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GLOBAL GOVERNANCE AND PRIVATE INTERNATIONAL LAW

DARIO MOURA VICENTE *

Abstract

Worldwide economic integration and the need that many associate with this for global governance have presented private international law with the challenge of a supranational unification of this discipline. Several arguments speak in favour of this: on the one hand, the free movement of persons, goods, services and capital across borders that the unification of the rules on international jurisdiction, conflicts of laws and recognition of foreign judgments necessarily engenders and, on the other hand, the increased regulation of those phenomena that it enables, on the basis of a proper balancing of the interests at stake, undertaken on an international scale. Indeed, there has been no lack of initiatives to this purpose, notably those undertaken within the scope of the Hague Conference on Private International Law. Nonetheless, States have often proved reluctant to adhere to these initiatives, and few international conventions in the area of private international law have as yet succeeded in attaining a truly global reach. Only in 2019, after more than twenty years of preparatory work, was it possible to conclude an international convention intended to ensure the worldwide recognition of foreign judgments on civil and commercial matters; but even this was only achieved at the expense of significant restrictions on the Convention’s substantive scope of application. This state of affairs is not unrelated to the tendency for a retreat to protectionism and unilateralism, which has recently emerged in several parts of the world. At the same time, in the light of the problems posed by the globalisation of the economy, it remains far from clear what direction the unification of private international law should take, and similarly the way it should be reconciled with preserving the diversity and plurality of national legal systems. This article seeks to identify the main origins of and possible pathways to resolving these issues.

Keywords: Conflict of laws, globalization, governance, legal pluralism, private international law, uniform law

I. THE CHALLENGE OF GLOBAL GOVERNANCE AND ITS CAUSES

Whilst in the none too distant past a considerable number of closed societies existed, in which all or most legal relationships were constituted, developed and terminated within the borders of a single State or an autonomously organised territory, in today’s world few, if any, such societies are still extant.

In effect, the extraordinary development of international trade and the upsurge in migration over the past seventy years have entailed a significant increase in the number of situations which are international in nature. Three phenomena have decisively contributed to this: (a) the sharp reduction in customs duties under the

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General Agreement on Tariffs and Trade and the World Trade Organization; (b) the regional economic integration achieved in various geographical areas, such as that occurred within the European Union, the West African Economic and Monetary Union, the MERCOSUL and the North American Free Trade Agreement (recently replaced by the United States-Mexico-Canada Agreement), the first two of which also feature the adoption of a single currency; and (c) the advent of worldwide electronic communications networks and of new forms of trade associated with them.

In short, this state of affairs corresponds to the growing intermeshing of national and local communities often dubbed *globalisation*, which has considerably fostered conflicts of laws and conflicts of jurisdiction.¹

These phenomena have been coupled with a host of economic and social developments, which have irreversibly changed the nature of private international relationships. Significant among these have been the growing emancipation of individuals and businesses in relation to State regulation of economic and family life, as well as the emergence of novel forms of private rule-making, the ubiquity of transactions entered into through global electronic networks, the increased mobility of populations across borders and the resulting mass migrations, and the decline of State sovereignty and physical territory as criteria for demarcating the spatial reach of national laws.²

These developments have in turn given rise to new challenges faced today by a large number of societies: the diminished ability of States to regulate economic and financial activity; the decline of privacy and of the enforceability of intellectual property rights on the Internet and social media; the advent of new forms of labour exploitation and human rights’ violations through the relocation of industrial activities; and the difficulty of integrating migrant populations in their host communities.

Many of these issues can only be resolved through political, economic and legal cooperation between States and other subjects of international law. This corresponds to what is termed – perhaps not altogether appropriately – *global governance*, as called for in several areas of legal and economic thought.³

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Private international law has been no exception to this trend, although some authors have pointed to the significant shortcomings in this field and its inadequate response in several respects in what is known as the resultant governance gap. This, in short, is the matter that will concern us in this essay.

II. THE PARADOX OF PRIVATE INTERNATIONAL LAW

As classically conceived, private international law discharges its fundamental mission of regulating private international relationships through conflict-of-laws rules, which subject those relationships to the law of one or more countries with which they are in some way connected. According to this approach, it is fundamentally the location of the legal relationships in question that must be considered in order to designate the law that applies to them, this law being in principle that of a State; moreover, such law should be determined without regard to the content of the respective substantive rules.

