values like pluralism, inclusiveness and humanism and the liberal regimes based on them in jeopardy.

Several factors are responsible for this new trend. They include among others: the controversial policies and trade wars the Trump administration is credited with,[75]carried

[74] Nationalism or patriotism is a positive sentiment. However, 'nationalists' sentiment represents altogether a different ideology and sentiment. It aims at negating the reality of globalization and dismembering global economic and political institutions, like the European Union. Nationalists oppose "two strains of internationalism" that Bannon and his allies want to do: "one of the liberal center-right and the other of the liberal center-left". Steve Bannon of the USA is credited with being "the key theoretician of US President Donald Trump's signature brand of nationalism'. See Kemal Dervis and Caroline Conroy, "Nationalists of the world, Unite", *Gulf Times* (Doha, Qatar), Monday, Nov. 26, 2018. This short note compares the current trend to build a federation of nationalist parties with the earlier historic attempt to forge socialist internationalism or global communism, which was firmly rooted in classical Marxism, at the beginning of the last century. Noting that the earlier attempt failed eventually given the force and appeal of market economy embraced by the West and other emerging economies including China, a "nominally communist country, it is suggested that this latest attempt to forge a "neo-nationalist international', an international alliance of the right wing nationalists would also fail because on the face of it 'nationalist internationalism' is an "oxymoron". The authors of this note are Fellows at the Brookings Institution, Washington, D.C. Mr. Dervis was a former Minister for Economic Affairs of Turkey and a former Administrator of the United Nations Development Program (UNDP).

[75] Trump upon his election as the President of the USA decided unilaterally to with draw the US from the Joint Comprehensive Action plan (JCPOA), otherwise known as the 2015 Iran Nuclear Deal, negotiated painstakingly by the Obama administration in cooperation with the EU, Russia and China freezing Iran's nuclear program for ten years, as a first step to settle several other issues including the issue concerning support to non-State actors and Iran's missile development program. Following that the Trump administration also imposed sanctions on Iran, much against the wishes of its European Allies who decided to stay the course with the JCPOA. It is likely that these actions would increase tensions between not only the US and Iran but eventually between Iran and the EU and the West. Similarly, the Trump administration pulled out of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which was once again maintained by the other 11 partner States despite the unilateral withdrawal of the US. This is a great setback to multilateralism and mega-regional trade arrangements which are aimed at filling the vacuum created by the failure of the Doha round of WTO negotiations. On the question of addressing growing migration challenge, a growing number of countries led by the US more recently raised several objections to the agreement developed under the UN auspices on the Global Compact for Safe, Orderly and Regular Migration, setting out some best practices. Even though the Marrakesh Agreement was eventually concluded earlier in December, it is unlikely that this will lead to a uniform global approach to the pressing problem. This is clear from the insistence of the Trump administration to persist with the construction of a wall across its border with Mexico despite lack of support for the same from the US Congress. Finally, mention may be made of the Trump administration's policy to ignore and even reject the urgent appeals world- wide for taking necessary action, by express treaty commitments, to maintain rise of global temperatures "well below 2C above pre-industrial level and [to pursue] efforts to limit the temperature increase to 1.5C above the pre-industrial levels". It is of some comfort that despite doubts raised and opposition expressed by the USA, Russia, Saudi Arabia and Kuwait to accept a key scientific report prepared by the Intergovernmental Panel on Climate Change, the Katowice Climate Change Conference (COP24) held in Poland on 2-14 December 2018, States parties agreed to a rulebook on time to implement the 2015 Paris Climate agreement. It may be recalled the 2015 Paris Agreement on Climate Change, hailed as a breakthrough in climate action and a pioneering approach to global governance, established a framework of overlapping soft and hard obligations. The US decision to pull out of the Paris Agreement would come into effect only in 2020. For an account on these matters see, Ana Palacio, "COP24 deal offers reprieve for global governance", *Gulf Times* (Doha, Qatar), Friday, Dec. 21, 2018, p.no. 14; and Jeffrey D. Sachs, "For Climate Safety, call in the engineers", *Gulf Times* (Doha, Qatar), Saturday, December 22, 2018, p.no. 14.

under the banner, termed as, 'Make America Great Again',[76]constant flow of migrants from Africa and Syria into Europe, resulting in the fall of leaders like Merkel in Germany, 'the yellow west' protests in France,[77] and the decision of the U.K. to leave the European Union, the so-called Brexit, the rise of the 'right extremists' in Europe in general, terrorism and religious intolerance, the rise and role of ISIS, internal conflicts in Syria and Yemen, the unilateral sanctions imposed by the USA on Iran, the heightened tensions between Israel and the Arab nations, following the shifting of the US Embassy in Israel from Tel Aviv to Jerusalem,[78] on the one hand and between the Sunni and Shia on the other, chiefly represented by the open rivalry between States supporting Saudi Arabia on one hand and Iran and the forces aligned with it on the other.[79]

The contemporary trends are disturbing enough for Fischer, a former German Foreign Minister and a leader of the German Green Party to note while assessing the significance of the announced retirement of Angela Merkel, that "international ruptures are shaking the very foundations of Germany's post-war democracy".[80] In this connection, equally noteworthy are developments concerning the Brexit, which is, as Varoufakis, a former Greek Finance Minister and professor of economics at the Athens University puts it, "A mere shadow when compared to the muffled but more fundamental disintegration taking place across the European Union."[81]

According to him the rise in 'nationalism', protectionist policies, xenophobia, inhuman austerity policies to secure budgetary surpluses during deflationary times could lead to the European disintegration of the European Union. One immediate result of the austerity policies, he adds, is the "crumbling infrastructure and deteriorating public services, reflected in overburdened hospitals and underfunded schools."[82] Added to this trend, there is the

[76] For a critical view of this policy, see https://www.nytimes.com/2018/10/23/opinion/midterms-democrats-trump-house-senate.html (last visited on November 20, 2018).

[77] 'Yellow Vests' or low wage earners in general who took to streets recently in France and elsewhere in Europe and even in Sudan more recently to demand higher wages and lower taxes hail from the very bottom of social order. These people who work long hours and accept low-wages are "often overworked and insecure", and because they are not unemployed their problems are easily overlooked by elites". For an understanding of the "Yellow Vests" movement, see Slawomir Sierakowski, "Yellow Wests are here to stay", *Gulf Times*, Saturday, Dec. 22, p.no. 15.

[78] For the application of the State of Palestine before the ICJ challenging the legality of the shifting of the US Embassy from Tel Aviv to Jerusalem and Order passed by the Court on November 15, 2018, fixing May 15, 2019, for the Memorial of the State of Palestine; November 15, 2019, for the Counter-Memorial of the United States of America as time limits, See "Relocation Of The United States Embassy To Jerusalem" (*Palestine* v. *United States Of America*), General List No. 176. For a broad understanding of the position of Israel and the State of Palestine, see James Crawford, "Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States"in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *Reality of International Law*95-124 (Clarendon Press, Oxford, 1999). On to the US decision of December 6, 2017, to move its Embassy in Israel from Tel Aviv to Jerusalem, see Stephen Farrell, "Why is the U.S. moving its embassy to Jerusalem?", *available at*:https://www.reuters.com/Article/us-usa-israel-diplomacy-jerusalem-explai/why-is-the-u-s-moving-its-embassy-to-jerusalem-idUSKBN1I811N (last visited on November 20, 2018).See also"United States recognition of Jerusalem as capital of Israel",*available at*:https://en.wikipedia.org/wiki/United_States_recognition_of_Jerusalem_as_capital_of_Israel (last visited on November 20, 2018).

[79]Blog Post *by* Steven A. Cook, "Why the Myth of Sunni-Shia Conflict Defines Middle East Policy—and Why It Shouldn't",*available at*: https://www.cfr.org/blog/why-myth-sunni-shia-conflict-defines-middle-east-policy-and-why-it-shouldnt (last visited on December 10, 2018).

[80]Joschka Fischer, "Angela Merkel's long goodbye", *Gulf Times* (Doha, Qatar), Thursday, Dec. 6, 2018, p.no. 2.7, col. 1.

[81]Yanis Varoufakis, "Pre-Condition for ending Europe's disintegration", *Gulf Times* (Doha, Qatar), Monday, Dec. 3, 2018, p.no. 22, col.3.

[82]*Ibid.*

Trump factor which actively encourages the far right, 'populist', 'white supremacy' attitudes producing a real "battle between progressives and authoritarians, whether establishment Austrians or insurgent racists."[83]

The fact is that the world is facing one crisis after another whether it is on political or economic front, while the UN Security Council is completely blocked by lack of consensus on the part of the five permanent members. Without the Security Council having a common minimum program to take any meaningful action to maintain international peace and security, the raging national and international conflicts would remain unresolved.[84] States in Asia, Africa and the Latin America are increasingly finding it difficult to provide political stability, good governance and basic necessities to their citizens being victims of corruption, internal conflicts, and terrorism besides not having the necessary financial, economic and technological means to push their development agenda. Even countries in the world's highly successful economies are struggling to meet their responsibilities towards their citizens, with large sections of their working class taking to streets to protest against low wages, rising unemployment and deteriorating health, education and social services. Sachs, a leading US development economist warns us about the negative impact on "the United Nations system, the European Union, and other multilateral organizations [which are] under great stress, because their budgets are inadequate to meet their responsibilities,"[85] in promoting Sustainable Development Goals.[86]The USA, EU and other developed countries are being

[83]See *Id.*, col.5.

[84] There are several questions that are pertinent in relation to the powers and effectiveness of the Security Council that are debated and still unresolved as any change in the present structure and powers of the Security Council would require amendments to the UN Charter, considered a wholly futile exercise given the fragmented nature of international relations and political rivalry among major powers. There is an ongoing debate about the reformation of the composition and powers of the Security Council, to enlarge its membership, to remove or restrict the right of veto, to subject decisions of the Security Council to judicial review, and to ascribe responsibility for acts considered as wrongful to the UN, to define or restrict the discretion of the Security Council in determining 'threats to peace' or acts of aggression. See for a note on some of these issues at the turn of 50 years of the United Nations, Milan Sahovitch, "The Charter VII of the UN Charter after the End of the Cold War" in M.S.Rajan (ed.),*supra* note 28 at 157-166. For the view that "Not only structurally, but also geopolitically, the United Nations as of 1995, is seriously anachronistic", see Richard Falk, "Explaining the United Nations Unhappy 50th Anniversary: Toward Reclaiming the Next-Half Century", in M.S.Rajan (ed.), *Id.* at284. See also for a review of the UN and its role in evolving a new world order, M.S.Rajan, "The United Nations since the end of the Cold War" in M.S. Rajan (ed.), *Id*. at 1-29.

[85] Jeffrey Sachs, "Financing international Co-operation", *Gulf Times* (Doha, Qatar), Dec.03, 2018, p.no.23, col.1. See also Davesh Kapoor and Arvind Subramaniam, "Can the World Bank redeem itself?", *Gulf Times* (Doha, Qatar), December 7, 2018, p.no. 14. While appreciating the World Bank's role "as a supplier of global public goods and a "knowledge bank" that provides data, analysis, and research to its developing country clients", and for "gathering indicators of economic activity, measuring poverty, identifying deficiencies in the provision of health and education and in the early years designing and evaluating development projects", the authors find fault with the World Bank for kowtowing "to its most powerful shareholders and their vested interests (such as Big Pharma and the financial industry, arguably in exchange for additional resources for its soft-loan window"; and in the process neglecting its "responsibility…to act as an advocate for its poor clients". Stressing in this connection the importance of maintaining an open global system, they caution that the World Bank "will not only fail its clients throughout the developing world; it will also lose whatever is left of its raison d'etre", if it "chooses not to uphold its core tenet of its mission, and instead continues to try integrating itself with its largest shareholders".

[86] Fortunately the cooperation between public and private sector which is increasingly urged and worked out appear to neutralize to some extent the stress and inability of global institutions in this regard. Recalling that the United Nations adopted Sustainable Development Goals in September 2015 to achieve a more sustainable future for all", by 2030, which goal is stressed as essential to prevent the planet from facing an irreversible damage by the recent report of Intergovernmental Panel on Climate Change (IPCC), it is estimated by the Business and Sustainable Development commission that meeting the SDGs could add "some $12tn and 380mn jobs to the global economy by the end of the next decade", encouraging private sector and 69% of business

forced or encouraged to adopt protectionist policies and turn away from seeking solutions through international cooperation and support to multilateral institutions. The decisions of the US Government under the Trump administration to pull out of its membership of the UNESCO (following admission of the State of Palestine as a full member), the Human Rights Council (after it launched a probe into recent killings in Gaza and accused Israel of excessive use of force, criticizing it as having permanent anti-Israel bias) and repudiating some of the international arrangements or agreements, like the Paris Agreement on Climate Change, NAFTA, Trans Pacific Partnership, the 2015 nuclear deal with Iran,[87] and it is also challenging the legal regime governing international trade by resorting to unilateral measures on tariffs and imposing economic sanctions. It is also a matter of some concern that the WTO is unable to make progress on several issues it identified as in need of reform at its Doha round of ministerial consultations.[88] Another cause for concern is the despite the pivotal role the Appellate Body has in the dispute settlement system of the WTO, and the great contribution it has been making the system a rule based one, thus serving the cause of the rule of law, three vacancies on the 7 member Appellate Body remain unfilled, thus increasing the work load on the existing members.[89] If the trend continues and the vacancies are not filled by next year when two more members are due to retire, the work of the Appellate Body would come to stand-still, leaving several appeals pending. That would be a blow to highly rated dispute settlement record of the WTO and might even trigger an unraveling of the WTO system itself.

In this context the warning sounded by the President of the ICJ participating in the meeting of the UN Security Council commemorating the end of the first world war, one hundred years ago:

> "Regulating global issues through a web of bilateral agreements has been tried in the past. It never worked. The spider web simply collapses on itself. It produces no silk. At best, it leads to a fragmented legal order composed of contradictory international

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executives to integrate these Goals into their business strategies. See Paul Polman, "A business model for sustainability", *Gulf Times* (Doha, Qatar), Wednesday, Dec. 26, 2018, p.no. 14.

[87] See for a short press note on these matters, "Trump's top five withdrawals from international agreements",*available at*:https://www.trtworld.com/americas/trump-s-top-five-withdrawals-from-international-agreements-18543 (last visited on December 30, 2018). It is also observed in this connection that "While the US withdraws from several United Nations bodies such as UNESCO, Human Rights Council, Population Fund; cuts its support for the Palestinian peace process; contemplates withdrawal from the World Trade Organization; and criticises the ineffectiveness of NATO, it is crystal clear that the form of globalisation envisioned by Washington DC is going through a qualitative shift", *available at*: https://www.trtworld.com/opinion/a-clash-of-globalisations-between-us-exceptionalism-and-chinese-pragmatism-20288 (last visited on December 30, 2018). In this process, the US is pitted against China which has strong bias in maintaining free access to global markets, vying with the US to gain supremacy as the super-power. The economic and power struggle between the two super-powers is another cause for affecting global peace and security, with other major powers Russia, the EU, Japan and India having to watch their own interests in the future but uncertain world order.

[88] The Doha Round is the latest round of trade negotiations among the WTO membership. Its aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The work programme covers about 20 areas of trade. The Round is also known semi-officially as the Doha Development Agenda as a fundamental objective is to improve the trading prospects of developing countries. The Round was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001. The Doha Ministerial Declaration provided the mandate for the negotiations, including on agriculture, services and an intellectual property topic, which began earlier. In Doha, ministers also approved a decision on how to address the problems developing countries face in implementing the current WTO agreements. See https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited on December 30, 2018).

[89] See the latest annual report, 2018, the section on dispute settlement mechanism of the WTO, https://www.wto.org/english/res_e/booksp_e/14_anrep18_disputesettlement_e.pdf (last visited on December 30, 2018).

legal obligations. Predictability, stability and certainty of the rule of law disappear. That is why your initiative is timely today when we are commemorating the end of the first world war, one hundred years ago, which gave a new impetus to the development of multilateralism."[90]

XIII. CONCLUDING REMARKS

The rule of law in international relations is as important as it is in national affairs. Since the First Hague Peace Conferences in 1899, the international community of States has been building the rule of law in international relations brick by brick. The building of a legal community of mankind commenced with the establishment of the Permanent Court of Arbitration in 1899 to settle disputes on the basis of international law instead of resorting to the use of force which until then was the chosen path. The construction of an international system under the rule of law taken to the next and more advanced stage with the creation of the League of Nations and the establishment of the Permanent Court of International Justice in 1922, following the First World War, even if did not survive too long. However, the end of the Second World War in 1945 saw the birth of the United Nations, built upon the foundations of the earlier experience, prohibiting the use of force and the setting up of a collective security system for the maintenance of international peace and security.

The UN and the ICJ, its principal judicial organ, is at the center of promotion of rule of law in international relations. The work of the UN and a host of other international organizations on such areas as climate change, terrorism, corruption, fighting poverty, disaster management, migration and refugees, and helping countries sustain good governance during conflict and post-conflict situations is central to maintenance of international peace as it is for the very survival of the future generations of mankind.

Some of the features of the international rule of law, giving rise to "obligations for States with or against their will"[91] have since become standard and well-accepted are noted above. The thick web of common interests and interdependent, if not totally integrated nature of international relations, particularly in areas of commerce, trade and finance, signifies a stage of globalization that is irreversible. The extensive network of international organizations and the hundreds of international treaties and agreements and the consequent 'multilateralism' moved the international community from "bilateralism" to rely on "community interest" in building international law as a basis for the rule of law.[92] They have also rendered unilateral sanctions counter-productive and even harmful to national interests, not to speak of their adverse effect on peace and security, and justice.

It is noteworthy that the rule of law in international relations is strong and ever expanding, thanks to the necessities of international life and the work of important regional and international institutions harmonizing the common interests of the international community composed of States and a variety of other participants. 'Reciprocity' and the culture of compliance generally provide the basis for effective implementation of international obligations.

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[90] See the Statement of the President of the ICJ, *supra* note 45, para.3.

[91] For an engaging study on this aspect see Christian Tomuschat, "Obligations Arising For States Without or Against Their Will" 241 *Recueil des Cours*195-374(1993-IV).

[92] For an exposition on this theme, see Bruno Simma, "From Bilateralism to Community Interest in International Law" 250 *Recueil des Cours* 221-384 (1994-VI).

While the world wars may have become history, the threat to the survival of mankind not only from the weapons of mass destruction but also from a variety of other sources cannot be under-estimated. These include: slow and inadequate levels of global response to climate change, the number of internal armed struggles and the ever present terrorist attacks carried out by an international network of domestically grown terrorist organizations, not wedded to the rule of law, and the rise of extreme rightist or 'nationalist' movements and populism opposed to pluralism and inclusiveness, trade wars and aggressive political posturing displacing traditional diplomatic discourse in international relations.

The crying challenges facing the international community cannot afford these negative trends. The "requirements of the international life", as the President of the ICJ so eloquently noted, dictates "the necessity of multilateral co-operation in a diverse and complex range of areas of common concern to humanity". "It is this common concern of humanity", he stressed, "recognized in many multilateral conventions, together with the shared values we all hold dear, which render imperative the strengthening and consolidation of multilateralism as well as the rules and institutions underpinning it."[93]

[93] Statement of the President of the ICJ, *supra* note 45, para.14.

BREXIT: TO BE OR NOT TO BE (IN THE EU)?

Stelios Andreadakis[*]

I. INTRODUCTION

June 23rd, 2016! A date that has left its mark in both the constitutional history of the United Kingdom, but also the every-day life of more than 65 million people, who live and work in the UK. The referendum was initially promised in January 23, 2013 by the then Prime Minister James Cameron, who decided that it was time for the British people to have their say and settle the relationship between the UK and the European Union in a clear way.[1] The Labour leader, Ed Miliband, accused Mr. Cameron of putting the country through years of uncertainty, and taking a huge gamble with the economy.

March 2019! Six years later and just a few days before the deadline,[2] Miliband's words have proven quite accurate. Regardless of how the Brexit saga will be concluded, the past six years have been full of uncertainly and it is still not clear whether the negotiation process was conducted in the most diligent way for the future of the country and its citizens.

The present piece will offer an overview of the Brexit process so far, before attempting to reflect on the future, although there are still numerous unanswered questions about key aspects of this process.

II. FROM EU ROSCEPTICISM TO THE PROMISE FOR A REFERENDUM

The rationale behind the promise of the referendum made in the Bloomberg speech was connected with the challenges confronting the EU: problems in the Eurozone were driving fundamental change in Europe; there was a crisis of European competitiveness; and there was a gap between the EU and its citizens, which had grown in recent years, this betokening a lack of democratic accountability and consent that was felt particularly acutely in Britain.[3] The Prime Minister articulated a vision for the EU grounded on five principles: competitiveness; flexibility; the two-way flow of power, back to the Member States, as well as upward to the EU; democratic accountability, with an enhanced role for national parliaments; and fairness in relation to the arrangements for those inside and outside the Eurozone.[4] Interestingly, the Scottish, Welsh and Northern Ireland governments had expressed their opposition to the prospect of leaving the EU. For example, the Scottish Government's Agenda for EU Reform paper[5] disagreed with the proposed renegotiation of

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[1] David Cameron, "EU Speech at Bloomberg", *available at*: https://www.gov.uk/government/speeches/eu-speech-at-bloomberg (last visited on April 04, 2019).

[2] Prime Minister Theresa May triggered the Article 50 process on March 29, 2017, which means that the UK is scheduled to leave at 11pm UK time on Friday, March 29, 2019. Recently, the EU Member States agreed to grant Britain a short Brexit delay and set a new deadline for April 12, 2019 if the Withdrawal Agreement is not approved by the Parliament or May 22, 2019 if the Parliament approves the Agreement.

[3] P. Craig, "Brexit: A Drama in Six Acts" 41(4) *European Law Review* 452 (2016).

[4] *Supra* note 1.

[5] Scottish Government, "Scotland's Agenda for EU Reform", *available* at: https://www.webarchive.org.uk/wayback/archive/20170110142717/http://www.gov.scot/Publications/2014/08/5067/downloads (last visited on April 04, 2019).

Britain's EU membership, did not support the potential subsequent referendum, and was supporting the view that EU reform can be delivered without major Treaty change.[6] Although the decision to hold a referendum and the potential UK exit from the EU would raise a large number of legal questions in relation to agriculture and fisheries, competition and intellectual property law, migration and trade, civil procedure and human rights, none of them were considered or discussed to any great extent in the weeks and months before the Referendum.[7]

It thus needs to be clarified that there was in reality no pressing need to call this referendum. It cannot be argued that the country was divided and it was essential that people should be given the choice of whether to stay in or leave the EU. Apart from the Eurosceptics camp in the Conservative Party, it is far from true that the EU was in the top of the agenda of British politics; in fact, for the ordinary voters the EU never ranked higher than about number 7 or 8 on the list of things that most concerned them when deciding how to vote. Concerns about immigration ranked higher, but issues, such as health, education, economy and crime, were always ranked above the EU.[8] Therefore, it is confirmed that the referendum was called primarily for political reasons and, more specifically, due to the internal divisions within the Conservative Party.

III. SOVEREIGNTY AND A REALITY CHECK

A lot of the referendum-related debate was phrased in terms of regaining sovereignty. Has (or will) the UK regained sovereignty or 'sovereign freedom' post-Brexit or was David Cameron right to claim that all we would gain was the illusion of sovereignty?

In terms of external sovereignty, the UK always had the ability to join and to leave an international Treaty. Article 50 merely sets out a way through which this can be exercised. The UK exercised its external sovereignty by deciding to leave and it did so again when negotiating the withdrawal agreement and also in the future by ratifying this agreement (if it happens) so it can have effect in UK law.

It is true that as a Member State of the EU, there would have been areas in which the UK Parliament would have found it difficult to legislate given the requirements of EU law. However, it is important to remember that the UK would have had a say in the making of these laws. First, the UK Parliament enjoyed pre-legislative scrutiny, as the Commission's common practice would be sent to the UK and other national parliaments. The UK Parliament could comment more generally and also raise concerns as to subsidiarity, including forcing the Commission to reconsider if enough national Parliaments also raised concerns of subsidiarity. Second, most legislation is enacted through the co-decision

[6] S. Douglas-Scott, "A UK exit from the EU: the end of the United Kingdom or a new constitutional dawn?" 25 *Cambridge Journal of International and Comparative Law* (2015), *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574405 (last visited on April 04, 2019). This was confirmed by the results of the 2016 Referendum, as the four constituent countries favoured different approaches: while both England (53.4 percent) and Wales (52.5 percent) voted to leave the EU, Northern Ireland (55.8 percent) and Scotland (62 percent) opted to remain. See BBC, "EU Referendum Results", *available at*: www.bbc.com/news/politics/eu_referendum/results (last visited on April 10, 2019).

[7] Holger P. Hestermeyer, "How Brexit Will Happen: A Brief Primer on EU Law and Constitutional Law Questions Raised by Brexit", King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2016-36, 2 (2016), *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825092 (last visited on April 10, 2019).

[8] https://www.ipsos.com/ipsos-mori/en-uk/economy-immigration-and-healthcare-are-britons-top-three-issues-deciding-general-election-vote (last visited on April 10, 2019).

procedure. UK members of the European Parliament and UK Ministers, as members of the Council, would have had the ability to deliberate and vote on this proposed legislation, even without having a veto power. It is extremely unlikely that the UK will retain this role in the EU law-making process following withdrawal from the EU.[9] Yet, the UK may still be bound to adhere to some aspects of EU law, for instance, those related to the operation of the internal market. To put it differently, irrespective of the content of the withdrawal agreement struck between the UK and the EU, anyone seeking to do business in the EU will continue to be bound to comply with EU rules if they wish to sell goods or services into the EU. The real difference in a post-Brexit world is that the UK will have no seat at the table and hence no voice when the relevant regulations are being drafted. The UK's sovereignty over economic and regulatory issues is also significantly circumscribed in relation to non-EU trade. This is because a great many standards that regulate safety and the like are set at the global level, through transnational or international regulatory organizations. These standards are binding factually and legally in the UK and this will not change in a post-Brexit world.

What will change is that the UK will, once again, have little or no voice in the framing of these rules. The principal players in this regard are the EU and the USA, and while we currently have influence through the former, this will cease if we leave the EU. This point is equally relevant in relation to the new breed of trade deals, such as the Transatlantic Trade and Investment Partnership (TTIP), between the EU and the USA. The reality is nonetheless that the UK will have no influence over such deals, but the UK will be significantly affected by the rules contained therein if the agreement is finalized. The degree of sovereign autonomy 'regained' over social and environmental issues broadly conceived will depend on a plethora of factors, which were not presented to voters.

These include the nature of the post-Brexit deal struck with the EU and how far this will require us to comply with EU social policy; the extent to which we will remain bound by subsisting international agreements on matters, such as the environment; how far a post-Brexit government will seek to reduce worker protection, an issue studiously ignored by the Leave Camp; and the downside cost of increased sovereignty, as exemplified by the fact that post-Brexit the UK will no longer benefit from the European Arrest Warrant, whereby thousands of criminals have been sent back to other EU countries to face trial, which will have to be replaced by 27 separate extradition treaties, a situation which law enforcement agencies view with extreme unease.

IV. ON THE TABLE OF NEGOTIATIONS

Once the decision to withdraw from the Union was notified to the European Council, formal negotiations on Brexit could commence. Pursuant to Article 50(2) of the TEU, which provides that "the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union", the EU and the U.K. will have to discuss two separate, but related item: firstly, the arrangements for the UK's withdrawal and the framework for its future relationship with the EU.

The first item involves mostly technical issues related to the divorce between the UK and the EU after decades of EU membership and participation in the European Union.

[9] Alison Young, "Regaining Sovereignty" in Pavlos Eleftheriadis (ed.), *Legal Aspects of Withdrawal from the EU: A Briefing Note* (2016). Oxford Legal Studies Research Paper No. 47/2016, 7-8, *available at*: https://ssrn.com/abstract=2809285 (last visited on April 10, 2019).

Despite being technical or procedural in nature, quite a few of these issues, including the rights of EU citizens in the UK as well as UK nationals abroad, budget contributions, social security and so on, in practice these issues proved to be sensitive and quite complex.

The second item on the future relationship between the EU and the UK basically concerns the terms of the agreement between the two parties on trade and the internal market.

Before the House of Lords, Sir David Edward argued that the "long-term ghastliness of the legal complications is almost unimaginable"[10] and he was absolutely right. However, not only because of the complexity of the related issues, but primarily because of the lack of a clear strategy from the UK in terms of aims, objectives and intended outcomes. There were a number of options on the table, such as the UK joining the EFTA, the UK remaining in the EEA, the UK following the example of Switzerland signing bilateral agreements, the UK negotiating a special trade agreement with the EU or opting for Turkey-like customs union. Unfortunately, advocates of Brexit were far from unanimous as the preferred option amongst those mentioned above, while at the same time they were insisting that any deal should give the UK full access to the EU Internal Market without free movement of people or any submission to EU acquis. Of course, in the course of negotiations each party is free to have its own expectations, but the UK goal was entirely unrealistic, as it was against the basis of the EU Single Market architecture and, if accepted, it would effectively undermine the autonomy of the EU. The Single Market is based on four pillars— the free movement of goods, services, capital and people — and its success is based on these freedoms. An 'ala carte' membership would not only give the UK an unjustifiably privileged position but would also set a dangerous precedent for other Eurosceptic Member States.

Another important issue is that, according to Art 50(3) TEU, the Treaties will cease to apply to the withdrawing state either from the date of entry into force of the withdrawal agreement or, if no agreement is reached, two years after the notification. The two-year time period provided for by Art 50 can be extended, but it is very restrictive considering the nature of the negotiations and the fact that there is no precedent or guidance as to the conduct of such demanding deliberations. Therefore, sitting on the table of negotiations with a goal that is by definition unrealistic makes the whole process counterproductive and it will undoubtedly create delays, if not lead the negotiations to a dead-end. EU leaders fully supported the EU institutions' strategy and there was little deviation from the opening positions drawn up by the Council and Commission, especially in relation to the indivisibility of the four freedoms and the impossibility of carving out the free movement of people from the rest of the single market. It would be harsh to argue that some of the UK's ideas and demands look as if they were designed in a vacuum without any effort to take into consideration the surrounding circumstances and the external forces. However, these views fail to recognise the fact that the other side of the negotiations is considerably stronger in terms of bargaining power, and the UK got the best deal possible.

Finally, even though a Withdrawal Agreement[11] was agreed between the two sides and despite months of onerous negotiations, many of the key questions raised by the Brexit

[10] House of Lords, "The Process of Withdrawing from the European Union" (2016), European Union Committee, *11th Report of Session 2015–16*, HL Paper 138, 13, https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf(last visited on April 10, 2019).

[11] Withdrawal Agreement and Political Declaration, Policy Paper, November 25, 2018, *available at*: https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration (last visited on April 10, 2019).

vote remain unanswered. Such is the opposition in Westminster to the terms on offer, that there were serious concerns that the Agreement is not the last word we heard in relation to the UK's future relationship with the EU. The House of Commons has not voted in favour of the Withdrawal Agreement and has not backed the deal that Teresa May has been negotiating, despite the fast approaching deadline and the instability that this domino of negative votes has created. The UK has been in an unprecedented political turmoil and there seems to be no light the end of the tunnel. Several options have been put forward in an attempt for the UK to leave the EU in an orderly manner. Regardless of which solution will attract a Commons majority and how this Brexit saga will end, the UK has no solid plan as to what they want to achieve and no real plan B in the event that Plan A would prove difficult to work.

V. DEAL OR NO DEAL?

> "*We are not leaving the European Union only to give up control of immigration all over again,"……. "And we are not leaving only to return to the jurisdiction of the European Court of Justice. That's not going to happen. We are leaving to become, once more, a fully sovereign and independent country*."[12]

This phrase from Theresa May's Conservative conference speech on Brexit in 2016 has been commonly used to indicate the UK rationale behind the Brexit decision. In her speech at Lancaster House in January 2017, she also mentioned that "no deal was better than a bad deal."[13]

Being currently at the end of the negotiation period provided by Art 50, there are doubts as to whether these two phrases depict reality in an accurate way. The Withdrawal Agreement is to a large extent in line with May's declarations in 2016, but the MPs, even within her own Party, are not convinced that this deal is the way forward for the UK. Is this agreement really a bad deal? The truth is that it is extremely hard to say, based on the points raised above. There has been no clear strategy and not much discussion as to the aims and objectives of the UK from these negotiations. Brexit is not about free movement of workers and migration controls. Undoing 46 years of social, economic and political integration is not an easy task and the factionalised Parliament serves as the best evidence thereof.

As a result, a 'Hard Brexit' or a 'No Deal' exit is fast approaching, but this is not part of the UK government's plan; it is more the consequence of the widespread lack of consensus in the Conservative Party as well as the House of Commons. The UK government and the UK society are not ready for a 'no deal' scenario and this is why the Prime Minister asked for an extension beyond the initial deadline of March 29, 2019. Theresa May keeps repeating that she will deliver Brexit as per the people's voice in the 2016 Referendum, but it is worth reflecting a bit on what the people really said? The result of the Referendum revealed a decision to leave the European Union. There was no reference to a deal, a good or a bad one. Therefore, the government should have left the EU at the end of March 2019. The political deliberations indicate that either the country is not ready to leave, in which case they should revoke Article 50, or that the Withdrawal Agreement is a bad one for the interests of the

[12] Theresa May, "Britain after Brexit: A Vision of a Global Britain", Speech, October 2016, *available at*: https://www.politicshome.com/news/uk/political-parties/conservative-party/news/79517/read-full-theresa-mays-conservative (last visited on April 10, 2019).

[13] "The Government's Negotiating Objectives for Exiting the EU: PM Speech", January 17, 2017, *available at*: https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech (last visited on April 25, 2019).

country, in which case the UK should leave without a deal and open a new chapter in its history as a sovereign state.

The first option is a difficult one from many different aspects. It may involve general elections and potentially a second referendum, but it will be hard not to create further division and polarisation in the UK society and this is the last thing that the country needs now after three difficult years filled with uncertainty and instability. Revocation of Article 50 should only take place if the government feels that it is not in the UK's interests to leave the Union. The 2016 Referendum is not binding in nature and the government has no legal obligation to follow it.[14] There can be an honest and thorough consultation process, during which the people will be informed about the true implications of leaving the EU and the reasons that led the government to decide to go against their will. One argument can be the economy, as the UK economy is expected to grow between 4-9% less than it would inside the EU over the next 15 years depending on the way it finally leaves the bloc.[15] Another argument is trade agreements. The EU is Britain's most important export market and its biggest source of foreign investment, not to mention that being part of the Union has helped London establish itself as a global financial hub. The impact of a no deal/bad deal exit will be extremely negative although it is difficult to quantify the exact consequences of an irregular exit. In addition, the UK has in numerous occasions expressed the belief that it will manage to get very profitable and competitive agreements with strong markets, such as the US, Canada and India. So far, there has been no evidence of such agreements or any commitment to grant the UK any preferential treatment. To the contrary, most of these markets appear to show their preference towards the EU, as it is a bloc of 27 (still 28 at the moment) countries, not one individual, albeit strong, country.

One interesting illustration is the US-UK future trade deal: Initially, Donald Trump had re-assured Teresa May that the UK will not be 'at the back of the queue' to negotiate a post-Brexit trade deal with the US as former US President Barack Obama had famously said in the run-up to the 2016 Referendum. However, at the end of February 2019 the Trump administration outlined its goals for a free trade deal with Britain, highlighting that the US is keen to secure 'comprehensive access' for agricultural goods in Britain by reducing or eliminating tariffs. However, removing such barriers could open Britain's door to genetically modified crops, animal feed with antibiotics and chlorine-washed chicken products that are not aligned with the EU safety and environmental rules, but common in the United States.[16] Additionally, the same document mentions that 'appropriate action' can be taken if the UK negotiates a trade deal with negotiates a trade deal with a 'non-market country'[17], allowing the US to withdraw the deal in the event that they are not happy with any agreement the United Kingdom makes with a country, such as China (of course no explicit reference is made to China). It still very early to make a conclusive assessment of the post-Brexit status quo, but the first indications are not encouraging. This reality also reinforces the point made above that the UK either over-estimated its ability to negotiate good trade agreements or had

[14] On the issue of revocation of Article 50, see Aurel Sari, "Reversing a Withdrawal Notification under Article 50 TEU: Can a Member State Change Its Mind?" 42 *European Law Review* 451-473 (2017).
[15] See also Dan Ciuriak, Jingliang Xiao, *et.al*., "The Trade-Related Impact of a UK Exit from the EU Single Market" (2015), *available* at: https://ssrn.com/abstract=2620718 (last visited on April 25, 2019).
[16] Office of the United States trade Representative Executive Office of the President, 'United States-United Kingdom Negotiations: Summary of Specific Negotiating Objectives', February 2019, *available at*: https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf (April 25, 2019).
[17] *Id*. at 15.

not anticipated how hard it would be to achieve better terms compared to those it enjoys as an EU Member State.

The only realistic possibility of achieving good agreements with advanced industrial economies is through its World Trade Organisation (WTO) membership. The UK is already a member of the WTO. There are two major issues in relation to the UK's future bound tariff schedule in the WTO, and its schedule of reservations (if any) on trade in services and establishment for individuals and companies engaged in service sectors. With its existing WTO membership renegotiated on these points, the UK will be free to negotiate its own free trade agreements with the EU and any other WTO member, as long as it keeps out of the EU's Customs Union. A first task will be to reconstitute as fast as possible the free trade content of the EU's many preferential agreements with developing and developed countries. The second step would be to negotiate agreements with countries with whom the EU has no agreement so far or countries the EU is currently negotiating with, such as Japan, India and the US. In theory, the UK could negotiate such deals faster than the EU, but the first indications were that the UK would not get any priority over the EU, as the advocates of Brexit were hoping.[18]

It is worth mentioning here that if the UK decides to rely entirely on WTO rules for its future trading relationship with the EU, in the absence of a free trade deal, there would be a sharp reduction of market access for both goods and services. The EU's existing preferential trade agreements with third countries would also cease to apply to the UK, and it would take years for the UK to reconstitute them bilaterally. Such negotiations will definitely be demanding, as the UK would need to persuade the rest of the world to revise its tariffs downwards offering more liberal rates than the EU, but at the same time WTO member states could take the occasion to demand various concessions, since the process requires that the applicant reaches bilateral agreements with each of them. Failure to conclude these negotiations in a swift and comprehensive way will undermine the attractiveness of the UK as a location for foreign direct investment targeting the EU market and it will cause serious damage to the UK's access to the EU market for both goods and services.[19]

The second decision is also a very difficult one, because the country has not been adequately prepared to face this scenario, although it was from the outset of the Brexit process amongst the available options. It was not until the end of February 2019 that a document including guidance on how to deal with a no-deal Brexit was published by the UK government.[20] It goes without saying that such a document is extremely interesting, but there is not sufficient time for the companies to develop and implement a strategy that would protect them from the unwanted consequences of a Hard Brexit. At the same time, it does not seem very likely that the UK will continue to be an attractive destination for foreign companies. The post-referendum uncertainty relates not only to the future of UK/EU relationship, but also to the stability and trustworthiness of British political institutions. Such uncertainty may not be enough to erode the competitive advantages for companies that are already established in the UK (for them, relocating elsewhere will be a certain cost that they have to consider and balance against the uncertain cost of remaining in the UK), but it makes

[18] Michael Emerson, "Which Model for Brexit?" (2016). CEPS Special Report No. 147, 1-2, https://ssrn.com/abstract=2860010 (last visited on April 25, 2019).
[19] *Ibid*.
[20] See Guidance: Operating in the EU after Brexit, *available at*: https://www.gov.uk/guidance/operating-in-the-eu-after-brexit (last visited on April 25, 2019).

any attempt to attract new businesses highly unlikely to succeed.[21] In the past decades, the appeal of the City of London as a financial centre was mainly due to the high quality, stability, and trustworthiness of UK's institutions. A long tradition of parliamentary democracy, free and inquisitive media, the rule of law, independent courts, stable governments, a strong legal profession and, relatively speaking, a predictable electorate that could be expected not to be willing to renounce the advantages of hosting a highly profitable financial centre all played an essential part in the City's success.[22] The context is now different and it will take much time coupled with a considerable amount of political goodwill, a committed leadership, a less temperamental electorate and a streamlined regulatory framework, before foreign companies will start considering the UK as an environment credible in the long run and decide to move there.[23]

VI. CONCLUSION

The UK has shaped the EU and has attained a very great deal of what has been on its wish list over the years. This includes, of course, the numerous opt-outs and special deals that it has negotiated repeatedly since 1972. It however goes further than this, since the UK has played a major role in shaping the EU as we know it today. In spite of this, the 2016 Referendum led to the initiation of the Article 50 TEU procedure for the first time in the history of the European Union.

The EU position was based on two basic pillars: the indivisibility of the four freedoms and the need to avoid a British solution that would risk encouragement by contagion for other Member States to escalate disintegration. On the other hand, the UK did not bring on the table anything that would make the EU side to deviate from its position or make any concessions. Inevitably, the UK government is currently at a deadlock, not because the Withdrawal Agreement is defective, but because it endorses the fact that the outcome was far from the UK's initial aims and objectives. There are still a few options available, some easier to be implemented and some more difficult (in theory), however it is time for bold decisions for both Theresa May and her government and the House of Commons as well. The time that has passed since the last referendum has been valuable in revealing the strengths and weaknesses of all different options and exposing certain half-truths and lies. This is positive and it can initiate a fresh debate on how to respond to 'the divisions that were laid bare in the Brexit vote'[24]. Another referendum, especially if organised in a rushed way, will create further polarisation and is unlikely to heal the economic and cultural divides that exist in contemporary Britain; the same applies to a 'no-deal' exit. Therefore, it is important that the UK government asks the people what future they want for their country and which way

[21] See Guglielmo Maria Caporale, Luis Gil-Alana, *et.al*., "Brexit and Uncertainty in Financial Markets" 6 *International Journal of Financial Studies* 21 (2018); LA Smales, " 'Brexit': A Case Study in the Relationship Between Political and Financial Market" 17(3) *International Review of Finance* 451-459 (2017).

[22] Luca Enriques, "Why the UK has Little Chance to Become a Successful Tax or Regulatory Haven" in Eleftheriadis, *supra* note 9 at 30, 31.

[23] See also Nhiam Moloney, "Financial Services, the EU and Brexit: An Uncertain Future for the City?" *German Law Journal, Brexit Supplement* (2016), *available at*: http://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/5776e5db579fb3bc18d93e3a/1467409883499/14+PDF_Vol_17_Brexit+_Moloney.pdf (last visited on April 25, 2019).

[24] Robert Ford and Matthew Goodwin, "Britain After Brexit: A Nation Divided" 28(1) *Journal of Democracy* 17, 28 (2017).

forward they wish to follow, either through general elections or through a referendum.[25] Political games created division and uncertainty, so it is time to go back to basics: democracy, but with clear questions that call for clear answers!

[25] Sandra Kröger, "Should There Be Another Referendum on British EU-Membership? Risks and Opportunities" (2019) 15, Policy Paper, Jacques Delors Institute Berlin, *available at*: https://ssrn.com/abstract=3321105 (last visited on April 25, 2019).

STATE RESPONSIBILITY UNDER SPACE LAW

G.S. Sachdeva[*]

I. INTRODUCTION

Space law grew as an adjunct of international law and has metabolized rather fast. It has since metamorphosed into an independent and auto-poietic system[1]having nexus and linkages with other sub-systems of cognate legal regimes[2] and international law jurisprudence. As a result, it is today, a well-developed, mature and independent branch of law despite its being nascent. It has adduced a small corpus of total five international instruments comprising a treaty, two conventions and two agreements and a part of it has assumed the status of customary space law. Besides these obligatory instruments, it has accumulated a clutch of soft law comprising principles, guidelines and a declaration.[3] To this list, International Codes of Conduct that are in draft or negotiation stages can also be added. This makes a respectable means for regulating human activities in outer space, including celestial bodies.

The primary document of 'positive space law' is the Outer Space Treaty[4], often reverentially referred to as the *Grundnorm* of space law. The importance of this Treaty is enhanced by the fact that this has evolved from a United Nations resolution adopted by the General Assembly as "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space."[5] This is the beginning of the progressive development and codification of international space law (ISL) which delineates the responsibility of states *qua* their activities in the outer space and on celestial bodies.

Space domain is an inhospitable environment to which humans are neither genetically adapted nor bodily acclimatized. Further, activities in outer space are inherently hazardous and highly risky whether it is space walk or in-orbit satellite repairs or jumps with space parachute. Therefore, independent and self-reliant space activity, in isolation, may be beset with imponderable risks. Recognition of conscious state responsibility towards space activities thus becomes incumbent. This Article purports to list out and define such responsibilities that become binding on the states by direct mention, allusion or implication.

II. STATE RESPONSIBILITY UNDER CODIFIED SPACE LAW

A. The Nature of Space Law

From primordial times, outer space has been governed and regulated by the rule of God, laws of nature, and the principles of astro-physics. In fact, the necessity of international

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[1]Anthony D'Amato, "International Law as an Autopoietic System" in Rudiger Wolfrum and Volker Robens (eds.), *Developments of International Law in Treaty Making* 335-399 (Springer, Berlin, 2005).

[2] For example, regimes for Antarctica, High Seas, *et al*.

[3]These instruments will be mentioned as relevant with full citation.

[4]Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967. Adopted as General Assembly Resolution 2222 (XXI), annex, on December 19, 1966, opened for signature on January 27, 1967 and it entered into force on October 10, 1967. It has variously been referred to in this Article as Outer Space Treaty or, in short OST.

[5]This General Assembly Resolution XVIII of 1962 was passed on December 13, 1963.

space law arose only to regulate conduct of human activity and operation of human-made objects in outer space. Thus, the primary purpose of ISL has been proper governance to ensure peace and order by informing of normative behaviour and regulating human activity within prescribed limits. A Spanish proverb succinctly sums up this wisdom that, 'it is not the fence that protects the orchard but the fear that goes with it and the respect that society accords'. Thus, this element of perceptible fear and normative reverence is imparted and instilled by the law. If it so happens, then the law has substantially achieved its purpose of protection and consequently safety and security would seem well assured.

By corollary, this principle can be safely extended to outer space where this *specialibus law*,performs a vital function by its proclamations of permitted, prohibited and regulated activities. It, thus, defines the nature of activities in outer space and stipulates norms of human conduct in relation to this domain. Hence, space law seems to govern and promote public order in outer space. By and large, this specific law has succeeded in achieving this task within the outer space and from outside. The corpus of space law is a few treaties and mostly comprises of soft law. A serious study of this subject uplifts a sense of altruism reflected in the concepts of responsibility and cooperation, among space-faring nations and between signatory countries, enshrined in this law that would assure survival of humanity and has substantially improved quality of life of mankind on the earth and in outer space.

In principle, every human activity in every field needs law, not to curb freedom but to regulate its operation to make it amicable and compatible with the same or similar rights of the others. A legal doctrine, '*summum jus, summa injuria*', broadly meaning that absolute right may cause great injury, implies the need for reasonable restrictions on enjoyment of any right so that it is equally exercised by all. In other words, regulation and not restraint is in the best interest of all, because rights have correlatives in duties, for our purpose responsibilities, and both must coexist for the benefit of all, that is provided to all. In a way, cooperation and responsibility constitute the core fundamentals of space law.

B. The Need for Human Order in Outer Space

It is wisely said that, 'scattered and disorderly notes of sound make cacophony but the same notes put in some proper order compose a good symphony'. Same way, a house in disarray looks a mess and may lead to accidents but when put in proper order makes it a snug home full of warmth and congeniality. To conclude the analogy, proper order to human actions makes for good life and cultured living. In analogous vein, in the outer space domain, despite the laws of nature, human activities with launched satellites and other artificial objects can be disorderly and unregulated and could surely make a recipe for disaster. Whereas, good governance and public order in outer space can certainly lead to human advancement, sustained growth, better welfare and good living in the larger interest of humankind.

C. Regulation Prior to OST

Pre-OST era was the period of cooperation between the two space-faring states voluntarily appreciating a sense of reciprocal responsibility, when treaty law did not exist. At that stage, the UN assumed responsibility and arrogated authority to regulate activities in the outer space under Article 1 (4) of the UN Charter, which enjoins that the UN shall be a nodal centre for harmonizing the actions of nations in the attainment of common ends and peaceful

objectives. In pursuance to this mandate, the General Assembly took upon itself, under Article 13 of the Charter to initiate studies, 'encouraging the progressive development of international law and its codification'[6] relating to the outer space.

The UN General Assembly, thereafter, became active to pass Resolutions that established principles of non-appropriation in outer space and celestial bodies, freedom of exploration, extension of international law and applicability of the Charter of the UN as well as the Statute of the International Court of Justice to regulate human activities and artificial objects in outer space.[7] As part of its efforts in this direction, the General Assembly, within the framework of the UN, constituted an international body for cooperation in the study of activities in the outer space that is now called the Committee on the Peaceful Uses of the Outer Space, in short, COPUOS.[8] The importance of cooperation among states is boldly underscored here.

The next important stage in the evolution of space law dawned with the General Assembly, adopting by acclamation,[9] 'The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space'.[10] The Declaration enunciated nine cardinal principles, which later got embodied in the Outer Space Treaty of 1967[11]. One of the fundamental principles underlying the Declaration, *inter alia*, was and continues to remain state responsibility. This principle finds copious references and due emphasis in the total gamut of space law spread over treaty law, agreements, principles and guidelines promulgated by the UN.

D. State Responsibility under Outer Space Treaty

State responsibility is rather definitive and expansive under space law. To begin with OST, which provides a general legal framework for the scientific exploration and peaceful uses of outer space. The specific provision relevant to international responsibility is contained in Article VI. The text of the Article reads, "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities". This means that corporate sector and other private 'astro-preneurs' are permitted to undertake legitimate space activities.

The next element of responsibility under space law mandates an assurance "that national activities are carried out in conformity with the provisions set forth in the present Treaty".[12] It means that activities which are not scientifically exploratory or that, where the use of outer space or celestial body is neither peaceful nor in the benefit of mankind would be contrary to the Treaty. Further in elaboration, the Treaty permits exploration but not exploitation and least of all for private appropriation and personal profit in contravention of the interest and benefit of all countries.

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[6] Ogunsola O. Ogunbanwo, *International Law and Outer Space Activities* 11 (Martinus Nijhoff- the Hague, 1975).
[7] General Assembly Resolutions 1148 (xii) of 1957 and 1721 (xvi) of December 20, 1961.
[8] General Assembly Resolution 1348 (xiii) of 1958.
[9] Adopted on December 13, 1963. *Supra* note 4 at 14.
[10] General Assembly Resolution 1962 (xviii) of 1962.
[11] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967 (or, the Outer Space Treaty, 1967).
[12] *Id.*, art. VI.

The third element of state responsibility relates to, space activities by private enterprise in the form of public-private partnerships and individual ventures by billionaires and corporate conglomerates that are gradually filling the widening hiatus created by withdrawal of state patronage. These are the private actors in space activities in respect of whose conduct, there is no clarity in law but all the same respective states are bound to bear responsibility for their acts. In order to properly discharge this responsibility, the State may have to regulate and supervise their activities by a specific domestic legislation or modulation of national statutes to ensure that space industry gets impetus and still causes least of injury to third party or, infringement of space laws resulting in consequential international liability.[13]

Therefore, space law specifically requires that, "The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty"[14]. The term, non-governmental entities, connotes a broad plexus of business models that are progressively filling the hiatus due to state withdrawal from non-strategic, non-exploratory, commercial space activities. Thus, this Article of the Treaty provides a normative leverage to promote and oversee space activities of private sector. The purpose of articulated stipulation for state authorization is to establish a nexus of committed responsibility with the state; and continuing supervision mandates the need for conformance to the permissibility of activities under the Treaty. The states have so far abided by these legal provisions but the future appears uncertain with commercialization and privatization of space activities coming of age and starting to wield its own clout to leverage national economic policies to its own advantage.

The next and fourth aspect of responsibility binds that, "States Parties…shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extra-terrestrial matter and, where necessary, shall adopt appropriate measures for the purpose".[15] The nature of this responsibility ordains due regard in conduct for avoidance of negligence in actions, whether of commission or omission. So far no serious case of such dereliction has come to notice but considering the trend, of exploitation of celestial resources, planetary migration, space habitations, and other multiplying applications and uses, may jeopardize sustainability of space environment and its usability by posterity.

E. State Responsibility under Other Space Law Instruments

The fundamental of state responsibility finds a portfolio of copious references scattered in other international instruments regulating space activities either in direct reference or, by its generic variants like, duty to assist in emergencies and distress or offer cooperation or engage in consultations for unusual events and potentially dangerous experiments. These are parts of the same generic responsibility skeletally mentioned in Articles VI and VII of OST. In order to correctly grasp the import and comprehend the nuances of this principle, it is proposed to adduce a few illustrations to vindicate the above statement. A few provisions from other international instruments of space law emphasizing this precept are discussed in succeeding paragraphs.

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[13] G. S. Sachdeva, "State Responsibility for the Space Activities of Private Actors" in Venkat Rao and Kumar Abhijeet (eds.), *Commercialisation and Privatisation of Outer Space* 13-30 (KW Publishers, New Delhi, 2016).
[14] *Supra* note 12.
[15] *Supra* note 11, art. IX.

For instance, the case of the Convention on International Liability for Damage Caused by Space Objects, 1972, that amplifies the provision of responsibility and liability and outlines the procedure for incumbent claims. Thus, an inalienable incident of responsibility arises due to *vinculum juris* that relates to liability for any damages caused, by misadventure or default, even for bona-fide state activities performed by its space objects, to third parties or other adjacent users in the outer space or on celestial bodies. The liability attaches to the launching state or, the one that procures launching. Therefore, "A launching state shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight".[16] The Convention upholds the principle of fault liability[17] for consequential damages and provides for compensation. But the element of causal fault in space activities, quite often, is difficult to establish and hence many accidents remain un-litigated and un-negotiated like the Iridium-Cosmos collision.

Another nuance of responsibility, humanitarian in character, is embodied in the Agreement on Rescue of Astronauts etc. It states, "If owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a contracting party, it shall immediately take all possible steps to rescue them and render them all necessary assistance".[18] This duty becomes particularized and specific on such a request of the launching authority, though however, it is equally binding even without such intimation.[19]

This Agreement is in amplification of the OST and is also a partial reiteration of Article V of the OST that requires, "State Parties to the treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress or emergency landing on the territory of another state Party or on the high seas." This provision also honors the jurisdiction and control over objects and personnel by the state of registry under Article VIII of the OST.

The Moon Agreement[20] too, carries a specific clause on this point. It reiterates, "States party to this Agreement shall bear international responsibility for national activities on the Moon, whether such activities are carried on by governmental agencies or by non-governmental entities…" And states shall assure that "national activities are carried out in conformity with provisions set forth in this Agreement".[21] This call to the 'ratifiers' of the Agreement for adherence to the law is loud and lucid; and more so ordains a responsibility for due care and implies liability for damages caused, advertently or inadvertently.

