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CHIEF PATRON'S MESSAGE

““There is but one law for all, namely, that law which governs all law, the law of our Creator, the law of humanity, justice, equity -- the law of nature and of nations.”

-Edmund Burke

I am delighted to present the First Issue of Volume Two of RGNUL Student Law Review (RSLR) in its second year.

The present edition of RSLR aims to provide a platform to students, academicians and legal practitioners to express their original thought on the contemporary legal issues. I sincerely believe that it would help in providing momentum to quality legal research.

This edition of the journal contains articles covering different aspects relating to “Public International Law”. In the era of extensive trans-boundary interaction among the sovereign nations, a set of uniform principles, rules and regulations are *sine qua non* to facilitate these transactions. In addition to this, various challenges such as “Terrorism,” “Climate Change” etc. require initiatives by the world community as a whole to tactfully combat them. Therefore, the present issue of the journal aspires a detailed discussion on growth and implementation of International Law both at International and National levels.

I, on behalf of the students and faculty of RGNUL Punjab, express my deep gratitude to all the distinguished members of the Peer Review Board who have devoted their valuable time in reviewing the papers and providing their valuable insights. I would like to appreciate the efforts made by the Faculty Editor and the entire student-run Editorial Board. This issue of the RSLR, I hope, will be a trendsetter. I wish the journal all the best.

Professor (Dr.) Paramjit S. Jaswal
Chief Patron
RGNUL Student Law Review

PATRON'S MESSAGE

It is a matter of satisfaction that the prrsent issue of RGNUL Student Law Review (RSLR) is continuing commendable success in the quest to promote legal education over a period. The objective of RSLR is sharing of knowledge on current legal issues and to enhance the understanding of these issues through extensive research.

The current issue of the journal is on Public International Law and it has received extensive participation and exchange of thought amongst the developing legal minds. Public International law concerns itself with states, intergovernmental organizations, multinational corporations and individuals giving it wider applicability and acceptability. Increasing global trade and movement, environmental concerns, human rights issues, peace and security issues etc have made PIL pivotal to understand legal developments and trends. However, major part of this field is still unexplored and demands in depth analysis and research. Keeping in mind the significance of legal research in PIL, RGNUL has always promoted the culture of academic deliberation and writing in its students.

RGNUL Student Law Review has achieved an unprecedented success by achieving new heights in quality of scrutiny involved in review and time bound delivery. Further, I would appreciate the hard work by students in making this journal internationally renowned, which has received contributions from across the globe.

I would like to express my gratitude to all professionals and academicians who have joined to this initiative as a part of Peer Review Board and shared their enormous experience to the success of this journal. Further I would like to appreciate the efforts made by Dr. Anand Pawar, the Faculty Editor for providing guidance to the Student Editors. I congratulate the Editorial Board of RSLR and all the young scholars who took out time from their academics for this outstanding initiative and wish them success in all their future endeavors. Finallly, I believe that the research papers will receive appreciation from the readers and experts; and will be beneficial to all concerned.

Prof. (Dr.) G.I.S Sandhu
Patron
RGNUL Student Law Review

FOREWORD

It gives me immense pleasure to write the foreword for the third edition of the RGNUL Student Law Review (RSLR). I would like to take the opportunity to appreciate the efforts made by the students of RGNUL in the form of an Editorial Board for the successful completion of this edition. RSLR has inspired the young and innovative students to undertake legal research and articulate it in a comprehensible form. In the course of running the Review, the editors have not only learnt editing skills but also managerial skills.

I sincerely appreciate the effort of our student members of the Editorial board for their hard work and dedication because of which, it became possible to release this issue on time. They interacted with the leading academicians of this country, practicing advocates and other legal luminaries. Their support has been invaluable to us and I humbly thank them for the time they took out to review the articles that were submitted for consideration. I would like to take this opportunity to thank our contributors for their excellent work. This journal would not have been possible without the support that the student community all over the country has provided.

The third edition begins with the guest articles from Ms. Natalia Silva, Consultant, Office of the Prosecutor General of the Nation of Colombia and Dr. Julius Cosmas, Lecturer in Law, Mzumbe University. They have very succinctly presented their views and have aided readers in developing a better understanding of the subject.

Furthermore, the contributors have provided articles on a wide spectrum of topics, discussing the recent development in patent laws of India, position of voiceless minorities in a globalised world, the hidden cost of labor in an international merger & acquisition, need for law on genocide in India, the odious debt doctrine in international law and reinterpretation of article 9 of Japanese Constitution.

We would appreciate any further improvements in the journal as may be suggested by the contributors.

Dr. Anand Pawar
Faculty Editor

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[GUEST ARTICLES]

CAN WATER PRIVATIZATION LEAD TO CORPORATE RESPONSIBILITY?

- Natalia Silva Santaularia[*]

1. PRELIMINARY CONSIDERATIONS

The right to water can be discerned in the wording of many international human rights covenants and declarations: we cannot imagine an effective "right to life" or define "human dignity" without real access to water. However, the so-called "blue gold" is unfortunately becoming a luxury good for some group of persons and therefore, necessary to take adequate action. Now more than ever, in a world where privatization and pollution matters are in many governments' agendas, potential violators must consider the right to water as an essential concern.

Although the right to water is explicitly recognized in some international human rights documents, its essence and components is still the object of debate and deliberations. It is dubious if we can defend its status of self-standing right because it is only implicitly derived from rights enshrined in the core conventions. However, the last onrush of resolutions dealing with the protection of this right has increased the consciousness of both states and non-state parties in this regard. Since states have a duty to protect the full enjoyment of the right to water, they must avoid violations of this right by other agents. Thus, businesses are more and more subject to both national and international pressure.

States are primarily responsible for human rights abuses. However, this paper will defend that accountability should not be limited to them. Although, the question whether business entities have international

[*] The Author is a consultant at the Office of the Prosecutor General of the Nation Colombia. She holds a Masters Degree in Human Rights and Criminal Justice from the University of Utrecht and a Diploma in Anglo-American Law from the University of Navarra.

personality or not remains open, under many national domestic systems: legal persons can be held responsible. This trend of making corporations liable for violations seems to be affecting the international perspective. New corporate responsibility codes of conduct are leading to the idea that non-state actors should respond for human rights infringements linked to their operations. In relation to water, the question is especially relevant since multinationals and other enterprises leave traces on it as a consequence of their production process, for instance, when they are the water providers.

The paper will begin with a chapter dedicated to the right to water *per se*, including an analysis of the international framework and discussed the concept of right. The second chapter will focus in the possible responsibility of corporations under the right to water. In this latter section, apart from the normative legal system, the duties of businesses under this right and the concept of privatization will be studied, with relevant emphasis in the Cochabamba case. Finally, the third chapter will encompass the proposal of creating a model of corporate responsibility for right to water abuses.

The exploration will include the primary and secondary sources of international law, such as international conventions, treaties, general comments, reports and resolutions; international custom; general principles of law; and also judicial decisions and doctrine of highly qualified publicists. Regarding the national systems, all kind of legal documents will be studied, such as constitutions, jurisprudence and legal academic literature.

2. The Right to Water

2.1. Legislative Framework and Recent Normative Developments

The normative framework of the right to water has been growing exponentially during the last years. Due to the problem of water scarcity in many countries and the question of how to deal with it in an efficient manner, the international community has responded with a series of recent "soft-law" documents. Notwithstanding, several covenants and treaties include this right, either implicitly or explicitly. As it has been implied by human rights experts, "*even the earliest human rights instruments*

imply a right to water because such a right to water is integral to the realization of other human rights."[1]

Thus, although the classic covenants and declarations do not recognize an explicit right to water, it is frequently alleged that this right is inherent to many other rights which are concretely defined in their provisions.[2] Accordingly, Article 25.1 of the Universal Declaration of Human Rights (UDHR) constitutes the "*most likely basis from which to infer the human right to water.*"[3] This disposition states that "*everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food...*" [4] Thus, many scholars have inferred from this provision a universal right to water.

Besides, the International Covenant on Civil and Political Rights (ICCPR) provides a definition in its Article 6 in which the right to water could be subsumed. This guarantee establishes that "*every human being has the inherent right to life.*"[5]In connection with this guarantee, early General Comment No. 6 established that the right to life "*cannot properly be understood in a restrictive manner*"[6]. In consequence, a broader interpretation of this provision directly leads to the inclusion of several other elements, such as "*health, enjoyment, respect and dignity.*"[7] On the other hand, the "*second generation rights*" document, [8] the International Covenant on Economic, Social and Cultural Rights (ICESCR) also infers the right to water[9]. In its Article 11.1, the ICESCR recognizes the right to "*an*

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1 L. Beail-Farkas, *The Human Right to Water and Sanitation: Context, Contours, and Enforcement Prospects*, 30 Wisconsin International Law Journal 761, 772 (2012-2013), available at: http://hosted.law.wisc.edu/wordpress/wilj/files/2014/04/Beail-Farkas_print.pdf, last seen on 12/03/2014.

2 UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 15' (2002), E/C.12/2002/11, 20/01/2003, para. 1, 3.

3 M. Fitzmaurice, *The Human Right to Water*, 18 Fordham Environmental Law Review 537, 540 (2007), available at: http://heinonline.org/HOL/LandingPage?handle=hein.journals/frdmev18&div=23&id=&page=, last seen on 12/03/2014.

4 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art. 25.1.

5 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23/03/1976) 999 UNTS 171 (ICCPR), art. 6.

6 Committee on the Rights of the Child, 'General Comment No. 06' (2005), CRC/GC/2005/6, 30/04/1982, para. 5.

7 Supra 1, at 774.

8 S. Salman & S. McInerney-Lankfort, *The Human Right to Water*, Law, Justice, and Development series, The World Bank, No. 30229, 22 (2004).

9 T. Kiefer & C. Brölmann, *Beyond State Sovereignty: The Human Right to Water*, 5 Non-State Actors and International Law 183, 185 (2005).

adequate standard of living... including adequate food, clothing and housing, and to the continuous improvement of living conditions"[10] and in Article 12. 1,"*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*."[11]General Comment No. 15, which will be subsequently analyzed, already asserted that the use of the word "including" in Article 11.1 ICESCR indicates that this catalogue of rights is not created to be an exhaustive list.[12]

A thorough study of other conventions and treaties demonstrates that the right is, however, explicitly recognized in many specific documents. For instance, Article 14.2 (h) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), obliges States to "*ensure to such women the right...to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...*"[13]Additionally, the Convention on the Rights of the Child (CRC) recognizes the State's duty to provide "*adequate nutritious foods and clean drinking-water*" to combat disease and malnutrition in Article 24.2(c).[14] Finally, in Article 28.2 (a) of the Convention on the Rights of Persons with Disabilities (CRPD) requires the States to "*ensure equal access by persons with disabilities to clean water services*."[15] The right to water has also been included in other instruments such as the Geneva Conventions III and IV and their first Optional Protocol,[16] the Declaration on the Right to Development[17] and

[10] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3/01/1976) 993 UNTS 3 (ICESCR) Art. 11.1.

[11] Ibid, at art. 12.1.

[12] Supra 2, at para. 3.

[13] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18/12/1979, entered into force 3/09/1981) 1249 UNTS 13 (CEDAW), art. 14.2(h).

[14] Convention on the Rights of the Child (adopted 20/11/1989, entered into force 2/09/1990) 1577 UNTS 3 (CRC), art. 24.2 (c).

Convention on the Rights of Persons with Disabilities (adopted 8/10/2009, entered into force 3/05/2008) 2515 UNTS 3 (CRPD), art. 28.2 (a).

[16] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12/08/1949, entered into force 21/10/1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12/08/1949, entered into force 21/10/1950) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12/08/1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I) (adopted 8/06/1977, entered into force 7/12/1979) 1125 UNTS 3.

[17] U.N. General Assembly, *Declaration on the Right to Development*, Res. 41/128, Meet. 97, U.N. Document A/RES/41/128, (04/12/1986) available at http://www.un.org/do cuments/ga/res/ 41/a41r128.htm, last seen on 29/06/2015.

the Convention on the Law of Non-Navigational Uses of International Watercourses.[18]

Before the description of the recent "soft-law" developments begins, it should be borne in mind that the resolutions and declarations are *statements of policy that do not posses formal legal enforceability*." [19] In consequence, it is essential to separate the conventions and treaties, which are signed and ratified, and that posses binding force on the states parties.[20]

Many pioneer international summits and conferences that began to take place during the 1970's started to seriously address the problems related to the water resources sectors. However, this paper will only focus in recent water developments. It is a well-known fact that the water recognition landmark took place when General Comment No. 15 was issued in the year 2002. This Comment is considered the "*strongest legal foundation for the human right to water*"[21] because of its direct and explicit attention in the concept and components of this right. Issued by the Committee on Economic, Social and Cultural rights, the Comment establishes that "*the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses*"[22] and mandates that States adopt positive measures to implement the right.

The same year, the United Nations hosted the Work Summit on Sustainable Development and created the Johannesburg Declaration on Sustainable Development [23] and the Johannesburg Plan of Implementation[24]; and in 2003, the UN High Level Committee on Programs established UN-Water.[25] This latter mechanism was created to

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[18] Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21/06/1997, not yet in force) A/51/869.
[19] Supra 8, at 12.
[20] Ibid.
[21] Supra 1, at 778.
[22] Supra 2, at para. 2.
[23] Johannesburg Declaration on Sustainable Development, A/CONF.199/20, 4/09/2002.
[24] Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/L.1, 26/06/2002.
[25] UN-Water, which was established in 2003 by the United Nations High Level Committee on Programmes, has evolved out of a history of close collaboration among UN agencies. It was created to add value to UN initiatives by fostering greater co-operation and information-sharing among existing UN agencies and

cooperate in the realization of the Johannesburg Declaration objectives and the UN Millennium Development Goals[26]. Later on, in 2006, the UN Human Rights Committee passed Decision 2/104 Human Rights and Access to Water.[27] This document concerned the request that the UN High Commissioner for Human Rights conduct "*a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.*"[28]

In consequence, in 2007 the UNHCR issued a report which lead to the Resolution 7/22 of 2008, which promoted an in-depth investigation and study of the right, and the appointment of an independent expert on the human rights obligations related to access to safe drinking water and sanitation.[29] Catarina de Albuquerque was appointed to the position of independent expert in 2008, and in 2010, a Report on Human rights obligations related to access to safe drinking water and sanitation was issued. This Report included non-State actors' obligations, as it will be analyzed in further chapters.[30]The same year, the UN General Assembly voted to adopt Resolution 64/292, which endorsed the "*right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.*"[31]

Finally, Resolution 15/9 of the UNHRC called upon the States to take all necessary measures to guarantee this right[32] and affirmed that the

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outside partners, available at http://www.unwater.org/about-us/en/, last seen on 20/03/2014.

26 Supra 1, at 779.

27 UN Human Rights Council, *Human Rights and Access to Water*, Decision 2/104, Meet 31, (27/11/2006) available at http://www2.ohchr.org/english/issues/water/doc s/HRC_decision2-104.pdf, last seen on 29/06/2015.

28 Ibid, at para. 4.

29 U.N. General Assembly, *Human Rights and Access to Safe Drinking Water and Sanitation*, Res. 7/22, Meet. 41, (28/03/2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf, last seen on 29/06/2015.

30 *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, *C. de Albuquerque*, U.N. General Assembly, Sess. 15, A/HRC/15/31, (01/07/2010) available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.31.Add.1_en.pdf, last seen on 29/06/2015.

31 U.N. General Assembly, *The human right to water and sanitation*, Res. 64/292, Sess. 64, U.N. Document A/RES/64/292, 1, (28/07/2010)available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/479/35/PDF/N0947935.pdf?OpenElement, last seen on 29/06/2015.

32 U.N. General Assembly, *Human rights and access to safe drinking water and sanitation*, Res. 15/9, Meet. 31, 3, (30/09/2010).

> "human right to safe drinking water and sanitation is derived from the right to an adequate standard of living" and it is "inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity."[33]

Taking into account the amount of legal documents and instruments with references to the right to water, this guarantee can be seen as existing on two planes: as a subordinated or instrumental right and as a self-standing or independent right.[34] As it has been previously analyzed, the right to water is needed for the realization of other rights.[35] However, it is by no means a far-fetched idea the consideration that water constitutes a right by its own within the international community and at the regional and state level. Accordingly, independent expert Catarina de Albuquerque has affirmed that for the UN, the right to water is "*contained in existing human rights treaties and is therefore legally binding*."[36]

2.2. Concept and Normative Content

The previously mentioned General Comment No. 15 established the contours of the right to water, asserting from the beginning of the document that it entitles everyone to "*sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses*."[37] Its paragraph 6 provides that water is necessary not only for personal and domestic uses, but also to produce food (right to food), ensure environmental hygiene (right to health) or for securing livelihoods (right to gain a living by work), among others.[38] It is especially remarkable that the same paragraph states the idea that priority shall be given, understandably, to the right to water for personal and domestic uses. Additionally, General Comment No. 15 establishes in paragraphs 7 and 8 the importance of guaranteeing "*access to water resources for agriculture to realize the right to*

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[33] Ibid, at para. 3.

[34] M. Williams, *Privatization and the Human Right to Water: Challenges for the New Century*, 28 Michigan Journal of International Law 469, 479 (2007).

[35] L. Watrous, *The Right to Water - From Paper to Practice*, 8 Regent Journal of International Law 109, 118 (2011).

[36] *Right to water and sanitation is legally binding, affirms key UN body*, UN News Centre (1/10/2010), available at http://www.un.org/apps/news/story.asp?NewsID=36308#.U1Ejm_l_tD6, last seen on 25/04/2014.

[37] Supra 2, at para. 2.

[38] Ibid, at para.6; Supra 8, at 151.

adequate food" and the environmental hygiene, which implies the prevention of hazards to health "*from unsafe and toxic water conditions*."[39]

Regarding the normative content of right to water, the said Comment asserts that the right to water consists of freedoms and entitlements.[40] The freedoms include the right to "*maintain access to existing water supplies*" and the right to be "*free from interference*." On the other hand, the entitlements embrace the right to "*a system of water supply and management*" in order to safeguard the equality of opportunity of people to effectively enjoy the right to water.

The requirements that provide for a real right to water are defined in paragraphs 11 and 12 of the General Comment. First, it is necessary that the components of the right to water be "*adequate for human dignity, life and health*". While the latter concept is not concretely defined in the Comment, there are three basic features, which are essential for water to become a fully enjoyable right. These are declared in paragraph 12 and refer to water's "*availability, quality and accessibility*". The first concept means that water supply has to be satisfactory and plentiful so that personal and domestic uses are covered.[41] Regarding the quality, it is required that the water is free from pollution, so that it does not constitute "*a threat to a person's health*."[42] Finally, accessibility refers to the availability of the water, which it has to be usable and reachable by all persons without discrimination. This feature has four dimensions, namely, physical accessibility, economic accessibility, non-discrimination and information accessibility. [43]

Other documents have further discussed the scope and content of safe drinking water and access, such as the relevant OHCHR Report 6/3 of 2007.[44] This instrument analyzed the essential concepts of General Comment No. 15 which were not extensively studied. Accordingly, the Report analyzes the concept of safe drinking water, including sufficient

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[39] Supra 2, at paras 7, 8.
[40] Ibid, at para. 10.
[41] Ibid, at para. 12(a).
[42] Ibid, at para. 12(b).
[43] Ibid, at para. 12(c).
[44] *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, General Assembly, Sess. 6, U.N. Document A/HRC/6/3, (16/08/2007), available at http://daccess-ddsny.un.org/doc/UNDOC/GEN/G07/136/55/PDF/G0713655.pdf?OpenElement, last seen on 29/06/2015.

quantity, which requires between 50 and 100 liters of water per person per day; and water quality, meaning potable, fresh and clean water.[45]In addition, the document discusses the different types of access, focusing in the equitable access (no discrimination),[46] physical access (available in "reasonable distance")[47] and financial access to water (no deprivation because of lack of economic resources).[48]

3. CORPORATE RESPONSIBILITY FOR WATER PRIVATIZATION

3.1. International Legal Framework

Relevant scholars such as Shaw, Clapham, Muchlinsky and Jägers have all defended that there should be protection for all violations of human rights, not only for State abuses.[49] Shaw has proposed that due to the increasing amount of practice at the international plane dealing with corporations, at least multinationals should possess international personality.[50] Jägers, for instance, supporting the doctrine of horizontal effect or "third-party effect", advocates that human right instruments should entail obligations for multinationals.[51] This last theory includes the private obligations of private actors to respect the human rights of one another.[52] According to Van der Walt, the horizontal application of fundamental rights includes the horizontal relationship between private law subjects or private individuals.[53] Obviously, this position would challenge the traditional vision of the whole human rights understanding.

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[45] Ibid, at paras. 13-17.
[46] Ibid, at paras. 22-24.
[47] Ibid, at paras. 25, 26.
[48] Ibid, at paras. 27-29.
[49] T. Lambooy& Y. Levashova, 'Human Rights and Non-State Actors (Business)', Utrecht University, Lecture of 21/06/2013.
[50] Ibid.
[51] Ibid.
[52] J. Letnar, *Corporate Obligations Under the Human Right to Water*, 39 *Denver* Journal of International Law and Policy 303, 333 (2011), available at http://works.bepress.com /cgi/viewcontent.cgi?article=1004&context=jernej_letnar_cernic, last seen on 10/04/2014.
[53] J. Van der Walt, *Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism,* 1Law, Social Justice and Global Development Journal (2003), available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/walt/, last seen on 11/04/2014.

However, reality speaks for itself. According to Carbone, "*it is increasingly necessary that the multinational enterprise be directly subjected to some principles of international law concerning human rights protection*."[54] Besides, Cassel has asserted that responsibility has deviated from the public to the private sector and especially to multinationals, which in consequence, leads to the fact that "*governments and intergovernmental organizations wield correspondingly less power*."[55] Thus, a number of commentators agree that corporations can be held responsible for human rights violations, although other allege that States are the only duty-bearers with regards to human rights.[56]

The basic expectation that society has of businesses is that they will respect the human rights.[57] Such idea of corporate responsibility in human rights was affirmed in the 2008 Report of John Ruggie, appointed Special Representative in 2005 with a mandate to provide views and practical recommendations on the scope and content of corporate responsibility with respect to human rights.[58]

But the issue had been already discussed earlier in time. The Preamble of the UDHR proclaimed that this instrument is "*a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms*."[59] In addition, Article 28 UDHR asserts that "*everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully*

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[54] G. Aguilar, *The Human Right to Water and Sanitation: Going Beyond Corporate Social Responsibility*, 29 Merkourios - International and European Law: General Issue 39, 45 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2219188, last seen on 11/04/2014.

[55] D. Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 Fordham International Law Journal 1963, 1984 (1995).

[56] Supra 52, at 331.

[57] *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, General Assembly, Sess. 14, U.N. Document A/HRC/14/27, 4, (7/04/2008), available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/14/27&Lang=E, last seen on 29/06/2015.

[58] E. Chen & S.A. Altschuller, *Corporate Accountability and Human Rights in the Age of Global Water Scarcity*, Natural Resources & Environment 9, 12 (2010), available at http://heinonline.org/HOL/LandingPage?handle=hein.journals/nre24&div=43&id=&page=, last seen on 15/04/2014.

[59] U.N. General Assembly, *Universal Declaration of Human Rights*, Res. 217 A (III), 1, (10/12/1948) available at http://daccess-ods.un.org/TMP/6879093.05095673.html, last seen on 26/07/2015.

realized."[60] Accordingly, Henkin affirmed that "*every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all*."[61]

Besides, through several "*global voluntary commitments,*"[62] such as the United Nations Global Compact in 1999[63] and the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights of 2003 (the UN Draft Norms),*[64] human rights norms that apply directly to corporations have received growing interest.[65]

The UN Draft Norms support the creation of binding, obligatory human rights duties for transnational corporations and other businesses enterprises.[66] Hence, international human rights law should "*focus adequately on these extremely potent non-state actors*."[67] In consequence, it is a reality that the Norms constitute a good basis to protect the right to water under privatization scenarios.[68] Thus, if business entities were found to have an obligation to protect the human right to water, "*these duties would provide a second line of protection for the right to water in the context of privatization*."[69] This is because the UN Draft Norms assert that the obligations of companies augment and do not diminish or replace state responsibilities.[70]

The UN Draft Norms specifically mandate that transnational corporations and other business entities "*contribute to the realization*" and

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[60] Ibid, at art.28.

[61] Supra 54, at 63.

[62] Supra 30, at para. 23.

[63] Global Compact, Principles 1 and 2, 1999, K. Annan.

[64] *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Draft Norms)*, U.N. Document E/CN.4/Sub.2/2003/12,(26/08/2003) available at http://daccessddsny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement, last seen on 29/06/2015.

[65] Supra 34, at 488.

[66] Supra 64.at 1.

[67] D. Weissbrodt & M. Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 American Journal Of International Law 901 (2003).

[68] Supra 34, 489.

[69] V. Petrova, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water*, 31 Brooklyn Journal of International Law 612, 613 (2006).

[70] Supra 64, at para. 19.

"*refrain from actions which obstruct or impede the realization*" of certain rights, including the right to "*adequate food and drinking water*" and the right to the "*highest attainable standard of health*."[71] Therefore, it can be implied that corporations that entered into privatization agreements to provide water services would be required to meet both positive and negative human rights obligations.[72] In conclusion, the UN Draft Norms offer the promise of holding private companies responsible for human rights violations, which could diminish reliance on states as the "*primary implementers and enforcers of human rights*."[73]

In this respect, it should be discussed the relevance of the Ruggie Framework, which was issued in response to the lack of certainty on the application of the UN Draft Norms. In April 2008, the UN SRSG advanced three basic principles, namely: States have a duty to protect against human rights abuses by third states, including companies; companies have a responsibility to respect human rights; there needs to be effective access to remedies so that these respective obligations can be enforced.[74] The second principle means that corporations have to respect, which means, basically, to do no harm. Companies must carry out sufficient due diligence efforts so that they are aware of and thus able to address and prevent any adverse human impacts associated with their operations.[75]

Besides, the UN SRSG established three elements that defined the concept of the due diligence process. Accordingly, it is required an analysis of the country and local context, the impacts that the company will have and "whether and how" a company may contribute to human rights abuses through its relationships with partners, contractors, other non-state actors and state agents.[76]

The previous engagements are enforced through recent "soft-law" documents such as the Guidelines for Multinational Enterprises of the

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[71] Ibid, at para. 12.

[72] S. Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 *ILSA* Journal of International & Comparative Law 507 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=630422, last seen on 24/04/2014.

[73] Supra 34, at 491.

[74] Supra 57, at para. 27-103.

[75] Ibid, at para. 56; Supra 58, at 12.

[76] Supra 57, at para. 56.

Organization for Economic Cooperation and Development,[77] the 2011 Guiding Principles on Business and Human Rights[78] or the 2012 Interpretive Guide regarding the Corporate Responsibility to Respect Human Rights.[79] These do not create legally binding obligations, but derive their normative force "*through recognition of social expectations by States and other key actors*."[80] In conclusion, despite all efforts to attribute responsibility to enterprises for human rights violation, this new-born field still requires further legislative development and implementation.

3.2. Obligations and Duties of Business Entities under the Right to Water

As already stated above, States have been always considered primary responsible for protecting human rights.[81] This means that they and only they cannot violate human rights, as they are obliged by international and regional human rights instruments.[82] General Comment No. 15 is the main document defining the State's obligations in relation to the right to water. The Comment imposes on the States general "*obligations to respect, obligations to protect and obligations to fulfill*,"[83] but it also contains core obligations, which have to be implemented immediately.[84]

However, non-State actors are constantly cited in this Comment, concretely within the State obligation to protect. This duty consists on preventing "*third parties from interfering in any way with the enjoyment of the right to water*."[85] The same paragraph provides a list with the subjects

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[77] Organization for Economic Co-operation and Development (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, available at http://dx. doi.org/10.1787/9789264115415-en, last seen on 24/04/2014.

[78] *Guiding Principles on Business and Human Rights*, General Assembly, U.N. Document HR/PUB/11/04, (16/06/2011), available at http://www.ohchr.org/Documents/ Publications/GuidingPrinciplesBusinessHR_EN.pdf, last seen on 29/06/2015.

[79] *Interpretive Guide regarding the Corporate Responsibility to Respect Human Rights*, General Assembly, U.N. Document HR/PUB/12/02, (2012), available at www.ohchr.org/ Documents/Publications/HR.PUB.12.2_En.pdf, last seen on 29/06/2015.

[80] *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*', Sess. 4, U.N. Document A/HRC/4/35, 15, (19/02/2007), available at http://daccess-dds-ny.un.org/doc/U NDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement , last visited on 26/09/2015.

[81] Supra 58, at 11.

[82] Supra 54, at 44.

[83] Supra 2, at para. 17-38.

[84] Ibid, at para. 37.

[85] Ibid, at para. 23.

considered "third parties", including corporations and other entities; and a detailed explanation of the extent of the obligation. According to the wording of the Comment, States have to take effective measures so that these non-State actors restrain from "*denying equal access to adequate water*" or "*polluting and inequitably extracting from water resources.*"[86]

In addition, in a situation where water services are operated or controlled by third parties, States must "*prevent them for compromising equal, affordable, and physical access to sufficient, safe and acceptable water.*"[87] Indeed, in relation with this last disposition, it can be argued that the obligation to protect manifests a whole link between the human right to water and privatization of water systems.[88] Accordingly, the significance of this paragraph is twofold.[89] First, the human rights regime itself foresees and accounts for the possibility that water services may be provided by private corporations or other third parties.[90] Second, the state parties maintain certain obligations to safeguard the right to water even in the cases of privatization agreements, defining states' responsibilities, and the way privatization could potentially violate rights and possible steps states should take to mitigate such impact on human rights.[91]

Besides, the Comment establishes the types of violations to the right to water, distinguishing between acts of commission, which are the "*actions of States parties or other entities insufficiently regulated by States,*"[92] and acts of omission or of "*failure to take appropriate steps towards the full realization of the right to water, the failure to have a national policy on water and the failure to enforce relevant laws.*"[93] It was a common and traditional belief that the only actor capable of violating rights was the State. However, it is important to consider that in practice, not only States violate human rights.[94]This applies especially in the right to water, since a private corporation can

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[86] Ibid.

[87] Ibid, at para. 24.

[88] Supra 3, at 551.

[89] Supra 34, at 486.

[90] Similarly, WHO concludes that the state can privatize water services and user fees may be charged so that everyone can afford essential water (World Health Org., Global Water Supply and Sanitation Assessment, 2000, 1-3, available at http://www.who.int/water_sanitation_health/monitoring/globalassess/en/, last seen 26/04/2014).

[91] *Liberalization of trade in services and human rights*, UN Committee on Economic, Social and Cultural Rights, U.N. Document E/CN.4/Sub.2/2002/9, 23, (25/06/2002)

[92] Supra 2, at para. 42.

[93] Ibid, at para. 43.

[94] Supra 54, at 44.

easily interfere in the fulfillment of this right an attempt to essential rights, such as life and health.[95]

In 2010, the Report of Catarina de Albuquerque focused on the role and obligations of non-State providers of water and sanitation service.[96] According to the Report, international human rights law obliges non-State service providers to respect the human right to water and sanitation.[97] The Report also establishes the three primary challenges, which affect non-State water providers: decision-making, operation of services, accountability and enforcement.[98] In consequence, non-State service providers have a positive duty to exercise due diligence to identify and prevent negative human rights impacts that their actions may cause.[99]

3.3. Business Entities as Water Providers and Relevant Case Law

Corporations can have an important impact on the right to water. According to Audrey Gaughran, this can occur in three major situations: where businesses are users of water, particularly where water is a limited resource; where businesses activities that are unrelated to water itself affect water sources; and where businesses are involved in the provision of water services.[100]In addition, the Institute for Business and Human Rights has argued that businesses have three potential responsibilities concerning water: as users or consumers (over-abstraction or pollution), as enablers of access to water and as providers or distributors of water.[101] Having in mind these two classifications, which I believe they complement each other, this section will focus in the corporations as providers of water services and the problems of privatization.

Many States have introduced the right to water into their laws and tried to use privatization in order to guarantee water for all citizens.[102]However, privatization of water is a much debated issue, involving not only political and economic matters, but also important

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[95] Ibid.
[96] Supra 30, at para. 14-17.
[97] Ibid, at para. 22-28.
[98] Ibid, at para. 32-60.
[99] Ibid, at para. 26.
[100] A. Gaughran, *Business and Human Rights and the Right to Water*, 106 American Society of International Law Proceedings 52, 53 (2012).
[101] Supra 52, at 317.
[102] Supra 35, at 123.

human rights. There are two main ways of involvement of the private sector in the water supply services: complete privatization and Public-Private-Partnerships (the PPP).[103] According to Fitzmaurice, the last mechanism implies that "*water services remain in the hand of a monopoly provider, with some of them outsourced to private companies*".[104]

When water is privatized, the pertinent corporation modifies the "*natural flow of water*" within a community: this can negatively affect a community's access to water and lead to individuals drinking unclean water or having to pay for it.[105] Taking into account that almost a billion people do not have access to clean and safe water, it can be argued that corporations can become violators of the right to water "*where their activities deny access to water or where water prices increase without warning*."[106]

However, according to McAdam, although privatization is often blamed for disregarding human rights and encouraging profit oriented strategies; other measures are frequently liable for the lack of economic growth.[107] This author states that while in some countries privatization has led to positive growth, lack of competition between private businesses in some developing countries has led to provide poor services.[108]An example of this last situation can be found in some States in South America, where "*illegal private enterprises that provide services of very poor quality are neither regulated by a State nor competed against*."[109]

The case of Cochabamba, Bolivia, offers a very interesting study since it shows how privatization can lead to disaster in a State. In 1998, the World Bank coerced the Bolivian state to open the water system up to the private sector as a condition for guaranteeing a million dollar loan to enhance the water system's infrastructure.[110] In consequence, the international consortium Aquas del Tunari was granted a concession to

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[103] Supra 3, at 558.
[104] Ibid.
[105] Supra 35, at 123.
[106] Supra 52, at 303; supra 54, at 42.
[107] K. C. McAdam, *The Human Right to Water - Market Allocations and Subsistence in a World of Scarcity*, The Interdisciplinary Journal of Study Abroad 59, 67 (2003), available at http://files.eric.ed.gov/fulltext/EJ891474.pdf, last seen on 25/04/2014.
[108] Ibid, at 35.
[109] Supra 3, at 561.
[110] R. Glennon, *Water Scarcity, Marketing, and Privatization*, 83 Texas Law Review 1873, 1890 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=762604, last seen on 27/04/2014.

supply drinking water to the city of Cochabamba in September 1999.[111] Once the negotiations concluded, water in lakes and rivers "*ceased to be a collectively owned resource and became a privately owned commodity*", thereby depriving people of its use.[112] Indeed, tariffs increased by 200-300 percent in many cases.[113] This meant that many workers had to spend between twenty and twenty five per cent of their monthly income in water bills.[114] Unable to survive under the burden of the new water prices, public protests started to take place in February 2000.[115]The whole situation led to the so-called "Water war", which resulted in numerous arrests, some injuries and the death of a 17-year-old boy.[116] Finally, the Bolivian government terminated the contract and Aguasdel Tunari was substituted by a cooperative, which does not possess the sufficient capital to enhance or expand the infrastructure.[117] Although it may be slowly increasing access to water to the poor sector of the population, inadequate service and corruption still flood the system.[118]

This analysis has shown that privatization in this particular State failed to provide low-cost water supply. The new system was implemented too quickly and the rise of prices resulted in an asphyxiation of the poor population. Privatization did not include everyone in the market for water.[119] Besides, the citizens did not believe in the Bolivian State protecting them if the negative effects of the private water supply could not be sustained on a household level.[120] Thus, privatization conditioned the access to water, and therefore to life, on wealth, in a district overpoweringly known for its poverty.[121]

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111 *Bolivia: The water war to resist privatization of water in Cochabamba* (#157), Global Water Partnership, available at http://www.gwp.org/en/ToolBox/CASE-STUDIES /Americas--Caribbean/Bolivia-The-water-war-to-resist-privatisation-of-water-inCoc habamba-157/, last seen on 16/04/2014.

112 Supra 3, at 565.

113 *Water Privatization Case Study: Cochabamba*, Bolivia, Public Citizen, p. 3

114 W. Finnegan, *Letter from Bolivia: Leasing the Rain*, available at http://www.newyorker. com/archive/2002/04/08/020408fa_FACT1, last seen on 28/04/2014.

115 Supra 113, at 3.

116 Supra 3, at 565.

117 Supra 110, at 1891.

118 Supra 34, at 498.

119 Supra 107, at 39.

120 Ibid,at 40.

121 E. Strother, *On Water Scarcity and the Right to Life: Bolivia*, Council on Hemispheric Affairs (27/06/2013)

There exist many reasons to argue that converting water into a commodity, a marketable item, can have dangerous consequences. Accordingly, privatization leads to rate increases, water quality undermining, accountability only to shareholders and not consumers, corruption fostering, reduction of local control and public rights, and denial of access to clean water to the poor, *inter alia*.[122] In the Cochabamba case, the hazards provoked to society as a consequence of privatization amounted to clear human rights violations. However, the right to water's lack of binding regulation linked to the fact that water is frequently considered as an economic, social and cultural right, usually leads to the perception that the right to water cannot be strictly violated. This is because ESC rights are progressive rights, unlike the civil and political ones, which require an immediate implementation.[123] Notwithstanding this reality, it can be alleged that a privatization process can violate the right to life in cases where access to water is fragrantly impeded.

Apart from the Cochabamba case, there have been many other examples were privatization has led to many failures, bringing water stress among the poor populations and causing people to drink polluted water, endangering their right to health.[124] For instance, in Canada, at least seven people died in Ontario after A&L Labs had privatized water testing; in Morocco, consumers saw the water price increase threefold after the service was privatized in Casablanca.[125]

However, and just to put the tin lid on it, privatization is not always necessarily negative. It is true that many States have tried to remedy their water problems through the Work Bank or other monetary institutions loans, which usually include a clause obliging the State to privatize its water system.[126] Although this can lead to terrible consequences, the truth is that privatization can help developing the existent water infrastructure provided of course that the context and situation of the country permit it. This means that in order to analyze the situation in

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[122] *Top 10 Reasons to Oppose Water Privatization*, Water for All, Campaign to Keep Water as a Public Trust, available at http://hesomagazine.com/Top_10_(PDF).pdf, last seen on 25/04/2014.

[123] Supra 3, at 556.

[124] D. Van Overbeke, *Water Privatization Conflicts*, available at http://academic.evergreen .edu/g/grossmaz/vanovedr/, last accessed on 25/04/2014.

[125] Ibid.

[126] Supra 1, at 765,766.

Cochabamba or elsewhere, "*one must know the state of affairs before the private company arrived*."[127]

When a company is conferred the management of the water service supply and invests millions in reforming a devastated infrastructure to ameliorate the water accessibility of the poor communities, "*it quite justifiably expects the return of its capital and a reasonable profit*."[128]When the water provision is led by the "*full cost recovery*" principle, water supply can become only accessible to wealthy sectors in society, creating obvious inequities and risking the fulfillment of their basic needs.[129]

Accordingly, the issue at stake raises concerns and tensions. Glennon reflects this debate quoting a conversation between Gilda Pedinoce de Valls (an opponent of privatization), who argued that: "*water is a gift from God*" to what Oliver Barbaroux (President of Vivendi's water business) replied: "*Yes... but he forgot to lay the pipes*."[130] Thus, the privatization can bring good results, but requires good governance and the correct institutional framework in the State in question.

4. MOVING TOWARDS A MODEL OF BUSINESS RESPONSIBILITY

Although privatization of water services might have the ultimate goal of providing water access to the poorest and most marginal regions in a state, the process needs to be carefully regulated and endowed of their necessary safeguards. Otherwise, the situation can unleash serious human rights abuses. Accordingly, these potential violations by the private sector must be punished in order to increase consciousness amongst corporations. Business entities eagerness to economic profiting cannot outweigh peoples' right to drinkable water.

Taking into account the efforts made by the UN SRSG Ruggie to promote greater reporting, and considering that access to water must be

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[127] Supra 110, at 1891.

[128] Ibid.

[129] E.B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 Ecology Law Quarterly 957, 962, 963 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367759, last seen on 27/04/2014.

[130] J. Tagliabue, As Multinationals Run the Taps, Anger Rises Over Water for Profit, *The New York Times* (26/08/2002), available at http://www.nytimes.com/2002/08/26/world/as-multinationals-run-the-taps-anger-rises-over-water-for-profit.html, last seen on 26/07/2015.

provided without discrimination, it is clear that "*private water entrepreneurs should be obliged to report how much they are paying for access to water and how much they in turn charge the public for it*."[131]Disclosure is necessary since it leads to transparency, and transparency, to accountability.[132]It is clear that companies should be held accountable for the impact of their activities on water access. This can be achieved through a wide variety of judicial and non-judicial mechanisms that enable the individuals the possibility of holding the corporations accountable.[133]

The dilemma is how to make corporations respond of abuses to the right to water. As it has been previously analyzed, it is not possible to affirm that companies possess international personality with the respective rights and duties. Besides, even if the international framework conferred capability to the corporations, the lack of definition of the human right to water would impede accountability for a violation to the said right. Notwithstanding the foregoing, it is known that three levels of sources establish corporate obligations: national legal orders, international level and unilateral voluntary commitments by the corporations themselves.

Therefore, my proposal is to approach the question at the national level until the international system creates a monitoring mechanism to deal with the corporations' responsibility under the right to water. The implementation of the right to water in the domestic regulation of states would lead to adjust the policies and to create enforcement mechanisms to execute the measures taken. It is known that several countries already have explicitly recognized the right to water in their Constitutions, including South Africa[134], Kenya[135], Ecuador[136] and the Democratic Republic of Congo.[137] Where the right is only implicitly recognized in the Magna Carta, some countries such as India have broadly interpreted Article 21 of the Constitution, which recognizes the right to life, to encompass the right to safe and sufficient water.[138]Other states, instead, are developing their national legislation to protect the right to water,

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[131] Supra 58, at 13.
[132] Ibid, at 14.
[133] Ibid.
[134] Constitution of South Africa (1996) s. 27.
[135] Constitution of Kenya (2010) a. 43.1(d).
[136] Constitution of Ecuador (1998) a. 23.
[137] Constitution of the Democratic Republic of the Congo (2005) a. 48.
[138] N. Chowdhury et al., *The Human Right to Water and the Responsibilities of Businesses: An Analysis of Legal Issues*, SOAS University of London 10 (2011), available at http://www.ihrb.org/pdf/SOAS-The_Human_Right_to_Water.pdf, last seen on 28/04/2014.

such as Belgium.[139] Some authors have already defended that the domestic incorporation of international human rights law is the best approach for the enforcement of human rights, since it "*commits the States to compliance and provides opportunities for redress in case of violation*."[140] According to Bruce Pardy, "*a right to water that is unenforceable does not exist*."[141]

Then, it would be necessary to create the essential scheme in order to make private corporations accountable for abusive conducts. It is known that many states have enacted legislation on corporate responsibility for the right to water. However, there is no homogeneity among the domestic laws in the definitions and scope of this concept.[142] This problem, however, can be approached by introducing a uniform national law identifying the obligations and responsibilities of corporations in relation to human rights, including the right to water.[143] Hence, in order for the system to work, all private sectors should be bound to act transparently to respect the human right to water effectively. Naturally, the compliance monitoring procedures should be strengthened or even created when necessary, and publicized to permit individuals to claim entitlement.[144]

Concretely, it has been proposed that states should consider creating a monetary penalty for corporations.[145] When private corporations raise the price to an extent which is economically unsustainable or when due to a negligent process of water cleansing, they end up providing polluted water; main recognized rights are manifestly violated. In consequence, with the imposition of fines, the funds obtained could be used then to provide water to the poor sectors, which do not have access to potable water.[146]

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[139] Ibid, at 9.
[140] Supra 1, at 797.
[141] B. Pardy, *The Dark Irony of International Water Rights*, 28 Pace Environmental Law Review 907, 915 (2011), available at http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1678&context=pelr, last seen on 28/04/2014.
[142] Supra 52, at 307.
[143] Ibid.
[144] Supra 1, at 767.
[145] Supra 35, at 127.
[146] Ibid.

5. CONCLUSION

Kok and Langford noted, "*The measure of neglect of the right to water in international and national jurisprudence stands in contrast to the severity of the plight of the millions without proper access to water*."[147] This quote clearly refers to a problem that has its origins in the lack of proper regulation of an essential right with the natural consequence of lack of enforcement and its correspondent troubles.

Water needs to be protected and respected. Given the fact that access to water is *conditio sine qua non* for the fulfillment of many other rights, and taking into account the essential role of enterprises in this respect, it is crucial to find a way of making companies responsible for their violations. As it has been previously analyzed, corporate responsibility is gaining ground in the national arenas, while at the international level there has been a notable soft-law development. The role and impact of enterprises in the right to water is huge and the new policies taken in the frame of their activities evidence the growing consciousness of many businesses. However, the precedent in the human right field demonstrates that it is necessary to have a binding law, with an enforcement mechanism, which permits the individual to initiate proceedings against a company. In the frame of the right to water, enterprises are becoming even more important than the State itself, especially when the water system is privatized. Notwithstanding, there is not yet an international mechanism to deal with this kind of violations.

Thus, it has been argued that the first step is managing the claims of individuals at the domestic level when enterprises directly infringe the right to water, knowing that corporate responsibility does not prejudice to the states responsibilities. This is by no means a far-fetched scenario, since in many countries the government itself does not provide solutions to such critical situations where the lives of thousands of people are at stake.

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[147] A. Kok & M. Langford, *The Right to Water*, in *Constitutional Law of South Africa*, 208 (2005).

CAN TANZANIA ADEQUATELY FULFILL ITS PUBLIC HEALTH REGULATORY OBLIGATIONS ALONGSIDE BILATERAL INVESTMENT TREATIES OBLIGATIONS?

- Dr. Julius Cosmas*

1. INTRODUCTION

It is a trite law that a host state has an obligation to ensure foreign investors' lives and properties are duly protected.[1] The International Court of Justice (ICJ) in *Barcelona Traction, Light and Power Company, Ltd* (*Belgium. v. Spain*)[2] rightly held:

> 'A state once it has allowed a foreigner or foreign investment in its territory whether natural or juristic persons, it becomes under duty to accord them legal protection and bears obligations with regards to treatment to be accorded to them.'[3]

At the same time, the host state has also the duty to ensure that it fulfil other international and national legal obligations. International obligations accrue from different instruments to which the host state is a party to or from *jus cogens* while national obligations accrue from the respective

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1 R Dolzer & C Schreuer, *Principles of International Investment Law*, 211 (2008); also see ZA Kronfol, *Protection of Foreign Investment: A study in International Law*, 14 (1972); see also SP Subedi, *International Investment Law: Reconciling Policy and Principle,* 8 (2008); see also JW Salacuse, *Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain* 51, 52 – 53in *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Horn N, ed., 2004); see also KJ Vandevelde, *A brief history of international investment agreements,* 12 University of California Davis Journal of International Law and Policy 157 (2005).

2 *Barcelona Traction, Light and Power Co Case (Belgium v Spain*), ICJ Reports (1970).

3 Ibid, para 33.

country constitution, national laws and other regulations. [4] By implementing these instruments and local legislations the state is legally discharging its sovereign duty of exercising public authority.[5] However, in recent years the world community has witnessed the lack of balance between the state duty to protect foreign investors' properties on one hand and public health on the other. Arbitral tribunals which are empowered to hear foreign investors' claims against states have, on a number of occasions, created a dilemma as to whether state's foreign investor obligations are superior over public health obligations. This article discusses and analyses the cases which have sparked the world community concerns. It is submitted here that protecting the health of its citizen and the foreign investors properties are both; international and national fundamental obligations.[6] It is further submitted that the duty to protect public health should come as a first priority to any state as it involve its citizens' right to life.

This article is divided in five sections. The first section discusses the legal framework on the host state obligation to protect foreign investment and foreigners under international and municipal law. Tanzania legislations and international commitment to that end are discussed in this section. The second section discusses the host state general obligation to public health. The section also analyses Tanzania international commitments and national legislations on this obligation. In the third section, the article analyses briefly cases on public health versus foreign investors' rights which have sparked world attention. The fourth section discusses the parallel nature of state obligation to protect

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[4] I Brownlie, *Principles of Public International Law*, 292–93 (2008); also see S.A Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements,* 13 Journal of International Economic Law 1037, 1046 (2010).

[5] See G Van Harten, & M Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law,* 17 European Journal of International Law 121, 123 (2006); see also Salacuse , Supra 1, at 68–70; see also H Mann, *The Right of State to Regulate and International Investment Law: A Comment* in *UNCTAD The Development Dimensions of FDI: Policy and Rule Making Perspective,* 216 (2003); see also T Waelde, & A Kolo, *Environmental Regulation, Investment Protection and Regulatory Taking in International Law,* 53 International Comparative Law Quarterly811, 811 (2004); see also Benedict Kingsbury & Stephan W. Schill, 76-118 in *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality*, *International Investment Law and Comparative Public Law* (S. Schill, 1st ed., 2010).

[6] See for example the *WHO Framework Convention on Tobacco Control*, (2003) 42 ILM 3, 518–539, available at http://www.fctc.org/about-fca/tobacco-control-treaty, last seen on 20/06/2014 (The Treaty came in force on 27/02/2005 and Tanzania ratified the Treaty 30/04/2007).

foreign investments and to regulate on public health. The fifth and last section provides the necessary recommendations and concludes the article.

2. OBLIGATION TO PROTECT INTERNATIONAL INVESTMENT

2.1. Obligation to Protect Foreign Investments under International Law

The state's duty to protect foreign investments is not provided in a single universal instrument but in Bilateral Investment Treaties (BITs), International Investment Agreements (IIAs) and customary rules of international law.[7]BITs or IIAs are agreement made between two or more countries that safeguards investments made in the territories of the signatory countries.[8]Before the proliferation of BITS and IIAs in 1990s, the protection of foreign investments was in a very fragile state. Many developing countries viewed customary law principles which demanded foreign investment to be accorded higher protection than local investments to be infringing on their sovereignty.[9] However, the coming into operation of BITs and IIAs stabilised this field of law as the BITs provides foreign investors with adequate protection and at times overprotect them.[10] The UNCTAD world investment Report 2014 indicates that by the end of 2013 there are 3240 BITs and IIAs scattered all over the world.[11]

BITs have received a worldwide acceptance due to the fact that they come with a number of advantages to foreign investors.[12] Through BITs, foreign investors are guaranteed different rights, including but not limited to; the right to compensation in case the investment is expropriated, right for the foreign investment to receive fair and

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[7] See Supra 1, at 54; see also SD Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,* 73 Fordham Law Review 1521, 1524 (2005).

[8] See *Bilateral Investment Treaties in the Mid-1990s,* U N Sales E 98 II D 8 (1998).

[9] Supra 1, at 157.

[10] A Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Vanderbilt Journal of Transnational Law 639, 641 (1998).

[11] *World Investment Report* 2014, *'investing in the SDGs: An Action Plan'*, UNCTAD, available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf, last seen on 30/06/2014.

[12] Supra 8, at 1529.

equitable treatment, right for the investment to be accorded protection and security and the foreign investors' right to move capital and currency from one country to another.[13] Apart from these rights, BITs also provide for procedural rights which entitle foreign investors to sue the host state without seeking prior consent from their home governments.

In summary, one may say that Investment treaties provide an extensive protection to investors' rights as a means to encourage foreign direct investment to the host state.

2.1.1. Obligation to Protect Foreign Investment under Tanzanian BITs

In as far as BITs are Concerned, Tanzania has concluded 17 BITs with Canada, Denmark, Egypt, Finland, Germany, Italy, Jordan, Korea, Republic of Mauritius, Netherlands, Oman, South Africa, Sweden, Switzerland, Turkey, United Kingdom and Zimbabwe.[14] As pointed out in the introduction, these BITs have provisions which ensure that foreign investments are protected to the maximum level. The Tanzanian BIT provide, among other things, for the obligation to compensate in case the investment is expropriated,[15] obligation to treat

[13] See *KJ Vandevelde*; Supra 1, at 157.

[14] See UNCTAD Treaty Database – Bilateral Investment Treaties signed by Tanzania, available at http://unctad.org/Sections/dite_pcbb/docs/bits_tanzania.pdf, last seen on 20/06/2014.

[15] See Article 4 of An Agreement between the Government of UK and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment of 07/01/1994, (Hereinafter Tanzania – UK BIT), available at http://unctad.org/sections/dite/iia/docs/bits/tanzania_UK.pdf, last seen on 12/05/2013; see also Article 5 of An Agreement between the Government of Republic of Korea and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment (hereinafter Tanzania – Korea BIT), available at http://unctad.org/sections/dite/iia/docs/bits/tanzania_Korea.pdf, last seen on 12/05/2013; see also Article 6 of An Agreement between the Kingdom of Netherlands and the Government of the United Republic of Tanzania for Encouragement and Reciprocal Protection of Investments of 31/07/2001 (hereinafter Tanzania – Netherlands BIT), available at http://unctad.org/sections/dite/iia/docs/bits/tanzania_netherlands.pdf accessed on 12/05/2013; and Art 5of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments of 27/11/2009 (hereinafter South Africa – Zimbabwe BIT), availableat http://unctad.org/sections/dite/iia/docs/bits/south africa_zimbabwe.pdf, last seen on 12/05/2013.

all foreign investment fairly and equitably,[16] obligation to ensure that all foreign investments are accorded protection and security[17] and the obligation to allow foreign investors to move capital and currency from one country to another.[18]

It can be concluded here that with exception of Tanzania – Canada BIT, Tanzanian BITs just like any other old generation BIT clearly guarantee foreign investment protection without placing any obligation to foreign investors.

2.2. Obligation to Protect Foreign Investments under Tanzania Laws

Apart from international obligations created in BITs, Tanzania as a state assumes obligations to foreign investors through national legislations. This is done by either ratifying the respective treaties or by having the constitutional provisions which provides for the protection of private property.

In as far as the constitution is concerned; Article 24 of the Constitution of United Republic of Tanzania (URT) guarantees the right to own property and the state's duty to protect such property.[19] Sub article 24(2) demands for fair and adequate compensation in case of nationalisation of private property. It is submitted here that this constitutional guarantee is supposed to be interpreted in a manner that extends the protection to foreign investors.

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[16] As above, Art 2 of Tanzania – Korea BIT; Art 2 Tanzania – UK BIT; Art 3 Tanzania – Netherlands BIT; Art 1 of the Treaty between the Federal Republic of Germany and the United Republic of Tanzania concerning the Encouragement and Reciprocal Protection of Investment of 30/01/1965 (hereinafter Tanzania – Germany BIT), available at http://unctad.org/sections/dite/iia/docs/bits/tanzania_germany.pdf, last seen on 12/05/2013 and Art 3 of South Africa – Zimbabwe BIT.

[17] Supra 16, art. 2.

[18] Supra 16, Article 6 of Tanzania – Korea BIT; See also Supra 15, Article 5 of Tanzania – Netherlands BIT, See Supra 16, Article 4 of Tanzania – Germany BIT and Article 5 of the Agreement on encouragement and reciprocal protection of investments between the Republic of South Africa and the Kingdom of the Netherlands of 09/05/1995, available at http://unctad.org/sections/dite/iia/docs/bits/southafrica_netherlands.pdf, last seen on 12/05/2013 (hereinafter South Africa – Netherland BIT).

[19] See Article 24 (1) of the United Republic of Tanzania Constitution, 1977 available at http://www.issafrica.org/cdct/mainpages/pdf/Corruption/Legislation/Tanzania/Tanzania%20Constitution%20in%20English.pdf, last seen on 26/04/2014.

Apart from the Constitution, the Tanzania Investment Act provides specific protection to foreign investments.[20] Section 22 of the Tanzania Investment Act provides for the protection of foreign investments.[21] The provision reads: 22 (a) No business shall be nationalised or expropriated by the government.

The provision further provides that in case of expropriation conducted under due process of law, payment of fair, adequate and prompt compensation shall be made.[22] It can be concluded here that Tanzania has the requisite legal framework for protection of foreign investment under its national and international instruments.