This is in essence the choice of law approach advocated by Savigny (1779-1861). This author posited the existence of a so-called community of laws between “civilised nations”, springing from the influence of Christian ideas and consisting of a fundamental agreement as to the resolution of certain legal issues. Such a community of laws yielded, in turn, a degree of fungibility between national legal systems and of parity between the law of the forum and foreign laws. This parity underlies the model, proposed by Savigny, of a bilateral conflict of laws rule – i.e. a conflict rule that can refer its subject-matter either to the domestic or to a foreign system of law – as the most appropriate one to resolve conflicts of laws. In Savigny’s view, each category of legal relations would have, in keeping with the nature of things, its own seat; the law in force in the seat of a legal relationship, to be designated by a conflicts rule, would be that which must be applied in each case. In choosing the connecting factors relevant to determining that law, private international law would be guided, according to Savigny, by an ideal of harmony of judgments: in the event of a conflict of laws, the same solution should be provided to legal issues, irrespective of the State to whose courts they are submitted.

However far private international law may have evolved over the past century and a half, this remains the methodological approach – based on the postulate of the

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existence of a notional justice proper to private international law, distinct from that prevailing in substantive private law— that inspires many of its rules.

The paradox of contemporary private international law can be seen precisely in this circumstance that a discipline that essentially seeks to regulate relationships “crossed by frontiers” is still based on conflict rules drawn from eminently national sources, and hence rooted in the assumption that the political organisation of the world is essentially based on nation States, from which, in essence, all private law rules emanate. Further, these conflict rules, because of their axiological neutrality, are fundamentally indifferent to the social, economic and technological changes in the commonly arising life situations they are intended to address, and, as such, appear to some as unfit to meet the challenges of global governance.

As we have sought to demonstrate elsewhere, that model of private international law has been largely superseded, insofar as what is called the “justice” of this discipline— i.e. the values that it serves in the field that constitutes its subject-matter— cannot be divorced from the major ideals of public and private law.

In any case, it is important to acknowledge that the fundamental method adopted by this branch of the legal system, and also its sources, need to adjust to the social and political realities emerging from globalisation.

This adjustment should take place at different levels: (a) firstly, through greater harmonisation or international unification of private international law; (b) then, by acknowledging the inadequacy of some of the preferential connecting factors traditionally used in its rules, especially those based on the territorial location of

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7 In the expression used by Isabel Magalhães Colaço, Direito Internacional Privado, vol. I, (AAFDL, Lisbon, 1966), p. 16.


certain forms of human action with their potential to generate legal consequences across borders, in particular the nationality of individuals or the seat of the management of commercial concerns; (c) in addition, through a broader recognition of legal situations constituted abroad, even if to the detriment of the law designated by ordinary conflict rules; (d) further, by regulating the enforcement of decisions issued by international non-judicial dispute resolution instances and coordinating these decisions with the jurisdiction of national and supra-national courts; (e) lastly, through the implementation of effective mechanisms for international judicial cooperation, especially in order to ensure that judgments can move freely across frontiers and, as a result, protect the concerned parties’ reliance on the legal situations thereby constituted, modified or extinguished in a given country.

This, in short, is the basis on which private international law may be able to overcome the paradox described above and contribute to instituting a global governance of cross-border legal relations in contemporary societies. These are therefore the topics to be analysed in the following sections.

III. THE NEED TO UNIFY PRIVATE INTERNATIONAL LAW AND THE DIFFICULTIES ENCOUNTERED

Cooperation between States on private international law matters takes place primarily through initiatives aimed at harmonising and unifying its rules. There are several significant reasons for this.

In the first place, the need to prevent conflicts of systems resulting from differences in national conflict-of-law rules and the legal uncertainty they bring: otherwise, the law applicable to the merits of a dispute may vary, depending on the court where the suit is originally filed, with the result that the same dispute may be decided on the basis of different laws, depending on the country where the most diligent party files the action.