F. State Responsibility under Declaration of International Cooperation

The concept of state responsibility has been redefined and given a new boost under the UN Declaration on International Cooperation in the Outer Space.[22] The UN Declaration

[16] Convention on International Liability for Damage Caused by Space Objects, 1972, art. II.
[17] *Id.*, art. III.
[18] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 1968, art. 2.
[19] *Id.*, art. 5.
[20] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979. Popularly referred to as the Moon Agreement.
[21] *Id.*,art. 14.
[22] The full title of the instrument is, "Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of

accepts that "States are free to determine all aspects of their participation in international cooperation in the exploration and use of outer space on an equitable and mutually acceptable basis,"[23] but at the same time, it urges that, "All states, particularly those with relevant space capabilities and with programmes for the exploration and use of outer space, should contribute to promoting and fostering international cooperation on an equitable and mutually acceptable basis."[24] It further adds, "International cooperation should be conducted in the modes that are considered most effective and appropriate…"[25]

The language of the Declaration is persuasive and passionate and makes a fervent appeal for cooperation between responsible space-faring states in the outer space domain. Therefore, the Declaration enunciates 'a responsibility to cooperation' that is incumbent on the states. In fact, cooperation is another form of responsibility that obligates an attitude of mutual understanding, consultation and assistance for activities in the outer space domain of hazards and imponderables. Thus, the term cooperation should carry a meaning no different than responsible behavior of a civilized, space-faring state.

In a wider sense, this exhortation by the UN constitutes an essential and binding element of state responsibility to cooperate internationally; this insistence on cooperation assumes a veritable form of a variant of state responsibility in content and connotation. Therefore, the International Declaration imposes at least a valid pseudo-duty, if not a total obligation on the states. Some scholars may differ in this insistence on duty, but support can be sought from *Bin Cheng* who also maintains that General assembly resolutions express the will of the states and were resorted to for simplification of the treaty-making procedure. These may be "Oral Agreements" but are "undoubtedly international agreements subject to the law of treaties" and are legally binding.[26] In similar vein, the International Law Commission (ILC) has also confirmed in its commentary that Oral International Agreements are "a new type of international instruments, which, belonging to the realm of law, and may, under concrete circumstances acquire the characteristics of a binding international instrument."[27] Thus, the effect and force of the Declaration is unimpeachable and operative and element of state responsibility to cooperate stands vindicated.

This view has been reiterated by the Office of Legal Affairs of the UN by pointing out that, "In United Nations practice, a 'declaration' is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated…"[28] Another scholar also, while discussing about the evolution of a new trend and validity of non-contractual agreements, e.g. UN declarations or resolutions, has asserted their democratic legitimacy; and emphasized their norm-creating capability and "non-legally binding" nature. These expedients and mechanisms are resorted to in important and urgent cases of necessity

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Developing Countries, 1996. It was adopted by the UN General Assembly in its resolution 51/22 of December 13, 1996.

[23]*Id.*,para. 2 of the text of the Declaration attached as Annexure to the UN Resolution.

[24]*Id.*,para. 3 of the Annexure mentioned.

[25]*Id.*,para. 4 of the Annexure mentioned.

[26]Bin Cheng, "United Nations Resolutions on Outer Space: Instant International Customary Law" 5 *Indian Journal of International Law* 23-48 (1965). Also refer G. S. Sachdeva, "Select Tenets of Space Law as Jus Cogens" in Venkat Rao, Gopalakrishnan, *et.al.* (eds.), *Recent Developments in Space Law* 13 (Springer, 2017).

[27]Manfred Lachs, "The Law-Making Process for Outer Space" in Edward McWhinney and Martin Bradley (eds.), *New Frontiers in Space Law* 18-19 (A.W. Sijthoff, New York, 1969). Also refer Sachdeva, *Id.* at 12-15.

[28]Manfred Lachs, *Ibid*.

for flexibility in procedure, ease in acceptance and effectuation in implementation of the instruments.[29]

Be that as it may, compliance and adherence to law and selecting international cooperation coupled with tacit acceptance of responsibility as a motto is our own determination and advertant discretion. There is no reductionist approach of criminality in space law; hence the bottom-line is either common survival or collective annihilation. The stakes are clear and choices limited. The decision, however, is in our hand, of our volition and depends upon our wisdom and sagacity. Thus international cooperation is a state responsibility and a mandate of space law. It is certainly the *mantra* for survival and sustainability, at least, for the simple reason that it finds repetition in the instruments of space law and for its ontological essence to impress the importance of this idiom.

III. STATE RESPONSIBILITYUNDER INTERNATIONAL LAW

The formulation of Space Treaty was under exigency and urgency and the framers were conscious of the fact that the *specialis* law so agreed, would neither be comprehensive nor holistic to cover all and allied aspects of proper governance and requisite regulation of space activities. This awareness impelled them to invoke the application of international law, *mutatis mutandis*, to the state activities in the space domain. It was thus confidently assumed that human activities in outer space could now be regulated and their consequences tackled by the combined operation and strength of both laws.

To give effect to this considered view, the OST embodies an appropriate provision. It thus enacts the applicability of international law and has amplified the scope of this application by specific reference to the Charter of the United Nations. The text of the relevant Article reads, "States Parties to the Treaty shall carry on activities in the exploitation and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding."[30] No wonder, the doctrine of state responsibility well-established under international law becomes germane and incumbent.

A. State Responsibility under International Law

It is axiomatic in International Law that, "state as a sovereign person, can have no legal responsibility whatever".[31] Or, as goes the old saying 'the king can do no wrong'. But such an absolute statement of classical law is no longer valid in modern times; and contemporary law of nations admits of wider international liability for harm caused due to acts of State or certain internationally injurious acts committed by its agents, officials or nationals so authorized, enabled or ordered.[32] A parallel to this is international duty cast by international pacts, treaties and conventions, and out of these arise the *vinculum juris*, a legal obligation to act within the confines of law or the *pacta* and to assume responsibility for any

[29]Ved P. Nanda, "The Role of International Organisations in Non-Contractual Lawmaking" in Rudigar Wolfrum and Volker Roben (eds.), *Development of International Law in Treaty Making* 157 (Springer, 2005).
[30]*Supra* note 11, art. III.
[31] H. Lauterpacht (ed.), I *Oppenheim's International Law A Treatise* 304 (Longmans, Green & Co., London,7th edn., 1952).
[32]*Id*. at 306.

digression of an obligatory treaty or commission of an internationally wrongful act or for violation of international legal duty.

The principle of state responsibility is a classical doctrine of international law and deems it "… necessary to distinguish two different kinds of state responsibility. These may be named 'original' in contradistinction to 'vicarious' responsibility".[33] The original responsibility may comprise of international delinquencies and acts of state organs while vicarious responsibility may relate to acts of private persons who are nationals of the state.[34] These tenets have been adhered to for centuries, only new connotations of state responsibility have gradually evolved with progressive liberal times, compromises on state sovereignty and changing international milieu.[35] State responsibility is a correlative of international obligation and this concept has now been embedded in space law with 'customary' legal mandate and a superior normative value. Nevertheless, its compliance is equally obligatory and attendant with sanctions. States as subjects of International Law are bound by its tenets and obligated to compliance.[36] This doctrine is thus expected "to serve as a specific instrument of legal regulation in international relations and stimulate the functioning of international law".[37]

This tenet of state responsibility for its own acts, or of government functionaries or official organizations or its natural and juridical nationals, that cause international wrong, injury or damage, is a well-established principle of customary international law. This has been embodied in space law that is *lex specialis* for the outer space domain, which is so unique, hazardous and vulnerable. Till recently, space activities which bear long gestation period, involve highly complex technologies, and require huge outlays with endemic risk of failure, were undertaken by governmental agencies funded from the state exchequer. This trend of space exploration and use, however, is fast changing. Commercial space activities, being initiated and undertaken by private players with no dependence on public funds, is the emerging trend. However, the space-faring nations have behaved responsibly, having done so voluntarily and in reciprocity, almost every time, till now. These, of course, are generalized statements that need to be buttressed with specific provisions of law and events of violation or aberration. A few such examples of law have been discussed in succeeding paragraphs.

Many scholars of International Law, while discussing substantive rules of rights and duties of the State assume that, there exists a minimum international standard of justice and have highlighted the international responsibility of the States for breaches of duty, even by governmental authorities.[38] In general terms, state responsibility refers to the legal consequences that follow upon violation or a *delictum* as an act of commission or omission relating to any international legal obligation. However, it is immaterial whether such delinquent action has been performed by any of its legally constituted entities, executive organs of governments, juridical persons or natural nationals, whoever can be deemed as subject or object of international law. It may be added for clarity that the state responsibility extends even to harmful consequences of legitimate activities by its nationals. Thus any omission, failure or detrimental effect, in turn, sets up legal liability *qua* aggrieved parties of

[33] *Id*. at 305-7.
[34] *Id*. at 304-34.
[35] The new concepts of state responsibility relate to, for example, war and aggression, coercion of minorities, denial of freedom by colonial powers and now extend to international and inter-governmental organizations.
[36] Schwarzenberger, I *International Law* 68-70 (Stevens and Sons Ltd., London, 3rd edn., 1957).
[37] G.I. Tunkin, *International Law* 223 (Progress Publishers, Moscow, English translation, 1986).
[38] Charles G. Fenwick, *International Law* 333 (Vakil, Feffer and Simons Private Ltd., Bombay, 1967).

another state, subject to the basic rule that all means of domestic protection must first be exhausted.

B. State Responsibility under ILC Code

Certain aspects of state responsibility under international law had literally frozen as doctrine and did not progress abreast with the political, social and humanitarian developments. This lacuna in theory was acute, and identified for attention of the International Law Commission (ILC). It took the Commission over two decades for its transformation, progression, codification and to come up with a Code enunciating and edifying several new aspects of state responsibility. The code is called Draft Articles of Responsibility of States for Internationally Wrongful Acts (ARSIWA) and was approved by the ILC in August 2001. It was adopted by the UN General Assembly through resolution in December 2001.[39] ARSIWA thus became part of international law and its articulation was well respected in juridical circles and came to be cited as honorable legal authority even in the highest courts.[40] The exposition of the Code is generic and neutral; and it can, therefore, be asserted with confidence that ARSIWA undoubtedly applies, *mutatis mutandis*, to the activities of states in the domain of outer space.

The Code is fairly elaborate in its' context. It defines 'internationally wrongful acts as those that can be attributed to the state under international law and, that these constitute a breach of an international law obligation of the state.' But attribution of responsibility is based on 'proof of causal connection' between the injury and the act or omission attributable to the state alleged of breach. As in theory and practice of international law, certain circumstances and specific situations exonerate and preclude state responsibility. Similarly, the Code contains certain defence pleas admissible like force majeure, consent, distress, necessity, self defence or counter measures. However, on adjudication, reparations can be granted, e.g. restitution, compensation or satisfaction, though the remedies depend on the competence of forum like UN, ICJ, WTO, ICC and so on.

Despite wide appreciation of the good work done by the ILC, certain critics have commented that some rules involve ambiguities and their application will often entail detailed fact-finding. Again some rules define responsibility involving private acts and stoppage of their breaches would need cooperation for abatement from private actors. Space activities by private enterprise involving environmental degradation or human rights abuses appear to be parallel cases of such violations. In nutshell, *Crawford* comments that the rules are "rigorously general in character."[41]

C. State Responsibility under the United Nations Charter

It now becomes pertinent to recall that space law, apart from international law, also beseeches support from "the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and

[39]UN General Assembly Resolution 56/83 of December 12, 2001. Refer UN Doc A/56/10 (2001).
[40]For example, refer Gabcikovo-Nagymaros Project (*Hungary* v. *Slovakia*) Judgment, 1997 ICJ Rep. 7 (September 25). Also see case concerning Fisheries Jurisdiction (*Spain* v. *Canada*), Jurisdiction of the Court, Judgment, 1998 ICJ Rep. 432 (December 4).
[41]James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 12 (Cambridge University Press, 2002).

understanding."[42] Among other aspects, the most relevant and prominent provision for our study exhorts, "All Member shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[43] The use of the word "shall" attaches certain imperious strictness to the clause and this cardinal principle should also prevail in international relations in outer space.

This principle, however laudable and espoused, has repeatedly courted controversy with sharp divisions regarding its meaning and scope. The Western states maintain an interpretation that the term 'force' assumes relevance only when it wears the garb of military force or military threat. At the same time, the Third world countries have insisted on a liberal and enlarged connotation to embrace "all forms of force, military, economic and moral force."[44] Anyhow, this fundamental provision almost banning use of force seems to exude confidence and is a great solace for assuring ostensive peace and security.

Ironically, the imperiousness of this rule of law has been compromised by another Article of the UN Charter. The text of this Article reads, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain [or restore] international peace and security."[45] This right, though, is valid for immediate expedience and under temporary predicament, till Security Council takes control of the situation, yet it seriously dents the majesty of Article 2 (4) of the Charter and relaxes its veritable strictness.

Legal experts have long wrestled with the true meaning and actual intent of the 'self-defence' clause. But it must be interpreted based on the maxim, *ex vinculus sermocinatur* which means in good faith. Many scholars contend that over the years, perception of self-defence has changed and notion of threat has blurred. Spatial separation and geographical distances have lost their meaning. No wonder, the US could use its armed forces, unilaterally or in concert, in Iraq or Kosovo, under an 'alief'[46] of threat by the phantomised potential of Iraq or imagined threat from instability in Kosovo. The US logic was beset with syllogistic fallacies and the principle of proportionality of force was ignored. Even the UN could not rise up to its ideals. International conscience seems to have been routed badly and torn asunder. Therefore, attribution of any advertently loose or liberal meaning to self-defence or threat would be, betrayal of our cherished values, and only at peril to humanity.[47]

D. State Responsibility Derived from Domestic Statutes

Space Law under OST stipulates state responsibility for "regulation and continuing supervision" of its space activities, particularly those undertaken by private enterprise. This is because treaties are state-centric and responsibility fully attaches to the state and not individual defaulter. The scholars have, therefore, asserted that international wrong

[42]*Supra* note 11, art. III.
[43]The United Nations Charter, art. 2(4).
[44]T. O. Elias, "The Law of Treaties: An Assessment of the Vienna Convention" in *Essays on International Law* 30 (Twentieth Anniversary Commemorative Volume issued by Asian-African Legal Consultative Committee, 1976).
[45]*Supra* note 43, art. 51.
[46]Alief is a new word meaning an irrational fear in mind knowing full well that the situation is safe.
[47]G. S. Sachdeva, *Outer Space: Security and Legal Challenges* 175 (KW Publishers, New Delhi, 2010).

committed by nationals also "engages the responsibility of the State".[48] This mandate has, therefore, required states to create their own domestic expedients to dispense local justice and sharing of attributed liability. In respect of space activities also, many countries have enacted local legislation to internally define and allocate responsibility for the consequences of activities in outer space undertaken by agencies not under direct state ownership or governmental control. Consequently, law often tends to derive the circumscription of state responsibility from domestic statutes like the Constitution or *specialis* legislation enacted for the purpose or both. In the United States, the treaties signed or ratified by the government are self-executing and laws are enacted if necessary to give effect to the treaty provisions. This is the case for space treaties, except the Moon Agreement that has not been signed by the US.

Another relevant aspect of state responsibility stems from national constitutions because international law has a symbiotic relationship and an intimate nexus with municipal laws. For example, Indian Constitution, under Article 51 directs 'to promote international peace and security' as well as 'foster respect for international law and treaty obligations…' This requires the government to maintain amiable inter-state relations, subject to national posturing and geo-political strategy. Thus, the constitution directs the state to perform its international obligations under ratified treaties, even if it requires a new domestic enactment. Indeed, the language is directive, explicit and binding. India has ensured compliance of the space treaties and abided by its responsibility in every way.

Further, Article 253 of the Indian Constitution empowers Parliament to make suitable and appropriate domestic laws to implement the provisions and obligations under any treaty, agreement or convention adhered to by the state. This duty of international responsibility is, therefore, solemn and obligatory as well as the basic philosophy of Indian public policy. In deference to this, with an emerging private sector desirous of undertaking space activities, India has initiated steps to formulate a specific Space Activities Act to regulate and supervise space activities by private players and other ancillary aspects. Regulation is essential and freedom should be permitted to only responsible limit. "[S]ubstantial individualism of the international community"[49] or the private sector is neither approved by the Indian Constitution nor espoused by the Indian political ethos.

E. State Responsibility towards its Nationals

The concept of sovereign state has conjecturally arisen out of Social Contract Theory of Rousseau where individuals collectively agreed to form a state and in return expected state protection for their life and property. This basic idea has evolved in many ways and has extended to the state responsibility to protect the life, liberty and assets of citizens even when residing beyond the territorial limit of the state. Diplomatic protection in foreign countries is now demanded as a matter of right by the nationals and the State has a bounden duty to ensure safety and protection of its nationals and their assets, even on foreign lands, in every possible manner whether legally, diplomatically, by dispute negotiation or by alternative methods.[50]

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[48] S*upra* note 38 at 334.

[49] R. A. Mullerson, "Sources of International Law: New Tendencies in the Soviet Thinking" 83 *American Journal of International Law* 508 (1989).

[50] Michael Akehurst, *A Modern Introduction to International Law* 88-102 (George Allen and Unwin, London, 1980).

This predicament seems more pertinent to the outer space domain where national activities, by whosoever, are likely to be more risky, hazardous and prone to vulnerability either way. A general understanding of customary state responsibility is fine, but not adequate for the purpose and for catering to its nuances. With growing commercialization of outer space, other ramifications of state responsibility like welfare of space workers and allied matters of evacuation may assume prominence. Of course, not many cases of default have occurred but with exponentially escalating activities, accumulating debris and lack of sufficient space situational awareness, more accidents may occur and more disputes are likely. Hence, ultra-hazardous activities in space environment, security of huge investments by private enterprise and peculiar humanitarian requirements for space-based labour would need a separate legal regime with well-defined responsibility, modalities and methodologies.[51]

F. State Responsibility towards Humanity

One is impelled to allude to another relevant aspect of state responsibility that can be sublimated to *erga omnes*,and this rule has since been recognized in customary international law that *pari passu* becomes applicable to contemporary space law. The legal force of this particular obligation that is owed by the states to the international community as a whole has been identified and obliquely highlighted in a celebrated suggestion by the International Court of Justice in the Barcelona Traction case[52] among others. It has been pointed out, that certain violations of international obligations can adversely affect the international comity as a whole such that state responsibility can be invoked by states on behalf of larger community as a whole.

As a result, this social duty of the state towards humanity at large has been accepted universally and has got deeply rooted in state practice. In fact, 'state responsibility *erga omnes*' is already in customary practice and can be, by *opinio juris*, elevated to the status of *Jus Cogen* of space law[53] so that violations of *erga omnes* obligations, by any state, may be punishable under the universality principle.[54] This *jus cogens* can also draw substantive support from the Vienna Convention.[55] Thus, such a responsibility *pro bono* humanity will certainly be incumbent on states and obligatory in nature.

An existing OST provision of similar character requires 'states to ensure that its space activities are carried out with due regard to the corresponding and reciprocal interests of all other states.' It further ordains that the states "…shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extra-terrestrial matter and where necessary, shall adopt appropriate measures for this purpose."[56] The provision is strongly directive of positive action and strict in obligatory character.

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[51] C W Jenks, "Liability for Ultra-Hazardous Activities in International Law" 117 *Recueil des Cours*, 99, 165 (1966). Also refer John Kelsen, "State Responsibility for Abnormally Dangerous Activities" 13 *Harvard International Law Journal* 197, 238 (1972).
[52] Barcelona Traction, Light and Power Co. *(Belgium* v. *Spain)* 1970 ICJ 3, 32 (February 05, 1970).
[53] G. S. Sachdeva, *supra* note 26 at 21, 22.
[54]Oscar Schachter, *International Law in Theory and Practice* 264 (Springer, 1985).
[55]The Vienna Convention of the Law of Treaties, 1969, art. 53. Also refer Sachdeva, *supra* note 50 at 7-26.
[56]*Supra* note 15.

The usage of the word "shall" in the text makes it pre-emptive and binding to require invariable compliance and attribution of causal responsibility to the defaulting state, leading to consequential liability. Thus the obligation not to despoil or pollute the medium of outer space and to sustain the pristinity of the celestial bodies, except legitimate exploration or use, is indefensible. And there is a similar, in reverse, directive to obviate transportation of similar celestial contamination and eschew its adverse fall out on the Earth. This need for care and caution thus constitutes a solemn responsibility *insummum bonum* of humanity and posterity, the sagacity of which is indeed laudable.

IV. APPRAISALAND CONCLUSION

In nutshell, in the beginning, space activities were state-sponsored, state-governed, and state-funded because such activities represented advancement of technology and afforded strategic advantages. While these motivations still prevail, this sole reason has somewhat eroded in its importance with possible commercial exploitation and private actors entering the fray. Multi-media applications, remotely sensed data, future of space transportation and tourism, possibility of planetary habitations, and viability of commercial exploitation of celestial resources are all becoming prospective business propositions. As a result, states are restricting investment to strategic research only and commercial ventures are passing on to private enterprise. And, it is here that private actors find their specific niche but their consideration of business and motivation for enterprise is profitability, even at the cost of compromise of international responsibilities of the state. Their benchmark is profit.

This calls for state regulation of private activities in space. The Treaty puts an incumbent rider of state regulation and continuing supervision of corporate space sector. Wisdom ordains a holistic approach and comprehensive agenda with optimal governance. Thus, all stakeholders should responsibly strive for a safe, secure and sustainable use of outer space and profitable commercial activities 'with benefit to all countries.' Collective responsibility of all actors and stake-holders in this fragile and hazardous domain thus becomes imperative. None can afford to be a weak link. Encouragingly, India has behaved as a responsible nation, with unblemished credentials, in its space activities and as a launching facility for the world.

Civilised nations do not have to be mandated or reminded to interact with a sense of responsibility and with conscious awareness of the consequences of irresponsible actions. Nevertheless, this reminder becomes more relevant in space relations and space activities. Therefore, it behooves space-faring nations to naturally respond and reflexively behave in a responsibly prudent manner; and of course, we all claim to be civilized nations honoring the tenets of international law and cooperating in international relations. Yet history is witness to a grand fact that many world-wide and sustained wars have happened among, so called, civilized nations; and at the end of each and every war on the globe, all parties, including the victor, have invariably come to the negotiating table for a final solution to compromise the very reason for war. If we were to do this after devastation and death then why not react responsibly in the first instance and avoid the catastrophe. Let's not encourage exorbitance of irresponsibility. Sagacity lies in choosing the prudent option rather than regret the holocaust *post facto*. This brings us to the concept of international responsibility that has multiple resonances. And these responsibilities bring to focus their importance as a cardinal principle of peaceful and prosperous living.

Space law is as yet an evolving branch of international law and within the short span of half a century, a nascent convention called OST has already assumed the status of customary law of outer space and is treated globally binding even on states that have not been party to the Treaty. Some of the salient provisions of the Treaty are taken as peremptory norms of state behaviour and conduct in outer space and hence, can logically be elevated to the pedestal of *Jus Cogens* of space law for reflexive obedience and universal compliance. The well-established concept of state responsibility for internationally wrongful acts is one such tenet, among others, recommended by *opinio juris* to be exalted as *jus cogens*.[57]

State responsibility has many facets and the state has to exercise restraint in eschewing internationally wrongful acts as against the relevant laws or other states or its nationals and juridical citizens or humanity and posterity, apart from other responsibilities drawn from the UN Charter, international law and domestic statutes. The obligations are incumbent and breaches may lead to liability and compensation payable *restitutio in integrum*. Thus, just as international law is the law of civilized nations, in the same manner, space law is the law of responsible and cooperative space-faring nations who understand their stakes and exercise good sense to appreciate their debt to the future generations. The relevance of state responsibility increases manifold on the dawn of the era of space commercialization and privatization of space activities.

[57] Refer G. S. Sachdeva, *supra* note 26 at 7-26.

CRITICAL TELECOMMUNICATION CABLE INFRASTRUCTURE UNDER THE LAW OF THE SEA CONVENTION (UNCLOS 1982)

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Raju KD[**]

I. INTRODUCTION

Submarine cable is the backbone of global telecommunication networks which facilitates interdependent economies.[1] The dependency on submarine cables of the global economy and security is ever increasing so does the challenges associated with the submarine cable infrastructure.[2] Other marine interests and activities including fishing, shipping, exploration, and exploitation of marine resources have the potential to cause interference to the cable operation and cable injury to telecommunication networks. The United Nations Convention on the Law of the Sea, 1982 (UNCLOS) and domestic laws sought to regulate activities relating to submarine cables. However, submarine cable regime is continuously stressed by conflicting interests of the nations and other marine uses.[3] Interestingly, at the domestic level, states may not be aware of the critical nature of the submarine cables and remain negligent to ensure the protection of cables at their respective jurisdictions due to lack of domestic legislation or policies.

For centuries submarine cables have been in use. The first transatlantic cable was laid in the 1860s. From telegraphic communication cable to telephonic cables, submarine cable has redefined e-communication system. Now, the submarine cables have become the key communication line for telecommunication, data traffic, marine scientific research, energy transmission, offshore energy infrastructure, etc. It is the submarine cables that transmit data which become accessible with the support of the internet. Submarine cables facilitate sending email, making a call or message, placing an order for dinner to international transactions.[4]

The various activities relating to submarine cables are the key to the free flow of communication. Submarine cable operation includes a survey of optimum cable routes, laying, repair, and maintenance of cables. The cable operation includes activities relating to the survey of cable route, laying, repair and maintenance of submarine cables *cable operation*. Presently there are 1 million kilometers of optic fiber cable connecting the whole

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[1] Eric Wagner, "Submarine cables and protections provided by the law of the sea" 19 *Marine Policy* 127 (1995).
[2] Submarine cables or cables represent telegraph cable, telephonic cable, power cable, military and scientific marine cables, etc. Law on submarine cables applies to all of these cables. In this essay, submarine cable/s or cables are used interchangeably.
[3] Tara Davenport, "Submarine Communications Cables and Law of the Sea: Problems in Law and Practice" 43 *Ocean Development and International Law* 201-242 (2012).
[4] Lionel Carter, Douglas Burnett, *et.al*., "Submarine Cables and the Oceans – Connecting the World" 8 (2009), *available at*: http://www.iscpc.org/publications/icpc-unep_report.pdf (last visited on November 30, 2018).

world is the nerves of the internet.[5] Anything happens to the network may paralyze the economic activities of the entire universe.

The central theme and objective of this paper are to analyze the laws on submarine cable operation, protection of submarine cables, jurisdictions of states parties and their rights thereof. Under the law of the sea, one of the key components of the freedom of sea is freedom of laying submarine cables. Though adoption of this High Seas freedom in the Exclusive Economic Zone (EEZ) and Contiguous Zones remains uncontested, the accommodation of respective rights and responsibilities of states under both laws of the sea and domestic laws has become a real challenge. It stresses the conflict between coastal states and noncoastal states over the 'inclusive use' of the ocean that benefits the international community and 'exclusive use' of the ocean by the coastal state.[6] Similarly, submarine cable infrastructure is also stressed by the traditional law of sea challenge, i.e., creeping jurisdiction or territorialization of ocean.

Most importantly, the protection of submarine cable infrastructure is vital for uninterrupted telecommunication and its multiple uses. A submarine cable network is vulnerable to the natural and anthropogenic causes.[7] As many as nine cables were cut Hengchun Earthquake in 2006. Cable repairing process engaged nine cable repair hips for forty-nine days to complete the work.[8] It catastrophically disrupted internets services in many countries in Asia causing serious interference in financial transactions. Incidents of cable breaks from anchoring and other marine activities are increasing with the growth of marine activities that include fishing, shipping, exploration, and exploitation of marine resources, etc. Submarine cables are in high risks in the marine spaces near to the coasts. The potential growth in marine technology increases marine activities in coastal regions. Therefore, the vulnerability of the cables near the coast continues. Cable injury may be caused due to negligence (primarily fishing, shipping, exploration and exploitation activities) and intentional activities (shipping, theft, a threat from terrorist activities) as well. As the economic value of submarine cables is attractive, the incidents of theft of submarine cables have increased. Further, submarine cables in the vital chokepoints may be a high target for terrorist attacks. Therefore, much depends on the submarine cable protection regime within the national jurisdictions of coastal states.

At the domestic level, only Australia and New Zealand have specific legislation for the management and maintenance of cables in their respective national jurisdictions. Other countries primarily rely on scattered measures which include regulations, notifications, directives, etc. A survey of legal instruments on submarine cables arguably reveals that both international and domestic legal orders for cables are not adequate to ensure stability in the underwater submarine cable network. Moreover, in most of the jurisdictions, the law does not define the act of cable breaks as illegal. Therefore, marine activities are mostly negligent of

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[5] Eric Hand, "Seafloor cables that carry the world's internet traffic can also detect earthquakes"*The Science*, June 14, 2018, *available at*: http://www.sciencemag.org/news/2018/06/seafloor-cables-carry-world-s-internet-traffic-can-also-detect-earthquakes (last visited on November 30, 2018).

[6]*Supra* note 3 at 202.

[7]Between January 1990 to January 2015 there were 18 cable breaks in Japan, 71 in Taiwan and 7 in Indonesia, Malaysia and the Philippines from the earthquake. See Ed L. Pope, Peter J. Talling , *et.al.*, "Which earthquakes trigger damaging submarine mass movements: Insights from a global record of submarine cable breaks?" 384 *Marine Geology* 134, 135 (2017).

[8] Keith Ford-Ramsden, Douglas Burnett, "Submarine Cable Repair and Maintenance" in Douglas R. Burnett, Robert Beckman, *et.al.* (eds.), *Submarine Cables: The Hand Book of Law and Policy*170 (Martinus Nijhoff Publishers, Leiden, 1st edn., 2014).

the cables. Lack of awareness among state parties about the role of this cable system adds to its poor protection regime. The study examines the role of international law on submarine cable operations with special reference to the submarine cable protection regime within the national jurisdictions.

The first part deals with the brief overview of the submarine cables; Second and third part analyses the international law and institutional framework on submarine cables respectively. Part IV deals with the legal analysis of the protection of submarine cables at the domestic level. The paper ends with a conclusion and suggestions.

II. INTERNATIONAL LAW ON SUBMARINE CABLES

In the 1860s, it was for the first time that the Trans-Atlantic telegraphic cables established a link between Ireland and Newfoundland.[9] Next hundred years, the cable industries have faced technological constraints and market challenges.[10] It is in the 1990s, with fiber optic cables and internet, the submarine cable system becomes the champion communication network. Besides the need for high bandwidth, the demand for cable is increasing for undersea oceanographic research, digital technology in oil and gas exploration, offshore energy parks, and green energy.[11]

Submarine cables are the largest marine business after offshore energy extraction, global shipping, and naval expenditures. Today, education, health, banking, share market, trade, insurance, entertainment, addressing emergencies, national security-related activities intensely rely on telecommunication system[12] that comprises 213 independent cables.[13] There is no doubt these 'unseen and unsung cables are the true skeleton and nerve of our world, linking our countries together in a fiber optic web'.[14] The cables have become the arteries carrying lifeblood of the communication. However, major cable damage produces significant loss (direct and indirect).[15] A cable connecting numerous stakeholders, if breaks, may lead to hue and cry globally.

The concern for the protection of submarine cables from damage was expressed since the 1870s. International submarine cable regime comprises the Convention for the Protection of Submarine Telegraph Cables, 1884, Geneva Conventions on the Law of the Sea, 1958 and

[9] First Trans-Pacific submarine cable was laid in 1902. Again first underwater telephone cable service connected San Francisco and Oakland in 1884. The following years with the developing technologies and efforts, Trans-Atlantic telephone cable in 1956 and fiber-optic cables in 1988 were in service.

[10] '…cables should be regarded as international utility agencies because their linking up with land telegraphs gives them an infinite radius of action'. See A. Pearce Higgins, "Submarine Cables and International Law" 2 *British Year Book of International Law* 33 (1921-1922).

[11] Emily Waltz, "Offshore Wind May Power the Future" *Scientific American*, *available at*: https://www.scientificamerican.com/Article/offshore-wind-may-power-the-future/ (last visited on November 21, 2018).

[12] "Cyberspace, in the physical form of undersea fibre-optic cables, carries an even greater value for trade [than shipping goods] through financial transactions and information". See Greenleaf, J. and Amos, J., "A New Naval Era", United States Naval Institute Proceedings at June 17, 2013.

[13] Douglas Burnett, Tara Davenport, *et.al.*, "Introduction: Why Submarine Cables?" in *supra* note 8 at 1, 2.

[14] U.N. GAOR, 65th Sess., 59th plan. mtg. at 4, U.N. Doc. A/65/PV.59 (December 07, 2010).

[15] For example, following the model, a fault in all landing points in Australia would entail direct costs (for cable repair) of US$ 2.2 million and indirect economic cost of US$ 3,169 million mostly due to the loss of 100% of international internet traffic. See Economic Impact of Submarine Cable Disruptions, 42 (2012).

UNCLOS 1982.[16] Additionally, the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS)[17] and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972provide measures for the safety of cable ships and submarine cables.[18] The UNCLOS 1982 included *ad verbatim* the relevant provisions on the submarine cable of the Geneva Convention on Law of the Sea 1956 which in its time had adopted relevant provisions on cable from the Cable Convention of 1884.[19] However, UNCLOS 1982 represents the present international law on submarine cables. On the customary international law, there is a wide acceptance that the relevant provisions of the UNCLOS 1982 including submarine cables protection have achieved the status of customary international law. During war submarine cables are not inviolable. The international practice remains consistent with the principle that international cables are legitimate wartime target.[20] The literature shows that State parties are reluctant to drag other states to enforce rights regarding submarine cables.[21]

The coastal States' sovereignty extends over its adjacent waters up to 12 nautical miles (nm) recognized as territorial waters (TW)[22] and archipelagic waters. Submarine cable operation has its major difficulties in these waters.[23] The submarine cables laid on the seabed of the Exclusive Economic Zone (EEZ) attract both the EEZ regime and continental shelf regime. In these marine spaces rights and jurisdictions of states are defined.[24] Still, there is no legal clarity on cable operations, leaving the places as a grey area of law of the sea.[25]Article 87 of the Convention provides that the freedom of laying submarine cables is one of the freedoms of High Seas. With the combined reading of Article 87 and Article 58 (2), it is clear that the freedom of laying submarine cable is applied in the EEZ as well. The result is that there are two provisions, i.e., Article 58 and Article 79, assuring other states' rights of laying submarine cable within the EEZ of a coastal state. The freedom of laying cables includes maintenance and repair operations. However, freedom of laying submarine cable must be exercised in compliance with the other provisions of the Convention.[26] Additionally Articles 77 and 78 also prescribe limitations on coastal states to facilitate submarine cable operation.

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[16] For the United Nations Convention of the Law of the Sea 1982, UNCLOS 1982 or UNCLOS used interchangeably.

[17] The International Regulations for Preventing Collisions at Sea 1972 (COLREGs) provides rules to govern, among other issues, the operations of ships including cable ships as a preventive measure.

[18] The Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Convention) provides that "'Dumping' does not include abandonment in the sea of cable placed for a purpose other than the mere disposal thereof" (art. 1, para. 4.2.3).

[19] The United Nations Convention on the Law of the Sea, 1982, 1833 UNTS 3.

[20] Reports of International Arbitral Awards, Recueil Des Sentences Arbitrales, "*Eastern Extension, Australasia and China Telegraph Company, Ltd. (Great Britain)* v. *United States*" vol. VI, p.no. 112 (November 09, 1923), *available at*: http://legal.un.org/riaa/cases/vol_VI/112-118_Eastern_Extension.pdf (last visited on November 26, 2018). See also Douglas Burnett, Tara Davenport, *et.al*., "Overview of the International Legal Regime"in *supra* note 8 at 66.

[21] However, there is an example where cables companies are approaching the domestic court to enforce rights. *Ninety-Four Consortium Cable Owners* v. *Eleven Named French Fishermen*, Tribunal de Grande Instance de Boulogne Sur Mer (1st Chamber) August 28, 2009 [File No 06/00229 DG/LM]. In this case, cable repair by cable ship was interrupted by the fishing vessels' action to extract financial payment form the cable owner to allow the cable ship for cable repair. According to the French Civil Code, fishermen are requiring to keep one nautical mile away from the cable repairing ships. The French court held the fishermen liable.

[22] United Nations Convention on the Law of the Sea, 1982, art. 3.

[23] Davenport, *supra* note 4, para. 206.

[24]*Supra* note 22, art. 56.

[25] Robert Beckman, *1982 UNCLOS: A legal framework for cooperation between cable companies and coastal States*, International Cable Protection Committee (ICPC) Plenary Meeting, Mauritius, 2010.

[26]*Supra* note 22, arts. 58, 79.

In the EEZ, freedom of submarine cable operation is stressed by various emerging claims such as the extension of domestic environmental law, measures for pipelines to cable lines, adoption of annual fees for laying cables, not in TW, application of complex and uncertain domestic measures on cable operation in EEZ, etc. Additionally, the extension of domestic environmental laws to cable operation and declaration of Special Areas of Conservation (SACs) and Maritime Protected Areas (MPAs) are among the recent trends of coastal states' excessive claims which interfere with the cable operation. These are few examples of the incidents of creeping jurisdiction and coastal states' extended authority over their marine spaces.

Article 79(2) provides that the coastal states' laws in both EEZ and the Continental Shelf must be reasonable. These measures interfering cable operation are arguably not supportive of free communication regime. Coastal states are required to reconsider this principle of free communication regime before they advance their claims. Here, interpreting phrases like 'reasonable measures' and 'internationally lawful use of sea' to support their claims may, in turn, weaken international communication regime provided by submarine cable infrastructure.

With regard to the protection, there are two issues, i.e., protection of cable ships and the protection of submarine cables. The ships engaged in fishing activities may come into conflict with the cable ships. Here the conflict of competing for marine use, i.e., to catch fish and to repair cables, is a problem. Fishing vessels engaged in fishing may cause interference to the cable ship engaged therein with the cable repair operation. Such interference may hamper quick cable repair and lead to disturbing urgent telecommunication link. The Cable Convention provides for measures to avoid such interference. It requires that the other ships are to maintain a minimum distance from cable ships, provided they give advance notice to the local guards of the area of cable operation. The 1972 COLREGs also requires cable ships to show signal and sound to keep other vessels especially fishing vessels away from cable ships in operation. However, the UNCLOS did not include these measures of the Cable Convention. Nevertheless, cable ships maintain those measures. But, the coastal states neglect to implement these mandates and the cable repair operation continues to be hampered by fishing vessels.

The protection of cable is a matter of real concern in the EEZ. Three provisions of the Cable Convention prescribing a penalty for cable breaks had been adapted by the Convention on the Continental shelf, 1958 and the UNCLOS. Articles 113 to 115 of the UNCLOS prescribe the liability of the state for cable breaks by its persons or ships on whom it has jurisdiction and hold cable owner liable for breaking existing cable and indemnity for sacrificing fishing net, fishing gear, etc. catching cables. All of these provisions apply to the High Seas and EEZ. However, most of the coastal states do not implement those provisions through their domestic laws. So, breaking of cables within their jurisdictions is not illegal, and the fishermen are reluctant to sacrifice their nets in the absence of indemnity for the loss.

The point is that without any deterrent, fishing, shipping, and other marine activities hardly cares about the safety of the cables. The cable companies are helpless and compelled to bear an enormous cost for cable repair operation. It is time to rethink whether such a loss is limited only to the cable companies? Further, there are incidents of the theft of submarine cables. Certain unanswered questions come up. Whether theft of cable is piracy under the law of the sea? Whether piracy as defined under Article 101 of the Convention includes the act of

the theft of submarine cable? The answer is not clear. Therefore, legal treatment of the theft of submarine cable is uncertain. Even more, there is a concern for the safety of the critical submarine cable infrastructure from terrorist activities. One incident of a terrorist attack against any chokepoint of the undersea network may cause serious interruption to the telecommunication and traffic of data. Such an incident will have a serious impact on the international economy and security and may cause a hue and cry globally. The recent or current terrorism Conventions have not taken into consideration the possible terrorist attacks on submarine cables. Considering the impact of the terrorist attack on internally important submarine cables, it required for the global community to take initiatives for appropriate measures for the protection of submarine cables from terrorist attacks.

Therefore international law on submarine cables is increasingly challenged by the issues arising from multiple jurisdictions along with the conflict between coastal state and noncoastal states over traditional challenges of the law of the sea, i.e. 'exclusive sue' and 'inclusive uses'.[27] The submarine cable infrastructure is further challenged by the inadequate cable protection regime and poor implementation issues. Such gaps in international laws and domestic laws offer a potentially lucrative, consolidated target for sabotage.

III. International Institutional Framework For Protection of Submarine Cables

The existing authorities do not adequately support the cause of the protection of submarine cable. Among the international institutions, first, the International Telegraph Union (ITU) was founded in 1865 to manage affairs related to telegraph. Later the agency concentrated on the standardization of the telecommunication. Under the umbrella of the UN, the International Maritime Organization (IMO) was given the responsibility to deal with the international shipping activities which included cable ships. Other important international organizations such as the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS) and Food and Agriculture Organizations (FAO) are also responsible for ocean affairs including underwater cables. However, none of these organizations are dedicated to the submarine cable operations and the protection of cables. In the absence of a lead agency, supervision and review of submarine cable operation remained poor. Thereby international submarine cable protection regime continues to be impaired. The recent developments show that issues of the protection of submarine cables are increasingly getting attention at international organizations including the UN.[28] In recent past, few international nongovernmental bodies like International Protection for Cable Communication (IPCC), regional bodies like Asia-Pacific Economic Cooperation (APEC), and research under the academic and other institutes are increasingly getting involved with the submarine cables related research work and workshops.[29] Nevertheless, the submarine cable protection regime is required to be supported by the lead agency.

IV. National Legislations And Other Instruments On Submarine Cables

Since the very beginning of the subsea communication design, there has always been a concern for the protection of cables.[30] With the ever increasing developments in the marine

[27] Davenport, s*upra* note 4, para. 202.
[28] The issue of submarine cable has been recognized by the UN as 'critical infrastructure' in 2010.
[29] Davenport, s*upra* note 4, para. 223.
[30] 'I feel that the greatest difficulties will not be in the deep sea but after reaching the shallows at either end of the line'. *Supra* note 1 at 129. Wagner's statement was 'prophetic'.

affairs in the waters near the coast, the potential threats to the cables have also increased. Majority of the incidents of submarine cable damage are reported in the marine space within the national jurisdictions.[31]As mentioned, the UNCLOS does not impose any obligation on state parties to adopt legislation on submarine cables within the territorial waters or archipelagic waters. Therefore, the adoption of measures for the protection of cables remains optional to the coastal states.

It was thought that all the state parties would appreciate the importance of the submarine cables. The significance of the submarine cables on the economies and securities of the nations would require coastal states to adopt appropriate measures for the protection of submarine cables in the domestic spheres. The initial thinking was that the local regulators would give priority to submarine cables and they would take necessary steps for the implementation of appropriate measures. However, in reality, coastal states are yet to appreciate the critical nature of the submarine cable networks. Most of the jurisdictions of submarine cable operation and its protection, in particular, remain one of the neglected areas of the local regulatory regime. There are a few countries that have adopted specific legislation for submarine cables protection. Other countries deal submarine cables with various legal provisions, notifications, orders, directives which may be found in a scattered form. Moreover, under the UNCLOS 1982, state parties are required to adopt a law for the protection of submarine cables in its EEZ. However, the following study reveals that most of the states are yet to take measures for the implementation of the same. Therefore, in most of the jurisdictions submarine cable breaking is not illegal. Without deterrence, marine operators will continue to remain careless about the safety of the submarine cables.

Another problem relating to submarine cables is that the coastal states are not only negligent in facilitating cable operation and protection but also ask cable companies to meet prior requirements before they can commence cable operation. It may be approval from defense authorities, national security authorizations, environmental permits, permits for construction and land use, etc. Let us focus this part of the discussion on the submarine cable protection measures within specified national jurisdictions.

The coastal states have both territorial and extraterritorial jurisdictions in marine zones. The coastal states' sovereignty extends till territorial waters as mentioned earlier. In the EEZ, coastal states are entitled to specified jurisdictions and sovereign rights that are less than sovereignty. Domestic laws apply to the incidents of cable damage in the territorial waters and archipelagic waters. Regarding the enforcement of measures on submarine cable damage in EEZ, the coastal states may exercise extraterritorial jurisdictions for cable damage by its subjects.

In addition to cable regime in South Asian countries, the study focuses on the law regulating submarine cables in Australia and New Zealand (as they have specific legislations

[31] The cable repair data used here had been prepared by Verizon for the International Cable Protection Committee (ICPC), presented to the ICPC Plenary, Hamburg on 12 April 2016 and calculated from data between January 2008 and December 2015. See Anjali Sugadev, "India's Critical Position in the Global Submarine Cable Network: An Analysis of Indian Law and Practice on Cable Repairs" 56 *Indian Journal of International Law* 182 (2016). (compiled by the author from different sources)
The study reveals that every year there are one or more cable faults in the following jurisdiction including India: Portugal, Thailand, Qatar, Singapore, Turkey, Belgium, India and Vietnam - one or two; Egypt, Saudi Arabia, South Africa, Libya, Greece, United States, Iran, Spain, France - two to four; United Arab Emirates, Philippines, Malaysia, South Korea, Japan, Netherlands - four to six; Italy - more than six; Indonesia - more than twelve; United Kingdom and Taiwan - more than fourteen; and China - more than twenty-four.

for cables). The submarine cable regimes of China, Japan, Malaysia, Indonesia, Singapore, Vietnam respectively from Southeast and Far East Asia are discussed below. This region is considered strategically significant in the global submarine cable map. Moreover, there is ever increasing demand for bandwidth in this region which is growing fast with its vast young economies. Furthermore, the study has given a brief look into law on the protection of submarine cables in some of the other jurisdictions. The first part of the discussion deals with the legal instruments on the protection of submarine cables in some of the countries in this region and beyond. Then, the second part discusses the dedicated legislations on submarine cables in both Australia and New Zealand.

IV. COMPARATIVE ANALYSISON THE PROTECTIONOF SUBMARINE CABLES

A. Legal Instruments onthe Protection of Submarine Cables in Different Jurisdictions

The incidents of cable damage in Indonesian waters are relatively high, and the Ministry of Transportation of Indonesia issued regulation of submarine cables (1999) that prescribes for protective measures such as a restricted area for cable route corridor where activities like anchorage, dredging, mining or other underwater activities are prohibited. It also prescribes requirement of navigational buoys for cable routes and official approval for cable operation and restricts underwater activities. The regulations also recommend punishment for cable damage.

The Chinese Regulations for cables (1989)[32] require a permit for cable operation. Regulations for the protection of submarine cables (2004)[33] prescribe for preventive measures (report, protection zones, prohibition of certain activities there, the sacrifice of instruments that catch cables) and compensation for cable damage. When the 1989 Regulations authorize State Oceanic Administration (SOA), the 2004 Regulations empower the Administration Department of the State Oceanographic Bureau to ensure the compliance of the mandates.

The Info-communications Development Authority of Singapore (IDA) issues guidelines (2010) for deployment and repair operation of submarine cables. The Law of the Sea of Vietnam requires prior consent from its authorities for submarine cable operation in its waters and in 2007 the government has come with a directive, viz. *On Strengthening the Protection of SubmarineCables and Ensuring the Safety of International Telecommunications*.

In Japan, Articles 140 to 143 of the Telecommunications Business Law 1984 deal with the issues of protection of submarine cables. These provisions prescribe for approval for cable laying, preventive measures for cable damages, and compensation for revoking fishing in cable corridors.

South Asian marine space holds important international submarine cables. It is interesting to note that in this region, submarine cable operation meets with the cumbersome legal regime. However, still, none of the states of this region has adopted measures for the protection of cable ships or cables.

[32] Regulations on Management of laying Submarine Cables and Pipelines, 1989.
[33] Regulations of the Protection of Submarine Cables and Pipelines, 2004.

The countries such as Ghana[34] and Columbia established security areas along the lines of submarine cables within their waters.[35] Uruguay[36] and Argentina prohibited fishing in the areas where submarine cables or facilities exist and those methods of fishing that could cause damage to the cables.[37] Iceland prohibited activities within a quarter mile of the cables as protective measures.[38]

The European Union has adopted the environmental measures which apply to the cable laying operation within the region. It provides for Environmental Impact Assessment before cable laying. The measures also prescribe for zonal management like the Marine Protected Areas.

B. Dedicated Legislations on the Protections of the Submarine cables

A dedicated submarine cable regime is rare in the world. However, both Australia and New Zealand have adopted legislations for submarine cable in their respective jurisdictions. The following part analyses the provisions of these two legislations.

(i) Australia

In 1997 Schedule 3A has been added to the Telecommunication Act to ensure the protection of submarine cables in Australian waters.[39] Additionally, the Australian Communication and Media Authority Act 2005 provides for the Australian Communication and Media Authority (ACMA).[40] Relevant provisions for the protection of the submarine cables as provided by the law are as follows.

Australian Communications and Media Authority Act 2005 (the ACMA Act) establishes the Australian Communications and Media Authority (ACMA) as the nodal authority to deal with the issues of a declaration of the protection zone, mentioning of prohibited activities in the protection zone. The Federal Police of Australia is entrusted with the implementation of the legislation.

The legislation prohibits activities such as towing, trawl gear, anchoring, dredge, mining, etc. It restricts activities like anchoring in a protection zone, lowering, raising or suspending a shot line from a ship, demersal fishing using J-hooks, use of or towing, operating or suspending from a ship a net anchored to the seabed or a grapnel. Further activities like use of an explosive or explosive device are also restricted in the protection zone.

About the violation, the Schedule 3A provides detailed measures. First is the offense about a protection zone where cable has been damaged. In a protection zone, cable damage by conduct attracts imprisonment for 10 years or 600 penalty units or both. However, the penalty may be reduced, if the conduct causing cable damage is due to negligence, to imprisonment for 3 years or 180 penalty units or both. In both cases, the liability is strict

[34] Ghana Shipping (Protection of Offshore Operations and Assets) Regulations, 2012.
[35] General maritime direction – Resolution Number 204 of 2012.
[36] Maritime Provision No. 128.
[37] The Law of Navigation 20.094.
[38] Act on the Protection of Telecommunication Cables, art. 71.
[39] The new legislation replaced the Submarine Cables and Pipeline Protection Act in 1963.
[40] The Australian Communication and Media Authority Act, 2005.

which only allows defense on the ground of saving a life or ship; prevent pollution; reasonable steps were taken to avoid cable damage, and the defendant is the owner of the damaged cable. These defenses are also applicable to the liability that arises from engagement with the prohibited or restrictive activities.

Interestingly, the perpetrator may be the master or owner of a ship or conduct is done with the permission of another person. Liability attracts when the person is reckless as to the fact that the ship is used in the commission of the offense. In any case, the liability is imprisonment for 10 years or 600 penalty units or both. The next segment of the scheme is the engagement in prohibited or restricted activities by a person in the protection zone. Such engagement may attract imprisonment for 5 years or 300 penalty units. An even greater penalty of 7 years' imprisonment or 420 penalty units or both may be applicable to the conduct or engagement with the intention of making a commercial gain. The next phase of penalty arises from the activities like installing of both international and domestic submarine cables without a permit or breaching conditions of a permit and failing to comply with ACMA direction to remove the unlawfully installed international or domestic submarine cables.

For the loss of an anchor, a net or any other fishing gear which have been sacrificed to avoid damage to the submarine cable in the protection zone, the Schedule 3A provides for indemnity, provided that all reasonable precautionary measures have been taken. It is to be noted here that compensation is for the loss of equipment and does not include for the catches (fishes, etc.). Further, the cable operators are obliged to compensate to the person in case the activities of the former cause loss or damage to the property or interests (assets, sand, soil, water, etc.) of the latter. And it is expected, according to the law, there should be an agreed understanding between the cable operators and the person whose interests are in question.[41] Lastly, the legislation adopts strict liability that applies to the offense which attracts the Criminal Code 1995 of Australia.[42]

(ii) New Zealand

The Protection of Submarine Cables and Pipelines Act, 1996 of New Zealand is another pioneering example of dedicated legislation in the domain of national submarine cables legislations.[43] It defines the cable protective areas, adopts measures for regulating activities in those areas important for the protection of submarine cables, and prescribes liability for violation of the same. Further, along with these measures the legislation prescribes for enforcement measures. Additionally, Submarine Cables and Pipelines Protection Order 1992 (NZ) and the Submarine Cables and Pipelines Protection Order, 2009 support the objectives of the legislation.[44] The legislation applies to a New Zealand citizen or person ordinarily resident or the person from the New Zealand Ship.[45] Part II of the Act provides for the protection and enforcement of measures on submarine cables. The important provisions of the legislation for the protection of submarine cables are as follows:

[41] Clauses 87 and 88 of the Schedule 3A.
[42] Telecommunications and other Legislation Amendment (Protection of Submarine Cables and other Measures) Bill, 2005, Explanatory Memorandum and introduction of Schedule 3A to the Telecommunications Act, 1997.
[43] The Submarine Cables and Pipelines Protection Act 1966 has been superseded by the 1996 Act. Submarine Cables and Pipelines Protection Act, 1996.
[44] In the areas defined as Protection Areas under the Submarine Cable and Pipelines Protection Order 1999, it is illegal to fish or anchor. Likewise, it is unlawful to fish in areas defined as Marine Reserves.
[45] New Zealand Ship means a ship that is registered under the Ship Registration Act, 1992 and includes a ship that is not registered under that Act but is required or entitled to be registered under that Act.

The law prescribes the Governor-General may declare an area as a protected area. Under the provision of the legislation, the claimant may claim for indemnity for the loss he has met due to the sacrifice of fishing equipment. However, this measure also obliges the owner of the equipment to follow every reasonable precaution to avoid the catching of cables. Section 11 of the legislation defines the offense and prescribes heavy fine in case of cable damage. The offender may be strictly liable for causing cable damage. Further, he may be liable under this provision if he facilitates the cable damage by permitting to use his ship or equipment to be used for the damage of submarine cables. The acceded may absolve liability if it is shown that the damage of cable has been resulted due to the necessity of saving life or ship. Here also, reasonable exercises of shipman skills are required from the shippers. Defense to the reasonable application of shipman skills may be an effective tool to the accused under this legislation.

Certain activities in the declared protected area have been regulated to ensure the protection of submarine cable from damage. These activities include fishing. Both of the owner and the master of a ship is liable for anchoring in the protected areas. Section 13 of the Act also provides for the collection of evidence of the offense under it by the enforcement officer or protection officer defined empowered under it for this purpose.

For enforcement, currently, the New Zealand Police and Royal New Zealand are empowered for the same. For the enforcement of the provisions, the District Court or the High Court has the jurisdiction. Additionally, in some instances like the prosecution of a foreigner or foreign ship needs prior consent of Attorney-General.

V. CONCLUDING REMARKS

Submarine cable infrastructure and its stability is the key to the global telecommunication *vis-à-vis* economy and security of all states even though most of the cable infrastructure is owned by private companies. Nevertheless, the states are yet to appreciate it and respond accordingly. From the discussion so far, it is clear that only two countries have adopted full-fledged legislations for the protection of submarine cables. The analysis in this study reveals that most of the states are yet to take appropriate measures for the protection of submarine cables and cable ships. There is an urgency to seriously look into the consequence of cable damage, especially in the 'chokepoints', considered as the *Achilles Heel* of the global economy and security. As mentioned, the laws of submarine cables in both Australia and New Zealand may become the model legal framework for working further in that direction. For proposed submarine cable law the authorities may consider broad issues including those relating to cable operation and protection of cables. There is an urgency to establish a lead agency like ACMA at the national levels to look into the matter relating to submarine cables to support submarine cable operation especially urgent cable repairs. Defining jurisdiction over activities causing interference to cable operation and cable damage are amongst the positive measures. Additionally, protective and preventive measures in cable corridors may also be useful parameters to accommodate the conflicting marine uses. The UNCLOS provisions should not be used as a barrier by its members to obstruct the repair works of cables rather they should facilitate by adopting legislations and regulations at the domestic level.