3. OBLIGATION TO PROTECT PUBLIC HEALTH UNDER INTERNATIONAL LAW

3.1. Obligation under International Law

The public right to health is expressly recognized in a series of international law instruments. A host state therefore is under duty to ensure that it honours the obligations created from these instruments. The main instruments which addresses the public health issue includes; the Universal Declaration of Human Rights (UDHR),[23] the constitution of the World Health Organisation,[24] the Convention on the Right of the Child,[25] the Convention on the Elimination of All Forms of Racial Discrimination,[26] the Convention on the Elimination of All Forms of Discrimination against Women,[27] and the International Covenant on

[20] The Tanzania Investment Act, 1997 (Tanzania).
[21] Supra 20, S. 22.
[22] Supra 20, S. 22 (2) (a).
[23] See the Universal Declaration of Human Right, GA Res/217A (III) available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf, last seen on 24/05/2014.
[24] See the WHO Constitution, 1946 available at http://www.who.int/governance/eb/who_constitution_en.pdf, last seen on 25/06/2014.
[25] The Convention on the Right of the Child, 1989 28 ILM 1457, available at http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf, last seen on 26/06/2014.
[26] Convention on the Elimination of All Forms of Racial Discrimination, 1965 660 UNTS 195,available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx, last seen on 05/06/2014.
[27] Convention on the Elimination of All Forms of Discrimination Against Women, 1979 1249 UNTS 13,available at http://www.ohchr.org/Documents/Professional Interest/cedaw.pdf, last seen on 23/05/2014.

Economic, Social, and Cultural Rights.[28] Tanzania in particular, is a member state to all these instruments by ratifying and acceding to some of them.[29]

Art 25(1) of the Universal Declaration of Human Rights (UDHR) clearly provides that 'everyone has the right to a standard of living adequate for the *health* and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[30]

On the other hand, Article 1 of the World Health Organisation declares that the World Health Organization primary objective is the attainment by all peoples of the highest possible level of *health*.[31]

In the same spirit, Article 24 (1) of the Convention on the Right of the Child demands State Parties to the convention to recognize the right of the child to enjoy highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.[32]

Right to health is also guaranteed under the Convention on the Elimination of All Forms of Racial Discrimination.[33] Article 5(e) (iv) clearly guarantees economic, social and cultural rights in particular with regard to the right to *public health*, medical care, social security and social services. The same is guaranteed under Article 11(1) (f) the Convention on the Elimination of All Forms of Discrimination against Women.[34]

Last but not the least, Article 12 of the International Covenant on Economic, Social, and Cultural Rights provides that the States Parties to

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[28] International Covenant on Economic, Social, and Cultural Rights, available at http://www.who.int/hhr/Economic_social_cultural.pdf, last seen on 12/06/2014.

[29] Tanzania ratified to the *Convention on the Rights of the Child* on 10/06/ 1991; acceded to the *Convention on Elimination of All form of Racial Discrimination* on 27/10/1971; ratified to the *Convention on the Elimination of All Forms of Discrimination Against Women* on 20/08/1985; ratified the *International Covenant on Economic, Social and Cultural Rights* on 11/06/1976.

[30] Supra 23.

[31] Supra 24.

[32] Supra 25.

[33] Supra 26.

[34] Supra 27.

the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[35]

The UN Committee on Economic, Social and Cultural Right (ECOSOC) has interpreted the state's failure to fulfil its obligation to public health as:

> … the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by … the failure to discourage production, marketing and consumption of tobacco … the failure to discourage the continued observance of harmful … cultural practices.[36]

From the preceding it can be concluded here that indeed states have committed themselves in ensuring that public health is protected. The above named treaties and covenants have been signed by majority of world nations. Most of the above cited instruments are UN documents which mean they have been endorsed by 194 member states to the UN.[37] The UN Declaration of Human right for example applies to all 194 UN member state countries.[38] WHO also constitute all UN member states, which means all 194 UN Members have committed themselves to the WHO Constitutional requirement on public health.[39] Tanzania joined the UN 5 days after its independence on 14th December 1961 which means the above discussed health provisions have a place of application in the country.

For dualist countries like Tanzania, an acceded international instrument does not have a force of law until the same has been ratified and a law is

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[35] Supra 28.

[36] General Comment 14, The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, 11 August 2000available at http://www.refworld.org/publisher,CESCR,GENERAL,,4538838d0,0.html, last seen on 15/06/2014.

[37] See the UN List of Member States available at http://www.un.org/en/members/growth.shtml, last seen on 23/06/2014.

[38] Ibid.

[39] World Health Organization Member states available at http://www.who.int/countries/en/, last seen on 24/06/2014.

passed to implement it.[40] It follows therefore that the importance of ratification cannot be overemphasized. In the following section, the local legal regime is analysed to see how efficiently it is protecting public health.

3.2. Public Health Obligation under Tanzanian BITs

Tanzania is among states which are still embracing the BITs which are normally referred to as 'first generation BITs'.[41] The so called first generation BITs were concluded before and during 1990s. They widely provides for foreign investment protection without imposing any obligations to foreign investors.[42] These BITs do not acknowledge that host states have the right and the duty to regulate in pursuit of policy objectives other than investment promotion and protection. As pointed out earlier, Tanzania has concluded 17 BITs with Canada, Denmark, Egypt, Finland, Germany, Italy, Jordan, Korea, Republic of Mauritius, Netherlands, Oman, South Africa, Sweden, Switzerland, Turkey, United Kingdom and Zimbabwe.[43] Out of all these 17 BITs only Tanzania – Canada BIT which was signed recently on 17th May 2013 provides for an article addressing health and social values.[44] Article 15 of the BIT provide as follows:

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic *health*, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

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[40] V.S Vereshchetin, *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, 7 European Journal of International Law, 29 (1996).

[41] Supra 5, at 1045.

[42] Supra 5, at 1040.

[43] Supra 14.

[44] See Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments of 17/05/2013, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/tanzania-text-tanzanie.aspx?lang=eng, last seen on 23/06/2014.

The rest of the treaties which were almost entered in the 1990s and early 2000s are silent on health matters. It is through such silence that tribunals finds excuses and ignore health issues in the course of interpreting BITs obligations.

3.3. Public Health Obligation under National Legal Framework

National legal framework plays a significant role in as far as protection of public health of the respective country is concerned. It is through a national legal framework that the international obligations of any country can be effectively implemented at national level.

As usual, the constitution, as the mother law of the country takes primacy. The United Republic of Tanzania Constitution is silent on state's obligation to protect public health. However, Article 9(i) obliges the state authorities and all its agencies to direct their policies and programs towards ensuring the use of national resources for development of the people and particularly geared towards the eradication of poverty and disease.[45] In addition, the Constitution has a provision on the right to life under Article 14 which provides that every person has the right to life and to the protection of their life to society in accordance with the law.[46] Furthermore, Article 30(2) (b) calls for enactment of laws to ensure public health.[47]

To implement the constitutional requirement under Article 30(2) (b) the government enacted the Public Health Act, 2009.[48] The preamble to the Act clearly state the objective of the legislation as 'to provide for the promotion, preservation and maintenance of public health with a view to ensuring the provisions of comprehensive, functional and sustainable public health services to the general public and to provide for other related matters'. Section 3 of the Act defines public health as:

> … a national health, community health and individual health which is primarily aimed at increasing the well-being of the population by providing essential public health services to all citizens of Mainland Tanzania.[49]

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[45] Supra 19.
[46] Supra 19, art. 14.
[47] Supra 19, art. 30 (2) (b).
[48] The Public Health Act 2009, (Tanzania).
[49] Ibid., S. 3.

Section 5 (c) on the other hand obligates public authority to safeguard and promote public health standards.

Therefore, as per the Constitution and the Public Health Act it is the duty of the state to ensure that public health standard is maintained and to take all necessary measures to ensure that public health is not compromised. In doing so, the state as a sovereign has the power to enact any law or policy which might be relevant to achieve the maintenance and protection of public health.

4. INVESTOR – STATE CASES AT LOGGERHEAD WITH PUBLIC HEALTH PROTECTION

It is always said charity begins at home. In *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*[50] public health was an issue which motivated the Tanzanian government to interfere with the foreign investor's rights. The facts in brief were that in 2003 a British-German joint venture - Biwater Gauff Tanzania (hereinafter "BGT") won a bid from the World Bank to renovate and upgrade and the water system in the city of Dar es Salaam Tanzania.[51] The firm miscalculated when bidding for the project to the extent that 18 months down the road it found itself in deep financial difficulties and unable to supply water as required. The water supply services deteriorated threatening the outbreak of cholera and other related diseases.[52] As a custodian of public health, the government of Tanzania decided to take charge of the management and the supply of water in the city.[53]Henceforth on 13 May 2005, the Minister of Water and Livestock Development issued a press release terminating the contract project with the claimant.[54] BGT was aggrieved by the government move and decided to institute a claim at ICSID pursuant to Tanzania – UK BIT[55] alleging breach on expropriation, fair and equitable treatment, full protection and security, discrimination and unrestricted transfer of capital guarantees.[56]

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[50] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID CASE NO. ARB/05/22 (ICSID).
[51] Ibid., para 3.
[52] Supra 50, para 789.
[53] Supra 50, para 436.
[54] Supra 50, para 792.
[55] Supra 19.
[56] Supra 50, para 205.

The Tribunal found Tanzania in breach of the UK – Tanzania BIT but fortunately awarded no damages to the claimant on the ground that the breaches of the BIT did not cause City Water any losses and that the Claimant's cannot benefit from its own failures in the performance of the project contract.[57]

It is should be borne in mind here that the government exercised the powers to prevent the possible outbreak of cholera as provided under section 4(1) (c) of the Public Health Act and The International Health Regulations, 2005 as adopted by the World Health Assembly to which Tanzania is a party.[58]

Another investor – state case on health issues is *Philip Morris Asia Ltd v The Commonwealth of Australia*.[59] In June 2011, Philip Morris Asia Limited (based in Hong Kong), a manufacturer, importer and distributor of cigarettes commenced the investment treaty claim against Australia alleging that Australia's plain cigarette packaging legislation, (the Plain Packaging Act, 2011) contravenes Australia's – Hong Kong bilateral investment treaty (BIT).[60]

The Tobacco Plain Packaging Act 2011 bans the use of cigarette companies' logos on cigarette packets and replaces them with health warnings.[61] The name of the cigarette companies are required to appear in the same font and size as other words on the cigarette packets.

The Claimant, Philip Morris Asia Limited, argues that the law is depriving it of the value of its investment in trademarks and other intellectual property in Australia and this is tantamount to expropriation.[62] The claim is essentially based on expropriation of intellectual property without compensation under Article 6 of the Australia-Hong Kong BIT and a breach of fair and equitable treatment

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[57] Supra 50, paras 519 & 773 – 808.

[58] See the World Health Regulations, 2005, available at http://www.who.int/ihr/publications/9789241596664/en/, last seen on 23/05/2014.

[59] *Philip Morris Asia Ltd* v. *The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012 – 12, available at http://www.italaw.com/cases/851, last seen on 6/08/2013.

[60] Ibid, para 6 of the Notice of Claim under the Australia – Hong Kong Agreement dated 27/06/2011, available at http://www.italaw.com/sites/default/files/case-documents/ita0664.pdf, last seen on 6/08/2013; see also the Notice of Arbitration, Para 1.2, available at http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf, last seen on 06/08/2013.

[61] Ibid.

[62] Supra 59, para 1.5 – 1.7.

under Article 2(2) of the Australia-Hong Kong BIT.[63] The claimant is therefore asking the Tribunal to order Australia to suspend enforcement of Plain Packaging Act and to compensate the Claimant for loss suffered through compliance. Alternatively, the claimant asks the Tribunal to order Australia to compensate the Claimant for loss suffered as a result of the enactment and continued application of plain packaging legislation.[64]

The case is still pending and is to be adjudicated in accordance to UNCITRAL rules 2010.[65]

As it can be gathered from the claimant pleadings, the Tribunal is asked to suspend the application of the law which is passed by the Australian parliament in accordance to the state regulatory powers. The legislation aims at protecting public health, and is in line with the World Health Organization Framework Convention on Tobacco Control.[66] Therefore Australia is not only protecting its citizens' health but fulfilling its WHO international obligation.

Another case is *Vattenfall AB and others* v. *Federal Republic of Germany.*[67]In May 2012 the Swedish energy company Vattenfall filed a request for arbitration at ICSID against the Republic of Germany and the Tribunal was dully constituted on 14th December 2013.[68] The case resulted from the Germany decision to opt out of nuclear energy by 2022 following the Fukushima disaster in March 2011.[69] The Federal Atomic Energy

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[63] Supra 59, para 1.5.
[64] Supra 59, para 1.7.
[65] The last Procedural Order regarding Amendment of the Timetable was issued on 31st December 2013, available at http://www.italaw.com/sites/default/files/case-documents/italaw1309.pdf, last seen on 06/08/2013.
[66] See the WHO Framework Convention on Tobacco Control, (2003) 42 ILM 3, 518–539, available at http://www.fctc.org/about-fca/tobacco-control-treaty, last seen on 20/06/2014 (The Treaty came in force on 27/02/2005).
[67] *Vattenfall AB and others v Federal Republic of Germany,* ICSID Case No ARB/12/12 (ICSID).
[68] See the case procedural details available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C2220&actionVal=vie wCase, last seen on 07/08/2013.
[69] The Fukushima Nuclear reactors failure caused 160,000 people to flee their homes in japan in 2011. For more on this see Green Peace International available at http://www.greenpeace.org/international/en/campaigns/nuclear/safety/accidents/Fukushima-nuclear-disaster/, last seen on 03/07/2014.

Act was amended in 2011 to give effect to the parliament decision to abandon the use of nuclear energy.[70]

The consequence of the amendment of the law is that the Brunsbüttel and Krümmel nuclear power plants, for which Vattenfall has operating responsibility and owns 66.7% and 50%, respectively, may not be restarted. Vattenfall claim the breach of rights accruing from the EU Energy Charter Treaty.[71] Vattenfall is reportedly requesting €3.7 billion in compensation.[72] The case is still pending and the last activity on record shows that the Tribunal issued the first procedural Order on procedural matters on 17th July 2013.[73]

Again, this case arises from the state's exercising regulatory powers on public health matters. One would expect that the respective tribunal would consider the necessity of the measure taken by the government and balance it with foreign investor interests. It is worrying however as investor – state Tribunals are not consistently doing that. For example the Tribunal in *Santa Elena v Costa Rica*,[74] held that:

> 'Expropriatory environmental measures-no matter how laudable and how beneficial to society as a whole-are in this respect, similar to any other expropriatory measure that a state may take in order to implement its policies… where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains'.[75]

With the Santa Elena trend, it will not be surprising if the Philip Morris tribunal and the Vattenfall Tribunal find the respondent states liable to the foreign investor despite the magnitude of the measure on public health.

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70 N Bernasconi – Osterwarder & RT Hoffman, *The German Nuclear Phase-Out Put to the Test in International Investment Arbitration?,* IISD Briefing Note, June 2012, available at http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf, last seen on 07/08/2013.

71 The European Energy Charter, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf

72 Supra 70.

73 See the Case Procedural Details available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C2220&actionVal=viewCase, last seen on 07/08/2013.

74 *Campania del Desarrollo de Santa Elena, S.A v Republic of Costa Rica*, ICSID Case No. ARB/96/1 (ICSID).

75 Ibid., paras 71-72.

5. The Parallel Nature of State's Obligation to Foreign Investors &Public Health

As evidenced in the discussion above, states have multiple international and national obligations. States has the duty among others to protect the foreign investors' interests in its territory. But also states have the primary duty to protect health of its citizens also from international and national instruments. The problem comes when the implementation of the two obligations conflict each other and demand the government to violate one in order to implement the other. Which obligation should prevail over the other is a question which has been given a critical consideration under this part of the discussion. It is submitted herein below that states have the duty to fulfil both obligations in parallel. The basis for this argument is the Vienna Convention on the Law of Treaties (VLCT) and relevant cases decided by the Court of Justice of the European Union (CJEU) and the WTO.

5.1. The Vienna Convention on Law of Treaties

The Vienna Convention on the Law of Treaties is the guiding instrument with regards to treaties interpretation. [76] The Preamble requires the adjudicators to perform their function of settling disputes 'in conformity with the principles of justice and international law'. The principles of international law on treaty interpretation are codified through Article 31 and 32 of the VLCT. Article 31 provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[77]

It is submitted here that by requiring that a treaty should be interpreted in the light of its object and purpose the VLCT intended to limit the scope of the respective treaty in question. This means that any adjudicators on a particular treaty are not supposed to give a wider scope to a treaty which would otherwise go beyond its scope. In other words, Article 31(1) requires interpreters to take the whole treaty into account when adopting the necessary measures to prevent over extension of the rights provided therein. The purpose of a BIT, for

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[76] The Vienna Convention on the Law of Treaties (1969), available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf , last seen on 27/06/2014.

[77] Ibid, art. 31(1).

example, is to guarantee foreign investors with specific rights and not to override other host state obligations created through other treaties. It follows therefore that any interpretation by arbitrators which gives investors' interests' priority over other host state obligation is not living up to the object and purpose for which the BIT was created for.

In addition, Article 31(3) (c) requires that in the course of interpreting any treaty relevant rules of international law applicable in the relations between the parties need to be taken into consideration.[78] One of such rules of international law is the right of sovereign state to exercise regulatory powers including, among other things, enactment and enforcement of regulations on a range of issues, including public health. Therefore a proper interpretation of Article 31(3) (c) in as far as balancing treaty obligations is concerned, would be that tribunals in the course of interpreting BITs and IIAs need to do so with other social values in mind; human rights, public health and environmental considerations. It follows further that tribunals need not blindly interpret BITs as if they exist in isolation but should interpret them in a manner that they would not undermine other host state's international obligations.[79]

5.2. Jurisprudence on Private Property v. Public Interest

Courts have also been able to put to light the scope of property protection versus public interests including public health. The European Court of Justice in *Booker Aquaculture and Hydro Seafood* ruled that the protection of public health is a general interest which can even justify substantial adverse consequences for freedom of trade and property rights.[80]

In another case *Swedish Match cases*, the ECJ recognized that the prohibition of the marketing of tobacco for oral use restricted free trade, but stressed that such a regulation was intended to protect a high level of health, which is an objective of general interest.[81]

The WTO as well has recognised the need to balance the trade interests Vis a Vis other social regulatory powers of the state parties. In *US V*

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[78] Supra 76, art. 31(3) (c).
[79] See Supra 5, at 1046.
[80] Booker Aquaculture and Hydro Seafood v Scottish Ministers, Joined Cases C-20/00 and 64/00, [2003] ECR 7411, Opinion of AG Mischo.
[81] Swedish Match, Case C 210/03, [2003] ECR I-11893.

Gasoline[82] case the US measure to regulate the composition and emission effects of gasoline in order to reduce air pollution was held valid despite the fact that it interfered with trade. Again, in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*,[83] the court decided to uphold French public health objective over Canada trade objectives. Also in *Brazil – Re-treaded Tyres*[84] the Appellate Body affirmed the relevancy of non – trade policies by holding that the import ban on re-treaded tyres was apt to produce a material contribution to the achievement of its objective i.e. the reduction in waste tyre volumes.[85]

6. WAY FORWARD

Despite the clear guidance from the VLCT, Tribunals have failed to balance the host state health obligations Vis a Vis foreign investors interests. As seen in *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*[86] and in *Santa Elena v Costa Rica*,[87] discussed earlier, tribunal focuses more on protecting foreign investors interests without giving regard to the necessity of the state measure.

As seen in the discussion above, Tanzania BITs, with exception of Tanzania – Canada BIT are all silent on public health matters. Which means, as earlier pointed out, tribunals constituted to deal with a dispute between a foreign investor and Tanzania as a host state are not specifically obliged by the state parties to take into consideration government regulatory powers on public health issues. It follows therefore that, Tanzania runs a risk of being found guilty for enacting legislations which are meant to protect public health. As earlier evidenced, foreign investors in *Philip Morris Asia Ltd v The Commonwealth of Australia*[88] and *Vattenfall AB and others v. Federal Republic of Germany*[89] are up in arms suing Australia and Federal Republic of Germany

[82] Appelate Body Report, *United States-Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R (29/04/1996).
[83] Appelate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R (12/03/2001).
[84] Appelate Body Report, *Brazil – Re-treaded Tyres* WT/DS332/AB/R (12/06/2007)
[85] Ibid.
[86] Supra 50.
[87] Supra 74.
[88] Supra 59.
[89] Supra 67.

respectively for exercising regulatory powers of legislating on public health.

Therefore Tanzania need to get her house in order before the Australian and Germany experience befalls it. There are a number of ways of addressing or curbing the situation. The most fulfilling and trending ones includes: renegotiation of the BIT so as to include treaty interpretative statements or formulate a model BIT which balances foreign investors interests with the host state power to regulate on public health and non - investment issues.

6.1. Renegotiate to Include Interpretative Statements

The fact that a BIT is a creature of the respective state parties' consent, it is just logical for the state parties to be given the mandate to provide the guidelines on how the BIT provisions should be interpreted.[90] The state parties should not leave the door wide open for tribunal to go around searching the intention of the state parties. As discussed before, the majority of Tanzanian BITs do not address Tanzania power to regulate on non- investment hence leaving the country vulnerable on this area. Government regulatory measures on public health could lend the country in the hands of the International Centre for Settlement of Investment Disputes tribunal or UNCITRAL tribunal and punitive damages may befall thereafter. The fact that most of the FDI entering the country are on extraction industry which, at times, affect the health of the community surrounding these extracting firms, calls for Tanzania to seek for interpretative statement before it is too late. For example, in May 2009, toxic sludge from the mine seeped into the Thigithe River in Tarime Mara. Reports from the surrounding villages alleged that the toxic material led to the deaths of about 20 people and to fish, crops and animals dying from the contaminated water. The following year, controversy raged in Tanzania's parliament as activists, villagers and human rights organizations tried to have the mineshut down.[91] It should be understood here that had the parliament decided to instruct the

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[90] See UNCTAD IIIA, Issue Note, *Interpretation of IIAs: What State can Do*, December 2011, available at http://unctad.org/en/docs/webdiaeia2011d10_en.pdf, last seen on 03/03/2014; see also See UNCTAD IIA Issues Note *Reform of Investor – State Dispute Settlement: In Search of a Roadmap,* 26/06/2013, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf, last seen on 03/03/2014.

[91] See *Tanzanian villagers sue London-based African Barrick Gold for deaths and injuries*, Protest Barrick.net, available at http://protestbarrick.net/article.php?id=928, last seen on 23/06/2014.

government to close the mine it would have warranted institution of a claim with ICSID by the foreign investor alleging expropriation and failure to accord fair and equitable treatment. The existing BITs would have invoked in favour of the foreign investor as they only provide for foreign investors rights and are silent on state right to regulate on public health.

It is submitted here that with such a lacuna in Tanzania BITs, it is ripe time to seek renegotiation of the BITs so as to allow state parties to have the power to provide interpretative statement that BITs rights are not meant to override other state obligations. The interpretative statement could go as far as stipulating the investors' duty to observe environmental, health, cultural regulations.

Other jurisdictions have managed to incorporate the interpretative statements in their Model BITs. The Canadian Model BIT under Article 40 (2) establishes a Commission constituted by Cabinet - level representatives from the BIT member States. [92] The Article further provides that the interpretative note shall be binding on the Tribunal and any award shall be required to conform to the interpretative statement.[93] In addition, Article 28 of Canada and the States of the European Free Trade Association which constitute Iceland, Liechtenstein, Norway and Switzerland provide for the establishment of the interpretative commission.[94] The same is provided for in the Canadian agreements with Colombia[95], Peru,[96] Chile,[97] Costa Rica,[98] Jordan[99] and Israel.[100]

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[92] Canadian Model BIT, 2004, available at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf, last seen on 25/02/2014.

[93] Ibid., art. 40(2).

[94] Free Trade Agreement between Canada and the States of the European Free Trade Association, available at http://www.efta.int/media/documents/legal-texts/free-trade-relations/canada/EFTA-Canada%20Free%20Trade%20Agreement%20EN.pdf, last seen on 26/02/2014.

[95] Article 832 of the Canada-Colombia Free Trade Agreement of 21/11/2008, available at http://www.international.gc.ca, last seen on 26/02/2014

[96] Article 50 of the Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, available at http://www.international.gc.ca, last seen on 26/02/2014.

[97] Article N-01 of the Canada-Chile Free Trade Agreement of 05/07/1997, available at http://www.international.gc.ca, last seen on 26/02/2014.

[98] See Article XIII.1, of the Canada-Costa Rica Free Trade Agreement of 01/11/2002, available at http://www.international.gc.ca, last seen on 26/02/2014.

[99] Article 40 of the Agreement between Canada and the Hashemite Kingdom of Jordan or the Promotion and Protection of Investments of 28/06/2009, available at http://www.international.gc.ca, last seen on 26/02/2014.

In the same spirit, the US Model BIT 2004, while does not establish a Commission as its counterpart Canada, it takes recognition of the member state parties' joint interpretation on any provision of the BIT.[101] The Model BIT considers such interpretation binding on a Tribunal and the award rendered thereby has to be in line with the joint interpretative statement.[102] the U.S.-Australia Free Trade Agreement,[103] the U.S.-Chile Free Trade Agreement,[104] and the recent agreements with Colombia, Korea, Morocco, Oman, Panama, Peru, Rwanda and Singapore all provides for the establishment of an interpretative statement by member states representatives.[105]

It is submitted here that Tanzania has the right to ask partner member states to each BIT to renegotiate the BIT so as to include a provision which provides for the establishment of interpretative statements commission. Renegotiating a BIT to achieve the intended goal is within the powers of state parties.[106] The Permanent Court of International Justice once held that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.[107]

6.2. Adopt the Canada – Tanzania BIT as a Model BIT

As discussed earlier, the Canada – Tanzania BIT which was signed last year has addressed host state non – investment regulatory powers. This is a right direction to go as foreign investment is not the end itself but one of the means to the end. Canada – Tanzania BIT recognises that while investment protection and promotion remains the principal

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100 Article 8(2) of the Canada-Israel Free Trade Agreement of 01/01/1997, available at http://www.international.gc.ca, last seen on 26/02/2014.

101 Article 30(3) of the US Model BIT, 2004, available at http://www.state.gov/documents/organization/117601.pdf, last seen on 25/02/2014.

102 Ibid.

103 United States-Australia Free Trade Agreement of 01/01/2005, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text, last seen on 26/02/2014.

104 United States-Chile Free Trade Agreement of 01/01/2004, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta, last seen on 26/02/2014.

105 See these FTAs at http://www.ustr.gov/trade-agreements/free-trade-agreements, last seen on 26/02/2014.

106 R Anthea, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 American Journal of International Law, 225 (2010).

107 *Jaworzina,* Advisory Opinion, 1923, P.C.I.J., Series B, No. 8, at 37 (Permanent Court of International Justice).

objective of the IIA, the objective has to be achieved in a manner consistent with the protection of health, safety, and the environment. The BIT in other words signifies that the parties do not intend to relinquish their right to regulate or their flexibility to address issues relating to the public interest.

Therefore as there is no Model BIT so far which Tanzania is following, it is suggested here that the Canada- Tanzania BIT should be adopted by the government as its model BIT to which all future BITs will be benchmarked upon. This will help the country from falling into the trap of entering into a BIT resembling the existing 16 BITs which do not balance the host state power to regulate vis a vis foreign investors rights.

7. CONCLUSION

In conclusion, it can be said here that investor – state tribunals as institutions empowered to interpret treaties need to adhere to the VLCT article 31(3)(c) which demand them to do their job by taking into account other international law rules. State's power to regulate is among the international law rules. Hence tribunals need to take cognisance of the state power to regulate and interpret BIT in a manner that will avoid as much as possible conflict with the regulatory powers of the host state on other matters, including public health. Meanwhile, it is further submitted that it is right time for Tanzania to consider renegotiating its BITs which hinders its capacity to regulate on public health. As a sovereign state it has an international obligation to ensure public health is maintained at highest standard possible. This obligation is provided as well in the constitution and other local legislations. Renegotiating the treaties will put the country at a better place of addressing public health issues and other non-investment obligation. alongside that, for future BITs Tanzania should consider making Tanzania – Canada BIT as its Model BIT as it is more balanced and give the state parties more power to regulate on non–investment issues.

[ARTICLES]

BUYER BEWARE: THE HIDDEN COST OF LABOR IN AN INTERNATIONAL MERGER AND ACQUISITION

- **Elvira Medici***

ABSTRACT

A US investor must understand the basic difference in the principle of individual labor law in the US and how it compares with the laws of the target country in a merger and acquisition (M &A). This paper emphasizes the importance of including in the due diligence process of M &A the target country's labor laws and investigate the cost of compliance or violation.

1. INTRODUCTION

In today's global economy, corporate mergers and acquisitions (M&As) have become part of economic reality.[1] Globalization opens many U.S. companies to a broader outlook of an interconnected and interdependent world with free transfer of capital, goods, and services

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[1] A. Charman, *Global Mergers and Acquisitions: The Human Resource Challenge,* 3 (1st ed., 1999).

across national frontiers.[2]The synergistic gains from M&As may result from more effective and efficient management, economies of scale, more profitable use of assets, exploitation of market power, and the use of complementary resources; yet, results of many empirical studies show that many M&As fail.[3] This article will concentrate on shedding light on important differences in international labor law between United States and specifically Germany and Italy and how failure to take those differences into consideration can compromise the success of a merger and acquisition.

2. Due Diligence: Scrutiny Of Labor Law Of Target Countries (Germany And Italy) In Relation US Labor Laws

2.1. Distinction in Terms: "Labor Law" and "Employment Law"

"The U.S. term "labor and employment law" does not translate easily because of differences in language and usage between the United States and the multilingual European Union (EU)[4]. In the U.S., there is a distinction between "labor law," which relates to unionized workers and collective bargaining, and "employment law," which relates to equal employment issues and to employment issues of non-unionized workers[5]. This distinction does not exist in EU countries. Generally speaking, the European term "labor law" covers all laws relating to employment.[6]

2.2. Distinctions in Legal Regulations

In addition, the distinction between regulated and unregulated aspects of industrial relations and human resources cannot be drawn sharply for a supranational body such as the EU. [7] Items that are subject to legal regulation in the U.S., such as union recognition and the collective bargaining process, may not be subject to legal regulation in a particular

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[2] Rick Maurer, *Why Most Mergers Fail: Global employment Law Compliance; Complex differences can cause headaches for even seasoned in-house counsel*, N.Y.L.J. (online) (2009), available at http://www.hkemploymentlaw.com/images/ps_attachment/attachment46.pdf, last seen on 29/06/2015.

[3] Ibid.

[4] Bloomberg BNA, *International Labor and Employment Laws*, 1 (4th ed., 2012).

[5] Ibid.

[6] Ibid.

[7] Ibid.

EU country[8]. Likewise, items that rarely are regulated in the United States, such as whether employers must give private sector employees time off for holidays, may be determined at a minimum level in EU legislation and in a more detailed fashion in individual Member States, where a higher standard of employment protection may be maintained or introduced.[9] The EU has acted to harmonize laws in the labor and employment "area," which should be understood to indicate that in some countries the issue may already have been the subject of legal regulation, while in other countries it might previously have been unregulated. [10] The term "harmonization" does not equate with unification.[11] It is a flexible term designed to achieve, where necessary through binding EU legislation, a greater degree of similarity between laws but not a uniform system of labor and employment regulation.[12]

2.3. Protective Legal Framework of "Social Policy"

The EU, in response to factors such as technological progress, globalization of trade, unemployment and ageing population, introduced a protective legal framework for the European citizens. [13] This protective legal framework was named "social policy". [14] The term "social policy" is used generically in the EU to encompass all forms of workplace regulation, including health and safety systems, equality laws, dismissal protection, worker involvement in decision making and, more broadly, job creation programs, education, vocational training, public health, and social welfare policies. [15] In most areas of social policy, legal authority for regulation lies with the Member States, which determine the overall structure of their social systems.[16] EU labor and employment laws are intended to be supplementary and must be sufficiently flexible to be compatible with the range of social systems operating in the Member States.[17]

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[8] Ibid.

[9] Donald C. Dowling Jr., *Global HR Topic- September 2012: Employment-Context Choice – of-Law Clauses*, White& Case LLP Publications, (September 2012).

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] George Soros, *Toward a Global Open Society*, 281 The Atlantic Monthly 20, 32 (1998).

[14] Ibid.

[15] Ibid.

[16] Supra 2.

[17] Ibid.

2.4. Definition of "Worker" and "Employee"

Another difference in terminology relates to the term "workers" which, in the United States, implies blue-collar workers, with the term "employees" having a more neutral connotation[18]. This is not the case in Europe. [19] U.S. practitioners reading the term "workers" in European materials should bear in mind that this means all employees, including casual workers.[20] The U.S. distinction between exempt and nonexempt employees is virtually unknown in Europe.[21] In the U.S., this distinction is based on classifications made in the Fair Labor Standards Act (FLSA) [22] which, as a general rule, exempts from coverage those performing managerial or creative work.[23]

2.5. Distinction between "Workers" and "Employees" in Reference to Public and Private Sector

In addition, the laws of most EU Member States and the directives of the EU make no distinction between private sector and public sector workers. [24] Thus, if a directive applies to "workers," it normally applies to persons employed in both publicly and privately owned enterprises. [25] However, where an EU directive refers only to "employees," a Member State may exclude civil servants with a public-law status who are deemed to fall outside the coverage of national employment law.

2.6. The Due Diligence Process and the Regulatory Compliance with Labor Law Provisions

When a company begins to consider M &As, the typical due diligence includes asset valuation, historical and future earnings valuation, comparative valuation, discounted tax flow, tax consequences and legal structures.[26] More companies are beginning to understand that culture plays a role in determining the success or failure of an international

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[18] Supra 6.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] 29 U.S.C. Ss. 8 *et. Seq.*
[23] Ibid.
[24] Supra 6.
[25] Ibid.
[26] Supra 15.

partnership.[27] Understanding a potential partner's corporate culture and national culture can mean the difference between success and failure of M&As.[28] While commercially sensitive information cannot be exchanged prior to a merger or acquisition, the legal and integration team of the acquirer needs to conduct the due diligence in the area of regulatory compliance and clearance, including timing issues.[29] Despite globalization of business across national frontiers, labor is not interdependent and cross border.[30] The acquirer needs to be aware of the entire employment law spectrum of the territory from the beginning of employer-employee relationships to notice of termination, mediation, arbitration and litigation, as well as termination agreements, regulations concerning industrial relations, work agreements between employers and staff representatives, and collective agreements between employers and trade unions.[31] In the event that M&As will require changes in company structure, the following information must be investigated as part of the initial due dilligence effort: the law on work committees;[32] the law concerning written cautions[33]; the law on labor leasing; regulations concerning executives; mergers, acquisitions and possible sales and shutdowns of companies and all relevant labor law consequences.[34]

2.7. The Cooparative Employer-Employee Relationship

It is important to note that in US the employer-employee relationship, as established by National Labor Relations Act (the NLRA)[35], still has an adversarial connotation[36], while in Germany and Italy, the relationship is cooperative. Three primary mechanisms of worker participation exist in Germany: (1) collective agreements negotiated by trade unions,[37] (2)

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27 Daniel Rottig, *Successfully Managing International Mergers And Acquisitions: A Descriptive Framework*, THE J. OF THE AIB-SE (2007).
28 Supra 2.
29 Ibid.
30 Ibid.
31 Ibid.
32 Viet D. Dinh, *Codetermination and Corporate Governance in a Multinational Business Enterprise* 24 J. Corp. L. 975 (1999).
33 Bernd Frick; A. Miguel Malo; Pilar Garcia; Martin Schneider, *The Demand for Individual Grievance Procedures in Germany and Spain: Labour Law Changes versus Business Cycle*, 30 Estudios de Economia Aplicada 283, 310 (2012).
34 Supra 42.
35 29 U.S.C. S. 151,169 (United States)
36 Electromation, Inc. v. NLRB, Nos. 92-4129, 93, 1169 (1994, 7th Circuit).
37 In the mid-1950s, 36% of the United States labor force was unionized. At America's union peak in the 1950s, union membership was lower in the United States than in

workshop co-determination by way of works councils, [38] and (3) supervisory board[39] co-determination.[40] Italy is a founding member of the European Union (EU), having co-signed the Treaty of Rome on March 25, 1957.[41] Italy is subject to EU directives and regulations and to the decisions of the European Court of Justice.[42] The following are the relevant EU directives implemented in Italy: (1) European Works Council,[43] (2) Collective redundancies,[44] (3) Transfers of undertakings,[45] (4) workplace safety[46] and (5) free movement of workers.[47] This information is significant to an U.S. Corporation which may be considering an M & A because the cooperative attitudes in EU and especially Germany and Italy have strong statutory underpinnings and are embedded in wider employee relations systems that recognize the interests of labor.[48] The U.S. employer must shift from the adversarial to cooperative mentality in order to secure a successful merger or acquisition.[49]

3. Comparative Analysis Of At-Will-Employment Concept And Doctrine In Untied States And Related Employments Laws In Germany And Italy

Many US companies due to the adversarial mentality and the influence of the at-will employment environment will be shocked to find out how

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most comparable countries. By 1989, that figure had dropped to about 16%, while in Germany and Italy, over 30% of labor force is unionized.

38 European Works Councils were created partly as a response to increased transnational restructuring brought about by the Single European Act.

39 Germany has a two-tier board there is an executive board (all executive directors) and a separate supervisory board (all non-executive directors) which was created to provide a monitoring role over corporate governance.

40 Zakson, *Worker Participation: Industrial Democracy and Managerial Prerogative in the Federal Republic of Germany, Sweden and the United States*, 8 Hastings Int'l & Comp. L. Rev. 93, 114 (1984). See W. Kolvenbach, *Cooperation between Management and Labor* (1982).

41 Supra 5.

42 Ibid.

43 EU Directive 94/45.

44 EU Directives 75/129 and 92/56.

45 EU Directives 77/187 and 98/50.

46 EU Directives 80–391, 89/391/EEC, 89/654/EEC, 89/655/EEC, 89/656/EEC, 90/269/EEC, 90/270/EEC, 90/394/EEC, and 90/679/EEC.

47 Article 48, Treaty of Rome.

48 George Strauss, *Worker participation – some under-considered issues*, 45(4) Industrial Relations Journal 778, 803 (2006).

49 Supra 42.

much time and money will be requred to accomplish a reduction in force or an involunatry separation for cuase in Germany and Italy due to their applicable labor protections statutes, collective bargaining agreements, relations and cultural attitudes.[50]The Employment–at–Will Doctrine (EAWD)[51] provides that, absent a legal rule to the contrary, either party to an employment relationship for an unspecified term can terminate the relationship for good reason, bad reason or no reason at all, despite the employee's length of service, with or without cause or notice, and without giving any explanation or reason, unless the freedom to terminate is constrained by contract.[52] Conversely, where employment is for a definite term based on a contract, an employer can terminate only for cause.[53] Under the EAWD, the presumption is that the employee is only a supplier of labor who has no legal interest or equity stake in the business other than the right to be paid fair wages for labor performed, while the employer, as owner of the business has the sole right to determine all matters concerning the operation of the business.[54] US companies that are contemplating mergers or acquisitions of companies in the European Community (the "EC" or the "Community")[55] must take into considerations the Directive of EC as well as the strict regulations of the member states which aim to protect employee rights and increase job security.[56] In contrast to the free wheeling EAWD, the EU countries have specific statutory schemes that address terminating of employment as demonstrated in the next subsections.

3.1. The German Employment Law Provisions

German law contains a complex set of mandatory notice provisions for the termination of employment contracts and relationships. One requirement for an effective termination is the legally effective service of a notice of termination. Pursuant to Section 623 of the BGB Civil Code[57], a

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[50] Supra 5.

[51] Shane and Rosenthal, *Employment Law Deskbook*, S. 16.02 (1999).

[52] Ibid.

[53] E. Allen Farnsworth, *Contracts*, S. 8.15 (2nd ed., 1990).

[54] V.W. Katherine Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace,* Industrial Law Journal(2007).

[55] Treaty Establishing the European Economic Community, (25/03/1957), 1973 Gr. Brit. T.S. No. I (Cmd. 5179-I), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

[56] Supra 6.

[57] Bürgerliches Gesetzbuch (BGB) (German Civil Code) of 18 August 1896 [RGBl. I S. 195,III 4 Nr. 400-2], as amended in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*])

notice of termination must be in writing to be valid.[58] A specific recitation of the reasons for termination is usually not necessary in the notice of termination (although, as an exception, reasons are required for contracts with apprentices and other training contracts). Another formal point is that any termination notice should be issued by one or more officers or directors who are registered as company representatives in the commercial register[59] or the employee can reject the notice without undue delay if it was not accompanied by the original of a power of attorney for the signatory and the employer must give notice again.[60]

In analyzing the applicable notice period provisions, one first looks to the applicable collective bargaining agreement (if any)[61] where the collective bargaining provisions with respect to termination notices preempt any statutory termination notice provisions.[62] Section 622[63], Paragraph (4)[64], of the BGB Civil Code expressly specifies that the statutory notice periods can be superseded by the notice periods contained in a collective bargaining agreement[65], and that the notice periods in such collective bargaining agreements can be longer or shorter than the periods required by Civil Code, Section 622(1) to (3).[66] The only restriction is that it is unlawful to agree upon a longer period of termination notice for the employee than must be given by the employer.[67] Under Section 622(1) of the Civil Code[68] there is a general requirement to give notice of termination of four weeks, effective as of the fifteenth of the month or the end of the month, where more specific provisions, do not apply.[69]

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58 Bürgerliches Gesetzbuch (BGB) (German Civil Code) of 18 August 1896 [RGBl. I S. 195, III 4 Nr. 400-2], as amendedin the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719) Title 8, Subtitle 1 Section 623 Termination of employment by notice of termination or separation agreement requires written form to be effective; electronic form is excluded.

59 Supra 61.

60 Ibid.

61 Ibid.

62 Ibid.

63 S. 622, Bürgerliches Gesetzbuch (BGB) (German Civil Code) (Germany).

64 Ibid, at S.4.

65 When a collective bargaining agreement is involved, the method for determining the applicable notice period for termination is different.

66 Supra 80.

67 Ibid, at S. 5.

68 Ibid, at S.1.

69 Ibid, at S. 1-4.

There is a general protection against (ordinary) termination of the employment relationship embodied in the Termination Protection Statute of August 25, 1969[70]. If an employment relationship falls within the scope of the Termination Protection Statute, then the termination is only possible under the limited terms of that law.[71]

An employment relationship falls under the Termination Protection Statute if both of the following requirements are met: (1) the employee must have worked for the same employer for more than six months without interruption;[72] and (2) the employer must, in the ordinary course, employ in an operation in Germany more than 10 employees (excluding apprentices and trainees).[73] Part-time employees with a regular weekly working time of no more than 20 hours are accounted for with a factor of 0.5, and those with a regular weekly working time of no more than 30 hours with a factor of 0.75.[74]

A U.S. company considering a merger and/or acquisition in Germany must be aware that any post merger restructuring plan that may require some lay offs will result in a lengthy and expensive process because employee wages and benefits must continue through the required notice period under the Termination Protection Statute.[75]

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70 Termination Protection Act [Kündigungsschutzgesetz; KSchG], in the version of the Proclamation of 25 August 1969 [BGBl. I, p. 1317], most recently amended by the Act of 27 April 1978 [BGBl. I, p. 550]) but also those of collective bargaining law (cf., in particular, the Collective Bargaining Act [Tarifvertragsgesetz; TVG], in the version of 25 August 1969 [BGBl. I, p. 1323], amended by the Homework Amending Act of 29 October 1974 [BGBl. I, p. 2879]), employees' representation law or -- for public service employers -- staff representation law and finally work protection law. Occupation under an employment relationship also normally establishes a mandatory insurance relationship in the various branches of social insurance.

71 S. 1(1) KSchG, the termination with notice of an employment relationship that has existed for more than six months is legally invalid when it is «socially unjustified» (this term is defined in detail in S. 1(2) and (3) KSchG). In order to avoid a circumvention of these mandatory provisions of termination protection, the labor courts have further placed considerable limitations on the possibility -- provided for under S. 620(1) of the Civil Code -- of establishing employment relationships of limited duration; even the one-time and, above all, the repeated limiting of employment relationships (chain employment contracts) is only valid when there is a materially justifiable reason for this.

72 S. 1(1), Termination Protection Statute.

73 Ibid.

74 Termination Protection Statute, Section 23(1), Sentences 3 and 4.

75 Supra 88.

3.2. The Italian Labor Law Provisions

Under Italian law, the dismissal of employees is subject to stringent restrictions. Employers cannot dismiss employees at will and mere labor-saving [76] dismissals are not allowed. As a matter of fact, employees can be lawfully dismissed only in the presence of a "just cause" or "justified grounds."[77]

3.2.1. Giusta causa (i.e., just cause)

It means any serious breach that renders the continuation of the employment impossible, including, for instance, theft, riot, and serious insubordination and any other employee's behavior that seriously undermines the fiduciary relationship with the employer.[78]

3.2.2. Justified grounds

It means either

i. a less serious breach by the employee (e.g., failure to follow important instructions given by the management, material damage to machinery and equipment, unjustified and repeated absences), or

ii. an objective reason relating to the employer's need to reorganize its production activities or its labor force; however in such cases case law precedents state that the employer must seek, within its organization, another job for the employee in order to avoid the dismissal if possible.[79]

The dismissal must be ordered in writing and must indicate the reasons on which it is based.[80] Moreover, whenever a dismissal is due to the employee's conduct (constituting either just cause or justified grounds, depending on the gravity), the employer must follow a specific

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[76] Dismissal for economic or reorganization reasons (objective reasons, such as the suppression of job position).
[77] Supra 51.
[78] Ibid.
[79] Ibid.
[80] Ibid.

disciplinary procedure set forth by law so that the employee is given the opportunity to defend his or her position before being dismissed.[81]

Upon termination of their employment employees are entitled to: [82]

i. the payment of a severance indemnity (the so-called *"TFR,"*[83]which is accrued in the employer's financial statements during the term of employment and amounts to approximately to one month's salary for each year of seniority);

ii. the payment of some minor termination indemnities (payment in lieu of unused holidays and in lieu of unused paid leaves of absence, accrued pro-rata 13th month's salary, and so on);[84] and

iii. a notice period, the duration of which varies according to the employees' seniority and professional level and is established in the applicable national labor collective agreement. In case the employer exempts the employees from working during the notice period, the employees must receive a corresponding payment in lieu of notice, which is equal to the normal salary (plus social security charges thereon) that would have been paid during the notice period. Payment under (a) and (b) above is always due in case of dismissal, while the notice period payment outlined in (c) above is not due in case of a dismissal for "just cause.[85]

Any employee dismissed may bring a legal action if the employee deems that his or her dismissal was not properly justified.[86] An action before the labor court[87] must be preceded by an out-of-court challenge of the dismissal by means of any written document to employer (within 60 days of the dismissal) and by a mandatory attempt to reach a settlement

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[81] Ibid.

[82] Ibid.

[83] Upon dismissal for any reason, employees in Italy are entitled to the "*Trattamento di Fine Rapporto*" ("*T.F.R.*"). "*T.F.R.*" is deferred compensation that accrues year by year in favor of an employee and is paid upon termination, but is not in any way connected or subject to the circumstances regarding termination.

[84] Supra 94.

[85] Ibid.

[86] Ibid.

[87] Aldo Matteis, Accardo Paola, Mammone Giovanni, *National Labour Law Profile: Italy* (2011).

before the local Labor Office[88]. In the event that the absence of justified grounds is confirmed by the labor court, the consequences for the employer differ, according to whether that employer exceeds the "15 employees threshold." [89]

The strict compliance requirement along with indemnity payments required with a termination can lead an uninformed international partner to unintended lengthy and costly legal battle.[90]

4. COMPARATIVE ANALYSIS OF US FEDERAL WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN ACT) AND THE RELEVANT WORKFORCE PROTECTION LAWS IN GERMANY AND ITALY

Germany and Italy are subject to directives and regulations of the European Union and to the decisions of the European Court of Justice[91] and the European Court of Human Rights[92]. EC as a result of dealing with unemployment and seeing the need to address jobs security, issued a Council Directive of 17 February 1975 on the Approximation of the Laws of the Member States Relating to Collective Redundancies (lay offs) (the "Directive").[93] The Directive requires that when a company contemplates mass dismissal, the management must announce such a dismissal at least thirty days before initiating lay offs.[94] This thirty day period attempts to provide labor the opportunity to participate in decision making and collaborate with management on feasibility of avoiding the dismissal.[95] If the dismissal is deemed to be unavoidable, then labor and management will move on to discuss mitigating effects.

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88 In Italy, Law No. 628 of 1961 introduced peripheral agencies: the Immigration Offices and the Labour Office for Maximising Employment.

89 Supra 94.

90 Ibid.

91 European Court of Justice (created in in 1952 as the Court of Justice of the European Coal and Steel Communities, later named Court of Justice of the European Communities), the highest court in the EU legal system.

92 The European Court of Human Rights (ECtHR; French: *Cour européenne des droits de l'homme*) is a supra-national or international court established by the European Convention on Human Rights.

93 Council Directive No. 75/129, OJ. L 48/29 (1975).

94 Ibid.

95 Ibid.

This enhanced labor participation gives employees a voice and increases job security.[96]

4.1. The Warn Act

In 1988, the U.S. Congress enacted legislation, WARN,[97] to address mass lay-offs. WARN requires that employers notify their employees and the local government prior to implementing the dismissals. The most important difference between WARN and the European practice under the Directive is that WARN contemplates no role for employees or employee representatives in either determining the need for layoffs nor how to mitigate their impact on effected employees.[98] WARN, contrary to the Directive, does not require negotiations between labor and management in addition to notice.[99] WARN sets out the procedure that employers must follow prior to executing a mass dismissal or plant closing.[100] "The objective seems, as much as anything else, to be designed to encourage some opportunity for public pressure to be organized against an employer contemplating layoffs."[101] The three substantive sections of WARN[102] include its definitions and their scope,[103] the required notice procedure,[104] and the remedy to which affected employees are entitled.[105]

WARN applies only to those businesses that employ 100 or more employees. Excluded from this threshold are temporary employees,[106]defined as those who are either hired with the understanding that their employment is only for the duration of a particular project, or those who are hired to operate a temporary facility.[107] Thus, the definition necessarily excludes seasonal workers as well.[108] Also outside

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96 Ibid., at 29.
97 29 U.S.C., WARN Act S. 2101, 2109 (United States).
98 Michele Floyd, *The Scope of Assistance for Dislocated Workers in the United States and the European Community: Warn And Directive 75/129 Compared*, 15 Fordham Int'l L.J. 436, 450 (1992).
99 Ibid.
100 29 U.S.C. S. 2102 (1988).
101 Ibid.
102 Ibid, at S. 2105 to 2109.
103 Ibid, at S. 2101, 2103.
104 Ibid, at S. 2102.
105 Ibid, at S. 2104.
106 Ibid, at S. 2103(1)
107 Ibid.
108 20 C.F.R. S. 639.3(h) (1991).

the reach of WARN are employees out of work due to a strike or lock-out.[109] Further, employees who are permanently replaced because of participation in an economic strike are not included in compiling the threshold.[110]

Employers must dismiss a statutory number of the employees included in this threshold to have effectuated a "mass dismissal" under WARN.[111] Like the Directive, WARN defines this statutory number in terms of the number of employees dismissed over a thirty-day period in relation to the number of employees usually employed at a given site.[112]To execute a mass dismissal, an employer[113] must permanently dismiss at least fifty employees at one site.[114] In the alternative, the employer must temporarily dismiss either 500 total or 33 percent of all employees.[115] Employers are thus not required to give notice at all unless the statutory minimum number of employees will experience an "employment loss."[116]

Once employers have decided to dismiss a sufficient number of employees, the second substantive section of WARN comes into play. This section requires employers to notify their employees. Employers are also required to notify both the state dislocated worker unit[117] and local government of the pending dismissal at least sixty days prior to the execution of the plant closure or dismissal.[118]

This notice period is somewhat flexible.[119] Employers may reduce the notice period to "as much notice as is practicable" in three circumstances.[120] Under the faltering company exception,[121] employers who actively seek capital to avoid a closing or lay-off may shorten the period if they have a good faith belief that giving notice would frustrate

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109 29 U.S.C. S. 2103(2) (1988).
110 Ibid.
111 Supra 110, at S. 2101 (a)(3).
112 Ibid, at S. 2101.
113 Ibid, at S. 2101(1)(a).
114 Ibid, at S. 2101(a)(2).
115 Ibid, at S. 2101(a)(3)(i)-(ii).
116 Ibid, at S. 2101 (a)(6).
117 The Economic Dislocation and Worker Adjustment Assistance Act (EDWAA) amended Title III of the Job Training Partnership Act (JTPA).
118 Supra 110, at S.2102(a)(1988).
119 Ibid, at S. 2102(b).
120 Ibid.
121 Ibid, at S. 2102(b)(1).

their efforts.[122] Employers may also reduce the notice period when confronted with unforeseen business circumstances at the time notice would normally have been required.[123] Finally, employers need not give any notice if the mass dismissal or plant closing is due to a natural disaster and the giving of notice is impracticable.[124]

Where the employer fails to give adequate notice, the third section of WARN provides a remedy for those employees who have been wrongfully discharged.[125] In essence, employers are liable for back pay for each day of the violation.[126] In addition, employers are liable for the value of any benefits to which the employees were entitled while on the job.[127] Employers must also pay a civil fine for failure to notify local officials.[128]

Employers may mitigate their liability in four ways. First, they may pay the employees their wages during the period of the violation.[129] Second, they may deduct from the initial calculation of sixty days wages, any voluntary and unconditional payments made to the employees.[130] Third, they may deduct any payment made to a third party on behalf of the employee during the period of the violation.[131] Fourth, they may mitigate their liability by demonstrating good faith beliefs that their actions would not violate WARN.[132]

4.2. The European Directive

The European Court of Justice, on the other hand, has consistently interpreted the Directive in conformity with its policy objectives to protect the worker. The result of this construction demonstrates that the Court of Justice will not allow the Member States to derogate from the language of the Directive in fashioning their implementing legislation to assure worker protection.[133] The Directive has broader

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[122] Ibid.
[123] Ibid, at S. 2102(b)(2)(A).
[124] Ibid, at S. 2102(b)(2)(B).
[125] Supra 110.
[126] Ibid, at S. 2104(a)(1)(A).
[127] Ibid, at S. 2104(a)(l)(B).
[128] Ibid, at S. 2104(a)(3) (1988).
[129] Ibid, at S. 2104(a)(2)(A).
[130] Ibid, at S. 2104(a)(2)(B).
[131] Ibid, at S. 2104(a)(2)(C).
[132] Ibid, at S. 2104(a)(4).
[133] Case 215/83, Commission v. Belgium, [1985] E.C.R. 1039, [1985] 3 C.M.L.R. 624.

coverage and lower thresholds thus covering a much greater segment of the employee population than does the WARN.

The Directive consists of three substantive sections. The first section defines the terms and the scope of the Directive,[134] while the second section establishes the procedure for consultation between management and labor, and notification of the government labor authority.[135] When the management-labor consultations fail to avoid a collective redundancy, the last section of the Directive sets forth the method by which an employer may effectuate the dismissal.[136] The Directive's first section defines a collective redundancy in terms of the number of employees dismissed in relation to the number of employees normally employed at a given site. The Directive allows each Member State to choose one of two thresholds.[137] The first threshold operates over a thirty day period. Under this option, businesses that employ between twenty and 100 employees must dismiss at least ten employees to trigger the Directive.[138] Those that maintain a workforce of 100 to 300 employees must dismiss at least 10 percent of the employees to trigger the Directive.[139] Businesses that employ at least 300 workers trigger the Directive by dismissing at least thirty workers.[140] The second, less stringent, option operates over a ninety-day period. Under this option, businesses that dismiss twenty employees, regardless of the size of their labor force, trigger the Directive.[141] In addition to setting up the two thresholds, the first section of the Directive excludes four classes of employees from its scope.[142] First, the Directive excludes those employees hired to complete a specific contract and those hired specifically for a limited period.[143] These employees, however, remain within the scope of the Directive if the dismissal occurs before the task is completed or before the limited period elapses.[144] Second, the Directive excludes employees of public administrative bodies or establishments governed by public law.[145] The

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134 Supra 54, at 29.
135 Ibid.
136 Ibid, at A. 3, 4, at 30.
137 Ibid, at A.1.
138 Ibid, at A. l(a)(l).
139 Ibid, at A. l(a)(2).
140 Ibid, at A. l(a)(3).
141 Ibid.
142 Ibid, at A.1(2).
143 Ibid, at A.1(2)(a).
144 Ibid.
145 Ibid, at A. 1(2)(b).

third exclusion encompasses the crews of sea-going vessels.[146] Fourth, the Directive excludes those employees who lose their jobs due to the closing of the business as the result of a judicial decision.[147] Once the employer decides to dismiss a sufficient number of employees to trigger the Directive, the second section of the Directive requires management and labor to embark on a detailed consultative process.[148] Article 2 requires the employer to provide the representatives of the employees with all relevant information, such as the number of employees that will be dismissed, the number of workers normally employed, and the period over which the redundancies will be affected.[149] The employer must also supply the representative of the employeeswith the reasons, in writing, for the redundancies.[150] The reason for this transfer of information is to aid the representatives of the employees in making constructive proposals.[151] In addition to providing this information, employers must simultaneously notify the government labor authority and meet with the representative of their employees.[152] During the meeting, labor and management discuss the possibility of avoiding the dismissal.[153] If they determine that a dismissal is the only viable solution, they propose and discuss methods to minimize the effect of the dismissal on workers.[154] The employers must first submit a detailed written report to the public employment authority.[155]

Upon receiving the report, the public employment authority has thirty days to evaluate the severity of the dismissal and to prepare the Community for the sudden flood of unemployed.[156] While waiting for this thirty-day period to expire, employers may not dismiss any employees.[157] The thirty-day notice period is somewhat flexible. In some circumstances, the Member States may permit the public employment authority to lengthen the period.[158] In these cases, the public employment authority may extend the period to a maximum of sixty

146 Ibid, at A. 1(2)(c).
147 Ibid, at A.1(2)(d).
148 Supra 54, at 30.
149 Ibid, at A. 2(3).
150 Ibid.
151 Ibid.
152 Ibid, at A.2(1),
153 Ibid, at A.2(2), at 30.
154 Ibid.
155 Ibid, at A.3(i).
156 Ibid, at A.4(2).
157 Ibid, at A.4(1).
158 Ibid, at A.4(l),(3).

days.[159] The provisions of the Directive represent the minimum standards required by the EC. In implementing the Directive, the Member States are free to impose standards that are more severe than those required by the Directive.[160]

4.3. German Labor Law Framework

The German constitution was adopted on 23 May 1949 and is referred to as the Basic Law. With its amendment by the Unification Treaty of 31 August 1990 and the Federal Statute of 23 September 1990, the Basic Law has become the Constitution of the unified West and East Germany (former Federal Republic of Germany and German Democratic Republic). The Basic Law guarantees freedom of association[161] as well as free choice of occupation and prohibition of forced labor.[162] It also establishes the principle of equal treatment and in particular obliges the state to support the effective realization of gender equality.[163] The major sources of labor law are Federal legislation, collective agreements, works agreements and case law. There is not one consolidated Labor Code; minimum labor standards are laid down in separate Acts[164] on various labor related issues, which are supplemented by the government's ordinances.[165]

Because most German companies are "unionized", the different unions concentrate negotiating individual terms that are much better and more employee favorable than the basic labor law.