Secondly, harmonisation and unification of private international law is necessary to regulate international judicial cooperation mechanisms, including both active and passive cooperation.\(^{10}\) Active cooperation comprises acts carried out in a State other than that where the proceedings take place, in order to assist the judicial authority before which the case is pending, such as service and notification abroad of judicial and extrajudicial acts, the taking of evidence abroad and the exchange of information between judicial authorities and between them and the administrative authorities responsible for judicial cooperation. Passive cooperation consists of collaboration between judicial authorities that in turn presupposes a court refraining

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\(^{10}\) The distinction is proposed by Peter Schlosser, “Jurisdiction and International Judicial Administrative Co-operation”, *Recueil des Cours de l’Académie de La Haye de Droit International*, vol. 284 (2000), at p. 29.
from deciding a dispute either already decided or pending before a foreign court, for which that court is competent. This includes two types of action: declining jurisdiction over proceedings where exclusive jurisdiction belongs to a foreign court; and the recognition and enforcement in the forum State of acts performed by or before a foreign jurisdiction. In turn, this sub-category includes the prevention of parallel proceedings through a stay of proceedings or by declining jurisdiction in favour of a foreign court before which the same or related proceedings were first commenced, as well as the recognition of foreign judgments.

The foundations for this form of global governance were laid at the Hague Conference on Private International Law, just over 125 years ago.\(^{11}\) The Conference, whose aim, as defined in its Statute, is the gradual unification of the rules of Private International Law, first convened in 1893, thanks to the endeavours of two eminent European legal scholars: Pasquale Stanislao Mancini (1819-1888) and Tobias Michael Carel Asser (1838-1913). During the first phase of its work, the Conference approved several draft conventions concerning the personal status of natural persons and international civil procedure. The former represented a triumph of the ideas propounded by Mancini, insofar as they enshrined as a general principle the applicability of the law of an individual’s nationality in order to govern the matters to which they relate. These conventions are today of only minor importance, as they are binding on a very small number of States.

The most fruitful phase of the Hague Conference’s work commenced in 1954, since then forty international conventions have been approved.\(^{12}\) However, seven of these have not been entered into force due to having failed to garner the minimum number of requisite ratifications, while others are in force in only a limited number of States. This situation is not unrelated to a number of structural problems that affect the functioning of the Conference: (a) In the first place, the originally Euro-centric character of the Conference and the fact that, as from the conclusion of the Treaty of Amsterdam, in 1997, the European Union has had powers to legislate on matters of Private International Law, partly depriving the Hague Conference of its hitherto leading role in the international unification of Private International Law; (b) Secondly, the fact that markedly divergent legal traditions face each other at the Hague Conference, most notably those belonging to common law systems, which tend to allow their courts a wide margin of discretion in assessing their international


jurisdiction, and those of civil law systems, where a much more rigid approach in this respect traditionally prevails; (c) Lastly, the reservations with which a number of States regard the recognition by their courts of judgments issued by certain foreign jurisdictions, where the substantive law applied to the merits of the dispute is significantly different in relation to certain particularly sensitive matters, such as intellectual property and personality rights, and where, in addition, the same guarantees as those prevailing in the forum State do not apply in respect of a respondent’s right of defence and judicial independence.

Hence the difficulties experienced over the past twenty years in drafting a convention on the recognition and enforcement of foreign judgments on civil and commercial matters, to which we return below.\footnote{13}{See below, section 9.}

It is therefore no surprise that the instruments adopted by an international organisation of more limited scope – the European Union – constitute the most fruitful steps having taken towards harmonisation and international unification.

Crucial to this has been the fact that Article 61 of the Treaty of Amsterdam mandated the Council of the European Union to adopt measures in the field of judicial cooperation on civil matters, with the goal, according to Article 65, of improving and simplifying the recognition and enforcement of judgments in civil and commercial matters and of promoting the compatibility between the rules applicable in Member States on conflicts of laws and jurisdictions. The Treaty of Lisbon, signed in 2007 and in force since 2009, reaffirmed this policy in the rule enshrined in Article 81 (1) of the Treaty on the Functioning of the European Union (TFEU):

“The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.”