UNILATERAL MINING OF SPACE RESOURCES

Kumar Abhijeet[*]

I.INTRODUCTION

Since human civilization came into existence natural resources have been so heavily exploited on earth that it is at verge of exhaustion. The declining stock of natural resource on earth operates as a catalytic factor to exploit natural resources from celestial bodies in outer space.[1] Development of space technology over the last sixty years has not only enabled humans to 'escape the bonds of Earth' but also have reduced the cost of space transportation that makes infeasible to exploit mineral resources on celestial bodies. On November 2015, the US Congress enacted the US Commercial Space Launch Competitiveness Act. It enables US citizen to engage in commercial recovery of an asteroid resource or a space resource. The Act entitles them to possess, own, transport, use, and sell the asteroid resource or space resource.[2]

Closely in the lines of the US, the Luxemburg on July 2017 enacted the Act on Exploration and Use of Space Resources (the Space Resources Act) that grants ownership rights in space resources to companies who mine them. Few more states are expected to follow the footsteps of the US and the Luxemburg. These legal developments are foreseen that a 'gold rush' beyond the horizons is on its way. The researcher views 'gold rush' merely a fictitious speculation because space resources are international commons that can be exploited only in accordance with international law and no state can unilaterally legislate for the same in conflict with international law.

Commercial exploitation of space resources raises some fundamental questions - Who owns the space resources? Does international law permit exploitation of space resources? Do States have jurisdictional competence to unilaterally legislate upon the space resources. What is the impact of national legislation granting ownership rights? In this paper an attempt has been made to find answer to the above raised fundamental questions.

II. WHO OWNS THE SPACE RESOURCES?

Dennis M. Hope, an American Entrepreneur claims that "the entire lunar surface, as well as the surface of all the other eight planets of our solar system and their moons (except Earth and the sun)" belongs to his company - Lunar Embassy.[3] The legal basis for his claim is (i)the property never belonged to anyone and Lunar Embassy are the first one to bring a claim, therefore they are the legal owner (ii) obligations of the Outer Space Treaty are applicable only to the Government and not the private individual.

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[1] Ricky J. Lee, *Law and Regulation of Commercial Mining of Minerals in Outer Space* 21 (Springer, Netherlands, 2012); Dennis Wingo, *Moonrush: Improving Life on earth with the Moon 's Resources* 90 (Collector's Guide Publishing Inc., Ontario, 2004).

[2] 51 US Code Chapter 513.

[3]See https://www.lunarembassy.com/ (last visited on January 15, 2018).

It is factually not correct to say that the Lunar Embassy are the first to claim ownership rights over celestial bodies, rather there have been numerous claims much before.[4] Nonetheless since 1980 under such justification the company has been selling plots on the Moon and other planets.

To understand the legal status of celestial bodies first a brief overview of the law of the outer space is presented below.

III. THE LAW OF THE OUTER SPACE

The corpus of space law is largely confined to the five treaties and bundle of non-binding resolutions of the United Nations General Assembly. In just two decades of the inception of the United Nations Committee on Peaceful Use of Outer Space (UNCOPUOS)[5], the committee came up with five international treaties such as, The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty hereinafter OST)[6]; the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (The Rescue Agreement)[7]; the 1972 Convention on International Liability for Damage Caused by Space Objects (The Liability Convention)[8]; the 1975 Convention on Registration of Objects Launched into Outer Space (The Registration Convention)[9] and the 1979 Agreement Governing Activities of States on the Moon and Other Celestial Bodies (The Moon Agreement)[10]. The OST is largely seen as the umbrella legislation governing space activities. The other four treaties are elaboration on specific provisions of the OST.

Apparently, 1979 onwards has been viewed as second phase of law making process. In this phase a bundle of non-binding resolutions were adopted – The 1982 'Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting'[11]; the 1986 'Principles Relating to Remote Sensing of the Earth from Outer Space'[12]; the 1992 'Principles Relevant to the Nuclear Power Sources in Outer Space'[13].

1996 onwards where the Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefits and in the Interests of All States, Taking into Particular the Needs of Developing Countries[14] was adopted and has been considered the third phase in the law making process i.e. the phase of reinterpretation of provisions of the

[4] For compendium of claim of ownership rights over Moon, refer Virgiliu Pop, *Unreal Estate – The Men Who Sold the Moon* (Exposure Publishing, London, 2006).
[5] The Committee on the Peaceful Uses of Outer Space (COPUOS) was set up by the General Assembly of the UN in 1959 to govern the exploration and use of space for the benefit of all humanity: for peace, security and development. The COPUOS has two wings the legal-subcommittee, which looks after the legal issues in outer space and other is the scientific and technical subcommittee that take cares of the technological developments for peaceful use of outer space. See http://www.unoosa.org/oosa/en/ourwork/copuos/index.html (last visited on January 15, 2018).
[6] 610 UNTS 205 (done January 27, 1967, entered into force on October 10, 1967).
[7] 672 UNTS 119 (done April 22, 1968, entered into force on December 03, 1968).
[8] 961 UNTS 187 (done March 29, 1972, entered into force on September 01, 1972).
[9] 289 UNTS 3 (done January 14, 1975, entered into force on September 15, 1976).
[10] 1363 UNTS 3 (done December 18, 1979, entered into force on July 11, 1984).
[11] UNGAR 37/92 (December 10, 1982).
[12] UNGAR 41/65 (December 03, 1986).
[13] UNGAR 47/68 (December 14, 1992).
[14] UNGAR 51/122 (December 13, 1996).

Outer Space Treaty began. The 2004 'Resolution on the Application of the Concept of the Launching State';[15] the 2007 'Resolution on Recommendations on Enhancing the Practice of States and International Intergovernmental Organizations in Registering Space Objects';[16] the 2013 'Resolution on Recommendations on Legislation Relevant to the Peaceful Exploration and Use of Outer Space'[17] belong to the phase of reinterpretation of the provisions of OST. In 2007 Space Debris Mitigation Guidelines[18] was adopted by the UNGA, which some other author[19] claim is a new era in space law because the resolution was initial drafted outside the UN body and later adopted.

It is but obvious that from 1979 onwards treaty making has come to a standstill and States are interested in non-binding resolutions only.

IV. THE LEGAL STATUS OF CELESTIAL BODIES

A.Article I, OST– Freedom In Outer Space

Article I of the OST grants states the freedom of exploration and use of outer space including celestial bodies. *Hobe* has commented that freedom in this sense means that any entity that benefits from the freedom need not take permission from other governments, but can find out whether any use is possible or use outer space.[20] The freedom conferred in Article 1 of the OST is not unlimited but rather subject to express restrictions stated within the Article 1 itself. "The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind."

The common benefit clause denotes that benefit must not be confined only to the country that has made investment but shall be in the general interest of all nations.[21] The phrase 'irrespective of their degree of economic or scientific development' connotes that even a non-space faring nations is entitled for the benefits derived from the activities undertaken by those who are capable.[22] Community aspects in space activities is further highlighted that the outer space and celestial bodies is 'province of mankind'.[23]

This draws the conclusion that outer space and celestial bodies are common spaces, not under the jurisdiction of specific States; therefore any activity in outer space or celestial bodies may not be undertaken for the sole advantage of States.[24]

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[15] UNGAR 59/115(December 10, 2004).
[16] UNGAR 62/101 (December 17, 2007).
[17] UNGAR 68/74 (December 11, 2013).
[18] UNGAR 62/217 (December 22, 2007).
[19] Stephan Hobe, "National Space Legislation: What the International Law Demands and How it isImplemented"in R. Venkata Rao and Kumar Abhijeet (eds.), *Commercialisation and Privatisation of Space: Issues for National Space Legislation* 31 (KW Publishers Pvt. Ltd., New Delhi, 2016).
[20] Stephan Hobe, "Article I"in Stephan Hobe, Bernard Schmidt-Tedd, *et.al.* (eds.), I *Cologne Commentary on Space Law* 34 (Carl Heymanns Verlag, Koln, 2009).
[21] *Id*., para. 38.
[22] *Ibid.*
[23] *Supra* note 20, para. 39.
[24] *Id*.,para. 37.

Outside Article I of the OST there are other specific limitation on the freedom principle like Article II prohibits appropriation of outer space and celestial bodies; Article III calls upon adherence to general international law; Article VI provides for the limitations of non-governmental entities.

B. Article II, OST –The Non-Appropriation Principle

Article I para 2 reiterates, 'freedom' principle includes 'free access to all areas of celestial bodies' but this does not mean access to celestial bodies includes claim to property which is exclusively prohibited by Article II of the OST.[25] Non-appropriation principle contained in Article II of the OST is a fundamental rule regulating the exploration and use of outer space.[26] It confirms "outer space, including the moon and other celestial bodies, is not subject to national, appropriation by claim of sovereignty, by means of use or occupation, or by any other means." The last words used in Article II 'any other means' leaves no room for any form or shape of appropriation of outer space by whatsoever means.[27]

C. Article III, OST – Exploration and Use of Outer Space in Accordance with International Law

Apparently the corpus of space law is confined to the above mentioned five treaties but Article III of the OST widens the scope of space law is much beyond these treaties. It provides that international law including the UN Charter applies to space activities.

Explaining the applicability of international law, Judge Manfred Lachs wrote: "By accepting the Charter as part of contemporary law applicable to outer space and celestial bodies, one has to accept it as it is today, including all the progress made during the years it has been in operation. Thus the obligation to conform with the Charter of the United Nations implies not only the application of provisions of international law as defined by it but also those that have grown as a result of the further development of the United Nations and subjected to a new and more up-to-date interpretation."[28]

International law is a continuous evolving law. As and when new treaties are laid, they become applicable to space activities as well.

D.Article VI, OST – Responsibility Of States For Their National Activities

States bear international responsibility for their activities in outer space, no matter whether it is carried by governmental entity or non-governmental entity.[29] This is to ensure that any activity in space irrespective of who undertakes the activity is in accordance with the international law. The non-governmental entities are not prohibited to undertake space activities but States have an obligation to authorize and continuingly supervise their activities. Governmental responsibility for non-governmental activities follows that States are under an obligation to take appropriate steps to ensure that their natural and juridical persons

[25] *Id*., para. 36.
[26] Steven Freeland and Ram Jakhu, "Article II" in *supra* note 20 at 44.
[27] *Id*., para. 54.
[28] Manfred Lachs, *The Law of Outer Space – An Experience in Contemporary Law Making* 15(Sijthoff, Leiden, 1972).
[29] The Outer Space Treaty, 1967, art. VI.

engaged in space activity conduct it in accordance with the international law.[30] A failure in diligent authorization and supervision may even make the state liable to compensate for damages.[31] Knowing that liability is unlimited in 'time, amount and location'[32] utmost precision is expected from the States for all its activity in outer space and especially when a private entity is undertaking such an activity.

Article VI of the OST permits a private enterprise to undertake commercial activities in outer space but responsibility will always be of the State.[33] Requirement of Article VI of the OST to 'authorize and continuingly supervise' has been generally considered to be the fundamental basis for national space legislation.[34] In fulfillment of these international obligations, many countries have enacted national laws empowering their non-governmental entities to take up space activities.[35]

From the above discussion it is ample clear that the status of outer space and celestial bodies is defined in a number of principles contained within the OST.

V. INTERNATIONAL LAW ON COMMERCIAL EXPLOITATION OF SPACE RESOURCES

A. Whether A Private Individual Can Appropriate Outer Space or Celestial Bodies?

Private sectors have shown growing interest in outer space for commercial benefits. Amongst other activities in outer space, mining of space resources has gained popularity in recent years. With innovation in space technology, cost of space transportation is expected to decrease significantly and is foreseen as emerging business opportunity.[36] The 'non-appropriation' principle of Article II of the OST has been seen as a major hurdle in claiming any ownership rights in celestial bodies. Those interested in establishing property rights in the celestial bodies like Dennis Hope, argue that 'non-appropriation' principle of the OST is applicable only to the government and not to private entities.[37]

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[30] *Supra* note 28, para. 122.

[31] *Supra* note 29, art. VII- A launching State is internationally liable for damage caused by space object to another State Party to the Treaty or to its natural or juridical persons.

[32] Armel Kerrest, "Sharing the Risk of Space Activities: Three Questions, Three Solutions," in Karl-Heinz Böckstiegel (ed.) *Project 2001—Legal Framework for the Commercial Use of Outer Space* 136 (Carl Heymanns Verlag, Koln, 2002).

[33] F.G. Von der Dunk, "The Origins of Authorization: Article VI of the Outer Space Treaty and International Space Law"in F.G. Von der Dunk (ed.) *National Space Legislation in Europe: Issues of Authorization of Private Space Activities in the Light of Developments in European Space Cooperation* 3-28 (Martinus Nijhoff Publishers, Leiden, Netherlands, 2011).

[34] Michael Gerhard, "Article VI" in *supra* note 20 at 120.

[35] The Institute of Air and Space Law (IASL), University of Cologne, Germany had undertaken two research project tilted "Project 2001 – Legal Framework for the Commercial Use of Outer Space" and "Project 2001 Plus – Global and European Challenges for Air and Space Law at the Edge of the 21st Century" in collaboration with the German Aerospace Centre. Within the scope of the projects national space legislation was extensively studied upon. For reports of the project refer Karl-Heinz Böckstiegel (ed.), *'Project 2001' – Legal Framework for the Commercial Use of Outer Space* (Carl Heymanns Verlag, 2002) and Stephan Hobe, Bernarhard Schmidt-Tedd and Kai-Uwe Schrogl (eds.), *Project 2001 Plus – Global and European Challenges for Air and Space Law at the Edge of 21st Century*, (Carl Heymann Verlag, 2006) respectively; also refer Paul Stephen Dempsey, "National Legislation Governing Commercial Space Activities" 1(2) *Journal of Space Safety Engineering* 44-60 (December 2014).

[36] Ram S. Jakhu, Joseph N. Pelton, *et.al.*, *Space Mining and Its Regulation* 133 (Springer, 2017).

[37] Rand Simberg, *Homesteading the Final Frontier - A Practical Proposal for Securing Property Rights in Space* (Competitive Enterprise Institute, Issue Analysis 2012, No. 3); also refer Stephen Gorove, "Interpreting Article II of the Outer Space Treaty" 37 *Fordham Law Review* 349-353 (1969).

It is counter argued that prohibition of appropriation is not only a fundamental legal principle of space law but has also acquired the status of *jus cogens*,[38] binding even upon states that are non-party to the OST.[39] Non-governmental entities do not by itself have direct access to space. Rather, by virtue of Article VI of the OST, States authorizes them to undertake space activities. As an authorization condition a State is free to impose restrictions or may even absolutely prohibit a particular activity if it is in conflict with any of its international obligation or is contrary to its national interest, because States bear international responsibility to ensure compliance with international law for all its space activities including those of private entities. For this reason States have an obligation to continuingly supervise the activities of non-governmental entity so that authorizing conditions are strictly complied with not only at the time of seeking authorization but throughout the life of the particular activity. States are themselves the guardians of all their activities in outer space whether they are undertaken by a governmental or non-governmental entity. The prohibition of national appropriation includes appropriation by non-governmental entities including individuals and enterprises because it constitutes a 'national activity'[40].

Such a proposition that Article II of the OST does not apply to private entities will defeat the purpose of the OST because it will nullify the common interest and freedom principle;[41] that intends to impede any State monopolization of space activities, so that all mankind can profit from those activities.[42]

***(i) The Bogota Declaration*[43]**

In 1976 some of the equatorial countries claimed sovereign rights over segments of the geostationary orbit above their respective territories. The assertion was not taken seriously and was rejected as it was in blatant disregard to the non-appropriation principle.[44]

(ii) Nemitz* v. *NASA

In 2001, Greogry W. Nimitz allegedly claimed asteroid 433(Eros) as his private property and sought parking fees from the NASA for placing a spacecraft on this particular asteroid. On being rejected by the NASA for such claim in 2003, Nemitz brought his claim before the Federal District Court of Nevada, which ruled out that the OST did not create any

[38] "They are customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect"; Ian Brownlie, *Principles of Public International Law* 515 (Oxford University Press, New York, 5th edn.).

[39]*Supra* note 26, para. 55; G. S. Sachdeva, "*Some Tenets of Space Law as Jus Cogens*"in R. Venkata Rao, V. Gopalakrishnan, *et.al.* (eds.), *Recent Developments in Space Law – Opportunities and Challenges* 7-26 (Springer, Singapore, 2017).

[40]Article VI of the OST treats both governmental and non-governmental activity in outer space as national activity.

[41]*Supra* note 36 at 121; *Supra* note 26 at 58.

[42]*Supra* note 19 at 35.

[43] The representatives of the States traversed by the Equator namely Brazil, Colombia, Congo, Ecuador, Indonesia, Kenya, Uganda, Zaire met in Bogota, Republic of Colombia, from November 29 to December 03, 1976 with the purpose of studying the geostationary orbit. The conclusion of the meeting was summed up in the Bogota Declaration.

[44] R. S. Jakhu, "The Legal Status of Geostationary Orbit" VIII *Annals of Air and Space Law* 333-352 (1982).

private property rights on asteroids.[45] For the reasons stated by the district court the Ninth Circuit Courts of Appeal also upheld the decision.[46]

(iii) The case of Lunar Embassy in China

Beijing Lunar Village Aeronautics Science and Technology Co. Ltd. in China claimed to sell land on the moon. The company issued customers a "certificate" that proclaimed property ownership, including rights to use the land and minerals on the Moon. Considering the activities to be in disregard to the laws and regulations, the Beijing administration suspended the licence of a company.[47] The Company in the Haidian District People's Court of China challenged the administrative decision. Citing Article II of the OST to which China is a party the Court rejected the petition of the Company saying no individual or state could claim ownership of the moon.[48]

(iv) The Case of 'Quarrelsome Litigant' in Cuebec

In 2012, a Canadian court declared a Quebec man named Sylvio Langvein 'quarrelsome litigant' barring him from filing lawsuits without authorization because he frivolously demanded sole ownership over planets, including earth and moon.[49]

From the discussions put forth in this section and subsequent state practices, it is established that no amount of use of outer space will ever suffice to justify a claim of ownership rights over the whole, or any part of outer space, including the Moon and other celestial bodies.[50]

B. Whether natural resources from outer space can be appropriated?

On November 25, 2015 the US Congress passed the 'Commercial Space Launch Competitiveness Act'.[51] Title IV of the Act conferred ownership rights for 'asteroid or space resources'[52] to a US citizen. It reads ''A United States citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space resource obtained in accordance with applicable law, including the international obligations of the United States.''[53]

Parallel to the US initiative the Luxembourg enacted 'Law of 20 July 2017 on the exploration and use of space resources' that ordained, "The resources of the space are

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[45] *Nemitz* v. *US*,Slip Copy, 2004 WL 316704, D. Nev., April 26, 2004.
[46] *Nemitz* v. *NASA*, 126 Fed. Appx. 343 (9th Cir. (nev.) February 10, 2005).
[47] "Licence of 'Lunar Embassy' suspended" *China Daily*, Oct. 11, 2015, p.no. 2, *available at*: http://www.chinadaily.com.cn/english/doc/2005-11/10/content_493317.htm (last visited on January 04, 2018).
[48] "Court rejects 'Lunar Embassy's' Moon Rights" reported in *the China Economic Review*, March 20, 2007, *available at*: http://www.chinaeconomicreview.com/node/46715 (last visited on January 04, 2018).
[49] "Man Sues for Ownership of Most of Solar System" *Toronto Sun*, Mar. 01, 2012, *available at*: https://torontosun.com/2012/03/01/man-sues-for-ownership-of-most-of-solar-system/wcm/1402f316-5c87-44f8-9311-45cbc6b58a4c (last visited on January 04, 2018).
[50] *Supra* note 26, para. 53.
[51] H.R.2262 — 114th Congress, 51 USC 10101.
[52] § 5130, 51 USC - The term 'asteroid resource' means a space resource found on or within a single asteroid. The term 'space resource' means a biotic resource in situ in outer space including water and minerals.
[53] § 51303, 51 USC.

susceptible of appropriation"[54]. These developments have generated much discourse at the international fora. The important moot issues are whether ownership rights in space based natural resources is in accordance with the 'non-appropriation principle' of the OST? Whether it is legitimate for a State to confer unilaterally ownership rights in space based natural resources?

The second issue is discussed in the subsequent section. As to the first issue there has been a conflict of opinion. Supporters of national mining law are of opinion that while the surfaces of the Moon and the celestial bodies cannot be appropriated by any means but natural resources can be.[55] These laws simply confer private citizens/companies to, extract and own the extracted resources and do not confer any territorial claims on the celestial bodies.[56] "The situation of a private company wanting to extract resources from a sovereign-free celestial body is similar to a commercial fishing vessel in international waters. . . .While it doesn't own the water (land) or the fish (resources) in the water, it has a right to the ownership of the fish once extracted."[57]

The opponent's counter argue, "Space exploration is a universal activity and therefore requires international regulation".[58]

Let us examine whether the international legal regime for mining of space resources is sufficiently defined or an international legal regime needs to be defined. Article I of the OST confers freedom in exploration and use of outer space and celestial bodies. Though the word exploitation of celestial bodies is nowhere been mentioned in the OST but one can argue exploitation of celestial bodies or commercial mining constitutes a kind of use contemplated in Article 1 of the OST, however by virtue of Article II no amount of use, or occupying the territory for mining or any other purposes can give rise to ownership rights in celestial territory.[59] Such use is subject to the rules and principles contained in the OST (i) common interest; (ii) freedom (iii) province of mankind (iv) non-appropriation (v) international cooperation (vi) authorisation and continuing supervision. These principles being so broad and subjective that their implementation will require further elaboration of more detailed provisions.[60]

The closest space law that directly establishes the legal conditions of exploitation of the natural resources of the Moon and other celestial bodies is the Moon Agreement. Article 11 of the Moon Agreement introduces the principle of 'common heritage of mankind' (CHM), which principally reiterates the 'common province' clause of Article I of the OST coupled with the idea of intergeneration equity and preservation of environment for the use of

[54] Luxembourg Law on the Exploration and Use of Space Resources, 2017, art. 1.
[55] Sagi Kfir, "Is Asteroid Mining Legal? The Truth Behind Title IV of the Commercial Space Launch Competitiveness Act of 2015"*available at*: http://deepspaceindustries.com/is-asteroid-mining-legal/ (last visited on January 05, 2018).
[56] Tanja Masson-Zwaan and Bob Richards, "International Perspectives on Space Resource Rights" *Space News*, Dec. 08, 2015.
[57]*Ibid*.
[58] Gbenga Oduntan, "Who owns space? US asteroid-mining act is dangerous and potentially illegal" *The Conversation*, Nov. 25, 2015, *available at*: https://theconversation.com/who-owns-space-us-asteroid-mining-act-is-dangerous-and-potentially-illegal-51073 (last visited on January 06, 2018)
[59]*Supra* note 26 at 53.
[60]*Supra* note 28 at 48.

future generations.[61] Some States have misunderstood the CHM principle that all nations would require sharing equally any benefits derived from the Moon exploration. Contrarily, the wordings of the Moon Agreement expressly state that for an 'equitable' benefit sharing all States Parties must establish an international regime, including appropriate procedures.[62] The purpose of international legal regime was to effectively and transparently govern the exploitation of lunar and celestial natural resources so as to ensure transparency and avoid conflicts by undertaking orderly and safe development of the natural resource; rationale management of resources; expansion of opportunities in the use of those resources; and equitable sharing of resources.[63] It is very clear that a private entity engaged in commercial exploitation of space resources would not be require to share such benefits unless and until prescribed by the international legal regime and that too in the prescribed manner.[64]

Article 11 of the Moon Agreement is very balanced and future oriented;[65] but only fifteen States have ratified the Moon Agreement, so practically it is not of much of significance. Rather these emerging opportunities must be attraction for States to rethink and discuss about the prospects of the Moon Agreement.

It is understood that even if it is agreed taking of space resources may not be in conflict with the non-appropriation principle of the OST, but such taking can only be in accordance with rules formulated by the international community.

C. Whether it is legitimate action of a State to Confer Unilaterally Ownership Rights in Space Based Natural Resources to its Natural or Juristic Persons?

(i) Jurisdictional Competence

The fundamental issue related to the commercial exploitation of space resources is do states have jurisdictional competence to legislate for the celestial bodies?[66] A State may exercise its jurisdiction by way of prescription or adjudication or enforcement. In international law prescriptive jurisdiction refers to competence of a state to make laws, decisions or rules to regulate the conduct of natural and juridical persons.[67] The General bases for exercise of the prescriptive jurisdiction are:[68]

(ii) The Territoriality Principle

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[61] Jakhu, Freeland, *et.al.*, "Article 11(Common Heritage of Mankind/ International Regime)" in Stephan Hobe, Bernhard Schmidt-Tedd, *et.al.* (eds.), II *Cologne Commentary on Space Law* 394 (Carl Heymanns Verlag, Germany, 2013).
[62] Moon Agreement, 1984, art. 11(2).
[63] *Id.*, art. 11(7).
[64] Ram Jakhu, "Twenty Years of the Moon Agreement: Space Law Challenges for Returning to the Moon" 54 *German Journal of Air and Space Law* 254 (2/2005).
[65] Stephan Hobe, "The Moon Agreement, Let's Use the Chance" 59 *German Journal of Air and Space Law* 372-381 (3/2010).
[66] The researcher had the opportunity to raise this issue earlier also in one of his paper published in *German Journal of Air and Space Law.* Refer Kumar Abhijeet, "Appropriation of Space? Apollo Lunar Landing Legacy Bill as a Trigger for Colonization of Space?" 64 *German Journal of Air and Space Law* 653-665 (4/2015).
[67] James Crawford, *Brownlie's Principle of Public International Law* 456 (Oxford University Press, New York, 8th edn.).
[68] *Ibid.*

The territoriality principle is the most fundamental principle of all principles governing jurisdiction.[69] "A State can make laws for, and apply them to, persons and events within its territory".[70]E.g. A person commits an offence in country X. Country X can exercise its jurisdiction against the person who has committed the offence because the offence was committed within its territory.

(iii) The Nationality Principle or the Personality Principle

A State may prescribe for the conduct of its own nationals located beyond the State's national territory and the conduct of its national is not covered by territorial jurisdiction of any other State. E.g.: A national of country X commits an offence in country Y that is not punishable in country Y. Country X wants to exercise its jurisdiction over its national who has committed an offence in country Y.

(iv)The passive personality principle

The passive personality principle aims to protect own nationals of a State who are located outside the territory of the State and are being affected by an event that occurs outside the State's territory.[71] E.g.: In the preceding example if Country Y wants to exercise its jurisdiction over the national of country X who has committed offence in country Y.

(v) The protective or the security principle

A State may exercise its jurisdiction with regard to activities committed abroad that has the potential to affect the security or interest of the State. E.g.: Non-nationals of country X in country Y are engaged in counterfeiting the currency of country X. X may exercise its jurisdiction.

(vi) The effects doctrine[72]

"Where an extra-territorial offence causes some harmful effect in the prescribing state, without actually meeting the criteria of territorial jurisdiction or representing an interest sufficiently vital to the internal or external security of the state in question to justify invoking the protective principle."[73] The doctrine focuses on deleterious effects of extra-territorial acts to the state.[74] E.g. Export/ import of country X being affected by the activities of a non-national companies located outside country X who are member of a cartel engaged in control of international market.[75] Country X may exercise jurisdiction as it affects its trade and economy even though no offence has committed within the territory of country X.

(vii) The Universality Principle

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[69] D.W. Bowett, "Jurisdiction: Changing Patterns of Authority Over Activities and Resources" in W. Michael Reisman (ed.), *Jurisdiction in International Law* 240 (Ashgate Publishing Ltd., United Kingdom, 1999).
[70] R. Higgins, "Allocating Competence: Jurisdiction", *Id*. at 263.
[71]*Supra* note 56 at 100.
[72] It has been very controversial.
[73]*Supra* note 52 at 462.
[74]*Supra* note 53.
[75] *Alcoa* case, *US* v. *Aluminum Co. of America*, 148 F.2d 416 (1945).

As a matter of international public policy every state has a legitimate interest in repression of certain heinous crime like genocide, war crimes or crime against humanity. The objective being the wrong doer must not go unpunished.

Generally if a state desires to project its prescriptive jurisdiction extra-territorially it must find a recognized basis in international law for doing so.[76] A state that intends to unilaterally enact legislation pertaining to governance of space resources, must demonstrate a genuine link with any of the above-mentioned six bases of prescriptive legislation recognized in any of the space treaties.[77] Objectively, it can be deduced that none of the space treaty recognizes the last four bases of prescriptive jurisdiction; conversely states do not have the power to legislate regarding space resources on these four principles.[78]

As discussed in this paper space resource are not within the national jurisdiction of any state. Outer space and celestial bodies are not national territory of any state.[79] So by virtue of Article II of the OST, exclusive jurisdiction of any State over the space resources on the basis of territoriality principle is also ruled out.[80]

Article VIII of the OST read, "A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such objects, and over any personnel thereof, while in outer space or a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth." Article VIII do confer power upon the States to exercise personal jurisdiction but it is limited only to space objects and personnel and not to outer space or celestial bodies.

An extraterritorial application of prescriptive jurisdiction should not be unfair from the standpoint of those whose interests would be affected and in an international case must not be inconsistent with the needs of the international system. [81]

There exists a 'global public interest in outer space'.[82] When a state unilaterally legislates for the celestial bodies (allocating ownership rights on space resources) unfairness to other states and even inconsistency with international space law is quite probable for the following reasons:

a. Allocation of mining sites on celestial body

Presently there is no international legal framework to regulate mining of space resources. For profitable investment returns each state engaged in mining of space resources will be interested in mining those areas on the celestial bodies which are rich in resources. A

[76]*Ibid*.
[77] Stephan Hobe and De Man, "National Appropriation of Outer Space and State Jurisdiction to Regulate the Exploitation, Exploration and Utilization of Space Resources" 66 *German Journal of Air and Space Law* 470 (3/2017).
[78]*Ibid*.
[79]*Supra* note 29, art. II.
[80]*Supra* note 77, para. 468.
[81] Willis L. M. Reese, "Limitations on the Extraterritorial Application of Law"*Dalhousie Law Journal* 594 (1978).
[82] Ram S. Jakhu, "Legal Issues Relating to the Global Public Interest in Outer Space" 32(1) *Journal of Space Law* 31-110 (2006).

State, which reaches first, may assert its claim over a particular site depriving other states to take up any activity within the same area, which may even lead to monopoly over the resources. Prolonged unilateral access to a particular celestial site in deprivation to other States is blatant disregard to the freedom principle of Article I of the OST and could even lead to appropriation of the particular area.[83] Therefore rules for allocation of mining sites on the celestial bodies are an indispensable necessity, which can be done only at the behest of the international community and not unilaterally through domestic legislation.

b. Management of space resources

A number of other issues are incidental to allocation of mining sites. The time period for which a country or its authorized private entities is entitled to do mining operation in particular area; protection of artifacts on the mining sites; maintenance of records and data of the resources mined; effective space traffic management for transportation of resources. The management of space resources further creates a necessity for international rules.

c. Access and Benefit Sharing

Article I of the OST enshrines international cooperation principles and mandates that the exploration and use of outer space shall be carried out for the 'benefit and in the interest of all countries, irrespective of their degree of economic or scientific development.' Space faring countries must enable non-space faring countries to participate more actively in space exploration and use.[84] The Declaration on Space Benefits[85] re-interpret Article I and clarify that in the exploration and use of outer space, particular attention should be given to the benefits and interests of developing countries.[86]

It will be unfair if non-spacefaring country or a developing State is not given an opportunity to access and benefit from these nascent extra-terrestrial resources.

d. Ecological consideration

Article IX of the OST is considered to be the basis for the environmental protection of outer space and its preservation for peaceful uses. It also reiterates that there is no unilateral interest in mining of space resources. State parties must give due regard to the corresponding interests of all other States in the exploration and use of outer space including the Moon and celestial bodies.[87] Kaiser explains, "due to low gravity environment of asteroids, mining activities are prone to create clouds of materials that will leave the asteroids and hamper the sustainable access to space and the unobstructed observation of outer space, of celestial bodies and of the Earth."[88] Contamination resulting from mining of space resources has

[83] Ramya Sankaran and Nivedita Raju, "A Framework to Address Burgeoning Commercial Complexities in Space Mining" 66 *German Journal of Air and Space Law* 93 (1/2017).
[84] *Supra* note 77, para. 38.
[85] The 1996 Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, UNGAR 51/122 adopted on December 13, 1996.
[86] Space Benefits Declaration, 1996, art. 3.
[87] *Supra* note 29, art. IX, sentence 1.
[88] Stefan A. Kaiser, "Legal Protection Against Contamination from Space Resource Mining" 66 *German Journal of Air and Space Law* 286 (2/2017).

greater potential to cause irreparable loss than the space debris, which in itself is a concern for international community.[89]

VI. LIMITS OF NATIONAL SPACE LEGISLATION

National space legislation is primarily in response to Article VI of the OST but nevertheless states also have their own specific reason to regulate the conduct of space activities.[90] That is why a variation is seen in the contents and scope of national laws of respective countries.[91] The fundamental question that arises from this diversity is what should be the limits of national space legislation? Whether ownership rights over the space resources can be unilaterally brought within the scope of national space legislation? Article VI OST, notes that "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried out by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present treaty. The activities of non-governmental entities in outer space shall require authorisation and continuing supervision by the appropriate State party to the Treaty".

Article VI confers prescriptive jurisdiction (based on personality principle) upon the 'appropriate State'[92]. An appropriate State is one that can bear international responsibility.[93] All such activities in outer space for which a State bear international responsibility can be brought and must be brought within the ambit of national space legislation and all such activities must be carried out in conformity with the provisions of the OST. On one hand the scope of national space legislation is very broad because 'any activity in outer space is subject to Article VI'[94] of the OST and on the hand the very same Article VI restrict the scope of national space legislation because no activity in outer space can be in conflict with the provisions of the OST. International law including the UN Charter being applicable to all space activities, any activity that is in conflict with them cannot be within the scope of national space legislation. In the preceding paragraph it has been explained that international law do not confer jurisdiction upon States to legislation upon space resource. This leads to the conclusion that if a State unilaterally legislate on space resources it will be in conflict with compliance with international law principle of Article III of the OST.

Hobe and de Man has expressed that outer space, celestial bodies, including their resources is global commons that fall under the jurisdiction of international community and so space resources are not subject to national jurisdiction.[95] States fundamentally lack jurisdiction to unilaterally legislate and national laws conferring ownership rights over space resources do not have any scope.[96]

VII. THE IISL POSITION PAPERS

[89] *Id.* at 287.
[90] *Supra* note 36 at 131.
[91] Irmgard Marboe, "National Space Legislation in National Space Law" in Frans von der Dunk and Fabio Tronchetti, *Handbook of Space Law* 185 (Edward Elgar Publishing, 2015).
[92] *Supra* note 29, sentence 2.
[93] Frans von der Dunk, *Private Enterprise and Public Interest in the European 'Spacescape'* 19 (Leiden University, Leiden, 1998).
[94] *Supra* note 34 at 109.
[95] *Supra* note 79, para. 478.
[96] *Ibid.*

The International Institute of Space Law (IISL) is an independent non-governmental organization dedicated to "promote the further development of space law and the expansion of the rule of law in the exploration and use of outer space for peaceful purposes".[97] Often on important issues of space law the IISL through its members, who are highly qualified experts in the field of space law has time and again issued position papers that could serve as a secondary source of international law recognized within Article 38 (1)(d) of the Statute of the International Court of Justice.

A. Position Paper on claims to property rights regarding the Moon and other celestial bodies

Within rampant claims by private parties to own the Moon or parts and other celestial bodies; even issuance of 'deeds to lunar property', the Board of Directors of the IISL in 2004 issued consensually statement explaining legal situation concerning such private claims:

> "The prohibition of national appropriation by Article II includes appropriation by non-governmental entities (i.e. private entities whether individuals or corporations) since that would be a national activity. The prohibition of national appropriation also precludes the application of any national legislation on a territorial basis to validate a 'private claim'. Hence, it is not sufficient for sellers of lunar deeds to point to national law, or the silence of national authorities, to justify their ostensible claims. The sellers of such deeds are unable to acquire legal title to their claims. Accordingly, the deeds they sell have no legal value or significance, and convey no recognized rights whatsoever."[98]

In 2009 further statement was issued clarifying that the "since there is no territorial jurisdiction in outer space or on celestial bodies, there can be no private ownership of parts thereof, as this would presuppose the existence of a territorial sovereign competent to confer such titles of ownership."

It was also highlighted that the "present, international space legislation does not include detailed provisions with regard to the exploitation of natural resources of outer space, the Moon and other celestial bodies, although it does set down a general framework for the conduct of all space activities, including those of private persons and companies, with respect to such natural resources….. That a specific legal regime for the exploitation of such resources should be elaborated through the United Nations . . ."[99]

B. Position paper on space resource mining

On 20 December 2015 in response to Title IV of the US Commercial Space Launch Competitiveness Act the IISL issued consensually issued a position paper clarifying that "it is uncontested under international law that any appropriation of "territory" even in outer space (e.g. orbital slots) or on celestial bodies is prohibited, it is less clear whether this Article also prohibits the taking of resources . . .. In view of the absence of a clear prohibition of the

[97] See http://iislweb.org/about-the-iisl/introduction/ (last visited on January 15, 2018).
[98] Statement by the Board of Directors of the International Institute of Space Law (IISL) On Claims to Property Rights Regarding The Moon and Other Celestial Bodies, 2004.
[99] Statement of the Board of Directors of the International Institute of Space Law, March 22, 2009.

taking of resources in the Outer Space Treaty one can conclude that the use of space resources is permitted."[100]

The position only clarified that taking of space resources may be permitted as per international law but did not comment if national laws can confer ownership rights to its private entities. Rather it also proposed for the development of international rules to be evaluated by means of an international dialogue in order to coordinate the free exploration and use of outer space, including resource extraction, for the benefit and in the interests of all countries.[101]

C. Directorate of Studies

A research study under the overall responsibility of Professor Stephan Hobe, Cologne, Chair of the IISL Directorate of Studies, was presented to the IISL Board of Directors at its session ofMarch 26, 2017. It discussed the likely impact of enacting national space legislation that allows for the taking of space resources:[102]

> "The legal framework governing activities in space does not prohibit the exploitation of resources as an activity open to States, but it nevertheless requires that such exploitation shall take place under the conditions laid down in the Outer Space Treaty which are to be shaped in an appropriate international legal order multilaterally."

The IISL position paper re-affirm that, (i) there cannot be any private/ state claim for ownership in the outer space or celestial bodies or its parts thereof; (ii) International space law do not expressly prohibit taking of natural resources from the Moon or other celestial body; (iii) Commercial exploitation of space resources must done in compliance with international law which is yet to be defined for space resources; (iv) The legal regime governing exploitation of space resources must be at the behest of the international community and not unilaterally by any State.

VIII. POSSIBLE SOLUTIONS

It is but obvious that practical difficulties associated with exploitation of space resources are beyond the scope of national laws. It demands the drafting of an international legal order as an international effort and not as a unilateral effort.[103]

A lack of internationally defined legal framework will create uncertainty of behaviors leading to legal disputes.[104] Following solutions have been proposed towards establishing an international legal order that would facilitate exploitation of space resources.

A. The Moon Agreement

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[100] Position Paper on Space Resource Mining, December 20, 2005.
[101] *Ibid*.
[102] IISL Directorate of Study on Space Resource Mining, 2017 "Does international space law either permit or prohibit the taking of resources in outer space and on celestial bodies, and how is this relevant for national actors? What is the context, and what are the contours and limits of this permission or prohibition?"
[103] Stephan Hobe, "IISL adopts Position Paper on Space Resource Mining" 65 *German Journal of Air and Space Law* 209 (2/2016).
[104] Fabio Tronchetti, "Title IV- Space Resource Exploration and Utilization of US Commercial Space Launch Competitiveness Act: A Legal and Political Assessment" 41 *Air and Space Law* 155 (2/2016).

The Moon Agreement, which has been silent since its enactment suggests a possible way forward regarding the commercial exploitation of space resources. States have been skeptic to ratify the Moon Agreement as they are of belief that it prohibits commercial use of outer space. Contrary to this disbelief the Moon Agreement has a much wider scope. It calls for the establishment of an international regime including appropriate procedures to govern the exploitation of space resources. The Moon Agreement is in the very interest of nations and States should hesitate any more to ratify it.

B. The ITU Regulatory Regime

The Geostationary orbit is an important natural resource. The allocation of exploitation rights including allocation of radio frequencies and orbital slots is governed under the aegis of the UN through the International Telecommunication Union (ITU) that has formulated rules to this effect. If States agree the jurisdiction of ITU may be extended over space resource governance as well.

C. The Hague Working Group

Since 2015 The Hague Space Resources Governance Working Group[105] hosted by the International Institute of Air and Space, University of Leiden has been engaged to propose the draft legal framework for exploitation of space resources. On September 13, 2017, the Working group circulated the preliminary result of its work. It has released a set of set of 19 Draft Building Blocks for the Development of an International Framework on Space Resources Activities.[106] The building blocks are designed to lay the groundwork for international discussions on the potential development of an international framework for the governance of space resources.[107] It is expected the international framework will create an enabling factor for exploitation of space resources. Since this an academic exercise engaging all stake holders, one can freely express their views, which is often not possible at the formal law making organs.

IX. CONCLUSION

Article VI of the OST is generally the fundamental basis for States to legislation upon any space activity. But not every activity in outer space can be legislated on the basis of Article VI. An activity, which is in conflict with international law, can never be within the scope of national space legislation. International law do not confer jurisdiction upon States to unilaterally legislate on space resources because it directly affects the interest of international community. An international legal regime governing space resource can only be at the initiative of international community.

'*Pacta Sunt Servanda'* is the cardinal principal of international law, wherein States are expected to fulfill their treaty obligation in good faith.[108] Till the time international community defines the legal regime for commercial exploitation of space resources, mining of space resources is practically not feasible and once such a legal order is defined,

[105] The working group consists of members as well as observers from all over the globe.
[106] https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/lucht--en-ruimterecht/space-resources/draft-building-blocks.pdf (last visited on January 15, 2018).
[107] *Ibid*.
[108] Vienna Convention on the Law of Treaties, 1969, art. 26.

exploitation of space resources has to be in accordance with it and so ‘Gold rush’ remains merely fictional.

The US and the Luxembourg law on space resource merely reflect their aspirations and are not of any practical utility because they cannot be implemented till the time international community comes with specific rules regulating space resources.

THE ICTY'S CONTRIBUTION TO THE DEVELOPMENT OF PUBLIC INTERNATIONAL LAW

Santosh K. Upadhyay[*]

I. INTRODUCTION

The International Criminal Tribunal for the Former Yugoslavia (hereinafter mentioned as ICTY) was established pursuant to the United Nations Security Council Resolution 827 of May 25, 1993. The Security Council adopted this resolution under chapter VII of the UN Charter that empowered it to adopt measures for the maintenance of the international peace and security. The explicit objective behind ICTY's establishment was to ensure prosecution for the acts of serious violations of International Humanitarian Law committed in the territory of Former Yugoslavia since January 01,1991.[1]

Situated in the Hague, the Netherlands, ICTY remained functional for almost 24 years from 1993 till December 2017 when it was closed and all the outstanding appeals against conviction were transferred to the UN's Residual Mechanism for Criminal Tribunal (MICT) and the other war crimes cases were transferred to the respective national courts in the region. During these 24 years, ICTY contributed immensely to many fields of Public International Law and ushered a new era of end of impunity for international crimes. Though it was established in the midst of criticism and doubt related to its legality and capability to bring the desire result, ICTY evolved its functioning brick by brick in a way that impressively answered these cynicism.

As per the ICTY infographic, it indicted almost 161 persons in which 90 were sentenced and 19 were acquitted. It sat for more than 10000 trail days and used more than 2.5 million pages of transcript while adjudicating four categories of international crimes that were genocide, crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions.[2]

The ICTY was established in the background of violent nationalistic aspirations that were ruthlessly playing havoc to the minorities in the territories of former Socialist Federal Republic of Yugoslavia. The world community had failed miserably to prevent or stop the massacres and thus there was something concrete needed to be done. The establishment of ICTY was one of those concrete steps. The Tribunal was a legal institution having manifest political aspirations that its functioning must correspond to the maintenance of international peace and security. It was the explicit acceptance of the fact that prosecution of the international crimes committed in conflict zones is one of the important measures for the maintenance of international peace and security.[3]

There are seemed to be three probable justifications behind the establishment of the Tribunal. First, its establishment was preventive in the nature that it would desist the possible perpetrators from future violations and would thus help end the culture of impunity. Second,

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[1] UNSC Resolution 827 of 1993, Operative para. 2. UNSC Resolutions can be found at http://www.un.org/en/sc/documents/resolutions/ (last visited on November 20, 2018).

[2] See http://www.icty.org/en/content/infographic-icty-facts-figures (last visited on November 20, 2018).

[3] *Supra* note 1, UNSC resolution 827, preambular paragraph.

it individualized the offences thus separating offenders from the rest of their community members. In this way, it protected the communities from imposition of guilt against one another. Third, it helped in writing down the reliable historical records of atrocities and sufferings and thus protected the future generations from misinterpretation and myth.[4]

Since ICTY stopped functioning from December 2017, it is high time to discuss its contributions to the Public International Law. This tribunal was the first of its kind after the Nuremberg and Tokyo tribunals therefore the discussion about its legality is also of much importance. Part I of the paper discusses these issues in little detail and also highlights the contribution made by the Tribunal to the Public International law jurisprudence while deciding the legality of its own establishment. Part II of the paper discusses in brief the contribution of the tribunal in respect of International Humanitarian law and International Criminal Law. This part does not intend to be comprehensive and specific jurisprudential advances were selected as per their relative importance. Part III of the paper provides over all appraisal of the Tribunal and presents its conclusion.

II. LEGALITY AND LEGITIMACY OF THE ESTABLISHMENT

The ICTY was established by the UN Security Council in pursuance of the Council's powers to maintain international peace and security. Thus, Security Council openly recognized the relationship between establishment of the judicial tribunal to prosecute the serious violation of the IHL and the maintenance of international peace and security.[5] This was a concrete step that had further heralded the establishment of International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC) and many other hybrid courts and tribunals to prosecute the serious violations of laws of armed conflict so that peace and security could be maintained.

Though after the Nuremberg and Tokyo tribunals, the ICTY was probably the first attempt to ensure the prosecution of the serious violations of the International Humanitarian Law. But it was also in many ways different from these tribunals that were generally termed as its predecessors. The ICTY was international in the sense that it was established by a UN body in contrast to the multinational character of the Nuremberg and Tokyo tribunals that were the result of an agreement between the victorious powers of the Second World War. In contrast to the Nuremberg and Tokyo tribunals that lacked jurisdiction to prosecute the persons of Allied powers, the ICTY's jurisdiction was equally applicable to all sides of the conflict and thus primarily making it bereft of the criticism of victor's justice as imputed easily against its so called predecessors.

However, it is also true that no permanent members of the Security Council were party to the conflict at the time of its constitution. Subsequently in 1999 when NATO forces bombarded many places in Serbia and Kosovo, the natural question arose whether ICTY would also take similar interest in prosecuting the alleged IHL breaches committed by NATO forces. The Prosecutor of ICTY had received many requests to investigate serious allegations of breaches of IHL by NATO forces. In response to this Prosecutor had constituted a review committee to find out and advise her about the sufficiency of evidences to investigate allegations imputed against NATO forces. And the said Review Committee recommended

[4] Ivan Simonovic, "The Role of the ICTY in the Development of International Criminal Adjudication" 23(2) *Fordham International Law Journal* 440, 446 (1999).
[5] *Supra* note 3.

that no such investigation against NATO forces should be commenced for the reason of unclear laws and insufficient evidence.[6]

The Prosecutor of the ICTY, though having power to reject recommendations of the review committee, accepted its recommendation and made statements while addressing the Security Council that though NATO forces made some mistakes but they did not deliberately targeted the civilians.[7] This approach of the Prosecutor and reasoning and methodologies of the review committee have been criticized by some scholars.[8] Thus, though it can be said that the accusation of victor's justice with its classical meaning could not be imputed against ICTY but it is also not true to think of it as a body completely bereft of the intricacies of international relations.

As this tribunal was established by the Security Council that is the political organ of the United Nations and does not possess any criminal jurisdiction, many apprehensions as to its legality were raised. In contrast to the Nuremberg and Tokyo tribunals that were the result of the consent of the states having jurisdiction over crimes, Security Council could not claim of possessing of such criminal jurisdiction over the offenders or the crimes.

Most of these issue and concerns related to the legal status of the Tribunal were raised during the *Tadic* case. It was the first case tried by ICTY. The ICTY's decision against interlocutory appeal on jurisdiction clarified these concerns.[9] The defence raised three important questions relating to the jurisdiction of the tribunal. These were first, unlawful establishment of the ICTY; second, illegal primacy of the ICTY over competent domestic courts and third the lack of jurisdiction relating to subject matter. All these questions had important bearings on its existence and meaningful functioning. The Tribunal had responded them very well and while doing so also made important jurisprudential contributions to the Public International Law.

The ICTY unequivocally stated that the Security Council is the organ of the United Nations and thus its power howsoever broad must be bound by the constitutional limits of the organisation.[10] While referring Article 24 of the UN Charter that empowers the Council with the primary responsibility for the maintenance of international peace and security, the ICTY impressively asserted that the Charter talks about the specific powers of the Security Council and not of absolute fiat. It observed that Charter nowhere either in the text or spirit makes Security Council unbound by the law. The Security Council has full discretion to determine whether there is 'threat to the peace', 'breach of peace' or 'act of aggression' so as to invoke its exceptional powers under chapter VII. But this discretion is not completely unfettered and should at least correspond to the purposes and principles of the United Nations.[11]

The Tribunal further observed that once the Council had already determined about the existence of 'threat to the peace', 'breach of the peace' or 'the act of aggression', it enjoyed

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[6] Paolo Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia"12(3) *European Journal of International Law* 503, 504 (2001).
[7] *Id*. at 505.
[8] *Id*. at 509-526.
[9] *Prosecutor* v. *Dusko Tadic*, Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction on October 02, 1995. *Available at*: http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (last visited on November 20, 2018).
[10] *Id*., para. 28.
[11] *Id*., para. 29.

discretion to adopt appropriate measures as per Articles 40[12], 41[13] or 42[14] of the UN Charter. While denying the arguments that constitution of the judicial tribunal is not contemplated under Article 41, the Tribunal specifically asserted that the Council was within its powers to establish the judicial tribunal.[15] The measures mentioned in Article 41 are merely indicative and do not provide exhaustive list.

Furthermore, the Security Council could do directly by itself what it could got to be done by its Member States.[16] ICTY observes that the establishment of the judicial tribunal is within the mandate of the Security Council by virtue of Article 41 of the UN Charter. The Security Council is very much within its powers to establish its subsidiary organ having jurisdiction to prosecute specific offences committed during specific time period and within specific territories in order to maintain international peace and security. By doing this, the Security Council does not delegate its own functions and powers to the ICTY and neither usurp nor intervene in the judicial powers of any other organs of the United Nations.[17]

While deciding this, ICTY had relied on the previous instances of establishment of the United Nations Emergency Force in the Middle East in 1956 by the General Assembly and the decision of the International Court of Justice in the Effects of Award case where the competence of the General Assembly to create a tribunal to decide the disputes related to the staffs of the United Nations was upheld.[18] Though this logic was objected by some scholars.[19]

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[12] The Charter of the United Nations, 1945, art. 40. This Article empowers the Security Council to adopt provisional measures in case of its determination of 'threat of peace', 'breach of peace' or 'act of aggression'. It states that:
"In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures."

[13] The UN Charter, art. 41, empowers the Security Council to adopt non-military measures in case of its determination of 'threat of peace', 'breach of peace', or 'act of aggression'. It states that:
"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

[14] The UN Charter, art. 42, empowers the Security Council to take necessary measures through air, sea and land forces in case of its determination that measures under Article 41 would be inadequate or have proved to be inadequate. It states that:
"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

[15] *Supra* note 4 at 445.

[16] *Supra* note 9, paras. 35, 36.

[17] *Id*., para. 38.

[18] *Ibid*.

[19] Christopher Greenwood, "The Development of the International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia" 2 *Max Planck Yearbook of United Nations Law* 97, 103 (1998). The author observes that "[t]he two cases are not, however, on a par. The Assembly, in the *Effect of Awards* case, had dealt with a matter internal to the United Nations and in respect of which no national court would normally have possessed jurisdiction. By contrast, the Council created the Tribunal as an alternative to the exercise of jurisdiction by national courts and conferred primacy upon it." The author however, finds no reason to deny the authority of the Security Council to constitute judicial organ for the maintenance of international peace and security.

The Security Council established the Tribunal only to fulfil its primary functions of maintenance of international peace and security.[20] Furthermore, the legality and validity of the measures adopted by the Security Council would not be determined by the success or failure such measures might have incurred in achieving their goals. The legal validity of the measures must not be determined *ex post facto* by the ultimate results of those measures.[21] The choice of means under Article 39 of the UN Charter and evaluation as to their efficacy lies completely with the Security Council.

The Tribunal in this decision also refuted the contention that the ICTY was not established by law and hence did not correspond to the well-established international human rights standards that a criminal tribunal must always be established by law.[22] The Tribunal observed that this requirement was there for national courts and tribunals and could not as such be applicable under international legal system that did not have standard legislative wing. There is no established doctrine of separation of power in the international law. The Tribunal further observed that since the ICTY's functioning was based on rule of law and it guaranteed to the accused most of the protections available under international human rights instruments, thus it complied with the said requirement of establishment by law.

The Tribunal, for obvious reasons, desisted itself from declaring the resolutions of the Security Council as law. Since the public international law has its own established sources of law making, any recognition to the Security Council resolution as law making authority would have definitely disturbed the edifice of public international law. The observation made by Christopher Greenwood that "a more convincing justification is that the tribunal was established by a decision of the Council lawfully taken under a legally binding instrument, the Charter, and that it was therefore established by law"[23] is even not convincing because Security Council does not have legislative power and the resolutions of the Security Council can never be termed as law. The Council can take measures to maintain international peace and security and its resolutions only correspond to such actions and measures.

The binding character of the Security Council resolution adopted under chapter VII even does not change this characteristics and does not give legislative competence to the Council to make 'law' under international legal structure. The Security Council resolutions under chapter VII though the source of binding obligation but they do not in any sense a source of international law. Thus, the legality or illegality of the obligations imposed by the Security Council is open for discussion under the framework of international law. These obligations must emerge from the existing Public International Law that has its well-recognized sources.

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[20] *Supra* note 17.
[21] *Id*., para. 39.
[22] This requirement has been provided for in most of the International Human Rights instruments. For example, Article 14(1) of the International Covenant on Civil and Political Rights, 1966 states "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."
Similarly, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 states that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]."
Similarly,Article 8(1) of the American Convention on Human Rights, 1969 states "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law."
[23] *Supra* note 19 at 104.

This was also explicit from the fact that the statute of the tribunal did not create any new offences. The definitions of the offences were taken from their then existing understanding under customary international law. It did not make anything unlawful that was previously lawful under international law nor did it create any kind of individual criminal responsibility that did not exist in the international law at that time. The offences against which the tribunal had jurisdiction had already been defined under international humanitarian law and also had their existence in customary international law.