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[159] Ibid, at A.4(3).
[160] Ibid.
[161] Basic Law -Article 9 Paragraph 3.
[162] Ibid, at A. 12.
[163] Ibid, at A. 3.
[164] The Civil Code adopted on 18.08.1896 and last amended on 02.11.2000 defines the employment relationship.
[165] Labor Legislation: *Employment relationships:* Federal Paid Leave Act; Employment Promotion Act; Employment Protection Act, Act regulating the Payment of Wages and Salaries on Public Holidays and in case of sickness; Protection against Dismissal Act; Act on the Commercial Transfer of Employees;
Occupational training: Occupational Training Act; Act on Part-Time and Fixed-term
Occupational safety and health, and conditions of work: Maternity Protection Act; Ordinance on Maternity Protection at the Workplace; Young Workers Protection Act; Working Time Act; Act on the Payment of Child Raising Benefit and Child Raising Leave; Insolvency Ordinance
Individual Dispute settlement: Labour Court Act; Code of Civil Procedure.

Labor legislation is interpreted by labor courts.[166] Some matters, especially strike regulation, are partly or even totally left to case law.[167] Collective agreements (Tarifverträge) are legally binding as long as they keep in line with the statutory minimum standards.[168] In practice, the *establishment* (Betrieb) also plays an important role.[169] The establishment is the organizational unit where particular working objectives are pursued.[170] At this level, conditions of work such as those determined in the Works Constitution Act may be or in certain cases must be laid down in *works agreements* (Betriebsvereinbarung).[171] These are written agreements concluded between the employer and the works council (a body representing the employees of the establishment).[172]

Workers' representation in the enterprise is governed by the Works Constitution Act.[173] This Act is decisively based on the term *establishment.*[174] In an establishment regularly employing five or more employees, its employees may decide to elect a works council, of which the period of office is four years.[175] The works council has rights of participation as well as of co-determination.[176] The right of participation includes the right to be informed and to make recommendations.[177] The right of co-determination is by far of much more practical consequence, because it entails the possibility of blocking a decision of the employer which is dependant on the works council's agreement.[178]

Any dispute must be settled by legal proceedings either leading to a court order or resulting in a decision of a conciliation committee.[179] The conciliation committee is set up in case of disagreements in matters of

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166 Supra 220.
167 Ibid.
168 Supra 226.
169 Supra 233.
170 Ibid.
171 Ibid.
172 Ibid.
173 Works Constitution Act (Betriebsverfassungsgesetz) of 1972.
174 Ibid.
175 Supra 240, at Sec. 21
176 Ibid.
177 Ibid.
178 Ibid.
179 Supra 243.

co-determination.[180] It is composed of an independent chairperson and an equal number of employer's and employees' representatives.[181]

Another essential duty of the works council and the employer is to supervise the equal treatment of all employees in the establishment.[182] This includes the prohibition against discrimination against the works council members, who are furthermore safeguarded against dismissal by special provisions.[183]

4.4. Italian Labor Law Framework

The Italian Constitution was approved by the Parliament in December 1947 and came into effect on 1st January, 1948.[184] The Country is organized as a centralized State, divided into Regions, Provinces and Municipalities. Sicily, Sardinia, Alto Adige (German-speaking region) Valle d'Aosta (French-speaking region) and Friuli (a region with Slavic minorities) have special statutes.[185] Article 39 of the Italian Constitution[186] guarantees freedom to organize, join a trade union and engage in trade union activity in the workplace. The unions joining the biggest federations have a very important function in collective bargaining in public employment and receive protection in view of trade union activity at the plant level.[187] The Workers' Statute, 1970, regulates plant level union activity.[188] The Statute has been an important means of support of the unions at plant level.[189] The Workers' Statute of 1970 gives the workers the right to organize a plant-level union representation structure (Rappresentanza sindacale aziendale, RSA).[190] The tripartite agreement of July 1993 introduced, in addition to the RSA, a so-called unitary workplace union structure (Rappresentanza sindacale unitaria, RSU).[191] This body is elected by all employees, but representatives are

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[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] The freedom of association (Libertà sindacale) is based on Article 39 of the Italian Constitution.
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid.

usually elected through trade union lists. [192] Therefore, it includes features of both works councils (the broad active electorate) and trade union bodies (the almost exclusive inclusion of trade union representatives).[193] The establishment of RSUs confirms the traditional system of single-channel representation in Italy, whereby union and employee representation are entrusted to a single body, as opposed to dual-channel systems where union delegates operate alongside works councils.[194]

In researching this paper, I consulted with Elena Ghigo of Jonson and Johnson Italy who summarized the acquisition process in clear and concise terms: "In Italy, when an acquisition occurs (i.e. a company absorbs another or part of Italian Company) Italian law provides that all the absorbed employees are transferred to the new/acquiring company maintaining their previous contracts with all relevant benefits and they also maintain seniority. In this case the passage from one company to the other is automatic and the consent of the employee is not required. So the employment relationship continues seamlessly, and the employee maintains all rights accrued up to the date of the transfer. In order to be able to renegotiate the previous contract, the new/acquiring company has to achieve the consent of the employee.

In case of redundancies, Italian law prescribes that three aspects must be taken into consideration when operating towards redundancy and they have to be taken into account when identifying the workers which will be dismissed. The above mentioned aspects are: technical and organizational requirements of the company, seniority and family burdens of the employee. If a company employs more than 15 people and is contemplating to dismiss more than 5 employees in a 120 days period, it is forced to draw upon redundancy and not simple summon dismissals due to economical issues. The collective dismissal implies a particular procedure that combines labor union participation, governmental authorities and the company in a dialogue that, through various steps, strives to reach a shared solution.[195]

[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Consultation with Elena Ghigo, Jonson and Johnson, Italy.

5. Conclusion- Inadequate Consideration of EC Doctrine and the Relevant Labor Laws in Italy and Germany can Lead to a Failed M&A

Pre merger due diligence in the area of labor law can have a direct impact on the success or failure of M &A. The due diligence involving the target country labor laws can help qualify and budget for the necessary severance packages, legal work, and potential fines. A US company must be prepared for a lengthy collaboration with the work counsel prior obtaining an approval for M &A and post M&A in a restructuring phase. Strict notice guidelines, compensation packages, legal fees can run into six even figures in a scenario involving high level or long term employees. Being unaware and unprepared to deal with these costs can compromise a successful merger or acquisition.

The following is a suggested checklist for the legal and hr team to implement when contemplating a merger or acquisition in eu with specific attention given to Italy and Germany.

1. Include HR in the deal from the beginning of M&A contemplation.
2. Coordinate between various integration teams.
3. Address works council, employee representatives and union requirements.
4. Analyze and plan the employee transfer method
5. Analyze and understand limitations and cost of redundancies.
6. Understand terms and conditions of employment and how their significance in an m&a.
7. Understand employee classifications and the regulations pertaining to wage, hours, and benefits.
8. Plan in time for benefit transfer.s
9. Understand labor market regulations.
10. Understand the laws and regulations behind agreement enforceability.

11. Immigration compliance.

12. Retain local representation.

13. Know the appropriate labor governing bodies.

14. Research discrimination laws.

15. Research privacy laws.

Although currently outside the US there is a strikingly different, more rigid and employee-protective approach to employment relationships that labor and employment practitioners need to recognize, as the economy grows increasingly global international labor laws will continue to change and transform and hopefully merge international labor and employment law. For now, buyers beware and do your homework.

BUYER BEWARE: THE HIDDEN COST OF FAMILY LEAVE PLAN IN AN INTERNATIONAL MERGER AND ACQUISITION

- **Linda J. Spievack***

ABSTRACT

This paper will examine the numerous paid work leave laws in Germany and Italy pointing out fundamental distinctions between these countries and the United States If you want to get the best end of a deal, you need to know the cultural landscape of the market before it becomes a point of conflict and it's your job to confirm the information you gather.

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1. INTRODUCTION

Much of what drives most businesses is the intangible element of "Human Capital", and the culture reflected in performance levels.[1] In the merger and acquisitions of a foreign company, perspective hidden costs are a real issue. If you want the best end of a deal, you will need to know the landscape of the laws governing labor and specifically, employee benefits guaranteed in the target market regarding family leave. The concept of guaranteed leave from work for family needs and other personal duties has long been one of the basic assumed rights in most European countries.[2] In Germany and Italy, for example, the greatest labour cost disparity with the US is not wages. It is the amount of paid time off and other perquisites/benefits.

Since labor standards define the work environment, shape the conditions of employment and have implications on trade, foreign direct investment, employment and economic competitiveness; it is critical that 'soft due diligence' be an integral part of the pre-acquisition research.

It is the onus of the lawyer to convince the American investors, they represent, to adjust their perspectives to fit the legal, synergized[3] cultural, and social realities that prevail in Europe [specifically, for this thesis: Germany and Italy] with respect to family and medical leave issues (and indeed, the entire relationship between work-life and home-life).[4] Perhaps, the greatest challenge facing top managers during the transition from two organizations to one integrated organization is establishing aprocess[5]and making decisionsin order to reconcile such differences so that the synergies planned for can be achieved.

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1 Woburn Update: "Integrating culture & technology for rapid growth", Woburn Consulting Group. www.woburnconsulting.com

2 Carol Daugherty Rasnic, *The United States' 1993 Family and Medical Leave Act: How Does it Compare with Work Leave Laws in European countries?,* 10 Conn. J. Int'l. L. 105 (1994).

3 Synergized defined as the interaction of two or more agents or forces so that their combined effect is greater than the sum of their individual effects.

4 Ibid.

5 Paul Thompson, Terry Wallace and Jorg Flecker, *The urge to merge: organizational change in the merger and acquisitions process in Europe,* 3 Int'l J. Human Resource Mgt., (1992);

When one starts the M&A investigation procedure, he will need to identify the differences between his company [US] values, procedures, laws and policies with the new company's policies, laws and procedures[6] governing family leave plans. The following sample list identifies critical areas for consideration:

i. Social ideology of the country, including the history and the present status of the country's political, economic, and social values and the systems in place to implement them,[7]

ii. The purposes of the legislation[8]and

iii. the coverage of the law.[9]

These are often practically interrelated, but reflect different theoretical perceptions. Not to mention, discovering a way to integrate and combine values that is not easily joined.[10] Pre-merger planning has a direct impact on the businesses' post-merger cultural and community integration.[11]

2. TARGET COUNTRY- GERMANY – FAMILY LEAVE BENEFITS

As early as 1878, Germany inaugurated the first Maternity Leave Act.[12] The legislated protections provided three weeks of leave after birth; coverage and benefits continue to increase.[13]

D.M. Schweiger, and K. Weber, *Strategies for Managing Human Resources during Mergers and Acquisitions: An Empirical Investigation*, 101,118 in*Human Resource Planning* (1st ed., 1992).

[6] Carol Kleiman, *On Family Leave Plans U.S. is Left Far Behind.,* CHI. TRIB. (22/05/1989), available at http://articles.chicagotribune.com/1989-05-22/business/8902030132_1_care-for-family-members-parental-leave, last seen on 02/07/2015

[7] See infra part 4.1 (discussing the social ideology of nations).

[8] See infra part 4.2 (discussing the purposes of the laws)

[9] See infra part 4.3 (discussing the coverage of the laws)

[10] Supra 27.

[11] Darryl A Weiss, *Opening in a Foreign Country; be careful,* Global Business News, available at http://www.globalbusinessnews.net/story.asp?sid=158, last seen on 02/07/2015.

[12] Mona L. Schuchmann, *The Family and Medical Leave Act of 1993:A Comparative Analysis with Germany*, 20 Iowa J. Corp. L. 331 (1995) (quoting Bulla & Buchner discussing history of maternity leave in Germany)

Basically, the Mutterschutzgesetz, Maternity Protection Act of 1968 was instituted to ensure that expecting mothers are not discriminated against when applying for jobs and to provide them with added protection from being dismissed from work as a result of their pregnancy or arrival of their newborn child. This law actually goes well beyond that fundamental claim and provides much more.[14]

Under the Maternity Protection Statute (*Mutterschutzgesetz* or *MuSchG*), revised on June 20, 2002, expectant mothers must not be employed for a period of six weeks before the date of expected childbirth and for a period of eight weeks after giving birth (12 weeks in the case of pre-term or multiple births), hereinafter "maternity leave."[15] This Act ensures that the expecting mothers that are deemed unable to work are not financially penalized during the *Schutzfrist*. The Maternity Protection Pay is issued by the employer and must be at least the same amount as of a 13-week wages' average or of the last 3 months before pregnancy.[16]

Women usually receive a maximum of €13 per day ($17.31 US), up to a maximum of €210 in total, during maternity leave from the government. The employer is then required to pay the difference between the applicable maternity pay and the woman's average salary or wages net of tax and social security contributions, calculated on the basis of the wage statements for the last three months or 13 weeks before the commencement of maternity leave.[17]

Termination within the probationary period, during which the protections of the Termination Protection Statute do not apply, is not permissible in the case of a pregnant woman and their job is protected for a three year period.[18] Only in particular cases, where the termination is unrelated to the woman's condition during pregnancy or the four months' period following childbirth, for example, in the event of a plant

[13] Ibid.
[14] Ibid.
[15] Bloomberg BNA, *International Labor and Employment Laws,* Germany, 3rd Ed., The Bureau of National Affairs, Inc. , 69-71, (2014)
[16] Ibid, at 63.
[17] Ibid, at 155., See also, note 55.
[18] Ibid, at 78.

closing, the authorities may declare a termination permissible upon the employer's application.

Parental leave is a two year income-tested leave.[19] Parents are also granted a 3 year job-protected leave following childbirth (This pertains only to parents whose employers have more than 15 employees). Parents can split this leave or take it at the same time. Although, both parents are eligible for this leave, less than one percent of eligible fathers actually take this leave in Germany.[20] Traditionally, social expectations have been that women will take on most, if not all, child care responsibilities.[21] This traditional view has been reinforced by the reality that mothers tend to earn less at paid work than fathers' do.[22] Women's traditional gender roles and their disadvantage relative to men in the labor market work together to shift the responsibility of care for infants and young children heavily toward mothers.

In many cases, women can take a period of up to three years of parental leave onto maternity leave. If a mother or father wishes to avail her or himself of parental leave, she or he must apply to the employer in writing, at least seven weeks before the leave is to commence. In that application, the employee must state for which periods until the child's second birthday she or he wishes to take parental leave. Parental leave can be taken in one or two parts; any further split requires the employer's consent.[23]

In principle, extended parental leave can be taken only until the child's third birthday, but with the employer's consent up to twelve months thereof can be taken until the child's eighth birthday.[24] Parental leave

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[19] Annie Pelletier, *The Family Medical Leave Act of 1993-Why Does Parental Leave in the United States Fall so far Behind Europe?,* 42 Gonz. L. Rev. 547 (2007).

[20] Ibid, at 565,567.

[21] Rebecca Ray, Janet C. Gornick, and John Schmitt, *Parental Leave Policies in 21 Countries,* Center for Economic and Policy Research (cepr), (2008).

[22] Of course, one reason that mothers earn less than the fathers of their children is that child care responsibilities lead many mothers to interrupt their employment or to put their jobs on a "mommy track" that trades off diminished responsibilities at work (and, therefore, diminished prospects for promotion) for more time and greater flexibility to devote to child care.

[23] Ibid.

[24] Ibid,

may be taken, in full or in part, by each parent alone or jointly by both parents.[25]

Such request can be made only twice during parental leave. If the employer wishes to deny the requested reduction in working hours, it must do so in writing within four weeks, setting forth the reasons for denial. If the employer fails to grant the request, or does not grant the request in a timely manner, the employee may institute legal proceedings in the labor courts.[26] The term Union has a very different connotation in the U.S. as compared to other countries. In most European countries, the employer will be working with either Works Councils or Trade Unions. The Unions, unlike in the U.S., are mandated by statute in most cases and play a major role in work determination, training, wage rates and redundancies,[27] regulated by Work Councils.

For the employer to facilitate the part-time work request, the employer must organize substitutes or otherwise cover the shortfall in working time.[28] If the employee shall be entitled to return to full time again, the employers will need predictability (announcement requirements sufficiently in advance) and laws enabling him to hire substitutes temporarily. Otherwise, he will have too many employees on board when the part-time employee returns to full time.[29]

Women are well protected in Germany from loss of employment due to dismissal from the beginning of pregnancy until 4 months following childbirth (*Schutzfrist*) through a *Kündigungsverbot*, Dismissal Ban. Only, in extremely rare exceptions are employers permitted to dismiss a pregnant employee during this time.[30]

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[25] Ibid, at 93.

[26] In Germany, worker participation in the most sensitive areas of management occurs through employee representation on works councils, not through union representation. The right to be consulted before decision-making combined with the right to share in the decisions invests the works councils with great power and influence.

[27] Ibid, at 50.

[28] *Labor and Employment Law Projects of the New German Government,* Jones Day Commentary, (March 2014)

[29] Ibid, at 68.

[30] Ibid, at 55.

If employer receives a Certificate of Expected Date of Delivery within 2 weeks of canceling a pregnant employees' contract- the dismissal is usually retracted or nullified. Not many company's want to invest in the complicated and often, unsuccessful undertaking of challenging the higher authorities on this subject.[31]

Having the work done by co-workers: to facilitate the part-time work request, currently requires the employer to organize substitutes or otherwise cover the shortfall in working time. Heavier work loads forco-workers may in the long run lead to dissatisfaction and increased fluctuation, more error-pronework and lower productivity.[32] Hence, we would expect the costs of work-sharing solutions borne by the employer to be a function of the duration of leave such that employer costs will generally increase with increasing maternity leave duration.[33]

If the employee shall be entitled to return to full time again, the employers will need predictability (announcement requirements sufficiently in advance) and laws enabling him to hire substitutes temporarily. Otherwise, he will have too many employees on board when the part-time employee returns to full time. It would be desirable (and can be expected) that the new laws will follow the pattern of the regulations on parental leave where such claim already exists. If the new model, once implemented, is widely used, this will mean an increasing administrative burden for employers, who once more will be encumbered with socio-political objectives of politics. The additional paid leave to care for family members will mean costs for the employers.[34]

Existing studies on the effect of maternity leave provisions on women's labor market position concentrate on the duration of maternity leave as a proxy for the costs accruing to employers – the underlying hypothesis being that the longer the leave duration, the more human capital is being

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31 Ibid.

32 Dorothea Alewell, Kerstin Pull, *An International Comparison and Assessment of Maternity Leave Regulations, www.wiwi.uni-jena.de/Papers/wp-a0102.pdf,* University of Jena.

33 Ibid.

34 Ibid, at 4.

lost. In many cases, however, the loss of human capital during a limited absence of several months may not be the main cost factor for employers faced with a mother on leave who wishes to return to her previous job. Moreover, it may well be the re-organization of work during absence and thereafter, that causes a problem to the employer.[35]

The United States maternity leave is unpaid, while mothers on maternity leave in Germany receive pay reaches up to a 100% of the wage – 40% of these costs are borne by the employer.[36]These costs of having to co-finance maternity pay add to the costs of reorganization.

3. Target Country - Italy – Family Leave Benefits

In Italy, parental leave is regulated mainly by the law (currently laws 1204 of 1971 and 903 of 1977).[37] According to a law adopted in 1971 and amended many times since, pregnant women here are obligated to take off the last two months of pregnancy and the first three months following the birth - for a total of five months during which they receive full salary, 80 percent of it paid by the state.[38] Having babies is a serious business everywhere. But in Italy, working women are given the time to treat it almost like a job. Long paid leaves, combined with free medical care, are considered part of an Italian mother's birthright - one element of the safety net that middle-class taxpayers across Europe have both enjoyed and supported with very steep taxes for many decades now, in contrast to their middle class counterparts in America, who by and large see social spending as money only for the poor.[39]

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35 Supra, at 34.

36 Ibid.

37 Office of Retirement and Disability Policy, *Social Security Programs Throughout the World: Europe, 2012,* available at http://www.ssa.gov/policy/docs/progdesc/ssptw/ 2012-2013/europe /italy.html, last seen on 16/07/2015; Article 99 of the Constitution established the National Economic and Labor Council (*Consiglio Nazionale dell'Economia e del Lavoro* (*CNEL)*).

38 Celestine Bohlen, *The State of Welfare in Italy; Where Every Day is Mother's Day,* The New York Times (12/05/1996).

39 Ibid.

The Italian Constitution, under Article 37, states that working women and men have equal rights as to salary and all protections of applicable laws. Moreover, it provides that a working woman must be granted work conditions that:

i. Give her the opportunity to carry out her essential role within the family, and

ii. Ensure a special and adequate protection to the mother and the child.[40]

After some delay, the 1996 EU Directive on parental leave has now been converted into Italian law. The aim of the new law is to enable a more satisfactory balance to be struck between family and work commitments. Legislative Decree no. 151 of March 26, 2001, sets out the main principles relating to maternity rights:

i. A pregnant employee has the right to time off during working hours for medical appointments. Requests for such leave are not to be unreasonably refused;

ii. A woman is entitled to maternity leave and salary during the following time periods:

   a) A mandatory period of two months before the expected date of delivery;

   b) The days between the predicted date of delivery and actual date of delivery;

   c) A further mandatory period of three months after the delivery;

   d) An optional period of six months (during which the employee is paid at a reduced rate) until the child is eight years old); and

   e) If there is only one parent, for a maximum of 10 days a working mother is entitled to two hours paid leave a day (reduced to one hour if her working hours are less than six), until the child is one year old, in order to feed the baby.

[40] Ibid, at 86.

The salary paid to the employee for the aforementioned periods is recoverable by the employer from the social security authorities (Istituto Nazionale di Previdenza Social (INPS)) as follows:

i. for 80 percent of the employee's salary for the mandatory periods, and

ii. for 30 percent of the employee's salary for the optional period for a maximum of six months until the child is three years old.

In addition to the mandatory maternity leave governed by the laws, there are also benefits that are not written in legislation, but simply sanctioned by tradition. For instance, women with risky pregnancies are entitled, with the appropriate doctor's certificate, to take all nine months of pregnancy off.[41] Likewise, mothers suffering from depression or mothers whose babies require special care can get other doctors' certificates, entitling them to stay away from work for up to three years.

A pregnant employee cannot be dismissed during the pregnancy period and within the first year after birth of the child, except for just cause.

The most significant amendments introduced by the Law no. 53 are the following:

i. The father is now entitled to take leave during the mandatory period of three months described under c) above in case of mother's death or illness, or in the event that he has custody of the child;

ii. Both parents have the opportunity to take leave to care for their children during the optional period of six months described under d) above;

iii. Both parents are now entitled to two hours paid leave a day described under e) above; and

iv. Both parents independently are permitted to take leave (being paid at a reduced rate) in the event of their child's sickness until

[41] Ibid.

> the child is eight years old, upon presentation of a medical certificate.[42]

Further, paid family leave taken for the purpose of caring for a newborn (or a newly adopted child) the Social Security Service grants an allowance equal to the 80% of the average daily wage for five months of compulsory leave from work. The parents can ask to be recognized a further period of elective leave from work and in this case, the allowance granted by INPS is equal to 30% of the average daily wage, this further period can go up to a maximum of 6 months within the 3rd year of the child. Specific provisions withheld in National Collective Bargain Agreements provide that, in order to grant the mother (or the father in particular circumstances) 100% of the total wage, the remaining part (from 80% up to 100% of the normal income) has to be paid by the employer.[43]

The period of compulsory maternity leave for women can now be arranged differently. Whereas, previously the entitlement was two months prior to confinement and three months after, under the new law mothers may apply for a period of leave amounting to one month before confinement and four months after.[44]

The M&A lawyer, whose client is acquiring an Italian company, must include in the due diligence phase must look at that when a case of personal illness of the employee occurs (illness not covered for by INPS) the paid leave can go up to a year, but single Collective Bargain agreements can allow it for less or more time, depending on the single provisions.

In the event of a newborn child or newly adopted, the mother is granted 5 months of mandatory leave, normally 8th and 9th month of pregnancy and up to the 3rd month of the child. This period can be extended and the mother can ask for the elective absence from work which, till the 3rd year of the child, can go up to 6 months of paid leave and after to 3rd

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42 Ibid, at 87.
43 Ibid.
44 Ibid, at 97.

year and up to the 8th year of the child (if occur particular circumstances) up to another 4 or 5 months (so on the whole no more than 10/11 months up to the 8th year of the child). As above mentioned, the elective absence income is granted only up to 30% of the average daily wage.[45]Moreover female workers are entitled to paid time off (*permessi retribuiti*) for prenatal visits and check-ups during working hours.[46]

Finally, the employer must know that the position has to be held by the company until the return of the employee from family and medical leave. The position does not have to be eliminated in the meantime and the company can replace the absent employee (if absent for long amount of time e.g. over a month) with another but only on a temporary basis, this means until the employee on leave does not return to work. When the employee returns he/she is granted the same position and tasks. Often companies, in case of parental leave, hire another employee with a fixed-term contract in order to grant covering for the position strictly for a determined period of time equal to the compulsory absence period; that opens up another set of requirements to be explored at another time.[47]

As this paper has noted, Italy's parental leave policy designs vary on multiple dimensions. Leave provisions can be, more or less, generous with respect to the amount of total time granted to parents and can be, more or less, generous with respect to the level of financial remuneration provided. One last thing when scrutinizing the Italian "human capital" costs is that female labor market participation varies from one part of the country to another, being much higher in the regions of northern Italy and some central regions than it is in the South.[48]

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[45] Ibid.
[46] *Family Benefits*, INPS; EURAXESS Italy, European Commission - Employment, Social Affairs and Equal Opportunities; Your Europe - Family; Eurofound: http://www.welcomeoffice.fvg.it/common/are-you-a-eueeacitizen/researcher/family-benefits.aspx (2009).
[47] Ibid, at 97.
[48] Ibid, at 97.

4. UNITED STATES – FAMILY LEAVE BENEFITS

The United States Family and Medical Leave Act (FMLA) sets a minimum standard for parental leave, but due to the exclusion of small employers and short-tenure workers, about 40 percent of United States workers are not eligible for the FMLA.[49] In general, United States employers as a group have not stepped in to fill the gap[50]. While about 60 percent of workers are eligible for FMLA related leave, only about one-fourth of United States employers offer fully paid "maternity-related leave" of any duration, and one-fifth of United States employers offer no maternity-related leave of any kind, paid or unpaid. Private employers do not appear to be narrowing the statutory gap in parental leave entitlements between the United States and the rest of the high-income countries analyzed herein.[51]

The United States is the only industrialized nation that does not guarantee workers paid time off to provide care to a new child, and one of only a handful of these nations that does not provide paid leave for other types of family care.[52]

The Family and Medical Leave Act of 1993 was an important accomplishment providing unpaid, job-protected leave to recover from a serious illness, care for a new child, or care for a seriously ill spouse, parent, or child, yet only half of all workers in the United States are covered and eligible.[53] Even when workers are eligible for unpaid leave under the Family and Medical Leave Act, they often cannot afford to take it. Only a small percentage of workers are away from work in an average week for the birth or adoption of a child. In the average week,

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[49] Annie Pelletier, *The Family Medical Leave Act of 1993-Why Does Parental Leave in the United States Fall so far Behind Europe?,* 42 Gonz. L. Rev. 558 2006-2007

[50] Ibid, at 560.

[51] Rebecca Ray, *et al, Parental Leave Policies in 21 Countries, Assessing Generosity and Gender Equality.* Center for Economic and Policy Research. September, 2008. Revised June, 2009

[52] OECD, *Gender Brief,* Prepared by the OECD Social Policy Division, Version: March 2010

[53] Family and Medical Leave Act of 1993, H.R. 1, 103rd Congress (1993)

only 0.4 percent of workers are out on parental leave.[54] Women are more likely than men to be out of work on parental leave in any given week, which is both because women are more likely than men to take leave, and because women take longer leaves.[55]

Further, as if these consequences are not enough, corporations could be held liable under United States law if they violate its laws while operating abroad. Therefore, it is not likely, but certainly possible, that a multinational operating in Europe could violate not only the relatively employee-favoring provisions of a member state operating under the Directive, but it could also be held liable for violation of the FMLA in the United States, if the requisite three months of unpaid leave is not given to the employee.

Similarly, multinational corporations, specifically those originally incorporated in the United States, operating in Europe who violates the Directive and the FMLA will suffer the consequences in a United States tribunal. Such issues have caused some commentators to ask, "What is an American company anymore?[56] Indeed, others are suggesting an extension of the territorialism of United States laws to reach its companies who violate acceptable labor standards on the international level.[57]

The notably short era and more stringent periods of leave provided for in the FMLA are in sharp contrast to the longer, variable standard the European Union has imposed upon its member states.[58] That is, the greater need for employee-protective legislation and the history of a more paternalistic view of employees' rights leads the European Union to

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[54] Dept. of Labour, Bureau of Labor Statistics, Table 2. *Wage and Salary Workers Who Took Leave from their Main Job. During an Average Week: percent of Workers Taking Leave, Hours of Leave Taken and Type of Leave Used; Main reason for taking leave,* 2011.

[55] Ibid.

[56] Ibid, at 566.

[57] Henry F. Drummonds, *Transnational Small and Emerging Businessina World of Nikes and Microsoft (A Retrospective Article on the 1998 Lewis* & *Clark Law Forum and the Message of Seattle,* 4 J. Small & Emergingbus.l. 249,293(2000).

[58] Ibid.

impose more restrictions on employers in member states in order to extend and preserve employees' rights.

The tragedy of America's inability (or unwillingness) to develop the mindset and the mechanisms to compete in this 'space between' means that we reduce our options and in the end, resort to the military instrument. Peace does not exist in a state of inertia. It must be actively and consistently maintained by engaging in the political competitions that are its constant feature.[59]

5. CONCLUSION

Clearly, the greatest difference between the FMLA and the EU Directive is the amount of leave given to parents before and after the birth or adoption of a child.[60] The FMLA mandates twelve weeks of unpaid leave to be taken responsibilities within twelve months of the child's birth or adoption,[61] while the typical length of leave granted to European employees is fourteen to sixteen weeks (though then Directive only requires twelve).[62]

It is no big secret that the United States is a shameless outlier among our peer nations when it comes to adapting to the realities of the 21st century workforce. Of 168 countries included in a recent global study, 163 guarantee a period of paid leave for childbirth; the U.S. does not. (Among affluent countries, only the U.S. and Australia do not provide paid childbirth leave - and Australia offers 52 weeks of job-protected leave to all women, compared to the miserly 12 weeks of unpaid leave available to roughly one-half of women workers in the U.S.)[63] While the

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[59] Darryl A. Weiss, *Opening in a Foreign Country, be careful,* Global Business News, available at http://www.globalbusinessnews.net/story.asp?sid=158, last seen on 02/07/2015.

[60] Supra, Morris @ Note 63 pg. 567.

[61] 29 U.S.C.Family and Medical Leave Act of 1993, S. 2601-2654.

[62] Council Directive 96/34/EC19960.J.(Ll45)4, Art.2(2) (granting a right to three months' leave); *See Also,* Kathryn L Morris, *A Matter of compliance: How do U.S. Multinational and Medical Leave Act of 1993 and the European Union Directive on Parental Leave; Is an International Standard Practical or Appropriate in this area of law?,* 30 Ga. J. Int'l & Comp. L. 543 (2001)

[63] Judith Stadtman Tucker. *Hands Off My FMLA,* Huffpost Healthy Living (24/08/2014), available at http://www.huffingtonpost.com/judith-stadtman-tucker

free market proponents defend this lackadaisical approach as the American Way, our nation's abysmal track record on implementing family friendly polices has led to serious social problems here and will lead to social problems when these same proponents elect to enter the "foreign" arena, as mentioned above.[64].

The social welfare ethic found in European countries is that the up bringing of children is often viewed as a societal responsibility.[65] The Directive's purpose is to: 'facilitate the reconciliation of parental and professional responsibilities for working parents.'[66] On the other hand, Americans tend to have an individualistic outlook on life and tend to view the upbringing and care of children 'in individual and voluntary terms.'[67] Collective responsibility for children is virtually unknown in the United States. The United States situation seems to assume that pregnancy [and child rearing to a large extent] is sort of a private hobby, which must be borne at your own expense.[68]

While these problems seem monumental and confusing to a company beginning their transnational business, steps can be taken to avoid sanctions and maintain the goodwill of their European customers.[69] To combat such problems and because of the varying standards it is imperative that drastic measures be taken.[70] The question remains: how much due diligence and to what extent would a United States corporations go to incorporate aspects of foreign industrial relations systems into its own system, especially without "golden guarantee."

/ hands-off-my-fmla_b_37623.html?ir=India&adsSiteOverride=in, last seen on 02/07/2015.

64 Supra 34.

65 EmilyA.Hayes, *Bridging the Gap between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of I 993, 42 Wm. & Mary Rey.* 1507, 1516 (2001).

66 Ibid, at 166.

67 Ibid.

68 Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Base on the Swedish Model?,* 17 Comp.Lab.L.J. 373, 373(1996) (citing HR 2020, 99th Cong. (1st Sess.1985)).

69 Supra 34.

70 Morris, *supra* note 177

NEED FOR LAW ON GENOCIDE IN INDIA: IN THE LIGHT OF INDIA'S OBLIGATION TO THE GENOCIDE CONVENTION, 1948

- Ankita Guru*

ABSTRACT

"We too will find ourselves unable to look our own children in the eye, for the shame of what we did and didn't do. For the shame of what we allowed to happen."[1]

The killing of Sikhs in 1984 after the death of the then Prime Minister Indira Gandhi, solely based on their religious identity has long been disputed as to whether would amount to a genocide of the Sikhs or not.[2] *The Babri Masjid and Godhra Riots of 1992 and 2002 have been subdued as a law and order situation. Within the secular trough of the largest democracy there exists, a not so tolerant history among the religious and racial communities. In absence of a law on genocide such grave offences against humanity have been hushed in India time and again. India has failed to fulfill its obligation to enact a national law on genocide to prevent and protect its citizens, religious minorities and vulnerable groups against the crimes of genocide. What has been more shocking is the acts have gone unpunished due to lack of evidences demanded by the national law, as it treats acts of genocide as mere individual acts, punishable under various sections of the Indian Penal Code. Today, we continue to live in a polarized country, where the bomb of holocaust is to explode time and again and the rest of the humanity except the offenders shall be put to shame again and again.*

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[1] Arundhati Roy, *The Algebra of Infinite Justice*, (2002).

[2] United States based advocacy group Sikhs for Justice have filed a petition before the United Nations Human Rights Commission in Geneva to launch investigation in the 1984 killings of Sikhs which should be considered as genocide and not rioting. The petition says it was a systematic killing of Sikhs with complicity and participation of government. See *Internationalising the 1984 riots*, The Hindu, available at http://www.thehindu.com/opinion/op-ed/internationalising-the-1984-riots/article5415029.ece, last seen on 15/4/2015.

1. Understanding Genocide and Obligation of States to Protect

1.1. What is Genocide?

The world had never seen as ugly a face of mankind as in the wake of the Second World War, when the Nazi's committed holocaust of the Jews on the orders of Adolf Hitler.[3] Winston Churchill remarked that the world was being faced with a crime without a name.[4] In 1944 the term 'genocide' was coined by Raphael Lemkin for the 'acts of barbarity' committed against the Jews.[5] The need for punishing these perpetrators of the gravest crimes against mankind led to the creation of the Nuremberg Tribunal. The Tribunal did not define the crime of genocide but made killings and persecution of civilians based on religious, racial and political identities punishable.[6] The term of 'genocide' was included in the indictment but not as a legal term.[7] This led to the UN General Assembly Resolution 96(I) in 1946 to adopt the Convention on the Prevention and Punishment of Genocide. The resolution affirmed that the crime of genocide is of international concern. The preamble to the convention adopted on 9th December, 1948 states that genocide is a crime under International law and should be condemned by the civilized world. It has wreaked havoc on humanity and has led to great losses and therefore international cooperation is sought to liberate mankind from such an 'odious scourge'.[8]

The Article II of the Genocide Convention defines the crime of genocide as:

Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

i. Killing members of the group;

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3 Dr Steve Paulsson, *A View of the Holocaust*, available at:*http://www.bbc.co.uk/history/worldwars/genocide/holocaust_overview_01.shtml,* last seen on 15/4/2015.

4 Leo Kuper, *Genocide, Its Political Use in Twentieth Century*, (1981).

5 *Introductory note on Convention on the Prevention and Punishment of the Crime of Genocide*, *Audiovisual Library of International Law,* available at http://legal.un.org/avl/ha/cppcg/cppcg.html, last seen on 15/4/2015.

6 Ibid.

7 *Origin of the term "Genocide"*, Holocaust, available at http://www.ushmm.org/confront-genocide/defining-genocide*,* last seen on 15/4/2015.

8 Supra note 6.

ii. Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

iii. Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

The following acts are made punishable under the convention as prescribed under Article III.

Article III: The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

This definition of genocide is also found in the charter of International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) under Article 4 and Article 2 respectively. The ICC Statute also defines the crime of genocide under Article 6 of the Roman Charter, 2002.

The essential element of the crime of genocide is the specific intent or 'dollus speciallis' to destroy a targeted group in whole or in part. The specific intent is to bring the destruction of this target group through a systematic planned attack. The acts that constitute genocide like killing, murder, extermination are done with an underlying intention to bring about the destruction of the group.[9]A person might have an intention to

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[9] G.H.Stanton, *The Eight Stages of Genocide*: Stanton has formulated eight stages of genocide in order to infer the specific intent behind a genocide. These eights stages in an increasing order are: Classification, Symbolisation, Dehumanisation, Organisation, Polarisation, Preparation, Extermination and Denial: available at: http: //www.genocidewatch.org/genocide/8stagesofgenocide.htmlw, last seen on 15/4/2015.

kill, murder, exterminate but unless such underlying intention is present to direct all these acts of offences towards commission of genocide, the specific intent cannot be proved. The ICTY in Jelisic Case[10] noted that it is the mens rea which gives genocide its speciality and distinguishes it from ordinary crime and other crimes against international humanitarian law. The ICTR also in the case of Akayesu[11] defines specific intent as constitutive element of the crime of genocide, which demands that the perpetrator clearly seeks to achieve through its acts the offence charged of. Since, it is difficult to prove this specific intention to commit genocide in absence of confessions the intention is inferred from the facts.[12]

The Convention punishes killing of the members of a group directly or actions leading to such deaths. Deliberate deprivation of means to sustain life and resources needed for survival which ultimately brings destruction of the group like restriction on food, shelter, clean water, widespread torture, rapes also amount to genocide. Prevention of births in the group by forced sterilization, castration etc. also amount to genocide as this leads to extinction of the particular group over a span of time. Therefore, commission of any of these acts under Article II with intention to destroy a national, religious, racial and ethnical group in whole or any part amounts to genocide.[13] The destruction of the group can be aimed at whole or in a particular geographical area or territory; region of a country and a municipality can also be characterized as genocide.[14]

1.2. Obligation under the Convention on the States

The Convention under Article V places an obligation on the parties to the convention to enact national legislation on genocide in accordance to their respective constitution to give effect to the provisions of the Convention and to effectively punish and attach penalty under domestic jurisdiction on persons guilty of genocide or the associated acts under Article II and III respectively.[15]

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[10] IT-95-10.
[11] ICTR-96-4-T.
[12] Ibid.
[13] *What Is Genocide?,* Genocide Watch, available at http://www.genocidewatch.org/genocide/whatisit.html , last seen on 15/4/2015.
[14] ICTY in Krstic case, IT-98-33-T, 2001.
[15] Article 5 of the Genocide Convention enshrines that *"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the*

Article VI provides that the persons charged with genocide shall be tried by a competent tribunal of the State in whose territory the acts were committed and in cases where two contracting parties are involved by such international penal tribunal to whose jurisdiction both the parties submit themselves.[16]

The domestic prosecution of perpetrators of genocide has become the subject of International interest and not merely matters of national significance. Failures to enact national legislations on genocide have international impact. In April 1999, the Rwandan Mayor Fulgence Niyonteze could not be held liable for genocide when he was tried in Swiss courts as Switzerland did not recognise 'genocide' as a separate offence and had no national laws or legislations punishing the acts of genocide.[17]

Many states like United States have a domestic legislation or law for genocide. Under Chapter 50 A of the US Code Section 1091 defines the offence of genocide. It states that whoever, whether in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such kills members of that group; causes serious bodily injury to members of that group; causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques; subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part; imposes measures intended to prevent births within the group; or transfers by force children of the group to another group; or attempts to do so, shall be punished in case of death by death or life imprisonment and in other cases, to an imprisonment of not more than twenty years and with a fine or only with a fine of not more than $1,000,000. The law also attaches penalty for direct and public incitement of genocide. The provision is applicable on persons committing genocide within the United States or

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provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3".

[16] Article 6 of the Genocide Convention enshrines that *"Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".*

[17] *Implementing the Genocide Convention in Domestic Law,* Prevent Genocide International (Human rights advocacy group working for prevention of genocide), available at http://preventgenocide.org/law/domestic/index.htm#asia-pacific, last seen on 15/4/2015.

on the nationals of the United States committing such offences elsewhere. Countries like Australia, Switzerland, and Bangladesh also have special Act implementing the ratified Convention of Genocide in their domestic laws.

India ratified the Genocide Convention on August 27th, 1959. The International Court of Justice (ICJ) in its Advisory Opinion on the Reservations to the Genocide Convention Case[18], 1951 has ruled that the "principles underlying the Convention are principles which are recognized by the civilized nations as binding on the states, even without any treaty or conventional obligations". The crimes like genocide, crimes against humanity and war crimes have become part of the general international law. The ICJ in the Barcelona Traction Case[19], 1970 stated that "By their very nature, the outlawing of genocide, aggression, slavery and racial discrimination are concerns of all states". All states have a legal interest in their protection and their prevention is therefore obligation against the entire world i.e. *erga omnes.*[20] Prof. V.S.Mani in his article on *Needed, a Law on Genocide*[21] states that India is bound by the general principles of International law and by its obligation as under the Genocide Convention to enact a national legislation on genocide. He draws four reasons as to why it has become absolutely important to enact a domestic law on genocide drawing a parallel analogy as to the reason for enacting laws on terrorism. He states that India as a member of the United Nations had a legal obligation to enact a specific law on terrorism, in accordance with the resolutions of the U.N. Security Council adopted in 2001. Second, terrorism as a special category of crime required a special law to deal with. Third, only a special enactment could have a deterrent effect on terrorism. Fourth, such a law was necessary to protect the territorial integrity and moral fabric of the country. For the same reasons a law to protect and prevent genocide should be immediately enacted in India. Firstly, as India is a party to the Genocide Convention and is bound by the obligation to prevent and punish genocide. Secondly, as per the obligations under the Convention India has a duty to enact necessary legislation to give effect to the provisions of the Convention and to provide for penalties to the

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[18] 1951 I.C.J. 15.

[19] Belgium v. Spain, 1970 I.C.J. 3.

[20] Prof. V.S Mani, *Needed, a law on genocide*, The Hindu, (10/04/2002), available at http://www.thehindu.com/2002/04/10/stories/2002041000251000.htm, last seen 15/4/2015.

[21] Ibid.

persons guilty of genocide. Thirdly, it has a duty to punish the perpetrators of genocide by creation of competent tribunals.[22]

Inspite of ratifying the Convention in 1959 India has till date not enacted any law on genocide. It has failed to fulfill its obligation under Article 51(c) of the Indian Constitution which "fosters respect for international law and treaty obligations". The non self executing treaties are to be made part of the domestic law by enacting laws by the national legislatures to meet the treaty obligation which India has failed to meet in respect of the Genocide Convention.

This failure implies that there can be no prosecution in domestic courts of India of any person accused of committing genocide, as Indian law does not recognizes genocide as an offence. Therefore, persons accused of perpetrating genocide in India or Indian citizen committing genocide abroad cannot be tried by the national courts under the Convention. India not being a signatory to International Criminal Court also protects such perpetrators of genocide residing within its territory from the jurisdiction of the ICC. Therefore, the only remedy which could be obtained is by filing a case in some other country which recognizes universal jurisdiction over crimes of genocide. Like cases regarding 1984 and 2002 communal riots being filed in USA to be recognized as crime of genocide.[23]

2. NEED FOR GENOCIDE LAWS IN INDIA

In absence of specific legislation to punish genocide and acts of genocide lot of atrocities has been committed in India. There are eight stages of genocide identified by G.H Stanton to understand and prevent genocides. The first and second stages are that of Classification and Symbolization. The Indian Society itself is marred by various religious, cultural and ethnical differentiations. The most highlighted of all are the religious and ethnical differences. Our societies and life styles are easily identifiable by our religion which has strong bearing on our social lives. Hindus, Muslims, Christians and Sikhs are distinctly classified religious

[22] Ibid.

[23] *US refuses to declare 1984 riots in India as genocide*, PTI, available at http://www.ndtv.com/article/india/us-refuses-to-declare-1984-riots-in-india-as-genocide-349116,, last seen 15/4/2015.

groups in India and time and again there have been reported communal clashes between these groups.[24]

The Genocide Watch in its report on India states that India is a diverse country with polarization based upon religious, regional, caste and economic background.[25] Dehumanization which is third stage of genocide is prevalent among religious groups in India for political reasons. Hate speeches by leaders of RSS, VHP, Majlis-e-Ittehadul Muslimeen etc has been a common phenomenon in India further pushing us towards a polarized society with hatred brewing among religious groups.[26] Further, attack on sacred centres of one religious community by the others is seen as polarizing India into two distinct religious groups of Hindus and Muslims. Like the 1992 demolition of Babri Masjid to proclaim the birth place of Lord Rama by Hindus and the celebration of the kar sevaks after the demolition, fired communal riots in Bombay in 1992-93 between Muslims and Hindus.

India has a list of communal violence like that of the 2002 Hindu Muslim riots in Gujarat, the 2012 killings of Assamese Muslims, Killing of Christians in Odisha and the ethnic cleansing of the Kashmiri Pandits from the valley.[27] Due to these existing differences, the Genocide Watch classifies India in the fifth category of Genocide Polarisation.[28]

3. CASE STUDY ON THE 1984 KILLING OF THE SIKHS: A GENOCIDE

3.1. Nanavati Commission and determination of events in the 1984 riots

The Nanavati Commission Report, 2005 conducting investigation in the 1984 riots, in the wake of assassination of the then Prime Minister

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[24] Communal riots between Hindus and Muslims at time of partition in 1947, the killing of Sikhs in 1984, 2002 killings of Muslims in Gujarat.: available at http://www.genocidewatch.org/india.html, last seen on 15/04/2015.

[25] Ibid.

[26] Latest of such speeches came from Pravin Togadia inciting Hindu mobs to forcefully take over Muslim land as these cases shall go unpunished and also to use various force against them if necessary. Pravin *Togadia under fire for hate-speech, RSS says he didn't say that*, The Indian Express (21/04/2014), available at http://indian express.com/article/india/india-others/prevent-sale-of-property-to-muslims-pravin-togadia/, last seen 15/4/2015.

[27] Chapter II, Sri Krishna Commission Report on Demolition of Babri Masjid.

[28] G.H.Stanton, Genocide Watch: *India, Those Who Own the Past Own the Future.*

Indira Gandhi states that a large number of Sikhs were killed in these riots. The official record states that 2773 Sikhs were killed in Delhi between 31.10.1984 and 7.11.1984. The report suggests that in the riots that broke out after the death of Indira Gandhi the Sikhs were targeted, as she was assassinated by her Sikh body guards. During this period various gurudwaras in Delhi were attacked and Sikhs were killed on roads and by dragging out of their homes. The Nanavati Commission Report finds mention therein of the leaders of Congress like Kamal Nath, Jagdish Tytler and Sajjan Kumar against whom some witnesses had deposed. But such witnesses turned hostile later on and no cases were filed in the courts in most cases and some were disposed due to lack of evidences. The report suggests that the 1984 killing of the Sikhs was not an isolated communal riot but culmination of events taking place in Punjab since the 1981. The killing of Hindu's by Sikh separatists had triggered a revenge killing of the Sikh's to teach them a lesson.[29]

Though the initial outbreak of violence could be termed as spontaneous reaction of the people on killing of Indira Gandhi by two Sikh bodyguards but the events in the following days as inferred from the statement of the witnesses and evidences examined by the commission, shows it to be a planned attack on the Sikh and their settlements. Persons who carry out attacks and violence were contacted to carry out such attacks and the gradual supply of arms or weapons and substances like kerosene to the mob in the following days show an organized plan to eliminate Sikhs from their areas of settlement in Delhi.[30] Meetings were held, plans were laid down and instructions were given to identify Sikh shops and houses and to loot them. The killings had a common pattern in which the male Sikhs were taken out of the house, beaten and burnt alive. A tyre was placed around the head and burnt with kerosene, petrol or a white inflammable powder. There appeared to be a systematic pattern in these killings with the mob shouting anti-Sikh slogans. The evidences collected by the Commission showed involvement of local Congress leaders. Though the commission could not find enough evidences to prove the involvement of any big leaders and therefore could not suggest any action against them. Commission recommended the Government to take actions against Jagdish Tytler and Sajjan Kumar

[29] Overall Consideration, Nanavati Commission Report (2005), available at: http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/Nanavati-I_eng.pdf, last seen on 15/4/2015.

[30] Ibid.

two Congress leaders against whom it found incriminating evidences of organizing the mob to kill Sikhs.[31]

3.2. Not Riots but planned 'Sikh Genocide'

The facts stated above point out that there was classification and symbolization of the Sikhs, as the violence was directed towards one particular religious group. The Sikhs could be easily identified because of their appearance and dressing, with a beard and a turban. There was dehumanization and polarization caused by anti-Sikh sentiments and revenge killings for what happened in Punjab. The killings were directed at Sikhs in particular and they were executed in a systematic pattern which shows planning and organization of the mob. Their houses and shops were identified and gurudwaras were attacked. The mass killings were not done as a spontaneous reaction of a mob or unlawful assembly but in execution of a common plan to eliminate the Sikhs systematically. This shows that it was not a case of rioting under Section 146 of the Indian Penal Code which merely says about use of violence by an unlawful assembly. But, an episode of genocide happened wherein the systematic elimination of Sikhs were carried out with an intention to destroy them in particular. There was Organisation, Planning and Preparation wherein the Sikhs were identified and targeted along with Extermination which amounts to the eights stages of Genocide as discussed earlier.[32] The extermination of the Sikhs carried out in such a way as to mutilate their bodies by burning, are manifestation of an intention of directing violence against the Sikhs. So, as to destroy them and reflects an extreme sense of hatred and revenge against this religious group.

The commission found congress leader like Sajjan Kumar and Jagdish Tytler involved in such violence as well as complacency and complicity of various police force officers who did not act and allowed such mob rioting to escalate. However, due to lack of evidences against Jagdish Tytler the C.B.I gave him a clean chit in 2009 due to insufficiency of evidences. However, recently the Delhi High Court has ordered CBI to

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[31] See supra note 26.

[32] G.H.Stanton, *The Eight Stages of Genocide*: Stanton has formulated eight stages of genocide in order to infer the specific intent behind genocide. These eights stages in an increasing order are: Classification, Symbolisation, Dehumanisation, Organisation, Polarisation, Preparation, Extermination and Denial, available at http://www.genocidewatch.org/genocide/8stagesofgenocide.html, last seen on 15/04/2015.

reinvestigate and open a case against him as there appears to be evidence which has not been examined. Witnesses who had filed affidavit before the Nanavati Commission and have testified against Tytler were asked by the court to be examined by the CBI. [33] Sajjan Kumar was acquitted in one of the cases filed against him while the rest three are still pending. In one of such cases he faces charges of murder, rioting and promoting hatred among communities which lead to the killing of six Sikhs.[34] It has been 30 years since the Sikh Genocide but the perpetrators have not been brought to justice yet. Various Non-Governmental Organisations have been working for the victims towards securing justice and to punish those responsible for instigating and organizing such mass killings of the Sikhs.[35]

4. NEED FOR RECOGNIZING ACTS OF 'GENOCIDE' AND ENACTING A DOMESTIC LAW

4.1. Effects of Denial of Recognition of Acts of Genocide

Lack of a law on genocide makes it more difficult for the victims to get justice. These violence inflicted on a group is not seen as a larger picture to bring their destruction in whole or in part but as mere individual offences like murder under section 302 coupled with Criminal Conspiracy, Unlawful Assembly and Rioting if carried out by a mob of people. Lack of recognition of genocide as a crime makes it difficult to book the perpetrators for their acts of barbarity as they are booked for individual crimes like murder, rioting etc. which is often disposed of due to lack of evidences. As the *actus reus* of these crimes are not carried out

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[33] *Delhi court reopens 1984 riots case against Tytler*, The Hindustan Times (10/04/2013), available at http://www.hindustantimes.com/india-news/newdelhi/delhi-court-reop ens-1984-riots-case-against-tytler/article1-1040274.aspx, last seen on 15/4/2015.

[34] *1984 Anti-Sikh Riots Case: SC rejects Sajjan Kumar's plea, asks him to face murder trial*, The Times of India (3/12/2013), available at http://timesofindia.indiatimes.com/ind ia/1984-anti-Sikh-riots-case-SC-rejects-Sajjan-Kumars-plea-asks-him-to-face-murder -trial/articleshow/26781065.cms, last seen 15/4/2015.

[35] Amnesty International, Chaurasi Ki Na insaafi, Sikhs for Justice and other campaigns urge Government to bring to Justice the real perpetrators behind 1984 killings. The Sikhs for Justice and other interested human rights group have filed a petition before the UNHCR to initiate investigation in the 1984 killings of the Sikhs and to recognize it as genocide while the Indian government fails to bring to justice the perpetrators. Amnesty Campaign is available at http://www.amnesty.org.in/acti on/detail/demand-justice-for-1984, last seen on 15/4/2015.

by the actual perpetrators of the genocide but by low level rioters or local goons and due to lack of evidences it becomes difficult to show complicity of the high level perpetrators of genocide in each of the FIR registered cases. At most these high level perpetrators are charged only with inciting violence. Therefore, there is a need to introduce a national legislation on genocide and to establish a national tribunal in the wake of such genocidal killings in India. So that, persons who perform the *actus reus* of the genocide as well as the high level perpetrators on whose plans such genocides take place are charged with crime of genocide in furtherance of intention to cause destruction of a religious, racial, national or ethnical group and not with mere individual offences under the penal code. In absence of a domestic law on genocide, the punishment and charges leveled are those which are commonly used for other crimes which take place every day and as such, the barbarity of crimes like genocide evade punishment.