To this effect, paragraph 2 of Article 81 of TFEU lays down that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring, among other things, the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases, the cross-border service of judicial and extrajudicial documents, the compatibility of the rules applicable in the Member States concerning conflicts of laws and of jurisdiction and cooperation in the taking of evidence.
On the basis of these provisions, a vast number of European legal acts concerning private international law have been approved.\textsuperscript{14} These legal acts are sources of private international law in force in the internal legal systems of EU Member States, insofar as they are directly applicable in these States. To the extent, in addition, they are universally applicable – in that they regulate all situations within their object, irrespective of the law designated by them being that of an EU Member State or that of a third State –, a wide range of private international situations, from obligations to the succession of deceased persons, is now subject to conflict of laws rules of European origin, advancing significantly harmonisation not only of the regulatory content of this branch of law, but also of the prevailing style of legal discourse in the various Member States.\textsuperscript{15}

Many of the provisions contained in the said instruments have served as a model for legislative initiatives adopted in other areas of the world. The European Union has therefore taken on a leading role in formulating the rules that seek to institute global governance in matters of private international relations.

However, there is still no body of general provisions of European private international law; this has led some to advocate the adoption of a “Rome 0” Regulation, that would set out the relevant rules on the general issues relating to the


interpretation and application of conflict-of-law rules in European law. However, such a development appears, at least for now, not to feature on the agenda of European legislators.

In the field of international civil procedure, the normative system instituted by the European Union on the basis of the current Brussels I-bis Regulation is likewise incomplete, in view of the inapplicability of most of the jurisdiction rules contained in that Regulation to respondents domiciled abroad and the corresponding applicability, with certain exceptions, of internal jurisdiction rules to actions brought against those respondents, expressly established in Article 6(1).

Moreover, in the absence of an agreement on judicial cooperation in civil matters between the European Union and the United Kingdom, Brexit has entailed a very significant restriction on the geographical scope of application of the system thus instituted. Relations between the EU Member States and the United Kingdom are now governed, with regard to judicial cooperation, by their national laws and the applicable international conventions - undeniably a backward step in this field.


IV. THE CRISIS OF TERRITORIALITY

Prominent among the factors which call for coordination between States in regulating private international relations is the crisis of territoriality, as unleashed by the advent of global electronic communication networks and the so-called information society. The ubiquity of these means of communication have called into question, with regard to the use of intangible assets, the division of national spheres of legislative competence based on the principle of territoriality, which has prevailed in this matter for decades.

In effect, thanks to the development of digital technologies, such use can now be made instantaneously and simultaneously in multiple locations, thereby potentially generating a concomitant breach of exclusive rights over those assets in as many separate legal systems. The “peaceful coexistence” of exclusive rights over the same intellectual property assets – trade marks and other distinguishing signs, inventions and utility models, literary and artistic works, etc. – belonging to different entities, but limited to a given territorial jurisdiction, has therefore ceased to be possible when unauthorised use takes place either online or on social media stretching around the world.

This circumstance has given rise to some international initiatives to review the traditional paradigms of intellectual property rules in situations involving multiple locations.

One of these is the Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, adopted by the Assembly of the Paris Union and by the General Assembly of WIPO in 2001.19 Article 2 of this text lays down that:

“Use of a sign on the Internet shall constitute use in a Member State for the purposes of these provisions, only if the use has a commercial effect in that Member State as described in Article 3.”

It therefore follows from the Recommendation that, in order for a distinguishing sign used on a website to be deemed as having been used in a given country, the mere accessibility of that website is not sufficient: other circumstances must also exist, which makes it possible to conclude that there are economic repercussions from the use in question in that country.

Other texts from international sources, whilst not binding, have also addressed this topic in general terms. One may point here to the *Principles on Conflict of Laws in Intellectual Property*, adopted in 2011 by the European Max-Planck Group on Conflict of Laws in Intellectual Property (referred to below as the *CLIP Principles*).\(^{20}\)

With regard to the “ubiquitous infringement” of intellectual property rights on means of communication with a global reach, such as the Internet, Article 3:603 (1) of the CLIP Principles establishes that the courts may apply a single law: that of the State that has the closest connection with the infringement, if it can be considered that the infringement took place in all the States where the signals were received.\(^{21}\)

In order to determine the applicable law, courts must take into consideration, in accordance with paragraph 2 of that Article, all relevant factors, including the infringer’s habitual residence, its principal place of business, the place where substantial activities in furtherance of the infringement have been carried out and the place where the harm caused by the infringement is deemed substantial.