Against the ground of unjustified supremacy of the international tribunal over domestic courts, the Tribunal emphatically relied on first, the grave nature of the offences for which the Tribunal was established, and second, the higher status of the Security Council resolutions adopted under chapter VII of the UN Charter. The tribunal observed that:

> [T]he crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State … the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world.[24]

Against the accused's plea of his right to be tried by his own national court (*Jus de non evocando*), the Tribunal rejected this plea and observed:

> *jus de non evocando* ... if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter.[25]

Against the appellant's claim of the subject matter jurisdiction of the Tribunal, ICTY observed that:

> [C]onflicts in the former Yugoslavia have both internal and international aspects … the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.[26]

The Tribunal had provided a new framework for the determination of the existence of the armed conflict both in spatial and temporal expansions and rejected the appellant's plea that the Tribunal did not possess the adequate subject matter jurisdiction over the crimes

[24] *Supra* note 9, para. 59. This is actually the quotation of the trial judgment as mentioned in this 1995 decision.
[25] *Id.*, para. 63.
[26] *Id.*, para. 77.

mentioned in its statute due to the existence of a non-international armed conflict or non-existence of any armed conflict.[27]

It is important to note that by the end of the twentieth century, Security Council through its chapter VII resolutions established overarching administrative missions in Kosovo and East Timor. Considering their transformative character, these administrative missions were first of their kinds in the history of the United Nations. Most of the scholarly writings discussed the legality of their establishment on the similar line as done in the 1995 Tadic decision. The said decision heralded a new way and understanding of utilising the Security Council to claim the powers of so called nation building missions.

III. SPECIFIC CONTRIBUTIONS IN INTERNATIONAL HUMANITARIAN AND CRIMINAL LAW

Under this heading the paper mainly discusses the contribution of the ICTY in developing and shaping the international legal jurisprudence aimed to defining the nature and extent of the armed conflict, doctrine of joint criminal enterprise and the procedural innovations particularly directed towards the victims and witnesses protection in trial proceeding. This part is not extensive and these three subjects are chosen considering their relative importance respectively in defining conflict, fixing modes of criminal liability and providing fair, just and impartial trial procedure as developed by ICTY. Nevertheless to say that this part touches these issues in very brief manner just to highlight their relevance.

A. Contribution in Defining the Nature and Extent of Armed Conflict

While deciding its first case, ICTY has made significant jurisprudential contribution to the determination regarding nature and extent of armed conflicts. The determination of the nature and extent of the conflict is an important factor that further provides for the applicability of specific set of IHL rules. It is also a key point for any conviction under specific offences. The offences over which ICTY had jurisdiction demanded it to make specific determinations about the existence of the armed conflict as well as its specific kinds whether international or non-international. Except genocide, the prosecution under other three offences namely, grave breaches of the Geneva Conventions, violations of the laws or customs of war and crime against humanity could not be possible without establishing the existence of the armed conflict and without determining its specific nature i.e. whether international or non-international armed conflict.[28]

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[27] This issue will be discussed in more detail in the next heading.

[28] The ICTY Statute, *available at*: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (last visited on November 20, 2018). The ICTY had jurisdiction over four offences. These were first, Grave Breaches of the Geneva Conventions of 1949 (art. 2); second, Violations of the Laws or Customs of War (art. 3); third, Genocide (art. 4); and fourth, Crimes against Humanity. Except the offence of genocide, the definition of all the other offences had close bearing on the determination about the existence and nature of the armed conflict.

For example:

The ICTY Statute, art. 2, states that- "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949……."

The ICTY Statute, art. 3, states that- "The international Tribunal shall have the power to prosecute persons violating the laws and customs ……."

The ICTY Statute, art. 5, states that- "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character ….."

Even the UNSC resolution 827 was of no help in this respect. The date of January 01, 1991 was chosen in neutral way without keeping in mind any specific battle or incident. The offences over which Tribunal had jurisdiction even did not positively affirm the existence of specific kind of armed conflict. The Security Council had not determined the nature of the conflict in the territories of Former Yugoslavia as it had determined the same while constituting the International Criminal Tribunal for Rwanda (ICTR). In the case of later, the Security Council provided jurisdiction to the ICTR over violations of the common Article 3 of the Geneva Conventions and the Additional Protocol II, thus specifically determining the nature of the conflict as non-international. No such indication in respect of ICTY was given by the Security Council. Thus the issue before the Tribunal was how to determine the existence of the conflict in this whole context. In this respect, ICTY Appeals Chamber in its decision of October 02, 1995 stated that:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[29]

By this the Tribunal categorically denied the argument that existence of armed conflict is limited to the areas of actual fighting. Though the applicability of specific IHL rules beyond the places of actual fighting were already established by the time but the Tribunal's determination about the temporal and spatial expansion of the armed conflicts both internal as well as international was a significant contribution. Before this, the term 'armed conflict' was not in much vogue for academic reflections and IHL deliberations had been mostly thought of in the terminologies of war or military operations.[30] Thus, the tribunal's contribution was significant and forward looking. However, the Tribunal accepted that to constitute crime under its statute there must be a relationship between the crime committed and the armed conflict.

The Tadic judgment has carved out two determinative criteria, namely organization of the parties and the intensity of the hostilities, for any protracted armed violence that distinguish it from mere banditry, unorganized insurrections and the terrorist activities.This approach as propounded by the Tribunal in Tadic case was applied by the ICTY itself and by other tribunals.[31] ICTY in the case of *Prosecutor* v. *Limaz et.al*.[32] further illustrated some

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[29]*Supra* note 9, para. 70.

[30]*Supra* note 19 at 114. Also see, Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* 119(Cambridge University Press, Cambridge, 2010). The author quoted the statement of Sonja Boelart-Suominen, a legal adviser at the Office of the Prosecutor whereby he mentioned the following important contributions made by the 1995 decision. He stated: "First, it covers a variety of hypotheses and caters explicitly for conflicts between non-state entities. Second, whilst it sets a low threshold for the application of humanitarian law in general, it is particularly important for its consequences in relation to internal armed conflicts. The definition of armed conflict suggested by the Appeals Chamber covers not only the classic example of: (a) an armed conflict between two or more states and, (b) a civil war between a state at one hand and a non-state entity on the other. It clearly encompasses the third situation, (c) an armed conflict in which no government party is involved, because two or more non-state entities are fighting each other".

[31] Anthony Cullen (2010), *Id*. at 132-136.

important points that could be helpful in determining the 'organization of the parties' that distinguish non international armed conflict from other unorganized forms of violence. Some of these determinative points were appointment of zonal commanders, supply of weapons, ability to recruit, train and equip new members, issuance of political statements and communiqué, authorization of military actions to units, assignment of tasks to individuals within organization, involvement of general Staff in the negotiation with the representatives of neutral and adversary parties.

To satisfy the requirement of the intensity factor, the situation must be above the internal disturbances and tensions but there is no need to reach it to the extent of sustained and continuous military operations. The entire period of the hostilities must be considered to determine their 'protracted' character. As per one scholar "the protracted requirement is met when the hostilities are extended over time and space and includes events attributable to the conflict" and it should be assessed with reference to "the entire period from the initiation of hostilities to the cessation of hostilities".[33] The indicative condition in this respect may be seriousness of the armed clashes, troops mobilization, types of weaponry used, scale of destruction of property and displacement of population and existence of causalities etc. This formulation of the ICTY was also used extensively in the jurisprudence of ICTR. Many independent experts have also used this criterion to characterize specific situation existing in different parts of the world such as Palestine, Sierra Leone, Lebanon, Somalia and East Timor.[34]

As already mentioned, the Tadic judgment is also important in the sense that it had extended the geographical and temporal horizon of the armed conflict beyond the place and time of the actual hostilities with a condition that the specific acts in question must have nexus with the ongoing armed conflict. This position is consistently been followed in the ICTY Jurisprudence in subsequent cases.[35] The small interruptions in fighting do not break the existence of the armed conflict. It does not suspend the obligations of the parties under IHL and there is no need of continuous, sustained and concerted hostilities.

This understanding of the protracted armed violence is without any doubt a significant progressive leap from the idea of non-international armed conflict as mentioned in Article 1(1) of the Additional Protocol II. This formulation was also used by the Rome Statute with a minor alteration. The Rome statute uses the term 'conflict' against the term 'violence' as used in the Tadic judgment.[36]

The ICTY generally and Tadic case particularly is also remembered for breaking the whole single situation in international and non-International armed conflicts depending upon the facts existing on the ground.[37] Before this, the whole situation in former Yugoslavia was discussed in academic circles either as international or non-international armed conflict. But,

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[32]*Prosecutor* v. *Limaj et. al*., ICTY Trial Chamber II, Case no. IT-03-66-T of November 30, 2005, para. 94-134, *available at*: http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf (last visited on November 30, 2018).

[33] Anthony Cullen (2010), *supra* note 30 at 128. Author quoted the statement of Bahia Thahzib-lie and Olivia Swaak Goldman, from Thahzib-lie and Swaak-Goldman, "Determining the Threshold", in Liesbeth Lijnzaad, *et.al.*, *Making the Voice of Humanity Heard* 248 (Martinus Nijhoff Publishers, Leiden/Boston, 2004).

[34] Anthony Cullen (2010), *supra* note 30 at 137-139.

[35]*Id*. at 140-142.

[36] Rome Statute of the International Criminal Court, 1998, art. 8.2.f, *available at*: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (last visited on November 30, 2018).

[37]*Supra* note 9, para. 72.

ICTY boldly denied it and announced a more nuanced and meaningful approach that IHL provides for different kinds of protection depending upon the identity of the parties involved in different geographical locations. Though this was not the new approach and International Court of Justice had already pronounced it in much discussed Nicaragua case but ICTY's unequivocal acceptance has further provided an impeccable place for this understanding in the international criminal law jurisprudence.[38]

B. Jurisprudence in Defining the Doctrine of Joint Criminal Enterprises

The ICTY has also contributed to the development of the doctrine of the Joint Criminal Enterprise under international criminal law. The doctrine assumes that the international crimes are mostly committed by the politically motivated plan conceived at one level and executed at another level. Thus, the behavior of political and military leaders responsible for conceiving plans for the commission of international crimes cannot be excluded from the criminal liability. All those who are participating in common criminal plan aware of its purpose having requisite criminal intent also share the criminal liability whatever role they may have played in the whole phenomenon. Though this doctrine was not specifically mentioned in the ICTY statute nevertheless, the ICTY employed it considering it the established principle under customary international law.[39]

The ICTY positively affirmed the JCE in the Tadic Appeal Chamber Judgment of 1999 by considering it a part of the customary international law. However, Tribunal's reliance on this doctrine while fixing criminal liability has subsequently contributed to further clarity and development of this doctrine. Tadic Appeals Chamber judgment has also distinguished JCE from other modes of liability like aiding and abetting.[40] It is also distinct from criminal conspiracy because JCE is always the mode of liability in completed crime while for conspiracy, completion of crime is not *sine qua non*.[41] There are three categories of

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[38] Case Concerning Military and Paramilitary Activities in and Against Nicaragua 1986, International Court of Justice, 1986, para. 219. The ICJ observed "The conflict between the contras forces and those of the Government of Nicaragua is an armed conflict which is not of an international character. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts." This statement is also quoted in Christopher Greenwood (1998), *supra* note 19 at 117.

[39]*Supra* note 28, art. 7(1). This Article states that- "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime". Also see, Giulia Bigi, "Joint criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of the Senior Political and Military Leaders: The Krajisnik Case" in 14 *Max Planck Yearbook of United Nations* 51, 57 (2010). The author observes that the Tribunal finds this form of culpability under the category of "committing" the crime under art. 7(1).

[40]*Prosecutor* v. *Dusko Tadic*, ICTY Appeal Chamber Judgment of July 15, 1999, Case No. IT-94-1-A, para. 229, *available at*: http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (last visited on November 30, 2018).

[41]*Prosecutor* v. *Milan Milutinovic, Nikola Sainovic and Dragoljub Odjanic*, ICTY Appeals Chamber Decision of May 21, 2003, Case No. IT-99-37-AR72, para. 23. *available at*: https://cld.irmct.org/assets/Uploads/full-text-dec/2003/03-05-21%20Milutinovic%20et%20al%20Decision%20on%20Ojdanic%20JCE%20Jxn%20Challenge.pdf (last visited on November 30, 2018). The Tribunal observes that: "Joint criminal enterprise and "conspiracy" are two different forms of liability. Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.

JCE based on the requisite mental element: namely basic, systematic and extended or they may also be called as JCE I, JCE II and JCE III.[42]

C. Important Innovations in Procedural Matters

The ICTY has also evolved a specific set of procedural rules for conducting of trials that subsequently enriched the corpus of international criminal law. These procedures are meant for ensuring just, safe and secure environment for the witnesses and victims so that they should not feel any sort of direct or indirect hindrances while deposing their testimonies. The procedures evolved by the Tribunal particularly in the cases of sexual violence are of much importance in this respect. Rule 96(1) of the Tribunal's Rules of Procedure and Evidence specifically provides that corroboration of testimony of the victim of the sexual violence is not required.[43]

This rule stated that the prior sexual conduct of the victim is at all no defense in such proceedings and thus, it protected the victims from humiliation and embarrassment. The Rule further prescribed the following conditions under which defence of consent can be ruled out. These conditions are first, if the victim "has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression" or second, the victim "reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear".[44] This is a practical acceptance of the grim and horrendous situation on the ground and the consent as a defence was rightly denied.

ICTY has also contributed to the jurisprudence of the witness protection and counseling. Under Rule 34, a special victims and witnesses section was established under the Registry of the Tribunal. This Office was mandated to offer counseling and support to the witnesses particularly in the cases of 'rape and sexual assault'. Victims and Witnesses Section has evolved the following mechanisms to protect the victims and witnesses from adverse consequences. These are: (1) maintaining complete secrecy about witness' identity in all public records; (2) blurring of witness face and distortion of his/her voices in the court video telecast, (3) providing opportunity to testify from witness's home country through

[42]*Supra* note 40, para. 220. The Tribunal observes about three kinds of JCE. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).

[43]Rules of Procedure and Evidence, rule 96(1), *available at*: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf (last visited on November 30, 2018).

[44]*Id*., rule 96(2).

video connectivity, (4) making arrangements so that witness could not see the accused and thus be protected against subsequent trauma, (5) relocation of the witnesses or victims in the third countries in cases of any veritable fear at their present location, (6) counseling to the victims and witnesses so that they could come out of the trauma. These initiatives have heralded a new era of the victims and witnesses protection in the international criminal law jurisprudence and positively informed subsequent development of the international law in this respect.

IV. CONCLUSION

The ICTY contributed immensely to the development of International Humanitarian Law and International Criminal Law. It has enriched the jurisprudence and provided an impetus for the renewed interest of the scholars in these subjects. Prosecution for international crimes has become the key word for the maintenance of international peace and security. Many hybrid and mixed tribunals were subsequently established towards this end. It has also heralded the new era of transitional justice where providing justice to the victims of the erstwhile totalitarian regimes became an important component in any peacebuilding exercises. Though the issues like efficacy of these developments in contributing and enforcing psychology of peace in international relations and whether prosecution is better than reconciliation are beyond the scope of this paper; but in pure jurisprudential sense, the contribution of ICTY towards refining, streamlining and redefining some of the concepts of International Humanitarian Law and International Criminal Law remains impeccable.

FROM CLASH TO ACCOMMODATION: REFLECTIONS FROM FOUR DEVELOPMENTS IN INTERNATIONAL LAW

Mohammad Umar[*]

I. INTRODUCTION

Non-western scholars have often contended that the demise of Eurocentrism in international law is an inevitable part of the entire process of physical and intellectual decolonization. With the third world nations getting more assertive day by day there is a remarkable shift from order oriented understanding of international law to demand for justice oriented modifications. Unlike *Rawls's* model, the law of peoples is increasingly assuming more active role in being responsive to the call for global justice. Pragmatism is giving way to purposiveness. One of the most significant developments in the global legal order in the recent times has been the acknowledgment of prevailing inequity and slow but definite initiation of its neutralization.

The paper shall elaborate this argument by discussing four contemporary developments in the corpus of international law- (i) Passing of the United Nations Declaration on the Rights of Indigenous People, 2007 by the United Nations General Assembly; (ii) Emergence of two separate international codes of conduct on transfer of technology; (iii) Doha Declaration, 2001 and subsequent amendment of The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995 (TRIPS) in 2017; (iv) Increased proliferation of third world scholarship in contemporary international law thinking. These four factors (amongst others) represent the aspirations of the third world countries and indicate that the present bargaining chip in the hands of the third world is not as devalued and hollowed as it used to be. Their voice is getting stronger and by the natural process of evolution, international law is entering a new phase of "accommodation" of interests from a culture of clash of interests.

The idea is to symbolically say that we are in that stage of international law progression where it is no more a tool of amelioration for the privileged few. With contracting global space and increasing interdependencies third world nations or the global south continues to push for a rightful place in international justice scheme.

II. FROM WESTPHALIAN CONCEPTUALIZATION TO UNDRIP, 2007

A. Indigenous Peoples and the Westphalian Model

Indigenous people have a long history of struggle. Along with colonized territories they were the worst victims of the process of colonization. The classical Westphalian world order could consist of only nation-states and not the natives per se. One of the reasons for it was that the structure that Westphalian system brought along with it was strictly formal and centralized which went against the very ethos of indigenous peoples' scheme of things. "Indian"[1] as the term was used to identify aboriginals or indigenous people by the European

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[1] Indian, native or aboriginal can safely be the synonyms of 'indigenous person'. The word 'indigenous' stems from the Latin form *indigena* (INDV +GENVS) which means 'one born in a place, a native' or 'born or produced in, or belonging to a particular place' (and not of external origin). Definition found in Oxford Latin

settlers in the annexed territories. A reflection of how they were looked upon could be found in *Francisco de Vitoria's* (a sixteenth century philosopher-jurist) account wherein he refers Indians as "unfit to found or administer a lawful State".[2]*Vitoria* was a complex figure of his times. In one of his assertions he argues "at the time of the Spaniard's first voyages to America they took with them no rights to occupy the lands of indigenous population".[3] On the other hand, his proposition also confers the ability of universal reason to Indian; nevertheless, tagging him as backward, barbaric, uncivilized and therefore subject to sanctions. In Vitorian thought, Indians who inevitably and invariably violate *jus gentium* are denied the status of the all-powerful sovereign that has the rightful capacity to administer the law.[4] After an excellent analysis of Vitoria's work, *Professor Anghie* has written in one of his works that –

> "Vitoria's work suggests that the conventional view that sovereignty doctrine was developed in the West and then transferred to the non-European world is, in important respects, misleading. Sovereignty doctrine acquired its character through the colonial encounter. This is the darker history of sovereignty…"[5]

B. Pre-United Nations Era

As a follow-up to the preceding narrative it would be appropriate to rope in two incidents of the pre-UN era wherein the status of indigenous people was considered by the self-anointed international community. It should be noted however, that this concern, if not disguised, was not very honest at the basic level. Indigenous people in the world's sight were still a 'backward community'. On the typical lines of *Kipling's* words in "White Man's Burden" the newly emerged nation-states took upon themselves to meet for the first time at the Berlin Africa Conference (1884-1885) which dealt with the issue of African aboriginals more specifically. The idea was to 'integrate' the aboriginal population into the "civilized world" and in order to realize this, the "trusteeship doctrine"[6] was introduced. It was, as if, a legitimate yardstick in the relationship between empowered nations of that time and indigenous populations.[7]

This position was more emphatically enunciated in the League of Nations in its Covenant.[8] Even though the text did not directly mention indigenous people (using only "peoples"), its language nevertheless had a direct impact on the future of indigenous people. As per the Covenant, those parties "which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world'' should be governed by the principle that "the well-being and development of such peoples form a *sacred trust* of

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Dictionary (1968). In modern international law, the indistinct use of those terms involves the idea of priority in time. See E. Daes, *Working Paper by the Chairperson-Rapporteur on the concept of "indigenous people"* UN Doc.E/CN.4/Sub.2/AC.4/1996/2, June 10, 1996, p.no. 5.

[2] Francisco de Vitoria, *De Indis et de Ivre Belli Relectiones* 116 (The Carnegie Institution of Washington, Washington, 1917).

[3] *Ibid*.

[4] "Francisco de Vitoria and the colonial origins of international law" in Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 29 (Cambridge University Press, U.K, 2005).

[5] *Ibid*.

[6] A kind of 'guardianship' exercised by nation-states over aboriginals.

[7] See Maria Victoria Cabrera Ormaza, "Rethinking the Role of Indigenous Peoples in International Law: New Developments in International Environmental Law and Development Cooperation" 4(1) *Goettingen Journal of International Law* 265-268 (2012).

[8] The Covenant of the League of Nations(April 28, 1919), art. 22, *available at*: http://www.unhcr.org/refworld/docid/3dd8b9854.html (last visited on November 10, 2018).

civilization and that securities for the performance of this trust should be embodied in this Covenant". The text goes on to say that "the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, *and who are willing to accept it*, and that this tutelage should be exercised by them as Mandatories on behalf of the League" (*emphasis supplied*).

C. Post UN Efforts and the UNDRIP, 2007

As an organ of the United Nations, International Labour Organization (ILO) became the first inter-governmental organization to give special attention to the concerns of indigenous people in 1957 with the adoption of the "*Convention (No.107) concerning the Protection and Integration of Indigenous and Tribal and Semi-Tribal Populations in Independent Countries.*"[9] For the first time indigenous people were defined by their identity and were not generalized as "populations". It sought to solve the crisis of forced and underpaid labour undergone by the indigenous people in former Spanish and Portuguese colonies in Latin America. Hence, the preamble declared – "it (is) desirable both for humanitarian reasons and in the interest of the countries concerned to promote continued action to improve the living and working conditions of these populations by simultaneous action in respect of all the factors which have hitherto prevented them from sharing fully in the progress of the national community of which they form part".[10]

This convention was rejected by the indigenous community for a simple reason that it had the same underpinnings of the League's Covenant that prescribed the idea of "integration" with absolute disregard to the cultural identity and distinctiveness of the people concerned.[11] In preamble alone the word "integration" features thrice. Article 2 makes it more emphatic.[12] Apart from the rejection by indigenous people themselves, world at large was also not very supportive of it and the convention could manage the ratification of only 17 states.[13]

This unevenness in the recognition of indigenous people didn't stop the communities' representatives to gain access to international intergovernmental institutions and spark discussions concerning their claims of self-determination; albeit subjected to the confines of nation-state international legal order.[14] In other words, indigenous peoples demanded what scholars define as *internal self-determination*.[15]

This was followed by the establishment of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. José Martinez Cobo was appointed as a Special Rapporteur to study the issues of discrimination against indigenous people. In his study,

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[9] 328 U.N.T.S 247, 26 June 1957 [ILO Convention No.107].
[10] *Ibid*.
[11] *Supra* note 7.
[12] It declares that the "Governments shall have the primary responsibility for developing co-ordinated and systematic gaction for the protection of the populations concerned and their progressive integration into the life of their respective countries".
[13] The Convention should however be given credit for being the first international document which conferred upon indigenous peoples' rights over the territories traditionally occupied by them (art. 11,12).
[14] R. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?" 7 *Harvard Human Rights Journal* 40-42 (1994).
[15] Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal*101(Cambridge University Press, Cambridge,1995).

*Cobo*emphasized on the element of "historical continuance" demonstrating the colonial precepts of the discrimination against the indigenous people.[16]

The ILO again took up the matter and in 1989 adopted a resolution titled *Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries.*[17]This convention was slightly more progressive in the sense that it took away from states and gave the right of self-identification as indigenous people to the people themselves.[18] Also, it explicitly supported the cultural distinctiveness and autonomy of indigenous and tribal groups.[19] This much of recognition didn't go down well with majority states and consequently, like its predecessor this convention also ended up being a legal and political failure with just 22 ratifications.

D. The UNDRIP

After these two treaties, it was realized that a concrete step is required to proceed in the direction of giving indigenous people what is rightfully theirs. It should also be noted that as politics unfolded, it was more profoundly realized that indigenous people were also equal subjects of debate on permanent sovereignty over natural resources and its colonial genesis.[20] Land rights and rights like self-determination and cultural identities took the centre stage in indigenous peoples' negotiations. After the initial draft in 1994, with prolonged discussions and stocktaking United Nations finally passed the historical declaration titled - UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[21] Some of its critical points that articulated key norms relating to indigenous people in international law are as follows:

i. No strict definition of indigenous people.[22]
ii. Right of self-determination.[23]
iii. Right to maintaining their identity.[24]
iv. Right to land and territories which they have traditionally owned.[25]
v. Participation in issues of governance and decision making process.[26]
vi. Restitution and fair compensation for their lands taken.[27]
vii. Fair, independent, impartial and open adjudication.[28]
viii. No militarization of areas belonging to indigenous people.[29]

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[16] J. R. Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, September 30, 1983, para. 379, 380.
[17] 1650 U.N.T.S. 383, 27 June 1989 [ILO Convention No. 169].
[18] Indigenous and Tribal Peoples Convention, 1989, art. 1.
[19]*Id*.,art. 2(b).
[20]Jane A. Hofbauer, *The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications* 63-68 (2009) (Unpublished LL.M. thesis, University of Iceland).
[21] GA Res. 61/295, 13 September 2007.
[22] In its preamble para. 21 UNDRIP recognizes the existence of a variety of historical and cultural backgrounds surrounding indigenous peoples and the necessity of taking these differences into consideration. Further in para. 4 the use of the words "inter alia" reflects an attempt to encompass other ethnic groups, which were also victims of dispossession, but not necessarily linked with the history of colonialism.
[23] UNDRIP, 2007, art. 3.
[24]*Id*., arts. 5, 8, 12, 14, 20, 24.
[25]*Id*., arts. 10, 26.
[26]*Id*., art. 18.
[27]*Id*., art. 28.
[28]*Id*., art. 27.
[29]*Id*., art. 30.

This resolution was adopted in the General Assembly with the approval of 143 member states. Although being a declaration, it may be categorized as a soft law instrument; nonetheless its text is pivotal in determining the place of indigenous people in the world vision. From here things can move on to become more concrete step by step as it generally happens in development of any aspect of international law.

III. UNITED NATIONS DRAFT INTERNATIONAL CODE OF CONDUCT ON TRANSFER OF TECHNOLOGY (COC)

A. Backdrop

When it comes to Transfer of Technology (TOT) there are two critical precepts that need to be understood. Firstly, immediately after the colonial era got over most of the TOT and its drivers such as intellectual property and investment were pitched by the MNCs as the panacea for the lagging economies of the developing and least developed nations. And, while the third world got convinced of the urgency to enter into agreements with the MNCs mostly incorporated in the developed world, they hardly realized the nature of the terms and clauses often riddled with restrictive trade practices. Secondly, TOT agreements were strategically linked by the MNCs to the right to build, operate and maintain the manufacturing units. This was coupled by the neo-colonial substratum that formed the basis of clauses stipulating 'grant back' provisions or the 'turnkey' packages.[30]

In effect though, these agreements did not lead to creation of jobs or rise in the substantial standard of living of the local population because of the misapplication of the idea of the TOT itself.[31] Scholars cite four primary reasons for this:[32]

a. **Lack of developed infrastructure and market**- Nations importing the technology had no support systems in place to back up or sustain the technology. This lead to a situation wherein, economies were rendered incapable of absorbing and sustaining advanced technology. Also, the lack of skill with regards to the operation and maintenance of the machinery aided as an impediment for creation of abilities to learn from the technology by getting involved in it.
b. **Inappropriate technology**- Improper discerning of technology needs and choosing on basis of imperfect information also lead to the importation of unnecessary technology which added little value to the nations' growth.
c. **Failure to develop indigenous technological skills**- A frenetic attitude towards quickly adopting technology at any cost lead to the lack in development of indigenous technology skills. This ultimately resulted in the long term dependence over the imported technology.

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[30] See David M Haug, "The International Transfer of Technology: Lessons that East Europe can Learn from the Failed Third World Experience" 5 *Harvard Journal of Law & Technology* 209 (Spring Issue, 1992).

[31] United Nations Draft International Code of Conduct on Transfer of Technology, 1985 defines TOT as - 'the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service and does not extend to the transactions involving the mere sale or mere lease of goods'. Hayden added to this definition of TOT saying- "the important factor [in defining technology transfer] is that the recipient acquires the capability to manufacture itself a product whose quality is comparable to that manufactured by the technology supplier." See Eric Hayden, Technology Transfer to East Europe-U.S. Corporate Experience, UN/ECE, Proceedings of the UN/ECE Seminar on The Management of the Transfer of Technology Within Industrial Co-operation, Geneva, Feb., 1976, 23.

[32] *Supra* note 30.

d. No technological development plan or policy- Lack of vision on the part of these increasingly dependent countries aided to the situation getting catapulted to technological colonialism.

B. COC and its Assessment

It is in this backdrop that the third world soon realized the necessity of guidelines with regards to a meaningful transfer of technology. Then UNCTAD took it up and after a heavy bargaining between the major global blocks United Nations Draft International Code of Conduct on Transfer of Technology, 1985 (COC) was framed.[33] It will not be an exaggeration if we say that this COC formed the 'conscience' of the fair TOT procedure. It was a product of long drawn negotiations between G77 and OECD countries in which G77 succeeded in identifying some crucial restrictive trade practices that MNCs till date continue to follow. Grant back provisions, provisions requiring the acquiring party to refrain from challenging the validity of patents, exclusive dealing, restriction on research, price fixing, restriction on adaptation (of the imported technology to local conditions or introducing innovations in it) etc. were categorically identified within the COC to put a check on 'technological colonization'.[34] Unfortunately though, the spirit of COC was gradually lost because of its non-binding nature and the arguments of the OECD countries during the time of negotiations continued to prevail as norms of the practices governing TOT. The only place where COC spirit is still to an extent reflected is in the text of the outcome documents of international environmental conferences.[35] But, the tragedy of non-inclusion of TRIPS[36] in TOT debate perpetually revives the chauvinistic cannons of negotiations like 'freedom of contract', 'freedom of choice of law and forum' etc.[37] It is no genius to construe that these cannons are detrimental to the interests of developing countries and LDCs because of a much weaker bargaining chip that they possess.[38]

Even after the apparent failure, the achievement of this COC is immense. It has made the technology importing countries more aware of the bargaining spaces that they can utilize during the technology transfer negotiations with the MNCs. Although, the restrictive trade practices identified in the globally available COC, the process of technological colonization has been slowed down considerably. As mentioned before, reflections of fairer technology

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[33] It primarily sought to identify restrictive trade practices adopted by the MNCs in TOT agreements like grant back provisions, denying challenges to validity of patents, exclusive dealing, restriction on research, restriction on the use of personnel, price fixing, restriction on adaptation (of the imported technology to local conditions or introducing innovations in it).

[34]Chapter IV, Draft International Code of Conduct on the Transfer of Technology, 1985 (version), *available at*: http://unctad.org/en/docs/psiteiitd28.en.pdf; See also David Silverstein, "Sharing United States Energy Technology with Less-Developed Countries: A Model for International Technology Transfer" 12 *Journal of International Law and Economics* 363 (1978).

[35] For instance, Chapter IV of Agenda 21 which was one of the documents adopted in the United Nations Conference on Environment and Development, 1992 has following to offer-

"Environmentally sound technologies are not just individual technologies, but *total systems which include know-how, procedures, goods and services, and equipment as well as organizational and managerial procedures*. This implies that when discussing transfer of technologies, *the human resource development and local capacity-building aspects of technology choices, including gender-relevant aspects, should also be addresse*d. Environmentally sound *technologies should be compatible with nationally determined socio-economic, cultural, and environmental priorities*." (*emphasis supplied*)

[36]The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995.

[37] Ton J. M. Zuijdwijk, "The UNCTAD Code of Conduct on the Transfer of Technology" 24 *McGill Law Journal* 571 (1978).

[38]Mohammad Umar, "Role of TRIPS in Transfer of Environmentally Sound Technologies to Developing and Least Developed Countries" 9 *Dr. Ram Manohar Lohiya National Law University Journal* 146 (2017).

transfer mechanisms are already there when it comes to transfer of environmentally sound technologies. Although, as a binding instrument the COC still seems a farfetched idea, but credit for aforesaid developments goes to the efforts of UNCTAD which prepared the draft COC and led to a certain awakening.

IV. DOHA DECLARATION ON TRIPS AGREEMENT AND PUBLIC HEALTH, 2001 &THE TRIPS AMENDMENT OF 2017

After hardening of international patent laws through TRIPS, it was increasingly realized by the developing and least developed countries (LDCs) that the so called flexibilities offered under the TRIPS agreement have significant loopholes. Especially, with regards to pharmaceuticals and public health it was considered extremely important to provide for cheaper health alternatives to their citizens. Given the fact that drugs dealing with diseases as serious as HIV/AIDS had been patented and their availability was beyond the reach of the poor population of the third world countries, a system of compulsory licenses (CL) was evolved.

CL is one of the most contentious yet most frequently invoked flexibilities under the TRIPS agreement. Through CL, member countries within their domestic jurisdiction can allow someone other than the patent holder to produce the patented product or process without the consent of the patent owner.[39] This is deemed justified on the grounds of public need and is backed by the rationale that government intervention to break the shackles of monopoly is legal if the IPR holders do not make technologies available in the public interest.[40] Pharmaceuticals is now one such public interest area in which Article 31 (from which legality of CL is derived) is frequently invoked by the developing countries and LDCs.[41]

However, the luxury of invoking Article 31 is available only to those countries which can afford to exploit non-market mechanisms. For the incapable, it is meaningless. The only option remaining is importing generic drugs from countries where compulsory license is already granted. Before 2003, the countries practicing CL who were sought to export generic drugs by the needy countries could not export because they were bound by Article 31(f) which allows the issuance of compulsory license only if its "use shall be authorized predominantly for the supply of the domestic market" of the member country.[42] This left needy countries helpless because they could not render basic generic to their ailing populations. To deal with this, on 14th November 2001, Doha Declaration on TRIPS Agreement and Public Health[43] instructed TRIPS Council to "find an expeditious solution to

[39] More details *available at*: https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm(last visited on November 10, 2018).

[40] Khorsed Zaman, "The TRIPS Patent Protection Provisions and Their Effects on Transferring Climate Change Technologies to LDCs and Poor Developing Countries: A Critical Appraisal" 3 *Asian Journal of International Law* 153 (2013); TRIPS, 1995, art. 8.1.

[41] *Ibid.*

[42] *Ibid.*

[43] Its philosophical genesis can be found in the initial four paragraphs which are as follows-

"1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.

2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.

this problem" and report to the General Council.[44] It came to be known as the "Paragraph 6 issue"[45]. General Council thereupon, in 2003 Cancun Ministerial Conference came up with the decision that Article 31(f) obligations shall be waived for the export of pharmaceutical products produced under a compulsory license to the developing countries and LDCs.[46] Though initially this decision was interim and provisional, it was agreed to be made permanent in General Council meeting of 2005, though unanimously adopting a protocol to that effect.[47] Recently in 2017, a formal amendment was made after reaching the threshold of two third members' ratification of that protocol to amend the TRIPS Agreement.[48]

It is the sheer gumption of the third world collective that made this amendment possible in the WTO agreement (the first and the only one till date). This will lead to the availability of cheaper drugs in many poor countries round the globe and can be seen as a symbol of growing strength of the third world voice internationally.

V. ADVENT OF THIRD WORLD SCHOLARSHIP

A. Backdrop

International Law scholarship has been dominated by the western scholars since its inception. Views about different aspects of international law were predominantly discussed and published in the galore of premier Ox-Bridge institutions that led to a situation in which the progress of international law was driven by a certain perspective of developed nations that did not necessarily include issues concerning the global south or the third world.[49] In an Article published in European Journal of International Law (not long back in 2014) it was highlighted that progress of international law had its roots in Christian civilization of the developed world today. The authors approve the objectivity of this arrangement rather than question it critically. It says:

> Law is traditionally attributed a key role in Western progress narratives. The roots of the strategic position of law in society and conflict resolution date back beyond the Enlightenment period. Two factors deserve mention here. First, there is the influence of the highly developed Roman law on the

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4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all."

[44] Doha Declaration on the TRIPS Agreement and Public Health, para. 5(b), adopted on November 14, 2001, WT/MIN(01)/DEC/2, *available at*: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (last visited on November 10, 2018).

[45] Para. 6 of Doha Declaration says- We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

[46] Decision of the General Council of August 30, 2003, WT/L/540 and Corr.1, *available at*: http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (last visited on November 10, 2018).

[47] More details *available at*: http://www.wto.org/english/thewto_e/gcounc_e/meeting_oct05_e.htm(last visited on November 10, 2018).

[48]WTO IP rules amended to ease poor countries' access to affordable, *available at*: medicineshttps://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm (last visited on November 10, 2018).

[49] A reflection of this proposition can also be found in the discussion on indigenous people in this paper.

> advancement of Western societies and legal systems. *Other, non-Western cultures were and still are less law-centred*. The second factor contributing to the key role of law builds on the relationship between the individual and God in a monotheistic religion. Here, i.e., in Christianity, Judaism, and Islam, strong rules and abiding by them play a central role. Rule-compliance is essential for the relationship between man and God. Law abidance connects man with God who turns into a punishing God if the rules are not observed. *The role of rule compliance in the monotheistic Christian religion was perfectly compatible with the law-centredness of the Roman law-based Western culture.*[50]

In another article from 1988, *Professor David Kennedy* traces the "generations of lawyers" in which he demonstrates how those western international lawyers and scholars were instrumental in shaping international law.[51] According to *Kennedy*, while the generation before the World War II was more doctrinal in its approach, the one after that gave those doctrines an "institutional shape, not only in the United Nations System and in the new international economic institutions, but also in the United States State Department, in the law firms and in the multinational corporations".[52]

B. TWAIL: Utility and Impact

When the new scholarship is taking a form and is pushing the existing alignment of the international legal discourse, it is becoming more and more evident that international law can be inclusive and just only when aggression of Eurocentric forces yield to the global democracy. The Third World Approaches to International Law (TWAIL) school of thought is an existing alternative to compete with the colonial and single eyed tendencies of existing international law. *Mohsen al Attar and Rebekah Thompson* note:

> TWAIL is an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus. A fundamentally counter-hegemonic movement, TWAIL is united in its rejection of what its champions regard as an unjust relationship between the Third World and international law.[53]

TWAIL can be bifurcated into two generations. First generation of the third world scholars (now titled as TWAIL-I) comprised greats like Professor R.P.Anand, Professor Upendra Baxi, Mohammed Bedjaoui etc.[54] They collectively challenged the notion that

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[50] Tilmann Altwicker and Oliver Diggelmann, "How is Progress Constructed in International Legal Scholarship?" 25(2) *European Journal of International Law* 425-444 (2014).

[51] David Kennedy, "A New Stream of International Law Scholarship" 7(1) *Wisconsin International Law Journal* 4 (Fall, 1988).

[52] *Ibid*.

[53] Mohsen al Attar & Rebekah Thompson, "How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination" 3(1) *Trade Law and Development* 65, 67 (2011).

[54] For a sample of first generation TWAIL scholarship from India writings see, Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India* (Firma KL Mukhopadhyay, Calcutta, 1958); Nagendra Singh, *India and International Law: Ancient and Medieval* (S. Chand and Co. Pvt. Ltd., New Delhi, 1973) (vols. I and II); S. Prakash Sinha, *New Nations and the Law of Nations* (A.W. Sijthoff, Leyden, 1967); R.P. Anand, *New States and International Law* (Vikas, New Delhi, 1979); R.P. Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff Publishers, The Hague, 1983); Upendra Baxi, "New Approaches to the History of

International Law is the propriety of the western thought process or is a gift from the west to the world. *Professor Chimni* has pointed out some of the achievements of TWAIL-I in following words:

> First, it recorded the contribution of Asian peoples to the evolution and development of international law. Second, it showed realism in recognizing that only reform and not revolution was possible in the sphere of international law. Third, it was correct in believing that a global coalition of Third World states alone could provide the counter-power to seek concessions from powerful states. Fourth, it rightly contended that the fact that the vast majorities of peoples lived in the third world must be reflected in the body of contemporary international law.[55]

However, in spite of these strengths there were few areas which were yet to be tackled by the third world scholars.[56] It was done by the second generation which was referred to as TWAIL-II. Most of them are carrying the battle forward and producing scholarship that, in the words of *Professor Chimni*:

> " …hopes to take the work of TWAIL I forward by refocusing attention on the structures and practices of imperialism, critiquing the undemocratic character of post-colonial states, systematically exposing the hegemonic character of international institutions (in particular the WTO and the IMF/World Bank combine), critically reviewing the debates on the sources doctrine and issues relating to indeterminacy of the legal process, devising a research agenda that reflects the concerns and needs of the marginal and oppressed peoples in the third world, and above all reducing the distance of the world of international law from the lives of ordinary peoples."[57]

TWAIL-II has largely been successful in its attempts to achieve the above objectives.Most of the prominent scholars associated with it such as Professor Antony Anghie, Professor B.S. Chimni, Professor James Thuo Gathii etc. have propelled the cause of TWAIL to the next level. Their third world manifesto[58] and writings on the imperial underpinnings of the international law prove the presence of neo-colonial tendencies in present international law paraphernalia. As *Professor Anghie* argued in one of his works that doctrinal and institutional developments in international law cannot be understood as "logical elaborations of a stable, philosophically conceived sovereignty doctrine…[but rather] as being generated by problems relating to colonial order".[59]

The TWAIL movement is making its marks and their predictions and criticisms are often vindicated by the calls in international forums. Internationally, it is getting more and more recognized, which is very essential to have a just international legal order. They have

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International Law" 19 *Leiden Journal of International Law* 555, 556 (2006); C. H. Alexandrowicz, *An introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th centuries)* (Clarendon Press, Oxford, 1967).

[55] B. S. Chimni, "The World of TWAIL: Introduction to the Special Issue" 3(1) *Trade Law and Development* 14 (2011).

[56] For details see *Ibid*.

[57] *Ibid*.

[58] B.S.Chimni, "Third World Approaches to International Law: A Manifesto" 8 *International Community Law Review* 3-27 (2006).

[59] *Supra* note 4 at 6, 7.

conducted various conferences[60] in different parts of the world where renowned scholars from all around the world have emphasized on the third world needs in today's era. Their scholarship is consistent, organized yet flexible, convincing and extremely impressive. *Professor Gathii* in one of his works published in 2011 attached a bibliography of modern TWAIL scholarship which is a proof that how qualitatively and vigorously this movement has grown to fill the crucial vacuum in international legal scholarship.[61] Although some scholars criticize them for offering no positive agenda for action or reform in international law and relations,[62] but credit goes to them for highlighting aspects and perspectives of international law which were never discussed before. If there are no solutions then identifying problems is the first step towards finding solutions.

VI. CONCLUSION

As stated in the introduction, the four illustrations above are to show the growing assertion for democracy in international legal order. However, the hypothesis of such transformation from order to justice cannot be accepted in absolute sense. There remains a significant amount of work that needs to be done so as to ingrain just aspirations of the third world as a part of hard law. For instance, like code of conduct there was a proposed code of conduct for MNCs as well and both of them were never officially adopted. Similarly, the UNDRIP does not guarantee a change in the treatment of indigenous people all around the world. Some even sense it as a non-obligatory document which is optional to abide as it is just a "declaration". While limitations of the current situation stand true, the fact cannot be sidelined that these are the signs of growing resistance from the victims of the skewed international legal system. As and when this resistance gets more organized; the international law will transcend from being the law of nations to the law of people.

[60] Recent conference was held at American University in Cairo. Previous conferences were hosted by premier institutions like Harvard Law School, Osgoode Hall Law School, Albany Law School, University of British Columbia, and University of Oregon Law School.

[61] James Thuo Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" 3(1) *Trade Law and Development* 26 (2011).

[62] For instance, see Jose Alvarez, "Revisiting TWAIL in Paris", *available at*: http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/ (last visited on November 14, 2018).

INTERNATIONAL LEGAL REGIME ON GENE PATENTING IN PLANTS

Smita Srivastava[*]

I. INTRODUCTION

Under international legal regime there is considerable room for genetic patenting, especially in cases of plants. Due to this flexibility, gene patenting in plants is permitted in many developed countries as biotech industry is dominated by them. Taking the advantage of this legal regime, agro-biotech companies have obtained several patents on genetic inventions relating to plants. They generate huge profits by misappropriating the genetic resources of developing or under-developed countries, which are rich in biodiversity. This free flow of genetic resources and associated knowledge from South to North take place due to concept of "free access" and "common heritage of mankind." Therefore, while accessing the genetic resources consent of country of origin is not obtained. Further, genetic material is taken without compensating and acknowledging the contribution of indigenous communities of provider country. This gives rise to issue of 'bio piracy' and 'cultural piracy'. Convention on Biological Diversity 1992 and Nagoya Protocol 2010 recognize the "sovereign right of state over its natural resources" and address these issues by providing necessary framework for appropriate access to genetic resources and traditional knowledge associated therewith. They also provide for fair and equitable sharing of benefits arising out of them. Purpose of this paper is to make analysis of basis of gene patenting in plants at the international level and to explore the concerns of developing countries in this regard. It further makes critical analysis of present international 'Access and Benefit Sharing regime' in addressing those concerns.

II. GENE PATENTING IN PLANTS AND TRIPS AGREEMENT

At the international level, Article 27 of TRIPS Agreement lays down minimum standards of patent protection that must be met by all WTO members. Article 27.1 provides**:**

> "……patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."

With regard to gene patenting the provision is not very clear. However, there is considerable room for gene patenting in plants. It says that patent shall be available for 'anyinvention.'It does not distinguish between inventions having life and inventions not having life, therefore, inventions having life form can be patented. Patent is available for both products and processes. Therefore, patent can be granted on isolated or artificial gene of plant, which is ultimate product. However, with regard to new "uses" of product Article 27.1 is silent. Therefore, member countries are free to allow or disallow the patenting of new use of known substance (e.g. genes).[1] It guarantees patents in all the fields of technology without any discrimination and that off course include the agricultural sector.

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[1] UNCTAD-ICTSD, *Resource Book on TRIPS and Development* 356-357 (Cambridge University Press, New York, 2005).

For patent protection, all inventions including the biotechnological inventions have to fulfill three basic patentability criteria i.e. novelty, inventive step and capability of industrial application. Novelty does not mean that the thing must not exist earlier but it must be "novel in a prior art sense." Therefore, on the date of filing of patent application, invention should not form "part of state of art." In the context of gene patents, the novelty requirement centers around the question whether genes, which already exist in nature can truly be said to new? Naturally occurring gene sequences contain sections that code for proteins and sections that do not. When scientists isolate, purify and amplify gene sequences, they isolate and purify only the protein-coding portions. These purified gene sequences do not occur naturally. Thus, they do not form the part of prior art.[2] Further if a gene can be properly described by its composition, by the process of obtaining it or by its use or other parameters, it is indeed novel item, and therefore merit patent protection.[3] The courts of most jurisdictions have accepted this reasoning, therefore, they have extended patent protection to isolated and purified naturally occurring genes.[4] However, discovery of gene or its known use cannot be accepted as patentable subject matter as it lacks the novelty. Genetic inventions also fulfil the criteria of inventive step as identification or isolation of genes is not an easy task. Individual gene is not obvious but become known only after extensive and sophisticated biochemical and micro-biological research. Further, it also fulfils the requirement of utility as genetically engineered plants, with desired traits such as high yield, resistant to pests, insects, herbicides, weeds and tolerance to drought, flood etc., are useful in serving the needs of society.

However, under Article 27.3(b) of TRIPS Agreement "plants, animals, and essentially biological processes for their production" may be excluded from patentability. But, "microorganisms and microbiological or non-biological processes" must be protected. Micro-organisms may be interpreted to include the genes. Article 27.3(b) of TRIPS requires the member states "to protect the plant varieties either by patent or by effective *sui generis* system or by combination of both." Therefore, TRIPS Agreement leaves considerable room for patenting of genes, plant varieties and microbiological process related therewith. However, it does not require the applicant to disclose the source of origin. Gene patenting is permitted in many jurisdictions like U.S., European Union, Australia, and Canada.

III. ISSUE OF BIO PIRACY

Issue of bio piracy arises out of concept of bioprospecting. According to Phillipe Cullet, "bioprospecting covers all activities related to the search and collection of biological resources, the use of information regarding traditional uses of biological resources as well as research towards commercial exploitation."[5] For, bioprospecting major mega diverse countries are Brazil, Columbia, South Africa, Philippines, Australia, Indonesia, China, Mexico, Venezuela, Ecuador, Peru, Mexico, India, Madagascar. Most of them are developing countries located in tropical and sub-tropical region and contain 70 percent of the world's biodiversity.In order to find out the desired genes traditional knowledge-based bioprospecting is more profitable than conventional screening system. But the controversy arises when

[2] Eike-Henner W. Kluge, "Res nullius, Res communis and Res propria: Patenting Genes and Patenting Life-Forms" 13*Annual Review of Law and Ethics (JRE)* 543, 549 (2005), *available at*: https://www.jstor.org/stable/43593718 (last visited on July 4, 2018).
[3] P. K. Vasudeva, "Patenting Biotech Products: Complex Issues" 35(42) *Economic & Political Weekly* 3726-3727 (October 14-20, 2000), *available at*: https://www.jstor.org/stable/4409857 (last visited on May 20, 2018).
[4] *Supra* note 2 at 549.
[5]Philippe Cullet, *Intellectual Property Protection And Sustainable Development* 157 (Lexis Nexis Butterworths, New Delhi, 2005).

without any consideration and acknowledgement of contribution of indigenous communities of developing countries, patent is granted to bio prospectors or their licensees on final product.[6] Therefore, demand of developing countries is that if profits are gained through bioprospecting based genetic engineering, there should be sharing of benefits and technology involved with original contributors of genetic material or traditional knowledge.

A.Bio piracy Episodes

(i) Enola Beans

Enola Beans is an alleged case of bio piracy, in which, PODNERS L.L.C., a small American seed company, studied the genes of traditional Mexican Beans through selection techniques and developed new variety of same beans with better yellow color and a more consistent shape. It obtained a US patent (No.5,894,079) and a US Plant Variety Protection Certificate (No. 9700027) on that bean.[7] Now the Mexican Beans were either prohibited from being imported to the USor subject to payment of royalties when sold. This had resulted in a sharp decline in exports of this bean from Mexico to USdriving many Mexican farmers out of the market.[8]

(ii) Sweet Berry

This case involves the patent over "brazzien" a "sweet berry" of a West African plant "pentadiplandra brazzeana," which was discovered by team of University of Wisconsin with the help of local community of Gabon. But people of Gabon were never compensated for that.[9]

(iii) Australian Bio piracy Episode

In 1998, two organizations "Agricultural Western Australia" and the "Grains Research Development Corporation" applied for Plant Breeder's Right under the Australian Plant Breeder's Rights Act, 1994, for two varieties of "chickpea" developed from genetic material obtained from the "International Crop Research Institute for the Semi-Arid Tropics (ICRISAT)." Chickpeas are generally grown by subsistence farmer in India and Iran. However, before the determination of issue by the Australian Plant Breeder's Rights Office, application was withdrawn due to public anger.[10]

(iv) Nuna Beans

In this case patent was obtained by US Corporation on a "bean-nut popping bean" onMarch 21, 2000. This variety was developed by selection and crossing of thirty-three "Andean nuna bean species" of Bolivia, Peru, Colombia and Ecuador.[11]

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[6] Jaishree Watal, *Intellectual Property Rights In WTO & Developing Countries* 170-171 (Oxford India Paperbacks, Oxford University Press, 3rd edn., 2009).
[7] Srividhya Ragavan, *Patent And Trade Disparities In Developing Countries* 340 (Oxford University Press, New Delhi, 2012).
[8] Tilahun Weldie, "The Impact of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) on the Realization of the Right to Food" 1(1) *Bahir Dar University Journal of Law* 97, 123 (2010).
[9] *Supra* note 7 at 340, 341.
[10] Michael Blankeney, "Regulating Access to Genetic Resources", in S.K. Verma & Raman Mittal (eds.), *Intellectual Property Rights: A Global Vision* 4 (The Indian Law Institute, New Delhi, 2008).
[11] *Id.* at 9.

IV. ACCESS TOGENETIC RESOURCES AND BENEFIT SHARING REGIME

A. Convention on Biological Diversity 1992

Convention on Biological Diversity was adopted in 1992 at the United Nation's Conference on Environment and Development. It became effective on December 29, 1993. It has a near universal participation with 196-member states, the main exception being the United States.[12] Apart from conservation and sustainable use of biodiversity, its main focus is on fair and equitable sharing of benefits derived from the use of genetic resources.

(i) Sovereign Right of State over its Natural Resources

Preamble and Article 3 of CBD reaffirms the sovereign right of states over their natural resources. Article 15, which deals with access to genetic resources, reflects this sentiment by emphasizing again on sovereign rights of States over their natural resources and provides that "the authority to determine access to genetic resources rests with the national governments and is subject to national legislation". However, Article 15(2) requires contracting parties "to endeavor to create conditions to facilitate access to genetic resources and not to impose restrictions that run counter to the objectives of the Convention."

(ii) Appropriate Access: Prior informed Consent, Mutually Agreed Terms and Benefit Sharing

In order to facilitate appropriate access to genetic resources CBD provides that access is subject to the 'prior informed consent'[13] of supplier country of genetic resources. It should be on 'mutually agreed terms.'[14]Most importantly, "each Contracting Party is bound to take legislative, administrative or policy measures with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms."[15] At international level, benefit-sharing is well recognized compensation mechanism. Objective is to compensate the holders of biological resources and traditional knowledge for their contribution to the evolution of plant varieties.[16] Sharing of benefit should be fair and equitable.

Transfer of technology may be means of benefit sharing. Therefore, Article 16 of CBD specifically requires the contracting parties to facilitate the transfer of technologies, that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources, on 'fair and most favorable terms, including on concessional and preferential terms' to the countries providing the genetic resources. It specifically indicates that genetic engineering is one of those technologies. Article 16(3) requires the "transfer of technology on mutually agreed terms."

(iii) Recognition of Traditional Knowledge

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[12] List of Parties, CBD, *available at*: https://www.cbd.int/information/parties.shtml (last visited on January 04, 2019).
[13] Convention on Biological Diversity, 1992, art. 15.5.
[14] *Id*., art. 15.4.
[15] *Id*., art. 15.7.
[16] *Supra* note 5 at 164.

Since traditional knowledge provides a significant basis for obtaining patent, therefore. Article8(j) of the CBD requires the member states to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities, promote their wider application and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

(iv) Critical Analysis

CBD provides merely general framework for access and benefit sharing. It does not provide implementation mechanism for the same. Though, it recognizes the principle of "sovereign rights of state over its natural resources" and requires the access to genetic resources subject to prior informed consent, and benefit sharing on mutually agreed terms, but in case of conflict, it does not have overriding effect on TRIPS. TRIPS does not require the patent applicant whose inventions incorporate or use the genetic material or associated knowledge to comply with these obligations. TRIPS also does not require to disclose the source of origin. Further, language of provisions of CBD is not sufficiently strong to enforce these obligations. Most of the provisions use words like 'endeavor to fulfil', 'as appropriate', 'as for as possible', 'subject to national legislation and international law.' Further, it lacks effective enforcement mechanism. All dispute concerning the interpretation or application of Convention is to be settled by "negotiation, mediation, conciliation, arbitration or submission to the International Court of Justice."[17]

B. Nagoya Protocol: An Effective Implementation Mechanism?

(i) Background

For further implementation of the third objective of CBD, onOctober 29, 2010, CBD Conference of Parties, at its 10th session in Nagoya, Japan, adopted "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity". It came into force on October 12, 2014, 90 days after its 50th ratification. Presently, it has 111 parties. Not all the parties of CBD have ratified the Nagoya Protocol.[18]

The Nagoya Protocol is a legally binding, ancillary agreement to the CBD.[19] It provides implementation mechanism for access and benefit sharing principle enshrined under Convention. It consists of 27 preambular paragraphs, 36Articles and one annexure having a "non-exhaustive list of monetary and non-monetary benefits."[20]

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[17] *Supra* note 13, art. 27.

[18] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, CBD (2010), *available at*: https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf (last visited on January 04, 2019).