The 'Denial'[36] of genocide has huge consequences. Denial harms the victims and their survivors.[37] The non-recognition of Armenian Genocide by the Turkish government is described as double killing by the survivors. Recognition of the crime of genocide is a healing closure to an open wound. Denial leads to crippling of victims into hardened revenge seekers without any chance of reconciliation.[38] Denial also harms the perpetrators and their successors.[39] G.H Stanton states that "studies by genocide scholars prove that the single best predictor of future genocide is denial of a past genocide coupled with impunity for its perpetrators. 'Genocide Deniers' are three times more likely to commit genocide again than other governments."[40] Therefore, the cycle of killing and revenge between groups shall go on. Denial does not serves the purpose with which India ratified the Genocide Convention, i.e. "never again"; it shall continue to be "again and again" till denied.

The insufficiency of the Government to recognise such killings as genocide leaves the victims with no justice against the fate that befalls them. With no reparation of the victims, no restorative justice the cycle of revenge and killings continue. Mere compensation is not justice for the victims.

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[36] G.H.Stanton, *The Eight Stages of Genocide*. See supra note 33.
[37] G.H.Stanton, *The Cost of Denial*, available at http://www.genocidewatch.org/aboutus/thecostofdenial.html, last seen on 11/6/2015.
[38] Ibid.
[39] Ibid.
[40] Ibid.

4.2. Need for Domestic Law for Successful Prosecution of Perpetrators

The author establishes herein below certain reasons as to why there is a need for a specific law on genocide and why it is insufficient to deal with such acts of genocide as one of the existing underlying offences under the Indian Penal Code, 1860.

Murder under Section 300 of the Indian Penal Code, requires for a successful conviction that death is to be caused by an act of the perpetrator with such intent or knowledge so as to cause such bodily injury which would likely cause death; or is imminently dangerous or is sufficient in ordinary course to cause death. Depending on the knowledge and likelihood component there is a fine distinction between culpable homicide and murder. Genocide on the other hand is not mere murder or mass murder.

Under the Indian Penal Code if death is caused by the acts of the offender, then he shall be convicted of murder, culpable homicide or attempt to murder. Whereas, genocide on the other hand, as recognized by G.H Stanton and mentioned hereinbefore, is a culmination of seven stages followed by denial. Each of these stages can bring culpability and the 'specific intent' to eliminate or cause damage to a particular social group is punishable as compared to 'mere intention or knowledge' that causes death in ordinary crimes .A perpetrator of Genocide under Article III of the 1948 Convention can be held liable for actual commission of acts amounting to genocide or for certain categories of acts, which are committed in preparation of the main offence of genocide. Such acts are conspiracy and incitement to commit genocide, attempt to commit genocide, and complicity in genocide. These conducts are cumulatively termed as 'inchoate offences'. These acts or conducts are deemed criminal without the actual crime being committed and for which the perpetrator may be prosecuted for the crime of genocide. What is necessary is therefore, the intent to destroy a protected group in whole or in part. Herein, lies the difference between ordinary crimes and acts of genocide.

The author further analyses certain reasons as to why individual cases filed by victims or their families and FIR's registered in each case of murder or death caused in a genocide makes it difficult to prosecute and convict perpetrators of genocidal acts under the Indian Penal Code:

a) Lack of forthcoming eyewitnesses in each case makes it difficult to establish the actual high level perpetrators on whose command and complicity, the acts of murder and culpable homicide are caused by the low level perpetrators.

   It also becomes difficult to establish the presence of such persons in an unlawful assembly or as the conspirators aiding and abetting each individual incident of crime that takes place during the entire duration of the genocide.

   Allegations and witnesses for example deposed before the commissions investigating the 1984 riots to have seen certain congress leaders at scene of crime, but it is impossible to establish their presence in each of the registered cases and hence, conviction becomes difficult. Whereas, if the offence of genocide existed, once the 'specific intent' or 'dollus speciallis' to attack a particular group would have been proved, involvement of such leaders/ individuals proven even in limited number of crime scenes and evidence of planning, organization, incitement and abetment against them existed pertaining to incidents during the duration of genocide, it would lead to conviction for genocide. Thus, leading to punishment for all unlawful acts and deaths are caused during the genocide and not on case to case basis. This means 'justice' in each case of victimization and suffering wreaked on the victims and not only for a few victims.

b) Certain high level perpetrators who are not seen at the scene of crime may evade responsibility as there would be lack of direct evidences against them.

c) Without a link being established between each of such acts which culminate in genocide it becomes difficult to book all the perpetrators who are part of the genocidal pogroms in part or more. And often they are charged of trifling individual offences of mischief, supplying arms, communal incitement etc.

d) It is difficult to establish Civil Command Superiority as each of these offences are charged under different offences under the Indian Penal Code, 1860. The aider and abettor in pursuance of whose incitement the killings take place might differ from case to case basis. Therefore, tracing back to establish culpability to the hidden perpetrators becomes difficult.

e) Since, conviction results in a very few cases and those are treated like ordinary murders, the repatriation and compensation is none or very few in such cases. Most of the victims are treated as victims of riots and are hardly reparated rehabilitated and reintegrated.

f) Investigation by local government agencies is opposed to the idea of independent tribunals to be established for investigating acts of genocide under the 1948 Convention[41] which raise serious doubts on impartiality of the investigative agencies which are directly controlled by the state. The idea of establishment of such tribunals is also to provide speedy and adequate elements of justice. The classic example of denied justice is the 1984 Sikh riots in which the victims still await justice. The Bangladesh Tribunal to try perpetrators of 1971 war crimes, established in 2009 show that the importance of an independent tribunal is never lost or that it cannot be avoided in cases of genocide.
g) No recognition of a wrong done to the whole community trivializes the sufferings and trifles the severity of act committed against them.

Following the 1984 Sikh Riots in individual cases where death had not been caused by act of perpetrators they were booked on trifling charges of Mischief (Section 427) punishable with only two years imprisonment; Mischief caused by fire or explosives (Section 436) punishable with imprisonment up to ten years; Promoting enmity between communities(Section 153A) and Statements inciting public mischief by inciting class or community to commit offence against each other (Section 505) both punishable with imprisonment up to three years; and rioting (Section 147) punishable with imprisonment up to two years.

But the crime of Genocide carries the same amount of punishment for genocide whether there is conspiracy, incitement, attempt or actual commission of genocide. Hence, the gravity of all acts whether underlying offence in the scheme of genocide is adequately punished.

The Krstic Case observed the importance of maintaining the stringent requirements to qualify an act as an act of genocide. But once these requirements of 'specific intention' are satisfied, the law must not shy away from referring to the crime committed by its proper name. The main purpose behind the United Nations General Assembly passing the Resolution 96(1) in 1946 was to recognize Lemkin's theory regarding genocide that genocide is an independent crime different from crimes against peace or war crimes and that both public and private individual could be punished and held accountable for their acts.[42] And part of

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[41] Art. 6, The Genocide Convention, 1948.
[42] Chapter II *: The Genocide Convention: The Travaux Préparatoires*.

India's obligation to the 1948 Convention, denial to recognise acts of genocide like the 1984 Sikh riots is failure to protect under the same.

5. DELIVERING JUSTICE: NOT RETRIBUTION BUT TRUTH AND RECONCILIATION NEEDED (SPECIAL TRIBUNALS)

In cases of genocide, retribution is never the actual justice. Beyond prosecution for underlying offences and compensation to riot victims the present Indian legal system offers nothing more to the victims. Whereas, human rights Advocate Vrinda Grover in her opinion on the Communal Violence Bill, 2005 argues that in cases of communal violence there can only be "reparation which under international law connotes the obligation of the State and the entitlement of the victim, which is indicative of the reluctance of the State to discharge its responsibility." Reparations are effort to repair and restore to victims the damages suffered by them as a result of failure of the State's machinery in protecting them.[43] Genocides based on religion are different from communal violence or riots they are not one day episodes or outbreak of sudden violence these are not mere law and order situations but socio-political problems inherent in the fabric of the society.[44] To tackle such crimes and to bring justice to the victim reparation followed by restitution is necessary. Compensation not only for physical damages but also for emotional, psychological harms on victims have to be assessed. The rehabilitation of the victims should include medical, psychological and legal services to remedy the wrongs committed to the victims and alleviate their condition of life.[45] The most important of all remedy and the purpose of penal tribunals is to conduct the trial in cases of genocide and war crimes to bring the perpetrator and the victims of such crimes face to face, thus acknowledging accountability.[46] Also to extend an apology to the satisfaction of the victims by the perpetrators and the State for the wrong done to them and building confidence among communities by promising of non-

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[43] Clifton D' Rozario, *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 Some Reflections,* Alternative law Forum.

[44] Ibid.

[45] Ibid.

[46] Summary of the high-level panel discussion dedicated to the sixty-fifth anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide, Report of the United Nations High Commissioner for Human Rights (30/06/2014), A/HRC/27/24.

occurrence of such crimes.[47] Retributive justice or mere penalization in such cases will not end the killings of one religious community by the others and the hatred between them. By refusing to recognise such incidents as genocide, we are also refusing to acknowledge the horrendous wrongs suffered by the targeted group. There is no forgiveness sought and none forgiven and the feelings of hatred and revenge continue to be engrained in the society.

As India continues to be a polarized society based on the socio-economic-religious factors, it is highly important that it fulfills its obligation to the Genocide Convention. A national law on genocide is the need of the hour to recognise the wrongs committed on one community by the other and for proper reparations there is a need for the establishment of specialized tribunals to try these cases. Independence of such tribunals is to be guaranteed from the state's interference. Concerned Citizens Tribunal Gujarat, a human rights advocacy group after the communal riots in 2002 has suggested that immediately a law should be passed on "mass violence and genocide", and vouched for the establishment of a Standing National Crimes Tribunal to deal with cases of genocides, mass violence, pogroms, riots etc. The Tribunal should be independent of the judicial mechanism for speeder disposal of complaints and should have independent investigating agency. It shall dispose such cases within fixed time and shall have the power to compensate and rehabilitate victims and their dependants. They also suggest reforms in the Police Act, 1861 giving more autonomy to police to handle such situations and prevent occurrence of genocide by freeing them from unnecessary political control.[48] India should fulfill its obligation to the Genocide Convention by taking steps towards prevention of genocide and spreading awareness about the same among its citizens rather than ignoring the existence of such a crime. In 2005, the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights law and Serious Violations of International Humanitarian Law[49] and has suggested therein, the basic framework of remedies that the State should ensure is made available to the victims of grave human rights breaches like crimes of genocide. These remedies include

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[47] Ibid.

[48] Asian Human Rights Commission, available at http://www.hrsolidarity.net/mainfile.php/2002vol12no05/2238/, last seen on 15/4/2015.

[49] UN General Assembly Resolution 60/147 (16/12/2005).

reparation, restitution, compensation, rehabilitation and satisfaction. Satisfaction includes an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim and a public apology acknowledging the facts and acceptance of responsibility by the State and the perpetrators.[50]

Crimes of Genocide need to be first recognized and then dealt under the legal system separately. The usual remedy under the legal system that of retribution serves no purpose in such cases. Criminal prosecutions in cases of genocide do not guarantee non-recurrence of such acts. Lasting peace is not a guarantee thereafter. Reconciliation and establishment of Truth and Reconciliation Commissions are seen as important remedies which the domestic legal system in India evades from. Reconciliation requires saying the truth and acceptance of a past. "The kind of reconciliation that lets bygones be bygones is not true reconciliation. It is reconciliation at gunpoint and should not be confused with the real thing".[51] Tina Rosenberg, a journalist observes that only when the victims' sufferings have been acknowledged, then there is a chance of reconciliation. If the victim knows that the crimes would remain buried, there can hardly be any peace established.[52] Therefore, there is a need to recognise the 'acts of genocide' as a specific crime and not as other underlying offences. Remedy and justice needs to follow an alternate model in such cases. A Truth and Reconciliation Commission has often been suggested as the justice delivery institution in such cases of violence. Lalita Ramdas, penning her thoughts on the 1984 riots observes that there is a need for legislation on genocide which embodies the doctrine of command superiority and administration liability. She argues that a Truth and Reconciliation Commission is an alternate model to deliver justice; as the implementing authority i.e. the government can itself be one of the perpetrators often.[53] Hence, there exists a need to create such justice delivery systems independent of influence of the perpetrators and which serves justice in cases of 'genocide' different from the procedure followed for ordinary crimes.

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[50] Ibid.

[51] *Reconciliation After Violent Conflict-A Handbook:* International Institute For Democracy And Electoral Assistance, available at http://www.un.org/en/peacebuilding/pbso/pdf/Reconciliation-After-Violent-Conflict-A-Handbook-Full-English-PDF.pdf, last seen on 11/6/2015.

[52] Ibid

[53] Lalita Ramdas, *Thoughts on 1984: A Fragile Democracy,* Economic and Political Weekly 4108, 4111 (Sep. 17-23, 2005).

6. CONCLUSION

Since, there can be no retrospective effect of the genocide legislation. The least that can be done to assuage the feelings of the victims is to establish such commission or independent tribunals to accept and reconcile with what has happened. Though, the criminality of the offence of genocide cannot be achieved, the retributive justice might fail. But, the reconciliation and truth which are both elements of justice can lead to ground level assessing of situations and human resource development that sees the idea of 'us' together rather than fragmented communities. The establishment of a SIT by the Delhi Government is a step welcome towards investigating into 1984 incidents. But India fails to recognise the incidents as genocide, which foreign governments like the Californian Senate have done. [54]

India continues to evade its responsibility of recognizing the horrendous acts of genocide that were committed against its victims in 1984 riots and unless a law on genocide is passed which recognizes such horrors of the crimes of genocide, justice shall remain elusive to all future victims of a new 1984, 2002 and more in future without any deterrence.

[54] *California Senate condemns 1984 anti-Sikh riot as 'genocide',* The Economic Times, (May 1, 2015), available at http://articles.economictimes.indiatimes.com/2015-05-01/news /61723683_1_law-enforcement-sikhs-resolution, last seen on 11/6/2015.

VOICELESS MINORITIES IN A GLOBALISED WORLD: SELF-DETERMINATION TO RESCUE?

- Twinkle Chawla & Aditya Goyal*

ABSTRACT

The past few decades have witnessed intense debate over the rights of the minorities. States have bound themselves to numerous International law treaties, conventions and other instruments, which grant rights to the minorities. However, collective rights have continued to elude them. The authors through this article argue that there is a pressing need to confer group rights on minorities in light of the effect of globalisation on their culture. Today, globalisation is not merely an economic phenomenon; it has also diffused popular cultures leading to the creation of shared norms by which people associate themselves. These intense cross-border linkages created between nations pose a potential threat to the cultural uniqueness of the minorities. As globalisation has become more powerful and all-encompassing in its scope, its effects have become more pronounced. The authors propose a non-territorial cultural self-determination as an appropriate mechanism through which the State can afford group rights to the minorities. Self-determination is a wide and flexible principle. It can manifest itself in forms other than secession and independence. The right to self-determination will serve little purpose in the present world if its internal aspect is not recognized. Cultural self-determination will grant autonomy to minorities in issues intrinsically connected to their cultural identity even if they are not concentrated over a particular territory. Autonomy, association or democratic governance will further the will of the people without compromising the territorial sovereignty of the home State. Hence, we believe that cultural self-determination will strike the right balance between territorial sovereignty and collective rights of minorities.

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1. INTRODUCTION

In the popular sense of the term, States are regarded as political communities where different groups are unified under a single entity.[1] This characterization of a State as a political entity and not as a culturally homogenous group allows for a distinction to be drawn between minority and majority groups. Hence, the identity and autonomy of such minority groups have always been contentious issues for States. Further, the recent events in Crimea and Scotland have stimulated the debate about the extent, operation and content of the right to autonomy, i.e., self-determination. Russia has justified its annexation of Crimea on grounds of its 'responsibility to protect' the ethnic Russians living in Crimea from the tyranny of the government and the Scottish referendum had been carried pursuant to a promise made by the Scottish National Party in its election manifesto to further Scottish national identity. Thus, self-determination is now being sought outside the previously defined confines of de-colonization and human rights violations.

Simultaneously, globalisation has led to exchange of ideas, tradition, technology, knowledge, culture and people. Globalisation has manifested itself as a chain reaction, affecting not only the established State structure, and their relations with each other but also the position of an individual vis-à-vis the State.

The possible domino effect of the expansion of the right of self-determination coupled with the rise of globalisation, brings the rights of the cultural minorities into question. In the light of these developments, this article seeks to analyze the impact of globalisation on the claims of secession by the cultural minorities.

The article shall proceed as follows: Part two analyses the current framework for the protection of minorities vis-à-vis globalisation. Part three discusses the challenges which the process of globalisation poses to minority culture. Part four proposes various solutions to the same. And Part five concludes the article.

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[1] Dieter Kugelmann, The *Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity*, 2 Max Planc Yearbook of United Nations Law, 235 (2007).

2. Framework of Protection of Minorities

A minority group is a group- a) which is numerically inferior to the rest of the population of a State; b) which is in a non-dominant position, and c) whose members, being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and that shows, even if implicitly a sense of solidarity, directed towards preserving their culture, traditions, religion or language. Such minorities can be national, ethnic, religious or linguistic. Thus, to be termed as a minority, a group must have an objective element (ethnicity, religion, language) which is distinct from the rest of the population and a subjective element (the desire to preserve such ethnicity, religion, language). Nation States wished to assimilate them with the majority,[2] as such groups, due to their distinct attributes, were viewed as anomalies that had the potential of dividing the Nation State. Hence, historically, the State structure has been such that it incentivizes the State to heed to the demands of the majority.[3] This threat of diminution of cultural diversity and the cultural identity of the minority groups propelled International Law to protect it.[4]

Such efforts have been made since the 19th century. It was first granted by the League of Nations through the establishment of minority treaties[5] and the Permanent Court of International Justice.[6] This protection was furthered by the United Nations (UN) and other regional organizations.[7] Article 27 of ICCPR evolved the individual rights of the members belonging to minority groups which could to be exercised in community in others.[8]

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2 Thomas Musgrave*, Self-Determination and National Minorities* 65 (2000).

3 Supra 2, at 10.

4 *Report of the Independent Expert on Minority Issues*, United Nations Human Rights Council, *Official Record*, Sess. 78, Sup. 23, UN Document A/HRC/7/23, 6, (28/02/2008) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08 /113/51/PDF / G0811351.pdf?OpenElement, last seen on 04/11/2015.

5 The Treaty of St Germain-en-Laye, [1919] 226 CTS 8 (Austria); The Treaty of Trianon, [1920] 6 LNTS 187 (Hungary); The treaty of Versailles, 28 June 1919, 225 CTS 412 (Poland); The Convention of Paris, 9 Nov. [1920] 6 LNTS 189 (Danzig).

6 Minority Schools in Albania case, [1935] PCIJ Reports, Series AB, No. 64 (Permanent Court of International Justice); German Settlers in Poland case, [1923] PCIJ Reports, Series B, No.6 (Permanent Court of International Justice).

7 Supra 2, at 45.

8 International Covenant on Civil and Political Rights, Art. 27, 999 U.N.T.S. 171 (1976); *Manfred Nowak's U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 288 (N.P. Engel, Kehl, 1993).

Thus, presently under International Law, the rights of minorities can be categorised as:

i. The rights aiming to protect minorities from extinction and discrimination[9]; and
ii. The rights designed to preserve and safeguard the ethnic and cultural identity of the group.[10]

However, the existing framework of the individual rights is inadequate. Firstly, it only protects the minorities from discrimination and does not mandate states to take positive action in respect of such communities. Secondly, the minorities are not granted collective rights.[11] Although, the right to self-determination is a collective right and enshrined under International Law; it provides little protection to the minorities in its existing form. The International Court of Justice (ICJ) has described self-determination, as the need to pay regard to the freely expressed will of the peoples [12] and has recognized its *ergaomnes* character.[13] The term "peoples" was defined in 1989, by the United Nations Educational, Social and Cultural Organization (UNESCO) International Meeting of Experts for the Elucidation of the study of the Concepts of Right of peoples, as "*a group of individual human beings who enjoy some or all of the following common features:*

i. a common historical tradition;
ii. a racial or ethnic identity;
iii. cultural homogeneity;
iv. linguistic unity;
v. religious or ideological affinity;
vi. territorial connection; and
vii. common economic life." [14]

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9 Supra 6.

10 Kempin Reuter, *Including Minority Rights in Peace Agreements: A Benefit or Obstacle to Peace Processes after Ethnic Conflicts?*, 9 International Journal on Minority and Group Rights 364, 359-397 (2012).

11 Supra 2, at 136.

12 Western Sahara case (Advisory Opinion), [1975] ICJ Reports 25 (International Court of Justice).

13 East Timor case (Portugal v. Australia), [1995] ICJ Reports 102 (International Court of Justice).

14 *Report of the United Nations Educational, Scientific and Cultural Organization*, International Meeting of Experts on further study of the concept of the rights of peoples: Final Report and Recommendations, November 27, 1989- November 30, 1989, *Official Record,* SHS-89/CONF.602/7, 7 (22/2/1990) available at http://www.burmalibrary.org/docs18/Rights_of_Peoples-report-UNESCO-red.pdf, last seen on 14/04/2014.

However, the inclusion of minorities in the ambit of 'peoples' still remains questionable. It has been argued that the sole purpose of the Minorities Treaties was to keep the ethnic minorities from demanding the right to self-determination.[15] Such reluctance is further evinced by the usage of the term 'peoples' in Article 1 of International Covenant of Civil and Political Rights (ICCPR) (which deals with self-determination) and 'minorities' in Article 27 of ICCPR (which deals with cultural rights); thereby drawing a distinction between them. However, various jurists, including Thornberry have opined that minorities apposite the vocabulary of peoples whether governments or scholars approve or not.[16] Thus, according to this line of thought, minorities are entitled to the right to self-determination, as they are equivalent to peoples. This theory is premised on the fact that peoples in Article 1 means 'Nation', and the criteria of determining the constitution of a State is similar to that of minority and thus, the minorities have a right to self-determination.[17] The second group of theorists, who form the more popular and majority opinion, believe that minorities are not *ipso facto* peoples, and have proposed a 'right of reversion' to establish the relationship between minorities and self-determination. This means that only if minority suffers oppression, then they attain the status of people and can exercise the right to self-determination,[18] which is also known as remedial self-determination. Hence, in its present form, the right to self-determination cannot be viewed as an adequate protection for the minorities.

In this light, the need of collective rights for the minorities cannot be overstated. It is required to sustain their distinct cultural identity. We believe that such sustenance is extremely important for a minority group[19], considering that one of the elements of such a group is their desire to preserve their ethnicity, culture etc. Cultural identity is defined as the aggregate of those factors on the basis of which individuals or groups define and express themselves and by which they wish to be

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[15] Supra 2, at 67.

[16] *P. Thornberry's Modern Law of Self-Determination The Democratic or Internal Aspect of Self-Determination with some remarks on federalism* 868 (ChirstianTomuschat, 1993).

[17] Felix Ermacora, *The Protection of Minorities before the United Nations*, 327 (1983); Badinter Arbitration Commission's Opinion No. 2 (1992) 31 ILM 1497 (Badinter Arbitration Commission).

[18] Karen Knop, *Diversity and Self-Determination in International Law,* 185 (2004).

[19] Supra 6.

recognized.[20] The protection of one's culture is the essence of the right to cultural identity. Though the term culture is not capable of being defined with exactitude yet its wide ambit is well-recognised. Culture is meant to include art, language[21], traditions and customs[22], way of life and the right to make a living in one's own cultural way[23].

Therefore, we can say that the reason of granting rights to minorities under International Law is to preserve the cultural diversity of States and to ensure that they are able to sustain their language and traditions even in the presence of oppressing majority forces. However, such protection does not imply that culture is incapable of change; it only provides that such change must be organic and must be brought only with the consent of the members of the minority group.[24] Thus, the right to cultural identity must ensure that neither the State nor any other person thrusts cultural values on the minority group against their will.[25] Hence, there is a need of a specific framework to protect the cultural identity of the minorities.

3. GLOBALISATION: THE ADAM'S APPLE?

Globalisation has led to the weakening of State sovereignty and State structures.[26] It is a multidimensional phenomenon encompassing not only economic components but also has cultural, ideological, political and other similar facets.[27] In the absence of collective rights being

[20] *Martin Scheinin's UNESCO Project Concerning A Declaration of Cultural Rights Cultural Human Rights, 173* (Francesco Francioni, 2008).

[21] Marc Weller, *Universal Minority Rights, A Commentary on the Jurisprudence of International Courts and Treaty Bodies,* 221 (2007) [Hereinafter "Weller"].

[22] *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,* Res. 47/135, Sess. 47, U.N. Document A/RES/47/135, 2, Article 4(1), (18/12/1992), available at http://www.ohchr.org/documents/publications/guidemi noritiesdeclarationen.pdf, last seen on 14/04/2015.

[23] Office of the High Commissioner for Human Rights, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 2001, UN Document E/CN.4/Sub.2/AC.5/2001/2, at 56.

[24] Claudia Tavani, *Collective Rights and the Cultural Identity of the Roma: A Case Study of Italy*, 176 (2012).

[25] Gilbert Ziebura, *"Americanization" of Europe? On the compatibility of economic liberalism and democratic welfare State*, 39 HIS Political Science Series 39, 34-40 (1996).

[26] Ulrich Beck, *What is Globalisation?* Business and Economics 86 (2001).

[27] *Prasad's Financial Globalisation: A Reappraisal*, 45 (M. AyhanKose, Kenneth Rogoff, Eswar Prasad, Wei, Shang-Jine ds, 2006).

granted to the minorities, the homogenizing forces propelled by globalisation hav e worsened the state of affairs for them.

3.1. Globalisation and Culture

The scholars are not unanimous about the cultural impact of globalisation and it has led to emergence of Cultural Homogenization and Cultural Heterogenizationas dominant theories. [28] The proponents of Cultural Heterogenization opine that though cultures do not remain unaffected by global flows and globalisation in general, but the actual crux of the culture remains intact and unaffected.[29] Different cultural groups develop into heterogonous entities due to different demands necessitated by their environment in order to respond to globalisation.[30] Thus, there is no global culture formed. This theory provides that local cultures are likely to get more diversified as a result of resisting globalising forces.

This is based on the premise that the local cultures will resist the globalising force and will only adapt to the changed environment. Hence, it may be said that Heterogenization presupposes the existence of a collective right of minority groups to assert their cultural identity. However, the right bearers under International Law are the 'persons belonging to minority groups' and not the minority groups.[31] Hence, this argument of greater diversification may not stand. Even if the theory does stand, the local cultures stand transformed by globalising forces without the consent of the minorities which in itself can be termed as a violation of right to cultural identity.[32]

The proponents of the Cultural Homogenization provide that the increased interconnection between countries contributes to forming a more culturally homogenous world by adopting the Western Euro-American model of social organization and life style.[33] Thus, it leads to a convergence of cultures whereby the local cultures are shaped by other

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[28] Abderrahman Hassi and Giovanna Storti, *Globalisation and Culture: The Three H Scenarios,* 3, 5, in *Globalization- Approaches to Diversity,* (Hector Cuadra- Montiel, 2012) [Hereinafter "Storti"]
[29] Ibid.
[30] Supra 28, at 6.
[31] Supra 8, at 288.
[32] Supra 24, at 178.
[33] Liebes, *American Dreams, Hebrew Subtitles: Globalisation from the receiving end,* 108 (2003).

powerful cultures and they are not able to maintain their uniqueness against such forces.[34]

When Mexico acceded to the North American Free Trade Agreement (NAFTA), it did away with a constitutional provision that granted certain village based communal lands (*ejidos*) to the landless peasants, a majority of whom belonged to the minority group. Since land ownership is a part of one's cultural identity,[35] here the minority's right was violated due to globalisation. A similar situation was faced by the Turkish minority groups in Bulagria when it attempted to globalise.[36]

The effect of globalisation on extinction of languages is also very prominent. The Human Rights Council Report of the Independent Expert on Minority Issues opined that language is an extremely important asset for non-dominant communities especially in times of marginalization where language can become a modicum of gathering solidarity.[37] They concluded that there is an irreversible decline in the usage of minority languages due to globalisation and processes of assimilation and cultural dilution.[38] This is worrisome as UNESCO has identified that majority of the 6000 languages that are spoken around the world belong to minorities,[39] however 55% of world population uses only 15 languages, which represent the majority culture[40]. The Council said that this denial of the possibility of propagating one's language is a violation of the State's obligation of protecting cultural identity.[41] Hence, it can be said that the theory of Cultural Homogenization has gathered some credence over the years.

3.2. Globalisation, Self-Determination and Cultural Identity of Minorities

The self-determination movements have increased manifold in the last 50 years. Certain scholars observe that this to be a result of globalisation

[34] *George Ritzer, Globalisation: A Basic Text,* 89 (Wiley Black well, 2010).
[35] Supra 21, at 67.
[36] *Krishna Chaitanya's The Triumph of Globalisation at the expense of minority discriminations?* 10 MPRA 8 (2008).
[37] Supra 4, at 6.
[38] Supra 4, at 20.
[39] Supra 4, at 6.
[40] Daniel Nettle, *Vanishing Voices: The Extinction of the world's languages,* 34 (2000).
[41] United Nations Commission On Human Rights, *Commentary to the United Nations Declaration on the Rights Of Persons Belonging To National or Ethnic, Religious and Linguistic Minorities*, U.N. Document E/CN.4/Sub.2/AC.5/ 2005/2, 28, (2005).

whereas others view it as a mere co-incidence.[42] The supporters of the latter view reason that since globalisation provides greater social and economic benefits, there are less chances of discrimination against people (including minority groups) and hence, they are less likely to demand self-determination.[43] Thus, the question that arises is whether globalisation increases the demands of self-determination by minorities.

In the 2003 Working Paper of the Human Rights Council, it was stated that it is not mere coincidence that minority-related issues, have multiplied during the period of globalisation that began with the end of the Cold War.[44] In the period of the Cold War that preceded the globalisation era, the world was polarised and each State had to choose one Power Bloc. Once the States were aligned, they often oppressed their internal minorities without any protection by the great Blocs.[45]

With the onset of globalisation there has been an enhanced inter-connection of communications, markets and consumer networks and this has led to increased communication at the international level and expansion of self-affirmation at the local level.[46] Thus there is a forum through which the information across the globe can be shared. This has led to a comparison between and greater awareness about the standards of human rights protection in various Nation States. Moreover, this has caused the identity question to emerge among the minority communities. As the local cultures start getting publicized, the impetus and need to protect the identity is also enhanced. Therefore, globalisation of communications has created increased consciousness about one's cultural identity.[47] The marginalised minorities have seized this opportunity to make their voices heard. Moreover, the Report observed that:

> "Tradition or the relics thereof are reinterpreted in the light of the new concepts of globalisation, giving persons who live in these societies a new sense of belonging and a particular outlook on global processes."[48]

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[42] David R. Cameron and SooYeon Kim, *Trade, Political Institutions and size of the government*, 15, 45 in *Globalisation and Self-Determination: Is the Nation-State Under Siege?* (David R. Cameron, Gustav Ranis, Annalisa Zinn).

[43] Supra 42, at 67; Supra 36, at 10.

[44] Supra 41, at 28.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Ibid.

The electoral supporters of Lega Nord, a political organization that furthers minority interests in Northern Italy, have increased manifold with the onset of globalisation. This is because political actors while representing the interests threatened by globalisation are likely to mobilise popular demands for greater autonomy as a response to globalisation.[49] 'Strengthening of local and regional institutions' has evolved as the response to global forces.[50] World Trade Organization (WTO), NAFTA and other regional and supranational institutions have developed to further globalisation and have caused lapses in the sovereignty of States. Consequently, the decisions of such institutions have a direct impact on the interests of the people. Therefore, they become additional targets against whom greater demands of autonomy can be sought.[51]

The subjective element of the minorities, i.e., the desire to strengthen their ethnic/cultural/linguistic identity is re-enforced due to the increased communications across the world and creation of possibilities of taking international support. The potential of such sensitization can be seen in the 2013 summit held by the Indigenous peoples along with the 9th Ministerial WTO Summit in Bali. The theme of the summit was "*World Trade Organization (WTO) and Indigenous Peoples: Resisting Globalisation, Asserting Self-Determination*" and consequently they passed a declaration renouncing WTO activities and demanded greater participation at the national and international decision making.[52] This shows that this increased consciousness of rights among the groups can lead to greater demands being sought.

Globalisation calls for local resistance by:

i. Posing threats of creating a global culture and eroding the cultural identity of the minority groups (Cause of oppression); and

ii. Providing a platform where no dispute remains local and there is extensive flow of information from one State to the other. This creates more awareness of the minority culture and opens up the

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[49] Tamara Dragadze, *Self-determination and Politics of Exclusion*, Ethnic and Racial Studies 341(1996).

[50] Beirich and Woods, *Globalisation, Workers and the Northern League Western European Politics*, 132, 130-43 (2000).

[51] Supra 42, at 50.

[52] *The World Trade Organization and Indigenous Peoples: Resisting Globalisation, Asserting Self-Determination*, World Trade Organization.

possibility of international support in cases of oppression (Facilitates the resistance movement).

Hence, we believe that the minorities are more likely to demand self-determination in a non-polarised and globalised world.

4. SUGGESTED SOLUTION

Article 27 of ICCPR, despite the constraints of International Law, has been used extensively to protect the rights of minority individuals. However, in the past few decades, the following two important observations have been made:

i. Globalisation has become an inevitable phenomenon and has adversely affected national minorities;[53] and
ii. A definite movement is in place in International Law towards the wider recognition of autonomy and collective rights to minorities, for example, Council of Europe's European Charter for Regional or Minority Languages adopted in 1992 and Framework Convention for the Protection of National Minorities. The Convention on the Rights of the Child-which has 140 signatories- specifically, confers a right on children of minority groups to enjoy their culture '*in community with other members of his or her group.*'[54]

Firstly, individual emphasis on the rights of the minority groups such as right against discrimination does not confer any positive obligations on the State to promote minority culture[55], which in the light of globalisation faces newchallenges and without any intervention by the State it may face extinction. Collective rights are more effective for protecting the cultural identity. As elaborated by Douglas Sanders, "*Cultural minorities seek more than the right of their individual members to equality and participation within the larger society. They also seek distinct group survival. Because economic and social forces, as well as State policies, tend to promote assimilation, the leaders of cultural minorities often look to the* State *for support. They seek either protection or autonomy as the means to ensure that their collectivities can survive and develop.*"[56]

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[53] Heading 3, (Globalisation: The Adam's Apple).
[54] United Nations Convention on the Rights of Child, Art.30, 1989, 1577 U.N.T.S. 3.
[55] Supra 2, at 78.
[56] Douglas Sanders, *Collective Rights*, 13 Human Rights Quarterly 370 (1991).

Secondly, it is imperative to acknowledge the collective dimension of minority rights. Minority culture, language, religion are necessarily enjoyed in groups.[57] The Permanent Court of International Justice in its Advisory Opinion on the subject of Minority Schools in Albania laid down that preserving minority characteristics and satisfying 'the ensuing special needs' are the aim of the minority treaties.[58] It ensures suitable means for minorities to preserve their traditions, peculiarities and characteristics. If the minorities are deprived of their institutions (either by action or inaction to global forces) they will be compelled to renounce their peculiarities and distinguishing features. The collective enjoyment of cultural practices, religion or particular form of education forms the very basis of their identity.

Thirdly, the present framework for the protection of minorities has proved to be patchy and inadequate.[59] Though soft law instruments like the 1995 Framework of the Council of Europe on Minority recognize this fact and focus on the content of the right to cultural identity of minorities, they do not provide any redressal mechanism to minorities. This leaves the party remediless even if their rights are violated. The excessive marginalization of the Roma community in Italy evinces the futility of individual rights in a context of repression of a group's identity.

Self-determination by virtue of its inherent flexibility must respond to the above need because the need to confer collective rights on the minorities was never greater than in the globalised world we live in. We will now consider the utility of the various forms of self-determination in solving the proposed problem:

4.1. External self-determination

External self-determination covers the right of peoples to decide their political status and covers within it the right to form a separate Nation State through the process of secession.[60] Minorities do not have this right to secede from the parent State.[61] However, even if such a right was available, it would be counter-productive for growth of the

57 Ibid.

58 Supra 6.

59 Helen O'Nions, *Minority Rights Protection in International Law: The Roma of Europe*, 49 (2007).

60 Ibid.

61 Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Supreme Court of Canada).

minorities. In the era of globalisation, countries with large economies and population have better bargaining power than smaller Nations.

Firstly, due to their huge internal demand, they are able to realize operational efficiencies and economies of scale in the production of goods. This results in relatively lower prices of their goods which makes them more attractive for export. The increase in export demands leads to further economies of scale and thus, creates a virtuous cycle triggering growth.

Secondly, industrial Nations are much more likely to secure favorable trade agreements in international forums and in bilateral exchanges. For example, it should not come as surprise that most of the Bilateral Investment Treaties (BITs) are signed between a developed Nation and a developing Nation.[62] They have been extensively used by the investors of the developed countries to secure their interests in international forums with monetary awards exceeding millions of dollars.[63]

Thirdly, industrial Nations have larger law making powers in the UN and WTO. The Security Council, the only body of UN with the authority to issue binding resolutions to member States[64] has five permanent members- Russia, China, France, the UK and the USA. They can veto any substantive Security Council resolution[65] and thus no binding resolution can be passed by the sole body of UN capable to do so, irrespective of the level of international support unless it satisfies the 'Big Five'. This ensures that they can always make laws suited to their purposes. Pocket veto i.e. the threat to use the veto power has been used to soften the language of unfavorable resolutions. Similarly, though WTO describes itself as a member-driven organization where all decisions and rules are the outcome of negotiations among member governments,[66] bigger markets, especially the United States of America

[62] Sarah Anderson and Sarah Grusky, *Challenging Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, And Bilateral Investment Treaties Have Unleashed a new era of corporate power and what to do about it,* Federal Watch18 (2007).
[63] Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 San Diego International Journal 345 (2007).
[64] Charter of the United Nations, Art. 25, 1949, 1 U.N.T.S. XVI.
[65] Supra 64, Art. 27(3).
[66] The WTO, World Trade Organization, available at http://www.wto.org/english/thewto_e/thewto_e.htm#decision_making, last seen on 14/04/2015.

and European Union create power asymmetry by threatening to exit the organization and promising incentives.[67]

Hence, we do not believe that rallying for external self-determination will solve the problem of diminishing cultural identity of minorities.

4.2. Internal self-determination (Territorial)

Internal self-determination covers the right of people to decide the form of government, choose their rulers and participate in the decision making process of the State and to exercise autonomy in selected matters. It can be utilized to give minorities more autonomy in matters affecting them. Firstly, since internal self-determination does not infringe upon the territorial integrity of the host State, it is a more acceptable solution than secession or independence.Secondly, there is ample State practice for the grant of autonomy within the State structure itself in regions which are heavily populated by a particular minority group. Thirdly, autonomy would ensure that minorities would have the same opportunities to protect, promote and profess their culture and identity as the majorities do.[68]

However, it might not always be practical to give internal self-determination to minorities.

Firstly, internal self-determination is a *territorial* right i.e. autonomy is granted over a particular region.[69] This assumes that the minority is numerically heavily located in a particular region of the country. As the case of Muslims in India and whites in America demonstrates, this might not always be true. In such cases, granting them autonomy over a particular region is not possible.

Secondly, even when a minority is concentrated in a particular geographical region of the country, granting them internal self-determination will create the parallel problem of the creation of minorities within the newly formed majorities. With the grant of regional autonomy, the group (cultural, religious or linguistic) which was hitherto the majority in that region will now become the minority and

[67] Richard H. Steinberg, *In the Shadow of Law or Power?Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 International Organization 339-74 (2002).

[68] S. Deets and S. Stroschein, *Dilemmas of autonomy and liberal pluralism: examples involving Hungarians inCentral Europe*, 11 Nations and Nationalism 295 (2005).

[69] Supra 16, at 76.

face the same problems in that region which the minorities had previously encountered. In the absence of any State intervention, there is a real likelihood that they might face marginalization in that specific region. As has been demonstrated in the case of former Yugoslavia and Soviet Union, ethnic self-determination is as likely to lead to new intolerance by new majorities for new minorities and create instability.

Hence, granting of international self-determination in the form of territorial autonomy may not serve the purpose.

4.3. Cultural Self-determination (Non-territorial self-determination)

Cultural autonomy guarantees cultural minorities certain benefits irrespective of their place of residence within the country.[70] It relates to self-government by the minority over specific aspects of life such as education, language, culture and religion, but within a territory over which the minority groups do not enjoy legislative or regulatory autonomy.[71]

We believe that granting cultural self-determination to minorities is the most plausible solution in the context of the identity issue. Primarily, it will ensure that minorities get a voice with respect to matters, which directly affect their identities even if they are geographically scattered within the country. Secondly, it will not pose the problem of creating minorities within minorities.

Cultural self-determination, may however be beset with the below-mentioned problems. Firstly, the right cannot be sought as a matter of instant enforcement as presently, International Law does not grant minorities a general right of autonomy.[72] In States, such as Germany where autonomy rights have been granted, it is a result of external political arrangements rather than operation of International Law.

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[70] H. Hannum and R.B. Lillich, *The Concept of Autonomy in International Law*, 74 American University International Law Review 883 (1980).

[71] Ibid.

[72] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Final Report on the Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities,* Sess. 45, U.N. Document E/CN.4/Sub.2/1993/34, 88, (16/07/1993) available at http://daccess-ddsny.un.org/doc/UNDOC/GEN/G93/143/20/PDF/G9314320.pdf?OpenElement, last seen on 14/04/2015.

However, many scholars have argued in favor of an 'emerging' right of autonomy.[73] Commission on Security and Cooperation in Europe in the Copenhagen Document, a soft law instrument, mentions autonomy as a 'possible means' for the protection of identity of minorities.[74] Uruguay,[75] Hungary,[76] Ukraine and Austria[77] have also admitted the validity of the principle. We believe that in light of the increased acceptance of the possibility of such a right among States and the proven futility of other mechanisms, International Law must seize this opportunity to make great advances towards recognizing a right of cultural autonomy.

Secondly, most of the States view granting cultural autonomy to a particular region as the first step towards self-determination and secession.[78] For example in 2008, Kosovo, an autonomous territory of Serbia inhabited mostly by Albanians, declared its independence from Serbia. The majority of the international community recognized Kosovo as an independent State fulfilling all the criteria under Article 1 of the Montevideo Convention, 1933. In many cases, the existence of a neighboring minority dominated State adds to such concerns. The recent incident about the secession of Crimea from Ukraine to Russia despite much international protests further allays such fears. However, in our opinion, such fears are unfounded in International Law. Secession and autonomy are alternatives to each other. If the minorities feel threatened about their identity, they would pose problems to proper functioning of State institutions. Autonomy makes the minority feel safe and it prevents massive exodus of the members of the minority. Therefore, it acts a powerful container of secessionist demands. It acts as a possible solution because it provides a feasible alternative to minority territorial segregation and satisfies the demands of minorities while preserving its territorial integrity.[79]

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[73] Ibid.

[74] *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, Organization for Security and Co-operation in Europe, available at http://www.osce.org/odihr/elections/14304?download=true, last seen on 14/04/2015.

[75] UN General Assembly, 51st Session, Third Committee, Summary Record of 27th Meeting, (13/08/1997), 46, UN Document A/C.3/51/SR 27.

[76] Supra 41, at 55.

[77] UN General Assembly, 48th Session, 3rd Committee, Summary Record of 22nd Meeting, (30/11/1993), 52, UN Document A/C.3/48/SR.22.

[78] G. Welhengama, *The Legitimacy of Minorities' Claim for Autonomy through the Right of Self-Determination*" 68 Nordic Journal of International Law 417 (1999).

[79] P. Pazartzis, *Secession and international Law: the European dimension,* 350, 361 in *Secession: International Law Perspectives* 361 (M.G. Kohen, 2006).

Even though the aforesaid problems with the enforcement of cultural autonomy do exist, International law must respond to the ebb and flow of the repressed communities. Such recognition is not difficult to achieve as International Law and self-determination, in particular, are flexible concepts and can be moulded to suit the demands of a situation. Law responds to various substantive economic, political, scientific and social issues. International Law's response to external changes indicates its permeability and shows how it transforms the dictates of changing environment into legal forms and solutions. [80] For example, self-determination which was initially equated only with the decolonization process, was used with equal vigour in the context of realising the will of 'peoples' in any form of oppression. Additionally, the arguments against cultural autonomy deal with the modalities of its execution and are not principle based. Such implicit recognition to the concept of cultural self-determination must be taken further by International Law.

International Law, in our opinion, is the most appropriate medium through which such a solution can be negotiated as the problem of repression emanates from the State itself, who on *its own accord* would be reluctant to grant protection to such groups due to deep-rooted fears of secession. Additionally, any measure of protection granted to the minorities against globalisation will not be feasible without the alignment of the policies of all States towards such a global force.

Therefore, in the light of aforementioned consideration, we believe that, cultural self-determination is the most probable solution against the repression of cultural minorities with the process of globalisation.

5. CONCLUSION

The issue of minority rights has always been a source of contention and debate in International Law. We began our analysis with a discussion on how the present framework of individual rights unaccompanied by any positive obligation on the State and collective rights to preserve the cultural identity is inadequate in the interconnected world we live in. Further, with the onset of globalisation and lapses in State sovereignty, the issue of minority rights must be seen in new light and it is incumbent upon International Law to respond to the above changes. A possible

[80] Sharyn L Roach Anleu, *Law and Social Change* 45 (2000).

response, we conclude, can be providing a form of self-determination which is tailored according to the needs of the minority community in this era.

It is accepted that only oppressive marginalization can lead to assertion of rights by the people. Globalisation, by leading to further marginalization of minority cultures and by enhancing communication, provides for dispersal of information about local cultures and thus in net effect increases the chances of exercise of self-determination by such communities.

Hence, it is put forth that minorities are more likely to demand self-determination in the globalised world. The globalisation phenomenon has proved to be inexorable, with States with ideology diametrically opposite to free market like Cuba choosing to globalise. If globalisation is bound to stay for a long time, it is imperative that it must be considered legitimate by people. Considering that the minority groups detest lack of participation in decision making of those aspects that affect them and are not against trade and the basic postulates of globalisation, the grant of internal self-determination to the minority groups can confer both support and greater legitimacy to the process of globalisation.

We have proposed cultural self-determination as a solution to the problem of minorities. Being a right which is unconnected with territory, it furthers the notion that a greater fragmentation of the World may not eventually solve the distinct problems of every group which emanate from a lack of recognition of communities. Such a form of self-determination will ensure that minorities have a right to be heard in respect of matters that affect their interests and will also be consistent with the sovereignty of States.

Every State institution or policy needs legitimacy in order to be effective. Hence, rights have always been seen as a trade-off between maintaining State sovereignty and gathering legitimacy. A unique aspect of the globalisation era is that not only the legitimacy of an absolute State is in question but also the effects of the globalising forces are being examined. It is thus, imperative for States to recognise and conceive new forms of rights to protect the uniqueness and peculiarities of minorities, in order to continue to reap benefits out of globalisation.

REINTERPRETING ARTICLE 9 OF JAPANESE CONSTITUTION: WAR, PEACE AND SELF-DEFENSE

- Pinaky Paliwal*

ABSTRACT

Self-defense has been recognized internationally as an inherent sovereign right. However, Japan in its attempt to ensure never ever to be revisited by the horrors of war, took the drastic step of demilitarizing and renouncing war and entrenched its cherished pacifism in it Constitution. Article 9 was the torchbearer of this pacifism and was very much appreciated by the world community. The interpretation of Article 9 have been evolving ever since the creation of Japanese Self-Defense Forces and recently in July, 2014, the Abe cabinet, in a landmark shift in policy, adopted a resolution reinterpreting Article 9 to involve right to come to the aid of allies.

In this article, the author analyses the international legal implications of this reinterpretation in light of the contemporary issues including the expectations of the global community for greater direct contribution from Japan in coping up with common security threats like terrorism, acts of aggression etc. through effective participation in UN peacekeeping operations, the changing nuances of the US-Japan security treaty and the fragile peace in the South-Asian region.

Japan is demanding for a permanent membership in the UN Security Council. But as a UN member, it has always been criticized for offering too little, too late in the UN missions. The recent beheading of two Japanese Nationals by the ISIS and the subsequent daring declaration of PM Abe of not succumbing to terrorism and joining the global fight against terrorism has brought Japan in the focus of the extremist groups also who had hitherto remained virtually indifferent towards Japan.

In wake of these circumstances, how the Article 9 has hitherto evolved? Is Japan slowly moving towards re-militarization after an almost peaceful history of about 70 years? These are the areas which the author has attempted to uncover.

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1. INTRODUCTION

The principle of self-defense was a precept of the *jus naturale* and *jus gentium*, and is universally recognized as an inherent right [1] in international law.[2] But in the dynamic global scenario where sovereign relations are so intertwined and equations of friend and foe change with the slightest intervening factor, where the weapons of mass destructions are so advanced that another direct war would virtually mean the advent of the dooms day – the connotations of 'war' are subtle and so are the nuances of 'self-defense'.

Japan's cabinet in July, 2014, approved a landmark change in its security policy, making way for its forces to fight overseas.[3] The so called 'dimensional change' rather than policy shift was awaited and deliberated for 18 months despite wariness among many Japanese voters worried about entanglement in foreign wars and angry at what some see as a gutting of the Constitution's war-renouncing Article 9.[4] The resolution taken by the Abe government on July 01, 2014, talked about policy of pro-active contribution to peace, avoiding armed conflicts before they materialize while increasing 'deterrence'.[5]

Japan's preamble portrays Japan's desire to live in "an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth." Its people wish never again to be "visited with by the horrors of the war".[6] It also draws from Article 13 in its requirement that the government protect its citizens' "right to life, liberty, and the pursuit of happiness." Being the only victim of the nuclear weapons in the world, no one can better identify with the futility and horrors of war than

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1 Art. 51, Charter of the United Nations.

2 P. Allan Dionisopoulos, *The No-War Clause in the Japanese Constitution*,31 Indiana Law Journal 437, 437 (1956), available at: http://www.repository.law.indiana.edu/ilj/vol31/iss4/1, last seen on 14/03/2015.

3 *Japan cabinet approves landmark military change*, BBC's News Asia (01/07/2014), available at http://www.bbc.com/news/world-asia-28086002, last seen on 14/03/2015.

4 Linda Sieg & Kiyoshi Takenaka, *Japan poised to ease constitution's limits on military in landmark shift*, Reuters (30/06/2014), available at http://www.reuters.com/article/2014/06/30/us-japan-defense-idUSKBN0F52S120140630, last seen on 14/03/2015.

5 Ministry of Foreign Affairs, Japan, *Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People*, available at http://www.mofa.go.jp/fp/nsp/page23e_000273.html, last seen on 14/03/2015.

6 Constitution of Japan, Preamble.

Japan. Deep scar left on the nation's psyche by the trauma and tragedy of war-loser country and the suffering, death and devastation that ensued to the nationals of the losing state – all contributed incredibly to the strong antiwar emotions of the nation and the religious acceptance of the "No War Clause" of the Constitution. The wide international recognition of Article 9 as a regional and international peace mechanism contributing to peace and stability in Northeast Asia and serving as a legal framework to promote peace, disarmament and sustainability, its nomination for last year's Nobel Peace Prize[7] highlighted its role as a tool for peace.

Yet, within less than a decade of the enactment, Japan possessed Self-Defense Forces (SDF) on the land, at sea, and in the air. On the one hand, why does Japan have a Constitution which does not incorporate the right of a nation to defend itself? On the other, why does Japan have what are for all intents and purposes an armed forces despite the presence of a clause with language specifically denying itself the right to maintain such?[8]

The move divided the country in two – while the supporters of the revision stated that there had been no change to Japan's pacifism, the critics felt Abe was pushing Japan towards remilitarization after nearly 70 years of peace and that this was the first step towards permanent revision or removal of Article 9[9]. While the general populace was very much apprehensive about the move[10], what went at the diplomatic level remained a brain-storming exercise for the intellectuals. Protests within the country were noteworthy meanwhile; the concerns of China with whom Japan is currently engaged in a bitter territorial dispute and other Eastern countries [11] apprehended turbulence in the East Asian

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7 Ankit Panda, *Article 9 of Japan's Constitution: Nobel Peace Prize Laureate Material?* , The Diplomat (25/04/2014), available at http://thediplomat.com/2014/04/article-9-of-japans-constitution-nobel-peace-prize-laureate-material/, last seen on 16/03/2015.

8 Mayumi Itoh, *Japanese Constitutional Revision: A Neo-liberal Proposal for Article 9 in Comparative Perspective*, 41 Asian Survey 310, 310 (2001), available at http://www.jstor.org/stable/10.1525/as.2001.41.2.310, last seen on 10/03/2015.

9 Supra 3.

10 See Reiji Yoshida & Tomohiro Osaki, *Fiery suicide bid shocks Shinjuku on eve of historic security decision*, The Japan Times (30/06/2014), available at http://www.japantimes.co.jp/news/2014/06/30/national/fiery-suicide-bid-shocksshinjuku/#.U9bupPmSx7N, last seen on 16/03/2015.

11 See *China, S. Korea Warn against Japan's Defense Policy Shift,* China Radio International (02/07/2014), available at http://english.cri.cn/12394/2014/07/02/2702s834121.htm, last seen on 16/03/2015; also see J. Berkshire Miller, *Japan's Defense Reforms and*

international peace. Their reasons included the tensions in Northeast Asia - markedly between Japan, China and the Koreas over territorial disputes, historical recognition issues and nuclear weapons programs which due to the reinterpretation of Article 9 threatened to further destabilize the fragile peace in the region.

As per the official version, the change only meant that in the past Japan could use force only in self-defense. Japan's military would now be able to come to the aid of allies though only if they come under attack from a common enemy. Other conditions were to apply including that there should be a clear threat to the Japanese state and that people's right to life and liberty. Nonetheless, this would officially include Japan shooting down a missile fired by North Korea at the US and Japan taking part in mine-sweeping operations in key sea lanes during a conflict. PM Abe said that the change did not mean taking part in multilateral wars, like the US-led war in Iraq.[12]

However, within less than a year, Japan found itself witnessing its first experience with global terrorism. Killing of two Japanese by the ISIS, Japan's refusal to bend to the terrorist threats and open declaration of full co-operation to the global community in fight against terrorism has revived the apprehensions of Japanese Populace – Is Japan really heading towards re-militarization after a peaceful history of 70 years?

2. EVER EVOLVING INTERPRETATION OF ARTICLE 9: DEFENDING A PACIFIST NATION

The origin of Article 9 remains shrouded in mystery. While it has been claimed by the SCAP, General MacArthur, that the war renouncing clause was not his idea but suggested by prime minister Shidehara[13], Shigeru Yoshida, Shidehara's Foreign Minister and later Prime Minister,

Korean Perceptions of Japan's Collective Self-Defense, 3 The Asian Forum 1, 1 (2014), available at http://www.theasanforum.org/japans-defense-reforms-and-korean-perceptions-of-japans-collective-self-defense/, last seen on 16/03/2015.

[12] Supra 3.

[13] D. Macarthur, *Reminiscences*, 302, 303 (1964) in James E. Auer, *Article Nine Of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 43 Law of Contemporary Problems 171, 173, available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4046&context=lcp, last seen on 14/03/2015.

stated his belief that MacArthur suggested the idea to Shidehara and Shidehara agreed.[14] Irrespective of whether the origins of Article 9 were in Tokyo or Washington, soon the U.S. realized the frustratingly restraining nature of the provision and found itself burdened with the security of a defenseless nation from the surrounding powers lest it be annexed by any emerging rival power in the South-East. So, Post Korean War outbreak in 1950, and MacArthur clarified that he had never intended a blanket ban on Japan's military power for self-defense.[15]

Article 9 of Japan's Constitution reads as follows:

1. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.
2. In order to accomplish the aim of the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.[16]

Over the time three lines of possible interpretation of the text of Article 9 evolved.