A tendency therefore emerges towards a certain attenuation of the principle of the territoriality of intellectual property rights,\(^{22}\) most strikingly in the exception clause which refers, regarding infringements committed using ubiquitous means of communication, to the law with which, in the court’s view, there is the closest connection.\(^{23}\) This is intended to avoid application (if only distributively) of the laws of more than one country to the same situations, whereby the principle potentially leads, in particular, to creative works and services hypothetically being offered to the public online, with a potentially inhibitory effect on such activities and on the access to information and cultural material they provide.


\(^{21}\) “In disputes concerned with infringement carried out through ubiquitous media such as the Internet, the court may apply the law of the State having the closest connection with the infringement if the infringement arguably takes place in every State in which the signals can be received. This rule also applies to existence, duration, limitations and scope to the extent that these questions arise as incidental questions in infringement proceedings”.

\(^{22}\) The inevitability of which was already pointed out in our monograph Dário Moura Vicente, *La propriété intellectuelle en droit international privé* (Brill/Nijhoff, Leiden, 2009). See also, more recently, Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar, Cheltenham/Northampton, 2020), p. 255.

There is however one important limitation, which the CLIP Principles set out in paragraph 3 of the same Article: any party may prove that the rules applying in a State or States covering the dispute differ from the law applicable to the dispute in accordance with the preceding paragraphs in aspects which are essential for the decision (e.g. with regard to the duration of copyright and the consequent occurrence of an infringement in that State). In that case, the court is to apply the differing national laws, unless that leads to inconsistent outcomes, in which case those inconsistencies are to be taken into account in devising the remedy. This is designed to ensure an appropriate balance between the interests at stake.

Similar rules are now enshrined in the Kyoto Guidelines on Intellectual Property and Private International Law,24 adopted in 2020 by the International Law Association at its 79th Conference, held in Kyoto, Japan, Article 26(1) of which states that:

“When the infringement in multiple States is pleaded in connection with the use of ubiquitous or multinational media, the court may apply to the infringement as a whole the law or laws of the State(s) having an especially close connection with the global infringement. Relevant factors to determine the applicable law (or laws) in these situations include: the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety; the parties’ habitual residences or principal places of business; the place where substantial activities in furthering the infringement have been carried out.”

A body of rules of this type can of course only result from cooperation between States and other interested parties, either through adoption of new normative texts on these matters, or through soft law instruments, such as those just alluded to.

V. THE DECLINE OF NATIONALITY AND THE EMERGENCE OF HABITUAL RESIDENCE

When determining the personal status of natural persons, countries have, as is well known, divided into those which assign jurisdiction to the law of nationality, and those that ascribe it to the law of domicile or habitual residence.

This division dates back to the nineteenth century, when many States in central and southern Europe, starting with France in 1804, broke with statutory tradition and enshrined in their legislations the principle of application of the national law to matters included within the personal status of individuals.

One of the leading advocates of this doctrine was Mancini. In a celebrated lecture delivered in 1851 at the University of Turin, he propounded the view that nationality constitutes the universal basis for solution of conflicts of law, as imposed by international law (diritto delle genti) itself.

Mancini saw the principle of nationality as not only the basis for the existence of the State, but also for the authority of its laws: in his view, private law relations were to be governed by the law of the nationality of the respective subjects. Mancini’s construct suited the spirit of his age, which saw the political unification of Italy under the banner of the idea of nationality. The nationality of persons would therefore determine the private law applicable to them, wherever they might be. This is because, for Mancini, private law was influenced by the spirit and character of each people, meaning that it would be unjust to apply to persons belonging to it any law other than that of their nationality. The nationality connection was to be enshrined in the first conventions unifying the law of conflicts, drawn up under the aegis of the Hague Conference on Private International Law, in which Mancini, as we have seen, was one of the leading figures.

The solution chosen for this problem is however not unrelated to the demographic structure of each country: States of emigration traditionally opt for the law of nationality, whilst States of immigration tend to prefer the law of domicile or habitual residence.

On the other hand, attainment of the goals of regional economic integration, in particular the increased mobility of persons over frontiers that these entail, may also justify the enshrinement, in certain matters included in the personal status of individuals, of the jurisdiction of the law of habitual residence, in order to facilitate the conclusion and enforceability of legal transactions relating to that status and their de jure incorporation into their respective host communities: this is what has happened in the European Union in relation to rules on marriage, divorce and judicial separation, as well as to succession to the estate of a deceased, under the relevant European regulations referred to above.