[19] Most of the provisions of Protocol have been borrowed from the "Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization", a set of voluntary non-binding guidelines on access and benefit sharing endorsed by the CBD Conference of the Parties (COP) at its 6th Session in 2002. *See* UNCTAD, *The Convention On Biological Diversity And Nagoya Protocol: Intellectual Property Implications* 11 (UNCTAD, Geneva, 2014).

[20] IUCN, "An Explanatory Guide to the Nagoya Protocol on Access and Benefit-Sharing" *IUCN Environmental Policy and Law Paper No. 83, available at*: https://cmsdata.iucn.org/downloads/an_explanatory_guide_to_the_nagoya_protocol.pdf (last visited on November 25, 2018).

(ii) Objective

Article 1 of Nagoya Protocol reiterates the third objective of the CBD by referring to "the fair and equitable sharing of the benefits arising from the utilization of genetic resources" as the fundamental aim of the Protocol. It makes clear that benefit sharing includes "appropriate access to genetic resources, appropriate transfer of relevant technologies, and appropriate funding."

(iii) Scope

Protocol applies to "genetic resources and benefit arising from utilization of such resources." It also extends to "traditional knowledge associated with genetic resources and benefit arising from utilization of such knowledge."[21]

(iv) Access Mechanism

The issue of "access to genetic resources and traditional knowledge associated therewith" is fundamental to Nagoya Protocol. Different part of Protocol addresses this issue. Reiterating the "sovereign rights of States over their natural resources", Article 6 specify once more that "access to genetic resources is subject to prior informed consent of country of origin, unless otherwise determined."[22] It further requires the parties to ensure "prior informed consent or approval and involvement of indigenous and local communities in obtaining the access to the genetic resources."[23] For implementation of these provisions, member countries are required "to take the necessary legislative, administrative or policy measures." For more legal certainty, Article 6(3) lays down elaborate procedural requirement that should be followed by all member countries requiring prior informed consent at the domestic level.

Article 7 obliges each party "to take appropriate measures to ensure that the prior informed consent and mutually agreed terms" in relation to "access to traditional knowledge associated with genetic resources" have been established. Aim of this provision is to contribute in implementation of Article 8(j) of the CBD. Article 8 of Nagoya Protocol requires that special consideration should be given to the "importance of genetic resources for food and agriculture and their special role for food security."

For further implementation of access requirement, Articles 13 and 14 provide for the required institutional framework at the national and international level. Article 13 requires the "designation of a national focal point" which shall give "information as to procedure for obtaining prior informed consent or approval or involvement of indigenous communities and establishing mutually agreed terms, including benefit-sharing" to applicant seeking access to genetic resources and traditional knowledge associated therewith. It shall also give information on "competent national authorities, relevant indigenous and local communities and relevant stakeholders."[24] It further requires the member countries to designate "one or more competent national authorities on access and benefit-sharing" which shall be "responsible for granting access or issuing written evidence that access requirements have

[21] *Supra* note 18, art. 3.
[22] *Id*., art. 6.1.
[23] *Id*., art. 6.2.
[24] *Id*., art. 13.1.

been met and be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms."[25] Single entity may be designated "to fulfil the functions of both focal point and competent national authority."[26]

Article 14 also plays an important role by establishing an Access and Benefit-Sharing Clearing-House which serve as a means for sharing of information related to access and benefit-sharing made available by member country relevant for implementation of the Protocol. Such information shall include "legislative, administrative and policy measures taken on access and benefit-sharing; information on the national focal point and competent national authority; permits or their equivalent issued at as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms." Aim of this provision is to improve the link between providers and users of genetic materials.

However critics are of view that additional requirement under the *Nagoya Protocol* for the "enactment of a law or regulation as a precondition for priorinformed consent", which is not required under the CBD, creates a condition that would be detrimental to the country of origin (developing countries) having no specificaccess and benefit sharinglaws and regulatory mechanism.[27] Further the requirement of "fair and non-arbitrary rules and procedures on accessing genetic resources" undermines the privilege of the provider country to determine conditions for access as it deems fit in the exercise of its sovereign right.[28]

(v) Benefit Sharing Mechanism

Fair and equitable benefit-sharing is key feature of the Nagoya Protocol. Article 5 reiterates the basic principle already incorporated in Articles 15(3) and 15(7) of the CBD. It provides that "benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources."[29] This also applies to the "utilization of genetic resources held by Indigenous and local communities", including their "traditional knowledge."[30] Such benefit sharing shall be on mutually agreed terms. For implementation of these provisions, again member country is required "to take appropriate legislative, administrative or policy measures."[31] Referring to annex, Article 5(4) provides that benefits may be monetary as well as non-monetary. Annex provides indicative and non-exhaustive list of potential monetary and non-monetary benefits to be shared.

Article 9 obliges the Parties "to encourage users and providers to direct benefits arising from utilization of genetic resources towards the conservation of biological diversity and sustainable use of its components." Article 10 requires the Parties "to consider the need for a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge

[25]*Id*., art. 13.2.
[26]*Id*., art. 13.3.
[27]Abdul Haseeb Ansari and Lekha Laxman, "A Review of the International Framework for Access and Benefit Sharing of Genetic Resources with Special Reference to the Nagoya Protocol"16 *Asia Pacific Journal of Environmental Law* 105, 128 (2013).
[28]*Id*. at 130.
[29]*Supra* note 18, art. 5.1.
[30]*Id.*, art. 5.2, 5.5.
[31]*Id.*, art. 5.3.

associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent."

(vi) Traditional Knowledge Associated with Genetic Resources

In Nagoya Protocol, Parties are under obligation "to take into consideration indigenous and local communities' customary laws, community protocols and procedures, with respect to traditional knowledge associated with genetic resources."[32] Members are also encouraged "to support Indigenous and local communities in developing community protocols for access to traditional knowledge, minimum requirements for mutually agreed terms and modern contractual clause for benefit sharing arising from utilization of traditional knowledge associated with genetic resources."[33]Purpose of these provisions is to ensure the prior informed consent and involvement of concerned indigenous and local communities in granting access as well as to ensure the benefit sharing with them.

Here, Nagoya Protocolcan be considered as CBD-plus, as it deals with the right of indigenous and local communities in relation to both genetic resources and traditional knowledge associated with it, in comparison to CBD, which only deals with traditional knowledge of indigenous and local communities.[34] However, it lacks strong provision on the protection of Indigenous and local communities regarding the utilization of their traditional knowledge associated with genetic resources. Parties are only obliged to "take into consideration" and "endeavor to support."[35] Further, issue of "publicly available traditional knowledge"[36]is not covered under Protocol. This created huge controversy during negotiation as it has led to "misappropriation of traditional knowledge associated with genetic resources." Further, effective implementation of provision will mainly depend on domestic legislation as well as interpretation of the ambiguous language by Parties to Protocol.[37]

(vii) Compliance

In Nagoya Protocol member countries are under obligation to take "appropriate, effective and proportionate legislative, administrative or policy measures in ensuring that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party."[38] Further, they have to take "appropriate, effective and proportionate measures to address the situation of non-compliance with measures adopted under Article15(1)."[39] They are obliged to "cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements."[40]Article 16 extends these obligations to "access and benefit-sharing for traditional knowledge associated with genetic resources."

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[32]*Id.*, art. 12.1.
[33]*Id.*, art. 12.3.
[34]*Supra* note27 at 135.
[35] Achmad Gusman Siswandi, "The Nagoya Protocol: unfinished business remains unfinished"inMatthew Rimmer (ed.) *Indigenous Intellectual Property* 355 (Edward Elgar Publishing, Cheltenham, UK, 2015).
[36] Situations where 'the knowledge was not obtained directly from indigenous and local communities' or alternatively where there was 'no identifiable owner of the resource as the traditional knowledge was passed down from generations ago.' See *supra* note27 at 136.
[37]*Supra* note35 at 355, 356.
[38]*Supra* note 18, art. 15.1.
[39]*Id*., art. 15.2.
[40]*Id*., art. 15.3.

In order to ensure compliance with mutually agreed terms, "parties are obliged to encourage providers and users of genetic resources as well as traditional knowledge associated with genetic resources to include dispute resolution provisions in mutually agreed terms."[41] For that purpose, member countries are under obligation to ensure that "opportunity to seek recourse is available under their legal systems in cases of disputes arising from mutually agreed terms."[42]

These compliance provisions can serve as practical means to address infringement of access and benefit sharing scheme. However, their effectiveness remains questionable as no guidelines have been laid down as to measures which are considered 'appropriate, effective and proportionate.'[43]

(viii) Monitoring

To support compliance, Protocol obliges member countries "to take measures, to monitor and to enhance transparency about the utilization of genetic resources." Such measures include designation of one or more checkpoints; encourage the parties to genetic resources to include mutually agreed terms clause that require information sharing and reporting on the implementation of such terms; and use of cost-effective communication tools and systems.[44]

According to Article 17(2) of Nagoya Protocol "permit issued under Article 6(3)(e) and made available to the Access and Benefit-sharing Clearing-House, shall constitute an internationally recognized certificate of compliance." It also states:

> "An internationally recognized certificate of compliance shall serve as evidence that the genetic resource which it covers has been accessed in accordance with prior informed consent and on mutually agreed terms as required by the domestic access and benefit-sharing legislation or regulatory requirements of the Party providing prior informed consent."[45]

(ix) Transfer of Technology

Article 23 of Nagoya Protocol focuses on two non-monetary benefits -*firstly*, collaboration and co-operation in technical and scientific research and development programmes, including biotechnological research activities; and*secondly*, access and transfer of technology.[46] It provides:

> "In accordance with Articles 15, 16, 18 and 19 of the Convention, the Parties *shall collaborate and cooperate in technical and scientific research and development programmes, including biotechnological research activities*, as a means to achieve the objective of this Protocol. The *Parties undertake to promote and encourage access to technology by, and transfer of technology to,*

[41]*Id*., art. 18.1.
[42]*Id*., art. 18.2.
[43]*Supra* note 35 at 357.
[44]*Supra* note 18, art. 17(1).
[45]*Id*., art. 17.3.
[46]*Supra* note 20 at 29.

> *developing country Parties, in particular the least developed countries and small island developing States* among them, and Parties with economies in transition, in order to enable the development and strengthening of a sound and viable technological and scientific base for the attainment of the objectives of the Convention and this Protocol."

This provision can be considered as CBD-minus as it has reduced the obligation of developed countries to merely "promote and encourage" access and transfer of technology to developing and least developed countries.[47]While there is a definite obligation regarding collaboration and co-operation in research programmes, with regard to access to and transfer of technology to developing countries, there is only a general commitment, not an obligation.[48]

(x) Critical Analysis

Although Nagoya Protocol has provided a comprehensive framework for access and benefit sharing issues, its success is doubtful as it consists of only weak and ambiguous provisions. It does not contain stronger compliance and enforcement mechanisms.[49] Without appropriate standards and guidelines for procedural requirements,the Protocol will not be able to attain its objective. For example, there are no criteria or mechanism in Nagoya Protocol to objectively determine whether national legislation on access fulfils the requirements of legal certainty and clarity or not.Further, there is no authority to determine on whether domestic law on access and benefit sharing fulfils the criteria of legal certainty and clarity.[50]

Many of the access and benefit sharing provisions in protocol have merely reiterated the principles laid down in the *Convention on Biological Diversity 1992* and *Bonn Guidelines 2002*. Though, it has laid down a number of new important features for implementation of access and benefit sharing mechanism such as special consideration to certain factors; a global multilateral benefit sharing system; and monitoring the utilization of genetic resources, these are also impaired by discretionary and ambiguous language.[51]

Nagoya Protocolis mainly referred to as a "masterpiece in creative ambiguity" due to the compromise and avoidance of issues about which there was no consensus among member countries. It does not regulate disclosure requirements in detail. There is no provision in Nagoya Protocol to define 'bio piracy' or acts constituting bio piracy and measures to address the concerns of developing countries in this regard.There is currently no agreed concept of 'bio piracy.'[52] Further, it does not address the issue of "publicly available traditional knowledge."

Most of the provisions of Protocol require each party "to take appropriate legislative, administrative, or policy measures" for exercise of their rights and obligations under the protocol. Therefore, effective implementation of the Protocol would depend on national legislation enacted for utilization of genetic resources. Since, not all the parties to CBD have

[47]*Supra* note27 at 136, 137.
[48]*Supra* note46.
[49]*Supra* note35at 364.
[50]*Supra* note27 at 129.
[51]*Supra* note35 at 360-361.
[52]*Supra* note27 at 137, 138.

ratified the Nagoya Protocol, it is difficult to ensure that user countries which are not parties to Nagoya Protocol would act in accordance with its provisions.[53]

V. CONCLUSION

Present access and benefit sharing regime does not fulfil the expectations of developing countries, as it lacks the stronger compliance and enforcement mechanism. Though Nagoya Protocol 2010 added a new chapter to access and benefit sharing regime, nevertheless it has not moved significantly from the access and benefit sharing principles and standards already incorporated in *Convention on Biological Diversity 1992* and the *Bonne Guidelines 2002*.

For, effective implementation of the Nagoya Protocol through national legislation, some issues still need to be resolved. Firstly, there is need to clarify ambiguous provisions. Secondly, there should be mechanism for objective assessment of national legislation whether it fulfils the procedural requirement laid down in Nagoya Protocol or not. Thirdly, there should be obligation of full disclosure in patent application. Fourthly, there should be consultation mechanism to reconcile the competing interests of various stakeholders in genetic resources utilization. Fifthly, there should be specific provision to define bio piracy and measures to address such concerns.

Lastly, the issue of"fair and equitable sharing of benefits" centers around the question of value. In order to ascertain the appropriate value, benefits sharing should be linked to the outcome of the ultimate utilization of genetic resources, as opposed to their access. This would greatly reduce the uncertainty in the calculation of benefits. Thus there is an urgent need to develop an internationally accepted mechanism for valuation of genetic resources.[54]

[53] *Supra* note35 at 361.
[54] *Supra* note27 at 135.

INTERNATIONAL REGULATION ON COMMERCIAL UTILISATION OF GENETIC RESOURCES: ITS IMPLEMENTATION AND IMPLICATION IN SOUTH ASIA

Amrendra Kumar[*]

I. INTRODUCTION

Genetic resources have been significant component for the ecological, economic, social and cultural development of a country. The potential value involved with genetic resources has benefited the societies and communities for long time. The rapid growth in science and technology has further added "the commercial value stimulating the trade and commerce among the countries and communities."[1] Further, it is the "biotechnological industry with help of information technology has widely utilized the genetic resources to develop new and improved crops varieties, medicines, cosmetics and other commodities."[2] Generally, the genetic resources are used by the industries, universities, research institutions, botanical gardens and gene banks which have either accessed directly from nature or acquired indirectly from the biodiversity rich nations, indigenous and local communities, intermediaries and individual.[3] The economic significance of the genetic resources has further increased "the appropriation by way of bio-prospecting and misappropriation by way of bio-piracy for the commercial and non-commercial purposes."[4] This has necessitated the efforts to regulate the access and use of genetic resources and traditional knowledge at international level.

Consequently, the last two decades have witnessed a growing momentum to establish international legal regime for the commercial utilization of genetic resources. At the international level, "the Convention on Biological Diversity (1992), its Bonn Guidelines (2002) and Nagoya Protocol (2010) along with FAO International Treaty on Plant Genetic Resources for Food and Agriculture (2001) have been prominent international legal instruments regulating the commercial utilization of genetic resources and associated traditional knowledge."[5] However, FAO regime provides the multilateral legal system specifically for plant genetic resources distinctive to the bilateral legal system for overall genetic resources provided under CBD regime. Under bilateral legal system, "Convention on Biological Diversity (CBD)"[6] provides the obligations to the member

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[1] K. ten Kate and S.A. Laird, *The Commercial Use of Biodiversity: Access to Genetic Resource and Benefits Sharing* 15 (Earth Scan, London, 3rd edn., 1999). See also Kate ten K. and S.A. Laird, "Biodiversity and Business: Coming to Terms with the 'Grand Bargains' " 76(1) *International Affairs* 12 (2000).

[2] *Ibid.*

[3] M.S. Suneetha and Balakrishna Pisupati, "Benefit Sharing in ABS: Options and Elaboration" UNU-IAS Report, 2009, *available at*: https://www.cbd.int/abs/doc/unu-abs-report-2009-en.pdf (last visited on October 22, 2018).

[4] Padmashree Gehl Sampath, *Regulating Bioprospecting: Institutions for Drug Research, Access and Benefit Sharing* 24-36 (United Nations University Press, Tokyo, 2005).

[5] Conference of Parties to the Convention on Biological Diversity: Decision X/1 Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from the Utilization, 2010; *available on:* URL: http://www.cbd.int /doc/decisions/cop-10/en.pdf. (last visited on October 12, 2018).

[6] Convention on Biological Diversity, 1992. It is framework convention for biodiversity conservation and management adopted on 5 June, 1992 at UN Conference on Environment and Development at Rio de Janerio, Brazil. It came into force on December 29, 1993 where 193 member countries are currently parties to it. *Available at*: http://www.cbd.int /doc/legal/cbd_un_en.pdf. (last visited on October 12, 2018).

states to establish legal and institutional framework at national level to facilitate and regulate the commercial utilization of genetic resources and benefit sharing arising from their utilization. Recently, the member states adopted the "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity."[7] After the adoption and ratification of the Nagoya Protocol, it became incumbent for the member nations including the South Asian Nations to implement it in their domestic jurisdiction being major repository of the biodiversity.

Against this background, this paper aims to examine the international regulation of the commercial utilization of the genetic resources and associated traditional knowledge especially after the adoption of Nagoya Protocol. It proceeds with analyzing the promises and prospects for its implementation in South Asian nations outlining the physical status of genetic resources and its commercial utilization. It also explores the major implications on the legal system of these South Asian nations fulfilling the obligations for the domestic legislation and regulatory requirements. The paper further proposes that South Asian nations should take initiative and leadership in the implementation of the Nagoya Protocol at regional level by trans-boundary cooperation and at national level by enacting specific legislation or amending existing legislation as well as improving the plans and policies for the commercial utilization of genetic resources and associated traditional knowledge.

II. GENETIC RESOURCES IN SOUTH ASIA

South Asia comprises with eight sovereign states i.e. Afghanistan, Pakistan, India, Nepal, Bhutan, Bangladesh, Maldives and Sri Lanka located in the Hindu Kush Himalayan and Hindu-Malay region. It ranges from the world's highest elevation in the Hind Kush Himalayan region to its river's delta and low laying coastal plains and islands of the Arabian Sea, Indian Ocean and Bay of Bengal. This is immensely diverse region comprising vast and unique variety of ecosystem i.e. Forest, Wetlands, Mountain, Desert and Coral reefs which harbors variety of faunal and floral species of plants, animals and microorganism enriching the biological and genetic resources due to its geographical and geological locations. Individually, "Afghanistan is comprised of eight bio-geographical provinces endowed with several species including 150 species of mammals, 500 species of birds, 100 species of reptiles, 10 species of amphibians, 140 species of birds, 245 species of butterflies and 4000 species of vascular plants."[8] In the similar bio geographical realms, "Pakistan has 195 recorded mammals species, 668 of birds species,177 reptiles species, 12 amphibians and 192 freshwater fish species along with 3500 plant species."[9]

With only 2.5% of the land area adorned with 10 bio-geographic zones and 26 biotic provinces, India accounts for 8% of the recorded species of the world which includes millions of races, sub- species and local variants of species. It is estimated that "India has approximately 45000 species of plants representing as much as 11 % the world's flora which

[7] Nagoya Protocol on the Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity adopted on October 30, 2010, CBD Secretariat: Montreal. *Available at*: http://www.cbd.int /abs/text/default.html (last visited on October 12, 2018).

[8] B.H. Desai, K.P. Oli, *et.al.*, *Implementation of the Convention on Biological Diversity: A retrospective analysis in the Hindu Kush-Himalayan countries* (ICIMOD, Kathmandu, 2011) *available at*: http://www.indiaenvironmentportal.org.in/files/implementation_of_the_convention_on_biological_diversity.pdf (last visited on November 2,2018).

[9] *Ibid.*

includes about 17500 species of flowering parts, 48 species of gymnosperms, 1200 species of pteridophyte, 1980 species of mosses, 845 species of liverworts, 6500 species algal, 2050 species of lichens, 14500 species of fungi and 850 species of bacteria."[10]"The total estimates of animal species in India are about 89,450, out of which insects alone include 59,353 species. Other faunal components include mammals (372 species), birds (1230 species), and reptiles (428 species), over 300 species of amphibians and 500 species of molluscs."[11] However, "Bhutan being small landlocked country situated on the southern slopes of the eastern Himalayan with three distinct ecozones harbors 5603 vascular plant species, 667 bird species, 49 species of fish etc."[12] Similarly, "Nepal also as landlocked nation has rich biological diversity with 342 endemic plants and 160 endemic animal species."[13] Bangladesh is also very rich small geographical regions of Indo-gangatic plain and eastern Himalayan realm provide wide range of plants, animal and marine species in its Sundervan wetlands, Chittagong Hills and Bay of Bengal. Maldives and Sri Lanka as Islands also have similar kind of diverse species in plants, animals, and marine species in their own regions. Being repository of large amount of genetic resources, the member nations of the South Asia has serious concerns over the conservation and commercial utilization of their genetic resources.

III. GENETIC RESOURCES AND ITS'COMMERCIAL UTILIZATION

Our Earth is endowed with different types of natural and non-natural resources. Among the natural resources, genetic resources are most significant which are found as genetic material in animal, plant, microbial or other organisms. These are generally distinguished from their source of nutrition, structure and mobility, however the genes are found in all of them. "'Gene' denotes a group of organism sharing number of heritable characteristics which are reproductively isolated for another parts or forms."[14] But in legal sense, it is defined as "genetic material of actual or potential value containing functional units of heredity."[15]However, it has been defined in simple words as "genetic resources are primary resources and raw materials in the form of genes, chemicals, gems, resins, enzymes and proteins etc. These are generally found in animal, human, plant and marine substances within their natural ecosystem and habitats, or outside their natural habitats like seed banks, gene banks, and botanical gardens."[16]Such genetic resource may be accessed by either acquiring the genetic resource and information from the nature directly or exploringother sources such as gene banks, seed banks, research institutions and botanical gardens. There are multiple stakeholders who play dominant role in providing or facilitating the access to such genetic resources as providers like "nation states, research institutions, universities, intermediaries, indigenous and local peoples, and individuals."[17] These genetic resources are used by different types of users such as researchers, scientists, industries in different sectors such as "pharmaceutical, biotechnology, seed, crop protection, horticulture, cosmetic and

[10] K. Venkataraman, "India's Biodiversity Act 2002 and its role in conservation" 50(1) *TropicalEcology* 23-30 (2009).
[11] *Ibid.*
[12]*Supra* note 8 at 12.
[13]*Ibid.*
[14] Peter Johan Schei and Morten Walløe Tvedt, " 'Genetic Resources' in the CBD : The Wording, The Past, The Present and The Future" FNI Report 4/2010, *available at*:https://www.fni.no/getfile.php/131744-1469869059/Filer/Publikasjoner/FNI-R0410.pdf (last visited on October 15, 2018).
[15]*Supra* note6, art. 2.
[16] Sarah Laird and Rachel Wynberg, *Access and Benefit Sharing in Practice: Trends in Partnership across Sectors,* CBD Technical Series No. 38 (Secretariat of CBD, Montreal, 2008*).* A*vailable at*: https://www.cbd.int/doc/publications/cbd-ts-38-en.pdf (last visited on October 16, 2018).
[17] *Supra* note 1 at 30.

personal care, fragrance and flavor, food and beverage industries for basic research and commercial utilization."[18]Their utilization of genetic resources has been recognized as "to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology."[19] Further, the biotechnology has been applied as "any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use."[20] Such commercial application and utilization of the genetic resources through biotechnology has been largely done by the above said industries unhindered and unregulated which has further stimulated for the strong and binding legal instrument for access and benefit sharing system at national and international level.

IV. INTERNATIONAL REGULATION ON COMMERCIAL UTILIZATION OF GENETIC RESOURCES

At international level, regulation on genetic resources has been addressed at different times and occasionsthrough different legal instruments such as CBD, ITPGRFA, TRIPS, UPOV and UNCLOS.[21] Among these, "the Convention on Biological Diversity (1992) has been one of the pioneer international legal instrument which deals with the conservation, sustainable utilization, access and benefit sharing of the biological resources i.e. genetic resources."[22] The CBD not only has given the fundamental principles and obligations as framework convention, but also demanded "a nationally implemented ABS legal regime for commercial utilization of genetic resources."[23] Even though, the implementation on the ABS mechanism at national level remained unsatisfactory across the member nations. For the implementation of its objective and principle on ABS for the commercial utilization of genetic resources, Conference of Parties (COP) of the CBD further led to recourse under Article 28 to initiate the deliberations for an effective legal instrument for the implementation of ABS regime on commercial utilization of genetic resources.

In the CBD COP fourth meeting in 1998, "a regionally balanced expert panel on ABS was set up which formally initiated the work on international instrument on ABS for commercial utilization of genetic resources."[24] In year 2000 at Nairobi, CBD COP fifth meeting further formalized the ongoing ABS negotiations by constituting an "Ad-Hoc Open Ended Working Group (AHWG) with a mandate to develop guidelines on ABS."[25] It presented the "Bonn Guidelines on Access to Genetic Resources and Fair and Equitable

[18] Thomas Greiber, Sonia Peña Moreno, *et.al.*, "An Explanatory Guide to the Nagoya Protocol on Access and Benefits Sharing" *IUCN Environmental Policy and Law Paper No. 83* 4 (2012), *available at:* https://cmsdata.iucn.org/downloads/an_explanatory_guide_to_the_nagoya_protocol.pdf (last visited on October 28, 2018).

[19]*Supra* note 7, art. 2.

[20]*Ibid.*

[21] Silke von Lewinski, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* 212 (Kluwer Law International, The Netherlands, 2nd edn., 2008); *See* also, G. Kristin Rosendal, "Regulating the Use of Genetic Resources: Between International Authorities" 16(5) *Environmental Policy and Governance* 265-277 (2006).

[22] Ananda Mohan Bhattarai, *Protection of Himalayan Biodiversity: International Environmental Law and A Regional Legal Framework* 6 (Sage India, Delhi, 2010).

[23]*Supra* note6,art. 15.

[24] CBD COP Decision IV/8: *Access and Benefit Sharing*, May 04-15, 1998 (Bratislava, Slovakia), *available at*: https://www.cbd.int/decision/cop/?id=7131 (last visited on October 20, 2018).

[25] CBD COP Decision V/26: *Access to Genetic Resources*, May 15-26, 2000 (Nairobi, Kenya), *available at:* https://www.cbd.int/decision/cop/?id=7168 (last visited on October 20, 2018).

Sharing of Benefits arising out of their Utilization"[26] which was subsequently adopted in year 2002 at CBD COP sixth meeting at The Hague. It was basically adopted to assist the parties, governments and other stakeholders in developing ABS agreements, plans and strategies for commercial utilization of genetic resources. It was also formulated to help the member states in establishing legislative, administrative and policy measures on access and benefit sharing and/or when negotiating contractual arrangements for commercial utilization of genetic resources. However, the guidelines became controversial among the states being non-binding and voluntary in nature. Then, the World Summit on Sustainable Development (2002) held in Johannesburg in its plan "called for consensus and action by the international community to have an effective legal instrument on ABS within the framework of the CBD taking into account the Bonn guidelines."[27] In view of this, CBD COP seventh meeting in 2004 at Kulalampur adopted "the term of references of AHWG for negotiations on an international regime on ABS."[28] Then, the CBD COP ninth meeting instructed the AHWG "to finalize the international regime for consideration and adoption by the conference of parties at its tenth meeting on an instrument to effectively implement the provisions in Articles 15 and 8(j) of the convention and its three objectives."[29]

At the end, CBD COP tenth meeting in 2010 at Nagoya (Japan) adopted the "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity."[30] This protocol has 27 preambular paragraphs and 36 Articles with an annexure having list of monetary and non-monetary benefits. The objective of this Protocol primarily consist of "the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over these resources and to technologies, and by appropriate funding."[31] It basically applies to "genetic resource and traditional knowledge associated with it as well as the benefits arising from their commercial utilization."[32]The basic obligations under this protocol have been assigned on the access to genetic resources and associated traditional knowledge, benefit sharing on their commercial utilization along with compliance measures in several provisions such as:

Access to Genetic Resources: It has been the first pillar of ABS mechanism explained in several provisions of this protocol. First of all, Article 6 reaffirms the sovereign rights of states over their national resources as per the domestic legislation and regulatory requirements and further clarifies that "access to genetic resources are subject to prior

[26] CBD COP Decision VI/24: *Access and Benefit Sharing as Related to Genetic Resources*, April 08-19, 2002 (The Hague, Netherlands) which adopted Bonn Guidelines. *Available at*: https://www.cbd.int/decision/cop/?id=7198 (last visited on October 23, 2018).

[27] See Plan of Implementation of the World Summit on Sustainable Development, Chapter IV, para. 44(o): *Access and Benefit Sharing*, *available at*: https://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last visited on October 20, 2018).

[28] CBD COP Decision VII/19: *Access and Benefit-Sharing as related to genetic resources*, February 09-20, 2004 (Kuala Lumpur, Malaysia), *available at*: https://www.cbd.int/decision/cop/?id=7756 (last visited on October 20, 2018).

[29] CBD COP Decision IX/12: *Access and Benefit Sharing*, May 19-30, 2008 (Bonn, Germany), *available at*: https://www.cbd.int/decision/cop/?id=11655 (last visited on October 20, 2018).

[30] CBD COP Decision X/1: *Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization*, October 18-29, 2010 (Nagoya, Japan), *available at*: https://www.cbd.int/decision/cop/?id=12267 (last visited on October 20, 2018).

[31] *Id.*, art. 1.

[32] *Id*., art. 3.

informed consent (PIC) for their utilization."[33] The above said consent is required from the providers which is either in the country of origin of such resources or the country that has acquired the genetic resources in accordance with CBD. In one circumstance, the country of origin indicates the country where those genetic resources are found in-situ conditions or within its ecosystem and natural habitats. In alternate circumstance, a party would have acquired genetic resources in accordance with PIC and MAT granted under CBD. For the genetic resources held by the ILCs, the protocol provides that "each party is also under obligation to ensure in accordance with domestic law that PIC or approval and involvement of ILCs is obtained for such access to genetic resources as well where they have the established rights to grant access to such resources."[34] Further, it requires the party "to take necessary legislative, administrative and policy measures for information, cost and criteria for obtaining PIC at domestic level."[35] For the access to traditional knowledge associated with genetic resources held by the ILCs, "states have to take measures in accordance with domestic law aiming to ensure that such traditional knowledge associated with genetic resources held by ILCs is accessed either with their PIC or with their approval and involvement."[36] Additionally, it also required that mutually agreed terms have to be established with the ILCs on acquiring the genetic resources and associated traditional knowledge and information in such cases. But, there has to be given special consideration "while granting access to genetic resources in the case of promotion of non-commercial research particularly in developing countries and in the matter eminent or present emergences threatening to human, animal or plant health i.e. pathogens and the importance of genetic resources for food and agriculture."[37] Not only this, the member states have also obligation to cooperate with each other and with involvement of their ILCs on the access of such resources and knowledge which is shared by more than one countries and communities in the trans-boundary situations to achieve the objective of this protocol.[38]

Benefit Sharing on its Commercial Utilization: After the access to genetic resources, Article 5 specifically deals with second pillar of the ABS mechanism demanding the fair and equitable benefit sharing on the basis of the mutually agreed terms. For this purpose, it provides that "benefits have to be shared in fair and equitable way arising from the utilization of genetic resources as well as its subsequent application and commercialization."[39] Such benefits have to share with the country or community providing such resources from in-situ situations or that has acquired the genetic resources in accordance with CBD. However, "the benefits may be monetary and non-monetary which has been referred in the Annexure."[40] Now, it depends upon the member states to take legislative, administrative or policy measure to facilitate, regulate and implement the benefit sharing mechanism in their domestic jurisdiction. The benefit sharing mechanism has to be established through contractual agreements or arrangements under mutually agreed terms (MAT).[41]

In the specific case where the ILCs have established rights over the genetic resources, the same benefit sharing mechanism has been prescribed on the basis of mutually agreed terms through contractual arrangements with them. The member states have to ensure that

[33] *Id.*, art. 6(1).
[34] *Id.*, art. 6(2).
[35] *Id.*, art. 6(3).
[36] *Id.*, art. 7.
[37] *Id.*, art. 8.
[38] *Id.*, art. 11(1).
[39] *Id.*, art. 5(1).
[40] *Id.*, art. 5(4).
[41] *Id.*, art. 5(2).

"benefits arising from the utilization of genetic resources that held by the ILCs are shared in a fair and equitable way with the communities concerned based on the mutually agreed terms."[42] In the case of traditional knowledge held by the ILCs, the benefits arising from the utilization of the traditional knowledge have to be shared in the same way on the basis of MAT with the ILCs concerned. However, it has been directed also that "member states will utilize those shared benefits towards the conservation and sustainable use of the biological diversity."[43] There has been also prescribed for giving consideration on the need and modalities of global multilateral benefits sharing mechanism. The basic purpose to establish such mechanism in future would address the issue of "fair and equitable sharing of benefits arising from the utilization of genetic resources and traditional knowledge associated with genetic resources that occurs in trans-boundary situations and where the granting and obtaining the PIC is not possible."[44] The member states as parties to this protocol shall also encourage the other countries which are non-parties to promote the ABS system and contribute appropriate information in regard to ABS process.[45]

Compliance Measures for Access and Benefit Sharing: Third pillar of the ABS system is the compliance measures which build the necessary backbone of the Nagoya Protocol. There has been given bunch of provisions in this protocol for the compliance measures for ABS to be established by both provider countries and user countries in their domestic jurisdiction. First of all, Article 15 basically asks for the compliance with domestic legislation or regulatory requirements of the provider countries for the user of such resources and knowledge. For this purpose, "the parties are obliged to take measure to provide that genetic resources utilized within their jurisdiction has been accessed in accordance with the PIC and MAT has been established as required by such legislation regulation."[46] Along with this, they are also obliged "to take measures to address situations of non-compliance of these obligations and cooperate in the cases of alleged violation of the domestic legislation or regulatory requirements of the other party."[47] In regard to the traditional knowledge associated with genetic resources, Article 16 especially obliged that "the parties have to take measures to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with PIC or approval and involvement of ILCs and MAT has been established as required under the domestic ABS legislation or regulatory requirements."[48] In same the same manner, they will also "to take measures to address situations of non-compliance of the above obligations as well as possible cooperation in the case of alleged violation of the domestic ABS legislation or regulatory requirements of the other party."[49] Apart from this, Article 18 specifically included to promote the compliance and enforcement of MAT between individual user and provider of the genetic resources and/or traditional knowledge associated with genetic resources through private contractual arrangements. For this purpose, it refers the parties to include the obligations in their private contract for appropriate dispute resolution mechanism, opportunity to recourse to their legal system and justice system through mutually agreed terms.[50]

[42] *Id.*, art. 5(5).
[43] *Id.*, art. 9.
[44] *Id.*, art. 10.
[45] *Id.*, art. 24.
[46] *Id.*, art. 15(1).
[47] *Id.*, art. 15(2).
[48] *Id.*, art. 16(1).
[49] *Id.*, art. 16(2).
[50] *Id.*, art. 18(1).

Institutional Mechanism on Access and Benefit Sharing: In support of the above compliance provisions, Article 17 provides for institutional monitoring system on the utilization of genetic resources through establishment or designation of one or more checkpoints in domestic jurisdiction. Not only this, these checkpoints would provide and share the information to the users by using the cost effective communication tool and system for monitoring and transparency.[51] For the purpose of monitoring and compliance, there has been prescribed for the "internationally recognized certificate of compliance"[52] as evidence of compliance. It would be available at the ABS Clearing House consist of detail information, function and authority issuing such certificate. It has been also asked to establish other domestic institutional mechanisms such as National Focal Points (NFP) and Competent National Authorities (CNA) to facilitate and implement the ABS principles and procedure in domestic jurisdiction.[53]These institutional arrangements would work together for the regulation and implementation of the ABS principles on commercial utilization of genetic resources with more legal clarity, certainty, transparency.

Enforcement Mechanism on Access and Benefit Sharing: The actual success of the ABS legal regime as embodied in the CBD and its Nagoya Protocol would depend upon the proper implementation and enforcement at international and national level. For this purpose, the member states have been given options "to take appropriate, effective and proportionate measures in the form of legislative, administrative and policy measures for the implementation and enforcement of the ABS obligations in domestic jurisdiction."[54] To support the enforcement mechanism, the Nagoya Protocol additionally provides for international monitoring, reporting, dispute resolution and review mechanism in compliance of the ABS legal regime. Besides, the public participation, empowerment and education have also been considered essential for the effective implementation and enforcement of the ABS legal regime. However, "the implementation and enforcement could vary among the member states depending upon their legal, political and social system."[55]

In sum, all these obligations provided by the CBD and its Nagoya Protocol have to be complied with present and future challenges and opportunities by the member states at national, regional and international level. This could also be in consonance to or conflict with crucial developmental needs, technological advancements and ecological concerns affecting the existence of priceless genetic resources in any nation and region.

V. IMPLEMENTATION OF NAGOYA PROTOCOL IN SOUTH ASIAN NATIONS

At the regional level, most of the nations of the South Asian region are parties to the Convention of Biological Diversity. Consequently, they may also become parties to the Nagaya Protocol after signing it. Recently, the protocol has come in to force which would require further "legislative, administrative and policy measures to implement it as provider

[51] *Id.*, art. 17(1).
[52]*Id.*, art. 17(2).
[53] *Id.*, art. 13(1).
[54]*Supra* note46.
[55] Jorge Cabrera Medaglia, "The Implementation of the Nagoya Protocol in Latin America and Caribbean: Challenges and Opportunities", in Elisa Morgera, Matthias Buck, *et.al.*(eds.), *The 2010 Nagoya Protocol on Access and Benefit Sharing in Perspective: Implications for International Law and Implementation Challenges* 356 (Martinus Nijhoff, London, 2013).

and/or user of the genetic resources and associated traditional knowledge."[56] Being as provider and user both, they have the options to implement this protocol through ABS legislation or any other regulatory instruments. The Nagoya Protocol requires the member state as provider country to establish the ABS mechanism for genetic resources based on prior informed consent (PIC) or as otherwise agreed by the parties. Not only this, there has to be certain prescribed criteria for PIC and focal point for giving information on how to apply for PIC to the potential user of the genetic resources. There has been also prescribed the establishment of competent national authority for granting clear and transparent written decision or permit which would be the evidence of compliance within given jurisdiction.Besides,"they have to make change or amend the existing law for the inclusion of the prior and informed consent or approval and involvement of the indigenous and local communities on the basis of their established right to grant access to such resources."[57] Similarly, their prior and informed consent or approval and involvement are also required to be placed in the new law for the access of traditional knowledge related with genetic resources. In compliance to this protocol, they have been also called for "to create legal, administrative and policy measures to share the benefits arising from the utilization of genetic resources as well as utilization of traditional knowledge in a fair and equitable way. Such rules and procedures have to be fair and non-arbitrary on Mutually Agreed Terms (MATs)."[58]

For the user countries, this protocol also provides obligation "to make legal, administrative and policy measures to ensure that the genetic resources or traditional knowledge utilized within its jurisdiction has been accessed in accordance with PIC and MAT as required by domestic ABS law or regulations of the other party."[59] Accordingly, they have to now ensure that "benefits arising from the utilization of genetic resources as well as subsequent application and commercialization of such resources are shared in fair and equitable manner with the providers as per the domestic ABS legislation and other regulatory requirement of the providing country."[60] It has been also asked to evolve measures to address the cases of non-compliance and violation of their ABS rules and regulations on commercial utilization of genetic resources. For all these purposes, new legislation would be required to be enacted or existing legislation would be amended in South Asian nations to meet the requirement of the obligations and promises provided under the Nagoya Protocol.

VI. IMPLICATIONS OF NAGOYA PROTOCOL IN SOUTH ASIAN NATIONS

Being the member of the CBD, most of countries in South Asia have signed and ratified its Nagoya Protocol. However, some of them have promulgated the national legislation on the biodiversity conservation and commercial utilization of the biological (genetic) resources and some are in the process of doing the same. For example, Afghanistan and Pakistan regulate conservation and management through different forms of environmental legislation and regulation. Afghanistan under its "Environmental Law (2007)"[61] addresses conservation, use and benefit sharing of genetic resources. Now, Afghanistan has to amend this law to incorporate the obligations of the Nagoya Protocol for

[56] CBD, "Government Fulfil Their Commitment: Access and Benefit Sharing Treaty receives required number of Ratifications to Enter into Force", Press Release, July 14, 2014, *available at*: https://www.cbd.int/doc/press/2014/pr-2014-07-14-Nagoya-Protocol-en.pdf (last visited on October 25, 2018).
[57] *Supra* note 42.
[58] *Supra* note 41.
[59] *Supra* note 39.
[60] *Ibid.*
[61] Environment Law, 2007, Islamic Republic of Afghanistan, *available at*: https://momp.gov.af/sites/default/files/2019-03/Environmental_Law.pdf (last visited on October 30, 2018).

permitting the access for the commercial utilization of genetic resources. Pakistan with its "Environmental Protection Act (1997)"[62] provides the principles and procedure for the conservation, use, access and benefit sharing over genetic resources. However, Pakistan has also come with "National Biodiversity Strategies and Action Plan (2015)"[63] which includes the provisions of PIC and MAT given under the Nagoya Protocol.

In Bhutan, "Biodiversity Act of Bhutan 2003 explicitly provides for biodiversity conservation, sustainable use, access and benefit sharing of genetic resources along with indigenous rights over them."[64] Bhutan has also now proposed the "Biodiversity Bill, 2016"[65] in consonance of the provisions of the Nagoya Protocol. India has been pioneer in the implementation of the CBD provisions by enacting the "Biological Diversity Act, 2002"[66] and subsequently framed the rules and procedures in "Biological Diversity Rules, 2004"[67] to regulate access and benefit sharing for the commercial utilization biological resources. Recently, there has been also issued new "Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014"[68] in pursuance of the Nagoya Protocol for access requirements and benefit sharing mechanisms in India. Bangladesh has enacted "Biodiversity Act, 2017"[69] in compliance with the Nagoya Protocol to create appropriate legal system for access to biological resources based on PIC for fair and equitable sharing of the benefits arising out of their commercial use. Nepal, Maldives and Sri Lanka are in the process of formulating the national legislation, plans and strategy on the access and benefit sharing for commercial utilization of the genetic resources.Above all, all the countries in South Asia are custodian of more than two third biodiversity of the world. Hence, they are highly responsible as provider countries in the implementation of the international regulation on commercial utilization of genetic resources in their domestic jurisdiction.

VII.CONCLUSION

After the adoption of new international regulation on the commercial utilization of genetic resources, implementation measures are required to be adopted in the domestic jurisdiction by translating the international commitments into national program of actions. The mode of national implementation could be legislative, administrative or policy measures for achieving the intended results or objectives of the international legal instruments agreed upon. Accordingly, South Asian nations have to adopt suitable legislation, administrative rules and policy measures to implement the Nagoya Protocol. Afghanistan and Pakistan have to evolve and enact the specialized ABS legislation for the commercial utilization of genetic

[62] Pakistan Environmental Protection Act, 1997, *available at*: http://extwprlegs1.fao.org/docs/pdf/pak115821.pdf (last visited on October 30, 2018).

[63] National Biodiversity Strategy and Action Plan 2015, Pakistan, *available at*: https://www.cbd.int/doc/world/pk/pk-nbsap-v2-en.pdf (last visited on October 30, 2018).

[64]The Biodiversity Act of Bhutan, 2003, *available at*: http://extwprlegs1.fao.org/docs/pdf/bhu69010.pdf (last visited on October 30, 2018).

[65] Biodiversity Bill of Bhutan, 2016; *available at*: http://www.nbc.gov.bt/wp-content/uploads/2016/03/Draft-Biodiversity-Bill-2016.pdf (last visited on October 30, 2018).

[66] The Biological Diversity Act, 2002, India, *available at*: http://extwprlegs1.fao.org/docs/pdf/ind40698.pdf (last visited on November 03, 2018).

[67] The Biological Diversity Rules, 2004, India, *available at*: http://extwprlegs1.fao.org/docs/pdf/ind53983.pdf (last visited on November 03, 2018).

[68] Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014, India, *available at*: http://nbaindia.org/uploaded/pdf/Gazette_Notification_of_ABS_Guidlines.pdf (last visited on November 03, 2018).

[69]Bangladesh Biodiversity Act, 2017, *available at*: http://www.ecolex.org/details/legislation/bangladesh/biodiversity-act-2017.html (last visited on November 03, 2018).

resources. Bhutan, Bangladesh and India has already enacted the new legislation or amended the existing legislation in consonance of the Nagoya Protocol. Nepal, Maldives and Sri Lanka are in the process of formulating the national legislation, plans and strategy on the access and benefit sharing for commercial utilization of the genetic resources. Not only this, they have also extended affords through cultural integration, mutual cooperation and diplomatic negotiation to implement the legal instrument at regional level. The implantation measures provided under the CBD regime and Nagoya Protocol, however suffer from several drawbacks which could be detrimental to the achievement of the objective of the convention. Despite some drawbacks, the international regulation would be implemented and further developed in domestic jurisdiction for better commercial utilization of the genetic resources and associated traditional knowledge especially in South Asia. Further multilateral and bilateral negotiations will also offer some guidance to operationalize and implement the international regulation on the commercial utilization of genetic resources at national and regional level in South Asia.

THE INTERPLAY BETWEEN THE BASEL NORMS AND THE GLOBAL FINANCIAL CRSIS- DOES BASEL III CREATE RESILIENT BANKS TO AVOID A FUTURE CRISIS?

Tanya Narula Chaudhary[*]

I. INTRODUCTION

The banks and the banking system around the globe have always played a vital role in an economy. However, the regulations that govern them, i.e. International Banking Regulations have not contributed in avoiding a financial crisis. The last Global Financial crisis 2008-09 was another unfortunate testament to that, considering that Basel II regulation was already in action and yet could not foresee the signs of the upcoming crisis. The domino effect started with the United States of America wherein for years, the stock prices and the real estate values had soared and then the housing bubble burst. The Wall Street firms and the financial institutions that had made billions of dollars on complex investments backed by mortgages, their value had now plunged. The stock market tanked, devastating not only big investors in the United States, but its ripple effect was felt in the entire globe initiating the most catastrophic of global financial crisis since the Great Depression.

The right and wrong of economic arrangement, aptly brings forth Aristotle's question of what people morally deserve, and why. In the United States, when in October 2008, the Congress had to bail out the nation's big banks and financial firms costing $700 billion of taxpayers money,[1] it didn't seem fair that banks and financial firms that had enjoyed huge profits during the good times and was now asking taxpayers to pay the price of their failure. But there seemed no alternative as the banks and financial firms had grown so vast and so entwined with every aspect of the economy that their collapse would have brought down the entire financial system. They were "too big to fail", a term which has become a part of our vocabulary since. There was public uproar for this ask, no one claimed that the banks and investments houses deserved the money, considering their reckless bets enabled by inadequate government regulations had created the crisis. But here was a case where the welfare of the economy as a whole seemed to outweigh consideration of fairness. And the Congress reluctantly appropriated the bailed funds.[2]

Michael J. Sandel in his book[3] said that "*Prosperity is key and it makes us better off than we would otherwise be as an individual and as a society*". As prosperity contributes to welfare, and turning to the Utilitarianism, the most influential account of how and why we should maximize welfare is to seek the greatest happiness for the greatest number.

The International Banking regulations formulated over time to regulate Banks and financial firms worldwide, play a vital role in avoiding any crisis, thereby also escaping a possible question of where lies the justice in the acts of the Government in bailing out the ones who failed at the cost of the ordinary tax payers at the behest to avoid a complete economic failure. It is important that such predicaments in a society do not fill up the books

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[1] The Congressional Record: Bound Volumes, Part 24, Volume 155 of Congressional Record, 32007, Congress, (INIAP Archivo Historico, 2015).

[2] *Ibid*.

[3] Michael J. Sandel, *Justice: What is the right thing to do*? 19-30 (Penguin Group, London, 2009).

history of mankind, and law and regulation contribute to such necessity. Therefore, it becomes important to examine the International Banking Regulations as it exists today to avoid an uncertain tomorrow.

II. TRACING THE ORIGIN OF INTERNATIONAL BANKING REGULATION

The origin of International banking regulations can be traced to the breakdown of the Bretton Woods system of managed exchange rates in the year 1973.[4] The Bretton Woods collapse transcended national boundaries and witnessed large foreign currency losses that were incurred by banks globally. As a reaction to these disruptions in the international financial markets, the central bank governors of the G-10[5] nations collaborated to establish a Committee on Banking Regulations and Supervisory Practices in 1974 which was later renamed as Basel Committee on Banking Supervision (BCBS).[6]

The BCBS was an acknowledgement by the G10 nations for the need of cooperation in regulating the banking sector. Designed as a forum for cooperation between its member countries on banking supervisory matters, an important aim of the BCBS was to close gaps in international supervision of banks, so that no foreign bank escapes supervision and that, the supervision would be adequate and consistent across member countries. BCBS sought to achieve its aims by setting minimum standards for the regulation and supervision of banks.

Basel I: The onset of the Latin American debt crisis, in the early 1980s, validated the urgent need for a multinational accord to strengthen the stability of the international banking system, which resulted in the Basel Capital Accord (1988 Accord)- Basel I. The fundamental objectives of Basel I were to devise a framework that would strengthen the soundness and stability of the international banking system; and that would be fair and consistent in its application to banks in different countries.[7] Basel I Accord set a minimum ratio of capital to risk-weighted assets of 8 percent. These norms were adopted by not only member countries but also almost 100 other countries[8] including India for its capital adequacy norms.[9] Such worldwide adoption of Basel I together with its relatively simple structure led to substantial increase in capital adequacy ratios of banks around the globe. However, the Asian financial crisis in 1997 showed that Basel I had failed as banks engaged in regulatory arbitrage wherein the banks were capitalizing on the loopholes in the regulatory system to circumvent unfavorable regulation.

Basel II: After the failure of Basel I norms, BCBS released the Revised Capital framework in 2004 with the aim of promoting safety and soundness in the financial system, maintaining the current overall level of capital and to provide a more comprehensive approach to address risks.

Basel II rested on three 'pillars': (i) the minimum capital requirements (Pillar 1), (ii) guidelines on supervision for national regulators (Pillar 2) and, (iii) the new information

[4] Bank for International Settlement, "History of the Basel Committee", October 2015, *available at*: http://www.bis.org/bcbs/history.pdf (last visited on November 15, 2018).
[5] Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States of America.
[6] *Supra* note 4.
[7] Basel Committee on Banking Supervision, "International Convergence of Capital Measurement and Capital Standards" (Bank for International Settlement, 2006).
[8] Mandira Sarma, "Understanding Basel Norms" 42 *Economic and Political Weekly* 3364-3367 (2007).
[9] *Ibid*.

disclosure standards for banks in order to enhance market discipline (Pillar 3).[10] This new framework was designed to improve the way regulatory capital requirements reflect underlying risks. In addition to the BCBS member countries, 82 other countries[11] intended to adopt Basel II norms in some form or the other by 2015. India too had committed to implement Basel II norms from March 2008 for foreign banks in India and from March 2009 for Indian banks. However, the implementation of Basel II norms in different countries was found inconsistent by BCBS and with the advent of Global Financial Crisis 2008[12] Basel II also failed, before it could be fully implemented.

Basel III: The last global financial crisis (starting 2007-08) critically impacted the global economy. The regulators, economist and politicians as always, came together hoping to find a way to mend the gaps in the policy and implementation to reassure the public at large that risk that exists in the environment can be curtailed. In that attempt, Basel III regulations were endorsed and adopted by the G20[13] nations in Seoul Summit in 2010, accepting the fact that that previous Basel norms had failed. The new capital and liquidity standards were proposed and endorsed with the aim to strengthen the banking and financial sector with respects its regulation, supervision and risk management, wherein the member nations would weave the Basel III recommendations in the fabric of their national legislations starting January 2013 and finishing by January 01, 2019 (March 31, 2019 in India).[14]

III. EVENTS THAT LED TO THE GLOBAL FINANCIAL CRISIS

With the advent of globalization and the consequent increase in the interplay between national economies, the banks today are no longer confined to their national domain and now shape how the 'world economy' functions. This increased stature led the last global financial crisis 2007-08 to be of distinctive nature as it featured cross-border losses, cross-border funding gaps and cross-border contagion thereby severely impacting the global economy.

The origin of the crisis was soon traced to the mortgaged backed securities and collateralized debt obligations. The traders in the 1980s traded in bonds to take advantage of the steadily rising house prices in the US after the World War II. The financial institutions and traders started to expand the bond market by restructuring bonds from the steady stream of payments from US mortgages and then sold them off to investors.[15]Following this in early 2000s, there was an explosion in the issuance of bonds backed by mortgages, also known as mortgage-backed securities. Investment banks were buying mortgages from mortgage issuers, repackaging them and then selling off specific tranches of the debt to investors. With time the number of new mortgages to securitize substantially decreased, the investment bankers

[10] *Supra* note 4.
[11] *Supra* note 8.
[12] Richard Barfield and Ors., "Basel III - Implications for Risk Management and Supervision" 89 *Compliance Officer Bulletin* 1 (2011).
[13] Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, The United Kingdom, the United States and the European Union.
[14] Reserve Bank of India, "Master Circular- Basel III Capital Regulations" 7 *available at*: https://rbidocs .rbi.org.in/rdocs/content/pdfs/58BS300685FL.pdf (last visited on November 9, 2018) read with the Constitution of India, 1950, art. 253.
[15] Wall Street Oasis, "Financial Banking Crisis 2008- Detailed Overview", *available at*: http://www.wallstreetoasis.com /financial-crisis-overview (last visited on October 5, 2018).

started taking the unsellable tranches of mortgage-backed securities repackaging them and selling them as the new product called collateralized debt obligations.[16]

The pooling of different mortgages theoretically reduced risk giving the illusions that these assets were safe, but in reality, the majority of the mortgages being securitized were of poor or sub-prime quality.[17] And the ratings agencies who rated the mortgage-backed securities and collateralized debt obligations without fully appreciating the low-quality mortgages backing these assets, overestimated the benefits of diversification in the housing market gave them top ratings. The top senior tranche of these products was rated high and were paid a low rate of interest whilst the bottom tranches were often rated low but paid a very high rate of interest. Many investors did not prefer the expensive high rated tranches which gave a low return and in order to keep the securitization machine rolling, many investment banks kept these tranches on their own balance sheet and went on a massive spending spree and borrowed vast amounts of money at low rates in the short term to fund these investments. The list included the top Investments banks such as- Morgan Stanley, Lehman Brothers, Merrill Lynch and Bear Stearns.[18]

By the mid-2000s there were hundreds of billions of dollars' worth of mortgages given to individuals with poor credit ratings on adjustable rates. For example, mortgages that required low interest payments, i.e. 8% for the first 2 years, where then increased to 15% per year for the next 28 years, making it impossible for the sub-prime borrowers to be able to afford the higher repayment rates.[19]Simultaneously the house prices instead of rising as was the trend started to fall and homeowners could no longer refinance and remortgage their houses and started to default.