The first line was that Article 9 does not prohibit a defensive war. The rationale behind justifying war in self-defense as permissible under Constitution is the custom of interpreting similar phrases in similar sense;since the General Treaty for the Renunciation of War (Kellogg-Briand Pact) of 1928 contained similar phraseology 'war for the solution of international controversies' which excluded a war in 'self-defense'. Language of Article 9, on the same lines, reads '…as a means of settling international disputes'. Thus, drawing the analogy from the consistent interpretation, Article 9 was interpreted by majority of scholars to be excluding a defensive war.[17] Thus, right to self-defense was balanced out with the war-renouncing clause just as Article 2(4) of UN charter has been balanced with Article 51 of the same.As for the second paragraph, the phrase 'in order to accomplish the aim of the preceding paragraph'

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14 S. Yoshida, *The Yoshida Memoirs: The Story of Japan in Crisis*, 137 (1962) in James E. Auer, Ibid.
15 Ibid.
16 Constitution of Japan Art. 9.
17 Supra 13.

provided sound basis for arguing in favour of maintaining armed forces for self-defense. As the preceding Paradid not prohibit a defensive war, an armed force for that purpose would not be against the aim of the preceding paragraph. Further, it was reasoned that Article 66, paragraph 2, of the Constitution, which requires the Prime Minister and other Ministers of State to be civilians, makes no sense if any war is not permitted by the Constitution, because military personnel would not exist if any war is not permitted.[18]

The opponents on the other hand argued that Article 9 is worded in a language stringent enough to bar any kind of war, whether offensive or defensive. By virtue of first Para, right to war is renounced absolutely and the presence of second Para restricts Japan from maintaining any war potential – defensive or offensive. The arguments rests on two grounds: (1) all wars, including a war in self-defense, can be means of settling international disputes; and (2) practically speaking, it is very difficult to distinguish a war of invasion and a war in self-defense.[19]

A third view point which can be convenientlycalled the middle path or the split approach to Article 9 is the one devised and taken by the Japanese government as its initial policy during the drafting of the Constitution itself. This line of interpretation goes to state that though Japan retains its right to self-defense under the first paragraph, yet by virtue of the second paragraph, it cannot maintain any war potential (armed forces). Hence it will have to rely upon police power or *ad hoc* militia for resisting foreign aggressions.

Despite its absurdity and impracticality, this third interpretation was the one adopted by the government during its initial legislative debates and public statements as to its army policy. This naturally questions the validity and legal status of the Japanese SDF which emerged as the National Police Reserve in 1950 on the order of MacArthur even as the Japanese constitution had banned armed forces and are today one of the world's 10 most costly military establishments[20]. It can be very difficult in practice to maintain the distinction between the army and the police, as MacArthur's own experience in Japan suggested. It may be equally difficult to distinguish between a war and a police action. The Korean

[18] Ibid.
[19] See Supra 13.
[20] Ibid.

War was called a "police action" by President Truman, who had not asked Congress for a declaration of war.[21]

Interpretation of this article has varied, broadly, from absolute pacifism to admission of the need for utilization of a collective self-defense right. Although the Constitution draft was modified so many times to keep some scope for a defensive force for Japan, and although MacArthur himself supported the self-defense forces, Japanese government's initial take on the issue was that all armed force was outlawed for all purposes. Since then, the interpretation of Article 9 has followed closely the political needs of U.S. and Japan.

As noted above, initially the Japanese government was of the view that though defensive war is not banned *per se*, yet as a result of not recognizing any war potential and the right of belligerency of the state in paragraph 2 of Article 9, Japan cannot maintain an armed force. Reliance was made upon the United Nations as the protector of the nation against any aggression. However, soon the cold war escalated in 1950s and the UN did not function as anticipated and soon the Korean War also broke out. US realized the importance of Japan as a significant military base as also a valuable economic partner to be saved from other emerging powers. At this time, the US-Japan security treaty was signed whereby the US urged Japan to raise its own armed forces for self-defence and a new interpretation adopted. American pressure led to the creation of a 'police reserve', which was later upgraded to Self-Defence Forces (SDF) in 1954.[22]

At this time, the government 'clarified' its stance by saying, "'The Constitution, while renouncing war, has not renounced fighting for self-defense. … To repel armed attack in the event of such an attack from other countries is self-defense itself, and is essentially different from settling international disputes. Hence, the use of force as an instrument for defending national territory when an armed attack has been launched against the nation does not violate the Constitution. … It is not a violation of the Constitution for Japan to set up an armed force such as

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21 Theodore McNelly & Clark Hosmer, *General Macarthur's Pacifism*, 6 International Journal on World Peace 41, 54 (1989), available at http://www.jstor.org/stable/20751321, last seen on 10/03/2015.

22 See First Report of the Advisory Panel on Reconstruction of the Legal Basis for Security, *The Advisory Panel on Reconstruction of the Legal Basis for Security*, (2008), available at http://www.kantei.go.jp/jp/singi/anzenhosyou/report.pdf, last seen on 10/03/2015.

the SDF having a mission for self-defense and to possess military force to the extent that is necessary for that purpose".[23]

Even then, the caveat of no-offensive war and exclusive territorial coverage prevailed meaning thereby that the SDF may not be armed with offensive weapons or dispatched overseas (even on United Nations missions). Every military facility has been assessed in the light of whether it would constitute the 'war potential' or not. The three non-nuclear principles are worth mentioning in this context as they provide for Japan that: (1) that it will not possess nuclear weapons; (2) that it will not produce nuclear weapons; and (3) that it will not allow them to be introduced in Japan.[24]

The need for stronger military was gradually accepted even as government maintained the position that SDF did not constitute the 'war potential' but merely the 'defensive potential'. All this happened when the SDF was increasingly becoming a meaningful element of the U.S.-Japan Treaty which is US' most important security arrangement anywhere in the Pacific and which already rivals in importance with the US ties with the NATO. Japan's defense budget is third largest in the world and largest among non-nuclear powers and its military capacity rivals those of the advanced armies like the Royal Army and U.S. army.[25]

The next landmark push towards re-militarization was the infusion of idea of 'collective self-defense' in the interpretation. Though the idea was already introduced as a sovereign right under UN Charter through the first US-Japan treaty, it practically covered areas 'under the territories of Japan' only.[26]After this, various incremental steps towards a broader defense power were justified through the right of self-defense with various connotations. Since his 2012 re-election, PM Abe, a

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[23] Ibid, at Seiichi Omura, Director-General of the Defense Agency, Budget Committee of the House of Representatives (1954) in First Report of the Advisory Panel.

[24] Hitoshi Nasu, *Article 9 of the Japanese Constitution: Revisited in the Light of International Law*, 9 Journal of Japanese Law 50, 54(2004).

[25] See Supra 13, at 184.

[26] See US-Japan Treaty of Mutual Cooperation and Security, 1960, Article 5 of the revised treaty provided, "…Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter…" .

conservative-nationalist, has been gradually reinterpreting (read rewriting) the pacifist Constitution and now this new resolution adopting new interpretation of Article 9 has been passed by the Abe cabinet on July 01, 2014 which paved way for 'proactive collective self-defence'. The new interpretation expands the scope of collective self-defence by including a right to act preventively to defend allies even before the threat materializes to Japan. Even if there is a 'danger' to the peace of Japan, it can react with use of force to defend the ally.

The final draft of the Cabinet document said that Japan could intervene militarily "when an attack on a country that 'has close relations' with Japan 'poses a clear danger of threatening our country's existence and fundamentally overthrowing our people's lives, freedom and right to pursue happiness".According to the new conditions, Japan can come to the aid of a friendly nation if[27]: -

i. The attack on that country poses a clear danger to Japan's survival or could fundamentally overturn Japanese citizens' constitutional rights to life, liberty and the pursuit of happiness.
ii. There is no other way of repelling the attack and protecting Japan and its citizens.
iii. The use of force is limited to the minimum necessary.

Previously, Japan was allowed to come to the aid of any country surrounding its territory, indulge in virtually full-fledged war in the name of defense in case the contingency arise threatening the peace and security of its nationals, however, it was not allowed to interfere proactively in aid of any other country if it was not directly targeted too. Now, with the reinterpretation, SDF can operate preventively in aid of other state in pursuance of pro-active collective self-defense also.

3. International Legal Connotations

The issue of national defense and security necessarily involves international aspects in a material sense, in so far as it encompasses the defense against external threats as much as internal threats. It entails international dimensions in a legal sense as well, since there exist a

[27] Ayako Mie, *Abe wins battle to broaden defense policy*, The Japan Times (01/07/2014), available at http://www.japantimes.co.jp/news/2014/07/01/national/coalition-agrees-on-scrapping-pacifist-postwar-defense-policy/#.VBZTCvmSzMt, last seen on 17/03/2015.

number of international rules of law to regulate military conducts undertaken for the purpose of national defense and security, including notably the Charter of the United Nations (hereinafter referred to as **'U.N. Charter'**). [28] Japanese Constitution itself acknowledges the significance of observing international law in Article 98 (2) of the constitution.

Irrespective of all the interpretative efforts to reconcile self-defense with pacifism, Article 9 has certainly created a gap vis-à-vis the internationally realized nuances of self-defense under the general international law as also the UN Charter.

Right of self-defense in international law has seen an expansion in its actual exercise. An extreme defense action was eminently illustrated when the Israeli fighter-bombers attacked and destroyed Iraq's Osiraq nuclear reactor near Baghdad only days before the reactor was set to come online just in anticipation of Iraq possessing nuclear weapons, which would have posed a huge risk to the Israel's national security.[29] Armed reprisals by Israel and U.S. have been justified in the name of self-defense against the presumable terrorist activities going in those states even though there was no direct and imminent threat of any terrorist attacks.. The notion of "pre-emptive self-defense" against remote, and not imminent, security threats is progressively getting global support. This way, the right of self-defense of states has in practice been widely interpreted, with a variety of justifications being sought for it by academicians and diplomats. Even the Japanese aggression in Manchuria in 1932 was done in the name of right of self-defense which nonetheless highlights the risks inherent in expanding the concept of right of self-defense.[30]

Noticeably enhanced defense budget, lifting of ban on export of arms[31], expansion of SDF's activities globally and locally, and reinterpretation of

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[28] Supra 24; See Art. 2 (4), U.N. Charter.

[29] D'Amato, Anthony, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, Faculty Working Papers, Working Paper Number 76,Northwestern University School of Law, (2010); also see Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 The American Journal of International Law599, 601 (2003), available at http://www.jstor .org/stable/3109845, last seen on 14/03/2015.

[30] Supra 24.

[31] Jeff Kingston, *Weapons for peace and proactive pacifism*, The Japan Times (12/04/2014), available at http://www.japantimes.co.jp/opinion/2014/04/12/commentary/weapo ns-for-peace-and-proactive-pacifism/#.VQlYXI6Uf6P, last seen on 10/03/2015.

Article 9 which now allows SDF to defend its 'allies' under attack as an exercise of collective self-defense – Japan is certainly shifting its focus towards military empowerment.[32]Nevertheless, the new interpretation takes the obvious attention to some of the more controversial aspects of Japan and its international relations – the role of Japan in UNPKOs, its relation with US under the mutual cooperation treaty and last but not the least – changing equations in the East-Asian global community.

3.1. Japan's International Security Commitments: UN PKOs

The effects of Article 9 were multifarious and complicated. While on one hand it regained Japan the lost trust of the world community, particularly the earlier victims and new victors of Imperial Japan, on the other it put the country in a fix by creating a bottleneck when it came to Japan's participation in international peace activities including U.N. peacekeeping operations (UNPKOs).[33]

Japan is a member of United Nations. Every member of the United Nations is obliged to comply with the decisions of the Security Council.[34] Also, it is constitutionally obliged under Article 98 of its Constitution to 'faithfully observe the treaties' concluded by it[35]. However, the way of implementing the decisions is left to the discretion of the member states in absence of a special agreement.[36] Hence in absence of any special agreement, there is no legal mandate on Japan to send its armed troops under U.N. peace operations.[37]Strong claims made from abroad during the U.N. military operation in the Gulf Crisis should be seen as political rather than legal pressure, in view of Japan's large military capacity.[38]

Domestically speaking, there is no specific prohibition – constitutional, legal or otherwise– in cases where the dispatch is not for the purpose of using force. Hence, deployment for other purposes such as peacekeeping

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32 *Terrorism Threatens Japan*, The Hindu (04/02/2015), available at http://www.thehindu.com/opinion/editorial/editorial-terrorism-threatens-japan/article6853387.ece, last seen on 10/03/2015.

33 Ibid.

34 Art. 25, United Nations Charter.

35 Art. 98, Constitution of Japan.

36 Art. 45, United Nations Charter.

37 Supra 24.

38 Yamaguchi Jiro, *The Gulf War and the Transformation of Japanese Constitutional Politics*, 18 Journal of Japanese Studies 155, 158 (1992), available at http://www.jstor.org/stable/132710, last seen on 10/03/2015.

becomes permissible under the Constitution.[39] However, any Japanese contribution to UN peacekeeping operations requires compliance with Japan's 1992 Law Concerning Cooperation for UNPKOs. It stipulates five principles for Japan's engagement, including the need for a ceasefire to be in place, consent of the parties to the deployment, maintenance of strict impartiality and the minimal use of weapons. These conditions imposed in an attempt to save the action from the sweep of 'offensive war' have indeed frustrated the aid thus given by the SDF troops' altogether. For instance, if there is already a ceasefire in operation, there is no reason why SDF would be even required with their 'minimal' use of weapons. As soon as the ceasefire ends, the SDF would any way not be able to continue with their 'aid'.[40] In this light, the Japanese aid is self-defeating and futile.

Nevertheless, Japan has deployed over 10,300 personnel to UN peacekeeping missions in places such Cambodia, Mozambique, the Golan Heights, Timor-Leste and Haiti. As of May 2014, Japan currently has 271 JSDF personnel deployed to the UN Mission in South Sudan (UNMISS), making Japan the 45th largest troop contributor to UN peacekeeping.[41]

Hitherto, the policy of Japan had been to aid in UNPKOs through providing logistics support, an activity that does not in itself constitute a "use of force". In situations where international peace and security are threatened, the global community unites to respond to the problem compliant with U.N. Security Council resolution, there exist situations in which it is necessary for Japan to conduct such support activities to armed forces of other countries carrying out legitimate "use of force" based on the resolution. Yet, Japan's support activities are limited by its legal frameworks to the 'rear or non-combat area' activities to ensure that the issue of '*ittaika*with the use of force'[42] does not arise and operations are not struck by unconstitutionality.[43]

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[39] Aurelia George, *Japan's Participation in U.N. Peacekeeping Operations: Radical Departure or PredictableResponse?*, 33 Asian Survey 560, 562 (1993), available at http://www.jstor.org/stable/2645006, last seen on 17/03/2015.

[40] International Peace Cooperation Law, 1992.

[41] Lisa Sharland, *Reinterpreting Article 9: enhancing Japan's engagement in UN peacekeeping*, The Strategist, Australian Strategic Policy Institute Blog, available at http://www.aspistrategist.org.au/reinterpreting-article-9-enhancing-japans-engagement-in-un-peacekeeping/, last seen on 16/03/2015.

[42] *Ittaika* with force means meaning 'forming an 'integral part' of the use of force'. Acts that are deemed to be "*ittaika*" with the use of force by other countries, including

As a result, these constitutional restraints were cited as the cause when Japan was criticized for offering 'too little, too late'[44] by way of its involvement in the Persian Gulf War. As one observer notes, Germany, which also had constitutional constraints on the use of its armed forces in both its former state as West Germany and now in its unified form, has revised its Basic Laws (Constitution) more than 40 times since 1947 in order to participate in both the North Atlantic Treaty Organization military operations and UNPKO. In contrast, Japan's Constitution remains intact amidst all the controversies.[45]

The national caveats, as complained by UNO, made it difficult for Japan to fulfill core obligations of peacekeeping mandates, including protecting civilians or ensuring the safety and security of other personnel that might come under attack. This is particularly relevant in contexts such as South Sudan, where the security environment is progressively deteriorating since December 2013.[46]

The contradictions in Japan's position on the right of collective self-defense are apparent in the fact that during the dispatch of the SDF to Iraq in support of reconstruction activities other militaries were required to provide perimeter defenses to Ground SDF, they were unable to use their weapons beyond the narrow purpose of defending themselves! Again when maritime SDF was sent to participate in the anti-piracy effort in the Gulf of Aden, ships were initially discouraged from using force on behalf of other coalition partners.[47]

In this scenario, the new interpretation comes as a relief as now not only can SDF personnel's use weapons to protect themselves, they are also not prohibited to come to the aid of any co-operating distant unit or

activities conducted under the U.N. or by allied countries, are interpreted as constituting a breach of the Constitution even if the acts themselves are not the use of force. See Supra 22.

[43] Ibid.

[44] See *T.* Shinoda, *Japan's Response to Terrorism*, Japan Sets Out: Japan's Role in the fight Against Terrorism, Woodrow Wilson Center for Scholars, Washington, D.C., 2001.

[45] Mayumi Itoh, *Japanese Constitutional Revision: A Neo-liberal Proposal for Article 9 in Comparative Perspective*, 41 Asian Survey 310, 313, available at http://www.jstor.org/stable/10.1525/as.2001.41.2.310, last seen on 14/03/2015.

[46] Supra 41.

[47] *Reinterpreting Japan's Constitution*, Forbes, available at http://www.forbes.com/sites/sheilaasmith/2014/07/03/reinterpreting-japans-constitution/, last seen on 14/03/2015.

personnel who are under attack and remove obstacles in their missions.[48] It enables SDF to use weapons in actual UNPKOs as also while operating with the US in evacuating or transporting Japanese nationals from a contingency.[49]

Thus, SDF are more empowered in global operations now though for the time being PM Abe has shown reluctant to accept this and has assured that Japan will not join military operations under U.N. like the Gulf War. Contrary to this, Abe's own handpicked panel recommended in May 2014 in a defense report that Japan should take part in such operations.[50]

3.2. US-Japan Mutual Co-operation Treaty

The US-Japan treaty despite its character as a collective defense treaty, the treaty[51] stipulated that the obligation of collective self-defense arises when an armed attack occurs against U.S. or Japan *only* within the territories under the administration of Japan. Thus, the treaty acknowledged Japan's right to collective self-defense but restricted it to the territories administered by Japan only which is practically nothing more than exercising of right of individual self-defense.

Under the new interpretation, JSDF can now even shoot missiles targeted towards US even though they are not yet in the territory of Japan. This will strengthen the mutual trust between the two allies.

Whether Article 9 barred the right of collective self-defense or Japan chose it as a legal policy to refrain from exercising this right the recognition of the stationing of a huge army base like that of US in its territory was itself as an acknowledgement of this right.[52] In fact, going by the definition of 'Acts of Aggression' given by the UN General Assembly, it *per se* constituted an act of aggression even if JSDF themselves did not indulge in the aggressive acts.[53] While this expansion

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[48] *Second Report of the Advisory Panel on Reconstruction of the Legal Basis for Security* (15/05/2014), available at http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf, last seen on 16/03/2015.

[49] Supra 47.

[50] Supra 27.

[51] US-Japan Treaty of Mutual Cooperation and Security, 1960.

[52] T. Matsuda, *The Japan-US Security Treaty and Japanese Laws*, 39 Japanese Annual of International Law 85, 86 (1996).

[53] The elements contained in the use of armed force within the meaning of Article 2 (4) of the U.N. Charter are in fact not limited to actual exchange of shots. Article 3(f) of

of right of 'self-defense' may be well within the four-corners of Article 9 so long as its exercise is for defending either nations, a real legal issue may arise as despite the limitations of Article 9 acknowledged in the guidelines[54], they give ample scope for abuse of JSDF against the constitutional limit.

An extended exercise of self-defense may go to the roots of Article 9 in case of a Chinese attack on Taiwan or an attack short of invasion which may well qualify as situation in surrounding areas of Japan.

The most controversial and obvious example of the over-expansion of the right of self-defense is the dispatch of three SDF warships to Diego Garcia in Indian Ocean to support US led military operations in Afghanistan. Apparently the step was taken as Japan's 'own initiative towards the eradication of terrorism, in cooperation with the United States'[55] and in absence of any specific authorization by the U.N. Security Council of the use of armed force. Thus the only possible explanation to it can be an exercise of collective self-defense if not an act of aggression. Also, it seems more likely that this step was taken as a response to the U.S. call for cooperation outside the treaty framework. It is obvious in this respect that this action dramatically deviated from Japan's policy hitherto, formalistic or substantive, on the exercise of the right of collective self-defense. This act could well be argued to be an unconstitutional one in absence of any amendment in Article 9 to reflect the liberal interpretation justifying fully the exercise of the right of collective self-defense.

Nevertheless, by adopting the new liberal interpretation, GOJ has authorized itself to do the same and similar in future without amending constitution.

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the GA Resolution 3314 (XXIX) defines an act of aggression *inter alia* as "The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State." See U.N. Doc. A/Res/3314 (XXIX) (14 December 1974).

[54] Section II (2), Japan-US Joint Statement on Review of Defense Cooperation Guidelines, 1997.

[55] Junichiro Koizumi, Prime Minister of Japan, Opening Statement at Press Conference (19/09/2001) in E.J.L. Southgate, *Comment: From Japan to Afghanistan: The U.S.-Japan Joint Security Relationship, the War on Terror, and the Ignominious End of the Pacifist State?*, 151 University of Pennsylvania Law Review, 1620 (2003), available at http://scholarsh
ip.law.upenn.edu/cgi/viewcontent.cgi?article=3221&context=penn_law_review, last seen on 14/03/2015.

3.3. Effects on the East Asian Peace and International Relations

The new interpretation was expected to bring Japan at par with the world in its exercise of defensive rights. But the scope interpretation is still a bit restricted. Unlike Article 51 which provides nations with the inherent right to come to the aid of allies even if the states themselves are not directly threatened, the reinterpreted Article 9 only allows Japan to defend allies if "the attack on that country poses a clear danger to Japan's survival or could fundamentally overturn Japanese citizens' constitutional rights to life, liberty and the pursuit of happiness, there is no other way of repelling the attack and protecting Japan and its citizens and the use of force is limited to the minimum necessary".[56]

The final draft of the Cabinet document said Japan could intervene militarily "when an attack on a country that 'has close relations' with Japan 'poses a clear danger of threatening our country's existence and fundamentally overthrowing our people's lives, freedom and right to pursue happiness'".

A controversy may therefore arise if China attacks Taiwan. Taipei is certainly the most close and friendly nation to Japan. If China occupies Taiwan it would certainly be a threat to Japan as the *Senkaku* islands are roughly half the distance from Taiwan as they are from mainland China, allowing China to attack more forcefully on them. China could also then approach the islands from two different directions. Furthermore, Taiwan's strategic location would greatly enhance China's ability to interdict maritime shipping to and from Japan. The only way then to repell approaching Chinese attack on Japan would be to intervene on behalf of Taipei. Anyway, if US were to join the battle, Japan, in order to defend US vessels would have to join the fight.[57] The peculiarity of this situation would be that under black-letter international law, Japan cannot use military force in Taiwan *sans* China's consent, even if the Taiwan government requests its assistance. That's because the Article 51 of UN Charter only authorizes an act of "collective self-defense if an armed attack occurs against a Member of the United Nations." Taiwan is not a UN member and Japan itself recognizes the government in Beijing as the rightful government of China, and that Taiwan is a part of

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[56] Supra 27.

[57] Zachary Keck, *Taiwan and Japan's Collective Self-Defense*, The Diplomat (02/07/2014), available at http://thediplomat.com/2014/07/taiwan-and-japans-collective-self-defense/#disqus_thread, last seen on August 15/03/2015.

China.[58] So unless Japan is able to plausibly claim that an attack on Taiwan triggers Japan's own inherent self-defense right, and unless a Chinese invasion could be said to justify humanitarian intervention, Japan would violate the U.N. Charter if it used military force in a way that violated the territorial integrity of another UN member (China).[59]

This is but one instance. Any similar disturbing act of aggression or anything short of it in the North East Asian Region would require Japan to take some stance. In that case, it may by virtue of the new interpretation come forward to the aid of the ally provided it satisfies the three caveats attached and discussed above.

3.4. Surging Threat of Terrorism and Japan

Japan's Anti Terrorism Special Measures Law came in the wake of the 9/11 attack under U.S. influence. Prior to this, the Situations in Areas Surrounding Japan Act, 1999 dealt with situations requiring Japanese defense aid. However, this law only covered the surrounding states, hence new law was passed.[60] This law was the first to allow SDF to operate on foreign soil. Passed in furtherance of UN Security Council resolution 1368, 1267, 1269 and1333 , it was purported to enable Japan to contribute actively and on its own initiatives to the efforts of the international community for the prevention and eradication of international terrorism, thereby ensuring the peace and security of the international community including Japan.[61] Even then there were caveats that such measures must not constitute the threat or use of force, they must be restricted to search and rescue, cooperation and support, assistance to people and such combative activities only[62] and that too only by way of proportional use of weapons in case of unavoidable cause[63]. Subsequently, Maritime SDF supply vessels and destroyers were

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[58] Julian Ku, *Why Japan Would Violate International Law If It Militarily Intervened to Defend Taiwan (But Why Japan Should Do So Anyway)?*,*OpinioJuris* Blog(10/07/2014), available at http://opiniojuris.org/2014/07/10/japan-violate-international-law-militarily -intervened-defend-taiwan-anyway/, last seen on 10/03/2015.

[59] Ibid.

[60] See *Report on Article 9 of the Constitution of Japan*, Law Library of Congress, available at http://www.loc.gov/law/help/japan-constitution/japan-constitution-article9.pdf, last seen on 11/03/2015; also see*Japan's Efforts based on Anti-Terrorism Special Measures Law*, Ministry of Foreign Affairs, Japan, available at http://www.mofa.go.jp/policy/terrorism/effort0510.html, last seen on 10/03/2015.

[61] Art. 2, The Anti-Terrorism Special Measures Law.

[62] Art. 3, The Anti-Terrorism Special Measures Law.

[63] Art. 10, The Anti-Terrorism Special Measures Law.

dispatched to the Indian Ocean to provide assistance to combat forces. Air Self-Defense Force cargo planes transported supplies for U.S. forces overseas, to places such as Guam. At the same Diet session, two other pieces of legislation which enhance Japan's defense ability were enacted. The Japan Coast Guard was authorized to fire on suspicious vessels, if necessary, in order to search them in Japanese waters. Another act also allowed the SDF to help guard U.S. military bases inside Japan.[64]

1997 guidelines issued consequent to the U.S. Japan Joint Declaration of 1996 brought a landmark shift in Japan's defense policy much to the discomfort of its neighbors. It *inter alia* provided for SDF intervention in areas surrounding Japan in the form of co-operating with U.S. This marked the end of 'Japan' oriented approach under the Article 5 of U.S. Japan Security treaty. The scope of 'areas surrounding Japan' was kept diplomatically ambiguous by not precisely stating which surrounding areas are to be covered.

Since then the Japanese approach towards dealing with contingency had been a very *ad hoc* one. Authorizing laws were required to empower SDF to implement the new guidelines; various laws were enacted to deal with different contingency situations and these were increasingly wider in scope. Some of these laws like theLaw Concerning Ensuring National Independence and Security in a Situation of Armed Attack, 2004, also covered 'terrorism' *inter alia* as one of the contingencies requiring Japan to extend SDF cooperation.[65]

On the international front, Japan has been collaborating with various nations in the global fight against terrorism. In 2003, Japan and Australia adopted a joint statement on cooperation to combat international terrorism which covered various activities including particularly immigration and border controls, transport security, anti-terrorist financing, including support for the establishment and operation of effective Financial Intelligence Units in countries in the region, cyber security and critical infrastructure protection and counter-terrorism aspects of APEC's Energy Security Initiative.[66]

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[64] Supra 60.

[65] See William C. Middlebrooks Jr., *Beyond Pacifism: Why Japan Must Become a Normal Nation?*, 43-47 (1st ed., 2008); See Supra 60.

[66] *Australia-Japan Joint Statement on Cooperation to Combat International Terrorism*, Ministry of Foreign Affairs, Japan, available at http://www.mofa.go.jp/region/asia-paci/australia/pmv0307/terrorism.html, last seen on 19/03/2015.

Notwithstanding these efforts, Japan has largely been insulated from international terrorism in the past decade and radical Islam has little or almost nil hold in the country.[67] However, the recent killing of two Japanese citizens by the ISIS and the declaration by PM Abe not to succumb to these threats and actively work against terrorism has reignited the need for revising the security policy.

It has been about 70 years since the formation of the United Nations and there are no real prospects of having a formal UN force to deal with global security threats like terrorism. On the other front, Japan's relations with the Middle East are becoming more central — and controversial. Being a resource-poor country, it is one of the largest importers of crude oil from the region. Political stability in the Middle East is in Japan's own interests. Consequently, during his recent visits to Egypt, Jordan, Lebanon, Israel and Palestine, PM Abe pledged $200 million in non-military aid and promised humanitarian and infrastructure assistance for countries fighting ISIS and terrorism as well as for refugees displaced from Syria and Iraq following ISIS activity. These attempts to gain prominence on the international stage by playing a bigger role in the West's counter-terrorism policy, have stimulated strong reactions from IS reflected in the outrageous beheadings.[68] Considering that many Japanese nationals are actively working overseas and face risks of being involved in emergency situations such as terrorism, it is necessary to enable the rescuing of Japanese nationals abroad by use of weapons subject to the consent of acceptance from the territorial State which, under international law, has the obligation to extend protection to foreigners who are within its territories.[69]

In light of these, the newly empowered SDF may prove helpful in coping with the hovering threat of global terrorism over Japan.

4. CONCLUSION

Needless to say, absolute non-armament is a utopian ideal and a blanket ban on the maintenance of any armed force even for the purpose of

[67] *Terrorism Threatens Japan*, The Hindu (04/02/2015), available at http://www.thehindu .com/opinion/editorial/editorial-terrorism-threatens-japan/article6 853387.ece, last seen on 10/03/2015.

[68] Ibid.

[69] Supra 5.

national self-defense, while acknowledging its military and tactical consequences, would oblige the Japanese people to fall into the same absurdity as absolute and blind trust in the '*justice and faith of the peace-loving peoples of the world*' would lead to. This would, contrary to the principle of effective interpretation, rather nullify the purposes and spirit of Article 9 as well as the preamble of the Japanese Constitution which recognizes the '*right of all people of the world to live in peace, free from fear and want*'. Therefore, effective interpretation necessitates Japan to possess certain level of military strength by virtue of its right to live in peace as embodied in its preamble and Article 9 of the Japanese Constitution itself. The journey from no defense to self-defense to collective self-defense to pro-active collective self-defense has seen a lot of twists and turns; the latest one being the July 2014 resolution by Abe government. While there are apprehensions amongst neighbours, Japan is being very calculative in expressing the complete scope of its new defensive power. Stimulated by contemporary needs, Article 9 as well as nuances of 'war', 'security risk' and 'self-defense' are evolving continuously.

While new interpretation stimulates political unrest in the region, it also widens scope for more direct and active cooperation from JSDF in UNPKOs. It enables Japan to fulfill its international obligation under UN Charter and enhances the scope of US-Japan treaty. Up till now, Japan could only defend US vessels and army only when the right of individual self-defense or reflex effect of self-defense extended. Now it can pro-actively act including shooting down ballistic missiles on its way towards US. However, this also opens up possibilities of Japan being dragged into US-led strategic wars. The East Asian peace and international relations are affected as the interpretation comes in wake of changing power equations in the region. Japan can now come to the aid of an 'ally' though the language of resolution give ample scope for further 'interpretation' of terms like 'friendly nation', 'minimum necessary force', 'Japan's survival' etc.

Hitherto, the interpretations have brought Japan nearer to the international law standards. But the road to interpretation is an endless journey – a maneuvering tool for the political parties, an uncertain international stand which can be reversed with a change in ruling power. This is even more probable for Japan with its strong popular opposition to and abhorrence for militarization. Japan has seen two self-immolation attempts in opposition to the new resolution. Recent beheading of two Japanese citizens by ISIS and its later threat to Japan which comes within a year of the new interpretation would increase public

apprehension but at the same time it makes it even more imperative for Japan to be ready to cope with any extremist threat. To amend the Constitution would be a more stable and definitive approachbut the requirement of ratification by majority of people in addition to two-third majority in diet makes it easier said than done. Given an opportunity to vote, people would defend their cherished pacifism. Therefore the convenient way to enable pro-active militarization is to 'interpret' Article 9 in a liberal way. How far this interpretational approach is justifiable – that is Japan's internal constitutional debate. For the international community, what is of prominence is the increased Japanese contribution towards world peace, the changing power dynamics in the East Asian region and rise of a potentially strong and capable opponent to global terrorism. To hope that shutting eyes towards global threats to peace and hiding behind the shield of absolute pacifism or even restricted armament would reciprocate world peaceis to bury head in the sand. Force is necessary to counter extremism and keep the peace stable. In wake of this, Japan's shift towards militarization is a welcome move. Germany realized this need long back and it is about time that Japan does that too.

That understood, it will be commendable if Japan does this in a more stable way. Moulding public opinion would be difficult but interpreting where amendment is required is susceptible to unconstitutionality. Even though Courts in Japan have hitherto excused themselves from deciding upon the constitutional vires of Article 9 definitively, it is only a matter of time before the interpretation becomes too farfetched to appear within words and spirit of Article 9. Therefore while the end result is laudable, the means are recommended to be constitutionally entrenched firmly. The expectant eyes of the global community are now on Japan for better contribution towards establishment and maintenance of international peace. But a caveat attaches to the interpretational route. While there are scopes of opening up rightful path to international peace and national security, it may also open up channels of gross abuse of self-defense ultra vires not only to the constitution but also to the international law.

BRIDGING THE HIATUS - AN APPRAISAL OF THE CIVIL LIABILITY FOR NUCLEAR DAMAGES ACT, 2010 AND ITS CONFORMITY WITH THE PRINCIPLES OF PUBLIC INTERNATIONAL LAW

- **Ashwin Pant and Drushan Engineer***

ABSTRACT

In this day and age, a country like India, with its rapid urbanization and bludgeoning population, needs a lot of energy to sustain itself. With the dangers of using fossil fuels apparent, but its use still inevitable, the Indian government saw it fit to open its borders to foreign companies, and allow them to build and operate Civilian nuclear reactors. A large section of the Indian public voiced concerns, that these foreign companies, interested only in a quick profit, would neglect safety standards and may not pay compensation to the affected people as required. It was also noted in India that the volume of risk dealt and lives lost could be very high, given the inherent dangers of operating nuclear energy. To work around the problem, the Indian Parliament passed the Civil Liability for Nuclear Damage Act, in 2010. The Act was made with the specific intention of ensuring that, in the unfortunate event of an accident at a nuclear facility, the people who are responsible for the same pay compensation to the victims. However, some parts of the Act, like S.46 and S.17 (b) were not welcomed by the foreign suppliers and they saw it as a way to make them liable for something that is not in their control. It was also said that these go against international customs and that in the various international instruments signed regarding civil nuclear liability, only the operator of the nuclear facility is held liable, unlike in India, where even the supplier can be held liable for any defect on his end. These differences between the laws have caused a lot of delays and cost escalations, which a developing country like India can ill afford. Plus, there is an immediate need for power in India, especially in rural areas. Therefore, what this research paper will attempt to do is that it will clarify the laws in question (both domestic and

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international), examine the facts from both sides and then try to come up with an equitable solution. This paper has been divided into four parts. The first part will be the analysis of current laws, which will also identify the bone of contention. The second part will analyse and give the readers, a perspective on the international laws and treaties in place governing civil nuclear liability. The third part will explain India's standpoint and spell out the concerns they have about the delicate issue of liability, and the fourth part will try achieving a balance between just and equitable liability and unnecessary corporate policing.

1. THE CURRENT SCENARIO AND LAW

1.1. Indian Nuclear Liability Framework Prior to, and Post Indo-United States Nuclear Agreement

Section 123 of the United States Atomic Energy Act of 1954, titled "Cooperation With Other Nations", established an agreement for cooperation as a prerequisite for nuclear deals between the United States (hereinafter referred to as **'US'**) and any other nation. [1] Such an agreement is called a 123 Agreement.[2] To date, the US has entered into roughly twenty-five 123 agreements with various countries. [3] The framework for the India-US civilian nuclear agreement was the India-US joint statement by then Indian Prime Minister Manmohan Singh and US President George W. Bush through which India agreed to separate its civil and military nuclear installation and place it's civil nuclear facilities under the safeguard of the IAEA, in return for which, the US agreed to work towards full civil co-operation with India[4], which also included an India-specific NSG waiver. Under the 123 Agreement, one of the understandings reached between the two countries was the enactment of a statute in India dealing with civil nuclear liability, which would ensure that the US companies are be able to get insurance cover back at home.

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[1] The Atomic Energy Act (Act of August 30 1954) S.123 (United States).

[2] *Nuclear Non-proliferation Issue,* Issue Brief for Congress (Washington, 10/05/2002).

[3] *National Nuclear Security Administration - 123 Agreements for Peaceful Cooperation.* National Nuclear Security Administration, available at http://nnsa.energy.gov/aboutus/ourro grmsnonproliferation/treatiesagreements/123agreementsforpeacefulcooperation, last seen on 9/3/2015.

[4] Office of the Press Secretary, *Joint Statement Between President George W. Bush and Prime Minister Manmohan Singh,* The White House (18/06/2005).

Prior to the passing of the Act, due to lack of penetration of nuclear energy in India and paucity of commercial agreements, India did not have an elaborate liability law. National Power Corporation of India Limited (hereinafter referred to as **'NPCIL'**) could enter into contracts with Indian suppliers for nuclear reactors, and there was no liability imposed on them and elaborate compensation schemes, as seen now, were not even envisaged.[5] With the increase in penetration of nuclear energy and with the outbreak of nuclear disasters, it was realised that the present form of nuclear liability laws was short-sighted. The scenario then mandated a civil nuclear liability law which was in conformity with the basic international principles and which would give an efficacious remedy to the aggrieved parties in case of a disaster. It was imperative that nuclear incidents, having trans-boundary ramifications and the costs of which could be of great magnitude, were governed by international conventions. It was in this aspect that the conformity of the Civil Liability for Nuclear Damages Act, 2010 (hereinafter referred to as **'CNLDA'**) with the international conventions was of a vital nature. Most international conventions are like insurance pools wherein each contracting party which has ratified the convention is given financial support and assistance in case of a nuclear incident. India had not ratified any major nuclear treaty and it was clear that the costs entailed in paying off claims would be too much for either the state or the operating party to bear and it was deemed necessary for India to become party to an international convention like the Convention on Supplementary Compensation (hereinafter referred to as **'CSC'**) which would grant the state additional funds to cope with the disaster, above and beyond what it could afford to pay.

1.2. Thorny Issues in the Indian Nuclear Liability Law and their Effect on Commercial Agreements

Since the exemption to civil nuclear trade was granted to India by the Nuclear Supplier's Group (hereinafter referred to as **'NSG'**), agreements to that effect were signed with 3 countries i.e. Russia, France and the US. In Section 13.1 of the first agreement with Russia[6] and Section 15,

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[5] R. Gruendel & E. Kini, *Through The Looking Glass,* Volume 3 Issue 1 OECD iLibrary 112, 115 (2012).

[6] Agreement between The Government of The Republic of India and The Government of The Russian Federation on Cooperation in the Construction of Additional Nuclear Power Plants at Kudankulam Site as well in the Construction of Russian Designed Nuclear Power Plants at New Sites in the Republic of India; which was signed on December 5, 2008.

it has been clearly laid down that the operator of power units of the nuclear power plant at Kudankulam site shall be fully responsible for any damage. Section 3.2 of the second agreement[7] is also to the effect that both these agreements and the relevant sections explicitly absolve the Russian supplier of any liability whatsoever in case of a nuclear incident at site hosting a Russian reactor. India signed a civil nuclear cooperation agreement with France[8] wherein clause 2 of Article VIII states that each party shall create a civil nuclear liability regime based upon established international principles.

The CLNDA was passed after frenetic debate and discussion and was one of the most controversial laws enacted in modern Indian history. Many of the provisions of the Act have been criticised, mostly by suppliers of nuclear inventory[9] and countries which are parties to various conventions and claim that it is in derogation of internationally accepted conventions and principles emanating from them.[10] The criticism ranges from domestic issues such as share of government in the financial liability to international issues such as supplier liability; which is said to be in contravention of major international conventions. This paper delves into the issues that spring up from an international viewpoint and its ambit will exclude the domestic issues. Section 17(b) of the CLNDA[11] states that:

> "The operator of the nuclear installation, after paying the compensation for nuclear damage in accordance with section 6, shall have a right of recourse where the nuclear incident has resulted is a consequence of an act of supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services."

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7 Agreement between the Government of the Republic of India and the Government of the Russian Federation on Cooperation in the Use of Atomic Energy for Peaceful Purposes; which was signed on March 12, 2010 and ratified on September 20, 2010.

8 Cooperation Agreement between the Government of the Republic of India and the Government of the French Republic on the Development of the Peaceful Uses of Nuclear Energy with France; signed on September 30, 2008.

9 K. Patil, *Untying the Civil Nuclear Liability Knot in the Indo-US Nuclear Deal*, NAPSNet Policy Forum, available at http://nautilus.org/napsnet/napsnet-policy-forum/untying-the-civil-nuclear-liability-knot-in-the-indo-us-nuclear-deal/, last seen on 30/07/14.

10 N. Pelzer & Göttingen, *The Indian Civil Liability for Nuclear Damage Act, 2010 – Legislation with Flaws?*, 56 International Journal for Nuclear Power 32 (2011).

11 S. 17(b), The Civil Liability for Nuclear Damage Act of 2010.

This section has been the reason for the disagreement between the Indian government and foreign countries including suppliers of those countries as no international convention imposes liability on the supplier for any nuclear incident. The principle of channelling of absolute liability to the operator as enshrined in the bare text of numerous conventions is achieved through 'legal channelling' while in national laws like the Anderson-Price Act of US, [12] it is achieved through 'economic channelling'.[13]

Our country and it's legislature has good reason to include the supplier in the liability chain as demonstrated in the latter part of the paper but the presence of S. 17 coupled with S.46 have been great hurdles in the goal to achieve our nuclear energy goals, from the point of foreign suppliers as the provisions of the CLNDA have stalled not only sales of nuclear reactors from US to India but from other major nuclear suppliers– Russia and France as well. Even though the NSG exemption for nuclear commerce was granted more than six years ago, and India had signed the nuclear cooperation agreements with these countries nearly six years ago, it has not been able to finalise even a single commercial contract for the import of reactors from any of these countries. The only nuclear cooperation that India has been able to conclude with any of the countries with whom it has nuclear cooperation agreements is in respect of nuclear fuel which would not have any implication on application of CLNDA[14].

Recent reports also indicate that one of the main reasons why no contract has been signed between NPCIL and Russian's Atomstroy export is that India would like Russia to accept the CLNDA in the case of Kundakulam 3 and 4. It is also said to be not in conformity with the

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[12] Price–Anderson Nuclear Industries Indemnity Act of 1957 (United States).

[13] D. Koplow, *Nuclear Power: Still Not Viable without Subsidies,* Union of Concerned Scientists (1/02/2011), available at http://www.ucsusa.org/sites/default/files/legacy/assets/documents/nuclear_power/nuclear_subsidies_report.pdf, last seen on 29/06/2015.

[14] G. Balachandran, *A primer on the Indian Civil Liability for Nuclear Damage Act 2010*, Institute for Defence Studies and Analyses, available at http://www.idsa.in/backgrounder/IndianCivilLiabilityt_gbalachandran_240914.html, last seen on 25/02/2015.

IAEA recommendations for a nuclear liability law.[15] As per the Standard General Conditions of Contract for Supply of Indigenous Stores:[16]

> "6.7.7 The Purchaser shall indemnify and hold harmless the Contractor in respect of Third Party life and Property damage claims arising out of nuclear event at Purchaser's Site."

It is also contended that not only did the CLNDA go against the foreign suppliers and agreements, it was also contrary to agreements that the nuclear suppliers had signed with state-owned NPCIL with respect to nuclear liability in case of an accident. This lack of legal consensus has led to the stalling of progress in the commercial agreements which India had signed with France, US and Russia.

2. INTERNATIONALLY ACCEPTED PRINCIPLES OF CIVIL NUCLEAR LIABILITY

2.1. Dawn of International Conventions based on Internationally Accepted Principles of Nuclear Liability

The financial costs and implications posed by the unique risks that nuclear accidents pose are potentially enormous and unquantifiable.[17] This potential liability is of concern not only to nuclear power plant operators but to all entities involved in design, construction, operation and decommissioning of a nuclear power plant, including equipment and service providers, manufacturers and even lenders providing finance to the plant. A state that has nuclear facilities on its territory, or is embarking upon a programme to develop nuclear facilities, must have legal regimes in place to provide compensation to possible victims of nuclear damage.[18] In addition to the potential trans-boundary impact of nuclear damage; neighbouring states and, arguably, all states should have

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[15] C. Stoiber, Alec Baer, N.T. Pelzer & W. Tonhauser, *Handbook on Nuclear Law,* 107 (IAEA, 2003).

[16] Nuclear Power Corporation of India, Government of India, *General Conditions of Contract*, available at https://npcil.etenders.in/tender_document/tender_3953/tech_com_doc/GCC%20CMM44%20Supply1%20R2.pdf, last seen on 1/1/2015.

[17] International Atomic Energy Agency, The Chernobyl Forum, *Chernobyl's Legacy: Health, Environmental and Socio-Economic Impacts and Recommendations to the Governments of Belarus, Russian Federation and Ukraine* (2003–2005).

[18] C. Cambbell, *Sustainable Environmental Law,* (Barry Breen and J William Futreel, St. Paul Minnesota, West Publishing Co, 1993).

legal regimes in place to protect their population, property and environment in the event that a nuclear accident does affect their territories. Nuclear liability regimes were borne out of the need to balance many different and at times, conflicting interests.[19] Prior to these conventions, many nations, which had nuclear facilities, enacted their own national laws.[20] Most international conventions came into force and were envisaged before the Chernobyl nuclear disaster and the first text in this regard was the Paris Convention[21] adopted by all OECD members. Later, the Vienna Convention[22] was adopted by the IAEA.

2.2. Paris, Vienna Convention and the doctrine of channelling of liability to the operator

The Paris and Vienna Convention envision the principle of 'legal channelling' imposing all liability on the operator of the nuclear installation and to the exclusion of any other entity. It is stated in the Paris Convention that the operator is liable for damage to or loss of life of any person and damage to or loss of property upon proof that such damage or loss was caused by a nuclear incident in such installation or involving nuclear substances coming from such installation.[23] This liability is only subjected to certain exceptions relating to carriage of nuclear substances.[24] The right to compensation for damage caused by an incident may be exercised only against the liable operator and no other person is liable for damage caused by a nuclear incident, (i) subject to the ability to claim directly against an insurer or financial guarantor of the liability,[25] (ii) unless a different arrangement applies to an incident occurring during the course of carriage of nuclear material,[26] or (iii) pursuant to the application of an international agreement in the field of transport.[27]

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[19] H. Cook, *The Law Of Nuclear Energy,* 71 (George Borovas, 1st ed., 2013).

[20] Price-Anderson Act 1957, (United States) and Nuclear Installations (Licensing and Insurance) Act 1959, (United Kingdom).

[21] Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 (IAEA), available at https://www.oecd-nea.org/law/nlparis_conv.html, last seen on 01/06/2015.

[22] Vienna Convention on Civil Liability for Nuclear Damage of 1963 (IAEA), available at https://www.iaea.org/publications/documents/infcircs/protocol-amend -vienna-convention-civil-liability-nuclear-damage, last seen on 01/06/2015.

[23] Supra 21, at Article 3.

[24] Supra 21, at Article 4.

[25] Supra 21, at Article 6.

[26] Supra 21, at Article 4.

[27] Supra 21, at Article 6.

The operator has a right of recourse only in limited circumstances.[28] This liability is limited in both amount and time. The maximum liability of the operator is set at 15 million SDRs[29] and this amount is subject to the ability of a contracting party to increase or decrease the amount. The amount though, cannot be set lower than 5 million SDRs, which is, in effect the "minimum liability amount".[30] Article 15 further provides that a contracting party may increase the levels of compensation. New provisions have been subsequently introduced in respect of the existing amount of compensation, pursuant to the Brussels Supplementary Conventions and the 2004 Protocols wherein it was felt that existing compensatory mechanisms were not sufficient. The Brussels Supplementary Convention was formed with the intention to make additional compensation available in the event of a nuclear accident. After amendment by the 2004 Protocol, the total compensation granted by the Brussels Supplementary Convention is now increased to 1.5 billion Euros and the operator's liability was increased to a minimum of 850 million pounds.

Under the Vienna Convention too, the liability is channelled to the operator and the liability is strict. The operator is liable for nuclear damage upon proof that it has been caused by a nuclear incident occurring in the operator's nuclear installation.[31] Subject to limited exceptions, no person other than the operator is liable for nuclear damage.[32] An operator may even be held liable for a nuclear damage caused directly due to a grave natural disaster of an exceptional character after the 1997 Protocol.[33] The operator will not be held liable only when he can prove that the nuclear damage is directly due to an act of armed conflict, hostilities, civil war or insurrection.[34] The liability of the operator is absolute[35] and he can escape it only when he proves that the person affected by the incident himself was in the wrong or was affected by his own act or negligent omission.[36] The operator has a right of

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[28] Supra 21, at Article 6.

[29] Supra 21, at Article 7; A Special Drawing Right is an "international reserve asset", created by the International Monetary Fund (IMF) and used as the IMF's unit of account.

[30] Supra 21, at Article 7.

[31] Supra 22, Article II para 1.

[32] Supra 22, Article II para 5.

[33] Supra 21, Article 6 para 1.

[34] Supra 22, Article IV para 3.

[35] Supra 22, Article IV para 1.

[36] Supra 22, Article IV para 2.

recourse only if it is expressly provided for in a written contract, or if the nuclear incident results from an act or omission done with intent to cause damage against the individual who has acted or omitted to act with such intent.[37] The liability may be limited by the installation state to 300 million SDRs and anything below this up to 100 million SDRs will have to be provided for by the state from its public funds in the event of a nuclear incident, to be ready to compensate victims.[38]

Both Vienna[39] and Paris[40] Conventions have set the limitation period for bringing legal claims for compensation after a nuclear incident to 30 years. The conventions require the operator to have a specified amount of financial security and insurance to cover the liability imposed by both the Paris[41] and the Vienna[42] Conventions. There was no direct link between the Vienna convention and the Paris convention and to bridge this gap in coverage and prevent potential conflicts, a joint protocol was entered into force in 1992. The protocol provides that either the Paris convention or the Vienna Convention will apply to a nuclear incident to the exclusion of the other. The determining factor would be whether the relevant nuclear installation is located in the territory of a party to the Paris Convention or the Vienna Convention.[43]

2.3. Post-Chernobyl Emergence of the Convention on Supplementary Compensation, a Radically Different Regime

After the Chernobyl incident, it was quite clear to the international community that existing compensatory mechanisms under various conventions were far too ill-equipped and would never serve to be an efficacious remedy for the claims arising out of them. It was to fix this very problem that the CSC[44] emerged from nearly a decade of work

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[37] Supra 22, at Article X.

[38] Supra 22, Article V at para. 1.

[39] Article 8, 1997 Protocol; 1(a) amending Article VI, 1963 Vienna Convention.

[40] Supra 21, at Article 8.

[41] Supra 21, at Article 10.

[42] Supra 22, at Article VII; Minimum financial security is set at 300 Million SDRs when liability is unlimited and financial security not less than 5 million SDRs may be prescribed by installation state.

[43] Article III, Joint Protocol relating to the Application of the Vienna Convention and Paris Convention 1992 (IAEA), available at https://www.oecd-nea.org/law/joint-protocol.html.

[44] Convention on Supplementary Compensation for Nuclear Damage 1997, (IAEA), available at https://www.iaea.org/publications/documents/treaties/convention-supplementary-compensation-nuclear-damage, last seen on 01/06/2015.

which had begun soon after the Chernobyl disaster. The CSC is a free-standing instrument open to all states wherein the states can become a party to it without adopting the Vienna or Paris Convention. However in this case, it must have a national legislation that is consistent with the general principles of international nuclear liability[45] as set out in the Annex to the CSC. The objective of the CSC is to enhance and supplement the Vienna and Paris Conventions and also the regimes developed by the consistent national legislations, with the primary intention of supporting contracting parties by increasing the amount of compensation that is available to the victims.[46] The compensation is made available to the contracting parties pursuant to the following two criteria: (i) Installation state must make available a minimum of 300 million SDRs (or a transitional amount).[47] (ii) The contracting parties are to make available public funds in accordance with a formula that takes into account both the amount of installed capacity in each contracting party and the UN rate of assessment.[48] A state that has a nuclear installation in its territory must also be a contracting state to Convention of Nuclear Safety.[49] In the annex to the CSC, the definition of nuclear damage has been broadened to give it a wider ambit such that all nuclear related incidents come under its purview. Article 2(1)(b) of the convention states that for conformity of the national legislation with CSC, it must contain provisions that "*require the indemnification of any person other than the operator liable for nuclear damage to the extent that person is legally liable to provide compensation*". Article 8 and 9 and 10(a) of the very same annex state that:

> "Article 8: Nothing in this Convention shall affect the liability outside this Convention of the operator for nuclear damage for which by virtue of paragraph 7(c) he is not liable under this Convention.
>
> Article 9: The right to compensation for nuclear damage may be exercised only against the operator liable, provided that national law may permit a direct right of action against any supplier of funds that are made available pursuant to provisions in national law to ensure compensation through the use of funds from sources other than the operator.

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[45] Ibid, at Article II para.1.
[46] Ibid, at Preamble and art. II.
[47] Ibid, at Article III para.1.
[48] Ibid, at Article IV para.1(b).
[49] Ibid, at Article XIX para.1.

> Article 10: National law may provide that the operator shall have a right of recourse only: (a) if this is expressly provided for by a contract in writing;"

CSC is based on the US nuclear liability legislation[50], which came prior to it and protects the suppliers and financers of nuclear inventory through economic channeling by means of a two tier insurance protection system. The CSC borrows from the very same concept and in this convention also there is a no fault liability exclusively upon the operator. Therefore, from a bare perusal of the text of each of the major international conventions, we can gather that they all channel liability solely to the operator and are in fact, absolve the suppliers from any liability. After the Chernobyl disaster, it dawned upon the international nuclear community the need to provide more efficacious remedy to the victims of such hazards. The international approach now is to further increase the liability of the state and the operators to make them more 'responsible' in their pursuit for nuclear generated power.

3. A DECONSTRUCTION OF THE INDIAN POSITION

The Indian standpoint in this situation is quite clear. Foreign suppliers of atomic reactors to India cannot be sued for the damages by victims of a nuclear accident but can be held liable by the operator who has the right of recourse.[51] It is an attempt to meet the principles laid down by international conventions at a halfway point.

3.1. Historical Burden of Past Disasters

To put this into perspective, it must be recalled that in November 1984, what has been called the "largest industrial chemical accident ever"[52] took place in Bhopal. Over half a million people were adversely affected,

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[50] S.Tromans, *Nuclear Law: The Law Applying to Nuclear Installations and Radioactive Substances in its Historic Context*, 143 (2nd ed., 2010).

[51] Insuring nuclear suppliers using Indian tax payers' money – how nationalist is diluting liability, Mr. PM?, Coalition for Disarmament and Peace, available at http://cndpindia .org/2015/01/insuring-nuclear-suppliers-using-indian-tax-payers-money-how-nation alist-is-diluting-liability-mr-pm/, last seen on 18/3/2015.

[52] I. Ekerman, *Chemical Industry and Public Health Bhopal as an Example,* Essay in Master of Public Health, 7, MPH 2001:24, Essay in Master of Public Health Nordic School of Public Health, Göteborg, Sweden, Nordic School of Public Health, Göteborg, Sweden, (2001).

and 16,000 people died because of the gas effects within 6 weeks. The Bhopal Gas Leakage has become a symbol of transnational corporate negligence towards human beings. It has thus served as a wake-up call.[53] Despite widespread protests, the compensation paid by the owner of the plant, Union Carbide, was abysmally low and it's then CEO, Warren Anderson had evaded the Indian justice system till he died in 2014. It ensured that the Indian government would put in place stringent norms for such potentially dangerous industries and set up a proper system for the maintenance of safety standards. The Supreme Court of India has devised the principle of "absolute liability" as a part of tort law where an offending party can be held liable, even without any intention to commit a crime, for an offence which involves a hazardous or dangerous material escaping and causing widespread damage while it was under his care.[54] When it was announced by the previous UPA government that India would throw open her markets for private companies who wish to generate nuclear energy, immediate safety concerns were raised and the example of the erstwhile USSR's Chernobyl disaster was cited. Then, in March 2011, 3 out of the 6 reactors of the Fukushima Dai-ichi Nuclear Reactor in Japan melted down because of an earthquake that measured 9 on the Richter scale and its subsequent tsunami prompted the evacuation of 300,000 people.[55] The possibility of a disaster and the fallibility of human engineering were exposed once again.

International conventions like the Vienna Convention exclusively channel the liability to the operator. In India, however, it was suggested that channelling liability solely to the operator is a means of protecting powerful nuclear suppliers from liability claims.[56] Contrary to popular belief, this is at the expense of the victims, the greater public, and the environment. The suppliers have no real incentive to ensure the safety and longevity of their goods and services. In addition, it is very difficult for plaintiffs to collect sufficient damages. It is understood that most of the reactors will be operated by NPCIL. NPCIL is a public sector

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[53] I. Ekerman, *The Bhopal Saga- Causes and Consequences of the World's Largest Industrial Disaster,* 2 (1st ed., 2004).

[54] M.C. Mehta v. Union of India, AIR 1987 SC 1086.