Thus, for example, under Article 8 of the Rome III Regulation, divorce and judicial separation are governed, in the alternative, in principle by the law of the State of the habitual residence of the spouses at the date of the filing of proceedings; or, failing that, of the last habitual residence of the spouses, provided the period of

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25 See Pasquale Stanislao Mancini, Della nazionalitè come fontamento del dirittodelle genti (Eredi Bota, Turin, 1851).

residence did not end more than a year prior to the filing of proceedings and provided one spouse still resides in that State at the time of filing. Only if there is no habitual residence will the law of nationality of both spouses at the date of filing of the proceedings be applicable, or failing that, the law of the State in which the court where proceedings are filed is located.

In turn, the Rome IV Regulation establishes, in Article 21(1), as a general rule, that “[u]nless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death”. Several reasons are invoked to support this solution: the law of habitual residence generally coincides with the centre of the main interests of the deceased and, often, with the place where most of his assets are located; this is also a solution that facilitates smooth administration of justice within the European Union and ensures a real connection between the succession and the Member State whose jurisdiction is exercised.27

Modern private international law of European origin accordingly tends, in matters of the personal status of natural persons, to ascribe primacy to the law of habitual residence over the law of nationality.

The same solution had previously been adopted in the situations provided for in the 1951 Geneva Convention on the Status of Refugees, which submits the personal status of refugees to the law of their domicile or, failing that, to that of their place of residence.28 Nonetheless, the division between legislations that opt for the law of nationality and those which prefer that of the domicile of the person concerned still endures.

Accordingly, in some cases, efforts have been made to find a compromise between the jurisdiction of the *lex patriae* and that of the *lex domicilii* in regulating certain matters falling within the scope of the personal status of individuals.

This was the case of the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons,29 Article 3 of which enshrined an interesting solution for determining the law applicable to a succession, whereby this is governed by the law of the State of habitual residence of the deceased, provided it had the nationality of that State or resided in it during the five years immediately prior to its death;30 in other cases, the law of nationality at the time of death is to be applied, unless that deceased had, at that moment, a close connection with another State, in which case the law of that State will apply.

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27 See recital 23 of the Regulation.
29 Concluded on 1 August 1989; not yet in force.
VI. PLACE OF EFFECTIVE COMPANY MANAGEMENT VERSUS THEIR PLACE OF INCORPORATION

Here too we may observe the importance of instruments of global governance in regulating one of the core issues of private international law.

However, it is not merely in relation to the personal status of individuals that international economic integration has required private international law to provide new solutions from a supranational source: the same has happened in relation to the personal status of companies.

The repercussions in the European Union through the Court of Justice case law on this matter are well known, most notably through the judgments in Centros Ltd. v Ehvervs- og Selskabsstyrelsen,31 Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art, Ltd.,32 Überseering B.V. v Nordic Construction Company Baumanagement GmbH (NCC),33 Cartesio Oktat Szolgáltató bővített vállalati felelősségügyi korlátozása,34 VALE35 and, lastly, Polbud — Wykonawstwo sp. z o.o.36

It may be concluded from these judgments, in sum, that the freedom of establishment currently enshrined in Articles 49 TFEU (in relation to natural persons) and Article 54 TFEU (in relation to companies) postulates the possibility of a company being incorporated in a Member State whose law is seen by its founders as more favourable, or of its registered office being transferred to that Member State, even if it carries out its business entirely in a separate Member State or is managed from there.37 The internal law of those States may not restrict this freedom, except where there are reasons of general interest or an abuse of rights. In any event, as the Court ruled in the Polbud case, “the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse”.

On the other hand, although the European treaties neither enshrine nor impose the adoption by Member States of a specific conflict-of-laws rule for determining

30 I.e., presumably without intending to return (“sans esprit de retour”).
31 ECLI:EU:C:1999:126.
32 ECLI:EU:C:2003:512.
33 ECLI:EU:C:2002:632.
34 ECLI:EU:C:2008:723.
35 ECLI: EU:C:2012:440
36 ECLI:EU:C:2017:804.
the personal law of companies, the national conflict-of-law rules on this matter must be applied by the courts and administrative bodies of those States without prejudice to the said freedom of establishment, unless serious reasons of general interest require otherwise.