By 2007-2008 the default rates on the subprime mortgages sharply increased, meaning thereby that some of the bottom tranches on these products were being wiped out. Suddenly, the investors started to lose confidence in the top-rated tranches and in the banks which held large amounts of them or had exposure to such assets. Such series of event resulted in Bear Stearns with exposure to subprime assets to shut down at a $3 billion dollar loss.[20]

After the events at Bear Stearns, the credit markets started to wither and problems with short-term debt funding and mortgages started to have a global contagion effect and many banks and mortgage institutions announced losses on their subprime exposure. In September 2007, the UK mortgage lender and bank Northern Rock was declared insolvent and had to be bought by the UK government. Thereafter, Lehman Brothers was under intense pressure and the share prices of Lehman Brothers drastically fluctuated and eventually without finding any rescue from the government had to file for Chapter 11 bankruptcy in September 2008.[21]

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[16]*Ibid.*

[17] The Black's Law dictionary defines subprime as "*the term that is used to describe loan or mortgage that is below prime*", thereby inferring that to whom such loans and mortgages have weakened credit histories and there is a greater risk that they default on the loans when compared to prime borrowers.

[18]*Supra* note 15.

[19]*Ibid.*

[20]*Ibid.*

[21]*Ibid.*

The next domino to fall was the insurance giant American International Group (AIG). AIG Financial Products had been issuing billions of dollars' worth derivatives called Credit Default Swaps on mortgage-backed securities and collateralized debt obligations. Therefore, the financial market turmoil started to directly affect AIG and AIG needed over $40 billion in cash within a matter of days.[22] The bankruptcy of Lehman Brothers, further adversely affected AIG's credit rating, which meant it had to post extra collateral to its creditors. Responding to this situation the US government and Federal Reserve reasoned that AIG had too much counterparty exposure and was too entwined in the global financing system in other words it was 'too big to fail' and in less than 48 hours after letting Lehman Brothers fail, they bought equity stakes in AIG for over $80 billion,[23]effectively bailing them out.

The European Union faced three interlocking crises that together challenged the viability of the currency union. There was the banking crisis- wherein the banks were under-capitalized and interbank liquidity was restrained and future losses were uncertain.[24]There was sovereign debt crisis- several countries had faced rising bond yields and challenges in funding themselves.[25]Lastly, there was growth crisis-wherein the economic growth was slow in the euro area overall and was unequally distributed across countries.[26]These crises connect with one another in several ways as the problems of weak banks and high sovereign debt are mutually reinforcing, and both are aggravated by weak growth but also in turn constrain growth in the economy.

The ripple effect subprime mortgage crisis which started in the USwas realized around the globe in the form of banking crisis, sovereign debt crisis, growth crisis resulting in double dip recession in EU. For instance, in Iceland, where the liabilities of the overall banking system reached around nine times its Gross Domestic Product (GDP) at the end of 2007 before a collapse of the banking system in 2008.[27]By the end of 2008 the liabilities of exchange of the listed banks in Switzerland and the United Kingdom had reached around five and six times their GDP[28] respectively.

This situation worldwide, escalated the unemployment rates around the world, for instance in the OECD (Organisation for Economic Co-operation and Development) countries, unemployment went up to 47 million in 2010[29] from 30.6 million in 2007[30] and the long-term unemployment rose to 14.9 million in 2010[31] from 8.5 million in 2007[32]. Unemployment is a very unjust and unfair punishment. It hits all segments of the society, wherein once employed have to live a life having lost their self-respect and dignity.

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[22] *Ibid.*
[23]*Ibid.*
[24] Jay Shambaugh, "The Euro's Three Crisis"158 *Brookings Papers on Economic Activity* (Spring 2012), *available at*: https://www.brookings.edu/wp-content/uploads/2012/03/2012a_Shambaugh.pdf (last visited on November 9, 2018).
[25]*Id.* at188.
[26]*Id.* at 158.
[27] Asli Demirguc- Kunt and Harry Huizinga, "Are banks too big to fail or too big to save? International evidence from equity prices and CDS spreads" *Policy Research Working Paper* (2010), *available at*: http://documents.worldbank.org/curated/en/516581468333021676/pdf/WPS5360.pdf (last visited on November 15, 2018).
[28]*Ibid.*
[29] Pramod N. Junankar, "The Global Economic Crisis: Long Term Unemployment in the OECD", *IZA Discussion Papers 6057*, Institute of Labor Economics (IZA), Germany, 3-4 (2011).
[30]*Ibid.*
[31]*Ibid.*
[32]*Ibid.*

IV. BASEL III: OBJECTIVES AND FEATURES

The domino effect the collapse of Lehman Brothers had created from September 2008, there was a need recognised by the BCBS to fundamentally strengthen the Basel II framework. But, the weakness revealed by the banking sector that had too much leverage and inadequate liquidity safeguards along with poor governance and risk management contributing to the contagion effect of the crisis, there was a need felt for a significant change in the design of these regulations, giving birth to Basel III. In November 2010, Basel III was endorsed at the G20 summit in Seoul and subsequently agreed in December 2010 in the Basel Committee meeting. Basel III was introduced with the aim to strengthen the banking and financial sector with respects its regulation, supervision and risk management[33] and to promote a more resilient banking sector.[34]Basel III norms are a set of comprehensive reformatory measures formulated by the BCBS that aim to prevent a crisis in future and shield the economy from any trickle down affect in the event such crisis does occur.[35]

The proposed standards were issued by BCBS are set out in *Basel III: International framework for liquidity risk measurement, standards and monitoring* and *Basel III: A global regulatory framework for more resilient banks and banking systems.*[36]The enhanced Basel framework revised and strengthen the three pillars established by Basel II. It also extended the framework with several innovations such as- an additional layer of common equity, i.e. the *capital conservation buffer*[37],which when breached restricts pay-outs to help meet the minimum common equity requirement, a *countercyclical capital buffer* that places restrictions on participation by banks in system-wide credit booms with the aim of reducing their losses in credit busts, a *leverage ratio*[38],i.e., a minimum amount of loss-absorbing capital relative to all of a bank's assets and off-balance sheet exposures regardless of risk weighting, *liquidity requirements*[39], i.e. a minimum liquidity ratio, the Liquidity Coverage Ratio (LCR)[40], intended to provide enough cash to cover funding needs over a 30-day period of stress; and a longer-term ratio, the Net Stable Funding Ratio (NSFR)[41], intended to address maturity mismatches over the entire balance sheet and additional proposals for systemically important banks, including requirements for supplementary capital, augmented contingent capital and strengthened arrangements for cross-border supervision and resolution.

V. INDIA AND BASEL III

India being the member nation that endorsed Basel III in the Seoul Summit in 2010 and keeping with Reserve Bank of India's goal to have consistency and harmony with the International Standards, RBI issued Master circular dated May 02, 2012- "Basel III Capital

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[33] Bank for International Settlement, "Basel III: A Global regulatory framework for more resilient banks and banking systems", 2, December 2010 (rev. June 2011), *available at*: http://www.bis.org/publ/bcbs189.pdf (last visited on November 7, 2018).

[34]*Ibid.*

[35]*Ibid*.

[36] Bank for International Settlement, "Basel III: International Framework for liquidity risk measurement, standards and monitoring", December 2010, *available at*: https://www.bis.org/publ/bcbs188.pdf (last visited on November 16, 2018).

[37]*Id.* at 54-59.

[38]*Id.* at 61-63.

[39]*Id.* at 8-9.

[40]*Id.* at 9.

[41]*Ibid*.

Regulation" reforms and prudential guidelines that are applicable to banks operating in India[42]. The Basel III capital regulation has been implemented in phases from April 2013 in India in phases and will be fully implemented by March 31, 2019.[43]

There have been several reforms and policy initiatives in the Indian Banking Sector since 2010, to best adopt Basel III regulations. Which include, amendments in the Banking Regulation Act, 1949, the Payments and Settlements Act, 2007, the Negotiable Instruments Act, 1881 and the introduction of the Insolvency and Bankruptcy Code, 2016, the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, Foreign Exchange Management (Remittance of Assets) Regulation, 2016 etc. Also, the Financial Regulation and the Deposit Insurance Bill, 2017, is pending report by the Joint Parliamentary Committee, which has raised serious debate in the public regarding the 'Bail in' Provision.

The Banking Laws (Amendment) Act, 2012 has amended some provisions of the Banking Regulation Act, 1949 and has given greater regulatory power to RBI to issue new banking licenses[44] to various private players. Also, Banks can now issue preference shares[45] in accordance with guidelines issued by the RBI.[46] There is an increase in the ceiling on voting rights- the RBI can now in a phased manner increase the voting rights of shareholders of private sector banks from the current limit of 10% to 26% and 1% to 10% in case of public sector banks.[47]There is also an increase in the authorized capital of nationalized banks.[48]

The amendments, changes and initiatives are in fact laudable as they intend to increase investor confidence in the banking sector in India. But there are serious concerns and challenges that exist in the implementation of the Basel III norms;Firstly, the fact that Basel III recommendations are to be weaved in the fabric of the member nations national legislations encourages discrepant implementation of Basel III framework among different countries which in its nature fundamentally in contradiction of the objective of providing the same level playing field and making banking in some countries more profitable as was the scenario before the crisis. In India, where the RBI is known to be more conservative in comparison to other economies has specified minimum Tier 1 leverage ratio of 4.5 percent[49] as against the BCBS minimum Tier 1 leverage ratio of 3 percent.[50]Also, the RBI prescribes a

[42]*Supra* note 14.
[43] *Id.* at 7.
[44] The Banking Regulation Act, 1949 (Act 10 of 1949), s. 22.
[45] *Id.*, s. 12(1).
[46]Internationally, preference shares have been used by banks to raise Tier 1 Capital (Basel III). Banks in India are also treating this as an additional avenue to raise capital and attract investments without ceding any voting control to the holder of those instruments.
[47] The increase in voting rights aims to bridge the gap between the legal and economic ownership of banks and would enable the investors to exercise more control over the working of the banks. This could make banks more attractive to investors thereby facilitating raising of additional capital by the banks
[48]*Supra* note 44, s. 12. The authorized share capital of nationalized bank has been increased to INR thirty billion from INR fifteen billion. Nationalized banks have also been permitted to increase or decrease their authorized capital with the permission of the RBI and the Central Government, and raise capital through rights issues and the issue of bonus shares. The ability to issue bonus share is likely to be appreciated by investors since earlier, even nationalized banks with significant amounts of free reserves could not issue any bonus shares in the absence of an enabling legislation.
[49] Reserve Bank of India, "Master Circular- Basel III Capital Regulations (4-Capital Funds)", *available at*:https://rbidocs.rbi.org.in/rdocs/content/pdfs/58BS300685FL.pdf (last visited on November 1, 2018).
[50] Bank for International Settlement, "Basel III Leverage Ratio framework and disclosure requirements", January 2014, *available at*: http://www.bis.org/publ/bcbs270.pdf (last visited on November 1, 2018).

minimum Capital to Risk Weighted Asset Ratio (CRAR) at 9 percent,[51]higher than 8 percent[52] prescription of Basel III recommendation. The capital adequacy regulation was not meant to be a significant source of competitive inequality among internationally active banks, but unfortunately through this proposition has become that source and would disturb equilibrium Basel Norms aims to attain. This situation may lead us back to the past, wherein the global economy suffered disruption of global financial stability.

Secondly, as banks go on increasing the growing economy's credit requirements, they would need additional capital funds under Basel III. In India, different estimates of additional capital infusion have been announced by various agencies. The RBI estimates project an additional capital requirement of Rs. 5 trillion.[53] These estimates were made on two assumptions – (1) risk weighted assets of individual banks will increase by 20% per annum and (2) banks can fund 1% capital requirements through retained profits.[54]This is an exceptionally high cost to the Central Banks and the citizens which raises serious concerns, such as: (a) the changes the banks will make to create this capital and the cost of these changes, (b) the impact of these changes on banks in general and in particular, the weaker banks if such banks are unable to comply with the requirements set forth by the RBI and, (c) vulnerability of the banks to the organisational and the legal structure as a result of these changes.

Thirdly, the profitability of banks and rate of exchange is still a concern which may be affected due to implementation of Basel norms, the increased capital requirements, increased cost of funding and the need to reorganize and deal with regulatory reform will put the pressure on margins and operating capacity. Investor returns will likely decrease at a time when firms need to encourage enhances investment to rebuild and restore buffers. Increased capital requirement would also result in the increase in the cost of banks as well as the borrowers.Among others this as consequence would affect SME's, requiring them to look for alternate sources for financing.[55]

VI.CONCLUDING REMARKS

[51] Reserve Bank of India, "Master Circular- Basel III Capital Regulations (4.2-Elements of Tier Capital)", *available at*:https://rbidocs.rbi.org.in/rdocs/content/pdfs/58BS300685FL.pdf (last visited on November 1, 2018).

[52] Basel Committee on Banking Supervision, "Basel III: A Global Regulatory Framework for more Resilient banks and banking system", December 2010, *available at*:http://www.bis.org/publ/bcbs189.pdf(last visited on February 1, 2019).

[53] Reserve Bank of India, "Report on Trend and Progress Banking-Basel III in International and Indian Context", Inaugural Address by Dr. Duvvuri Subbarao, Governor RBI at Annual FICCI IBA Banking Conference (September 4, 2012). The government is to deposit Rs. 88,000 crore into 20 state run banks, in the current fiscal, i.e. 2017-2018, wherein an insurance is given by the Finance Minister, that they will not let any Public Bank to fail. These Banks have high non-performing assets, and this is an attempt to get them floating again. ET Bureau, "Government to Deposit Rs. 88,000 Crore into 20 PSBs this fiscal", *The Economic Times*, January 25, 2018, *available at*: https://economictimes.indiatimes.com/industry/banking/finance/banking/your-money-is-safe-with-us-says-govt-as-it-spells-out-new-banking-roadmap/Articleshow/62635054.cms (last visited on January 25, 2019).

[54]*Ibid.*

[55] Alternate source of financing may include 'peer to peer' lending that is currently unregulated and for which so far only a discussion paper has released by the RBI in April 2016 looking at possible options if it should be regulated Reserve Bank of India, "Consultation Paper on Peer to Peer Lending", April 2016, *available at*: https://rbidocs.rbi.org.in/rdocs/content/pdfs/CPERR280416.pdf (last visited on November 3, 2018).

The global financial crisis occurred when Basel II was already in place which led to a hasty Basel III, wherein the BCBS is persistently making changes to its original form.[56]It is positive step forward towards banking regulation as it strives to avoid the domino effect of a crisis if not the crisis itself, but unfortunately it is an afterthought and covers only the lacunas of Basel I and II and lacks vision as it has not considered foreseeable factors that may cause disturbance in the financial equilibrium of the world economy.

Basel III with its 'one size fits all approach' ignores the diversity of the world economies, way of governance and approach towards banking sector of the member nations. There exists a need to re-evaluate the impact of Basel III norms before they are fully implemented as in its present form is not adequate to avoid a future crisis. There are costs and disadvantages of implementing Basel III, which need to be fully appreciated to enable harmonious financial development globally to create maximum welfare in the global economy and for that it is important to understand and appreciate the diversity that exists and that the developed economies don't intimidate other nations to follow suit in the garb of international standards.

[56] Informally the changes made to Basel III are now referred as Basel IV.

LEGALITY OF CENSORING CYBER PORNOGRAPHY

Neha Kheria[*]

I. INTRODUCTION

Dig up the history and you will find footprints of pornography in every corner of the world. The development of science and technology has transformed those sexual explicit sculptures and paintings into high definition video clips and movies which are easily available on the cyberspace. The unhindered availability of porn on the internet has stirred up a moral debate and controversy regarding its legality throughout the world.In India also the Information Technology Ministry in the year 2015 directed the Internet Service Providers to block 857 websites for ostensibly containing pornographic content though later government backtracked that order. This is another instance where government used its power of censorship.[1]

Controlling the information and expression of opinion disseminating within a society has been a trait of dictatorships since time immemorial so it is not out of the blue we are witnessing work of arts, (including books, plays, films), radio programs, news reports, internet and other forms of communication austerely been screened to maintain the legacy of orthodox conventions. Here we must admit that our fundamental rights were never absolute and they can be restricted on the ground of reasonable restriction.

The aim of this research paper is to provide insight into the laws governing cyber pornography. The Article further discusses the various test propounded by Courts in United Kingdom (hereinafter called UK), United States of America (hereinafter called US) and India to ascertain whether objectionable content is obscene or pornographic or not and in the end the research paper discusses the validity of those laws in light of one's right to privacy, personal liberty and freedom of speech and expression. Through this Article an attempt has been made to ascertain the legality of censoring cyber pornography. Various allegation made by proponents and opponents of cyber pornographyhave been weighed against each other to reach to appropriate conclusion.

II. TUG OF WAR

The main contention of the opponents of pornography is that, they consider that there is a direct relationship between pornography and crime against women, and they believe that pornography is the reason of deterioration of standards of morality in the family and the society. They claim that pedophiles and sex predators distribute child pornography and captivate children in sexually explicit conversation and seek victim in chat rooms.[2] Opponents of pornography demands to inculcate some family values of intimacy, marriage, sex and relationship in their children but instead of that what their children are learning from this industry is, violent sexual practices, particularly sexual assault against women. Children are exposed to soft-core pornography as well as hard core pornography. They think sex without responsibility is acceptable and do not offend standards of society. This may have

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[1] "SC's observations prompt Centre to block 857 porn sites" *Times of India*, Aug. 3, 2015.

[2] AmitaVerma, *Cyber Crimes And Law* (Central Law Publications, Allahabad, 2009).

dire consequences as the children will be vulnerable to many serious diseases including HIV of course. It is well known fact that impact of the things we conceive visually is very much higher than what we read in the newspaper and nobody can deny that children and youths do imitate the things they watch in the television or internet. During this period the mind of the youth is most vulnerable. It is the time they develop their sexual orientation, that for what things they should be sexually arouse. If at this stage value of love, family and respect for women are inculcated in the child's mind it will lead to healthy sex life. To the contrary if he is exposed to hard core pornography he will treat women only as an object of pleasure. He will not be sensitive enough about the social issues prevalent in the world such as rape, women subjugation, discrimination against women, etc. and would be one of those criminals who commit atrocities against the women without any guilt in their mind.[3]

Proponents of pornography on the other hand, deny these claims and demand their right to freedom of speech and expression and right to privacy and personal liberty assured by the Constitution of India itself under Articles 19 (1) and 21.They argue that by banning the sites the government is forcing them to watch stuff which is fit for children consumption only. They claim that if both the parties are consenting then they are not answerable for what they do in the four corners of their wall. They also deny the relation between pornography and atrocities against women. They claim it as a punishment without trial which violates the principle of rule of law which is claimed to be fundamental law of the land. Any kind of censorship is unacceptable to civil libertarians as it gags right to dissent and they demand regulation instead of prohibition.[4]

III.OBSCENITY AND PORNOGRAPHY

Word Obscenity is derived from the Latin*ob*, meaning "to", and the term *caenum*, meaning "filth". It is a legal term that is based on offence to accepted standards of decency or sexual morality. And the word Pornography is derived from the Greek *porne*, meaning "whore", and *graphein* meaning "to write". Pornography literally means the "writing of harlots" or "depictions of acts of prostitutes".[5] For writers such as Gloria Steinem and others, it has come to mean materials intended to arouse sexual feeling that include sexist or violent elements.[6]The Williams Committee[7]defined pornography as *sexually explicit representation which has the function or intention of sexually arousing its audience.*The word 'Pornography' is different from the word 'obscenity' and should not be confused under the law. The standard measure of the word obscenity to determine criminality is different in different places, cultures and countries in this world. Even the standard of criminality of obscenity is changeable and changes from time to time. For instance, what may have been considered obscene in the 19th century may not be obscene in the modern times with the globalization of the world as one village particularly with the help of cyberspace and Internet which have no boundaries according to various countries.[8]

In Indian laws, nowhere the expression pornography is used. Even the legislatures in

[3]*Ibid.*
[4]*Ibid.*
[5] Neil M. Malamuth, "Pornography" *Social Sciences* (1999),*available at*: http://www.sscnet.ucla.edu/comm/malamuth/pdf/99evpc3pdf (last visited on November 15, 2018).
[6]*Ibid.*
[7]Report of the Committee on *Obscenity and Film Censorship*, Her Majesty's Stationery Office, London, 103 (1979).
[8] Harish Chander, *Cyber Law and IT Protection* (PHI Learning Pvt. Ltd., Delhi, 2012).

the United States of America or the United Kingdom have not tried to give legal connotation to this term pornography. And it is impossible to find a definition of this term in the multi-cultural and multi-national environment of the Internet, the reason being that there exists no uniform standard of moral culture and ethics, and therefore there cannot be any uniform law in different cultures and countries in this world hence the term pornography and obscenity may be understood in their widest possible meaning.[9]

For the first time, the test of obscenity was held to have the tendency "*to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall*".[10]It was understood that this test would apply only to isolated passages of a work. In the US a Superior Court held that the criterion for obscenity was not the content of isolated obscene passage but "*whether publication taken as a whole has a libidinous effect*".[11]Thereafter the Supreme Court of the US gave a basic redefinition of obscenity which say that *whether, to the average person, applying community standard the dominant theme of material as a whole appeals to prurient interest*,[12] if yes then only the material can be said to be obscene.

After that in the year 1973, Chief Justice Burger of the US Supreme Court propounded a triple test for determining whether a work is obscene or not. The test is as follows:

i. "That the average person, applying the contemporary 'community standards', would find that the work, taken as a whole appeals to the prurient interest.
ii. That the work depicts or describes in a patently offensive way, sexual conduct specifically defined by state law or applicable law.
iii. Whether the work taken as a whole lacks serious literary, artistic, political or scientific value".[13]

In India the offence of obscenity is punishable under section 292 of the Indian Penal Code[14] and section 67 of the Information Technology Amendment Act.[15]Section 67 of the Information Technology Act is analogous to section 292 of the Indian Penal Code which is based on Hicklin Test in UK. Ironically this test has been abandoned by both US and UK way back in the year 1933 and 1954 respectively but our law makers in India are still glued to it. Consequently the novel "Lady Chatterley's Lover" which was condemned as obscene by this court in *Ranjit D. Udeshi*[16]which was held to be not obscene in England by Central Criminal Court.[17] There the lordship instructed the jury to take into consideration effect of book taken as a whole, and not by selecting passage here and there and if effect is such that it tends to deprave and corrupt persons who were likely to read it[18] then only book can be held as obscene.

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[9]*Ibid*.
[10]*Regina* v. *Hicklin* 3 QB 360 (1860).
[11]*United States* v. *One Book entitled 'Ulysses*, 72 NY 705 (1934).
[12]*Roth* v. *United States*, 354 US 15 (1973).
[13]*Millar* v. *California*, 413 US 15 (1973).
[14]The Indian Penal Code (Amendment) Act, 1925, No.8, Acts of Parliament, 1925 (India).
[15] Information Technology (Amendment) Act, 2009, No.10, Acts of Parliament, 2009 (India).
[16]*Ranjit D. Udeshi* v. *State of Maharashtra*(1969) 2 SCC 687.
[17]*R* v.*Penguin Books Ltd.*, 1961 Crl. LR 176.
[18]*Ibid*. To deprave means to make morally bad, to pervert, to debase or corrupt morally.
To corrupt means to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile.

Fortunately the community standard test found approval of the Supreme Court and in many judgments such as *Samaresh Bose* v. *Amal Mitra*[19] and *S. Khushboo* v. *Kanniammal*[20],the court chose to depart from the *Hicklin* test and applied community standard to determine matter is obscene or not. Explaining the community standard test in *Aveek Sarkar* v. *State of West Bengal*[21] the Hon'ble Court held that *Hicklin* test is not the appropriate test to ascertain obscenity. The correct test to be applied is the community standard test. It was further held that once content is found to be obscene in the terms of section 292 IPC, it shall be determined that whether such impugned matter falls within the ambit of any of the exceptions contained in the section itself. The Court further clarified that a per se a nude/seminude picture of a woman can't be declared to be obscene unless there is a likelihood of it arousing feeling or revealing overt sexual desire. Particular posture and the background in which the picture was captured if gives reflection of depraved mind and suggests that the aim was to arouse sexual passion in person who are likely to see that picture. That only those sexual content which have a tendency of exciting lustful thought in the mind of average person, by applying contemporary community standards could be said to be obscene.[22]

Section 67A,[23] of the Information Technology Amendment Act, 2008, entails punishment for five years and with fine up to ten lakh rupees and on subsequent conviction, imprisonment for a term which may extend to seven years and also a fine which may extend to ten lakh rupees for publishing or transmitting material which is sexually explicit in an electronic form. The provision is vague as language employed in the section is full of ambiguity as what is sexually explicit is nowhere defined or explained.

Child pornography is a more serious concern in cyberspace. It is material that visually depicts children (real children as well as computer- generated depictions of children) under the age of eighteen engaged in actual or stimulated sexual activity which also includes lewd exhibition of the genitals.[24] In order to adhere to provisions of the International Conference on Combating Child Pornography on the Internet, Vienna, 1999,[25]our Indian Parliamentarians incorporated section 67B of the Information Technology Amendment Act.[26]It is specifically concerned with the obscenity & pornography of children below the age of 18 years. Unlike sections 67 and 67A of the Act, 67 B not only punishes publication and transmission of child pornography rather browsing and downloading of child pornography is also punishable.

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[19] (1985) 4 SCC 289.
[20] (2010) 5 SCC 600.
[21](2014) 4 SCC 257.
[22]*Ibid.*
[23]*Supra* note 15.
[24] "How Children Access Pornography on Net", *available at*: http://www.protectkids.com/dangers/childaccess.htm.
[25]International Conference on Child Pornography on the Internet, Vienna, 1999. International Conference on Combating Child Pornography on the Internet Vienna, September 29-October 01, 1999.The conference calls for the worldwide criminalization of the production, distribution, exportation, transmission, importation, intentional possession and advertising of child pornography. In addition to national legislation, efforts for an international instrument, such as the ongoing negotiation within the council of Europe on a Convention against Cybercrime are welcomed and encouraged. States, which have not yet done so, are called upon to enact appropriate legislation. States and regional and international institutions are encouraged to work towards harmonization of legislation. While recognizing some remaining difficulties concerning its definition, the conference identified international minimum standards concerning the prohibition of child pornography, in particular in its application to the Internet.
[26]*Supra* note 15.

Then we have section 66E of the Information Technology Amendment Act, 2008 that punishes capturing, publication or transmission of a private area of any person intentionally or with knowledge, irrespective of his or her gender without his or her consent, which lead to infringing privacy of that person.[27]

Then section 79 of Chapter XII of the Information Technology Amendment Act,[28]which absolves Network Service Provider from punishment for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.[29]

Section 69 A of the Information Technology Amendment Act,[30]says that where the Central Government or any of its officer authorized by it is satisfied that it is necessary or expedient in the interest of sovereignty with foreign States or public order[31] or, for preventing incitement to the commission of any cognizable offence relating to above, it may direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

IV. JUDICIARY ON PORNOGRAPHY

On the matter of cyber pornography the stand of Judiciary has remain dubious. In response to central government blocking the pornographic site, Former Chief Justice of India, H.L. Dattu remarked, "India can't do so". Saying total ban on sex sites would infringe right to privacy and personal liberty guaranteed by Article 21 of the Constitution of India and such eroticism is a personal choice. He stated[32] that stopping people from watching anything within the four walls of his room, would tantamount to infringing Article 21 of the Constitution.

It is noteworthy that this observation of Supreme Court is in contradiction with its earlier order passed by Former Chief Justice R.M. Lodha in the same PIL which was filed by KamleshVaswani who seeks to ban pornographic sites. During the hearing in August 2014,Former Chief Justice stated "*that such raunchy sites need to be blocked and demanded strict laws to curb the menace*".

According to Justice RohintonNariman it was "*impractical to block two crore websites as then two crore more sites will surface. They pop up in foreign countries and are hydra-headed. So, only servers here will help*".[33]

In March 2016, the Supreme Court came up with a new order and declared as right to freedom of speech, thought and expression is not absolute therefore Centre should take

[27]*Ibid.*
[28]*Ibid.*
[29]*Supra*note8.
[30]*Supra* note 15.
[31] Public peace, safety and tranquility.
[32]*KamleshVaswani* v. *Union of India and others*(2014) 6 SCC 705.
[33]http://www.dailymail.co.uk/indiahome/indianews/Article-3153957/Supreme-Court-says-India-t-ban-porn-CJI-says-total-ban-sex-sites-violate-privacy-personal-liberty.html#ixzz41oUq3t8k (last visited on November 15, 2018).

necessary steps to block child pornographic sites and gradually consider blocking of other pornographic sites as well.

Bench of Justice Dipak Misra also decided that it shall entertain petition dealing with criminalization of consumption of pornographic material on which ASG Anand said the Centre has no inclination to act like a moral policing and that it is inclined to ban only those sites which contains child pornography though it is pertinent to mention here that the Court speaking through Justice Dipak Misra asked Centre to develop mechanism for blocking all such porn sites taking aid of Information Technology experts and Intermediaries.[34]

From the above discussion this can be easily concluded that even the Supreme Court Judges are not carrying a single opinion and they themselves are divided on the question of suppressing pornography.

V. SHOULD GOVERNMENT BAN THE CYBER PORN SITES OR SHOULD THESE SITES BE REGULATED? A LEGAL ANALYSIS

It is often suggested that to protect our women and children circulation of cyber pornography should be banned. Before taking into consideration this suggestion we need to remind ourselves that while the protection of women and children is paramount duty of any government but we should not forget that a civil society first right is to have right to freedom of speech and expression. It is through this right other rights can be claimed and made meaningful. Freedom of expression is to be prized as a condition of a free society. Censoring this right shall be unhealthy for any developing or developed society.[35]

It is also the claim of many civil libertarians that once the state is allowed to use the remote of censorship and ban the things, it shall prejudicially use that remote again and again to foist their whims and fancies upon us and god knows up to what extend and for what area the next bullet shall be triggered. Beef ban imposed in certain part of India to appease some political party is the latest example of government power of censorship. This culture of censorship is not prevalent only in India rather no government of any country in the world can pat itself for never using such authority over their subjects. This is how Canadian feminist managed to force government to amend law dealing with obscenity.

Censoring porn will result into pushing the multi-billion industry underground where it can no longer be put under surveillance and this is in addition to economy and monetary loss the country will suffer. Instead of it the government will be spending from its own pocket which in reality the pocket of the honest tax payers to put checks on this menace. The hard earned money of the people will be spent on strengthening investigation and prosecution system. Offenders look after and their maintenance are also responsibility of the state which further shrunken the resources of state. Once they get out from the jail they won't easily get the job and thereafter also the state will be paying money for their support. The activity ones become illegal will make criminals to all the actors voluntary working in the industry, this consequentially will shoot up crime rate in the society. Yesterday who were not culprits will be held offenders from the next day which will defame country's name throughout the world because of so called raised crime rate. Actor may leave this industry owing to its illegal nature which further will lure the dealers of the illegal industry to haul the girls through

[34]http://www.livelaw.in/block-child-pornographic-sites-explore-if-viewing-porn-in-public-can-beprohibited-sc-to-centre/.
[35] Daniel Frederick, "Pornography and Freedom" 5(2)*Kritike* 84-95 (December 2011).

trafficking. To silence the police officers bribe would be offered to them and this is how corruption will expand. Trafficking corruption and black marketing all together will raise the crime rate in the country which will tarnish the image of the country internationally.[36]

It is also a known fact that if the risk is not to some innocent but to one who gives consent to other to harm him or her there the state has no authority to interfere of course subject to certain situations. Also for opponents, pornography is intolerable but the same is not the case with the defenders. For them it is a source of entertainment. Someone else definition of morality can't be imposed on others especially when it is a free democratic society.[37]

John Stuart Mill in his essay *On Liberty*[38]has explained when power can be exerted to restrict individual freedom of action. In his composition he has maintained that individual can't be held liable towards society as long as his action affects his own interest only but the moment his action ends up violating other rights or interest, legal or social sanction against that person shall be tenable.[39]Hence in the absence of harm to the society, activities performed for personal gratification can't be questioned.[40]Law can't be used as a weapon to restrict individual independent acts no matter how degrading or depraved the acts are, so long as they do not have the potential to harm others.[41]Therefore if the relationship between pornography and sexual violence can be established then only the shield of classic harm principle of J.S. Mill can be removed otherwise pornography will continue to enjoy the constitutional protection of right to liberty.

Pornography supporter, feminist author Nadine Strossen[42] states that, there is no credible evidence which substantiate causal relationship between availability of sexual explicit content and crime committed against women.[43]

Again it is further argued several times that on ground of morality the government has right to restrict freedom of speech and expression. Here it becomes necessary to clarify that wherever the word morality is used, the framers of our Constitution were talking about Constitutional morality. It is not public morality but Constitutional morality which empowers government to curtail our freedom of speech and expression. On this Naz Foundation Judgment[44] becomes relevant for our purpose in which it was held that popular morality or

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[36] John Arlidge, "The Dirty Secret that Drives New Technology: it's Porn", *The Observer* (March03, 2002) quoted in N Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights*(NYU Press, New York, 1995).
Mancur Olsen, *The Rise and Decline of Nations* (Yale University Press, New Haven, 1982); *Power and Prosperity* (Basic Books, New York, 2000).
[37]*Supra*note 2.
[38] JS Mill, "On Liberty" in M. Warnock (ed.), *Utilitarianism* 135 (Blackwell Publishing Ltd., Oxford, 2003) (2003) quoted in Steven Balmer, JR "The Limits of Free Speech, Pornography and the Law"1 *Aberdeen Student Law Review* (July 2010).
[39] SM Easton, *The Problem of Pornography: Regulation and the Right to Free Speech*1(Routledge, Florence, 1994).
[40] R. Dworkin, "Is there a Right to Pornography?" 1(2) *Oxford Journal of Legal Studies*177-212 (1981).
[41] Steven Balmer, *supra* note 38.
[42] N. Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* 75(NYU Press, New York, 1995).
TM Bruce, "Pornophobia, Pornophilia, and the Need for a Middle Path"5 *American University Journal of Gender, Social Policy & the Law* 399(1997).
[43]*Supra* note 42.
[44]*Naz Founation* v. *Govt. of NCT of Delhi* (2009) 166 DLT 277.

public disapproval is not a valid justification to restrict one's right to life under Article 21. In para. 79 the Court stated '*Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly*".[45]That moral indignation howsoever strong might be does not provide any valid basis for overriding individual basic right of dignity and privacy and therefore Constitutional morality must outweigh public morality, even if public morality represents the perception of majority.[46]

Opponents in their next contention say that viewing pornography depraves and corrupts those who produce or consume it. Well if this is the problem then solution lies in allowing the individual to decide what is in their best interest. It is a matter of their choice to decide whether they are ready to expose themselves to take the risk or not. It is also a line of thought that politics, bureaucrats and corporate all are susceptible to corruption. Despite that we the citizen of this nation encourage and desire man of integrity to join this profession.[47]If these acts are not wrong how come watching and producing pornography can be wrong? It is all about exercising once right to life and liberty their right to freedom of speech and expression which should not remain in papers and must be given its logical conclusion.

Pro porno also argues that it is unfair to allege that pornography degrades women as, if the allegation has any substance it is for the women folk to decide as a consenting adult that degradation is worthwhile or not.[48]Also if the allegations are accepted to be true, censorship could be allowed only as the last resort where the government is left with no alternative but to ban it. However the problem before us can be resolved through regulation of pornography. Sex education perhaps can be used to minimize sexual assaults.[49]

It is further claimed that porn subjugates women, and such conviction inveterate gender inequality. If this contention considered being truthful, then answering to this problem lies in changing the mentality which can be made possible only by educating people and for which effectively exercising our right to freedom of expression is a must.[50]

Also if the allegation is raised against the message it delivers to the world at large, the answer lies in changing the message and for that suppression of speech does not provide us any solution rather expanding the speech, discussing the problem through debate and settling the matter through most agreeable thought is the need of the hour. If regularizing the industry can prominently handle the situation then why to waste our resources on first banning and then maintaining that ban?

Nobody doubts that statistics depict atrocities against women are not declining and certainly can sweep away any government if the government remains sleeping over women right to have protected and safe environment in the society. The data also reveal that substantial part of reported cases is flooded with sexual violence against women. Nobody questions their occurrence and it is rather shameful for the society to be witness of such

[45]*Ibid.*
[46]*Ibid.*
[47]*Supra*note35.
[48] *Ibid.*
[49]*Ibid.*
[50]*Ibid.*

brutality but before deciding the future of pornography we must find out the role played by pornography in such crimes. Catharine MacKinnon, the American radical feminist herself has little proof to corroborate the fact that sexual assaults are the outcome of watching porn. Consuming violent pornography is found to be responsible for sexual offence in some of the cases but such instances are rare and certainly not such which could prove the link between the two.[51]

If we consider Justice Bhagwati suggestion in *National Textile Workers Union* v. *PR Ramakrishnan*[52] he observed that:

> "W*e cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still, it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree it will shed the bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society then either it will stifle the growth of the society and choke its progress and if the society is vigorous enough it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind.*"

Also in *Kesavananda Bharti*[53] case, it was said by the Supreme Court that:

> "*No generation has monopoly of wisdom nor has it a right to place fetters on future generation to mould the machinery of government according to their requirements. If no provision were made for the amendment of the constitution the people would have recourse to extra constitutional method like revolution to change the constitution*".

JeremyBentham's utilitarian theory says that law must be such which gives maximum pleasure to maximum members of the society. In view of German Jurist Savigny, "*law is not static. It keeps revolving. It grows with the growth of people, strengthens with the strength of people and finally dies when the nation loses its nationality*". Law is nothing but reflection of its people belief, their opinion and ideology which keeps changing with the passage of time.

Also if it is claimed that pornography defiles children mind and is harmful for them. But driving car and consuming alcohol and cigarette is also unsafe for them despite this fact adults are allowed to drive cars and their having liquor and smoking is not prohibited generally. In fact government itself grant license to sell liquor and earn large revenue from this sector. Hence it is for the adult to be attentive and restrain children to come into contact with such things. In the same way parents may use filters or may download or buy software to manage the contents on the internet. This will prevent their children to come across any such pornographic video.[54]

VI. CONCLUSION

The above discussion is forcing us to run over the middle road and balance the rights of adult as well as children in a way which take care of both of them needs. Without being

[51]See *supra*note41.
[52](1983) AIR 750, (1983) 3 SCR 12.
[53]*Kesavananda Bharti* v. *State of Kerala*(1973) 4 SCC 225.
[54]*Supra*note 41.

excessively restrictive and fulfilling everyone aspirations should be the aim of any government. Hence the stick of law should be moved judiciously. And from the result of various studies and researches conducted throughout the world it becomes pristine clear that imposition of general ban on all kind of pornography is not required. As in the opinion of Justice Felix Frankfurter, that would mean 'reducing the adult population to reading only what is fit for children'[55] although there is found to be slightest tilt in causal connection of "violent porn" and crime against women. The majority of members of our society are believers of prevention is better than cure theory hence if there exist little merit in pornography itself then violent pornography offers none.[56]Any pornography that depicts an illegal act, whether, rape, assault or child abuse should not get the same protection as is offered to 'regular' pornography under freedom of expression.[57]Therefore, violent pornography needed to be banned as violent pornography is a mere camouflage, inherent to which is the year old patriarchal approach which violates women dignity in the name of sex and refurbish male dominance over women which they never want to give up. Censorship of this type of porn may appear to be harsh on mankind however in light of the apprehension of various scholars and philosophers and government obligation to make society safe and secure for women, ban at least against hard core porn is sustainable.[58]In the name of free speech, commission of crime cannot be sponsored. It is true that end result of violent pornography is not yet proved but violence from the very name of it is not allowed and cannot be allowed in any form. In no country freedom of speech is bestowed to the natives absolutely without any exception. Hence it can be curtailed on certain grounds provided in Article 19 sub clause (2) itself.[59]In view of *Deana Pollard* like speeding violent pornography is intrinsically hazardous, and therefore legislatures holds the right to channelize it efficiently without affording or forwarding any explanation about the proof of particular harm it may cause to the society.[60]Sexual violence as a form of speech has no substance in it which one should feel required to be protected from government intrusion. It's true that suppressing porn will lead to expansion of black marketing and under-ground activities. It is important to understand that arbitrariness of any kind, whether it is of the government or the citizens of the state is not permissible. Violence through any medium can never be encouraged especially the one which reinforces rape myths and principle of inequality, which penetrates the belief of women to be subservient to men. Message need to be unambiguously delivered to the mankind that sexual violence is unacceptable and shall never be supported by the state despite the consequences state has to suffer. As reinstatement of peace and security of every single individual is state concern and to protect right of speech and expression of those who want to be entertained by it at the cost of infringing women right to be protected from any kind of violence inside and outside of the precinct of her house which is a façade of right to life, is untenable. When the two shall be weighed against each other obviously the later will get state protection.

[55]*Butler* v. *Michigan,* 352 U.S. 380 (1957).
[56]*Supra*note41.
[57]*Ibid.*
[58]*Ibid.*
[59] The Constitution of India, 1950,art. 19, cl.1 and 2.
[60] D Pollard, "Regulating Violent Pornography" 125 *Vanderbilt Law Review*141 (1990).

MIGRATION AND ITS UNKNOWN ALLY: THE HUMAN RIGHTS

Kunal Bhardwaj[*]

I. INTRODUCTION

Examination of migration *vis-a-vis* Human Rights has been a largely neglected area of Indian jurisprudence. The reasons could be manifold viz. low awareness of rights/human rights, constitution of India and the national statutes not directly counting Migration as something affecting human rights, migration itself being a neglected issue and lack of research on Migration and its effect on human rights.

It is important to note that Migration comes in several hues and for the purposes of this Article, the word 'Migration' must be deemed to include them all.[1] This uniqueness associated with the issue of Migration owes its origin to many factors- local, national and international; social and religious; and racial and discriminatory. The word 'Migrant' must be construed to have such a wide ambit that it imports refugees as well as displaced. Thus, the issue of Migration and Human Rights needs a multi-disciplinary and multi-sectoral approach and a permanent solution is possible only when it is dissected with that much precision.

India has the largest diaspora in the world.[2]Indians were transported to the foreign lands as indentured labour by the British. The present day migration is largely voluntary. There is a rapid increase of migrants in Asia, with intra-regional migration dominating worldwide. There are 258 million international migrants living abroad worldwide.[3]

The first large scale instance of Migration in modern India was witnessed in the period leading to independence. Informally, these persons were called refugees,[4]which was inherently flawed because the independent India was their homeland and not an entirely foreign land. So,the approach towards tackling the Migrants' cause has always been lackadaisical and casual. Thereasons are varied like ignorance, insecurity about one's own resource, sometimes even xenophobia and sociopolitical and diplomatic reason. Quintessentially, the issue of Migration, in its various forms, has never garbed attention of the lawmakers and practically ignored by the policymakers. The nature and cause of migration in the inter-state as well as intra-state case are varied. This article is primarily concerned with violation of Human Right as a by-product of Migration. Nonetheless, all related phenomena have also been discussed at appropriate places.

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[1] Types of Migration have been discussed in subsequent pages.

[2] International Migration Report 2017: Highlights, *available at* http://www.un.org/development/desa/publicatons/international-migration-report-2017.html (last visited on April 25, 2019).

[3] *Ibid*.

[4] The office of the United Nations High Commissioner for Refugees (UNHCR) defines refugees as 'someone who has fled his or her country and cannot return because of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Refugees may also flee their countries due to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order'. This definition is *available at*: http://www.unhcr.org.in/index.php? option=com_content&view=Article&id =22&Itemid=141 (last visited on April 25, 2019).

II. DEFINITION AND TYPES

Migration, in the present context, may be defined as movement of large numbers of people from one place to another. It is the simplest and hence the best definition. The causes and effects of Migration are manifold. These causes and effects will be relevant twice for this article viz. for the purpose of deciding types of Migration and also for analyzing the human rights violation of the migrants. It is the act of moving from one place to another - within a country or across borders and usually refers to migration on a larger scale.

Migration may be on an individual level, or in a group or even in a form of exodus. 'Exodus' implies migration on the largest scale. Individual migrate, usually, because of some private inducement or incentive. It is like moving by a spouse after marriage. Group migration is usually a result of the action or inaction of state i.e. people from a region migrate to another region for want of government's action or because of government's promotion to that effect.

A. Types

There are various kinds of migration viz. Rural-Urban migration, Seasonal migration, Long and short term migration, Forced or involuntary migration, Impelled migration and Return migration. Most of the terms are self-explanatory. From the viewpoint of Human Rights, it is noticeable that migration mostly contains an element of compulsion. This goes against the ethos of Human Rights.

To start with, there are 'Regular' and 'Irregular' migration. In India, those who go abroad using the services of agents registered with the Indian government or its official online e-Migrate recruitment channel are 'regular' migrants while those going abroad through unregistered sub-agents are 'irregular' migrants. Migrants right activist would argue that there is a big difference between the official e-Migrate number and the number of actual migrants.[5]

In case of Rural-Urban migration, there is push as well as pull factor. Lack of employment, poverty, absence of health and educational infrastructure are push factors while a better living standard of life in urban areas, in general, is the pull factor. Here, push factors are compelling factors which forces individuals to act against their free wills. These actions are not result of an ambition for a better and comfortable life. These actions are act of desperation which an individual or a group of individual take for meeting their need of the basic amenities in life like food, potable water, elementary education and medical treatment etc.

Seasonal migration is little different in this regard in the sense that the pull factor outweighs the push factor. Certain examples of seasonal migration are movement of students for higher education to bigger cities and transfer of individual to another city on promotion etc. This kind of migration is by and large voluntary and does not involve element of direct or indirect compulsion. Other kinds of migration can also be explained accordingly.

The displacement of people from their natural habitation also causes Migration. Such kind of migration includes displacement for the purposes of industrial development.

[5] Rejimon K., "India needs to look beyond the debate on regular and irregular migrants", *available at*: https://thewire.in/labour/india-needs-to-look-beyond-the-debate-on-regular-and-irregular-migrants (last visited on April 25, 2019).

Various kind of Migration can be placed on a continuum from full and free consent to no consent. If there is a free and full consent, it is certainly not a violation of right. If there is no consent or not a valid consent, it is certainly a violation of human rights.

If anthropogenic greenhouse gas emissions are not drastically curtailed within the next two to three decades, sea-level rise will displace tens of millions of people worldwide – and potentially many more – in the latter decades of the current century and the early decades of the next. Displacements are already taking place in small communities situated in erosion-prone, low-lying coastal locations. Governments will need to invest heavily in protective infrastructure for high-population-density settlements and to develop strategies for organized relocations of people from high-risk locations that will need to be abandoned. Experience suggests that the costs will be beyond the means of many less-developed and middle-income countries, and that the socioeconomic well-being of those who must relocate will be heavily compromised. An anticipatory "migration with dignity" strategy proposed by the government of Kiribati may be one way to avert worst-case displacement scenarios.[6]This shows the variety in types and causes of migration including even climate change, civil war and poverty etc.

B. Migration, Emigration and Immigration

Migration has already been discussed. Emigration is leaving one's country for settling in another. Immigration may typically be defined as arriving at another country i.e. a country other than the country of one's origin with an intention of living there permanently. It involves movement of an individual or a family to move to a new country from their country of origin.

Thus, technically, while migration involves movement across an international border or within a country, immigration and emigration involves States and the international law or treaties comes into play.

However, the main issue is that of recognition of migration as an act violating fundamental rights, at least in some cases. This acknowledgement is missing entirely from the national jurisprudence. In the international arena, there is some acceptance of this fact, however some actual emphasis is still desired.

C. State and Migration

Migration is primarily a social issue, directly related to the quality of governance, which has its implication for legal jurisprudence. State thus comes into picture. It has to establish a social order which optimizes Migration as per its need and it also has to provide a legal framework regulating Migration. Migration is not necessarily an evil. State needs mobility of her citizen across its length and breadth and in tune with the requirement of the national interest.

Thus, the policy of the State plays a pivotal role leading to migration or an absence of it. It could be long term policy or the short term policy or even the economic policy pursued

[6] R. McLeman, "Migration and displacement risks due to mean sea level", *available at*: https://thebulletin.org/2018/may/migration-and-displacement-risks-due-mean-sea-level-rise (last visited on April 25, 2019) .

by the State. Suppose, the tax levied by a State in its different region is different. People will automatically move to the region where the tax is lesser provided all other conditions are constant. Similarly, if a State is misgoverned or less efficiently governed, people tend to flee for neighbouring state with a proven track record because they will be having better living standard there.

Have we ever heard of an American migrant or an Israeli migrant? We know the London and Paris streets being flooded by the Asian immigrants. Similarly, in the national perspective, we have seen a continuous flow of migrants from eastern India to Northern and Western India. It implies that there is violation of some rights of the citizenry of these regions which they are entitled to by virtue of being human. People usually do not leave their place of residence for long if there are not any compelling factors. Leaving for tourism is voluntary nevertheless leaving because of fear to life or absence of basic amenities of life like water, food, employment is compulsory. It is violation of the right to live and settle in a particular place conferred on citizens by the respective state governments and international provisions.

III. MIGRATION, UNO, UNHCR AND COUNTRIES

By definition, an international migrant is a person who is living in a country other than his or her country of birth.[7]

Department of Economic and Social Affairs, United Nations Organization (UNO), *inter alia*, deals with the issue of Migrants. Besides, there is a United Nations High Commissioner for Refugees which exclusively deals with the cases of refugees. At the cost of repetition, it is stated that there is a difference between migrants and refugees. The status of Refugees is an exaggerated form of migration. That is why there is a special body under the supervision of UNO to deal with Refugees. A refugee has a right to safe asylum, and not to be forcibly returned to a country where his/her life or freedom may be at risk. All asylum seekers and refugees have access to: the national legal system, the government healthcare system and Government schools for children's education.[8]

This is not the case with Migration. A sense of urgency on the part of International agencies is missing in case of Migration. It is usually left to the Country or group of countries to deal with a migrant issue even if it involves substantial violation of their human rights. Difficulties faced by the Syrian Migrants is the most recent and apt example of this. A distinct variety of migration is witnessed in Hong Kong where after the 1997 handing over of Hong Kong to China, people from the mainland has been dominating either through their physical presence or through their policies. So, there can be myriad varieties of migration. The study of migrants and their rights can be a discipline in itself. This would also be helpful in policy formulation and judicial intervention in case of migrants. It would allow a clinical precision in dissection of the various layers relating to migrants' problems. Since the 1994 International Conference on Population and Development (ICPD), the issue of international migration and its relation to development has risen steadily on the agenda of the international community.

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[7]*Available at*: http://www.unhcr.org.in/index.php?option=com_content&view=Article&id=22&Itemid=141 (last visited on April 25, 2019).

[8]International Migration Report 2015: Highlights, *available at*: http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf (last visited on April 25, 2019).

The 2030 Agenda for Sustainable Development not only includes several migration-related targets, but also encourages countries to disaggregate targets by, inter alia, migratory status.[9]

A.Migration to Europe and Syria

Nearly two thirds of all international migrants live in Asia (80 million) or Europe (78 million). Northern America hosted the third largest number of international migrants (58 million), followed by Africa (25 million), Latin America and the Caribbean (10 million) and Oceania (8 million).[10]

It would be better if the cases of Migration in the relatively developed world like Europe and Asia is discussed because it would mean that instances of violation of Human rights in the lesser developed part of world like third world countries of African continent is more grim.

European countries always had a soft boundary. Their countries are distinctly marked on the basis of the languages spoken. The intermingling of citizenry is commonplace. After the formation of European Union, it became more prominent because whole of the European Union is treated like a country for certain practical reasons.

The migration within European Union has more of a positive effect and leads to development in cultural and social arena. Even then it is regulated by European immigration policy. European immigration policy is organized around two main themes. The first theme concerns the area of free movement. According to Article 77 of the Treaty on the Functioning of the European Union (TFEU), the Union is competent to adopt rules relating to the absence of internal border controls, the management of external borders and short stay visa policy.

There are differences among the members. If Germany and France are liberal, a sizeable section of their own society is raising xenophobic concerns. UK, though liberal, is largely known for "managed migration" which shows her own need for immigrants in the first place and not only an altruistic vision of the State or society *per se.* From a country's perspective, every country has the first duty towards their citizen and without endangering their life, property and progress, the *bone fide* immigrants may be welcomed. Protecting citizen's interest is as much important as protecting interest of the individual who becomes uninvited guest for reasons beyond his control.

The second theme concerns common immigration policy. Article 79 TFEU defines the areas in which the EU can act. The EU may adopt rules relating to the conditions of entry and residence, the definition of the rights of third country nationals residing legally, illegal immigration and unauthorised residence, and combating human trafficking.[11]

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[9]*Supra* note 6.

[10]International Migration Report published by DESA, UNO: Highlights, *available at*: http://www.un.org/development/desa/publicatons/international-migration-report-2017.html(last visited on April 25, 2019).

[11]TFEU, art. 79, *available at*:http://europeanmigrationlaw.eu/en/immigration (last visited on April 25, 2019).

In 2017, of the 258 million international migrants worldwide, 106 million were born in Asia. Europe was the region of birth of the second largest number of migrants (61 million), followed by Latin America and the Caribbean (38 million) and Africa (36 million).[12]

The migration from non-European countries to Europe is a real intractable area of discourse. The Syrian refugees fleeing from scornful ISIS were initially not received in Europe. Then one fine day, a shocking picture of a baby boy Aylan Al-Kurdi lying face down near Turkey coast was splashed on all newspaper and social media and that awakened the conscience of the European Union leaders. They opened their doors to Syrian refugees. Issues relating to migrants have to be dealt with in an innovative way. Some migrants may cause law and order issue. There are ways to tackle it. Young migrants should be made aware of the local culture by the NGOs and governments. Integration in the mainstream of the country may exponentially raise the contribution of migrants in the economy of the host country. It is like the force of water, which can be used constructively, if regulated or it is always open to bring devastation.

In 2015, Germany was the main European Union (EU) country of destination for migrants and refugees. A news briefing from IOM's Global Migration Data Analysis Centre in Berlin presents the main data on arrivals of migrants, refugees, and asylum-seekers during 2015. During 2015, one million registered their intention to seek asylum in Germany. The data shows that since April 2015, the majority of first-time asylum applicants were from Syria. The relatively little known fact is about the profile of the people who registered an intention to apply for asylum in Germany. This is because Germany´s EASY data collection system only collects data on the country of origin of the applicant and the receiving German "Land" or federal state, and not the socioeconomic profile of the person. In Germany, a quota system is used to distribute refugees and asylum-seekers among German states. This system allocates a specific percentage of asylum applicants, based on tax receipts and population numbers, to each state. Asylum applicants in Germany are required to stay in a reception facility when they first arrive for up to six months (This was previously three months).[13] France and all other neighbouring countries are opposing the German policy of welcoming refugees.

IV. MIGRATION, INDIA AND HUMAN RIGHTS

It cannot be forgotten that Mahatma Gandhi, the Father of Nation, was a migrant himself for a good part of his life. In the national context i.e. in case of internal migrants, India does not have any specific law regulating or prescribing for migration. It is very much in consonance with the Constitutional scheme as India has been treated as an Unit and people have been given a right to move and settle across India.[14]If there is or was any law, it dealt primarily with migration of labour from one region to another.[15] It is primarily an issue of policy administered by the government of the day. The problems arising out of the internal migration are mainly resolved through policy intervention.[16]

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[12]*Ibid.*

[13]*Available at*: https://www.iom.int/news/migration-asylum-and-refugees-germany-understanding-data (last visited on April 25, 2019).

[14] Article 19 of the Constitution of India, 1950, provides these fundamental rights. However, some exceptions exist. These are also delineated in the Article itself.

[15]Interstate Migrant Workmen Act, 1979.