[55] P. Lipsky, K. Kushida & T. Incerti, The *Fukushima Disaster and Japan's Nuclear Plant Vulnerability in Comparative Perspective,* Environmental Science and Technology (2013), available at http://web.stanford.edu/~plipscy/LipscyKushidaIncertiEST2013.pdf, last seen on 19/03/2015.

[56] Department-related Parliamentary Standing Committee on Science & Technology, Environment & Forests, Rajya Sabha, *The Civil Liability for Nuclear Damage Bill, 2010,* 2010.

undertaking and in the event of an accident, even if it happened due to a mistake on the part of the supplier, a very heavy burden will be put on the tax payer and especially when the ultimate liability is that of the Central government as per the provisions of Section 7 of the CLNDA.[57]

3.2. Stance of the Indian Government

Section 46 of the CLNDA was the one which received the most parliamentary scrutiny. Currently, it reads as:

> "The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt the operator from any proceedings which might, apart from this Act, be instituted against such operator."[58]

Thrice the Left Front tried to amend it. They wanted to ensure that in the event of an accident, the supplier should also be held liable, not only in an Indian court, but also in foreign courts.[59] International conventions, they argued only favoured the suppliers. Also, under Section 17(b), a liable operator can recover compensation from suppliers of nuclear material in the event of a nuclear accident if the damage is caused by the provision of substandard services or patent or latent defects in equipment or material if it is previously agreed upon to do so under the terms of the contract signed. This is contrary to the practice of recourse in international civil nuclear liability conventions, which channel the liability exclusively to the operator.[60] Rakesh Sood, the then Prime Minister's Special Envoy for Disarmament and Non-Proliferation has previously said in a meeting of the Nuclear Law Association of India that the current international conventions were put in as a part of international law in the 1950s in an attempt to shield the US companies (which enjoyed a monopoly) in what was then a very nascent and growing industry. He further went on to elaborate by saying that this was no longer the case and that the Indian law was truly

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[57] Supra 14, at 21.

[58] S. 46, The Civil Liability for Nuclear Damage (CLND) Act, 2010.

[59] G. Balachandran, *Some issues in respect of Indian's nuclear liability law – I*, IDSA, available at http://www.idsa.in/idsacomments/issuesinIndiansnuclearliabilitylaw_gbalachandran_100215.html, last seen on 11/03/2015.

[60] See Vienna Convention, Paris Convention, Convention on Supplementary Compensation, Brussels Supplementary Compensation, Joint Protocol; all available at https://www.iaea.org/.

reflective of the "spirit of the times".[61] He also said that India's unique position as a developing country, along with the historical burden of the Bhopal Gas Tragedy, warranted an exception.

Furthermore, the CSC allows countries to make reservations to certain provisions in treaties despite being signatories to them. India can do so and express her valid reservations and concerns to the International community.

3.3. Reasons for India's Apprehension

The Indian concerns are centred on reservations they have about the quality of the materials that are to be set up and run in India. Since the supplier and the operator of the facilities are going to be separate, Parliament feared negligent practices because legal channelling, in practice, transfers liability onto the victims, and would not compel the industry to comply with safety measures. Channelling benefits the nuclear industry and its suppliers but it prejudices the victims as it limits the parties against whom they may claim.[62] This is because the manufacturers, designers, suppliers, and transporters agree to transfer all liability towards the operators in an attempt to limit damages and costs, and ignore the basic social costs to victims.[63]

The concern is that why would the foreign suppliers bother safety compliance if the system does not impose any liability upon them and offers them protection for any potential loss of income, without making them even remotely liable for the damages cost, even if they have made a manufacturing or designing error on their end. The effects of negative incentive on both care and activity are magnified correspondingly when

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[61] *Nuclear energy and Indian society: Public engagement, risk assessment and legal frameworks,* 93 Nuclear Law Bulletin 63, 66 (2014), available at http://www.oecd-nea.org/law/nlb/nlb93.pdf, last seen on 18/03/2015.

[62] D. Currie, *The Problems and Gaps in the Nuclear Liability Conventions and an Analysis of How an Actual Claim Would be Brought Under the Current Existing Treaty Regime in the Event of a Nuclear Accident*, 35 Denver Journal of International Law and Policy 85, 93 (2006), available at http://www.law.du.edu/documents/djilp/The-Problems-Gaps-Nuclear-Liability-Conventions-Analysis-How-Actual-Claim.pdf, last seen on 18/03/2015.

[63] E. Ameye, *Channelling of Nuclear Third Party Liability Towards the Operator: Is it Sustainable in a Developing Nuclear World or is There a Need for Liability of Nuclear Architects and Engineers?*, 19 European Energy and Environmental Law Review 33, 35 (2010).

liability is channelled strictly to the operator.[64] It must also be remembered here that in the nuclear power generating industry, the magnitude of damage and the quantum of destruction that can be wrought is extremely high. Critics of the bill in its infant form believed that taking a product's liability-type approach would help minimize potentially negligent practices by foreign suppliers far removed from the negative impacts a nuclear disaster would have on the subcontinent.[65]

To put the Indian apprehensions further into perspective, it must be remembered that India is a developing country. In the event of a nuclear disaster, the vulnerability that India and her people will have is much more than that of a developed country, like Japan[66]. Plus, high density of population and growth of inhabited areas are ever-increasing in India.[67] After the disaster at Bhopal, the lack of adequate compensation granted and the intense media scrutiny has egged on the Indian government to put in clauses like Section 17(b). The central idea is not only to ensure that a just and equitable compensation from a company when the accident takes place because of some oversight on their part but also to ensure that the supplier company takes all the required care and responsibility to build something as sensitive as a nuclear reactor.

4. THE CIVIL NUCLEAR LIABILITY FOR DAMAGES ACT AND ITS HARMONY WITH INTERNATIONAL CONVENTIONS

4.1. The CLNDA and its Conformity with the CSC

The CLNDA has received flak from many quarters, including the parties to major conventions. India has been consistently pressurised to ratify any one of the major conventions so that its nuclear liability law is consistent with the broad international principles regarding nuclear

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[64] M. Trebilcock & R. Winter, *The Economics of Nuclear Accident Law*, 17 International Review of Law and Economics 215, 219 (1997).

[65] P. Purkayastha, *Nuclear Liability Bill: Subsidizing Foreign Suppliers With Indian Money,* Delhi Science Forum, available at http://www.delhiscienceforum.net/peace-and-disarmament/407-nuclear-liability-bill.html, last seen on 18/03/2015.

[66] *Nuclear Power in India,* World Nuclear Association, available at http://www.world-uclear.org/info/Country-Profiles/Countries-G-N/India/, last seen on 19/03/2015.

[67] W. Donner & H. Rodriguez*, Disaster Risk and Vulnerability: The Role and Impact of Population and Society,* Population Reference Bureau, available at http://www .prb.org/Publications/Articles/2011/disaster-risk.aspx, last seen on 18/03/2015.

liability. After events like the Fukushima disaster[68], it has dawned upon the Indian authorities that it will be impossible for the state to pay off claims on its own and assistance will be required by the international community in managing the legal claims in the aftermath of a nuclear incident. India, not being an OECD member, cannot ratify the Paris Convention and the subsequent supplementary and amending conventions. Consequently, the least cumbersome route for India to be a party to international conventions would be ratifying the CSC, as all it requires is for the contracting party to have a national legislation that is in conformity with the annex to the CSC. The benefits of joining the CSC are two-fold. It will make India eligible for grant of excess funds to cope with any nuclear disaster and it will establish that the national legislation of India is in conformity with the broad international principles. This will enable India to move forward with agreements with various countries, for example, the Indo-French Agreement. For this, the other parties to the convention do not have to object to the ratification by India. The US has been very keen on India joining the CSC and has voiced concerns that the CLNDA may not be consistent with international principles[69]; but the Indian government in a press release by MoEA has said that the CLNDA is in 'broad conformity' with the CSC and that India will be ratifying the CSC in the near future[70]. The ICJ had stated in its advisory opinion that:

> "a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention." [71]

It remains to be seen whether after ratification of the CSC, the US

[68] The Fukushima Nuclear Accident Independent Investigation Commission, The National Diet of Japan, *The official report of The Fukushima Nuclear Accident Independent Investigation Commission, 2012,* available at https://www.nirs.org/fukushima /naiic_repo rt.pdf, last seen on 17/03/2014.

[69] R. Einhorn & W.P.S. Sidhu, *Operationalizing U.S.-India Civil Nucl5ar Cooperation*, Brookings.edu, available at http://brookings.in/wp-content/uploads/2015/01/ Einhorn-Sidhu-Civil-Nuclear-Cooperation.pdf, last seen 2/03/2015.

[70] Ministry of External Affairs, Government of India, *Frequently Asked Questions and Answers on Civil Liability for Nuclear Damage Act 2010 and related issues,* available at http://www.mea.gov.in/pressreleases.htm?dtl/24766/Frequently_Asked_Questions _and_Answers_on_Civil_Liability_for_Nuclear_Damage_Act_2010_and_related_iss ues, last seen on 29/06/2015.

[71] Advisory Opinion: I.C. J. Reports, *Reservations to the Convention on Genocide*, 15 (1951).

relents with its objections to the CLNDA and lets India become a party to the convention.

4.2. Other Countries with Provisions for Supplier Liability and the Status of their Commercial Nuclear Trade

Much of the debate on CLNDA's inconsistency with international principles stems from a few provisions, most controversial of them being the provisions connected with supplier's liability[72]. It must be kept in perspective, that other countries already have domestic laws in place that do not comply completely with international conventions with respect to channeling all the liability only to the operator, or have simply not ratified the same.

Section 5 of the Japanese "Act on Compensation for Nuclear Damage"[73] states

> "Where nuclear damage is covered by Section 3 and if the damage is caused by the wilful act of a third party, the nuclear operator who has compensated the damage pursuant to Section 3 shall retain a right of recourse against such third party. The provisions of the preceding paragraph shall not prevent a nuclear operator from entering into a special agreement with any person regarding rights of recourse."

In South Korea, Article 4 of the "Act on Compensation for Nuclear Damage"[74] has the following:

> "1. Where nuclear damage is caused by the wilful act or gross negligence of a third party, a nuclear operator who has provided compensation for nuclear damage in accordance with Article 3 shall have a right of recourse against such third party, provided however, that where the nuclear damage occurs due to the supply of material or services (including labour) for the operation of a nuclear reactor (hereinafter referred to as "supply of material"), the nuclear operator shall have a right of recourse only insofar as there has been a willful act or gross negligence by the supplier of the materials concerned or by his employees."

S. 17, being termed contrary to CSC, is by itself no barrier for foreign

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[72] S. 17 & 46, The Civil Liability for Nuclear Damages Act, 2010.

[73] S. 5, Act on Compensation for Nuclear Damage 1961, (Japan).

[74] A. 4, Act on Compensation for Nuclear Damage 1969, (Republic of Korea).

companies willing to supply nuclear technology to invest in India. South Korea, for example, has suppliers from the private sectors of countries like Canada, France, and US etc. supplying nuclear items despite the domestic laws being unduly "scared away" by the operator's right of recourse against the supplier, unless, of course, the suppliers have special pre-signed contractual agreements regarding the right of recourse[75].

On the advent of the visit of President Barack Obama to India, both countries claimed to have broken a major deadlock concerning the supplier liability due to which many nuclear companies were having apprehensions of investing in India, by declaring the creation of The India Nuclear Insurance Pool. This is a risk transfer mechanism formed by the General Insurance Corporation of India and 4 other PSUs who will together contribute a capacity of Rs 750 crores out of a total of Rs 1500 crores. The balance capacity will be contributed by the Government on a tapering basis. The pool will cover the risks of the liability of the nuclear operator under S. 6(2) of the CLNDA and of the suppliers u/s 17 of the Act. The Pool envisages three types of policies including a special suppliers' contingency policy for suppliers other than turn key suppliers[76]. As a result of the insurance pool, compensation to the tune of 300 million SDRs or 2610 crores can be paid which is much more than what most countries offer as compensation.[77] The formation of the insurance pool is similar to that provided by the British government to its operators[78] and negates the need of the operator to take recourse from the supplier by providing for a type of economic channelling. Besides this, what also needs to be taken into account is the fact that the right of recourse is not mandatory. So in all cases, the operator can forego the right of recourse with a supplier in the contractual stages itself. Since out of the 2610 crores, 750 crores will come from the state on a tapering basis, the requirement of an

[75] Supra 14, at 18.

[76] Supra 71, at Answer to Question 14.

[77] Only 4 other countries out of 28 NPP offer higher compensation than 300 million SDRs.

[78] In UK the Nuclear Risk Insurers Ltd (NRI) is a Financial Services Authority (FSA) authorised intermediary that acts as the UK insurance market's underwriting agent for all matters of nuclear insurance. It operates as a limited company and has a membership consisting of over 20 leading UK market property & casualty insurers from both Lloyd's and the general market, who pool their insurance capacity for nuclear risks into NRI; it is therefore commonly known as the British nuclear insurance pool.

installation state to compensate victims is also fulfilled, very much in line with the principles enshrined in the CSC. An appraisal of the provisions relating to limit on liability and limitation period for bringing claims[79] in the CLNDA reveals that the provisions are more or less within the internationally accepted norms of liability.

4.3. The Middle Ground and the Indian Governments Approach to Solving the Issue

The wording in S. 46 of CLNDA is similar to the wording in other laws that have liability as an issue in them, such as the Telecom Regulatory Authority Act, Electricity Act, Securities and Exchange Board of India Act, Insurance Commission Act. The entire point of such wording is that it makes sure that other relevant laws continue to be applicable in their respective domains, to ensure that the most efficacious remedy is available to the aggrieved. On the issue of S. 46 conferring a very wide right upon litigants to sue suppliers also, the Indian Government in a FAQ released through the MoEA has made it very clear that the provisions of S.46 will not be used to hold suppliers liable in conjunction with S.17 nor will it be used to grant jurisdiction to the foreign courts over the issue.

The major challenge faced by the Indian side was to strike a just and equitable balance where domestic misgivings are placated and international conventions are followed. The successful completion of the nuclear reactors is, without doubt, in India's interests. It remains to be seen, if the foreign suppliers, who contend that they are immune from liability by most of the International Conventions in place, are sufficiently assured by India's willingness to start an insurance pool, and also sign the CSC which will further indemnify India's citizens from a nuclear disaster. The Indian side also sees the addition of this clause as a way to ensure that the designing and manufacturing of the reactor is done as per international standards.

However, attention must be given to the fact that the Indian Government under the UPA regime itself has passed the Civil Liability for Nuclear Damage Rules, 2011[80] which was nothing but a clever

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[79] S. 18, The Civil Liability for Nuclear Damage (CLND) Act, 2010.

[80] Department of Atomic Energy, Government of India, *CLNDA Rules,* available at http://www.prsindia.org/uploads/media/Nuclear%20Rules/Civil%20Liability%20for%20Nuclear%20Damage%20Rules%202011.pdf, last seen on 01/06/2015.

sleight of hand by the authorities concerned with the primary aim of diluting the supplier liability legislation imposed by the CLNDA. The devil is in the detail, and one must carefully analyse the contents of Chapter V of the rules, which explains the operator's Right of Recourse under Clause 17(a) of the Act. *Firstly*, Rule 24(1) binds the amount of compensation which the operator can seek from the supplier through right of recourse under Clause 17(a) of the Act. Since the maximum liability of the operator is Rs. 1,500 crores as per the Act, Rule 24(1) states that the right of recourse from the supplier in no case can be more than that amount, whatever is the contract value. But, if the contract value is lower than that, the right of recourse from the supplier will be capped at the contract value. In any case, certainly Rule 24(1) appears to preclude the operator from seeking any 'consequential damages' from the supplier under Section 17(a) of the Act to compensate for the larger damage the supplies could have caused to the public and the environment.

The legal intent of the Act was to provide three separate and stand-alone sub-clauses, viz S. 17 Clause (a), S. 17 Clause (b), and S. 17 Clause (c). As per the Act, S. 17(b) reads:

> "The operator… shall have the right of recourse where the nuclear incident has resulted as a consequence of an act of the supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services."

But now if we compare clause with S. 17(a), as elaborated through Rules 24(2) and 24(2)(a), it can be seen that both S. 17(a) and S. 17(b) now deal with the identical shortcoming of 'supply of equipment or material with patent or latent defects or sub-standard services.' Except that, u/s 17(a) and the associated contract between the operator and supplier, the quantum and time validity of the supplier's liability towards the operator under right of recourse is well-defined and bounded whereas for the same default of the supplier, S. 17(b) of the Act allows recourse without specifying any limits on time period or amount.

If an accident occurs within the applicable time limit as per the contract mentioned in S. 17(a), the operator can argue for recourse u/s 17(a), for the quantum of compensation as per the contract. But if an accident occurs as a result of the supply, beyond the period of validity mutually agreed in the contract, S. 17(a) will not help in seeking right of recourse as it will be time-barred through limitation in the contract. It must be

remembered here that nuclear power plants generally have a long shelf life. Then, S. 17(b) cannot be resorted to because the supplier will argue that for the very same deficiency or default, he has a contract with the operator whose time validity has already expired. In effect, one finds that through a clever manipulation of rules framed u/s 17(a), the government has succeeded in linking Clauses 17(a) and 17(b) of the Act in contravention of the legal intent of the Parliament that they should be independent of each other, and shall be applicable separately. The serious consequence of this linkage is that the provisions for recourse from the supplier given in the contract under Section 17(a) and its rules will prevail at all times, thus nullifying the provisions of Clause 17(b)[81].

Although this legislation was enacted by the UPA Government in order to circumvent the opposition at the time, by giving a different interpretation of clause 17(b), it has not yet been nullified by the present NDA-led government also whose primary aim at the moment is to get as much corporate wealth and foreign business into India as possible. Even the current government hopes to ensure that as a result of this, the CLNDA becomes more palatable to the foreign entities concerned and they do not see the Indian nuclear market to be a hostile one. Both the CLNDA and the CSC make it abundantly clear that the RoR should be expressly provided for in a written contract. As the primary instrument to determine the framework for transactions between the operator and supplier, the contract could be suitably drafted in a manner that satisfies both parties while being consistent with the principles of various laws. In other words, the time and resource limits to the supplier's liability, actual conditions under which RoR will be invoked and other functional pre-requisites could be incorporated into the contract to mutual satisfaction. In fact, the CLNDA does not carry any provision to restrict such flexibility in drafting contracts. Furthermore, some jurists have opined that S. 17(a) allows the operator to decide whether RoR provision should be incorporated in a particular contract or not[82].

It shall be imperative to instil some collaborative ethos to redress the lingering mistrust over the operator-supplier relationship. Contrary to

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[81] Dr. A Gopalakrishnan, *Why the Nuclear Liabilities Rule Must be amended,* DNA (05/12/11), available at http://www.dnaindia.com/analysis/comment-why-the-nuclear-liability-rules-need-to-be-modified-1621411, last seen on 02/06/2015.

[82] S. Dikshit & J. Venkatesan, *Manmohan may carry Nuclear Liability dilution as gift for US Companies*, The Hindu (19/09/2013), available at http://www.thehindu.com/news/national/manmohan-may-carry-nuclear-liability-dilution-as-gift-for-us-companies/article5142882.ece, last seen on 29/06/2015.

the spirit of nuclear cooperation envisaged between India and other supplier countries, the ongoing contractual engagements seem to have given little space for collaborative structures, like a joint assessment mechanism for quality assurance or for early detection of product or design defects. These difficulties can be overcome by some flexibility on the part of both the parties. The supplier should by all means be obligated to provide for safety and quality guarantees for the reactor or equipment for a particular period (product liability/guarantee period), ideally concurrent with the contractual timeline or license period, whichever suits both the parties. Similarly, the operator could certify its confidence on the quality of equipment for a particular timeline with the contractual qualification that such certification may not mitigate its RoR if an act with intent to cause damage is proven in the event of a nuclear accident. Neither the CSC nor CLNDA forbids the scope of any such joint mechanisms which could go a long way in building a durable operator-supplier relationship[83].

There is no compulsion for any nation to be a part of any international nuclear liability conventions as they will always be able to have bilateral agreements with various countries pertaining to civil nuclear trade. However, the nature of our present agreements with various countries and India being a developing nation can ill-afford not to be a part of any international convention. The Indian government believes, especially after the Obama-Modi meet that they have made all the efforts that they possibly could and it is up to the foreign suppliers now to guage the business scenario and make a foray into the Indian civil nuclear market. On Feb 8th 2015, the MoEA stated:

> "During the course of the discussions in the Contact Group, using case law and legislative history, the Indian side presented its position concerning the compatibility of the CLNDA and the Convention on Supplementary Compensation for Nuclear Damage (CSC). The idea of the India Nuclear Insurance Pool as a part of the overall risk-management scheme for liability was also presented to the U.S. side. The CLND Act is compliant with the Annex to the CSC."[84]

It must be realised that not all the circuitous routes, the government has

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[83] V, Kumar & K. Patel, *Resolving India's Nuclear Liability Impasse,* ISDA Issue Brief, 2014, available at http://www.idsa.in/issuebrief/ResolvingIndiasNuclearLiabilityImpasse_kumarpatil_061214.html, last seen on 01/06/2015.

[84] Supra 71, Answers to Questions 4 and 6.

taken, may stand legal scrutiny; and the constitutional validity of the rules itself may come under challenge as the Supreme Court has held that:

> "in the absence of a specific warrant, delegated legislation (rules) cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself".[85]

Rule 24 clearly specifies a substantive limitation that operates as a disability on operators seeking to claim recourse, and that such a limitation is not contemplated by the Act. On the contrary, the Act specifically omits to mention any limitations whatsoever regarding the exercise of the right of recourse despite several proposals to this effect having been suggested. Only time and the prevailing business atmosphere will tell how the companies choose to sway within the Indian nuclear industry. Notwithstanding the fervent criticism from various quarters, the Indian law has emerged as an appropriate template that could rekindle the nuclear energy sector while also safeguarding the public interest. Post-Fukushima, many countries, including Japan[86], are now coming around to appreciate the Indian law, its innate ethos of public interest and its spirit of promoting a culture of safe nuclear energy. Tokyo University Professor, Eri Osaka, in his article argues how, despite Japan being a member of the CSC[87]and the fact that under Japanese law, a nuclear operator bears strict channelling and unlimited liability for nuclear damage, even the Tokyo Electric Power Company must compensate any damage if the nuclear accident is the consequence of their actions. The professor also says that General Electric, the designer of the reactors at the plant, shall also be liable for the nuclear damage under US law, assuming the reactors had any weaknesses in their design[88]. We must also accrue the benefit that the Japanese got

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[85] Kunj Bihari Butail v. State of Himachal Pradesh, AIR 2000 SC 1069.

[86] S. Dixit, *Japan may amend its nuclear damage compensation act,* The Hindu (05/03/2015), available at http://www.thehindu.com/sci-tech/energy-and-environment/japan-may-amend-its-nuclear-damage-compensation-act/article4476106.ece, last seen on 29/06/2015.

[87] A. Dixit, *Japan Joins the Convention on Supplementary Compensation for Nuclear Damage,* International Atomic Energy Agency, available at https://www.iaea.org/newsCenter/news/japan-joins-convention-supplementary-compensation-nuclear-damage, last seen on 01/06/2015.

[88] E. Osaka, *Corporate Liability, government liability, and the Fukushima Nuclear Disaster,* 21 Pacific Rim Law and Policy Journal 433, 452 (2012), available at https://digital.law

while ratifying their CSC as our liability legislation is more or less an import of theirs and our situation can be deemed to be similar to theirs.

All the provisions of the CLNDA can now be defended as being compliant with the annex to the CSC. The ratification to the CSC is the most appropriate way for the Indian government to get huge amount of funds from the International community in order to cope with any nuclear disaster. The forming of the National Insurance Pool, which has funds to the tune of 300 million SDRs, now insures the operators as well as the suppliers and ensures that the suppliers are protected from liability in the form of economic channelling of liability much similar to the insurance pool protecting the suppliers as under the Price-Anderson Act. Also it must be taken into account that there are countries like South Korea and Japan which are doing business with countries such as Canada and USA despite having supplier liability clauses in their domestic legislations. The Indian Government's stand on s.46 has been quite clear, especially after the MoEA press release, and it is merely a non-obstante clause in the legislation and cannot be invoked to grant jurisdiction to the foreign courts over the issue, nor can it be used in conjunction with S. 17 to hold the suppliers liable. The BJP government, being the major proponent of holding suppliers liable, is unlikely to dilute the provisions of the legislation to any extent. It must now play the role of a soothsayer and allay the fears of the foreign suppliers and itself, must make a move to ratify the CSC. When India does ratify the CSC in the near future, it can be rest assured that the US will find no reason to object as the Indian administration has taken various steps over the course of the last 4 years to harmonise the CLNDA's provisions with the accepted international legal principles governing nuclear liability. The same old legislation, coupled with various new mechanisms, clarifications and undertakings from the Indian side will sail through the ratification process unhindered and the CLNDA can be only deemed complaint with the annex to the CSC and not otherwise. Once India ratifies the CSC, it can move forward with the agreements it has signed with the French side too since the Indian piece of legislation will now be compliant with clause 2 of Article VIII of the Indo-French agreement which states that "each party shall create a civil nuclear liability regime based upon established international principles". If all things go as the Indian government has planned, we may have our first commercial agreement signed for the first time in six years since inking major agreements with 3 different countries, ushering in an era of nuclear power for prosperity.

.washington.edu/dspace-law/bitstream/handle/1773.1/1161/21PRPLJ433.pdf?sequence=1, last seen on 01/06/2015.

A SUMMARY OF THE ARGUMENTS SUPPORTING AND OPPOSING THE DECLARATION OF INDIA AS A PRIORITY FOREIGN COUNTRY

- Ashley Cohen and Emily Rezendes*

ABSTRACT

In 2005, India enacted patent reform legislation that has sparked controversy in the pharmaceutical industry worldwide.[1] *Among other things, India's patent reform requires patent holders to make measurable changes with regard to the efficacy of pharmaceuticals before they can obtain a secondary patent on a previously patented product and establishes standards for compulsory licensing in cases where patented products are not being worked on in India. These provisions have been decried by the multinational pharmaceutical industry as destructive to innovation and unreasonably burdensome. In response to these and other concerns, the United States International Trade Commission (USITC) is investigating India's alleged protectionism.*[2] *This article aims to analyze the industry's Special 301 submissions and nearly identical submissions to the USITC on the issue of whether or not India should be listed as a Priority Foreign Country due to its intellectual property policies. The following article is structured as a complete argument for and a complete argument against India's designation as a Priority Foreign Country. As similar debates will continue in the future, this article hopes to provide a holistic view of the arguments for and against pharmaceutical patent reform, and to accurately represent the views of each side in a neutral fashion.*

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[1] India Amended Patents Act, 2005, available at http://ipindia.nic.in/ipr/patent/patent_2005.pdf.

[2] News Release, India's Trade, Investment and Industrial Policies will be focus of new USITC Investigation (Aug. 29, 2013), available at http://www.usitc.gov/press_room/news_release/2013/er0829ll1.htm.

1. INTRODUCTION

In 2005, India enacted patent reform legislation that has sparked controversy in the pharmaceutical industry worldwide.[3] Among other things, India's patent reform requires patent holders to make measurable changes with regard to the efficacy of pharmaceuticals before they can obtain a secondary patent on a previously patented product and establishes standards for compulsory licensing in cases where patented products are not being worked on in India. These provisions have been decried by the multinational pharmaceutical industry as destructive to innovation and unreasonably burdensome. In response to these and other concerns, the United States International Trade Commission (USITC) is investigating India's alleged protectionism.[4] In addition during its annual Special 301 Trade List review process, the Office of the United States Trade Representative (USTR) received multiple submissions from pharmaceutical companies and other interested parties on the subject of whether or not India should be listed as a Priority Foreign Country on due to its intellectual property policies.

On April 30, 2014, the USTR determined that India would not be designated a priority foreign country, but would remain on the Priority Watch List.[5] The USTR issued a report which simultaneously acknowledges the positive steps that India has taken in intellectual property reform and improving its legal and administrative framework but cautioned that the United States is wary of the challenges that rights holders face under India's weak IP regime. The Special 301 Report specifically cites India's plans to hire 500 new patent examiners over the next five years as a positive step to be congratulated, while expressing concerns about India's strict standards of patentability, including its enhanced efficacy requirement; its issuance of compulsory licenses, based in part on failure to work the patent locally; and need for greater administrative transparency. Overall, the USTR expressed concern about India patent and data protection policies, but did not appear to be convinced by the arguments of major pharmaceutical companies. As such, India remains a Priority Watch List country but was not elevated to Priority Foreign Country status.

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[3] The Patents (Amendment) Act, 2005.

[4] News Release, *India's Trade, Investment and Industrial Policies will be focus of new USITC Investigation* (29/08/2013), available at http://www.usitc.gov/press_room/news_release/2013/er0829ll1.htm.

[5] 2014 Special 301 Report 37-43, available at http://www.ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf.

Especially, because India remains on this list, these arguments continue to be relevant to patent law and international intellectual property policy. It is important to recognize that the pharmaceutical industry will continue to argue against patent reform, whether originating in India or any other country that might adopt similar (or more progressive) standards in the future. This memorandum aims to analyze industry's Special 301 submissions and nearly identical submissions to the USITC on the issue of whether or not India should be listed as a Priority Foreign Country due to its intellectual property policies. The following article is structured as a complete argument for and a complete argument against India's designation as a Priority Foreign Country. As similar debateswill continue in the future, this article hopes to provide a holistic view of the arguments for and against pharmaceutical patent reform, and to accurately represent the views of each side in a neutral fashion.

2. SUPPORTING ARGUMENTS

2.1. Whether Section 3 (d) of the Indian Patents Act violated the TRIPS Agreement?

Section 3(d) of the India Patents Act[6] violates the TRIPS Agreement Article 27.1 by discriminating against a particular field of technology and by creating an impermissible fourth criterion for patent protection. TRIPS Agreement Article 27.1 clearly states:

> "Subject to the provisions of paragraphs 2 and 3, 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. (5) Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced [emphases added]."[7]

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[6] Supra 1, at S. 3(d).

[7] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27.1, at 1 (15/04/1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

Section 3(d) requires a showing of "enhanced efficiency," a condition, which has been applied thus far only to pharmaceuticals, thus discriminating against a particular field of technology.[8] TRIPS Article 27 requires that patents be available to "any inventions...in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application" and further requires that patent rights be "enjoyable without discrimination as to … the field of technology … ." Thus, by excluding patentability of pharmaceutical substances without an additional showing of enhanced efficacy, Section 3(d) creates an additional, discriminatory element with respect to a particular field of technology in violation if Article 27.[9] This extra step India created is undeniably destructive, and has resulted in the denial of patents for an anticancer therapy, Glivec, that have already been approved in 40 other countries.[10]

Not only is Section 3(d) discriminatory with respect to the pharmaceutical field of technology, it also impermissibly introduces a fourth element of patentability beyond the globally harmonized patentability criteria establish by Article 27.1, novelty, inventive step, and industrial applicability. Section 3(d) is contained in Chapter 2 of the Indian Patents Act, which addresses inventions that are not patentable. Section 3 contains exemptions from patentability authorized by TRIPS Article 27.2 and 27.3, but it adds other exclusions, including subsection (d) that is not authorized by TRIPS. Although there are some apparent flexibility in TRIPS to exclude subject matter not include in Article 27, e.g., abstract ideas, business methods, and computer software, there is not a *carte blanche* to adopt exclusions that undercut the patentability criteria of Article 27.1.

This "extra step" has also made it difficult to bring innovation into India's market. Pharmaceutical companies do not want to bring new investments into countries that abuse patent protection in violation of

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8 US International Trade Commission, Statement of Rod Hunter, PhRMA, Special 301 Submission (2014), available at http://www.regulations.gov/!docketBrowser;rpp=25;po=0;dct=N%252BFR%252BPR%252BPS;D=USTR-2013-0040.

9 BIO Special 301 Submission (2014), available at http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=N%252BFR%252BPR%252BPS;D=USTR-2013-0040.

10 National Association of Manufactures, Linda M. Dempsey (07/02/2014), Special 301 Submission (2014), available at http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=N%252BFR%252BPR%252BPS;D=USTR-2013-0040.

their obligations under TRIPS.[11] The resulting lack of confidence has directly impacted India's foreign direct investment.[12] India's direct foreign investment went from $35.1 billion in 2011-2012 to $22.4 billion in 2013 once the challenged uses of Section 3(d) were applied.[13] Weakening intellectual property rights will cause innovators, especially individual inventors, and small to medium sized companies, to be unwilling to invest.[14] Larger players will make capital allocation decisions that favor countries with stable intellectual property environments.[15] India's failure to apply fair and equitable market access as well as its discriminatory measures will continue to weaken foreign investment in India.

If innovators will have less incentive to invest, there will be a decline in producing new life saving drugs. Article 27 of TRIPS requires patents to be made available for any non-excludable invention and yet Section 3(d) creates extra hurdles that are detrimental to U.S. businesses and the U.S. economy.

2.2. Whether India's Local Working requirement as well as its Compulsory Licensing requirement violates the TRIPS Agreement?

India's local working requirement is a clear violation of TRIPS Article 27.1, which requires "patent rights to be enjoyable without

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11 Memorandum from the Biotechnology Industry Organization, Vice Pres. Joseph Damond, Special 301 Submission (2014), available at http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=N%252BFR%252BPR%252BPS;D=USTR-2013-0040, last seen on 26/07/2015.

12 SeeMemorandum U.S. Chamber's Global Intellectual Property Center, Special 301 Submission (2014), available at http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=N%252BFR%252BPR%252BPS;D=USTR-2013-0040, *citing* a recent study by the Organization of Economic Co-operation and Development (OECD) concludes that a 1 percent change in the strength of the national IP environment, based on a statistical index, is associated with a 2.8 percent increase in foreign direct investment flow.

13 Ben Wolfgang, *U.S. drug industry upset with Indian policies on patents*," Washington Times (26/09/2013), available at http://www.washingtontimes.com/news/2013/sep/26/us-drug-industry-upset-with-intian-policies-on-pat/, last seen on 26/07/2015.

14 Notice of Intent to Testify and Hearing Statement of the IPO, Intellectual Property Owners Ass.Herbert C. Wamsley, Intellectual Property Owners Assoc. 1 (24/02/2014), Special 301 Submission (2014), available at http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=N%252BFR%252BPR%252BPS;D=USTR-2013-0040, last seen on 26/07/2015.

15 Ibid, at 2.

discrimination as to the place of invention, the field of technology and whether products are imported or locally produced [emphasis added]."[16] India's Patents Act §84(1)(c) allows The Controller General of Patents, Designs and Trade Marks, to grant a compulsory license on the ground that the patented invention is not worked in the territory of India.[17] An example of this blatant injustice came when the Indian generic pharmaceutical company NatcoPharma was granted a compulsory license on Bayer's Sorafenib, a treatment for liver and kidney cancer. The Controller General found that the license was justified on three grounds; reasonable requirements of the public are not met, the invention is not available to the public, and the invention was not "worked" in India.[18] While all three grounds are legally questionable, the pharmaceutical companies object especially to the domestic production requirement, which is a violation of Article 3 and Article 27 of the TRIPS Agreement. Article 3, confirming national treatment, states, "Each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection." Therefore, imposing a local working requirement on patent holders is treating the foreign patent holders less favorably than domestic patent holders because foreign patent holders are less likely to site their production facilities in India rather than their home country. This indirect favoring of domestic or foreign patent holders is in direct violation of Article 3. Similarly, as previously stated, Article 27, by its express terms prohibits discrimination against imported patented products in favor of domestically produced patented products.

This local production requirement not only violates TRIPS, but its implementation is also infeasible and fraught with procedural and substantive challenges. India's new National Manufacturing Policy requires patent holders to complete a "Form 27," an explanation of how each patent is being worked on in India. This form is complicated and burdensome, and there is a concern that the information provided can be used to justify compulsory licenses.[19] Furthermore, there is confusion with Form 27 as most of the questions are not answerable except in a one-patent-one-product context.[20] Most companies have many patents comprising a single product. Since one or more patents comprising a product may be worked in India without every single patent being

[16] Supra 9.
[17] Supra 1, at S. 84(1).
[18] Ibid, at S. 84(1)(c).
[19] Supra 10.
[20] Ibid.

worked there, patent holders may meet India's policy goals without complying with the law with respect to each and every component. The Form 27, however, is impractical and allows India to take advantage of companies who comply with domestic production policy for components to create compulsory licenses for final products where no real policy justification exists.

India's overbroad compulsory licensing, provided for in India Patents Act § 84, poses a clear risk not only to the U.S. pharmaceutical industry but also to advanced manufacturing, industrial and other innovative U.S. businesses as well.[21] For example, in its National Manufacturing Policy, India encourages compulsory licensing of green technology that is "not available at reasonable rates". [22] This policy promotes India's own domestic industries at the expense of patent holders in the United States and elsewhere and is a clear violation of TRIPS Article 3.

2.3. Whether Strict Patent Protection is Beneficial to Developing Countries?

India's lack of consistent adherence to patent rules as well as its unnecessarily burdensome patent applications has exacerbated a bad situation by disproportionally punishing U.S. and other foreign companies' patents.[23] In May 2013, Indian President Pranab Mukherjee pointed out that the U.S and China receive 12 times more patent applications than India.[24]This is not surprising when India time and time again refuses to adhere to standard intellectual property practice.

If India had stronger intellectual property protection, it would improve the country's long-term economic growth. IP-intensive industries contribute to a more sustainable economy. In fact, in the United States the IP-intensive industries contributed nearly 35 percent of U.S. GDP in 2010, or over $1.5 trillion in economic output.[25] As much as 40 percent

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[21] Ibid, 60.

[22] Supra 8, at 3.

[23] Supra 7, 8.

[24] Speech by the President of India, Shri Pranab Mukherjee on the Occasion of the National Technology Day (01/05/2013), available at http://presidentofindia.gov.in /sp110513.html, last seen on 30/01/2014.

[25] Intellectual Property and the U.S. Economy: Industries in Focus, U.S. Department of Commerce (01/03/2012), available at http://www.esa.doc.gov/sites/default/files /reports/documents/ipandtheuseconomyindustriesinfocus.pdf, last seen on 30/01/ 2014.

of U.S. growth in the twentieth century was a result of IP-related innovation.[26] Pharmaceutical companies are important for the growth of any developing country. They provide high-paying, productive jobs. In the United States, pharmaceutical industry employment in 2011 totaled 3.4 million jobs, including direct employment of over 810,000 Americans.[27]The U.S. innovative biopharmaceutical industry exported over $50 billion in biopharmaceuticals in 2012.[28] Patents and other IP protections are critical in securing investment and helping India's economy grow. India should model the U.S. industry in order to improve its economy.[29]

Moreover, as the Biotechnology Industry Organization points out in its brief, some of the most damaging policies India has adopted are that of issuing marketing approvals for generic companies while patents are being challenged and during appeal processes:

> "India's drug regulatory agency approves generic company applications to market generic drugs if a patent is being challenged. Accordingly, a generic company needs only challenge a patent to apply for marketing approval. This loophole creates an unfair advantage for Indian generic companies and undermines U.S. IPR."[30]

Once the generic companies begin producing the drugs, innovators find it difficult to stop the Indian generic companies from exporting into countries with proper patent protection.[31] India allows companies who have these kinds of licenses to produce and export outside of India without the patent holder's permission. This policy further underscores India's disregard for standard intellectual property practices. It should adopt a pathway consistent with U.S. law necessary for Indian

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[26] See E.F. Denison, *The Sources of Economic Growth in the United Sates and the Alternatives before us,* Committee for Economic Develops, Supplementary 13 (1962); R.M. Solow, *Technological Change and the Aggregate Production Function*, Review of Economics and Statistics 39(3)312-23 (1957); R.M. Solow,*A Contribution to the Theory of Economic Growth*, Quarterly Journal of Economics 70:65-94 (1956).

[27] Hearing of Statement of Pharmaceutical Research and Manufacturers of America (PhRMA) (24/02/2014), available at http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=N%252BFR%252BPR%252BPS;D=USTR-2013-0040.

[28] Ibid.

[29] Supra 7, at 11.

[30] Ibid, at 12.

[31] Ibid.

manufacturers providing a linkage between patent rights and registration/ marketing approval.

2.4. Reasons for Opposing India's Patent Law and its Impact

India is spearheading an anti-IP or IP-weakening regime on the international stage. The country is violating the spirit of TRIPS by denying patent protection to some innovators whose applications have been accepted in other countries. Any weakening of intellectual property rights is inherently against the spirit of TRIPS and it is the United States' duty to ensure that no other nation weakens IP rights, as it will be detrimental to the international economy and to the innovation of life-saving medicine.

"India's weak IPR policies will serve as a model for other emerging economies. Some countries have already started to follow India's lead by proposing changes to their own national laws."[32] This shows that India is undermining patent law all over the world by leading others to embrace its own detrimental policy choices. Since 2012, India has infringed, overridden, or revoked nearly a dozen pharmaceutical patents held by foreign firms.[33] India is denying patent protection for inventions that have met internationally accepted criteria.[34]

As stated previously, India's failure to develop and adhere to conventional international practices in intellectual property law has especially hindered its economic development this past year. A growing lack of confidence by foreign investors has impacted investment in India.[35] This will directly impact innovation. No investor will invest in India with the added risk posed by India's reckless new IP regime. Furthermore, India is influencing other countries, such as South Africa, Brazil, and even China, to adopt its weak intellectual property model. Having an "enhanced efficiency" standard coupled with the broad compulsory licensing scheme under Section 84 poses a clear threat not only to the U.S. pharmaceutical industry but to advanced manufacturing, industrial and other innovative U.S. and foreign businesses [36] Any decrease in IP holder rights will disincentive innovation, perhaps to the

[32] Supra 8.
[33] Supra 10, at 60.
[34] Supra 8.
[35] Supra 10, at 54.
[36] Ibid, at 60; SeeNational Association of Manufactures; Supra 8.

point of halting it altogether; the mere discussion in international fora of weakening IP rights serves to scare off investors and stifle innovation.

Innovators are further frustrated by the fact that India's patent office is not properly run. Companies have reported delays in post-grant opposition proceedings, and one company reported waiting almost a year for a decision.[37] "The existence of both pre- and post-grant opposition proceeding creates problems as U.S. company will survive a pre-grant opposition proceeding and have the patent granted only to face post-grant proceeding from the same opponent."[38] The Indian generic industry uses this process to purposefully delay the grant of foreign patents in order to justify the production of generic copies.[39]

The patent application process itself hampers efficient filing, especially for non-Indian entities that have joint inventions with Indian residents and institutions. India should consider accepting a first-filing regime in the country where the research or product development is conducted for joint inventions or in the country where the patent applicant is located.[40] India's Patents Act makes it more difficult for foreign companies to file and have their patents granted, which violates the spirit of the TRIPS Agreement.[41]

Although India claims that its policies improve access to medicine, its policies are not really about access to medicine. In many cases, patent holders were giving their drugs to Indian consumers either free of charge or at greatly reduced prices. In fact, Novartis provided the controversial Glivec to 95 percent of the 16,000 Indian patients for free and to the remaining five percent at a heavily subsidized rate.[42] The new generic rates are higher than the subsidized rate, and surely no price can be more accessible than free. Thus, it is more expensive for Indian patients to access these medicines after the compulsory license, contrary to the policy India is claiming to enforce.

[37] Supra 7, at 9.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] See TRIPS, Supra 5, at art. 27.1.
[42] Supra 10, at 58.

2.5. Remarks

Over the past several years India has not only failed to address growing concerns regarding its new intellectual property system but continues to willfully violate TRIPS and take advantage of U.S. and foreign businesses and patents. India's actions are not about access to medicine, but are designed to serve its own economy through its unauthorized fourth patentability standard – enhanced efficacy – and through its impermissible local working provision. India's patent regime is a threat to the innovators who strengthen the U.S. economy. India has already pledged to take a leadership role amongst the BRICS IP Offices to spread the influence of their IP-destructive policy.[43] The simple reality is that, over the past months, India's actions are egregious and belligerent. At this point in time, simply placing India on a Priority Watch List is not a sufficient deterrent. India should be elevated to a Priority Foreign Country to send a strong message that the United States and other TRIPS-compliant nations will not stand idly by as India continues on its path of destroying intellectual property rights.

3. COUNTER ARGUMENTS

3.1. Whether India's Patent Act is in Compliance with the TRIPS Agreement with Particular Reference to Innovations?

Opponents of patent reform in the pharmaceutical industry have targeted § 3(d) of the India Patents Act, arguing that it violates international law under the TRIPS Agreement (Article 27.1 and generally) by discriminating against certain types of inventions and by imposing an impermissible fourth criteria for patent protection, and that it will discourage bio-pharmaceutical innovation. These claims are false. Section 3(d) is fully compliant with TRIPS, and history has proven that the types of restrictions imposed under § 3(d) of the Patents Act—and, indeed, even more stringent restrictions—have not stifled innovation.

In addressing anti-reformers' complaints about § 3(d), it is instructive to examine the text of the statute. Section 3 excepts certain types of innovations from qualifying as "inventions" within the context of the

[43] Supra 25, at 3.

Patents Act. Subsection (d) is but one of sixteen bullet points under that heading, and provides that:

> "[T]he mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant."[44]

In essence, this requires innovators to create truly new substances in order to qualify for patent protection. The purpose of this is to disincentivize the practice of filing new patents for extant inventions that have only been altered slightly in order to maintain market exclusivity (colloquially referred to as "evergreening"). Patent terms are limited for good reason, and allowing one manufacturer to corner the market on lifesaving drugs prevents those who need them from obtaining treatment at the favorable prices offered by generic products, as well as preventing other innovators from offering versions of the product enhanced by their own research. Section 3(d) gets around these problems by preventing patent holders from obtaining unreasonable periods of patent protection for inventions upon which they have not made sufficient improvements to justify the burden to the public and the market of such extended periods of protection.

Pharmaceutical lobbyists contend that this section violates Article 27.1 of TRIPS by discriminating against a particular field of technology (pharmaceuticals) in providing patent protection. This is simply not the case. Article 27.1 states, in relevant portion, that patents shall be available for any kind of invention within any field of technology as long as they "are new, involve an inventive step, and are capable of industrial application."[45]Section 3(d) does not impact the availability of patents under these criteria – in fact, it holds these criteria to a strict standard by imposing a high standard for "inventive step." It has long been settled that TRIPS member nations have the authority under the Agreement to tailor IP policies to national need, including defining what constitutes an invention, what is not patentable subject matter, as well as what is novel, inventive, and industrially applicable. With this interpretative authority, the policy rationale espoused under § 3(d) constitutes an allowable demarcation of patentable subject matter and exclusions, and is also an

[44] Supra 1, S. 3(d).
[45] Supra 5, art.27.1, at 1.

allowable interpretation of inventive step.[46] Creating more stringent patent requirements and including an exception requiring enhanced therapeutic efficacy for secondary patents is a TRIPS-compliant means of addressing evergreening in a manner suitable for India's national needs, and also falls well within the ambit of what has been allowed in the United States.[47]

Opponents of patent reform further contend that § 3(d) imposes an impermissible "fourth step" or requirement to patent protection. This is categorically untrue, as § 3(d) refers to patents on variations and new uses of known substancesand processes without a new component, not truly novel and inventive ones. Therefore, § 3(d) simply limits the scope of secondary patents, and does not impose an additional requirement on obtaining primary patents. With regard to the argument that § 3(d) is unduly burdensome for innovators who will have to contend with an additional "step" to obtain these secondary patents, TRIPS allows for a wide variety of patent regimes with different levels of stringency among member nations.[48] For example, Japan only allows 14% of the patents allowed by the US.[49] India is well within its TRIPS obligations in making this specific narrowing of its definition of "invention," and has in fact issued thousands of pharmaceutical patents under § 3(d). It should also be noted that the industry does not seem to object to any of the other fifteen subsections under § 3 as imposing unlawful requirements, probably because many of them parallel exclusions from patentable subject matter enforced in the US, Europe, and many other countries.

Finally, pharmaceutical lobbyists argue that § 3(d) will stifle invention within the pharmaceutical field. This is untrue for obvious reasons: humans are unlikely to no longer require pharmaceutical innovation, particularly as the antibodies for old pathogens disappear from new generations and medicines cause current diseases to mutate and become stronger. Consequently, there will always be financial and humanitarian incentive for pharmaceutical innovation. However, this "stifled innovation" claim has also been proven false by history. Before

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[46] Ragavan, Flynn & Baker, *Special 301 Submission* (2014), available at http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=N%252BFR%252BPR%252BPS;D=USTR-2013-0040; Health GAP, *2014 Special 301 Watch List Submission*, available at http://infojustice.org/wp-content/uploads/2014/03/Health-GAP-2014-Special-301-Watch-List-Submission-Health-GAP-final.pdf.

[47] Supra 44, at 4.

[48] Supra 44, at 7.

[49] Supra 44, at 6.

becoming TRIPS compliant, India operated under a process patent-only administration for food and drugs.[50] This regime did not stifle innovation, but instead incentivized innovation in the manufacturing process.[51] In fact, the Indian pharmaceutical industry thrived under the process patent system.[52] This proves that less expansive IP protection does not cause stagnation, but instead incentivizes different styles of innovation. Similarly, then, § 3(d) restrictions will not stifle innovation, but will incentivize targeted innovation in pharmaceutical efficacy and reward focus on truly innovative pharmaceutical compounds. Moreover, as non-governmental third parties, the industry's views about what does and does not incentivize innovation are irrelevant with respect to the lawfulness of India's IP policies. Finally, there is ample evidence challenging anti-reformers' contention that weaker standards of patentability incentivize useful and significant innovation. Excessive patenting and patent thickets can block follow-on innovations and the search for low-hanging incremental changes and me-too medicines rewarded by easy-to-get 20-year patents can deform research away from break-through innovation. For all of these reasons, § 3(d) is fully compliant with international law. The United States should not seek to impose its own will upon the lawful policies of other nations.

3.2. Whether the Local Working and Compulsory Licensing Provisions are Legal and Whether These Provisions are within the Ambit and Scope of the Policy concerned?

The pharmaceutical industry claims that India's local working provision under § 84 of the Patents Ace violates TRIPS Articles 27.1 and 3 as discriminatory against international innovators, and further complain that Form 27 (used to monitor compliance with the local working provision) is unduly burdensome. They also argue that India's compulsory licensing practices under the same section violate TRIPS

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[50] Supra 44, at 3; Adam Mannan and Alan Story, *The Power of Pills: Social, Ethical and Legal Issues in Drug Development, Marketing and Pricing* 184-85 (27th vol., 2006).

[51] Supra 44, at 3; Supra 48, at 184.

[52] "In 1971, there were only two Indian companies in the top ten by pharmaceutical sales in India. By 1996 there were six… Today, India has about 20,000 pharmaceutical firms and employees over two and a half million people directly or in related work. It produces high-quality drugs with prices amongst the lowest in the world. India has become the prime source of generic medicines and supplies over 27 developing nations with desperately needed pharmaceuticals, including generic anti-retroviral drugs at prices that have lowered immensely the price bar for their nationals"; Ibid.

Article 31(h) by failing to ensure that the rights holder of drugs produced under a compulsory license be compensated in accordance with the "economic value of the authorization." Finally, pharmaceutical companies take issue with the policy of registering or granting marketing approvals to patents with pending appeals.

These are weak arguments founded on broad provisions within TRIPS, and premised upon faulty assumptions about the India Patents Act and the discretionary power afforded to TRIPS member nations. The pharmaceutical industry mischaracterizes the local working provision as categorical discrimination in the granting of patents to non-Indian rights holders by alleging that the local working provision violates the TRIPS Articles 27.1 and 3 requirement that patents be available to all innovators regardless of the location of origin or production of the patentable subject matter. This is incorrect. India is fully granting the patents of foreign applicants whether they produce locally or abroad. However, in some, but not all circumstances, where a patent holder does not manufacture locally, although able to do so, the patent holder must explain its decisions. Where the patent holder cannot do so or the market is not being adequately serviced, the absence of local manufacturing can legitimately be grounds for issuing a compulsory license.[53] This is in full accord with international customary law regarding the issue of compulsory licenses, dating back to the earliest patent law practices sanctioned in Article 5 of the Paris Convention.[54] Furthermore, rights holders maintain ownership of their patents and can continue to work them through import or local production despite the issuance of a non-exclusive compulsory license.

With regard to complaints that Form 27 is unduly burdensome due to its basis on a one-patent/one-product model, administrative difficulties with the structure of a form are an insufficient basis to classify India as a Priority Foreign Country, and complicated or ill-suited government forms are hardly uncommon, let alone unlawful. The information sought in the form is perfectly legal given India's legitimate concerns for technology transfer and need to collect information on the degree of

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[53] Doha Declaration (14/11/2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm, at S. 5(2); Supra 44, at 4; Supra 44, at 7-8.

[54] Paris Convention for the Protection of Industrial Property (March 20, 1993; effective July 7, 1884, and amended June 2, 1934 and July 14, 1967), Article 5; Supra 44, at 7.

local manufacture. The fact that the form is not traditional in international practice does not render it unlawful.

If necessary, the form could be amended to address the needs of patent holders with multiple patents on a single medicine: simply adding an invention designation that would allow patents to be indexed with reference to product could suffice. Because India's purpose in gathering the information is lawful under international norms of compulsory licensing, Form 27 hardly warrants the attention of policymakers, and concerns regarding its structure would be better forwarded on to India's Controller General.

The assertion that India has not met the TRIPS Article 31(h) requirement of reasonable remuneration for patent holders in compulsory licensing cases is plainly false, as § 95 of the Patents Act provides that such rights holders will be given reasonable royalties and other remuneration, satisfying the 31(h) requirement.[55] Moreover, in the single license granted to date, the Indian Intellectual Property Appeals Board raised the royalty to 7%, a figure which is fully reasonable in medicines licensing agreements and higher than the rate granted on compulsory licenses in other countries.[56] In addition, many countries have royalty guidelines that would be satisfied by the granted 7% royalty.[57]

The complaint regarding the issuance of compulsory licenses during periods of pending appeal similarly mischaracterize a generous policy as destructive. A pending patent (the only kind of patent subject to appeal) is not a granted patent, so India would be within its rights to allow generic versions of these unpatented products to be sold without any of the guarantees or restitutions available to rights holders under compulsory licensing. By allowing generic versions of such products under a compulsory license regime, then, India is in fact granting the

[55] Supra 1, at S. 95(1)(i) ("In settling the terms and conditions of a license granted under S. 84, the Controller shall endeavor to secure…that the royalty and other remuneration, if any, reserved to the patentee or other person beneficially entitled to the patent, is reasonable, having regard to the nature of the invention, the expenditure incurred by the patentee in making the invention or in developing it and obtaining a patent and keeping it in force and other relevant factors.").

[56] Compulsory licenses granted in Thailand had royalties ranging from .5% to 5%.

[57] James Love, *Remuneration Guidelines for Non-Voluntary Use of a Patent* (WHO & UNDP 2001), available at http://keionline.org/sites/default/files/who_undp_2005_royalty_guidelines.pdf.

patent applicant even greater rights than those to which they are entitled. The pharmaceutical industry's efforts to characterize India's compulsory licensing policy as reckless and underhanded have no leg to stand on.

3.3. Whether strict Patent regime and protection of Patents is considered to be a viable solution?

Opponents of patent reform point to India's 2013 GDP and claim that it has been negatively affected by weakening patent protection, pointing to the United States economy as an example of how strong patent protections drive economic growth and claiming that strong patent protections foster growth in developing nations. Contrary to this assertion, ample evidence exists to show that heightened intellectual property protections are actually bad for many low- and middle-income countries.[58] Stringent IP protections kick away the ladder of imitation that most developed countries use to develop their own technological capacity.[59] Economic and other evidence indicates that IP produces high prices for essential global goods, including medicines, educational resources, climate control and mitigation technologies, and agricultural products, and that access to such global goods is adversely affected in low- and middle-income countries.

Furthermore, holding India to a rigorous standard of IP protection actually undermines United States policy initiatives, such as the U.S. President's Emergency Plan for AIDS Relief and U.S. global AIDS programs, which are dependent for success on continued, robust Indian generic production of AIDS drugs through continued Indian use of WTO-compliant legal flexibilities.[60] Listing India on the 301 Watch List would undermine President Obama's declared priority of creating an "AIDS Free Generation," waste U.S. taxpayer funds, and imperil the PEPFAR program.

3.4. Whether arguments advances by Industrial Players are founded in Law?

Reviewing the briefs submitted by pharmaceutical players, the arguments listed in Sections I through III of this paper are the only ones

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[58] Brook Baker, *Debunking IP-For-Development: Africa Needs IP Space, Not IP Shackles*, African Law and Economic Development: International Perspectives 1 (in publication 2014).

[59] Ibid, at 2.