The exercise of this freedom, e.g. through the opening of branch offices, may therefore entail restrictions on the scope of application of the law of the country of the place of principal and effective management (enshrined, for example, in Article 3(1) of the Portuguese Commercial Companies Code), in favour of the law of the company’s country of incorporation or statutory seat.

To some degree, these developments were anticipated by the Convention on the Mutual Recognition of Companies and Bodies Corporate, signed in Brussels on 29 February 1968 between the Member States of the then European Economic Community, Article 1 of which lays down that:

“Companies under civil or commercial law, including co-operative societies, established in accordance with the law of a Contracting State which grants them the capacity of persons having rights and duties, and having their statutory registered office in the territories to which the present Convention applies, shall be recognized as of right.”

It is true that the Convention never actually entered into force between its signatory States, for reasons not unrelated to the deep conflicts in approach that existed between them on this matter at that time. However, the Convention still provides evidence of the need, today more pressing than ever, for normative cooperation between States, in order for private international law to be able to rise adequately to the challenges of a globalised economy, as regards the personal status of companies.

This shift towards greater openness to the place of incorporation as a relevant connecting factor in the field under consideration should not overlook the risks of artificial relocation of companies, especially when this takes place to countries which lack a minimum degree of harmonisation between the applicable company law rules, such as exists in the European Union.

This explains the great care taken by the Comprehensive and Economic Trade Agreement between Canada and the European Union and its Member States (CETA)\textsuperscript{38} in defining, in Article 8.1, the concept of “enterprise of a Party”, for the purposes of the agreement’s provisions on investment. The definition reads:

“(a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or

(b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a).”

VII. RECOGNITION AS AN ALTERNATIVE METHODOLOGY?

The foregoing section raises the much broader question of the extent to which recognition should be adopted as a methodological alternative to regulating private international situations through conflict-of-law rules.

The notion of recognition is a familiar one in private international law. It is used in this discipline to signify the extension to a certain country of the effects pertaining to a legal situation duly constituted under the law of another country.\(^{39}\)

Recognition is often the consequence of application of the law designated by the conflict rules of the forum State, in the light of which it is determined whether a given subjective right was validly constituted, extinguished or transferred. Recognition of a right constituted under a foreign law is not, in those cases, something distinct from the actual application of that law.\(^{40}\)

Nevertheless, the object of recognition may be a legal situation constituted by a contractual instrument or a public act, in accordance with a law different from that which would be applicable in accordance with the conflict rules of the country where it is invoked.

In these cases, for the sake of the stability and continuity of those situations across frontiers, which should prevail over the interests underlying the applicability of the law designated by the common conflict rules, it is accepted that situations validly constituted in a foreign country, even if they could not be validly constituted locally, may produce effects in the country holding jurisdiction.

Dutch private international law offers an example of a rule dictated by concerns of this sort in Article 10:9 of the Civil Code:

“Where a fact has certain legal effects under the law that is applicable according to the private international law of a foreign State involved, a


Dutch court may, even when the law of that foreign State is not be applicable according to Dutch private international law, attach the same legal effects to that fact, as far as a non-attachment of these legal effects would be an unacceptable violation of the parties’ justified confidence or of legal certainty.”

Recognition of legal situations constituted under a foreign law other than that deemed applicable by the private international law of the forum state may accordingly be a way of coping with the diversity of national conflict rules in an age of economic integration characterised by growing cross-border legal transactions.

In the European Union, mutual recognition is the expression used to refer to the requirement, arising from free movement of the production factors, that each Member State should allow the marketing in its territory of goods or services lawfully placed on the market of their Member State of origin, and also that each Member State should accept companies validly incorporated under the law of another Member State to establish themselves in their territory.  

In addition to this positive aspect, mutual recognition also has another, negative, side in that it can operate as a limit on, or deviation from, the application of the rules of the lex causae. This limit may come into play when, in particular, the application of this law entails a restriction on free movement of products or services or on the freedom of establishment. In these cases, the principle of mutual recognition should be construed as a mechanism designed to correct, in intra-community relations, the result of application of the common conflict-of-law rules.  