[16]The Mahatma Gandhi National Rural Employment Guarantee Act, 2005, Integrated Skill Development Scheme for the Textiles and Apparel Sector, Udaan Scheme for youth of Jammu and Kashmir, Seekho aur

A. The Case of Kashmiri Pandits

The plight of Kashmiri Pandits speaks volume about the status of migrants in India and the violation of their fundamental rights. Indeed, the case of Kashmiri Pandits amply demonstrates the absence of any effective redressal mechanism for the victims of forced migrants. This force may arise out of political compulsion as is the case with Kashmiri Pandits or it may have its roots in economic duress as is the case with migration of labour from Bihar.

Recent bout of migration of Kashmiri Pandits started in the late 1980s. Aided by external forces, Kashmiri Pandits were persecuted in every possible ways. They were beaten up, murdered, their women raped, their property was destroyed, their movement was restricted. Majority of them fled the valley to safeguard their person, wealth and esteem. They are not adequately covered by any kind of specific legislation providing employment, social security, rehabilitation or protection of their wealth left behind in the valley of Kashmir.

Any Citizen of India has a right to move freely throughout the territory of India,[17] to reside and settle in any part of the territory of India.[18]Article 370 of the Constitution of India limits the scope of these freedoms in case of Jammu and Kashmir.[19] However this does not forbid a domicile of Jammu and Kashmir to prosper and grow in the land of their forefathers.

Kashmiri pandits are residing in tents and several makeshift arrangements in Jammu, outside cities, outside Jammu and Kashmir and some have even managed to find a strong foothold on their own on foreign lands. Majority of them are still perishing day in and day out. The Government keeps taking several measures to alleviate the pain but that is too little and too late.[20]

The exodus of Kashmiri Pandits has a unique cause and that is the external invisible hand in their plight. So, the case has an international dimension to it which does not find a remedy under any rule, regulation, convention or treaty. Till the external aid to the trouble-mongers does not cease, the rehabilitation of Kashmiri Pandits is practically insurmountable.

B. The Bangladesh Refugees/Migrants

India shares a porous border with Bangladesh. Besides the large scale migration of people from the then East Pakistan,[21] the infiltration continues till date. A better living standard and employment opportunity seems the determinative factors. While the immigrants benefit, the citizens of India suffer. Resources are scarce and the illegal migrants do not show

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Kamao (Learn and earn) scheme for Minorities are a few of such initiatives which directly or indirectly minimize the disproportionate internal migration.

[17] The Constitution of India, 1950, art. 19(1)(d).

[18] *Id*., art. 19(1)(e).

[19] Article 370 provides some temporary provisions with respect to the state of Jammu and Kashmir.

[20] The Jammu and Kashmir Division of the Ministry of Home Affairs provides the details of various steps like package for return and rehabilitation for Kashmiri Migrants, construction of Two-Room tenements for Kashmiri Migrants directed towards bringing back the Kashmiri Pandits back to Valley but the social and political conducive environment are still elusive and hence the piecemeal approach has largely failed.

[21] After the Liberation War of 1971, Bangladesh came into existence and was recognised by India and the world as such.

up in the government records thereby stretching the pressure on the resources up to the point where both parties suffer. It violates the rights of Indian Citizens as their growth is hampered and at the same time the Bangladeshi migrants also lives a live devoid of all basic amenities.

Bangladeshi migrates to Europe, America and several other countries. However, India is the most convenient host country, especially for the poor Bangladeshis who cannot even arrange for transportation expenses to Europe etc. Such migrants seeking blue-collar jobs have several nuances relating to their arrival and employment in the host countries and sometimes intractable.

C. Nepal and Madhesis

Nepal and India share a unique relationship. Still, there is an outrage and sense of alienation amongst the Madhesis. They are not Migrants from India *per se*. They have their roots in India which is not at par with being migrant. Madhesi leaders accuse the Nepalese governments of treating them as outsiders because of their Indian origin. More than 40 percent of Madhesis still do not have citizenship or voting rights.[22] There is an urgent need to reconcile the differences of various sections of society as it is adversely affecting the constitution-making process.[23]

D. The Positive Aspect of Migration and the Facilitating Enactments

Nepal ranks fourth in the world in terms of the contribution of remittances to GDP, according to a report launched by Ministry of Labour, Employment and Social Security, with support from IOM, the UN Migration Agency, the International Labour Organisation (ILO) and The Asia Foundation.[24] The citizens of Nepal and Bhutan and to some extent citizens of Sri Lanka have also been migrants in India. Their migration to India, in general, has not posed any danger to the people on the mainland. In fact, to the contrary, the government has made some overt facilitation for them. Nepali citizens do not need a visa for visiting India and *vice versa*. They come and work here for infinite period. There is some tacit understanding between the two states for free movement of their citizens when they are convinced that it would result in a win-win situation for both.

Sajid Javid, a son of Pakistani immigrants, has been appointed as Home Secretary replacing Amber Rudd who had to resign following his criticism over the treatment of migrants from former British Colonies.[25] These kind of events shows the constructive benefit of immigration provided the State is capable of exploiting it positively rather than panicking.

Matters of immigration and emigration are bound by various enactments and government orders. India is not party to the 1951 Refugee Convention or its 1967 Protocol

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[22]*Available at*: http://www.irinnews.org/report/70027/nepal-background-of-the-terai-s-madhesi-people (last visited on April 25, 2019).

[23]UN Political Chief has encouraged the dialogue among leaders to overcome differences on constitution. *Available at*: http://www.un.org/apps/news/story.asp? NewsID=52970#. Vpz BYdxhnIU (last visited on April 25, 2019).

[24] "Labour Migration for Employment- A Status Report for Nepal: 2015/16-2016/17", *available at*: http://nepal.iom.int/jupgrade/images/stories/CoM/LabourMigration_for_Employment-A_%20StatusReport_for_Nepal_201516201617_Eng.PDF (last visited on April 25, 2019).

[25]Stephen Castle, "Sajid Javid is named U.K. Home Secretary, replacing Amber Rudd", *The New York Times*, April 29, 2018, *available at*: https://www.nytimes.com/2018/04/29/world/europe/amber-rudd-resigns-windrush.html (last visited on April 25, 2019).

and does not have a national refugee protection framework. However, it continues to grant asylum to a large number of refugees from neighbouring states and respects UNHCR's mandate for other nationals, mainly from Afghanistan and Myanmar. This shows India's positivity towards the issue.

E. Migration and National Human Rights Commission (NHRC)

The Human Rights is a vast world. Constitution of India provides for fundamental rights in part III (Article 12 to Article 35). Part IV (Article 36 to Article 51) of the Constitution also provides for certain rights which a State must confer provided it is capable and having resources for the same. All these fall under the purview of NHRC. Sadly there is an absolute lack of some consistent and genuine efforts.

In case of Migration, there is a possibility that either of the two or both parts of rights are violated. Suppose, a person is forced to migrate,it would certainly violate right to equality. In addition, it may also consequentially violate the right to freedom of speech and expression, the right to freedom of religion and so on. If rights from part IV are considered, it is obvious that a number of rights from part IV viz. provision for just and humane conditions of work or the right to have a social order for the promotion of welfare of the people are violated.

Migration is not amongst the human rights issues taken up by the NHRC,though it has an issue i.e. ‘problems faced by denotified and nomadic tribes’ as a programme/issue pursued by it. It is insufficient and just a fraction of what should have been pursued by it.

The Commission, since its inception in 1993, has evolved in several aspects. However, its scope and mandate has largely remained chained. NHRC has monitored the implementation of its recommendation for the rehabilitation of marginalized and destitute women residing in Vrindavan. On the other hand, the relief and rehabilitation of the people displaced because of the raising of the height of Narmada Dam or the acquisition made for Special Economic Zone or for various other public purposes has remained untouched. Even if NHRC has taken up serious issues like denotified and nomadic tribes, the implementation aspect has not been impressive. NHRC is said to be a white tiger having which is unable to lead the matter to some meaningful conclusion.

V. VICTIMS OF MIGRATION

We all rise together and suffer together. However, the devil is in the detail. Around 50 percent of the migrant population is female.[26] More vulnerable is the category of migrant children which has been symbolised by the death of Aylan Kurdi. As it is alleged, when Kashmiri pandits were forced to leave Kashmir, the slogans shouted to instil a sense of fear amongst them was that Kashmir would be without male Pandit but with female Pandits.

In spite of the many benefits of migration, migrants themselves remain among the most vulnerable members of society. They are often the first to lose their job in the event of an economic downturn, often working for less pay, for longer hours, and in worse conditions

[26]As per International Migration Report 2017 published by DESA, UNO, the share of female migrants fell from 49 per cent in 2000 to 48 per cent in 2017. Female migrants outnumber male migrants in Europe, Northern America, Oceania and Latin America and the Caribbean while in Africa and Asia, particularly Western Asia, migrants are predominantly men. For the link, see *supra* note 2.

than national workers. While for many migration is an empowering experience, others endure human rights violations, abuse and discrimination. Migrants, particularly women and children, are too often victims of human trafficking and the heinous forms of exploitation that human trafficking entails. Further, in many parts of the world, migration remains one of the few options for people, particularly young people, to find decent work, and escape poverty, persecution and violence.[27]

Ostensibly, Migration and Human Rights have not been closely examined or looked into seriously, especially at the national level. The awareness regarding rights has always been low in India and if there is any, it is about fundamental rights clearly enumerated in part III of the Constitution of India. The consequential rights arising out of these rights like right to food and right to clean air etc.[28]are yet to take shape and concretize. Rights of a Migrant fall in this category. There is an uncertainty attached with the rights of Migrants. It is all encompassing yet void. Ideally, a Migrant should be seated next to the citizen. Sadly, the harsh fact is that Migrants nowhere feature in the scheme of things of the State.

Nationally, there is an urgent need of enacting a statue covering at least major aspect of migration like prohibition of forced migration, illegal trafficking of minors and women etc. Kashmiri pandits and victims of illegal trafficking can be rehabilitated and resettled under these laws. If there are any loopholes in the immoral traffic Act, another amendment may be carried out to rule out any deficiency in this regard.[29] Minor aspects of migration like poverty, unemployment, lawlessness etc. may be dealt with by bylaws, policy formulation. Migration due to marriage and white-collar jobs are normal and need not to be covered by such initiatives. Rather, they are beneficial providing interaction between different sections of people.

Mission statement of the Migration Policy Institute (MPI) states that:

"The international migration system now includes almost every country in the world. Many of them are relatively new to large-scale migration and have not developed the institutions, laws, and policies needed to manage migration flows optimally. Economic, humanitarian, social, and political priorities often dictate contradictory policy directions or conflict with international obligations. MPI uses the extensive expertise of its directors and staff to assist governments and civil-society organizations to develop solutions to these migration problems. MPI's work addresses the following questions:

How to organize an immigration agency within governmental structures?
How to address a migration/refugee emergency?
How to balance domestic security with immigration demands?
How to redirect immigration policy to reflect changing economic or demographic realities?
How to protect human rights (including the right to seek asylum) while implementing border controls and other programs to regulate entry?

[27]*Supra* note 8.
[28]The Supreme Court of India in a series of cases popularly known as *M.C. Mehta* v. *UOI* line of cases took several environment ameliorating decisions and laid down several landmark guidelines and regulations. As a consequent thereof, the apex court is being viewed as saviour of environment related issues in India. Similarly right to food in India is not a fundamental right and a public campaign for it is still in a nascent stage.
[29]An amendment to The Suppression of Immoral Traffic in Women and Girls Act, 1956, was proposed in 2006.

How to manage the impact of immigration on disadvantaged sectors of domestic society?
How to enforce domestic labour, immigration, and anti-trafficking laws without increasing the vulnerability of immigrants?"[30]

All this said and done, the Syria crisis and the consequent migrations have exposed the policy of Europe towards the migrants. It took an Aylan Al-Kurdi[31] to awaken the conscience of European leaders to the huge catastrophe of Syrian refugees. Lesser sense of urgency and importance is attached to the status of Migrants. They have their own ghettos. They live in down-town colonies and lead a socially and culturally isolated life. What can be more offending to the human rights than this? The 2005 urban riots of France have demonstrated the pain of migrants. However, the conditions have not ameliorated till date.[32] Even the people living in France for two generations have a sense of alienation.[33] They have not been accepted in the mainstream. It must be clearly acknowledged that Migration is a continuing phenomenon and to a large extent the simplest and innocuous form of Migration is good for the world as it is mutually beneficial.[34] The forced or illegal migrations are the real challenges and usually unwelcome.[35] However, in the latter cases, people do not choose to migrate rather they are forced by the circumstance to migrate. So, instead of treating them as an offender or violator of some rules/provisions, their predicament must be appreciated. Even in those circumstances they must not be deprived of the rights they have by virtue of being human i.e. right to human dignity and well- being.[36]

Between 1990 and 2017, the number of international migrants worldwide rose by over 105 million, or by 69 percent. Most of this increase occurred from 2005 to 2017, when some 5.6 million migrants were added annually.[37] Women comprise slightly less than half of all international migrants. The share of female migrants fell from 49 per cent in 2000 to 48.4% in 2017. Female migrants outnumber males in all regions except Africa and Asia; in some countries of Asia, male migrants outnumber females by about three to one.[38] The type of Migration is also sometimes gender specific. For example, in India, post-marriage migration is mostly migration of the bride/female while education related migration largely involves males.

Be it war or human trafficking or civil strife, the worst victim of migration is women and child. Their health suffers, sometimes irreparably. Education and upbringing of children suffer. Trauma and mental scar are something which never leaves them for their life and do

[30]Mission statement of MPI is *available at*: http://www.migrationpolicy.org/about/ mission (last visited on April 25, 2019).
[31]Aylan Al-Kurdi, a baby boy, was amongst hundreds of Syrian refugees drowned while fleeing from the clutches of ISIS. Aylan's shocking picture of a lying face- down near Turkey coast finally made an impact on the European Union leaders and Germany and U.K. opened their borders for these refugees.
[32]Angelique Chrisafis, " 'Nothing's Changed': 10 years after French riots, banlieues remain in crisis", *The Guardian*, October 22, 2015, *available at*: http://www.theguardian.com/world/2015/oct/22/nothings-changed-10-years-after-french-riots-banlieues-remain-in-crisis (last visited on April 25, 2019).
[33]*Ibid.*
[34]The Mission statement of International Organization for Migration (IOM) states *inter alia* that it acts to encourage social and economic development through migration. The Mission statement is *available at*: http://www.iom.int/mission (last visited on April 25, 2019).
[35]The Mission statement of International Organization for Migration (IOM) states *inter alia* that it acts to advance understanding of Migration issues. *Ibid.*
[36]*Ibid.*
[37]*Supra* note 2.
[38]*Ibid.*

not allow them to grow as a normal cheerful human being. The old age and physically disabled are other categories which suffer and sometimes abandoned to live on their own, in the most hostile circumstances.

"Migrants are vulnerable whatever the reason they embark on their journey towards a better life, and it is our duty to support them," said Francesco Rocca, President of the International Federation of Red Cross and Red Crescent Societies (IFRC).

VI. AWARENESS AND SENSITISATION

'Migration' should cause positive ripples. The resistance to Migrants stems out of the apprehension that the inhabitants would be deprived of their resources and employment opportunities by the Migrants. This is, however, not the real picture. Knowledge of legal instruments protecting the rights of migrants is low and hence the violation of their right.

The International Migration Report 2017 shows that international migration makes an important contribution to population growth in many parts of the world and even reverses population decline in some countries or areas. Between 2000 and 2015, migration contributed 42% of the population growth in Northern America and 31% in Oceania. In Europe, the size of the total population would have declined during the period 2000-2015 in the absence of migration.[39]

There are some very interesting statistics regarding Migration, revealing significant trends. The International Migration Report 2017 states that 3.4% of the world's inhabitants today are international migrants. This reflects a modest increase from a value of 2.8% in 2000. By contrast, the number of migrants as a fraction of the population residing in high-income countries rose from 9.6% in 2000 to 14% in 2017.[40] So, the motive behind migration is to lead a quality life which impliedly involves preservation and continuous addition of all human rights.

There is a yearning for a better living standard. Individuals have a right to evolve and there is a right to movement and trade as world is now a small village. Migration is mainly a search for 'opportunities'.

In 2017, high-income countries hosted 64%, or nearly 165 million, of the total number of international migrants worldwide. Moreover, most of the growth in the global population of international migrants has been caused by movements toward high-income countries, which host 64 million of the 85 million migrants added since 2000.[41] So, the quest is for growth of individual which could not be achieved at their place of origin. The relation between the Migrants and their host is a symbiotic one. Migrants need better places for their growth and their hosts need them to 'fill in the gap' in their otherwise complete world. Cheap workforce is often cited as a major benefit which accrues to the host country or region.

For example, in Bangladesh, external and internal migration is alleviating poverty for those who stay behind in two distinct ways. External migration, particularly short-term, promotes economic development through remittance flows, while internal migration, especially rural to urban, encourages economic self-sufficiency for farmers who remain at

[39] *Supra* note 2.
[40] *Ibid.*
[41] *Ibid.*

home by raising agricultural wages. Thus, reducing poverty through migration in Bangladesh is not just the purview of those who temporarily immigrate to another country. Similarly to international migrants, internal migrants who leave the countryside for the city are contributing to wage growth in their home villages.[42]

International remittances however also have indirect effects on the migrant's native economy. Even non-migrant households in areas of extensive migration tend to see increased local demand from the inflow of remittances. External remittances, therefore, create an opportunity for workers in the form of employment and rising wages.[43]

International remittances still remain a crucial factor in lifting poor households out of poverty in the developing world. However, even if levels of remittance flows recovers soon—as is expected by the World Bank—having another approach to reducing poverty through migration would serve as a fillip to Bangladesh and other developing countries if future downturns in remittances occur.[44]

Nevertheless, the bias remains. At least 1,000 highly skilled migrants seeking indefinite leave to remain (ILR) in the UK are wrongly facing deportation under a section of the Immigration Act designed in part to tackle terrorists and individuals judged to be a threat to national security. The highly skilled workers – including teachers, doctors, lawyers, engineers and IT professionals – are being refused ILR after being accused of lying in their applications either for making minor and legal amendments to their tax records, or having discrepancies in declared income. Saleem Dadabhoy, a scion of one of the wealthiest families in Pakistan, is facing deportation under section 322(5) despite three different appeal courts having scrutinised his accounts and finding no evidence of any irregularities, and a court of appeal judge having ruled that he is trustworthy and credible. His deportation would directly lead to the loss of 20 jobs, all held by British citizens, and the closure of a British company worth £1.5m.[45]

Similarly, the acknowledgement of violation of human rights of Migrants is very rare. Only some impartial agencies bring the issue to the forefront with such urgency as is required. For example, the international humanitarian organisation, Doctors without borders (Medecins Sans Frontiers or MSF) says it is concerned about the fate of hundreds of migrants and refugees, including women and children being held in a dangerously overcrowded detention centre in Libya.[46]

Head of MSF's emergencies desk, Karline Kleijer said "the situation is critical". The group says these people are kept in inhuman conditions without adequate food or water.[47]

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[42]Nathan Ghelli, "Reducing Poverty Through Migration in Bangladesh", *Borgen Magazine*, May 06, 2018, *available at*: http://www.borgenmagazine.com/reducing-poverty-through-migration-bangladesh/ (last visited on April 25, 2019).
[43]*Ibid.*
[44]*Ibid.*
[45]Amelia Hill, "At least 1000 highly skilled migrants wrongly face deportation, experts reveal", *The Guardian*, May 06, 2018, *available at*: https://www.theguardian.com/uk-news/2018/may/06/at-least-1000-highly-skilled-migrants-wrongly-face-deportation-experts-reveal (last visited on April 25, 2019).
[46]Ignatius Annor, "Overcrowded migrant centre in Libya is 'inhumane'-MSF", *Africanews*, May 06, 2018, *available at*: http://www.africanews.com/2018/05/06/overcrowded-migrant-centre-in-libya-is-inhumane-msf/ (last visited on April 25, 2019).
[47]*Ibid.*

On May 1, 2018, the United Nations Refugee Agency (UNHCR) airlifted 88 people in need of international protection out of Zuwara, Libya. They were taken to a detention centre in Tripoli with a view to identifying the most vulnerable cases for potential evacuation abroad.[48] The group is strongly urging all international agencies in Libya, representatives from countries of origin and the Libyan authorities to do everything they can to find a solution for these people over the next few days.

Given the nature and type of migration, the first impediment is the identification and acknowledgement of the problems associated with the migrants. The case of Rohingya refugees is a case in hand. Rohingya refugees are fleeing Myanmar's Rakhine state and relocating in neighboring countries. An estimated 693,000 Rohingya have fled mass violence and persecution since 25 August 2017 and crossed the border into Bangaldesh. It's a huge effort, which sadly won't suffice," said Francesco Segoni, Emergency Coordinator for Doctors Without Borders/Médecins Sans Frontières (MSF). "There just isn't enough land available, the camp is too crowded." "Where relocation is already happening, sanitation and hygiene conditions are below the minimum standards. When the rain comes, not only do we anticipate flooding and landslides, but also an exponential increase in the risk of an outbreak. Latrines will go underwater, contamination seems inevitable. We are bracing for the worst."[49]

Estimates are that around 200,000 people are at risk and 15% of the camp could be flooded, according to the UNHCR. While some 680 acres more are planned to be provided by the government at an unknown point in the future, that still remains well below what would be needed: 10 acres is estimated to hold 10,000 people, according to the UNHCR. There remains an urgent need to provide water for the new and existing refugees, especially in newly designated expansion areas. The provision of clean drinking water is an absolute priority in the camp: it's as much a life-saving activity as our medical work, says Segoni. We are racing against time to reach out to new areas and keep up with the ever-evolving context.[50]

The Libyan authorities have transferred some people to other detention centres in an attempt to reduce the extreme overcrowding and the International Organisation for Migration has initiated a process of "voluntary humanitarian return" for some detainees. However, hundreds of people remain trapped inside the detention centre in Zuwara with no solution in sight.[51]So, several aspects of Migration is unknown to a substantial section of the society including the lawmakers, partly because one kind of migration and its paraphernalia is different from another kind. Migration is a very complex issue since it is multi-sectoral and also because it is encumbered by the prevailing culture of the migrant as well as the host country.

VII. MIGRATION LAW

International Migration Law (IML), which is the international legal framework governing migration, is not covered by any one legal instrument or norm. Instead, IML is an

[48] *Ibid.*
[49] "Bangladesh: An ever expanding Rohingya refugee camp Kutupalong-Balukhali", *Medecins Sans Frontiers*, May 07, 2018, *available at*: https://www.msfindia.in/bangladesh-ever-expanding-rohingya-refugee-camp-kutupalong-balukhali(last visited on April 25, 2019).
[50] *Ibid.*
[51] *Supra* note 46.

umbrella term covering a variety of principles and rules that together regulate the international obligations of States with regard to migrants. Such broad range of principles and rules belong to numerous branches of international law such as human rights law, humanitarian law, labour law, refugee law, consular law and maritime law.[52]

In India, the Constitution of India, the Citizenship Act, 1955, the Foreigners Act, 1946 and the Foreigners Tribunal Order, 1964 comprises a comprehensive statutory regime dealing with both substantive and procedural questions of citizenship and migration. Then, there is the Emigration Act, 1983. As per the this, Emigration Check Required (ECR) categories of Indian passport-holders require "emigration clearance" from the office of Protector of Emigrants (P0E) for going to 18 countries, including the United Arab Emirates, Saudi Arabia, Qatar, Oman, Kuwait, Bahrain, Malaysia, Libya, Jordan, Yemen, Sudan, Afghanistan, Indonesia, Syria, Lebanon and Thailand.[53]

From Human Rights perspective, majority of migrants are usually not aware of these laws or treaties etc. Safe, orderly and regular migration need to be emphasized upon. However, the irregular migrants also have human rights. So, the solution is to support countries rescuing, receiving and hosting large numbers of refugees and migrants; integrate migrants – addressing their needs and capacities as well as those of receiving communities – in humanitarian and development assistance frameworks and planning; combat xenophobia, racism and discrimination towards all migrants; develop, through a state-led process, non-binding principles and voluntary guidelines on the treatment of migrants in vulnerable situations; present a framework for comprehensive international cooperation on migrants and human mobility; and strengthen global governance of migration, including by bringing IOM into the UN family and through the development of a global compact for safe, orderly and regular migration.[54]

VIII. CONCLUSION

Still, even in January 2016, Syrian nationals were dying off the coast of Greece and Turkey in an attempt to flee Syria. Forty-four people drowned after three refugee boats sank on 22.01.2016 off Greece. There were 20 children among dead. The Greek coastguard said they had rescued 74 people after two boats ran into trouble off the Greek Aegean islands of Farmakonisi and Kalolimnos in the early hours.[55] It is high time that the migrants be recognised and accepted as one of the most vulnerable section of society across the globe. If governments alone cannot bear with the economic burden created by the influx of migrants, corporate sector may be asked to join in rehabilitation and settlement of migrants. It may be made a Corporate Social Responsibility to rehabilitate Migrants/refugees.

The 2030 Agenda for Sustainable Development recognises the positive contribution of migrants for inclusive growth and sustainable development. It further recognises that international migration is a multi-dimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. International cooperation is critical to ensure safe, orderly and regular migration

[52]Information is *available at*: https://www.iom.int/migration-law(last visited on April 25, 2019).
[53]*Supra* note 5.
[54]Information is *available at*: https://www.iom.int/global-compact-migration (last visited on April 25, 2019).
[55]Published as news report in *The Tribune*, January 22, 2016. The news item is available at web link http://tribune.com.pk/story/1032290/at-least-21-migrants-dead-as-boats-sink-off-greece/ (last visited on April 25, 2019).

involving full respect for human rights and the humane treatment of migrants and refugees.[56] It is imperative that emergent situations be seen with a sense of urgency and required policy and fiscal measures may be taken globally.

IOM, UNHCR and some 65 other organizations yesterday appealed in Geneva to donors for USD 550 million to support the ongoing humanitarian response. With global forced displacement at a record high of some 60 million people and increasingly impacting countries of the Global North, 2015 saw over a million refugees and migrants arriving in Europe by boat.[57] Around 850,000 of these crossed from Turkey to Greece, with most continuing through the Balkans and towards Austria, Germany, Sweden and other western European countries. The appeal aims at funding humanitarian operations in 2016 across the affected countries, with approximately half of the funds allocated for Greece.

At the same time, there is a need to publicise the benefits of migration. Remittances from developed countries to developing countries are an established phenomenon. In developing countries, remittances have a role in reducing poverty.[58] H1B visas may or may not be given. That is the prerogative of U.S.A. as it does not involve any violation of human rights. However, where the very survival or basic amenities or the question of evolving into a better human being is concerned, that requires a detailed contemplation and compassionate law-making.

The Human Rights paradigm keeps evolving with time. The political and civil rights were followed by economic and social rights at the international level. The Universal Declaration of Human Rights was devoid of any legal obligation and hence the necessity of some legally binding convention was felt.

The non-acceptance of people living in France for more than two generations speaks volume about the issue of Migration dealt with legally or even socially or politically. This borders on the verge of chauvinism and racism. Otherwise how could one accept the rejection of migrants/refugees who have been living for two or more generations on a land earning their bread and butter, which is their birthplace as well as the workplace.

World has become a global village. People need to mingle and exchange their goods and services. Developing and developed world need to bridge their vast gap.[59] Same applies to the migration within a country. Migration should be taken as a positive development of the modern world and its benefits should be optimally utilised while minimizing its side effects through treaty and convention in case of immigration/emigration and through policy intervention in case of regional migration in a country.

Migration is indispensable. It cannot be called a necessary evil also because it involves more gains than losses provided it is regulated with an element of humanity and a sense of the compelling need of migration of different types and hues. A combined effort of

[56]*Supra* note 2.
[57]The news item is available on the website of IOM at the web link: http://www.iom.int/news/iom-unhcr-partners-seek-usd-550-million-europes-refugees-and-migrants (last visited on April 25, 2019).
[58]The UNCTAD Report, *available at*: https://unctad.org/en/docs/ditctncd20108_en.pdf (last visited on April 25, 2019).
[59]It is one of the Millennium Development Goals also. The related text is *available at*: https://www.wto.org /english/thewto_e/coher_e/mdg_e/development_e.htm (last visited on April 25, 2019).

nations, international organizations/institutes and migrants' rights activists will settle the dust causing the violation of human rights irrespective of their age, gender and race.

PROTECTION OF ENVIRONMENT IN INTERNATIONAL ARMED CONFLICTS

Ashutosh Acharya[*]

I. INTRODUCTION

Environment is vulnerable and represents the living space, the quality of life and the very health of human beings, including generations unborn.[1] It is because of this reason that various environmental principles have developed to lay down the general human and humanitarian obligations to protect the environment. The continuing warfare since ages has led to the degradation of environment and armed conflicts can be held responsible for the same, as huge destruction of environment takes place during conflict situations which leads to direct and immediate damage and imparts a long term effect, resulting ultimately into unhealthy environment for the surrounding living beings affecting them directly and the ecology of the earth as a whole. For instance, during the Vietnam war, wherein two serious tactics were employed which included the Napalm bomb and the Agent Orange (Herbicide) where the former could actually catch up anything and burn it in around ten minutes and the latter caused a much severe environmental damage leading to human suffering, resulting into defoliated leaves, barren agricultural lands and death of the living persons as well as the unborn,[2] the effect of which persists till date.

The International Law Commission (ILC) works on the protection of environment in international armed conflicts and can be taken as an ideal draft.In addition to this the paper will discuss the laws that govern these issues during war[3] and also covers issue arising out of pre-war and post war obligations as measures to be looked in, to deter and reduce the harm done to the environment in times of conflict.

We see a culmination of principles present in the International Humanitarian law and the International Environmental law which provide for general obligations to protect the environment. In this regard we shall see instances where disregard towards environment has been witnessed and due to which the researcher feels that the area has to be revisited in order to cover up the inadequacies present and fulfil the same with best possible means.

II. GENERAL PRINCIPLES (CUSTOMARY INTERNATIONAL ENVIRONMENTAL LAW) OF INTERNATIONAL ENVIRONMENTAL LAW APPLICABLE IN ARMED CONFLICT SITUATIONS

A. Application of Principle 21 of Stockholm Declaration, 1972 in Armed Conflict Situation

Principle 21 of Stockholm Declaration enumerates that:

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[1] "Legality of the Threat or Use of Nuclear Weapons", Advisory Opinion (1996) International Court of Justice (ICJ), I.C.J. Reports, 226, *available at*: http://www.refworld.org/docid/4b2913d62.html (last visited on October 31, 2018)

[2]http://vietnamawbb.weebly.com/napalm-agent-orange.html (last visited on October 31, 2018).

[3] International Law Commission, Sixty-fifth session (second part), Provisional summary record of the 3188th meeting held at the Palais des Nations, Geneva, on Tuesday, July 30, 2013, "Protection of Environment in Relation to Armed Conflicts", A/CN.4/SR.3188, *available at*: http://legal.un.org/ilc/documentation/english/a_cn4_sr3188.pdf (last visited on November 07, 2018).

"*States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*."[4]

The principle mentioned above shows similar principle enumerated in the *Trial Smelter*[5] case of 1938 where the court seems to establish a state responsibility in peace time but when it comes to the principle 21 of the declaration it seeks to extend the protection at all times and raises a general obligation upon the states to do the required. This declaration by way of imposing an obligation upon the states renders to limit the acts of states within their particular boundary whether it is a peace time situation or armed conflict situation.

(i) Laws of Neutrality

This flows from the above principle which is essentially a question of state territorial sovereignty, hence the neutral states' land and territorial sea, and airspace above these two, is inviolable from the effects of war and therefore, International environmental law is similarly based on state sovereignty. Principle 21 of the Stockholm Declaration extends this inviolability with regard to trans-boundary pollution. Principle 21 was recently reaffirmed in the United Nations Convention on the Law of the Sea under Article 194 which says that territorial inviolability can include the prohibition of any damage even environmental pollution damage seems to be settled.[6] This was witnessed in a case law where collateral damage caused to neutral Switzerland was compensated bythe allies.[7] Seemingly therefore "serious" or "significant" environmental damage caused to neutrals is prohibited, even if collateral. Thus, belligerent parties must take utmost care when targeting objectives near the neutral state's border or which is likely to affect neutral states' interest adversely.[8]

B. Application of the Principle of Rio Declaration, 1992 in armed conflict situation

(i) PRINCIPLE 24

"Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary."

The principle may be interpreted as referring to the continued application of IEL during warfare. Since Rio Declaration is a non-binding international document[9] and the only way for Principle 24 to become binding would be for the principles contained in the Rio Declaration to rise to the level of acceptance and practice of customary international law.

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[4] Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law, United Nations Environment Programme, November 2009.
[5] Trail Smelter Case (*United States* v. *Canada*) (April 16, 1938 and March 11, 1941) III Reports of International Arbitral Awards (R.I.A.A.) 1905.
[6] Michael Bothe, Carl Bruch, *et.al*.,"Jordan Diamond and David Jensen, 'International law protecting the environment during armed conflict: gaps and opportunities" 92 *International Review of the Red Cross* 577 (September 2010).
[7] *Id.* at 569.
[8] *Ibid*.
[9] Michael N. Schmitt, "Green war: An assessment of the environmental law of international armed conflict" 22(1) *Yale Journal of International Law* (1997).

While much commentary suggests that many Rio principles may be customary international law or are emerging provisions of customary international law such as on the provisions of public participation. Justification to this may be the sustenance of human population in a healthy environment. Destruction of natural environment is a direct threat to human existence, measure to take pre-emptive action is at the core of human requirements. Thus, even though the provision may not be explicitly binding however, it denotes or reiterates nothing less than securing the peremptory norm of International Law.

Further it is pertinent to note that in the Nuclear Weapon's Case[10] the Court was of the view that the issue is not whether the treaties relating to the protection of the environment are or not applicable during an armed conflict, but whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.[11] However, these observations are, of course, significant. They provide general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict, despite the fact that, as indicated in the written submissions relating to the Advisory Opinion proceedings; there was no general agreement on the specific legal question.[12]

(ii) PRINCIPLE 25

> *"Peace, development and environmental protection are interdependent and indivisible."*

As recognized in the last paragraph of the preamble of the Rio Declaration, the integral and interdependent nature of the Earth needs to be acknowledged. Sustainable development is an integrative concept; the interdependency stressed in Principle 25 refers to the necessity of integration, which forms the backbone of the concept of sustainable development. Further if we focus upon the provision so constructed, we'll see that it starts from the word 'Peace' and then 'Development' and 'Environmental Protection' which shows that unless and until there is no peace development and environmental protection cannot be attained, therefore in a war like situation the principles and the aspirations of the declaration is unachievable.

(iii) PRINCIPLE 26

> *"States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations."*

The general principle of peaceful settlement of disputes is one of the fundamental principles enshrined in the Charter of the United Nations. Regarding dispute settlement in the field of environment,[13] a number of significant developments have taken place, including the decision of 1993 of the International Court of Justice to create Chamber for Environmental Matters, under Article 26(1) of the Statute of the Court. Indeed, most environmental treaties stipulate that the parties involved should first aim to resolve disputes through negotiation. If this is unsuccessful, many treaties provide for further arrangements which may involve the

[10] *Supra* note 1 at 226-241, para. 29.
[11] Nada Al-Duaiji, *Environmental Law Of Armed Conflict* 105 (Transnational Publishers, Inc. Ardsley, New York, 2004).
[12] *Id.* at 106.
[13] Agenda 21: Programme of Action for Sustainable Development (June 14, 1992) UN GAOR, 46th Session, Agenda Item 21, UN Doc. A/Conf. 151/26.

assistance of third parties. Some treaties provide that the dispute will be submitted to either arbitration or the International Court of Justice, if negotiations have proven unsuccessful. For example, the Convention on Climate Change provides, in Article 14.1: "*In the event of a dispute between any two or more parties concerning the interpretation or application of the Convention, the Parties concerned shall seek settlement of the dispute through negotiation or any other peaceful means of their own choice".*[14] *The Convention on Biological Diversity states in Article 27.1 that in the event of a dispute, the parties concerned "shall seek solution by negotiation*".[15] Paragraph 2 of the same Article creates the possibility for parties, in case of non-agreement by negotiation, to request mediation or seek the good offices of a third party.[16]

Although in many of these cases the dispute settlement clauses are optional, there is a growing trend towards compulsory dispute settlement. Part XV of UNCLOS makes it obligatory for State Parties to settle their disputes concerning the interpretation and application of the Convention by peaceful means. Two recent international instruments have applied the dispute settlement provisions of UNCLOS: part VIII of the 1995 Agreement on Fish Stocks, and Article 16 of the 1996 Protocol to the London Dumping Convention. In both cases, the UNCLOS procedure is applied whether or not the Parties to the Agreement or Protocol are also Parties to UNCLOS. In October 1996 the International Tribunal for the Law of the Sea was inaugurated in Hamburg. The Tribunal will be called upon to settle disputes arising out of interpretation or application of UNCLOS.

In order to suffice the above made arguments, it is submitted that the need to protect the environment during armed conflict is set forth in several international instruments.[17] The general need to protect the environment during armed conflict is also articulated in some military manuals, official statements and reported practice.[18] It is further reflected in condemnations of behaviour in armed conflict that caused severe damage to the environment.[19] In their submission to the International Court of Justice in Nuclear Weapons Case[20] many states emphasized that international law recognizes the importance of protection of environment during armed conflict, and they did not limit themselves to the requirements of treaties specifically applicable to armed conflict.[21]

[14] UN General Assembly, "United Nations Framework Convention on Climate Change : resolution / adopted by the General Assembly", (January 20, 1994) A/RES/48/189, available *at:* http://www.refworld.org/docid/3b00f2770.html (last visited on November 01, 2018).

[15]Convention on Biological Diversity, 1992, 1760 UNTS 79; 31 ILM 818, *available at*:http://www.cbd.int/convention/text (last visited on November 01, 2018).

[16] See Part V of the North American Agreement on Environmental Cooperation, 1994.

[17] Example, World Charter for Nature, Principle 5 and Principle 20; Rio Declaration, Principle 24; Guidelines on the Protection of the Environment in Times of Armed Conflict; San Remo Manual, rules 35 and 44.

[18] ICRC, Jean-Marie Henckaerts And Louise Doswald-Beck (eds.), II *Customary International Humanitarian Law* (Cambridge, 2005): Practice, San Remo Manual on International Law Applicable to Armed Conflicts at Sea(1995) 119, e.g., the military manuals of Australia, Republic of Korea and United States, the statement of Yemen and the reported practice of Lebanon.

[19]*Ibid*, e.g., the statements of China, Colombia, Germany, Islamic Republic of Iran, Netherlands and United Kingdom.

[20]*Supra* note 1 at 226, para.29.

[21]*Ibid*, the written statements submitted to the ICJ in the N*uclear Weapons case* by Egypt, Islamic Republic of Iran, Malaysia, Qatar and Solomon Islands.

III. SPECIFIC INTERNATIONAL HUMANITARIAN LAWS FOR THE PROTECTION OF ENVIRONMENT AT THE TIME OF ARMED CONFLICT

A. Critical evaluation of Additional Protocol I (Article 35 (3) and 55), 1949

Article 35 (3) gives direct and specific protection to the natural environment at the time of International Armed Conflict and states that:

> *"It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".*

The law is very much in its place to guard the environment at the time of International Armed Conflict, but the potentials of these laws are in question and have to be examined thoroughly and critically, with reference to the same, it is pertinent to note here that the provision mentioned above follows after the prohibition of superfluous injury and restrictions on choosing the means and methods of warfare[22] where it can be said that no such means and methods can be applied that are not justified under the known principle of military necessity.

Military necessity here means that no such destruction can be made at time of war that is not justified as per the requirement of military action, further what connotes to military necessity is question of fact and has to be determined on case to case basis and there is no hard and fast formula to derive the same.Moreover it is a discretionary power of the commander in charge to decide whether a particular act at the time of war is justified under the above mentioned principle or not.[23]

In this regard one author has said that Military necessity is a *"legal concept used as a part of the legal justification for attacks on legitimate military targets that may have adverse, even terrible, consequences for civilians and the civilian objects"*.[24]

Thus, this brings us to the derivation that the law mentioned in the additional protocol is subject to a high degree of subjectivity, where things can be argued as there exists no parameter for defining military necessity and only a direct case would impose a violation. Therefore this brings us to draw that there is no direct protection of the environment although we see that a provision is made to deal with the issue in a precise manner but even then it goes into the favour of the party who bears the burden to show the necessity of invoking the damage to the environment and natural environment so mentioned in the Protocol struggles with the secondary treatment it gets within the regime it is protected.

As regards Article 55 we see that the same provides for the protection of environment in a manner conducive to the protection of civilian population where it elucidates that:

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[22] International Committee of the Red Cross (ICRC), "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)", June 08, 1977, 1125 UNTS 3, Article 35 (1) & (2), available at: http://www.refworld.org/docid/3ae6b36b4.html (last accessed on October 30, 2019).

[23] Yves Sandoz, Christophe Swinarski, *et.al.* (eds.), *Commentary on Additional Protocols of June 08, 1977, to the Geneva Conventions of August 12, 1949International Committee of the Red Cross* 393 (Martinus Nijhoff Publishers, Geneva, 1987), Property Of U.S. Army The Judge Advocate General's School Library.

[24] Francoise Hampson, "Military Necessity" in Roy Gutman & Rieff (eds.), 251 *Crimes of war "What The Public Should Know*" (1999).

"(1) Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. (2) Attacks against the natural environment by way of reprisals are prohibited."[25]

While Article 35 provides the basic rules and broaches the problem from the point of view of methods of warfare, Article 55 concentrates on the survival of the population, so that even though the two provisions overlap to some extent but they do not duplicate each other.[26] Further, it is important to note that, in spite of the great environmental protection provided by the Protocol I, it fail to govern all environmental destruction and affects only the destruction intended or reasonably expected to cause widespread, long-term, and severe damage to the environment where it seems that all three elements must be met for the prohibition to apply. Thus in this regard an author has argued that this being a very stringent standard to apply, environmental damage that meets any of the three elements is more than the international community should tolerate, even in wartimes.[27]

Further, the threshold provided for the protection is too high where from an environmental point of view the legal standpoint is highly unsatisfactory and the conditions attached to the prohibition of Article 35 and 55 of Additional Protocol I are excessively restrictive, making the prohibition too much restrictive.

Moreover, Article 55 tends to protect the environment when it is in the form of civilian objects and to that extent restrictive conditions of Article 35 and 55 of AP I do not apply as the elements of environment subject to the protection is shaky as environmental elements can easily become military objectives. For example, any protected zone can be brought under military action where military advantage is anticipated as in the Vietnam War, Herbicides (Agent Orange) were used to defoliate the leaves as the same constituted definite military advantage. Thus elements of environment are too likely to become military objectives, invalidating their protections as civilian objects.[28]

Apart from this Article 85(5) of the 1977 Additional Protocol I specifies that grave breaches of that instrument or of the 1949 Conventions constitute war crimes; however, it does not identify breaches of its environmental provisions (Articles 35(3) and 55) as grave breaches- although *"extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly"* is so classified by Article 147 of Geneva Convention IV and is thus a war crime for parties to the Protocol. In addition, the I.L.C. had included in its first reading of the Draft Code of Crimes against the Peace and Security of Mankind, the "*employing of methods and means of warfare which are intended or may be expected to cause wide-spread, long-term and severe damage to the natural environment"* as an exceptionally serious war crime.[29]

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[25]*Supra* note 22, art. 55.
[26]*Supra* note 1.
[27] Neil A.F. Popovic, "Humanitarian Law: Protection of Environment, and Human Rights" 8 *Georgetown International Environmental Law Review* 73 (1995).
[28]*Supra* note 10.
[29] A. Roberts, "Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War" in R.J. Grunawalt, John E. King, *et.al.* (eds.), 69 *Protection of the Environment during Armed Conflict* 248 (International Law Studies, 1996).

B. ENMOD Convention

The objective of the Convention was to prohibit the use of environmental modification techniques as a means of warfare in which Article (1) states that *"each state party to this convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long lasting or severe effects as the means of destruction, damage or injury to any other State Party."*

Therefore, here it is seen that while Article 35(3) of Additional Protocol I aims to protect the natural environment per se, ENMOD prohibits the use of techniques that turn the environment into a "weapon." With regard to the same another noticeable difference with the Article of Additional Protocol I is that ENMOD requires a much lower threshold of damage, with the triple cumulative standard being replaced by an alternative one: "widespread, long lasting orsevere." In addition, it appears that the terms were interpreted differently. For instance, under ENMOD the term "long-lasting" is defined as lasting for a period of months or approximately a season, while under Additional Protocol I "long-term" is interpreted as a matter of decades.[30] These qualifications have received severe criticism for their subjectivity and complexity of meanings,[31] also the language of the convention was drafted intentionally so as not to hinder any vital military interests.[32] The above can be evidenced as till now no case has been witnessed under the convention as the threshold seems to be unrealistic to the instance that have happened so far.[33]

C. UNGA Resolution[34]: An Aftermath of Gulf War

In this Resolution 47/37 of 9 February 1993, the UN General Assembly stated in the Preamble that *"destruction of the environment, not justified by military necessity and carried out wantonly is clearly contrary to existing international law."* With regard to the same resolution then expressed concern that the relevant provisions of international law on the matter *"may not be widely disseminated and applied."* Further, the resolution *"urges States to take all measures to ensure compliance with the existing international law"* on the issue concerned, including by *"becoming Parties to the relevant international conventions"* and *"incorporating these provisions of international law into their military manuals."* Thus here it is seen that after the gulf war it was the first resolution that General Assembly took as course of action to lay before themselves the duty to protect the environment in a manner as consistent as possible though the resolution however did not identify specific gaps in the existing international legal framework, and consequently did not recommend developing or strengthening particular measures. The significance of the resolution comes from the states getting concerned about the issue of protection of environment in armed conflicts and in the form of a resolution they try to affirm a law based world society.

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[30] *Id.* at 416.

[31] *Ibid*, see also Paul Fauteux, "The Gulf War, The ENMOD Convention and the Review Conference" 18 *UNIDIR Newsletter* 7, 8 (1992).

[32] Paul Fauteux, *Ibid* ; see also Michael Bothe, "The Additional Protocols" in Ronzitti (ed.), 7 *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 61 (Martinus Nijhoff Publishers, London, 1988).

[33] Gulf War II, 1991.

[34] UN General Assembly resolution 47/37, February 09, 1993, *Protection of the Environment in Times of Armed Conflict*, UN Doc. A/RES/47/37, *available at*: http://www.un.org/documents/ga/res/47/a47r037.htm (last visited on November 01, 2018).

IV. CONCLUSION

After discussing the instances of major environmental destruction, the development of legal regime on the protection of environment in international armed conflicts and the implication of the laws that exist today, an effort is made to try and suggest recommendations.

The existing international legal framework, including International Humanitarian Law and the International Environmental Law contain provisions that either directly or indirectly protect the environment during armed conflict. However, in practice these provisions have not been effectively implemented due to which a huge amount of irreparable injury to the environment has been witnessed by the world community. It appears, the only exception to failure of enforcement has been the 1990-1991 Gulf War, where Iraq took some measures, held liable and billions were compensated for the damages.

Here it is intended to seek for probable solutions that can be achieved where we see that the International scholars are divided on two points i.e. whether the existing legal regime should be improved or should there be a new legal regime. Therefore, the chapter has been divided into two parts where the former shall suggest that how the existing regime can be improved and the later shall argue for a completely new code to deal with the protection of environment as a separate issue altogether and provide a special protection thereby making a distinct legal body that will understand the nature of the concern and the necessity to protect the environment, not from humanitarian perspective rather from the perspective of humanity.

V. FINDINGS AND SUGGESTIONS

A. Improving the Existing Legal Regime

(i) Definition of "Natural Environment"

From the eco-centric point of view the word 'natural' has to be necessarily defined where AP I does not clearly define it but only make a mention. Similarly, ENMOD convention provides a broad range of environmental component which includes "Earth's biota, lithosphere, hydrosphere, atmosphere and outer space".[35] Under environmental law the definition of "environment" usually includes elements of fauna, flora, soil, water and climatic factors, material assets of historic or cultural heritage, landscape and amenity value.[36] This *per se* doesn't deal with damage to persons and property but only environment. In this regard the probable definition would interpret "environmental damage" widely, to include fauna and flora, climatic and biotic elements, and the physical forces that they occur within.[37]

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[35]Article II.

[36] Philippe Sands, *Principles of International Environmental Law* (Manchester University Press, Manchester, 1995); see also Karen Hulme, "Armed conflict, wanton ecological devastation and scorched earth policies: how the 1990-91 gulf conflict revealed the inadequacies of the current laws to ensure effective protection and preservation of the natural environment" 2 *Journal of Armed Conflict Law* 45 (1997), *available at*: http://heinonline.org/HOL/License (last visited on November 05, 2018).

[37] David Tolbert, "The Environmental Impact of War: A Scientific Analysis and Greenpeace's Reaction" in Glen Plant (ed.), *Environmental Protection and the Law of War*71 (Belhaven Press, London, 1992). The ICRC also wanted the term understood in its widest sense to cover the biological environment in which a population is living. See *supra* note 23 at 662.

(ii) Article 35 and 55 of the Additional Protocol I to the 1949 Geneva Conventions

Article 35 and 55 of the AP I do not effectively protect the environment during armed conflict due to stringent and imprecise threshold required to show the damage as all the three conditions i.e. "widespread, long-term and severe" has to be proven. Further, this standard is almost impossible to be matched with as the terms are not defined.[38] Thus it is suggested that these terms should be defined and made precise, moreover, ENMOD convention can be taken as an example and minimum standard should be maintained taking the same into consideration.[39]

(iii) International Humanitarian Law provides Indirect Protection

It is seen that restrictions on the means and methods of warfare provide for a direct protection to the human population or the civilians and protects the environment that is necessary for the survival of the human population and does not cover the environmental components that are not necessary for the human population. In addition to that environment lacks the identity of being protected as a primary object it rather gets a secondary treatment. Thus, it is necessary to update the guidelines on the Protection of the environment during armed conflict where task of the ICRC (International Committee for the Red Cross) is imminent.[40] Under this the aim should be to highlight the importance environment *per se* and advocate the continued application of environmental law during the armed conflict.

(iv) Lack of case law protecting the environment during armed conflict

The lack of case laws show that there is reluctance or difficulty in bringing claims under the existing legal regime before the courts or the tribunals as very less importance is given to such issues and only a very limited number of case laws have been brought before the national, regional and international courts and tribunals. Moreover, in cases where decisions were handed down, procedural rather than merit-based reasoning has predominated.

Thus in this regard it is suggested that the attitude of the legal practitioners, judges and the prosecutors should change where they should take serious note of such violations, moreover, they should be trained on the content of international law that can be used to prosecute environmental violations during armed conflict.[41] It is necessary to develop case laws as it helps bringing clarity to the subject.

(v) Absence of International Mechanism to address infringements

There is no permanent international mechanism to monitor legal infringements and address compensation claims for environmental damage sustained during international armed conflicts. The world community lacks tools to monitor legal violations, determine liability and support compensation processes due to which there is an absence of sanctioning body that can provide deterrence in order to prevent environmental damage and redress the infringements.

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[38] Karen Hulme, *supra* note 36.
[39] *Supra* note 23.
[40] *Ibid.*
[41] *Ibid.*

In this regard it is pertinent to note that UNEP suggests that there should implementation of the international laws that protect environment at times of armed conflict into the national level where it asks for capacity building programmes for legal drafters but the researcher disagrees to the extent that such incorporation again brings us back to the same point where nation states show their reluctance in doing so and the faster mode of having a permanent mechanism could be to establish an environment sensitive adjudicating bodies that can keep a watch as well as redress the same under a specialized head.

(vi) Imprecise threshold of general humanitarian principles of distinction, necessity, and proportionality

The threshold provided under these principles is too flexible and can be modulated as per the necessity and can be easily brought under the military necessity as there exist no precision as far as these general humanitarian principles are concerned. Therefore we see a limitation over the practical effectiveness of these principles for preventing damage to the environment. In this regard ICRC suggests taking precautionary measures in the absence of certainty.[42]

(vii) Continued application of International Environmental Law during armed conflicts

It is seen in practice that during armed conflicts International Humanitarian Law takes over International Environmental Law, but this should not be the case rather core International Environmental Law should continue to apply and should not be overlooked in armed conflict situations. It is also the opinion of the legal experts and the International Law Commission that such implication shall help us remove uncertainty existing in the insufficiently clear International Humanitarian Laws.[43]

(viii) Protection of Environment during Non-International armed conflicts

It is evident that most of the armed conflicts that take place all over the world are of non-international character and it is pertinent to note that nearly 61% of the warfare is of non-international type.[44] Therefore, it constitutes a large number of armed conflicts along with a good amount of environmental destruction. Further, it is accepted that these types of armed conflicts are governed by the internal laws but, it is suggested that there should be an international legal system which shall cover this issue as well, because it has been seen in various cases of armed conflicts that outsider nations support inner armed groups with amenities including arms.In such cases we see two problems, first the host nation does not recognise or, are reluctant to recognise such conflicts having international character due to sovereignty issues and secondly, the third party nation does not realize the loss that hounds over the environment in armed conflict situation.

Thus, it is suggested that there should be an international legal regime to cover such non-international type of armed conflicts and a precise threshold should be made to recognize such conflicts as being referred to international community so that appropriate laws can be enforced therewith and check can be made over the damage to the environment.

[42]*Supra* note 11, part II.
[43]*Supra* note 3.
[44]*Ibid.*

(ix) ENMOD Convention

The use of environmental modification techniques should be unlawful *per se* during warfare, thus it is argued that the threshold under the ENMOD convention should be repealed as it was originally intended.[45] By this the instrument would be able to cover larger concerns of the protection regime where even science fictional manipulations can be covered.[46] This step can be taken under Article VI of the convention that provides for amendment.

(x) Enforcement

Education can be developed as a tool to combat this issue, by educating the military commanders about the importance of protection of environment and by developing sensitiveness towards the protection of environment. Environmental education to military personnel today will garner an environmentally aware and protective military tomorrow.[47] In this way military commanders can weigh environmental destruction in the balance with military necessity, and avoid environmentally hazardous activities.[48]

B. A New Regime-"5th Geneva Convention"

After the devastating effects of Gulf War in 1991 a meeting at London School of economics was called to discuss upon the viability of the legal regime existing to protect environment and to realize the need for a new convention for the protection of environment in armed conflict situations.[49]

By calling for new legal measures that would include 'the environment' at equal legal stand in relation to the human victims of warfare as prescribed in the former Geneva Conventions, the 1991- 5GC was not only pushing towards tighter environmental protection, but potentially re-framing the very place of 'the environment' inside the law itself.[50]

In furtherance to this the advocates of 5th Geneva Convention suggested following points to be considered as the core of the concern:

(1) the prohibition of attacks against specific areas of land and the provision of demilitarization of certain zones on environmental grounds;
(2) development of a new category of "international crimes against (nature or) the environment";

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[45] Arthur Westing, *Environmental Warfare: A Technical, Legal and Policy Appraisal*9 (Stockholm International Peace Research Institute, London, 1984); see also Karen Hulme, *supra* note 36.
[46] Lijnzaad and Tanja, "Protection of the Environment in Times of Armed Conflict: The Iraq - Kuwait War" 40 *National Law Review* 169 (1993).
[47] Michael Bothe, Carl Bruch, *et.al.*, "International law protecting the environment during armed conflict: gaps and opportunities" 92 *International Review of the Red Cross* 569-577 (September 2010).
[48] *Supra* note 9 at 188.
[49] The conference was organized by legal scholar Glen Plant (London School of Economics), Dr. Gerd Leipold (Greenpeace International), and Professor Michael Clarke (University of London's Centre for Defence Studies). The transcripts of the conference were compiled by Glen Plant in: *Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict*, London Belhaven Press 1992. The 1991'A Fifth Geneva Convention' conference dealt exclusively with *jus* in *bello*.
[50] *Ibid*, Paulo Tavares & Adrian Lahoud, Fifth Geneva Convention: *Nature, conflict, and international law in the Anthropocene*.