[60] Supra 44.

founded on legitimate legal or policy issues. The remainder (and majority) of the industry's arguments revolve around "boogey man" tactics designed to paint India as an unscrupulous pirate spear-heading an international coup against patent rights. The industry accuses India of claiming a dedication to access to medicine as a facade to mask its "true goals" of weakening IP rights worldwide and propping up its own economy by forcing rights holders to work their patents in India. They complain that India has violated "the spirit" of TRIPS by denying patent protection to innovators whose applications have been accepted in other countries, and claim that being so selective disincentives innovation, possibly leading to an end to all new invention. They claim also that any weakening of IP rights on the international stage, or discussion thereof in international fora, frightens innovators and investors and that the United States must vigorously oppose attempts at such weakening under "the spirit" of TRIPS.

These arguments are conclusory and disingenuous, and do not contain citations to law or real-world examples of the ill effects they foretell. It is important that those who allege catastrophic consequences show some foundation for their beliefs beyond "parade of horribles" assertions, particularly where history (in this case, India's IP regime before becoming TRIPS-compliant) has tended to prove otherwise. The United States pursues its IP interest according to national policy in international fora, and India has the clear right to do the same as a sovereign nation to which the United States should show comity, not enmity. Similarly, developing nations seeking to establish favorable IP policies should be free to choose a regime that suits their own national policy needs best in accordance with their sovereignty. If the United States and pharmaceutical companies' positions are losing the debate on the global stage to proponents of IP reform, India is hardly to blame. Suggesting that India has somehow coerced these developing nations into unfair or damaging policies is the patronizing, imperialist argument of a sore loser.

Similarly, it is disingenuous to argue that India's history of reducing prices for drugs by over 90% - sometimes over 99% - is not about access to medicines. Moreover, countries are allowed to issue compulsory licenses under the Paris Convention, the TRIPS Agreement, and national law, as confirmed by the Doha Declaration. They can do so in whole or in part based on the desire to achieve technology transfer and local pharmaceutical capacity. The arguments by anti-reformers that India is not sincere in its dedication to access to medicine because India

benefits economically from the effects of its efforts are duplicitous in that American industry asks the USTR and USITC to protect U.S. corporate interests with one side of its mouth, but demands that India should have not power to protect or promote its own industry (as long as that power threatens profit margins) out of the other.

The complaint that India has declined to grant patent protection in some cases where other countries have granted it is simply a function of the international patent system, and not attributable to unfairness in the India Patents Act or any other Indian IP policy. Countries have different patent standards and make different decisions with respect to the same application on a daily basis. As stated above, Japan only allows 14% of the patents allowed by the US.[61] The fact that a patent has been granted elsewhere, under different or less stringent standards, has no bearing whatsoever on whether a patent must be or should be granted in another country.

The industry makes much of the "spirit of TRIPS," but TRIPS is an international treaty, not a religious organization or a moral code, and meeting its spirit merely requires meeting its minimum harmonized standards. It doesn't mean adopting the higher standards codified in U.S. law and practice. If the United States truly believes that TRIPS standards are being violated by India, its sole and exclusive remedy is through the WTO multilateral dispute resolution procedures. In that case, the U.S. should not seek to retaliate for perceived violations by placing India on its special 301 watch list, but should deal frankly with its ally. Moreover, the United States Chamber of Commerce's Global Intellectual Property Committee (GIPC), which advanced this argument in its submission,[62] would do well to avoid the pot and kettle scenario created by the suggestion that any sort of IP weakening is illegitimate, as the United States Supreme Court has recently ruled against patents on isolated, naturally occurring genes, thus "weakening" patent rights in that regard.[63]

Although a favorite argument of proponents of strong IP rights, the assertion that strong IP protections incentivize innovation and those weak protections, conversely, disincentive or scare away innovation and investment is not necessarily supported. The evidence on whether IP

[61] Supra 44, at 6.
[62] Supra 10, at 58.
[63] Association for Molecular Pathology v. Myriad Genetics, 569 U.S. 12-398 (2013).

incentivizes true innovation or whether it actually deforms R&D and blocks follow-on innovation is highly contested. Similarly, evidence of whether IP incentives direct foreign investment in low- and middle-income countries is highly contested.[64] India is not decreasing IP holders' rights overall, but enforcing the right they have under Indian law and using lawful flexibilities authorized by the TRIPS Agreement. As the saying goes, necessity is the mother of invention, and proposing that the mere discussion of weakening IP rights in international fora could result in a complete halt in innovation and investment therein worldwide is farcical.

4. CONCLUSION

Arguments that India should be sanctioned for its perfectly lawful activities that rely on scare tactics and conclusory allegations only serve to muddle the issue at hand, and further underscore the pharmaceutical industry's utter lack of legal support for its claims. Those legal arguments that the industry does advance are flimsy at best, relying upon "the spirit" of the law, broad provisions of TRIPS that do not directly address the industry's arguments, and mischaracterizations of India's policies. At present, India's patent reform has not been caused the downfall of pharmaceutical innovation, and as their policies are fully compliant with TRIPS and long-held international legal norms, the United States should respect India's sovereignty with regard to its own national policy at least until they can marshal a better argument supported by legal authority or credible evidence.

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[64] Supra 56, at 1.

THE FORCE OF RECENT EVENTS IN BROADENING THE HORIZON OF ARTICLE 2(4): CAN THE CHARTER ACCOMMODATE CYBER ATTACKS AND THE RESPONSIBILITY TO PROTECT?

- Rajalakshmi Natarajan[*] and Chethana Venkataraghavan[**]

Abstract

The concept of use of force is a core principle of international law which is embodied in a complex legal framework. The ambit, threshold and limit of Article 2(4) of the UN Charter has been discussed by the International Court of Justice (ICJ) and jurists in detail, outlining the traditional definition of force and supplementing dependent concepts like armed attack and self-defense in the context of a kinetic attack. However, seventy years after the inception of the UN Charter, the authors of this paper believe that ideals of territorial integrity and sovereignty have evolved and science and technology have progressed. The notion of force has shifted dramatically from the Nicaragua case. Taking into account recent events, this paper will discuss two diverse topics that credit their inception to Article 2(4).

First, this paper will analyze another contemporary change in the circumstances under which force is used, namely the doctrine of responsibility to protect. This doctrine as can be seen in recent cases has been used as a justification for unilateral humanitarian intervention. This paper will aim to analyze, whether, this unilateral humanitarian intervention has become custom, and is now an exception to Article 2(4) of the charter or does it continue to be illegal and if so, what the possible solutions to the same.

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Secondly, this paper has dealt with using the cyber domain as a weapon and the threshold where force becomes an armed attack under Article 51 with respect to a computer network attack. The authors have also discussed the appropriate response to a cyber-attack and noted the confluence of the law of state responsibility.

Analyzing both sides of this very problem, this paper will aim at proving that the evolving nature of Article 2(4) must be recognized and codified to usher in an era of stability and safety to the subjects of international law who are living in an age where traditional notions of force and armed attack are colliding with the expanding horizon of Article 2(4).

1. PROLOGUE

All conflicts in the sphere of international politics can be reduced to contests of a legal nature.

-Hersch Lauterpacht

Sir Lauterpacht was accurate, in his deduction, as, more often than not, what is perceived to be legal is largely different from what is accepted to be legal, which in turn greatly differs from what is actually legal within the domain of international law. In 1945, the world had witnessed two world wars when and the threat of artillery power and formidable armies played a role in converting the dynamics of international law.[1] Hence the legal order was no longer based on 'an absence of war' but rather on 'the presence of peace'.[2] In light of the same, Part I of this paper will focus on the history and evolution of Article 2 (4) of the UN Charter.

However, events that have taken place in the last two decades, have largely changed the contours of the very foundation of International peace and security, namely, the prohibition on the use of force as contained in Article 2(4). In 1999, the North Atlantic Treaty Organization (NATO) sent forces to Yugoslavia, and undertook mass scale bombings, in support of the Kosovar's right of self-determination, and termed it to be a justified intervention on the basis of 'humanitarian'

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1 G Ress, *Interpretation of the Charter*, 13, 23-25 in The Charter Of the United Nations: A Commentary (Bruno Simma et al.eds., 2nd ed., 2002).

2 K.C.Wellens, *The United Security Council and new threats to the peace: back to the future*, 8 Journal of Conflict and Security Law 15 (2003).

ends[3]. Today, we find a similar situation occurring in Crimea, where the same alleged humanitarian purpose, has led to the annexation of Crimea by Russia, which is termed by the world community at large to be a gross violation of the territorial integrity of Ukraine[4]. Part II of this paper will be primarily dealing with the paradigm shift in the circumstances under which force is used. Further, an analysis of whether the intervention in favour of Kosovo has set a dangerous precedent in favour of humanitarian intervention and a study on the contours of humanitarian intervention, in the event of its legality, will be under taken as well.

Another aspect of force that has undergone a drastic change is the gradual shift in the type of force used. The UN was founded to protect future generations from the scourge of war and thus the notion of force after two world wars was limited to military instruments and attacks at that point in time.[5] Slowly, a shift to nuclear weapons occurred, followed by chemical and biological weapons, and now, in this age of technology, weaponry has extended to that of cyber weapons. Thus, Part III, will discuss and analyze the legality or illegality of cyber warfare, and propose suggestions to better regulate the same.

Lastly, Part IV of this paper, will deal with a possible confluence between these two contemporary changes in the domain of force, and propose certain checks and balances, to ensure that international peace and security is not compromised.

1.1. The Ambit of Article 2(4) of the Charter – A Brief Overview:

To save succeeding generations from the scourge of war, this twice in our lifetime has brought untold sorrow to mankind.

-Preamble, Charter of the United Nations

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[3] *Minutes of the 3988th Meeting of the U.N Security Council,* 3988th meeting, U.N Document S/ PV.3988, (24/3/1999), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/kos 20SPV3988.pdf, last seen on 2/3/2015.

[4] *Ambassador Murmokaite - Statement of the UN Assistant Secretary-General on Crimea,* United Nations Organization, available at http://www.un.org/apps/news/story.asp?NewsI D=47253#.VCw1MGeSzm5, last seen on 1/1/2015.

[5] Preamble, UN Charter, 1945.

The foundation of the international system rests in the prohibition on use of force, as the preamble of the Charter clearly lays out. Article 2(4) of the Charter explicitly states that all member nations should refrain from the threat or use of force against another state.[6] In ordinary parlance, force can be defined as power, pressure or violence directed against a person or a thing.[7] If one broadly interprets the same, it can mean kinetic use of force or other means of financial, diplomatic, economic and ideological coercion.[8]However, the *travaux preparatoires* of the Charter shows that a proposal to increase the ambit of Article 2(4) to include economic coercion was clearly rejected by the United Nations.[9] Hence, it can be concluded that the use of force as envisaged in the United Nations Charter and accepted by the world community was only restricted to acts of military aggression and the traditional, kinetic notion of force that included armies and artilleries.

Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of the nation. The ambit of Article 2(4) is predominantlyis restricted to the use of armed[10] or physical force[11] and the threat of the same. It is argued, that the provision is to be interpreted broadly, not restricting itself to a direct threat or use of force, but also extending to the indirect threat or use of force.[12]

However, there are two universally recognized exceptions to Article 2(4) of the Charter. The first is the right of self-defense as enshrined in

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6 Article 2(4), U.N. Charter, 1945.

7 B.A.Garner, *Black's Law Dictionary,* 717 (9th ed., 2009).

8 Michael Gervais, *Cyber Attacks and the Laws of War*, 30 Berkeley Journal of International Law 525, 536 (2012).

9 Ibid, at 537.

10 A Verdoss and B Simma, *Universelles Volkerrecht,* 478 (3rd edn, Dunker and Humbolt 1984); H Kelsen and R Tucker, *Principles of International law*, 86 (2nd edn, Rinehart 1966); I Brownlie, *International Law and the Use of Force,* 362 (Clarendon Press 1963); U.N. General Assembly, *Definition of Aggression*, Res. 3314 (XXIX), Sess. 29, U.N.Document A/RES/3314, available at http://daccess-dds-ny.un.org/doc/RESO LUTION/GE N/NR0/739/16/I MG/NR073916.pdf?OpenElement last seen on 20/03/2015 (hereinafter known as the Definition of Aggression Resolution).

11 H Kelsen and R Tucker, *Principles of International law*, 86 (2nd edn, Rinehart 1966); I Brownlie, *International Law and the Use of Force,* 362-363, 376 (Clarendon Press 1963).

12 A Randelzhofer, *Use of Force,* 4 Encyclopedia of Public International Law 248, 250 (1999); A Verdoss and B Simma *Universelles Volkerrecht,* 481 (3rd edn., 1984); L Zanardi, *Indirect Military Aggression*, 111 in *The Current Legal Regulation of the Use of Force* (Antonio Cassese, Martinus Nijhoff Publishers 1986).

Article 51, where a state may resort to force to defend itself if it is faced with an armed attack.[13] The second is the right of collective self-defense/humanitarian intervention through the Security Council under the auspices of chapter VII of the Charter, where a threat to international peace and security exists[14]. Article 3 of Definition of Aggression UNGA Resolution 3314 (which was accepted to be custom, in the *Nicaragua* judgment by the ICJ)[15],lays out the various forms of aggression that include bombardment by armed forced, military occupation, attack or invasion of armed forces and the use of armed forces, bands, groups, irregulars or mercenaries.[16]

The court noted the existence of a gap between Article 2(4) and Article 51[17] and jurists propound that the use of different phraseology with respect to 'armed attack' and 'use of force' was done with the intent to differentiate between the two terms.[18] The difference lies in the fact that while use of force can accelerate to an armed attack, the threshold of armed attack is achieved only when the attack leaves behind a trail of human casualties or ample destruction of property. If there is an armed attack that does not involve significant destruction or loss of human life, the use of force would fall short of an armed attack, which gives a state the right to defend herself, under Article 51 of the Charter. [19]

2. UNILATERALUSE OF FORCE AND THE RESPONSIBILITY TO PROTECT:

Intervention only works when the people concerned seem to be keen for peace.

- Nelson Mandela

The prohibition on use of force rests on the fact that the inherent sovereignty of a state must be respected. The responsibility to protect doctrine, thus, emerged, when this sovereignty was looked at not as a

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[13] Article 51, UN Charter, 1945.

[14] Chapter VII, UN Charter, 1945.

[15] Article 3, Definition of Aggression Resolution; Nicaragua v US, [1986] ICJ Rep 14, 101 (International Court of Justice).

[16] Article 3, Definition of Aggression Resolution.

[17] Nicaragua v US, [1986] ICJ Rep 14, 101 (International Court of Justice).

[18] Yoram Dinstein, *Cyber War and International Law: Concluding Remarks at the 2012 Naval War College International Law Conference*, 89 International Law Studies 276, 279 (2013).

[19] Ibid.

right but as a responsibility, which may be forgone, under certain circumstances. The responsibility to protect doctrine, surfaced for the first time, in 2001 under the mandate of the International Commission on Intervention and State Sovereignty[20], and was later, emphasized by the High-Level Panel on Threats, Challenges, and Change, in 2004, in its report[21] and finally by the General Assembly, in 2005.[22] The Security Council on numerous occasions has applied the principle and carried out collective measures as well.[23]

The concept of responsibility to protect is essentially an obligation upon all states to prevent and protect its populations from genocide, war, ethnic cleansing and other human rights violations. It further entails that if that state fails to do so, then the international community through the United Nations and with the prior sanction of the SC may take collective action and intervene on humanitarian grounds. Thus, it reinforces the power of the Security Council under Chapter VII of the charter where the UN has the power to intervene, including for humanitarian purposes, in any Member State but the same can only be invoked, if the situation is a threat to international peace and security as covered by Article 39 of the Charter. However, several states, resort to unilateral use of force, and use, the doctrine of 'responsibility to protect'

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[20] *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Commission on Intervention and State Sovereignty, (December 2001), available athttp://responsibilitytoprotect.org/ICISS%20Report.pdf, last seen on 9/01/2015.

[21] *A More Secure World: Our shared responsibility,* Report of the Secretary- General's High Level Panel on Threats, Challenges and Change, U.N. Document A/59/565, (December 2004) available at http://www.un.org/en/peace building/pdf/historical/hlp_more_secure_world.pdf, last seen on 20/3/2015.

[22] U.N General Assembly, *2005 World Summit Outcome,* RES 61/1 of 2005, Sess. 60, U.N document A/59/2005, (24 October 2005), available at http://daccess- dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/ N0 5487 60.pdf?OpenElement, last seen on 22/02/2015.

[23] U.N. Security Council, *Granting the Secretary-General Discretion in the Further Employment of Personnel of the United Nations Operation in Somalis,* Res 794 of 1992, Sess. 47 UN Doc S/RES/794 (3 December 1992), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-F6E4FF96FF9%7D/Chap%20VII%20SRES %20 794.pdf, last seen on 14/4/2015;U. N. Security Council *Authorization to form a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti,* Res 940 of 1994 sess. UN Document S/RES/940 (31 July 1994) available at http://daccess-dds-ny.un .org /doc /UN Document /GEN /N94 /312/ 22/PDF/N9431222.pdf?OpenElement last seen on 14/4/2015.

as a justification. It is this contemporary increase in use of unilateral force and its legality that is in question today.

The Charter establishes the sovereign equality of States in Article 2(1), the obligation to settle disputes peacefully in Article 2(3), and specific exceptions to the prohibition of use of force, in Article 51 and Chapter VII of the charter. These principles are further developed in subsequent general assembly resolutions. [24] Therefore, for any humanitarian intervention to be justified under international law it must be in accordance with these principles or come within an established exception to their application or a normative custom must be shown, in light of recent state practice.

2.1. Can the use of force be positive? : The promise of intervention in the protection of human rights:

"Humanitarian intervention draws its powerful appeal from the revolutionary discourse of human rights, which promises liberation fromtyranny and a future built on something other than militarised andtechnocratic state interests."

-Anne Orford, 'Reading Humanitarian Intervention'.

Scholarly opinion in the last century has supported the right of states to intervene in other states on humanitarian grounds. [25] The simple reasoning for this follows from the fact that an intervention on

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[24] United Nations General Assembly,*Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Res 2625, Sess.25, UN Doc A/RES/25/2625 (24/10/1970) available at http://www.un-documents.net/a25r2625.htm, last seen on 20/3/2015 ; United Nations General Assembly, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,* Res 2131 Sess. 20 UN Doc A/RES/20/2131 (21 December 1965) available at http://www.un-docume nts.net/a20r2131.htm last seen on 20/3/2015 ; United Nations General Assembly, *Definition of Aggression*, Res 3314, Sess. 29, UN Doc A/RES/3314. (14 December 1974), available at http://daccess-dds-n y.un m.org /do c/RESOLUTION/GEN/NR0 /739 /16/I MG /N R0739 16.pdf?OpenElement, last seen on 20/3/2015.

[25] Lilich, R.B, '*Humanitarian intervention, a reply to Ian Brownlie and a plea for constrictive alternatives* , 229, 241 & 250 in Law and civil war in the modern world (Moore, JN, 1974) , Fonteyne J.P, *The customary international law doctrine of humanitarian intervention : Its current validity under the UN charter*, 4, Calif. W Int'l LJ, 203, 258 (1974); Reisman, M/McDougal, M.S., '*Humanitarian intervention to protect the Ibos*' in Reisman, M/McDougal, M.S., '*Humanitarian intervention to protect the Ibos*', 167, 178 & 192-3 in Humanitarian Intervention and the UN (Lillich R.B, 1973).

humanitarian grounds is directed neither against the territorial integrity nor the political independence of other and moreover is in conformity with other 'preemptory norms' of the charter. [26] It is interesting to note at this point that the same argument, was raised by Britain in the Corfu Channel case, in 1951, but the ICJ rejected the same, and decided against Britain.[27]

Humanitarian intervention is seen as a need for balancing the opposite goals of conflict minimalization and protection of human rights which is why under certain circumstances, humanitarian intervention is considered lawful[28]. Judge Simma, in his separate opinion in the *DRC v. Uganda* case, has also emphasized that in light of the use of force by the entire international community against terrorist activities, particularly with respect to the Bush doctrine, a new and expanded definition of the term self defense should be duly adopted.[29]

There have been cases when the UNSC retrospectively or retroactively recognizes the use of force for humanitarian intervention. For example, the US, UK and the French invaded Iraq in support of the Kurdistan movement, to protect the human rights of the Kurds in Iraq, despite there being no prior authorization by the UNSC[30].

The NATO Bombing in Yugoslavia, was the true turning point for humanitarian intervention, as it largely influenced, subsequent measures in favour of mitigating human rights violations in Kosovo. Though the NATO bombing in Yugoslavia received contrary opinions, several countries spoke in support of the same, such as UK, US and France, in particular, the Belgian government's submissions in the *Legality of Use of Force* [31] cases outlines the support for the right of humanitarian intervention,

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[26] Tom Farer*, 'Law and War'* 55in The Future of the International Legal Order (CE Black and RA Falk ,1st edn, 1969), Michael Akehurst, *Humanitarian intervention,* 105 in Intervention in World Politics (Hedley Bull, 1984) 105.

[27] UK v Albania [1949] ICJ Rep 4, 35 (International Court of Justice).

[28] Fonteyne J.P, *The customary international law doctrine of humanitarian intervention: Its current validity under the UN charter*, 4, Calif. W International Law Journal 203, 255 (1974).

[29] DRC v Uganda [2005] ICJ Rep 334, 337 (Separate Opinion of Judge Simma, International Court of Justice).

[30] Foreign Affairs Committee ,*The FCO Memorandum to the HC Foreign affairs Committee* 63 British Ybk Intl L 825(1992); DJ Harris, *Cases and Materials on International Law* 779, (3rd edn, 1983).

[31] Serbia and Montenegro v. UK, [2004] ICJ Rep 1307, 1320 (International Court of Justice).

> "This is not an intervention against the territorial integrity or independence of the former republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress, for this reason the kingdom of Belgium takes the view that this an armed humanitarian intervention, compatible with Article 2(4) of the charter which covers only intervention against the territorial integrity and political independence of a state."

Further, Australia's support of the East Timor liberation movement[32] and India's intervention of East Pakistan were both justified by the respective states on grounds of responsibility to protect and humanitarian intervention[33]. Thus there has been a reasonable amount of state practice as well as scholarly opinion in support of humanitarian intervention.

2.2. The imbalance, instability and illegality of Humanitarian Intervention

The great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force

-International Law Commission, 1966

Even though the above section clearly elucidates a possible support for humanitarian intervention, the fact remains, that humanitarian intervention, in reality, is not a recognized exception to Article 2(4) of the UN Charter. It is argued, by the proponents of unilateral humanitarian intervention, that humanitarian intervention is legal as it does not affect the territorial integrity or the political independence of a State; however, this was not added in order to restrict the operation of Article 2(4)[34], but as an added safeguard. It should be noted, that the only exceptions are the right of self defense and collective security under chapter VII of the Charter and unilateral humanitarian intervention does not fall under the same.

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[32] Australian Department of Foreign Affairs, *Annual Report 1974*, 53 (Australian Government Printing Service, 1975).

[33] *India's recognition of Bangladesh was reported in telegram 18766 from New Delhi, December 6,* National Archives, RG 59, Central Files 1970-73, POL INDIA-PAK, available at http://hcidhaka.gov.in/pages.php?id=1252, last seen on 2/10/2014.

[34] UK v Albania, [1949] ICJ Rep 4.35 (International Court of Justice).

The GA Resolution on the Definition of Aggression states that, '*No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression*.'[35] Humanitarian intervention is permissible to the extent it is sanctioned by the SC.[36] The only invasions on the basis of humanitarian considerations have been India in East Pakistan, Vietnam in Cambodia and Tanzania in Uganda which could all be justified on account of self defense under Article 51.[37] The more recent state practice would include the NATO bombing of Kosovo and Russian intervention of Crimea, which were both condemned by the world community at large[38]. In fact, many scholars believe that the Russian intervention of Crimea, is hypocrisy at its best, and the west and the ICJ in its advisory opinion[39], have set a dangerous precedent for years to come.

Humanitarian intervention has also been used in the context of self determination movements around the world[40] as the above examples have also indicated. However, the same has been considered to be a violation of the territorial integrity of the parent state and this is affirmed in state practice as evidenced in Scotland[41], Biafra[42], Kashmir[43],

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[35] United Nations General Assembly, *Definition of Aggression*, Res 3314, Sess. 29, UN Doc A/RES/3314 (14/12/1974), available at http://daccess-dds-ny.unm.org /doc/RESO LUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement, last seen on 20/3/2015.

[36] Article 42, UN Charter 1945; Y Dinstein, *War, Aggression, Self-Defence, 67* (3rd edn, 2001).

[37] S V Scott, A J Billingsley and C Michaelson ,*International Law and the Use of force- A Documentary and Reference Guide,* 101 (1st ed, 2010).

[38] *Ambassador Murmokaite - Statement of the UN Assistant Secretary-General on Crimea*, United Nations Organization, available at http://www.un.org/apps/news/story.asp? NewsID =47253#.VCw1MGeSzm5 last seen on 1/1/2015; United Nations Security Council Press Release, *Security Council rejects demand for cessation of use of force against Federal Republic of Yugoslavia*, U.N Document SC/6659 (26/3/1999) available at http:/ /www.un.org/press/en/1999/19990326.sc6659.html, last seen on 26/12/2014.

[39] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo [2010] ICJ Rep 403, 437 (Advisory Opinion, International Court of Justice).

[40] L. Eastwood, *Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia,* 3, Duke Journal of Comparative and International Law 299, 310-313 (1993); L R Evans. *Secession and the use of force in international law*, Cambridge Student Law Review 1, 4-5 (2008); N Higgins, K.OReilly, '*The Use of Force, Wars of National Liberation and the Right to Self-Determination in the South Ossetian Conflict*, 9 International Criminal Law Review 567-583 (2009).

[41] *Recognizing the friendship between the United Kingdom and the United States and expressing the support of the House of Representatives for a united, secure, and prosperous United Kingdom*, United States Congress-House of Representatives (7/8/2014), available at https://w

Cyprus[44], Kosovo[45] and Hong Kong[46] to name a few. Further, it is an established norm, that a countermeasure in response to a violation of an *erga omnes* obligation must not involve violations of *jus cogens* norms (notably the prohibition against the use of force), or affect obligations to settle disputes by pacific means.[47]While the right to self determination is an *erga omnes* obligation[48], Article 2(4) is a *jus cogens* norm[49], and therefore, a *jus cogens* norm cannot be violated to defend an *erga omnes* obligation, thus at a fundamental level negating the use of humanitarian intervention to achieve self-determination of states, which by itself is largely contested in the international domain.

2.3. Threshold of Humanitarian Intervention

'The Council may only take such [forceful] action . . . as may be necessary to maintain or restore international peace and security'

-Article 42, UN charter.

Assuming the validity of humanitarian intervention, one has to also analyze the permissible threshold of unilateral humanitarian intervention.

The biggest arguments against humanitarian intervention have been that is has been used disproportionately, and in situations that do not

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ww.congress.gov/113/bills/hres713/BILLS-113hres713ih.pdf, last seen on 7/1/2015.

[42] T D Musgrave, *Self-Determination and National Minorities*, 197 (1997).

[43] *Transcript of Media Briefing by Official Spokesperson and Joint Secretary Shri Syed Akbaruddin*, Ministry of External Affairs, Government of India, (20/9/2014) available at http://www.mea.gov.in/mediabriefings.Htm?dtl/24026/Transcript+of+Media+Briefing+by+Official+Spokesperson+and+Joint+Secretary+BM+September+20+2014, last seen on 3/1/2015.

[44] United Nations Security Council, Press Release, *Security Council fails to adopt text on Cyprus, as Russian Federation casts technical veto*, UN Document SC/8066 (21/4/2004) available at http://www.un.org/press/en/2004/sc8066.doc.htm, last seen on 7/1/2015.

[45] *UNSC Press Release*, Security Council Expresses Deep Concern at Escalating Violence in Kosovo, UN Document SC/6637 (29/1/1999), available at http://www.un.org/press/en/1999/19990129.sc6637.html, last seen on 7/1/2015.

[46] *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference*, Ministry of Foreign Affairs, People's Republic of China (30/9/2014), available at http://www.Fmco prc.gov.hk/eng/xwdt/wjbt/t1197147.htm, last seen on 1/1/2015.

[47] India v Pakistan [1972] ICJ Rep 46, 53 (International Civil Aviation Organization Council); US v Iran, [1980] ICJ Rep 3, 28 (International Court of Justice).

[48] Portugal v Australia, [1995] ICJ Rep 90, 102 (International Court of Justice).

[49] Nicaragua v US, [1986] ICJ Rep 14, 90 (International Court of Justice).

command the same. As, the facts and circumstances are different in each situation where humanitarian intervention has been carried out, there has to be an adherence of at least the basic principles of necessity and proportionality[50], which as can be seen on the number of cases elucidated above, was not followed. This is a pre requirement in all cases, where unilateral measures are taken, such as countermeasures[51] as well as the right of self- defense as enshrined in Art 51 of the Charter. Thus the same should be complied with in this regard as well.

Thus, as can be deduced from the above, that in light of conflicting state practice, and opinio Juris, it cannot be said at this point, that unilateral humanitarian intervention, is permissible under the charter, however, the fact in hand is indicative of the fact, that there is growing acceptance of humanitarian action taken, particularly when it is in furtherance of other founding UN principles, and thus, it is necessary, at this point to carve out certain sound legal norms governing the same, so that, misuse of this, can be better curbed.

3. CYBER-ATTACKS: A NEW FORM OF FORCE

Global interconnectedness brought about through linked digital information networks brings immense benefits, but it also places a new set of offensive weapons in the hands of states and non-state actors.

- Matthew.C. Waxman, Back to the Future of Article 2(4).

As the above sections have clearly elucidated, use of force as it existed in 1945 and as it exists today, has drastically transformed. The ambit of use of force is only widening due to the betterment of technology, the imbalance of power among states, and due to vast discrepancies in notions of democracy and human rights.[52] Subsequent sections of this paper, will aim to analyze the contemporary changes in the definition of

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50 RY Jennings, '*The Caroline and McLeod Cases'* 32 American Journal of Int'l Law 82, 89 (1938); *Letter from Daniel Webster to Lord Ashburton on July 28 1842* 30 British and Foreign State Papers 195 (1843).

50 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo CR 2009/32 (10 December 2009) 42, 50 and 54 (Oral Submissions of the United Kingdom, International Court of Justice).

51 Article 51, Articles of State Responsibility.

52 T M Franck, *Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States*, 64 American Journal of International Law 813 (1970).

force and weaponry, and whether or not it is time to expand the said definition, in light of growing usage of cyber-attacks.

3.1. The Cyber Domain as a Weapon

The Charter neither expressly prohibits, nor permits, the use of any specific weapon

- Opined by the ICJ in the Threat or Use of Nuclear Weapons judgment

In order to determine whether, there has been an evolution of the definition of force and that of an armed attack with respect to cyber warfare , the definition of a weapon or 'arms' is of paramount importance. While guns and weapons belonging to traditional combat fall under this category, the meaning of the word 'arm' took a paradigm shift after 9/11 when two commercial airplanes were used as weapons by a terrorist group that caused wide spread death and destruction.[53] Hence, the notion of weapons changed radically at that point and it was agreed that it was not the designation of design or conventional use of a device, but rather, the intent with which it is used that makes it a weapon in the domain of Article 51.[54].

There are two basic kinds of hostile actions that can be taken against a computer network, namely cyber exploitation and cyber-attack. Cyber exploitation uses cyber offensive actions to obtain information in an adversary's computer system or network.[55] The focus of this article however is on cyber-attack which has been defined by the National Research Council, whose breakthrough article in 2009 has given a strong foundation for the possibility of codification of cyber laws, as 'deliberate actions to alter, disrupt, deceive, degrade, or destroy computer systems or networks or the information and/or programs resident in or transiting these systems or networks'.[56] The existence of these cyber-attacks brings about the question, if the cyber domain can indeed, be attributed the status of a 'weapon' or not. Noted international jurist

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[53] *Armed Attack by Karl Zemanek*, Max Planck Encyclopedia of Public International Law October 2013, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241, last seen on 15/03/2015.

[54] Ibid.

[55] Anna Wortham, *Should Cyber Exploitation Ever Constitute a Demonstration of Hostile Intent That May Violate UN Charter Provisions Prohibiting the Threat or Use of Force?*, 64 Federal Communications Law Journal 643, 646 (2011).

[56] W. A. Owens, K. W. Dam & H. S. Lin, *Technology, Policy, Law, And Ethics Regarding U.S. Acquisition And Use Of Cyberattack Capabilities* I, 11 (National Research Council Eds., 2009).

Yoram Dinstein has answered aggressively in the affirmative by stating that 'cyber' must be looked upon as a weapon which is not in any way less than other weapons used in the course of an armed attack.[57] According to him, the test of a new weapon is not how intimidating it looksor how ingeniously the novel mechanism works, but what harm it is liable to produce.[58]

Even in the event that the cyber domain is not accepted as a weapon by itself, the ICJ's opinion on the Legality of Nuclear Weapons[59] has clearly held that the threshold of threat of force was deemed to be met when there existed a 'signaled intention to use force'. Thus, if an action is performed through a computer network with a specific intention of harming a state, person or adversary computer network, it constitutes an attack. This was further affirmed through the jurisprudence established by the ICJ in the Oil Platforms Case.[60]

3.2. Cyber-Attack and the Threshold of Force:

The logic behind this extension of the principle of non-use of force to reprisals has been that if use of force was made permissible not as a lone restricted measure of self-defence, but also for other minor provocations demanding counter-measures, the day would soon dawn when the world would have to face the major catastrophe of a third World War - an event so dreaded in 1946 as to have justified concrete measures being taken forthwith to eliminate such a contingency arising in the future.

\- *Former ICJ President Nagendra Singh*

In the *Armed Activities on the Territory of Congo* case, the ICJ has opined that a violation of Article 2(4) emerged from the magnitude and duration of one state party's actions.[61] Hence it can be reasonably inferred that a cyber-attack that causes damage or destruction to a great magnitude, should be considered to be a use of force as covered under

57 Supra 18, p.280.

58 Ibid.

59 Legality of the Threat or Use of Nuclear Weapons, [1996] ICJ Rep 226, 246(Advisory opinion, International Court of Justice).

60 Islamic Republic of Iran v. United States of America, [2003] ICJ Rep 161(International Court of Justice).

61 Democratic Republic of Congo v Uganda, [2005] ICJ Rep 168, 225 (International Court of Justice).

Article 2(4) of the charter.[62]Further, under the doctrine of strict liability, which has been laid out in the *Trail Smelter arbitration*award[63] and subsequently upheld by the ICJ[64], it could be argued that any cyber-attack that affects the critical infrastructure of a state is a violation of Article 2(4).[65]

An appropriate example of a cyber-attack in this category would be the 2008 Estonia cyber-attack. Estonia had a very active e-governance system, which enabled its citizens to vote online and further, a majority of bank transactions also happened through the World Wide Web.[66] In 2007, when the government decided to relocate a monument that commemorated Soviet troops and their contribution, Estonia was under a cyber-siege for weeks because of the activities of a certain group of hackers who allegedly had Russian allegiance.[67] The websites of the Department of Justice and Ministry of Foreign Affairs were shut down, the civilians who logged onto government websites had their computers frozen, the servers of two of Estonia's largest banks[68] and the emergency hotline number as well was temporarily suspended.[69]

Given that critical infrastructure was under attack for an extended period of time, this can be stated as a cyber-attack that arguably, in the opinion of the authors should qualify as a violation of Article 2(4). It is our opinion, that such an attack is synonymous to that of an armed attack if the same could unequivocally be attributed to Russia or another state party.[70] However, even though there was a strong suspicion that Russian hackersinsulated by the government of Russia were behind the

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[62] D. E. Graham, *Cyber Threats and the Laws of War,* 4 Journal of National Security Law and Policy 87, 91 (2010); MatthewC.Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 Yale Journal of International Law 421, 436 (2011); *Cyberwarfare and International Law 2011 by Nils Melzer*, UNIDIR Resources, available at http://www.unidir.org/files/publications/pdfs/cyberwarfare-and-international-law-382.pdf, last seen on 15/04/2015.

[63] United States v. Canada,3 U.N. Rep. Int'l Arb.Awards 1905 (1941, Arbitral Tribunal).

[64] UK v Albania, [1949] ICJ Rep 15 (International Court of Justice).

[65] Walter Gary Sharp, *Cyberspace & the Use of Force*, 129-31 (1st ed., 1999).

[66] Marc Olivier, *CYBER WARFARE The Frontline of 21st Century Conflict*, 20 LBJ Journal of Public Affairs 23, 27 (2012).

[67] Ibid.

[68] Titiriga Remus, *Cyber-attacks and International law of armed conflicts; a "jus ad bellum" perspective*, 8 Journal of International Commercial Law and Technology 179, 185 (2013).

[69] Supra 67.

[70] Ibid.

attacks, it could not be linked to the State of Russia directly.[71] This lack of attribution of a wrongful act makes pinning responsibility with respect to a cyber-attack extremely difficult and is essentially the reason, why it is hard, to pin liability on a state for the same. Thus, it is all the more essential that certain mechanisms must be set in place, for attributing liability on the perpetrating state.

3.3. Cyber and Armed attacks: A comparative perspective:

Stuxnet has increased the likelihood that malware authors, be they nation-states or smaller entities, will perpetrate similar attacks in the future and it has proven such attacks possible, raised awareness of them and perhaps interest in them among malicious entities.

- *Paul Mueller and Babak Yadegari in 'The Stuxnet Worm'*

Another method of identifying, if there is indeed a requirement to expand the threshold for use of force encompassing a cyber attack, is to compare the consequence of the cyber-attack to a traditional attack.

If the intent behind the cyber-attack was to cause death or destruction and if the consequence of that attack is equivalent to that of a kinetic attack, it should be deemed to be a violation of Article 2(4).[72] The importance of this approach is that the nuances of the impugned cyber-attack involving jurisdiction, method of attack and nature of device would be eliminated and the Charter can directly be utilized to pin liability in such a situation.[73]

An example to highlight its importance is the Stuxnet virus, which was used by the United States of America and Israel against the Iranian Republic in 2010. The virus took control of the Natanz nuclear plant and caused almost one fifth of the nuclear centrifuges to spin out of control and self-destruct.[74] Though this was a cyber-attack, the effect it had on the Iranian nuclear reactor was similar to the 1981 Israeli airstrike that destroyed a partially constructed nuclear reactor in

[71] Supra 67.
[72] Supra 8.
[73] I Brownlie, *International Law and the Use of Force,* 362 (1st edn., 1963).
[74] Reese Nguyen, *Navigating Jus Ad Bellum in the Age of Cyber Warfare*, 101 California Law Review 1079, 1082 (2013).

Baghdad.[75] Assuming that, the Stuxnet virus was a use of force, it is also imperative to analyze if it did amount to an armed attack to which the State of Iran could have responded under Article 51.

The attack used a virus to shut down a nuclear facility and in doing so; it invaded the territorial integrity of Iran.[76] Further, while deciding the threshold of armed conflict, the 'scale and effect test' that draws the line between a use of force and armed attack, which was established by the ICJ in the Nicaragua case must also be considered.[77] In this test, it has been opined that there is a *de minimis* threshold between an armed attack and use of force.[78] Thus, even small scale bombings that result in destruction and loss of lives are capable of being armed attack under Article 51.[79] On the other hand, firing a large missile capable of huge destruction in an unpopulated wilderness may amount to use of force but does not rise to an armed attack due to the lack of damage to people and property.[80]

Thus, from the above, an inference can be drawn that, in the cyber domain, the equivalent of firing a missile into wilderness would be the cyber-attack on Estonia which caused inconvenience and rose to the use of force but in the Stuxnet case, there was actual destruction of property due to a cyber-attack which made it an armed attack. Thus, it follows, that a cyber attack, should come under the purview of Art 2(4), and based on itsintensity,it may evolve to an armed attack from use of force.

3.4. The North Korean Cyber-Attack of 2014:

The frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible, in order to resolve the intricate and frequently multidimensional issues involved.

-Opined by the ICJ in the Aegean Sea Continental Shelf case

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75 *1981: Israel bombs Baghdad nuclear reactor*, British Broadcasting Corporation, available athttp://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm, last seen at 10/03/2015.

76 Irving Lachow, *The Stuxnet Enigma-Implications for the Future of Cybersecurity*, 11 Georgetown Journal of International Affairs 118, 123 (2011).

77 Nicaragua v US, [1986] ICJ Rep 14, 220 (International Court of Justice).

78 Ibid.

79 Yoram Dinstein*, War, Aggression and Self-Defense*, 193 (5th edn., 2001).

80 Supra 8, at 543.

In November 2014, a group of individuals calling themselves '*The Guardians of Peace*' hacked into Sony files and leaked confidential data and emails belonging to the company, holding them ransom to prevent and threatened to bomb theatres which release the Hollywood movie, 'The Interview'.[81] The government of USA attributed the attack to North Korea and they believed North Korea had crossed a 'threshold' as the act was committed with the aim of causing financial destruction to a US company.[82]

This 'threshold' can be examined by a test propagated by the eminent cyber warfare scholar Michael. N. Schmitt, which identifies six elements that establish the threshold of use of force for a cyber-attack which are namely: [83]

i. severity (degree of property damage and personal injury)
ii. immediacy (manifestation of negative consequences)
iii. proximity (closeness of the act and its consequences)
iv. invasiveness (the extent of territorial penetration)
v. measurability (quantifiable damage or consequences)
vi. presumptive legitimacy (whether the act was legal under domestic or international law)

The severity of the attack did not cause the state of USA any damage, but caused the multinational corporation of Sony immense financial loses. The immediacy of the attack is established as the leak was due to the hack and the economic loss was suffered because of the cyber-attack thus establishing proximity. With respect to measurability, the loss of revenue from the movie release and the loss of profits due to the leaked confidential files can be ascertained while the act of hacking and leaking data was illegal in itself.

Thus on all six counts, it can be reasonably deduced that the cyber-attack by North Korea was a use of force.

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81 *Sony cyber-attack: North Korea faces new US sanctions*, British Broadcasting Corporation, available at http://www.bbc.com/news/world-us-canada-30661973, last seen on 15/03/2015.

82 *Condemning Cyber-Attack by North Korea - Press statement of John Kerry on 19 December 2014*, U.S Department of State, available at http://www.state.gov/secretary/remarks /2014/12/235444.htm, last seen on 1/2/2015.

83 M.N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 Columbia Journal of Transnational Law 885, 914-15 (1999).

3.5. Response to a Cyber Use of Force Not Amounting to an Armed Attack under the Law of State Responsibility:

It is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.

- Sir Robert Ago

In the event the attack does not amount to an armed attack for which self-defense under Article 51 is possible, the injured state can invoke the responsibility of the perpetrator state through the internationally wrongful act. [84] The injured state can take retortions, which are essentially, unfriendly but lawful acts against the other state. [85] An example would be an injured state shutting down the servers of the perpetrators in case of a cyber-attack.[86] Following this, the injured state can take countermeasures until the perpetrator state ceases with its wrongful act.[87] The countermeasure should however be proportionate[88], reversible and temporary[89] in nature. Its purpose must be to induce the state conducting the cyber-attack to cease its activity and the countermeasure must end immediately after the injured state's purpose has been achieved.[90] After the North-Korean cyber-attack, USA took valid countermeasures by imposing sanctions on Korea.[91]

Another question that arises, is in the event that a cyber-attack is a use of force or armed attack, should the response by the injured state be

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[84] Article 1, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

[85] Denis Alland, *The Definition of Countermeasures*, 1131 in *The Law of International Responsibility* (James Crawford, Alain Pellet, and Simon Olleson, 1st ed., 2010).

[86] Supra 8, at 555.

[87] Article 22, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

[88] Article 50, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001; US v France [1978] 18 417, 433 (International Arbitration Tribunal); Hungary/Slovakia [1997] ICJ Rep 7, 27 (International Court of Justice).

[89] Article 49, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

[90] Article 52, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

[91] *Exectuive Order of the President imposing additional sanction in respect of North Korea,* Barack Obama, United States Government, available at https://www.whitehouse.gov/the-press-office/2015/01/02/executive-order-imposing-additional-sanctions-respect-north-korea, last seen on 23/12/2014.

through the cyber domain or can it use kinetic methods as well? The legal opinion on this issue is bifurcated with a few jurists believing that a state can respond to a cyber-attack with conventional and traditional weapons[92] while others believe that the response should only be through the cyber-domain.[93] While the cyber-activities of certain state actors can be examined through existing treaty and customary law, there is a need to evolve a *lex specialis* framework for cyber-law as there are nuanced subjects in international law that find a place in this dimension like non-state actors, anticipatory and interceptive self-defense, espionage and terrorism. Given the wide ambit of cyber-attacks and the all-pervasive presence of the cyber-domain, it is in the interest of the world community to evolve the definition of use of force and armed attack as this would be the first step towards shaping a universal doctrine regarding cyber-attacks and consequences arising from the same.

4. CONCLUSION – THE CONFLUENCE BETWEEN CYBER ATTACKS AND HUMANITARIAN INTERVENTION: THE WAY FORWARD

The cyber domain is a creature of contradiction. While it connects the world community and provides a platform for countries to govern their citizens through the internet, it is highly susceptible and vulnerable to attacks. It has become a necessity and its indispensable nature exacerbates the nature of problems associated with it. There is a requirement to codify the evolution of Article 2(4) due to the intricate interconnection of international law issues related to it. The expansion of the concept of use of force would lead to an altogether different threshold to prove an armed attack. This in turn would influence the notion of self-defense and hence alter the requirements of proportionality and necessity required to legitimize self-defense. Controversial issues in international law which are debated among jurists like anticipatory self-defense would gain a different character when associated with the cyber domain. Beyond these transformations, humanitarian law would be altered as well. The notion of war would change and dependent concepts like civilian objects and belligerent occupation would also have to evolve.

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[92] Supra 18, at 280.

[93] Marco Roscini, *World Wide Warfare - Jus ad Bellum and the Use of Cyber Force*, 14 Max Plank Yearbook of International Law 85, 120 (2010).

Apart from this, there is a requirement for a specialized United Nations international cyber warfare committee (which has been recommended to the UN General Assembly by the Republic of Chad) to monitor the growth and development of the cyber domain and threats associated with the same. Here is further a probability, that with this maturity in weaponry, the same weaponry could be used to invade territories with alleged humanitarian perspectives. This would be largely possible at this point, due to the catastrophic impact, and complete lack of governance, which makes it all the more necessary to cater to the regulation of cyber force as well as humanitarian intervention.

One thing that is most definitely common between the two is an imbalance of states. This imbalance is a result of other certain technological superiority, or certain political superiority, as the case may be. As far as unilateral humanitarian intervention is concerned, it was in 1986, in the *Nicaragua* judgment that the ICJ ruled, that humanitarian intervention was not custom. Times have changed since then, and unilateral humanitarian intervention has increased since then, with the *Kosovo* case in particular. This is a perfect case of imbalance, where an essentially west dominated organization took it upon itself to ensure peace and security, thus it is time to stop ignoring the same. The authors admit that unilateral humanitarian intervention can at no instance be held to be legal even today, but maybe, it is time for the UN to act more immediately, in times of dire need, where there are gross human rights violations, and to utilize the collective security measures, accorded to it under the charter more effectively, so as to avoid these circumstances. There has to be a line drawn, which will not result in the crumbling of territorial integrity of states. One way to ensure this would be a special organization for force under the auspices of the UN or according the General Assembly powers in times of extenuating circumstances, so that the 'veto' may be surpassed.

The result of neglecting the issue of cyber-attack and probable cyber warfare along with unilateral humanitarian intervention would render the object and purpose of the United Nations, which is to preserve and protect peace, completely void.

[SHORT NOTES]

THE EFFECT OF THE EC-SEALS DECISION ON THE PUBLIC MORALS EXCEPTION

- **Arthad Kurlekar***

ABSTRACT

For over 50 years adjudicatory bodies were reluctant to address the precarious question of balancing public morals of a state with its obligations of non-discrimination and trade liberalization. Governments have adopted trade restrictive measures and seek to justify them under the exceptions including public morals. Some of these exceptions are legitimate while some other restriction may be covertly designed to escape onerous trade obligations upon the implementing party. Usually what constitutes public morals has been left open to each member state, with some commonalities such as slavery, child labour etc. are quintessential examples where the defence of public morals can be used. This essay addresses the contributions of the EC seals dispute in terms of its contribution to the available jurisprudence on public morality. To this effect, the essay seeks to compare and support the reasoning of the Panel Report in order to critique the Appellate Body report on two grounds: first on the threshold of animal welfare used in the Appellate Body report to justify public morals; and second on the unfettered power given to the State claiming an exemption to decide what constitutes public morals. Thereafter, the essay recommends certain measures which may be adopted by WTO Panels.

1. INTRODUCTION

For over 50 years, adjudicatory bodies were reluctant to address the precarious question of balancing public morals of a state with its obligations of non-discrimination and trade liberalization.[1] During this time, governments have adopted trade restrictive measures and seek to justify them under the exceptions present in the GATT including public

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[1] Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 Yale Journal of International Law 215 (2008).

morals. Some of these exceptions are legitimate while in some other cases, the restriction may be covertly designed to escape onerous trade obligations upon the implementing party.[2] Usually what constitutes public morals has been left open to each member state. As an illustration, child labour, slavery etc., are quintessential examples where the defence of public morals can be used.[3]

2. BACKGROUND OF ARTICLE XX (a)

The public morals exception was first proposed by the United States in 1945 and is present in all subsequent drafts of the General Agreement on Trade and Tariff (GATT). However, due to disagreement or varying intentions, no preparatory text is available as to the reason for the inclusion of the public morals exception,[4] save the minutes of the London meeting in 1946 simply reveal the fact that a need to insert the clause was recognized by the participating states.[5] This clause remained without interpretation till 2005 when the *US-Gambling*[6] decision first sought to interpret the public morals exception.

In the *US-Gambling* decision, the phrase 'necessary to protect public morals', found in Article XIV of the GATS, was to be interpreted in addition to the meaning of the term public morals. In its interpretation, the WTO panel refused to consider the substance of the moral claim. In its opinion, the determination of the content of the public moral was part of the sovereign function. Thus, as per the panel, public morals may 'vary with time and space'.[7]

Two interpretations are possible from this difference: *first*, 'public order' was included within the scope of 'public morals' under the GATT 1994 or *second*, that it was an additional exception introduced for the GATS.[8]

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[2] Peter Van den Bossche, *The Law and Policy of the World Trade Organization*, 679 (1st ed., 2005).

[3] Edward.M. Thomas, *Playing Chicken at the WTO: Defending an animal welfare based trade restriction under GATT's Moral Exception*, 34 Boston College Environmental Affairs Law Review 605, 637 (2007).

[4] Supra 3.

[5] *Draft Report of the Technical Sub-committee*, United Nations Conference on Trade and Employment, 32, U.N. Document E/PC/T/C.II/54 (16/11/1946).

[6] Panel Report, *United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services,* WT/DS285/R (November 2004).

[7] Ibid.

[8] Supra 2.

However, the fact that the text of the clause remained obscure did not deter the States from adopting the clause. More than one hundred treaties (bilateral and multilateral) have 'protection of public morals' as an exception.[9] This exception has become a common feature in Free Trade Agreements as well. For e.g., the India-Sri Lanka FTA, the China-ASEAN Framework Agreement, and the Japan-Singapore regional trade agreement all contain a similar public morals clause.[10]

Thus in the opinion of the author, the prevailing use and ambiguous nature of the public morals exception warrants an analysis into its scope, which has been provided in the subsequent section.

3. SCOPE OF ARTICLE XX (a)

A bare reading of the Article XX (a) does not clarify the scope of this exception. It leaves much for interpretation by the individual State parties. Only a few WTO decisions have extensively interpreted this exception.

The *US-Gambling decision*[11] defined public morals to mean "*standards of right and wrong conduct maintained by or on behalf of a community or nation*"[12]. The test for invoking this exception was first laid down in the *US Gasoline case.*[13] A three prong test was provided: *first* that the moral advances are a policy goal which fits under the exception public morals; *second*, the measure is necessary to protect the morals and *third* that it is not a violation of the Article XX chapeau.[14]

The first prong of the *US- Gasoline* test involves the demonstration of policy or legislative objectives for protecting the moral.[15] The necessity

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[9] Supra 1.

[10] Supra 2.

[11] Appellate Body Report, *United States - Measures Affecting The Cross-Border Supply Of Gambling And Betting Services*, WT/DS285/AB/R (November, 2004).

[12] Ibid.

[13] Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (May, 1996).

[14] A. Narlikar, M. Daunton, *Oxford Handbook on The World Trade Organization*, 447-450 (1st ed., 2012).

[15] In the EC Seals, the AB required the EU to show that its constitutional treaties included measures to prevent seal products and a diminishing trend in the use of seal products.

test, which is the second prong, is harder to prove. The necessity test was first interpreted in 2009 in the *China - Publications and Audio-visual Products decision.*[16] China had invoked the public morals exception to regulate the entry of foreign publications, audio-visuals and other media forms. The panel upheld the *US-Gambling* test while rejecting China's contention on the ground that the measures were not necessary. Thus, the necessity test involves *first*, that the act should not be oriented towards only foreign parties. This establishes a very high threshold, particularly in the case of animal welfare, because foreign players have to change their methods of production because of the import ban.[17]However, in the *Shrimp Turtle-I case*, the Appellate Body (AB) did not criticize the outwardly nature of the measure despite striking it down on other grounds.[18]*Second*, no other "less trade restrictive measure" must be possible to efficaciously protect the moral.[19] This is also very difficult to demonstrate before an arbitral panel.[20] One suggested way is to adduce evidence to the fact that bilateral or multilateral negotiations were undertaken to achieve a more desirable standard. Though, this in itself might not be entirely sufficient.[21]

The test laid down in *US- Gasoline case* and subsequently interpreted by other panels may seem to cull out the principle sufficiently.[22] However, in interpreting the extent and scope of each of these three prongs, each state must make its own determination.[23] Further, it is difficult to produce uniformly accepted objective evidence as to the existence of the exception itself. This is the most important difference between public morals and other exceptions such as natural resources or health.[24] As an

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16 Panel Report, *China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audio-visual Entertainment Products*, WT/DS363/R (August, 2009).

17 J. C. Marwell, *Trade and Morality: The WTO Public Morals Exception after Gambling*, 81 New York University Law Review 802 (2006).

18 Supra 15, at 2792.

19 See Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos,* ¶170, WT/DS135/AB/R (March 12, 2001); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶5.37, WT/DS58/RW (June 15, 2001).

20 Ibid.

21 Supra 19.

22 The necessity test has been uniformly upheld in all relevant disputes by both the AB and the Panel.

23 Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS/401/AB/R (June, 2014).

24 Supra 19.

illustration, the *EC-Asbestos case*[25] relied on evidence from several health regulatory bodies to determine the carcinogenic nature of asbestos. Similarly in the *Shrimp-Turtle- I case*[26] several scientific data and survey were involved in the determination that the species are susceptible to extinction. But in the definition of a public moral, such an extent of scientific evidence is impossible to procure *vis-à-vis* a state which provides a reason of subjective nature to this exception.

4. CONTRIBUTION OF THE *EC SEALS DISPUTE*

This essay addresses the contributions of the *EC seals dispute* to the available jurisprudence on public morality. Towards this objective, the essay seeks to compare and support the reasoning of the Panel Report and the process it undertook to establish the existence of public morals in the *EC Seals dispute*. This analysis has been made as a critique of the AB report on two interlinked grounds: *first* on the threshold of animal welfare used in the AB report to justify public morals; and *second* on the unfettered power given to the State claiming an exemption to decide what constitutes public morals.

The recent AB decision warrants further analysis.[27] Canada and Norway initiated consultations with the European Union which concerned the implementation of the "EC Seals Regime".[28] Canada and Norway sought a declaration that these regulations were in violation of the Article I and III of the GATT along with Articles 2, 5, 6 and 7 of the TBT Agreement. In February 2014, a request for the establishment of the Panel was communicated by Canada and Norway, pursuant to which a panel was established.[29]

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25 Ibid.

26 Supra 19.

27 Supra 23.

28 This is a collective nomenclature for Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, of 16 September 2009 on trade in seal products; Regulation (EU) No 737/2010 positing rules for the implementation of the above-mentioned 2009 regulation of the European Parliament and of the Council on trade in seal products.

29 Supra 23.

The dispute concerned the ban, which the EU adopted, on the importation or sale of seal products.[30] The ban exempted the Inuit population from Greenland as they were indigenous seal hunters. Canada and Norway challenged the Seals regime, stating that it was discriminatory towards their manufacturers.