(3) provisions to create an exclusive International Criminal Court with mandate on such crimes;

(4) the establishment of a new organization similar to the Red Cross/Crescent to be named “The Green Cross/Crescent”.

It is subsumed from the above four suggestions that demilitarization of certain zones seems to be a fair proposal to leave certain environmental sensitive areas beyond the scope of damage, further the need to categorise environmental destruction as an international crime and having an International court seems to be fulfilled after the Rome Convention. Moreover, a separate organization would provide specialized work with regard to the protection of environment in armed conflict situations.

REFORM OF VETO POWER IN SECURITY COUNCIL

Nimmi[*]

I. INTRODUCTION

The United Nations Organization came into existence on October 24, 1945 as a result of realization of the need for an international institution to be in charge of collective security of mankind. This was brought about by the bitter experiences of two World Wars which showed clearly that if war is allowed to be veritable instrument of policy in interstate relations, it was only a question of time before mankind and civilization would go into oblivion.[1] So Preamble of the charter of United Nations provides that:

> "*We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind do hereby establish an International Organization to be known as the United Nations*."[2]

The organ that is so central to the realization of the United Nations objective of collective security of the entire humanity is Security Council.[3]It is the most powerful organ of United Nations. The charter has given it primary responsibility for the maintenance of global peace and security and its decisions are binding for all members States.[4]

Ever since the creation of the United Nations, the reform of the United Nations is high on International political agenda. One of the most controversial issues is reform of the Security Council. It includes expansion of membership, working methods and veto power of the permanent members of the Security Council. This paper is mainly concerned with the topic of reform of veto power of Security Council.

The United Nations Security Council "Power of Veto" refers to the veto power wielded solely by five permanent members of United Nations Security Council (China, France, Russia, United Kingdom and United States) enabling them to prevent the adoption of any substantive draft Council resolution, regardless of the level of international support for the draft. The veto does not apply to procedural votes, which is significant in that the Security Council's permanent membership can vote against 'procedural' draft resolution, without necessarily blocking its adoption by the Council.[5]

The veto is exercised when any permanent member castes a 'negative' vote on a 'substantive' draft resolution. Abstention or absence from the vote by a permanent member does not prevent draft resolution from being adopted.[6]

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[1]L.O. Taiwa, "The Imperative of Reforming the United Nations Security Council in the Post Cost War Era" *Indian Journal of International Law* 237 (2007).

[2] Preamble of The United Nations Charter, 1945.

[3] The United Nations Charter, art. 23.

[4]*Id*., arts. 24(1) and 25.

[5]*Id*., art. 27(2).

[6]*Available at*: https://partners.academic.ru/dic.nsf/enwiki/917128 (last visited on July 15, 2018).

II. HISTORY OF VETO POWER

The United Nation's veto system was formalized at the Yalta ConferenceFebruary 04-11, 1945. It was established to prohibit the United Nations from taking any future action directly against its principle founding member, in large part of legacy of the expulsion of the Soviet Union from the League of Nations in 1939, at the outbreak of World War –II. It had already been decided at the United Nation Founding Conference in 1944, the Britain, China, the Soviet Union, the United States and "In due course" France should be the permanent members of any newly formed Council.[7]

France had been defeated and occupied by Germany, but its role as a permanent member of the League of Nations, its status as a colonial power and the activities of the Free French Forces on the allied side allowed it a place at the table with the other four.[8]

During the negotiations at the San Francisco Conference (April 25-June 26, 1945), numerous small and medium sized States protested against the privileged status of the five permanent members and unacceptable infringement on the sovereign equality of States.[9] Apart from this, one of the reasons for granting the veto power i.e. being great power is no longer valid as the concept 'great power' is not static. It is a shifting phenomenon.[10]

Nevertheless, the countries in permanent membership made it clear that the complete and unconditional acceptance of the permanent membership and veto power was a condition sine qua non for their participation in the creation of the new world organization.[11]

The Allied powers attempted to reassure other countries by pointing out that despite the veto right, the operation of the Council would be less subject to obstruction than was the case under the League of Nations, where unanimity among all members were required. Furthermore, they accepted that their privileged status entailed a primary responsibility with regard to the maintenance of International peace and security and argued that it was not assumed that "the permanent members, any more than non-permanent members, would use their 'veto' power willfully to obstruct the operation of the Council.[12] In the end, the founding members were forced to accept the codification of the proposed balance of power through the insertion of Article 27, United Nations Charter.

III. DEFINITION OF VETO

A veto, Latin for "I Forbid", is the power of an officer of the States to stop unilaterally a piece of legislation. In practice, the veto can be absolute (as in the U.N. Security Council, whose members can block any resolution) or limited (as in the legislative process of the United States, where a two-third votes in both the Houses and Senate may override presidential veto of legislation).[13]

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[7] *Ibid*.
[8] *Ibid*.
[9] Jan Wouters and Tom Ruys, *Security Council Reform: A New Veto For A New Century* 5 (2005).
[10] *Supra* note 1 at 243.
[11] *Supra* note 8 at 7.
[12] D.M.Malone (ed.), *The UN Security Council: From The Cold War to 21st Century* 352 (Lynne Rienner Publishers, Colorado, USA, 2004).
[13] *Available at*: https://partners.academic.ru/dic.nsf/enwiki/45879 (last visited on August 03, 2018).

The concept of the veto originated in the 6th century BC with Roman consuls and tribunes. Either of the two consuls holding office in a given year could block a military or civil decision by the other; any tribune has the power to unilaterally block legislation passed by the Roman Senate. It is known as the 'Intercession'.[14]

A. Article 27

Article 27 of the United Nations Charter states:-

1) *Each member of the Security Council shall have one vote.*
2) *Decisions of the Security Council procedural matters shall be made by an affirmative vote of nine members.*
3) *Decisions of the Security Council on all other matter shall be made by an affirmative vote of nine members including concurring votes of the permanent members, provided that in decisions under chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting*.

Although the 'Power of Veto' is not explicitly mentioned in the United Nations Charter, the fact that 'substantive' decisions by the Security Council requires "the concurring votes of permanent members", means that any of those permanent can prevent the adoption, by the Council, of any draft resolution on 'substantive' matters.

IV. USES AND ABUSES OF VETO POWER

The first veto was cast in February 1946 by the Union of Soviet Socialist Republics (USSR). According to the Global Policy Forum (2008) some 261 vetoes have been cast in the period between 1946 and 2007. Almost half of the veto (123) in the history of the Security Council was cast by the Soviet Union, with the vast majority of those being before 1965. With 82 vetoes, the United States is entitled to silver medal. Since, using the first veto in 1970, the United States has been the most frequent user of the veto. Next in line are United Kingdom, France and China with 32, 18 and 6 respectively.[15]

Between the fall of the Berlin Wall in 1989 and the end of 2004, vetoes were issued on 19 occasions. United States used veto on 13 occasions, Russia on 4 occasions and other permanent members used their vetoes only two times.[16]Most recently, the veto was employed in July 2015, by Russia. OnJuly 08, Russia vetoed a draft resolution on the 20th anniversary of genocide in Srebrenica, Bosnia and Herzegovina [S/2-15/508], and on July 29, it vetoed a draft resolution [**S/2015/562**] on the creation of an ad hoc tribunal for prosecuting those responsible for the downing of Malaysian Airlines flight MH17.[17]

A. Use of Veto and admission of new members

According to Article 4(2) of the United Nations Charter, the Admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

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[14]*Ibid.*

[15] "Changing Patterns in the use of the Veto in Security Council", Global Policy Forum (2008) *available at*: http://www.globalpolicy.org/security/data/vstoab.htm (last visited on July 15, 2018).

[16]*Ibid.*

[17] The Veto: UN Security Council Working Methods, *available at*:www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php (last visited September 28, 2018).

As early as February 1946, admission of new members to the United Nations has been frequently barred by the permanent members by casting a negative vote. Between 1946 and 1955, a small number of new members were admitted.[18] But in 1955, the permanent members reached a 'package deal on the joint admission of sixteen new members'.

Soviet Union used its veto approximately 51 times to block the application of Kuwait, Vietnam, North Korea, South Korea, Japan, Spain, Libya, Nepal, Finland, Austria, Italy, Portugal, Ireland and Jordan.[19] After 1971, United States has become by far the most frequent user of the veto, mainly on resolution criticizing Israel, since 2002 the Negroponte Doctrine (on July 26,2002 John Negroponte the United States ambassador to the United Nation, stated that the United States will oppose Security Council resolutions concerning the Israel – Palestinian conflict that condemn Israel without also condemning terrorist groups) has been applied for the use of a veto on resolution relating to ongoing Israel-Palestinian conflict. This has been a constant cause of friction between the General Assembly and Security Council as seen with the 2003 Iraqi war which was not endorsed by the United Nations.

United States also blocked the application of Vietnam six consecutive times. China used it twice to reject the membership of Mongolia in 1955 and to reject the Bangladesh application in 1972. It is very clear that the exercise of the veto has frequently worsened rivalries, rather than promoting unity. Therefore, in 1948 and 1949 both the US Senate and the General Assembly requested that the permanent members would refrain from the veto with regard to recommendation under Article 4(2) of the Charter. In the light of steady increase in United Nations membership the concept of the use of the veto against application for membership no longer undermines the working of the United Nations.[20]

B. Article 27(3) and Abuse of veto

According to Article 27(3), the United Nations Security Council members are obliged to abstain from voting in decisions regarding the peaceful settlement of disputes whenever they are party to the dispute under consideration.

Since the beginning of the 1960s, it has become increasing rare for Council members to invoke abstention pursuant to Article 27(3), it is especially problematic when the party to the dispute in question belongs to the Permanent membership. The Security Council records show that then five permanent members have used their veto in such contested situations.[21]

C. List of cases which involved the use of Veto

1) Soviet Union vetoed a resolution regarding-
   A. Berlin question, 25 October, 1948.[22]
   B. Concerning the Soviet invasion of Czechoslovakia on 21st March, 1973.[23]
   C. Concerning the shooting down by Soviet Forces of a South Korean Commercial Airlines on 12th September, 1983.[24]

[18] J. Kaufman, *United Nations Decision Making* 50 (Sijthoff & Noordhoff Publishers, Rockville, 1980).
[19] *Supra* note 8 at 10.
[20] *Ibid*.
[21] Y. Z. Blum, *Eroding the United Nations Charter* 289 (Martinus Nijhoff Publishers, Dordrecht, 1993).
[22] United Nations Year Book (UNYB) 286 (1948-49).
[23] *Id*. at 302 (1968).

2) United States vetoed a resolution concerning-
   A. Status of Panama Canal on 21st March, 1973.[25]
   B. Condemning US air attacks against Libya on 21st April, 1986.[26]
   C. Censuring US military activities in Panama on 22 December, 1989.[27]
   D. Condemning the violation by US forces of the inviolability of the residence of the Nicaraguan ambassador in Panama city on 17 January, 1990.[28]

3) France vetoed a resolution concerning the dispute between France and the Comoros about the Island of Mayottee on 6 February, 1976.[29]

V. POCKET VETO

Countries increasing prefer to use the "pocket veto" (the threat the use of veto) instead of casting a veto. They use that threat either implicitly or explicitly, either in the private meetings of the Permanent Five or in the Larger Council. Although France has not cast any vetoes after the end of the Cold War, it has threatened to use that power on several occasions. The most prominent example was the case of 2003 Iraq War when France's threats to veto any resolution that would automatically lead to a war successfully prevented the United States, the United Kingdom and Spain to prevent a draft resolution to the Council seeking to authorize military action(although France could not eventually prevent them from attacking Iraq). France also used the threat of veto very recently. A non-violent protest in West Sahara was crushed by Moroccan forces in November 2010. France intervened to support its ally, Morocco. By threatening to use its veto, France could prevent the UNSC members from presenting a resolution to the Council to look into the crimes of the Moroccan military.

A careful analysis of the Security Council records shows that Russia and China are the two countries that have been relying on "pocket veto" more than other permanent members. Sri Lanka is an important ally of China and Russia and it is believed in the last phase of Sri Lankan civil war in 2009 many Sri Lankan Tamils were killed by the Sri Lankan army and the forces of Liberation Tigers of Tamil Eelam(LTTE).UNSC did not take any action.[30]

During the course of the conflicts and its aftermath, Russia and China opposed the discussion of alleged violations in Sri Lanka. Moreover, a UN Panel of Experts was established and on April 25, 2011 released a report on accountability with respect to the final stages of Sri Lankan conflict. Concluding that both the Sri Lankan army and the LTTE forces committed grave human rights abuses, that panel recommended establishing an international independent investigation into abuses during the armed conflict.

VI. VETO REFORM PROPOSALS

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[24] *Id*. at 219 (1983).
[25] *Id*. at 168 (1973).
[26] *Id*. at 247-257 (1986).
[27] *Id*. at 173 (1989).
[28] *Id*. at 187 (1990).
[29] *Id*. at 180 (1976).
[30] Sahar Okhovat, "The United Nations Security Council: Its Veto Power and Its Reform", *available at*: http://www.miat.org.au/Articles/UNSC%20FULL%20REPORT%20Sept%202011.pdf (last visited on September 11, 2018).

Ever since the creation of the United Nations, the composition, working method, voting procedure of the Security Council have provoked strong criticism from vast majority of States member. As regard the existing veto power of the five permanent members, four proposals can be advanced. First of these proposal is to abolish the veto power. This means that the permanent members may stay as permanent members but would be divested of their veto powers.[31] Such a reform is being promoted by the African Union, the Arab League, and the Group of Non Aligned Nations and also by numerous Western countries. Apart from the permanent members hardly any State explicitly supports the existing veto power (Poland, Australia and Singapore figuring among rare exceptions).[32] The supporter to abolish the veto power considered that the exercise of veto power was introduced, it was hoped that the powers that have played that have played an important role in bringing the Second World War to an end would employ this power judiciously but unfortunately it did not happen. On the contrary, the National interest of Individual Countries began to guide the application of veto. Hence the world experienced the gross misuse of the veto power. To avoid the somewhat continuous misuse, perhaps the best way out is to divest all the five permanent members of their veto power.[33]

The second proposal revolves around more veto power. This proposal includes that more members to be given veto power especially from the developing countries in which regional representations may also be considered. Two or three among the non-permanent members are allowed to enjoy veto power during their tenure of Security Council. The weaker aspects of this proposal are that it would increase the chances of obstructions rather than facilitating the passage of resolutions.[34]

It also concludes the extension of the veto to possible additional permanent members. In this regard, Germany, Japan, India and Brazil have argued that there can be discrimination between first rate and second rate permanent members. Thus in their view, New permanent members should have same responsibilities and obligations as the current permanent members. So veto should be awarded to possible newcomers.[35]

China, Russia, the United Kingdom and the United States, permanent members of the Security Council, all signaled unwillingness to give up, change or reform the current veto structure. France also a permanent member of the Council underlined that they believed in so called intermediate solution new permanent members without veto admitted to Council, now with the option of evaluating their status at a later review conference.[36]

Some States Germany, Norway including Italy as well as other affiliated with the uniting for consensus faction, which opposes adding new permanent member to the Council, argued against giving any new members the veto. Italy's ambassador Giulio Terzi said that even when not used, the veto can alter or block the discussion of urgent issues. "Again and

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[31] P.M. Kamath, *Reforming and Restructuring the United Nations* 70 (Anamika Publishers, New Delhi, 2007).
[32] B.Fassbender, "Pressure for Security Council Reform", in D.M. Malone (ed.), *The UN Security Council From the Cold War to the 21st Century* 352 (Lynne Rienner Publishers, Colorado, USA, 2004).
[33] *Supra* note 32 at 71.
[34] *Ibid*.
[35] "Draft Resolution on Security Council Reform, 13 May 2005", *available at*: http://www.globalpolicy.org (last visited on August 06, 2018).
[36] "Second Meeting on Security Council Reform Addresses the Veto, 18 March 2009", *available at*: www.centerforunreform.org/node/394 (last visited on August 10, 2018).

Again the hidden veto has prevented substantial discussion of questions that are crucial to international peace and security," he said.[37]

The proposal suggests the concept of rotating veto power. This implies that veto power is given to various deserving powers for a period of four years and after the expiry of their tenure the veto is given to another set of States. The idea of rotating veto powers means that only two or three States may be given veto powers (two from permanent members and one from non-permanent members) and after every two or three years the United Nations Security Council should elect from its members new veto wielding States. Those who have already done such privileged term will have to wait for five to ten years before their name can again be considered. In this way, the principle of geographical representation can be applied.[38]

The fourth proposal is combination of 4+3 permanent members plus 15 non-permanent members. This is a combination of various proposal already advanced in one form or the other. This First Four are US, Russia, China and one from European Union (could be either France or Germany or UK). The next three are one each from Asia, Africa and South America.[39]

But these reform proposals stand little chance of being incorporated into the Charter, because the permanent members, most notably the United States and Russia, have repeated time and again said that they will not accept any limitation to the veto[40]. Consequently, several States have adopted a more pragmatic approach, calling for restrictions that are self-imposed and do not require Charter amendment. Even the Secretary-General in "Large Freedom Report" recommended that the Member States that already have veto right should limit their use in accordance with the principle of organised self –restraint.[41] Again, the Groups of Ten (Austria, Australia, Belgium, Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Portugal and Slovenia) argued the permanent members to only use their veto with regard to the decisions listed as procedural and General Assembly Resolution 267(111). Moreover the Group of Ten advocated that the veto should be excluded with regard to admission or expulsion of Member States, or appointment of United Nations Secretary-General.[42]

The Report of the High Level Panel, recognizing that there is no practical way of changing the existing members veto power, proposed the introduction of a system of 'Indicative Voting' whereby the members of the Security Council could call for a public indication of positions on a proposal action. Thus, the actual vote would be preceded by a non-binding voting round, in order to make the Council's decision making procedure less secretive and to increase the accountability of the veto use. Yet, even the mild modifications of the Council's procedures may not prove workable for some of five permanent members.[43]

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[37]*Ibid*.
[38]*Supra* note 32 at 72.
[39]*Ibid*.
[40]*Supra* note 32 at 352.
[41] Kofi Annan, *In Larger Freedom: towards development, security and human rights for all*, UN Doc.A/59/2005 (March 21, 2005).
[42]*Supra* note 8 at 28.
[43] Report of The High-Level Panel on Threats, Challenges And Change on A More Secure World: Our Shared Responsibility 256-257 (March 29, 2009), *available at*: https://peacekeeping.un.org/en/report-of-high-level-panel-threats-challenges-and-change-more-secure-world-our-shared-responsibility (last visited on September 07, 2018).

The reforms are heavily dependent upon the unanimity of view of permanent members as any one of them could easily veto even the reform package. Perhaps that's why the Pakistani Foreign Minister remarks on the television that 'permanent members cannot be replaced even they cease to deserve the privilege. While they do not support the reforms, their attitudes towards reform are generally passive, although China and France are relatively more positive. In addition five permanent countries would not accept the demand for veto power by aspirant countries.[44]

The idea of responsibility no to veto in case of genocide and mass atrocities appears to have originated from permanent members-French Foreign Minister Huber Verdine. When in 2004 High Level Panel published its report, referred to the institution of the veto as having an 'anachronistic' character and recommended that any proposal for Council reform refrain from expanding the veto power.[45] The High Level Panel called for the permanent members, in their individual capacities to pledge themselves to refrain from use of the veto in cases if genocide and large scale human rights abuses.

After the release of the Genocide Prevention Task Force, United Nations Secretary General released his January 2009 Report, implementing the responsibility to protect, which called for reform of the way the permanent five members wielded their veto power. In sum, the permanent five's commitment to the responsibility to protect must be questioned; the failure to adopt a concrete proposal to reform their approach to the veto in cases of genocide and mass atrocities demonstrate that there is still a lot of work to be done here.[46]

In 2013, France hinted at this possibility with Foreign Minister Laurent Fabius making informal reference to a possible "code of conduct" to rein in the veto under such dire circumstances. In an op-ed published in The New York *Times* on October 04, 2013, Fabius proposed that "[i]f the Security Council were required to make a decision with regard to a mass crime, the permanent members would agree to suspend their right to veto…[except]…where the[ir] vital national interests…were at stake."[47]

France and Mexico took this initiative one step further in 2014. OnSeptember 25, on the margins of the 69th session of the General Assembly, the two countries co-chaired a ministerial-level event on this issue. The meeting was presided over by Fabius, and Mexican Secretary for Foreign Affairs José Antonio Meade Kuribreña. The High Commissioner for Human Rights, Zeid Ra'ad Al Hussein made a statement in support of the French initiative. In a summary of the event, the co-chairs called on the P5 to "voluntarily and collectively pledge not to use the veto in case of genocide, crimes against humanity and war crimes on a large scale." According to the proposed framework, the UN Secretary-General would have the authority to make a determination on whether the situation amounts to one of those crimes, if necessary at the request of the UN High Commissioner for Human Rights or of 50 UN member states.[48]

[44]*Supra* note 32 at 72.
[45]*Available at*: http://www.globalsolutions.org/files/genera/issues/pdfs/CGS_RN2V-7-14-2010.pdf (last visited on September 15, 2018).
[46]*Ibid.*
[47]*Supra* note 17.
[48]*Ibid.*

ACT has launched a code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes. As of October 23, 2015, this had been supported by 104 UN member states, including France and the UK. The other permanent Council members—China, Russia and the US—have not supported the ACT initiative, nor have they backed a French/Mexican declaration on veto restraint in cases of mass atrocity.[49]

VII. CONCLUSION

Ever since the birth of United Nations, veto powerof the Security Council hasprovoked strong criticism from the vast majority of United Nations Members States. These States want to abolish or restrain the veto. But it is equally true that permanent five members reject any limitation on the veto power. So, the practical way to reform the veto power is voluntary restraint on the veto use. The permanent members must recognize that their primary responsibilities with regard to international peace and security require to use the veto with caution, taking into account not only their national interest, but also interest of the wider international community. They must understand that such measures are for the better and safer world, not a sacrifice on their part.

[49] *Ibid.*

Women Empowerment Across The Globe: Problem, Perspectives and Challenges

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"There is no tool for development more effective than the empowerment of women."
Kofi Annan[1] , Secretary General of U.N.O.

I. INTRODUCTION

Empowerment is a multi-dimensional process which enables individuals or a group of individuals to realize their full identity and powers in all spheres of life.[2]Conceptually the term empowerment can be described as a process wherein a group or individuals are able to enhance their status in the society on the one hand and overall participation and growth in the other.[3]Empowerment provides greater opportunity in the decision-making process at home and in the matters concerning society so that they could be able to find their rightful place in the society.

According to the United Nations,[4] women's empowerment mainly has five components[5]:

1. *Generating women's sense of self-worth;*
2. *Women's right to have and to determine their choices;*
3. *Women's right to have access to equal opportunities and all kinds of resources;*
4. *Women's right to have the power to regulate and control their own lives, within and outside the home; and*
5. *Women's ability to contribute their might in creating a more just, social and economic order.*

Thus, women empowerment is nothing but recognition of women's basic human rights and creating an environment where they are treated as equal to men. The women empowerment does not mean 'deifying women' rather it means replacing patriarchy with parity.

In this regard, there are various **facets of women empowerment** which are recognized at Global level, such as:

1. **Individual Rights:** A woman is a being with senses, imagination and thoughts; she should be able to express them freely. Individual empowerment means to have the self-confidence to articulate and assert the power to negotiate and decide.[6]

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[2]*Available at*:https://livinggoods.org/international-womens-day-2019-there-is-no-tool-for-development-more-effective-than-the-empowerment-of-women/ (last visited on February 25, 2019).
[3] https://www.quora.com/What-is-women-empowerment-7 (last visited on February 25, 2019).
[4]The United Nations Charter, 1945.
[5] https://www.indiacelebrating.com/social-issues/women-empowerment/ (last visited on February 25, 2019).

2. **Social Empowerment:** A critical aspect of social empowerment of women is the promotion of gender equality. Gender equality implies a society in which women and men enjoy the same opportunities, outcomes, rights and obligations in all spheres of life.[7]
3. **Educational Empowerment:** It means empowering women with the knowledge, skills, and self-confidence necessary to participate fully in the development process. It means making women aware of their rights and developing a confidence to claim them.[8]
4. **Economic and occupational empowerment:** It implies a better quality of material life through sustainable livelihoods owned and managed by women. It means reducing their financial dependence on their male counterparts by making them a significant part of the human resource.[9]
5. **Legal Empowerment:** It suggests the provision of an effective legal structure which is supportive of women empowerment. It means addressing the gaps between what the law prescribes and what actually occurs.[10]
6. **Political Empowerment:** It means the existence of a political system favoring the participation in and control by the women of the political decision-making process and in governance.[11]

Since the adoption of the **Universal Declaration**[12], States have repeatedly emphasized the universality and indivisibility of human rights. At the World Conference in Vienna it was specifically recognized that women's human rights are part of universal human rights and it has been subsequently reaffirmed it in World Conferences on Women. The Vienna Programme of Action explicitly stressed the importance of eradicating "any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism."[13]

Various Instruments and Conventions have been developed for women's Empowerment and their protection at International Level. These International Conventions and instruments are specifically focused keeping intact multifacets of women Empowerment and challenges, some of these International instruments are:

- Universal Declaration of Human Rights (1948)
- Convention on the Political Rights of Women (1952)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Declaration on the Elimination of All Forms of Discrimination against Women (1967)
- Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)

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[6]*Available at*: http://www.educationjournal.in/download/90/1-8-37-932.pdf (last visited on February 02, 2019).

[7] http://www.un.org/womenwatch/daw/news/speech2007/CH_stmts/2007%20Promoting%20Women%20in%20 Cities%20Korea%20August%202007.pdf (last visited on February 02, 2019).

[8] http://www.worldwidejournals.com/global-journal-for-research-analysis-GJRA/special_issues_pdf/September_2017 _ 1507115716__61.pdf (last visited on February 02, 2019).

[9]*Available at*: https://telanganatoday.com/what-is-women-empowerment (last visited on February 10, 2019).

[10]*Ibid.*

[11]*Available at*:https://www.omicsonline.org/open-access/challenges-and-opportunities-of-women-political-participation-in-ethiopia-2375-4389-1000162.php?aid=64938 (last visited on February 10, 2019).

[12] The Universal Declaration of Human Rights, 1948.

[13]*Available at*: https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf (last visited on April 10, 2019).

- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Declaration on the Elimination of Violence against Women (1993)
- Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (Belém do Pará Convention) (1995)
- Universal Declaration on Democracy (1997)
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)

Above conventions and declarations have been ratified by various participating countries but not in Toto, Countries member to it have either modified them or have adopted them according to their country's situations and position of women in their countries. After the declaration of Universal Declaration of Human Rights, we cannot say that there are separate set of rights for women, but still when empowerment comes into focus, above conventions specifically recognize the rights of the Women separately. Apart from these various regional conventions have also been developed empowerment of women at Regional levels or continent levels.

The Constitution of India[14] in this respect guarantees: Right to equality under Article 14 to all Indian women equality before law; Article 15(1) specifically prohibits discrimination on the basis of sex. Article 15(3) empowers the State to take affirmative actions in favor of women. Article 16 provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office. Article 39(a) provides that the State to direct its policy towards securing for men and women equally free legal aid. Equal pay for equal work under Article 39(d), guards the economic rights of women by guaranteeing equal pay for equal work; and Maternity Relief under Article 42, allows provisions to be made by the state for securing just and humane condition of work and maternity relief for women. Article 51(A)(e) expects from the citizen of the country to promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women.[15]

Through 73rd and 74th Constitutional Amendment of 1993, a very important political right has been given to women by making provision for 33.33 percent reservation in seats at different levels of elections in local governance i.e. at Panchayat, providing. This amendment can be said to be a landmark in the direction of women empowerment in India. But at the same time it is a matter of serious concern that Women's Reservation Bill is still pending before Parliament providing for reservation of 33% seats in the Lok Sabha and in all State Legislative Assemblies for women. If passed, this Bill will give a significant boost to the position of women in politics. Because of these Constitutional provisions the State is duty bound to apply these principles in taking policy decisions as well as in enacting laws.[16]

In addition to this number of laws have also been enacted like The Immoral Traffic (Prevention) Act, 1956, Dowry Prohibition Act, 1961, The Maternity Benefit Act, 1961, The Medical Termination of Pregnancy Act, 1971, The Equal Remuneration Act, 1976, The Commission of Sati (Prevention) Act, 1987, The Pre-Conception & Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. Protection of Women from Domestic Violence Act, 2005, The Prohibition of Child Marriage Act, 2006 Sexual

[14] Part III and Part IV

[15] A*vailable at* https://edugeneral.org/blog/polity/women-rights-in-india/ (visited on 10th April, 2019)

[16] https://www.academia.edu/35719313/_Rights_Laws_and_Policies_for_Women_Empowerment_in_India_ (last visited on April 10, 2019).

Harassment of Women at Work Place (Prevention, Prohibition, and Redressal) Act, 2013, to create a conducive environment at home and at workplace for women, The Criminal Law Amendment Act,2013 & The Criminal Law Amendment Act,2016.[17]

Apart from the above mentioned laws several other laws are there which not only provide specific legal rights to women but also give them a sense of security and empowerment.

II. JUDICIAL APPROACH ON WOMEN EMPOWERMENT

Judiciary, worldwide has recognized and followed the International Conventions. Various cases at International level are landmark for scripting the empowerment of women in the Century.

Freedom from violence and fear of violence is essential to the full enjoyment of all human rights. Under international human rights law, States have an obligation to refrain from committing acts of violence against women and to put in place laws and policies to prevent others from doing the same (such as by criminalizing domestic violence).[18] In fulfilling the latter duty, the State cannot be expected to prevent all violence between individuals; however, the State must implement effective mechanisms to reduce the frequency of the violence, prosecute perpetrators, and assist victims.[19]

The Inter-American Court of Human Rights examined Mexico's responsibility for violations of both the American Convention on Human Rights and the Convention of Belém Do Pará in connection with a wave of murders and disappearances of girls and women in Ciudad Juarez.[20] The Court found the State responsible for violating the victims' rights to life, humane treatment, personal liberty, due process, and judicial protection in relation to its obligation under the Convention of Belém do Pará to prevent, punish and eradicate violence against women.[21]The Court pointed to "irregularities in the handling of evidence, the alleged fabrication of guilty parties, the delay in the investigations, the absence of lines of inquiry that took into account the context of violence against women in which the three women were killed, and the inexistence of investigations against public officials for alleged serious negligence" and concluded, "This judicial ineffectiveness when dealing with individual cases of violence against women encourages an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women is tolerated and accepted as part of daily life."[22]As such, the Court determined that Mexico had failed to adopt the domestic legislation or measures necessary to ensure that authorities conducted an effective investigation, as required by the American Convention and Convention of Belém do Pará.[23]

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[17] A*vailable at*: https://digitallylearn.com/role-women-organization-general-studies-indian-society-upsc-ias/ (last visited on April 10, 2019).

[18]*Available at*: https://ijrcenter.org/thematic-research-guides/womens-human-rights/ (last visited on April 10, 2019).

[19]See,for e.g., *ECtHR, Eremia* v. *Republic of Moldova*, no. 3564/11, Judgment of May 28, 2013, paras. 48-52, 56; I/A Court, H.R., *Rosendo Cantú et al.* v. *Mexico*, Judgment of August 31, 2010. Series C No. 216; IACHR, Report No. 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al.* (United States), July 21, 2011.

[20]*See* I/A Court H.R., *González et al. ("Cotton Field")* v. *Mexico*, Judgment of November 16, 2009. Series C No. 205, para. 232 *et seq.*

[21]*Id.*, paras. 388, 389.

[22]*Ibid.*

[23]*Ibid.*

Sexual violence includes rape, enforced prostitution, and other forms of sexual assault. As with other forms of violence, as described above, States have an obligation to prevent State actors from committing sexual violence against women, as well as a duty to adopt laws and policies to prevent such abuses by private persons and to ensure the effective investigation and prosecution of those responsible.[24]

The European Court of Human Rights has interpreted the European Convention on Human Rights to require States "to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse."[25]

The African Commission on Human and Peoples' Rights has condemned armed forces' use of sexual violence as a military tactic against civilian populations.[26]In the case of *D.R. Congo*, armed forces of Burundi, Rwanda, and Uganda raped and killed women in the Democratic Republic of Congo, among other violations. The Democratic Republic of Congo also alleged that the Rwandan and Ugandan forces specifically attempted to decimate local populations by spreading AIDS through the rape of Congolese women and girls.[27] The African Commission found violations of the First Protocol Additional to the Geneva Conventions and the Convention on the Elimination of All Forms of Discrimination against Women, and the African Charter on Human and Peoples' Rights.[28]

The European Court of Human Rights held Bulgaria responsible for its failure to promptly enact interim measures to protect the applicant from further violence and explained the State's duty to investigate and provide mechanisms to prosecute allegations of domestic violence.[29]

Human rights bodies have held that States have positive obligations to investigate and prosecute domestic violence. In a landmark decision concerning Brazil, the Inter-American Commission declared that the State had an affirmative obligation to take all measures to prevent and end violence against women, including prosecution of domestic violence.[30]In this regard, the CEDAW Committee has noted that "women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy."[31]

Indian Judiciary too have adopted wider approach in uplifting the status and position of women in India. A social worker was brutally gang-raped by five men for preventing a child marriage. Determined to seek justice, she decided to go to court. In a shocking decision, the trial court acquitted all five accused. Vishaka, a Group for Women's Education and Research, took up the cause. They joined other women's organizations, and filed a petition before the Apex Court of India on the issue of sexual harassment at the workplace. On

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[24]See, for e.g., Convention of Belém Do Pará, art. 7; ECtHR, *Aydin* v. *Turkey*, ECtHR, no. 23178/94, Rep. 1997-IV, Judgment of September 25, 1997.

[25]ECtHR, *M.C.* v. *Bulgaria*, no. 39272/98, ECHR 2003-XII, Judgment of December 04, 2003.

[26]*See*, ACommHPR, *D.R. Congo* v. *Burundi, Rwanda, and Uganda*, Communication No. 313/05, 33rd Ordinary Session, May 2003.

[27]*Id.*, paras. 4, 5.

[28]*Id.*, para. 86.

[29]ECtHR, *Bevacqua and S.* v. *Bulgaria*, no. 71127/01, Judgment of June 12, 2008; *see also* ECtHR, *Opuz* v. *Turkey*, no. 33401/02, ECHR 2009, Judgment of June 09, 2009.

[30] IACHR, Report No. 54/01, Case 12.051, *Maria da Penha Maia Fernandes* (Brazil), April 16, 2001.

[31]CEDAW Committee, *Ms. A. T.* v. *Hungary*, Communication No. 2/2003, Views of January 26, 2005.

August 13, 1997, the Supreme Court commissioned the Vishaka guidelines that defined sexual harassment and put the onus on the employers to provide a safe working environment for women.[32]

The Supreme Court in *Vaddeboyina Tulasamma* v. *Vaddeboyina Shesha Reddi*,[33] highlighted the Hindu female's right to maintenance as a tangible right against property which flows from the spiritual relationship between the husband and wife. It was held that section 14(1) of the Hindu Succession Act, 1956 must be liberally construed in favour of the females so as to advance the object of the Act. This section makes female Hindu a full owner of a property, instead of a limited owner.[34]

The Supreme Court in *Mohd. Ahmed Khan* v. *Shah Bano Begum*,[35] ruled in favour of Shah Banoand ordered maintenance from her ex-husband under section 125 of the Criminal Procedure Code (with an upper limit of Rs. 500 a month) like any other Indian woman. The judgment was not the first granting a divorced Muslim woman maintenance under Section 125. But a voluble orthodoxy deemed the verdict as boon for Muslim women. This was a milestone, however, the Muslim Women (Protection of Rights on Divorce) Act, 1986 has been seen as making an attempt to dilute the effects of this judgment. The Act was seen as discriminatory as it denied divorced Muslim women the right to basic maintenance which women of other faiths had recourse to under secular law.[36]

The Supreme Court in *Daniel Latifi* v. *Union of India*,[37] held that liability of Muslim husband to his divorced wife arising under section 3(1) (a) of the Act to pay maintenance is not confined to iddat period. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of section 3(1) (a) of the Act.

The Supreme Court in *Upendra Baxi & Ors.* v. *State of Uttar Pradesh*,[38] treated a letter as a Writ Petition. The Petitioners had pointed out that the conditions in which girls were living in the Government Protective Home at Agra were abominable and they were being denied their right to live with basic human dignity by the State of Uttar Pradesh which was running the Protective Home. The Court issued several directions to the State Government for better administration of protective homes, such as proper ventilation, mosquito nets and cooking gas provisions. The Superintendent of the Protective Home was directed to take care that no woman or girl is detained in the Protective Home without due authority and process of law. The District Judge, Agra was directed to nominate two socially committed advocates who would by turns visit the Protective Homes once in a fortnight.[39]

The Supreme Court in *Sakshi* v. *Union of India*,[40] passed directions that must be adhered to while conducting trial of child sexual abuse or rape. Special arrangements such as

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[32]*Vishaka & Ors.* v. *State of Rajasthan*, AIR 1997 SCC 241.
[33]1977 SCR (3) 261.
[34]*Available at*:https://www.livelaw.in/womens-day-special-15-judgments-that-made-india-a-better-place-for-women/ (last visited on April 10, 2019).
[35]1985 SCR (3) 844.
[36]*Supra* note 34.
[37]2001 (7) SCC 740.
[38]AIR 1987 SC 191.
[39]*Supra* note 34.
[40]AIR 2004 SC 3566.

a screen must be made so as to ensure that the victim or witness do not see the body or face of the accused. The questions for cross examination must be framed and given to the Presiding Officer of the Court who must then put them to the victim or witness in a language that is clear and not embarrassing. Adequate breaks must be given to the victims of child abuse or rape while they give their testimony in court. The Petitioner NGO had also sought a declaration that all forms of penetration be included within "sexual intercourse" in section 375 of the Indian Penal Code. The Court however declined to redefine rape.

Apart from above revolutionary Judgments many other rulings of Honorable Supreme court have proven to be boon for Indian women and empowering them to live with a dignified life. However, still there are certain Challenges existing at Global level.

III. WOMEN EMPOWERMENT — GLOBAL CHALLENGES

i. **Gender Biased Perspective:**Gender equality is a human right, but our world faces a persistent gap in access to opportunities and decision-making power for women and men.[41]

The most widespread and dehumanizing discriminations against women are on the basis of the biased perspective. The discrimination against the girl child begins from the birth itself. Boys are preferred over girls; hence, female infanticide is a common practice in India. The ordeal that an Indian girl faces at birth is only the beginning of a lifelong struggle to be seen and heard.[42]

ii. **Patriarchate Bottlenecks:**Socially-constructed roles and responsibilities for man and women across the globe is most common, Roles are decided considering appropriation for men and women keeping in Societal status. Although its an international feature, but the traditional Indian society is a patriarchal society ruled by the diktats of self-proclaimed caste lords who are the guardians of archaic and unjust traditions. They put the burden of traditions, culture, and honor on the shoulders of women and mark their growth. The incidences of "honor killing" reveal the distorted social fiber in the male-dominated society.[43]

iii. **Economic Backwardness**: Area of focus in attaining gender equality is women's economic and political empowerment. Though women comprise more than 50% of the world's population, they only own 1% of the world's wealth. Across the globe, women and girls perform long hours of unpaid domestic work. In some places, women still lack rights to own land or to inherit property, obtain access to credit, earn income, or to move up in their workplace, free from job discrimination. In India, Women constitute only 29% of the workforce but forms majority of the destitute in the country. There has been a failure in transforming the available women base into human resource. This, in turn, has hampered not only the economic development of women but also of the country's development as a whole.[44]

iv. **Implementation Gaps:**Globally, no country has fully attained the gender equality. Scandinavian countries like Iceland, Norway, Finland, and Sweden lead the world in their progress toward closing the gender gap.[45] In these countries, there is relatively equitable distribution of available income, resources, and opportunities for men and

[41]*Available at*: https://www.peacecorps.gov/educators/resources/global-issues-gender-equality-and-womens-empowerment/ (last visited on April 10, 2019).
[42]*Available at*: https://telanganatoday.com/challenges-faced-women (last visited on April 10, 2019).
[43]*Supra* note 18.
[44]*Ibid*.
[45]*Supra* note 17.

women. The greatest gender gaps are identified primarily in the Middle East, Africa, and South Asia. However, a number of countries in these regions, including Lesotho, South Africa, and Sri Lanka outrank the United States in gender equality.[46] In India, through all these years, the attention is only on developing and devising new schemes, policies and programmes and have paid less attention to the proper monitoring system and implementation short-sightedness, for e.g. despite the presence of The Pre-Natal Diagnostic Techniques Act 1994 and various health programmes like Janani Suraksha Yojana 2005, National Rural Health Mission 2005 (NHRM), our country has a skewed sex ratio and a high maternal mortality rate (MMR).[47]

v. **Loopholes in the legal structure:**Guaranteeing the rights of women and giving them opportunities to reach their full potential is critical not only for attaining gender equality, but also for meeting a wide range of international development goals.[48] Empowered women and girls contribute to the health and productivity of their families, communities, and countries, creating a ripple effect that benefits everyone.[49] Although there are a number of laws to protect women against all sorts of violence yet there has been the significant increase in the episodes of rapes, extortions, acid, attacks etc. This is due to delay in legal procedures and the presence of several loopholes in the functioning of a judicial system.[50]

vi. **Lack of Political Will:**At all levels, including at home and in the public arena, women are widely underrepresented as decision-makers. In legislatures around the world, women are outnumbered 4 to 1, yet women's political participation is crucial for achieving gender equality and genuine democracy.[51] In India, the still- pending Women's Reservation Bill underscores the lack of political will to empower women politically. The male dominance prevails in the politics of India and women are forced to remain mute spectators. Women should have access to resources, rights, and entitlements. They should be given decision-making powers and due position in governance. Thus, the Women Reservation Bill should be passed as soon as possible to increase the effective participation of women in the politics of India.[52]

vii. **Replacing 'Patriarchy' with Parity:** A strong patriarchate society with deep- rooted socio-cultural values continues to affect women's empowerment. The need of the hour is an egalitarian society, where there is no place for superiority. In India, The Government should identify and eliminate such forces that work to keep alive the tradition of male dominance over its female counterpart by issuing inhumane and unlawful diktats.[53]

viii. **Education:**Education is a key area of focus. Although the world is making progress in achieving gender parity in education, girls still make up a higher percentage of out-of-school children than boys.[54]Approximately one quarter of girls in the developing

[46]*Available at:* http://www3.weforum.org/docs/WEF_GenderGap_Report_2010.pdf (last visited on March 22, 2019).

[47]*Available at*: https://www.iaspaper.net/women-empowerment-in-india/ (last visited on March 22, 2019).

[48]*Available at*: https://www.peacecorps.gov/educators/resources/global-issues-gender-equality-and-womens-empowerment/ (last visited on March 22, 2019).

[49]*Ibid*.

[50]*Available at*: https://www.slideshare.net/debabratanayak756/an-emperical-study-on-women-empowerment-and-their-status-in-society (last visited on March 22, 2019).

[51]*Supra* note 24.

[52] https://www.thehindubusinessline.com/opinion/pass-the-womens-reservation-bill/Article21421141.ece (last visited on March 23, 2019).

[53]*Available at*: http://absjournal.abs.edu.in/ABS-Journal-Volume-4-isuue-2-December-2016/abs-j-v-4-i-2-dec-2016-Article-16.pdf (last visited on April 02, 2019).

[54]*Available at*: http://www.worldbank.org/en/topic/girlseducation (last visited on April 02, 2019).

world do not attend school. Typically, families with limited means who cannot afford costs such as school fees, uniforms, and supplies for all of their children will prioritize education for their sons.[55]Families may also rely on girls' labor for household chores, carrying water, and childcare, leaving limited time for schooling. But prioritizing girls' education provides perhaps the single highest return on investment in the developing world. An educated girl is more likely to postpone marriage, raise a smaller family, have healthier children, and send her own children to school. She has more opportunities to earn an income and to participate in political processes, and she is less likely to become infected with HIV.[56]

Education is the most important and indispensable tool for women empowerment. It makes women aware of their rights and responsibilities. Educational achievements of a woman can have ripple effects for the family and across generations.[57]

ix. **Justice delayed is justice denied:**Guaranteeing the rights of women and giving them opportunities to reach their full potential is critical not only for attaining gender equality, but also for meeting a wide range of international development goals.[58] Empowered women and girls contribute to the health and productivity of their families, communities, and countries, creating a ripple effect that benefits everyone.

Efforts should be made to restructure the legal process to deliver fair and in- time justice to the victims of heinous crimes like rapes, acid attacks, sexual harassment, trafficking and domestic violence. The idea of fast-track courts, devised to impart speedy justice to the victims of rapes and other crimes against women, is a good initiative taken by the judiciary and the Government of India.[59]

IV. INDIA'S INTERNATIONAL COMMITMENTS FOR WOMEN EMPOWERMENT

India is a part to various International conventions and treaties which are committed to secure equal rights of women.

One of the most important among them is the Convention on Elimination of All Forms of Discrimination against Women(CEDAW) 1979, ratified by India in 1993.Other important International instruments for women empowerment are: The Mexico Plan of Action 1975, The Nairobi Forward Looking Strategies 1985,The Beijing Declaration as well as the Platform for Action 1995, and the Outcome Document adopted by the United Nations General Assembly Session on Gender Equality and Development & Peace for the 21st century, titled "*Further actions and initiatives to implement the Beijing Declaration and the Platform for Action*". All these have been whole-heartedly endorsed by India for appropriate follow up.[60]

Despite these national and International commitments, laws and policies women's situation on the ground have still not improved satisfactorily. Varied problems related to women are still subsisting; female infanticide is growing, dowry is still prevalent, domestic

[55]*Supra* note 30.
[56]*Supra* note 27.
[57]*Available at*: https://www.sggt.in/women-empowerment/ (last visited on April 02, 2019).
[58]*Supra* note 24.
[59]*Available at*: https://www.irjet.net/archives/V5/i4/IRJET-V5I4596.pdf (last visited on March 25, 2019).
[60]*Available at*: http://wcd.nic.in/womendevelopment/national-policy-women-empowerment (last visited on March 25, 2019).

violence against women is practiced; sexual harassment at workplace and other heinous sex crimes against women are on the rise.[61]

Though, economic and social condition of women has improved in a significant way but the change is especially visible only in metro cities or in urban areas; the situation is not much improved in semi-urban areas and villages. This disparity is due to lack of education and job opportunities and negative mind set of the society which does not approve girls' education even in 21st century.[62]

In the year 2001, the Government of India launched a National Policy for Empowerment of Women. The specific objectives of the policy are as follows[63]:

1. *Creation of an environment through positive economic and social policies for full development of women to enable them to realize their full potential.*
2. *Creation of an environment for enjoyments of all human rights and fundamental freedom by women on equal basis with men in all political, economic, social, cultural and civil spheres.*
3. *Providing equal access to participation and decision making of women in social political and economic life of the nation.*
4. *Providing equal access to women to health care, quality education at all levels, career and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public life etc.*
5. *Strengthening legal systems aimed at elimination of all forms of discrimination against women and the girl child.*
6. *Changing societal attitudes and community practices by active participation and involvement of both men and women.*
7. *Mainstreaming a gender perspective in the development process.*
8. *Building and strengthening partnerships with civil society, particularly women's organizations.*

The Ministry of Women and Child Development is the nodal agency for all matters pertaining to welfare, development and empowerment of women. It has evolved schemes and programmes for their benefit. These schemes are spread across a very wide spectrum such as women's need for shelter, security, safety, legal aid, justice, information, maternal health, food, nutrition etc., as well as their need for economic sustenance through skill development, education and access to credit and marketing.[64]

To make women self-reliant Various schemes have been launched by the Central and State Government like Beti Bachao Beti Padhao Scheme,Women Helpline Scheme,Ujjawala which is a Comprehensive Scheme for Prevention of trafficking and Rescue, Rehabilitation and Re-integration of Victims of Trafficking and Commercial Sexual Exploitation,Working Women Hostel,Swadhar Greh a Scheme for Women in Difficult Circumstances,Support to Training and Employment Programme for Women (STEP). The Central and State Government also supports autonomous bodies like National Commission, Central Social

[61]*Available at*: https://acadpubl.eu/hub/2018-120-5/2/167.pdf (last visited on March 25, 2019).
[62]*Available at*: https://presidencyuniversity.in/specific-laws-for-women-empowerment-in-india/ (last visited on March 29, 2019).
[63]*Available at*: http://wcd.nic.in/womendevelopment/national-policy-women-empowerment (last visited on April 02, 2019).
[64]*Available at*: www.imrfjournals.in/pdf/MATHS/arts-education/AEIRJ-41/5.pdf (last visited on March 22, 2019).

Welfare Board and Rashtriya Mahila Kosh which work for the welfare and development of women. Economic sustenance of women through skill development, education and access to credit and marketing is also one of the areas where the Central and State Governments have special focus.[65]

The Draft National Policy for Women - 2016 has been released by the Women and Child Development Ministry, Government of India.[66]

The policy is roughly based on the Pam Rajput Committee report set up by the Women and Child Development Ministery in 2012. The draft is a comprehensive document which puts effort towards bringing a gamut of issues critical to the progress of Indian women and the ways in which they might be actualized.[67] The policy envisions a society in which women attain their full potential and are able to participate as equal partners in all spheres of life. It also emphasizes the role of an effective framework to enable the process of developing policies, programmes and practices which will ensure equal rights and opportunities for women.[68] The broad objective of the policy is to create a conducive socio-cultural, economic and political environment to enable women enjoy de jure and de facto fundamental rights and realize their full potential.[69] The 24-page draft policy sets out a detailed plan of action for the mainstreaming of women in areas such as health, education, economy, governance and many others including: Bringing down India's high maternal mortality rate, boosting nutrition for girls and women, protecting their reproductive rights, ensuring adolescent girls stay in school, improving child sex ratio, preventing female foeticide, eliminating gender wage gap, skill development, ensuring safety for women at home and outside, involving men and boys in gender sensitization efforts and many others.[70]

Priority Areas of the Draft:[71]

1. *Health including food security and nutrition:*
2. *Education*
3. *Economy*
4. *Governance and Decision Making*
5. *Violence against Women*
6. *Enabling Environment*
7. *Environment and Climate Change*

The Draft National Policy for Women is a step in the right direction providing backing hand to those Indian women who have been breaching one constricting social norm after another.[72]

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[65] These are the schemes launched by the Government of India and State Government.
[66] http://www.wcd.nic.in/sites/default/files/draft%20national%20policy%20for%20women%202016_0.pdf (last visited on March 20, 2019).
[67]*Available at*:https://iasscore.in/national-issues/draft-national-policy-for-women-2016 (last visited on March 20, 2019).
[68]*Ibid*.
[69]*Available at*:https://aspirantforum.com/2017/09/21/women-empowerment-schemes-in-india/ (last visited on March 02, 2019).
[70]*Available at*:https://iasscore.in/national-issues/draft-national-policy-for-women-2016(last visited on March 03, 2019).
[71] The Draft National Policy for Women, 2016.
[72]*Supra* note 37.

V. CONCLUSION AND SUGGESTIONS

Attaining equality between women and men and eliminating all forms of discrimination against women are fundamental human rights and United Nations values. Women around the world nevertheless regularly suffer violations of their human rights throughout their lives, and realizing women's human rights has not always been a priority. Achieving equality between women and men requires a comprehensive understanding of the ways in which women experience discrimination and are denied equality so as to develop appropriate strategies to eliminate such discrimination.[73] The United Nations has a long history of addressing women's human rights and much progress has been made in securing women's rights across the world in recent decades. However, important gaps remain and women's realities are constantly changing, with new manifestations of discrimination against them regularly emerging. Some groups of women face additional forms of discrimination based on their age, ethnicity, nationality, religion, health status, marital status, education, disability and socioeconomic status, among other grounds.[74] These intersecting forms of discrimination must be taken into account when developing measures and responses to combat discrimination against women.[75]

The Committee on the Elimination of Discrimination against Women (CEDAW)**,** the treaty body that monitors compliance with CEDAW, reviews States parties' reports on their implementation of the convention's provisions and identifies areas for improvement. The CEDAW Committee also publishes "General Recommendations" interpreting the convention's protections. For States that have elected to become party to the Optional Protocol to the Convention on the Elimination of Discrimination against Women, the Committee may receive individual complaints, or "communications," alleging violations of CEDAW by States parties. As of May 2014, there are 104 States parties to the Optional Protocol.[76]

Two United Nations Human Rights Council's "special procedures" specifically monitor women's human rights worldwide. In 1994, the United Nations Commission on Human Rights (predecessor to the UN Human Rights Council) established a Special Rapporteur on Violence against Women to report on the causes and consequences of violence against women. In 2010, the UN Human Rights Council established an expert Working Group on the issue of discrimination against women in law and in practice, which is charged with studying and promoting dialogue and policy reform to eliminate laws that discriminate against women. Other UN human rights treaty bodies and special procedures may also monitor States' progress in respecting and guaranteeing women's rights to the extent that such issues fall within their mandates.[77]

Women in India, through their own uncompromising efforts and Constitutional and other legal provisions and moreover with the Government's aid relating to various welfare schemes, are trying to make their own place in the universe. Their participation in

[73]*Available at*:https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf (last visited on March 03, 2019)
[74]*Ibid.*
[75]*Ibid.*
[76]*Available at*: https://ijrcenter.org/thematic-research-guides/womens-human-rights/ (last visited on April 10, 2019).
[77]*Ibid.*

Employment, in socio-political activities of the nation and also their presence at the highest decision and policy making bodies is improving day by day.

There is no denying the fact that women in India have made a considerable progress in almost seven decades of Independence, but still positioned at the 29th rank among 146 countries across the globe on the basis of Gender Inequality Index.[78]

However, we are still far behind in achieving the equality and justice. The real problem lies in the patriarchal and male-dominated system of our society which considers women as subordinate to men and creates different types of methods to subjugate them.[79]

The need of hour is to educate and sensitize male members of the society regarding women issues and try to inculcate a feeling of togetherness and equality among them so that they would stop their discriminatory practices towards the fairer sex.[80]

For this apart from Government, the efforts are needed from various NGOs and from enlightened citizens of the country. But first of all efforts should begin from our homes by empowering female members of our family by providing them equal opportunities of education, health, nutrition and decision making without any discrimination.[81]

> "*There is no chance for the welfare of the world unless the condition of women is improved; it is not possible for a bird to fly on only one wing*."[82]
>
> Swami Vivekananda

Therefore, we should have "Women Empowerment" as one of the prime goals if we want to achieve the status of a developed country.

[78]https://www.worldwidejournals.com/global-journal-for-research-analysis-GJRA/special_issues_pdf/September_2017 _ 1507115716__61.pdf (last visited on April 10, 2019).

[79]*Available at*:https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf (last visited on April 10, 2019).

[80]*Available at*:https://www.nipccd-earchive.wcd.nic.in/sites/default/files/PDF/Gender%20Sensitization%20of%20Police%20Officers.pdf (last visited on April 10, 2019).

[81]*Available at*:https://www.indusedu.org/pdfs/IJREISS/IJREISS_1311_28913.pdf (last visited on April 10, 2019).

[82] https://en.wikisource.org/wiki/The_Complete_Works_of_Swami_Vivekananda/Volume_6/Epistles_-_Second_Series/ LXXV _ Shashi (last visited on March 03, 2019).

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