The Panel Report found that the EU had violated its obligations under GATT but apart from its regulation on travellers carrying seal products, which was found to violate the chapeau of Article XX, the regulations were protected by the morals concern.[31] The Panel undertook a comprehensive analysis to establish the legitimate objective of the morals exception. It employed a threshold which consisted of two prongs: *first,* the identification of a risk and *second,* an overall assessment.[32] Having considered this, it upheld the EU's claim, save in case of certain hunting methods such as 'trapping and netting' which were considered indispensable for the subsistence of the Inuit. The Panel found that these methods although inhuman, were necessary for the subsistence of the Inuit and therefore, overrode the animal welfare concerns in this case.

It could be argued that the test expounded in the Panel Report serves the purpose of balancing the use of the public morals exception as well as the obligations of a State under GATT. The balance is consistent with the approach adopted by the AB on numerous occasions. The AB in the *US Gasoline*[33] and *Shrimp Turtle* I[34] decided to adopt a harmonious view of balancing the general obligations and the exceptions.[35] In the *US-Gasoline case* the AB stated:

> "the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III: 4 be given so broad a reach as effectively to emasculate Article XX (g)… the 'General Exceptions' listed in

[30] Panel report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R (November 25, 2013).
[31] Ibid.
[32] Supra 30. The Panel Report considers the conservation measures undertaken for the specific species in its determination as opposed to the AB which by opposing this threshold indirectly purports to support general animal welfare as a threshold to accept the exception of public morals.
[33] Supra 15.
[34] Supra 19.
[35] Supra 1.

> Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis"[36]

In the *EC Seals case* however, despite the Panel Report and the AB striving to achieve a common end, differed on the thresholds to be used. As stated above, the Panel report sought to objectively determine the existence of a public moral by using the identifiable risk and overall assessment approach while the AB resorted to a lower standard that of deference.

In contrast, the AB stated that the approach of the EU towards animal welfare (not focussed on seals) had to be considered; the evidence for the same being in the legislative history and the policies implemented by the EU. The AB used a 'deference review', whereby it adopted an approach which allowed States to decide the content of their public morals.[37] By using this test, the AB failed to distinguish between a social concern and a moral concern, a point which the Panel report emphasized upon. The importance of this distinction stems back to the *US-Gambling* decision. The GATS undisputedly contains an exception to public order which is missing from the GATT. Thus, especially after the distinction was discussed in both *US-Gambling* and the *EC-Seals Panel*, it was imperative for the *EC-Seal* AB report to ensure that what the EU sought to protect was a moral concern and not a social concern. This determination would require making an objective analysis of the public moral in question using the identifiable risk and overall assessment test as done by the Panel. In failing to draw this distinction, the AB allowed an escape route to a Member State to use the public moral defence even in situations of public order thereby inappropriately and indirectly expanding the scope of the exception.

In its report, the AB has cited the *EC-Asbestos decision* as justification for the use of the deference standard. *EC- Asbestos* itself favours a deference review with respect to the health exception under Article XX (b).[38] Yet, what the AB failed to consider and what indeed the Panel Report has considered is the abstract nature of the morals claim. With respect to the health exception, the *EC-Asbestos decision* while allowing for deference, cautions against exploitation and warrants the existence of a scientific

[36] Supra 15.
[37] Supra15.
[38] Supra 19.

evidence of a link between the health objective and the measure.[39] However, there is no similar link envisaged by the AB with respect to public morals. Merely historical evidence of regulation, as it has suggested, does not further any objective criteria on the basis of which a determination could be made.

Contrarily, the Panel Report's approach does entail objective criteria which may be justified by illustration. Country A has a morals ban on the import of refrigerated perishable products due to the excessive emission of Chlorofluorocarbons in the process of refrigeration of perishable goods. In the opinion of Country 'A', CFCs are a key factor in global warming. Country B takes objection citing that although regulations for reduction of CFCs are in place, the country cannot raise a morals exception because the amount of carbon emission from the country is in excess of its Kyoto Protocol obligations.[40]

In a hypothetical proceeding, if the panel or the AB held that merely because carbon emissions of Country A were excessive, specifically banning refrigeration of CFC emissions could not be done, such a decision would be erroneous.

To elucidate, when considering a morals claim, the Panel or the AB would have to consider not the fact that the carbon emissions of country A were higher but the fact that the CFCs in particular were heavily regulated in State A. This is because the carbon emissions of Country A could be higher as a result of multiplicity of factors such as unavailability of unclean technology etc. However, Country A should not be denied of its claim of public morals.

Inverting the situation, if the country has stringent carbon-emission regulations, except of emission of CFC from refrigeration, a morals claim would not be sustainable for a ban on refrigerated perishable goods. In this situation, the Panel or AB would have to consider the fact that CFCs form a special category which cannot be clubbed in the broader sphere of carbon emission in the particular factual matrix. Therefore, if Country A were to ban refrigerated perishable goods on the ground of morals, it would not be able to avail the defence of public

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[39] Ibid.

[40] In this example the premise is that Carbon-emissions from anthropogenic sources affect the climate in an adverse manner. See Climate Change 2001: Inter Governmental Panel for Climate Change Third Assessment Report (T.A.R.).

morals as it did not have or have had relaxed norms on the emission of CFCs. Thus, the question in either situation would be to consider the standard of regulation of CFCs and not the standard of regulation of carbon emissions.

Applying the example in the *EC-Seals case*, the Panel Report was right in considering the processes involved in sealing and the nature of the trade (akin to the CFCs in the hypothesis). The threshold which should have been applied is whether there was an identifiable risk to seals and whether the regulations of the EU were justified on an overall assessment and not on the basis that the EU considered conservation of animals or on a 'global norm of conservation' as a moral concern.[41]

The AB report focuses on animal welfare as a general measure across species (akin to considering regulation of carbon emission in general). Although, *prima facie*, it may seem that the threshold used by the AB is more stringent such as inference is erroneous. This is because the AB leaves the content of the morals entirely to the determination by the State claiming the observation.

Applying this approach to the previous hypothesis, the AB would merely ensure that the State claiming the exception has certain norms or a history of regulating carbon emissions. If in its opinion that occurs, then the ban on CFCs or any other pollutants, which Country A deems fit, would be upheld despite the fact that the state has less stringent norms or no norms on governing CFCs.[42]

Therefore, what needs to be considered next is whether the AB threshold of allowing the State claiming the exception to freely decide what constitutes public morals, is in furtherance of the balance sought to be achieved by the WTO: that of international obligations and the ability of the state to govern its domestic matters.

The AB decision states that "*we … have difficulty accepting Canada's argument that, for the purposes of an analysis under Article XX (a), a panel is required to identify the exact content of the public morals standard at issue.*"[43] Thus the AB has made it clear, that the exact demonstration of the existence of a moral value and its contravention need not be shown. To this effect, in

[41] Supra 19.

[42] Contrary to this the ban would not be upheld using the threshold of the Panel Report in EC Seals.

[43] Supra 23, at ¶5.199.

the subsequent paragraph, the AB report states "*Members may set different levels of protection even when responding to similar interests of moral concern*".[44]

The AB thus, required the EU to demonstrate, through legislative text and history, the existence of the public morals against seal products. Further, it has held that a representation by the government to the effect that public morals have been affected in addition to the legislative history is sufficient evidence. It did not even require the demonstration of an identifiable risk. Canada contended that the words "to protect" mean that there had to be an identifiable risk. It based its argument on the fact that similar phrasing has been used in Article XX (b) where the AB in *EC Asbestos* required the identification of a health hazard.[45] Rejecting the argument, the panel body was of the opinion that public morality was a fluid concept and thus there could not be an identifiable risk to public morals.

This, in the opinion of the author, is an excessively low threshold and is contrary to the objectives laid down in the preamble of the GATT namely, "*entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction… barriers to trade and to the elimination of discriminatory treatment in international commerce*".[46] It is possible that without an identifiable risk, every state may use this exception to escape its obligations. In agreement with the author's opinion, the Panel report too requires the existence and demonstration of an identifiable risk to the public morals.[47]

Analysing it from the example cited previously, if country A succeeds to demonstrate that there is an identifiable risk in trading in CFCs then the exception of country A would be upheld.

The fallacy in the view of the AB in this regard can best be brought out by another example. If one country makes a declaration that no neem products will be imported due to moral concerns. As per the AB report, that country is not required to furnish any evidence except the fact that neem regulation has happened in its domestic market and legislative history. Whereas, the Panel Report threshold would mandate the country to demonstrate why import of neem products conflicts with its

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[44] Supra 23, at ¶5.3.3.4.
[45] Supra 19.
[46] Preamble, General Agreement on Trade and Tariffs (1994), 1867 UNTS 187; 33 ILM 1153 (1994).
[47] Supra 30.

morals. The latter approach would minimize the chance of arbitrary declarations by states on the grounds of public morals to avoid trade obligations as it imposes a higher threshold.

Elaborating further upon the distinction, the Panel does not remain satisfied by the *prima facie* evidence of the long-standing history of regulation. The Panel looks at a higher degree of analysis, first between commercial and non-commercial use of seal products and how it ties in with the justification of public morals. In determining this question, the Panel looked into several factors such as the characteristics and the methods of hunting seals, the anatomical structure of seals etc. It considered arguments on the humane method of killing seals and accepted EU's notion that practically the unique conditions make it improbable to conduct those in sealing. It identifies concerns of inhumane treatment such as delay[48], struck and lost[49] and hooking a conscious seal[50] having considered this the Panel states:

> "The challenge of reconciling the requirements of humane killing with the practical risks and difficulties of seal hunting, together with the potentially large territory of the hunt, poses an obstacle to monitoring and enforcement of the application of humane killing methods. Our assessment of the evidence taken together indicates that these risks to seal welfare are present in seal hunts in general."[51]

The Panel report considers an overall assessment of the sealing regime prior to deciding upon the grant of the morals exception. Contrarily, the AB relies on the principle of sovereign deference. Thus in the opinion of the author, the balance between the international obligations to which a state has itself consented to, and exceptions from these obligations in exercise of its regulatory powers had been well-achieved by the panel report.

Further, the author emphasizes that the proving of an exception under the GATT regime is a mixed question of fact and law. If the AB report is adopted, it no longer remains a question of law. It is reduced to a question of fact namely- whether the state envisages that degree of regulation, a question to which the answer is to be given by the State

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[48] Supra 30.
[49] Supra30.
[50] Supra 30.
[51] Supra 30, at ¶7.224.

invoking the exception itself. If however, the Panel report is adopted, it deals with the issue keeping in mind both that a discovery of fact is necessary along with an equally important question of law.

For these reasons, the author is of the opinion that the AB report suffers from a deficiency, in that it renders a mixed question of fact and law, solely one of fact and contrarily the Panel report was accurate in adopting the 'overall assessment threshold'. A vital question however may be with regard to the difficulty in the availability of reliable sources and measures of objective analysis. This question has been addressed in the subsequent section.

5. RECOMMENDATIONS

Although the EC-Seals dispute has shed new light upon the public morals exception, there is little jurisprudence to clearly spell out the contours of this exception. The *EC-Seals dispute* is itself disharmonious, where the AB overruled the Panel. Thus, the author notes a need to diversify sources from which an analogical extension may be made to administer an 'overall assessment threshold' akin to the one used by the EC-Seals Panel, which the author advocates for the aforementioned reasons. The author recommends a mechanism *first*, an analogy to arbitral awards, and *second*, other sources of law which need to be looked at in order to develop the concept and content of public morals. For this the author relies on customary international law.[52]

The author suggests that one way to look at the threshold of public morality is to equate it with the exception of public policy under the New York Convention.[53] The New York Convention imposes an obligation upon the member States to enforce arbitral awards. As an exception, it provides that member states may escape the obligation to enforce an award if it contravenes its public policy.

[52] There is a long standing debate on the role of Public international law in WTO Law, but at this juncture the author does not seek to venture in this debate. The proponents of the pro-interaction theory may look at custom as one of the sources, the proponents of the *legesspecialis* notion may look at it from analogical terms.

[53] The New York Convention on the Recognition and Enforcement of foreign Arbitral Awards, 330 UNTS 38; 21 UST 2517.

At the outset, the author admits that the manner of interpretation, as put forth by the *US- Gasoline* and *the US- Gambling test,* are different and from the manner of interpretation of public policy exception.

However, the situations where public policy violations are claimed are analogous to that of public morals. For ex, where the enforcement of an arbitral award risks the fundamental conception of justice in a State, it may be a ground to refuse enforcement.[54] The author in no way posits that arbitral or court decisions on enforcement in investment or commercial arbitration would be persuasive in the determination of public morals under trade law. However, the author finds scope to derive an analogical extension in the absence of other substantial jurisprudence to be helpful in this quest.

Arbitral awards enforcing contracts performed on child labour or slavery or in some cases violation of environmental norms etc. pose a risk to the public policy of the state and are good examples when enforcement of arbitral awards are refused.[55] The function of the sovereign in its exercise of the public policy exception and in its exercise of the public morality exception, it is the same to shield the citizens' values which are required to be protected. Thus, hypothetically, if country A is exporting a product engaged in child labour the importing country may use the morals as exceptions. Crucially, though the Panel should look at situations where arbitral awards have been refused enforcement in these circumstances as similar situations to favourably consider these exceptions.

6. DRAWING FROM CUSTOMARY INTERNATIONAL LAW

As regards the content of what constitutes morals, customary international law holds various values which are to be followed as law by all States.[56] With the call for a dynamic interpretation of public morals, not only to protect the citizens of the nations but also outwardly measures designed to protect other values, customary international law has become all the more important. Values such as prevention of torture, *pacta sunt servanda* etc. are upheld by states as custom under

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[54] Zimbabwe Electricity Supply Authority v. Genius Joel Maposa,[1999] (Supreme Court of Zimbabwe).

[55] See Ch. Setting Aside Arbitral Awards: Public Policy, Gary B. Born, International Commercial Arbitration Vol. I & II Kluwer Law International (2009).

[56] Ian Brownlie, *Principles of Public International Law* (7th ed., 2008)

international law. These values could thus be looked at in order to form the minimum content.

These two methods seek to meet the deficiency in evidence which may arise in considering cases of public morals. The AB's scepticism in addressing the content of the 'moral' and consequently its deference threshold may be nullified in future with these analogical tools as they grant more liberty to panels to gather evidence for an 'overall assessment'. It is submitted these two analogical tools would aid is outlining a content of the moral which would be invoked from an 'overall assessment' threshold.

7. CONCLUSION

Scholars such as Prof Van den Bossche argue that public morals as an exception has been deliberately phrased in a vague manner or that the drafters were unable to come to an agreement as to its meaning.[57]. The *US-Gambling case* of 2005 and the EC- Seals decision, the AB decision being given in June 2014 are the only specific interpretations of the public morals exception. The EC Seals AB decision relaxes the thresholds which were put in place by the Panel decision which in the opinion of the author is an ill-advised.

The AB decision is in consonance with the *US-Gambling* decision as regards the manner of determination of public morals: that what constitutes public morals is the prerogative of the state. Although the Dispute Resolution Body decisions do not constitute precedent, both the decisions together constitute a pattern of non-interference of the sovereign power of the state with respect to the content or identification of public morals. This pattern remains unchallenged by any other AB report and thus, becomes highly persuasive. It is detrimental in nature as it could be prone to misuse by the states to avoid certain products.

In the opinion of the author, the AB decision to recognize existence of animal welfare in the legislative history of the State raising the exception as opposed to recognition to specific efforts in the conservation of that species is erroneous. If the "morals" of the citizens of a State are being jeopardized by the hunting of a particular animal or a particular method of hunting, it is reasonable to assume that the measures are reflected

[57] Supra 2.

even in the domestic sphere of the State. The author is of the opinion that the Panel's enquiry into the factual circumstances was well-warranted as it must also be ascertained that the ban imposed on that species is not a sham to avoid trade obligations but arises out of a *bona fide* morals concern. These specific measures ensure that the exception does not allow a state to unnecessarily escape its trade obligations.

Finally, as regards the use of the exception, the author argues that the Panel Report decision of requiring an 'identifiable risk' to the moral on an 'overall assessment' is a reasonable approach. Requiring the demonstration of identifiable risk institutes a check on an unsubstantiated claim of "morals" being affected as the risk would have to be evidenced in fact. An overall assessment ensures that States do not unreasonably exploit the exception to avoid trade-obligations. This would further reduce the probability of misuse or would in the least, require a state to demonstrate its *bonafides* while raising the exception.

THE CURIOUS CASE OF 'ODIOUS DEBTS' IN INTERNATIONAL LAW

- Srimukundan R*

ABSTRACT

The epilogue to the twentieth century marked the formation of numerous nation states by the rupturing of fractured societies. This state of affairs has carried over into the twenty first century, well unto the present year. It poses the greatest problems to the 'continuity of obligations' of states and governments. Pertinent areas of discussion within the realm of Public International Law are State successions and Political transitions. It is generally believed that states and governments succeed to the debts of their predecessors. The odious debt doctrine is the most controversial of the exceptions to this general rule. Odious debts are the debts incurred by a particular regime that do not benefit the state. Debate over Iraq's possible repudiation of the debts incurred by the Saddam Hussein regime has renewed interest in the subject. The sheer odiousness of the debts is best understood through countries with a history of autocratic regimes such as Nicaragua and Congo where the odious debt to income per person ratios are as high as 563.3% and 274.9% respectively. While the existing state of affairs may not affect a majority of nations, the reality that funds continue to flow into nations with autocratic and oppressive regimes is only deplorable. This Paper examines the odious debt doctrine and its foundations in Treaties and Customary International law. Arguing that the doctrine has not crystallized into International custom, the paper makes a case for its recognition in International law and makes recommendations for an International regulatory mechanism. The Paper identifies doctrinal legal challenges to the viability of such mechanism and provides potential solutions.

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1. INTRODUCTION

"None of us clearly know to whom or to what we are indebted in this wise, until some marked stop in the whirling wheel of life brings the right perception with it."

- Charles Dickens, Little Dorrit

Considered by some to be a 'more seditious' text than Marx's Das Kapital, Charles Dickens's Little Dorrit remarkably portrayed the degrading reality of bankruptcy.[1] Set in Marshalsea's Victorian-era debtors' prisons, though the novel's tortuous fabric may have been sewn for nineteenth century middle class English households, its haunting truth continues to be relevant to numerous nations saddled with odious debts.

State successions and political transitions pose the greatest problems to 'continuity of obligations' of a state or a government. It is generally believed that states and governments succeed to the debts of their predecessors.[2] While the veracity of this statement is beyond the scope of this paper, it should however be observed that arguing otherwise would render sovereign lending impossible for want of certainty. The rule has a number of exceptions; and the most significant and complicated of those is the concept of 'odious debt'.[3] First proposed by Aristotle,[4] this rarely invoked doctrine has been debated since the introduction of its modern avatar in the writings of the Russian Jurist Alexander Nahun Sack.[5] Though the legal standing of the doctrine has been subject to severe criticism from numerous quarters, the doctrine's moral foundation has inspired support. Published in the 1920's, Alexander Sack's treatise, The Effects of State Transformations on their

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1 T Hunt, *Toxic Debts, Collapsing Banks And Endemic Fraud... Ring Any Bells?,* The Guardian (11/10/2008), available at http://www.theguardian.com/books/2008/oct/12/charlesdickens, last seen on 9/2/2015.

2 B. Lewis, *Restructuring The Odious Debt Exception*, 25 Boston University International Law Journal 297, 301 (2014).

3 A. Yianni & D. Tinkler, *Is There A Recognized Legal Doctrine Of Odious Debt?*, 32 North Carolina Journal of International Law and Commercial Regulation 749, 751 (2007).

4 Cheng T, *Renegotiating The Odious Debt Doctrine*, 70 Law and Contemporary Problems 7, 12 (2007). ; *Ukraine's Odious Debts*, Hudson Institute, available at http://www.hudson.org/research/10247-ukraine-s-odious-debts, last seen on 18/3/2015.

5 R. Howse, *The Concept Of Odious Debt In Public International Law*, UNCITRAL Discussion Papers, 2, United Nations Conference on Trade & Development (2007).

Public Debts and Other Financial Obligations, offers the first modern discourse on the subject of odious debts.[6] Essentially, odious debts are the debts that do not benefit the state, incurred by a particular regime and hence, should be unenforceable. While the doctrine remained dormant for the major part of the twenty-first century, there has been renewed interest in the subject beginning with the debate over Iraq's possible repudiation of the debts incurred by the Saddam Hussein regime.[7] The recent crisis in Ukraine has also sparked off the debate on the odious debt doctrine.[8]

Part I examines the definitions and the types of odious debts. Part II examines the concept's foundations in Treaties and Customary International law. Part III expounds on why the odious debt doctrine must be recognized in International law. Part IV puts forward suggestions to concretize the odious debts doctrine. Part V examines some of the challenges posed to the doctrine's viability and possible solutions.

2. DEFINING & CLASSIFYING ODIOUS DEBTS

2.1. Definition of Odious Debts

"*If a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress the population that fights against it, etc., this debt is odious for the population of all the State*."[9] The concept of odious debts, despite the lack of sizable state practice, has been a recurrent subject in academic literature. The world's pre-eminent authority on state debts and political transformations, Russian jurist Alexander Nahun Sack propounded the odious debt doctrine in 1927, synthesizing from historical instances of debt repudiation. Sack's definition proposed

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6 Ibid, at 2.

7 A. Allawi, *How To Save Iraq From Civil War*, The New York Times (27/12/2011), available at http://www.nytimes.com/2011/12/28/opinion/how-to-save-iraq-from-civil-war.html?pagewanted=all&_r=0, last seen on 12/2/2015; M. Medish, *Make Baghdad Pay*, The New York Times (4/11/2003), available at http://www.nytimes.com/2003/11/04/opinion/make-baghdad-pay.html, last seen on 12/2/2015.

8 Supra 4.

9 E. Mancina, *Sinners In The Hands Of An Angry God: Resurrecting The Odious Debt Doctrine In International Law*, 36 George Washington International Law Review 1239, 1246 (2004).

three criteria to determine odious debts. *First*, the debt should be incurred hostile to the debtor state's interests; *second*, the creditors should be aware of the fact that their debts had been used to oppress the population of the state; *third*, the debtor state's population must not have consented to the debt.[10] Mohammed Bedjaoui, the Special Rapporteur to the International Law Commission, formalised a definition of 'odious debts' that was to beinvoked from two different perspectives.[11] *First*, from the perspective of the Successor State, an odious debt is a debt contracted by the Predecessor State to attain objectives hostile to the major interests of the Successor state. *Second*, from the viewpoint of the International community, odious debts included all debts contracted for attaining ends contrary to contemporary international law, particularly the principles crystallized in the UN Charter.[12]

2.2. The Three Types of Odious Debt

There is considerable disagreement on the question of types of odious debts. Commonly, odious debts are classified into two categories: war debts, and hostile or subjugation debts.[13] War debts are those debts that have been contracted by governments to defeat an enemy that eventually overthrows the government.[14] Hostile debts are those that have been contracted to the detriment of its own people, for example to

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[10] C. Paulus, *The Evolution of the "Concept Of Odious Debts"*, 68 Heidelberg Journal of International Law 391, 404 (2008).

[11] Yearbook of the International Law Commission, Volume I, Sales E.78.V.1, 66, (1977) available at http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_
1977_v1_e.pdf , last seen on 18/3/2015.

[12] Article C: Definition of odious debts: 'For the purposes of the present articles, "odious debts" means:(a) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory; (b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.'

[13] J. King, *Odious Debt: The Terms Of The Debate*, 32 North Carolina Journal of International Law and Commercial Regulation 605, 629 (2007).

[14] V. Nehru & M. Thomas, *The Concept Of Odious Debt: Some Considerations*, 205, 206 in *Debt Relief and Beyond: Lessons Learned and Challenges Ahead* (Carlos A Primo Braga, 1st ed., 2009).

suppress secessionist movements, for conquests, etc.[15] This Paper also contends that war debts should not constitute a category of odious debts.[16] Scholars such as Sack and P K Menon have argued for an additional category of 'regime debts'.[17] The third category primarily consists of the debts of the developing world incurred against the interests of the population of a State, particularly debts incurred by undemocratic or dictatorial regimes.[18]

3. THE ODIOUS DEBT DOCTRINE IN INTERNATIONAL LAW

It must be appreciated that the odious debt doctrine has never been theorized as a legal norm; but only as an exception to the norm that debts continue upon succession, both of the state and the government.[19]

3.1. Conventions

The only international convention that deals with the subject of debt repayment with respect to 'state' succession is the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983.[20] It must be noted that the final draft Convention did not contain any provisions defining odious debts. A number of critics have argued that the non-inclusion of Bedjaoui's definition of odious debts in the final draft should be construed as an express rejection of the doctrine's relevance.[21] Such criticism must be deemed to be unsubstantial because the International Law Commission, after having discussed the article defining odious debts, believed that there was no need to specifically provide for a definition article and that the rules for each type of succession would govern the odious debt doctrine.[22] The

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[15] Supra 2, at 301.
[16] Reasons have been dealt with below in Part II (C).
[17] P. Menon, *The Succession of States and the Problem of State Debts*, 6 Boston College Third World Law Journal 111, 117 (1986).
[18] Supra 3, at 761.
[19] A. Khalfan, J. King & B. Thomas, *Advancing The Odious Debt Doctrine*, 21, Centre for International Sustainable Development Law, (2003).
[20] M. Akehurst, *Akehurst's Modern Introduction to International Law*, 172 (Malanczuk P, 1st ed., 2002).
[21] Supra 4, at 24.
[22] Supra 11, at 79.

Convention, however, has remained a highly unsuccessful piece of drafting; and has not entered into force as yet.[23]

3.2. Customary International Law

Traditional Customary International Law under Article 38(1)(b) of the ICJ Charter contains two elements: state practice, and *opinio juris*. State practice, i.e. the actual general practice of the States, is the objective element of international custom; while *opinio juris* is the subjective element, i.e. it establishes whether States behave in a particular manner owing to some binding international law obligation or owing to other reasons such as formalities, convenience, etc. There is no disagreement as to the need for consistent and uniform state practice for an international custom to be established.[24] Despite criticism from some quarters, the traditional psychological requirement of *opinio juris* also continues to be relevant for the purpose of determining international custom. A number of historical instances are pivotal to the study of this doctrine, *particularly* the following.

3.2.1. The Franco-Prussian Peace Treaty (1807)

The Peace Treaties signed at Tilsit in 1807 brought the War of the Fourth Coalition fought between France on the one hand and Prussia and Russia, on the other hand, to an end.[25] Importantly, the Franco-Prussian Peace Treaty[26] excluded the debts that had been contracted during the war from the Successor state's obligations.[27] However, it must be noted that these war debts were not actually treated as a legal exception to the continuing obligations of the Successor state in the early 1800's. It is best evinced by the fact that numerous war treaties that had been entered into in Europe contained no provisions to exclude war debts till the 1860's.[28] Therefore, it cannot be said that these debts were excluded owing to any binding international law obligation.

3.2.1. The Annexation of the Republic of Texas by the United States (1844)

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[23] Supra 20, at 172.
[24] Ibid.
[25] J. Verzijl, W. Heere & J. Offerhaus, *International Law in Historical Perspective*, 331 (3rd ed., 1998).
[26] Ibid.
[27] H. Cahn, *The Responsibility of the Successor State for War Debts*, 44 American Journal of International Law 477, 481 (1950).
[28] Ibid.

The United States and the Republic of Texas entered into a treaty to effectuate the Union of the two states in 1844; and the same provided for the assumption of Texas's debts by the United States.[29] Certain circumstances prevented the US Senate from ratifying the treaty; and the union was effectuated through a joint resolution.[30] As the debts persisted, the United States agreed to transfer a sum of $10,000,000 in consideration of the revocation of all debts that accrued to the United States after the union with Texas.[31] Ultimately, the US Government on a *pro rata* basis settled the debts in 1855.[32] Though this scenario does not deal with the question of 'odious debts' as such, it can be argued that the United States founded its arguments, not in hard law principles, but on equitable principles of what would have been '*right*' and '*just*' in the particular situation.[33] Its contribution to the instant inquiry is the tendency of examining the moral and equitable aspects of debts, and not towards establishing instances of state practice and *opinio juris*.

3.2.2. Mexican Repudiation of Emperor Maximilian's Debts (1867)

Emperor Ferdinand Maximilian Joseph, the archduke of Austria and the Emperor of Mexico,[34] was known to have contracted debts at onerous rates in order to prevent uprisings against his suzerainty over Mexico.[35] Subsequent to his execution and the succession to the monarchy by the liberal Republican Government under President Benito Juarez, Mexico repudiated the loans contracted by him in 1867.[36]

3.2.3. Cession of Cuban Territory to the United States (1898)

The American repudiation of Cuban debts marks the first significant exposition of the odious debt doctrine. Before the Spanish-American War of 1898, the Spanish territory of Cuba contracted a number of loans with the Spanish Government under Spanish laws, secured by

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[29] M. Hoeflich, *Through a Glass Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession*, University of Illinois Law Review 39, 48 (1982).
[30] Ibid, at 49.
[31] Ibid, at 50.
[32] Ibid, at 50.
[33] Ibid, at 51.
[34] Encyclopedia Britannica, Britannica, available at http://www.britannica.com/EBchecked/topic/370459/Maximilian, last accessed on 18/3/2015.
[35] Ibid.
[36] E. Borchard & J. Hotchkiss, *State Insolvency and Foreign Bondholders,* 129 (1st ed., 1951).

Cuban revenues. Victory at the 1898 war gave the United States control over the Cuban territory.[37] When the question of continuity of Cuban debt obligations came up, the Americans argued that Cuba's debts had been imposed against the consent of its people, and aimed at suppressing the uprisings against the Spanish Government.[38] Consequently, the United States invoked the odious debt doctrine to avoid maintenance of the debts, and Spain assumed the Cuban debts instead. It has been argued that Spain's act validated and established an instance of odious debt repudiation. However, it must be noted that Spain accepted responsibility for Cuba's loans out of international pressure, and not out of any legal obligations.[39]

3.2.4. Annexation of the Boer Republics (1900)

Britain annexed the Republics of the Transvaal and the Orange Free State after emerging victorious at the Second Boer War of 1900.[40] Though the Supreme Court of the Transvaal in *Postmaster General v. Taute*[41] ruled that the debts of the South African Republic and the Orange Free State had devolved unto the Successor state i.e. Britain, the latter refused to maintain these debt obligations claiming that they were odious.[42] After denying all legal liability of Britain for these debts, Great Britain only made *ex gratia* payments for these debts.

3.2.5. Soviet repudiation of Tsarist Debts (1918)

While the Russian Revolution and the related events of 1918-19 have been widely studied, the fate of the debts of the Tsarist regime has been little explored. Though the Russian state's identity remained unchanged through the political transition, Soviet Russia unequivocally repudiated all the foreign debts incurred by the Tsarist regime on the ground of their odiousness. Despite its creditors' demands that Russia recognize

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37 R. Zedalis, *Claims Against Iraqi Oil And Gas: Legal Considerations And Lessons Learned*, 28 (1st ed., 2010).

38 Ibid.

39 *Odious Debt: When dictators borrow, who repays the loan*, The Brookings Institution, available at http://www.brookings.edu/research/articles/2003/03/springdevelopment-kremer, last seen on 18/3/2015.

40 F. Pretorius, *History Of The Boer Wars*, *BBC* (29/3/2011), available at http://www.bb c.co.uk/history/british/victorians/boer_wars_01.shtml, last seen on 12/2/2015.

41 Postmaster General v. Taute, TSCR 582 (1905, Transvaal Supreme Court).

42 Supra 28, at 59.

the debts of the previous regime,[43] the Soviet Government stated that Revolutionary Governments had no duty to maintain the contractual obligations of the overthrown governments.[44] However, *opinio juris*, i.e. legal sanction to repudiate odious debts, cannot be inferred from the Soviet Government's acts. In fact, the Soviet delegation to the Genoa Conference (1922) declared that they were willing to denounce their extreme attitude and to settle their debts problem *in accordance with International law.*[45] Therefore, it can be concluded that the Soviet Statesmen repudiated the Tsarist debts knowing fully well that the same had not been permitted by International law.

3.2.6. The Treaty of Versailles (1919)

At the end of the Second World War, it was discovered that the German and Prussian Governments had contracted massive loans for ethnic Germans to purchase the Polish estates.[46] Consequently, Article 255 of the Treaty of Versailles waived these debts off the Polish Government to the extent that they were used in the colonization process.[47] Several authors including Jeff King and O' Connell argue that this is a direct application of the odious debt doctrine.[48]

3.2.7. Treaty of Saint Germain & Treaty of Trianon (1919)

After the First World War, the Treaty of Saint Germain was signed by German Austria and the Treaty of Trianon was signed by Hungary. Both these treaties excluded the Successor states of the Austro-Hungarian Empire from being burdened with the debts incurred by the Empire, post 1914.[49]

3.2.8. The Tinoco Arbitration (1923)

The Royal Bank of Canada had granted loans to the Costa Rica under the rule of its dictator Federico Tinoco. When his Government was

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[43] J. Foorman J & M. Jehle, *Effect Of State And Government Succession On Commercial Bank Loans To Foreign Sovereign Borrowers,* University of Illinois Law Review 9, 19 (1982).

[44] Ibid, at 20.

[45] Ibid.

[46] Supra 19, at 27.

[47] Peace Treaty of Versailles, Brigham Young University Resources, available at http://net.lib.byu.edu/~rdh7/wwi/versa/versa8.html, last seen on 20/3/2015.

[48] Supra 5, at 11.

[49] Supra 27, at 484.

overthrown in 1922, the Costa Rican Constitutional Congress enacted a legislation repudiating the obligations under those debts.[50] The dispute was arbitrated between Great Britain (representing the Royal Bank of Canada) and Costa Rica before a tribunal chaired by William Taft, former Chief Justice of the American Supreme Court. Judge Taft ruled that the public debt had neither been incurred validly not had been in public interest, and dismissed Great Britain's claim.[51]

The subsequent democratically elected Costa Rican government argued that the obligations contracted by the unrecognized government headed by Tinoco. However, the arbitral award clearly notes that Tinoco's government had the consent of the people towards its activities, and cited the report of the Successor government to that effect.[52] The Arbitrator awarded repudiation of debts in Costa Rica's favour only because the creditors had been aware that the funds had been for Tinoco's private purposes.[53] Furthermore, the doctrine of odious debts had not been invoked in the arbitration at all.[54] Hence, the Tinoco arbitration also cannot be used to defend the doctrine of odious debts as part of customary international law.

3.2.9. German Repudiation of Austrian debts (1938)

Upon annexation of Austria, Germany repudiated the former's debts owed to American and British citizens.[55] Germany founded its arguments on the basis that these debts were incurred to prevent the German annexation of Austria; and hence were odious debts that need not be serviced, assuming fully that its annexation was beneficial to Austrian citizens as such.[56] However, this has been considered to be a misapplication of the doctrine, as a substantial amount of the debts had been used to procure food,[57] and not to prevent German annexation of Austria. The doctrine having been invoked wrongly, this instance cannot be said to evince any *opinio juris* in favour of the odious debt doctrine.

3.2.10. Treaty of Peace with Italy (1947)

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50 Great Britain v. Costa Rica, (1923) 1 RIAA 376 (William H. Taft Arbitral Tribunal).
51 Ibid, at 399.
52 Supra 50, at 379.
53 Supra 9, at1248.
54 Supra 9, at 1248.
55 Supra 28, at 63.
56 Supra 28, at 64.
57 Supra 43, at 21.

After World War II, the Peace treaty entered into by the Successor states of Mussolini's Italy were excluded from being burdened with the debts that had been incurred for military purposes specifically.[58]

3.2.11. Franco-Italian Commission (1947)

The Franco-Italian Commission, constituted under the Treaty of Peace with Italy after the Second World War in 1947, declared that Ethiopia could not be forced to maintain debts that had been contracted by Italy for the subjugation of Ethiopia itself.[59] It must be noted that these funds were used against the consent of the Ethiopian people; and to their detriment.[60] While the attachment of *opinio juris* in this situation is highly ambiguous, even the Commission's observation does not distinguish between whether the loans had been applied for war purposes or for the subjugation of Ethiopia.[61]

Arguments have been made in favour of the odious debt doctrine constituting international custom, on the basis of the above instances. The *historic novelty* of the twentieth century is demonstrated by the numerous instances of state successions, especially after World War II and the Cold War.[62] This background must not be forgotten while analysing the legal standing of the odious debt doctrine. Surprisingly, the odious debt doctrine has not seen practical application in the last seventy years; despite attempts at and scholarly calls for its application. Without doubt, this phenomenon has been highly detrimental to the cause of establishing the odious debt doctrine as a binding principle of International law. It is important to examine if these instances actually led to the crystallisation of the doctrine as international custom.

Further, the above analysis clearly demonstrates a lack of consistent and uniform state practice regarding odious debts.[63] As explained above, most acts of repudiation of the alleged odious debts were not accompanied by any legal obligation/sanction to do so. For example,

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[58] 61 US Stat. 1245, 76(5) (United States).

[59] Supra 3, at 759.

[60] Supra 3, at 760.

[61] Report of International Arbitral Awards, 13, 639, (1956), http://legal.un.org/riaa/vol_XIII.htm, last seen on 15/3/2015.

[62] E. Hobsbawm, *Some Reflections On The Break-Up Of Britain*, 105 New Left Review 3, (1977), available at http://newleftreview.org/I/105/eric-hobsbawm-some-reflections-on-the-break-up-of-britain, last seen on 18/3/2015.

[63] Supra 59.

later statements of the Revolutionary Soviet Government deemed their repudiation of the debts incurred by the Tsarist regime to not be in accordance with international law. Other instances like Spain's assumption of Cuban debts and Britain's repudiation of the Boer Republics' debts were also not out of a sense of legal obligation/sanction. While instances like Mexico's repudiation of Maximilian's debts indeed possessed *opinio juris*, such practice seems few and far between. Hence, it must be concluded that there is not sufficient and widespread *opinio juris* necessary for the odious debt doctrine to constitute customary international law. Therefore, this Paper concludes that there is no legally binding international custom that entitles Successor states to repudiate odious debts.

3.3. War Debts

The case of war debts is a *red herring* that must be subject to further scrutiny. It is submitted that the practice of the Conquering Sovereign repudiating the war debts of its Predecessor state is justified in International law.[64] Though jurists such as Sack and Menon have argued for recognizing three kinds of odious debts, this Paper contends that the inclusion of war debts will run contradictory to the other criteria defining odious debts. Professor O'Connell argues that there are no *intrinsic* reasons to include war debts within the umbrella of odious debts.[65] Repudiation of war debts is not founded on the doctrine of odiousness of debts; instead, on the rights of a Conquering Sovereign.[66] The practice of repudiation of war debts can be traced to Hugo Grotius who wrote, "*the conqueror may impose whatever terms, and exact whatever fines he pleases*".[67] It is important to note that the subsequent practice of repudiation of war debts developed even before the first instance of repudiation of debts based on the odious debt doctrine. Further, while repudiation of war debts had crystallized into international custom by the end of the Second World War,[68] the odious debt doctrine as such has rarely been invoked in the twentieth century.

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[64] Supra 27, at 487.

[65] Supra 19, at 18.

[66] West Rand Central Gold Mining Co Ltd v. The King, 2 KB 402 (1905, King's Bench Division).

[67] H. Grotius, *The Rights Of War And Peace* (A. Campbell, 1st ed., 1901).

[68] Supra 27, at 487.

4. WHY THE ODIOUS DEBTS DOCTRINE MUST BE RECOGNIZED IN INTERNATIONAL LAW?

The odious debt doctrine is of particular significance for the twenty-first century. The epilogue to the twentieth century marked the formation of numerous nation states by the rupturing of fractured societies.[69] The world has experienced a number of serious political transitions, particularly the democratization of numerous authoritarian regimes.[70] This change has not missed the attention of International lawyers and academics. It is interesting to observe[71] that the most recent edition of Professor Brierly's *locus classicus*, *The Law of Nations*, appreciates the need to reconsider the proposition that obligations ordinarily devolved unto the Successor states.[72] Professor Starke argues that debts incurred for purposes hostile to the Successor state need not be maintained.[73] Professor O'Connell argues that a Successor shall be legally obligated to repay debts only if it has been unjustly enriched by the Predecessor state's loans.[74] The probable advantages that would accrue, if the odious debt doctrine became a legally binding norm, would be immeasurable.

The following are a few potential examples of odious debts. Franjo Tudjman became the President of the then newly proclaimed Croatia in 1990, only to install autocratic governance with a pitiable civil rights record.[75] Western powers pressurized the International Monetary Fund to cut off all lending to Croatia in 1997. Despite this, private creditors lent more than $2 billion to Croatia, which are still being borne by the Croatian state.[76] It has been reported that the Nicaraguan dictator Anastasio Somoza had swindled about $150 million dollars from 1967 till his ouster in 1979.[77] Jean Claude Duvalier, Haiti's former dictator has

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[69] S. Kaplan, *Fixing Fragile States: A New Paradigm for Development*, 36 (1st ed., 2008).

[70] S. Huntington, *The Third Wave: Democratization In The Late Twentieth Century*, 48 (1st ed., 1993).

[71] This observation does not directly concern the odious debt doctrine. *Nevertheless*, it is important to understand the change in the attitudes of International law scholars.

[72] A. Clapham, *Brierly's Law Of Nations*, 165 (7th ed., 2012).

[73] J. Starke, *Introduction To International Law*, 334 (10th ed., 2014).

[74] Supra 28, at 46.

[75] D. Robertson, *Franjo Tudjman: Father Of Croatia*, BBC (11/12/1999), available at http://news.bbc.co.uk/2/hi/europe/294990.stm, last seen on 10/10/2014.

[76] T. Harford, *The Not-So-Sweet Smell Of Odious Debt*, *Financial Times* (9/3/2012), available at http://www.ft.com/intl/cms/s/2/a001772c-67f2-11e1-978e-00144feabdc0.htm, last seen on 10/10/2014.

[77] S. Hermann, *Nicaragua Timeline*, BBC News (9/9/2012), available at http://news.bbc.

allegedly looted more than $900 million of the funds forwarded to Haiti.[78] Saddam Hussein's regime in Iraq contracted loans amounting to more than $130 billion; most of these loans were used for military purposes and to suppress political opponents. Policy experts such Michael Hanlon had deemed these to be odious debts that needed to be repudiated.[79] The Nobel Laureate Joseph Stiglitz argues that requiring nations to maintain obligations under their odious debts would lead to a virtual destruction of those nations that have faced serious civil rights abuse and wars, such as Iraq.[80] Countries like Nicaragua and Congo have sky shattering odious debt to income ratios per person of 563.3% and 274.9% respectively.[81] The following summary[82] of odious debts incurred by a few nations from 1970 to 2004 should highlight the burden borne by these nations.

Country	**Total Odious Debt (In US $ Billion)**	**Total Public Debt still outstanding (In US $ Billion)**
Indonesia	223.5	72.9
Argentina	180.7	103.9
Nigeria	94.8	31.3
Philippines	70.6	35.6

co.uk/2/hi/americas/1225283.stm, last seen on 10/10/2014.

78 R. Archibald, *Jean-Claude Duvalier Dies At 63,* The New York Times (4/10/2014), available at http://www.nytimes.com/2014/10/05/world/americas/jean-claude-duvalier-haitis-baby-doc-dies-at-63.html?_r=0, last seen on 10/10/2014.

79 E. Pan, *Q&A: Iraq's Debt*, The New York Times (7/11/2003), available at http://www.nytimes.com/cfr/international/slot3_110703.html?pagewanted=all&position=, last seen on 10/10/2014.

80 J. Stiglitz, Odious Rulers, Odious Debts, The Atlantic (1/11/2003), available at http://www.theatlantic.com/magazine/archive/2003/11/odious-rulers-odious-debts/302831/, last seen on 10/10/2014.

81 *Odious Lending: Debt Relief As If Morals Mattered*, The New Economics Foundation, available at http://www.dette2000.org/data/File/Odiouslendingfinal.pdf, last seen on 18/3/2015.

82 Ibid, at 17.

Pakistan	47.0	31.0
Peru	37.6	23.5
Sudan	17.5	11.7
South Africa	17.4	9.8
Democratic Republic of Congo	17.0	10.5
Nicaragua	10.7	4.1
Ghana	5.9	5.5
Malawi	3.3	2.8
Haiti	1.2	0.9

The doctrine, despite a century-long existence, has still failed to crystallize into international custom. The possible reasons could be that these states have hesitated to invoke the doctrine, fearing adverse effects in the capital markets. To substantiate, most nations with odious debts such as Iraq, Congo, Indonesia are developing, third world nations. Removal of access to credit will seriously stunt their development, only to let millions languish in ignorance and poverty.[83] The Paris Club created in 1956 is an informal group of creditors who meet often in Paris to provide debt treatment to nations seriously ridden with debts. Their schemes often involve debt restructuring or debt reduction.[84] However, debt relief provided under the Paris Club's auspices do not legally accept the odious debt doctrine, and the relief agreements do not provide for repudiation of odious debts. Though the mechanism has worked considerably, the ultimate need of the day is a full-fledged system. Professor Upendra Baxi argues for certain normative expectations of the Third World to become principles of International law through soft law instruments, such as General Assembly resolutions, etc.[85] He puts forward a case for recognizing the need for *global reparative*

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[83] Supra 84.

[84] Who are we, Club de Paris.org, available at http://www.clubdeparis.org/sections/composition/membres-permanents-et, last seen on 18/3/2015.

[85] U. Baxi, *What May The 'Third World' Expect From International Law?*, 27 Third World

justice to address past wrongs. The odious debts doctrine would clearly fit under this category.[86] A fine example from history is the movement to force the UN Security Council to declare the odiousness of the debts incurred by the apartheid South African Government; and to prevent any Successor state from being obligated to repay the same.[87] One of the most practical solutions offered to the problem of odious debts is the *ex ante* model proposed by Jayachandran & Kraemer. This Paper accepts the effectiveness of the model; and it is dealt with below.

5. An Ex-Ante Model To Solve The Odious Debts Problem

One of the solutions provided to tackle the problem of the odious debts is the *ex ante* model proposed by Jayachandran & Kraemer. The odious debt doctrine is envisaged as an exception that can be employed by the Successor state to repudiate the debts of its Predecessor. However, the later repudiation of debts can adversely affect the nation's access to funds. Founded in the economic analysis of the law, the *ex ante* model mandates that a regime be recognized by a pre-designated international institution as 'odious', thereby making it imperative on the part of the creditors to exercise *due diligence* before lending.[88] A mere declaration of 'odiousness' will not render all loans contracted odious. The other criteria of the loans being used against the state's interests, and without the consent of the population will still hold good. The pre-designation is only a matter of abundant precaution that acts as a notice to the creditors. Designating 'odiousness' will remove the impediments that creditors could possibly face; consequently, leading to an economically efficient *Coasean* situation. Coase theorem posits that high transaction costs distort efficient allocation of resources.[89] Transaction costs are the costs over and above the contractual consideration.[90] They include the costs of identifying the parties, bringing them together to bargain and

Quarterly 9, 17 (2006).

[86] Ibid, at 18.

[87] Supra 5, at 14.

[88] M. Kremer & S. Jayachandran, *Odious Debt*, 96 The American Economic Review 82, 91 (2014).

[89] R. Cooter & T. Ulen, *Law And Economics*, 92 (1st ed., 1988).

[90] David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Costs Minimization in a World of Friction*, 47 Arizona Law Review 61, 84 (2005).

enforcing the subsequent agreement.[91] Here, the envisaged pre-designation will lead to Creditors being able to identify creditworthy nations (or governments) to lend to. In turn, this incentivizes governments to take active measures to prevent their regimes from being designated as 'odious', and therefore allow access to credit to many economically weak countries. Consequently, the transaction costs for the creditor i.e. to identify creditworthy states and to enforce the debt contract will become less expensive. Similarly, for countries that have been incentivized to not have 'odious' regimes, the transaction costs of borrowing will become less expensive.

An automatic minimization of odious debts[92] will occur with creditors being made 'better off' with prior knowledge.[93] A number of ancillary advantages may accrue such as the deterrence of potential odious borrowing by dictators[94] and the reduction in interest rates for legitimate borrowing.[95] It must be remembered that even quasi-democratic governments can contract odious debts; consequently, not having designated 'odious' does not indicate the legitimacy of the debts. Their legitimacy can still be dealt with *post facto* by the institution. It must be noted that the *ex ante* model is not entirely free from shortcomings. A number of important questions must be answered. Some of these questions are - what standards that should be used to determine odiousness, who should determine odiousness, whether humanitarian loans ought to be blocked, etc. Comprehensive answers to these questions will be equivalent to designing an International framework to deal with the problem of odious debts, which is beyond the scope of this Paper. Nonetheless, attempts may be made at answering these questions preliminarily. The *ex ante* model necessarily requires an authorized[96] International body that has to wrestle with three important questions: whether a regime is legitimate or odious; regardless of the regime's legitimacy, whether the loans advanced have been utilized for odious purposes; the extent to which the debts can be repudiated.

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[91] James E. Krier & W. David Montgomery, *Resource Allocation, Information Cost, and the Form of Government Intervention*, 13 Natural Resources Journal 89, 91 (1973).

[92] S. Bonilla, *Odious Debt*, 105 (1st ed., 2011).

[93] Supra 88, at 91.

[94] Supra 92, at 105.

[95] Supra 88, at 91.

[96] 'Authorised' to distinguish it from the likes of the Paris Club, the London Club and the HIPC, which are managed by private creditors themselves. See Supra 85, at 22.

This Paper sets forth the following principles to solve the problem of odious debts. It must be noted that these principles are not comprehensive, and are mere guidelines that can be adopted while designing a suitable framework to implement the *ex ante* model.

i. The institution's determination is essentially quasi-judicial, and hence its objective independence is mandatory. Due importance must be attached to the principle of *nemo iudex in causa sua* i.e. no man should be a judge in his own cause.

ii. The institution must be free from the influence of the creditors as well as the debtor states. The task could be entrusted to a permanent International judicial or arbitral institution, and should be designed to not succumb to commercial and political exigencies. Ad hoc mechanisms such as the Paris Club have been heavily laden with the influence of the creditor states.

iii. It must be noted that neither the World Bank nor the IMF can provide for this procedure, solely because of their impartial decision making process.[97] It could possibly function under the auspices of the UN General Assembly.

iv. The Institution should work on the basis of principles agreed at the time of its inception, so as to avoid arbitrariness in individual cases.

v. Either the creditors or the debtors may initiate the procedure.

vi. The procedure must be fair, and premised on the principle that all parties must be heard.

vii. The institution should develop debt inventories mandatorily that distinguish between legitimate and odious debts. Debt servicing should be carried through a third party escrow account.

viii. Provisions must be made for appealing the decisions of the institution.

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[97] R. Rajan, *The Future of the IMF and the World Bank*, 98 American Economic Review 110, 111 (2008).

It cannot however be the situation that odious debt working out mechanisms continue to function without a basis in International law. Though not immediately essential, an international treaty could be formulated to establish this mechanism in International law, with consequent rights and obligations.

6. CHALLENGES TO THE ODIOUS DEBTS DOCTRINE: POSSIBLE SOLUTIONS

6.1. State Succession vs. Government Succession

The debate that could actually cripple the application of the odious debt doctrine is the distinction drawn between succession of states and succession of governments. It has been argued by critics that the odious debt doctrine would apply only in case of state successions and to not mere successions of governments.[98] The Iran-United States Claims Tribunal has also espoused the same in its judgments.[99] Instances in history also hint at the verity of such a distinction. The Revolutionary Government in France after the 1789 French Revolution had assumed all the debts incurred by the monarchy.[100]The distinction was a key under pinning of the legal view of the nineteenth and the twentieth centuries. It has been argued by authors such as Professor Detlev Vagts that the principle of distinction could be traced back to Grotius.[101] It is expedient to make certain observations here. *First*, there are two general theories that prevail with respect to state successions – Universal Succession and Clean Slate Theories. Universal succession theory mandates that the Successor state succeed to all the obligations of the Predecessor state;[102] while the Clean slate theory puts forward that obligations shall not be carried on to the Successor state.[103] The former is a product of the Continental lawyers, while the latter evolved from Anglo-American practice in the nineteenth and twentieth centuries.[104]

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[98] Supra 19, at 47.

[99] *The United States of America v. The Islamic Republic of Iran*, [1996] CTR 175 (Iran-United States Claims Tribunal).

[100] Supra 28, at 62.

[101] D. Vagts, *State Succession: The Codifiers' View*, 33 Virginia Journal of International Law 275, 282 (1993).

[102] Supra 28, at 44.

[103] Supra 28, at 60.

[104] Supra 28, at 44 & 60.

While the Universal theory has been traced back to the writings of Grotius, Pufendorf and Gentili, it must be remembered that each of these scholars focused his writings on the passing of duties from a Predecessor to a Successor sovereign.[105] This Paper contends that not only that Universal theory of State Succession (vis-à-vis Succession of governments) cannot be attributed to Grotius, the distinction between the two kinds of succession is also a later creation; consequently, the distinction should not be allowed to prevent the application of the odious debt doctrine. Numerous scholarly opinions also rank in favour of this conclusion. For instance, one of the world's foremost scholars on State Succession, Daniel O' Connell observes that the distinction between the two kinds of succession "*wears thin to the point of disappearance*".[106] Further, Professor Oscar Schechter argues that the distinction is no longer sound in law, and hence should change with the needs of the world.[107] His prognosis has only been confirmed by the recent surge in the number of nations facing serious internal political transitions. Professor Starke also argues that fundamental or revolutionary changes in the government should free the Successor government from maintaining the Predecessor government's obligations.[108] Some scholars such as Professor Cheng have completely redefined state succession to mean all changes in fundamental structures of governance that cause international demands regarding commercial obligations.[109] Redefining state succession or evaluating recent postulations is outside the scope of this Paper; nonetheless, the change in scholarly attitude to meet contemporary challenges is of crucial importance. Hence, an arbitrary distinction should not be allowed to prevent the application of the odious debt doctrine to solve the most pressing problem of undemocratic and unconstitutional regimes heaping debts upon a nation's future generations. It must however not be understood that a mere change in Government shall not entitle the Successor government to repudiate the obligations of its Predecessor. This Paper submits that such a change must be so fundamental to the

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105 M. Craven, *The Problem Of State Succession and the Identity of States under International Law,* 9 European Journal of International Law 142, 147 (1998).

106 O. Schachter, *State Succession: The Once and Future Law*,33 Virginia Journal of International Law 253, 254 (1993).

107 Ibid, at 255.

108 Supra 73, at 338.

109 G. Bowman, *Seeing the Forest and the Trees: Reconceptualizing State and Government Succession*, 51 New York Law School Law Review 582 (2006).

political and economic structure of the State.[110] It is implicit that the institution designated for implementing the *ex ante* model shall also hold this understanding of Succession.

6.2. Determining the odiousness of a Debt:

The *ex ante* model does not judge the legitimacy of a debt neither at the time of lending nor at the time of designation of an *odious* regime. The model only creates a presumption of odiousness in dictatorial regimes, which can be discharged before the institution. Similarly, a presumption of legitimacy of debts can be raised in cases of states with democratic regimes, which can also be discharged before the institution. The latter is particularly relevant because of the widespread use of bribes and corrupt practices with respect to the funds obtained for government projects, etc.[111] The legitimacy or odiousness of the debts depends on two factors: consent of the state's population, and benefits to the population. It is recommended that the institution adopt an adversarial procedure to determine absence of consent of the population. A presumption that consent to the debts exists must be made if they were contracted by democratic regimes, and a contrary presumption must be made if they were contracted by dictatorial regimes. In the former situation, the burden of proof will be transferred to the debtor state; in the latter situation, the burden of proof will be transferred to the creditors. Logically sound, this scheme has to be deemed to accord protection to good faith creditors, as these creditors should have had notice of 'odiousness' at the time of lending. Once the presence or absence of consent has been established, determining absence of benefit should be carried out on a case-by-case basis. Some *possible* factors could be: arms & ammunitions purchase to suppress internal minority uprisings; undesirable investment infrastructure projects; unjust enrichment of the regime's key official and their families, etc. Reiterating, these factors are not exhaustive and are merely indicative of absence of benefit.

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[110] Supra 73, at 338.

[111] Mike Stefanovic, 'Stepping up Prosecution of Transnational Bribery Cases' (*World Bank*, 2011), available at http://live.worldbank.org/stepping-prosecution-transnational-bribery-cases, last seen on 10/10/2014.

7. CONCLUSION

The question of whether the odious debt doctrine is a binding principle in International law must be answered in the negative, as has been demonstrated. It is however imperative to deter odious lending; otherwise *status quo* shall prevail. While the existing state of affairs may not affect a majority of nations, the reality that funds continue to flow into nations with autocratic and oppressive regimes is only deplorable. Notwithstanding the shortcomings of the doctrine today, the doctrine has not been given adequate opportunities for the world to realize its full potential. This Paper has put forward solutions to come to grips with the difficulties that the odious debt doctrine has created. The proposed *ex ante* model is appreciably the most effective mechanism to deal with the problem at hand.

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