There are accordingly some who refer, in these cases, to an exception of mutual recognition. This does not substitute conflict-of-law rules, but rather merely makes it possible to overrule certain rules of the law of the country of destination.

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42 This is what happened in the Centros, Überseeringand Inspire Art cases, referred to above. See, to the effect of the text, Michael Bogdan, Concise Introduction to EU Private International Law, 3rd Edition, (Europa Law Publishing, Groningen, 2016), pp. 23 et seq.

of goods, services or persons, or those of the law designated by the local conflict-of-law rules, when their application involves a restriction on freedom of movement.\footnote{That exception may be formulated as follows: “The provisions of the law designated by the conflict-of-law rules are not applicable when that application leads to an outcome contrary to the provisions of European Union law on the free movement of persons, goods, services and capital.” We have based this on the formulation proposed by Marc Fallon, in “Libertés communautaires et règles de conflit de lois”, op. cit., pp. 77 et seq.}

The workings of this exception presuppose, in any case, that the provisions overruled be functionally equivalent to those of the law of the Member State in accordance with which the legal situation under consideration was constituted: functional equivalence is the foundation for mutual recognition.

If, therefore, those provisions establish a higher level of protection for a certain category of persons, resulting in a real benefit, for example, to the consumer or employee, there will be no grounds for overruling them.

Conversely, this exception operates irrespective of the basis on which the rule to be set aside is applicable (either by operation of a conflict-of-law rule or because it constitutes an internationally mandatory rule), of the origin of the rule to be set aside (which may belong to national or foreign law, thereby differing from the international public policy exception) and of its nature (as it may belong to public or private law).

Another question which can be raised is whether mutual recognition, understood as described above, constitutes a \textit{methodological alternative} to – or, as Coester-Waltjen\footnote{See “Anerkennung im Internationalen Personen-, Familien- und Erbrecht und das Europäische Kollisionsrecht”, IPRax, (2006), pp. 392 et seq.} asks, a substitute ("\textit{Ersatz}") – for conflict-of-law rules.\footnote{See, for a summary of recent legal thinking on this issue, Paul Lagarde, “La méthode de la reconnaissance est-elle l’avenir du droit international privé?”, Rec. Cours, vol. 371 (2015), pp. 9 et seq.} In other words: will all the situations validly constituted under the law of another EU Member State be able to benefit from mutual recognition, whatever that national law may be?

Contemporary legal theory has widely rejected that autonomy. It instead holds that the recognition of acquired rights must only be admitted if and to the extent that these rights have been validly constituted under the law or the laws designated by the conflict-of-law rules of the forum state. That recognition is not therefore theoretically autonomous in relation to conflicts of laws.

However, as Erik Jayme and Christian Kohler have noted, it is clear that European plans of action in this field have been underscored by a tendency to replace private international law with mutual recognition, or, as Christian Kohler has written, a tendency for mutual recognition to be “reborn” as the basic principle for solving the problems of private international law. This is a tendency that those authors deplore, perhaps unsurprisingly in the homeland of Savigny.

There have been those who characterise recent developments in European private international law, in particular the acceptance extended to the country-of-origin principle and the mutual recognition principle, as a “revolution” and a “paradigm shift”. A method based on the idea of the closest connection is now, they contend, pitted against another, which seeks to resolve conflicts of laws on the basis of community freedoms.

This begs the question: should we dispense with control of the law under which a legal situation to be recognised was constituted for the sake of these freedoms?


51 A greater openness to developing this method has nonetheless been advocated by Paul Lagarde, who argues that it was adopted in the Hague Conventions of 1978 on the celebration and recognition of the validity of marriages and of 1985 on the law applicable to trusts and to their recognition, and also in the 2003 ICCS Convention on the recognition of surnames (See “Développements futurs du droit international privé dans une Europe en voie d’unification: quelques conjectures”, *RabelsZ*, (2004), pp. 225 et seq. (pp. 232 et seq.).

A principle of mutual recognition understood in this way might perhaps facilitate the resolution of specific cases; and it would even promote legal certainty and the foreseeability of judgments.\footnote{See, to this effect, Dagmar Coester-Waltjen, “Das Annerkennungsprinzip im Dornröschenschlaf?”, in Heinz-Peter Mansel, and others (eds.), Festschrift für Erik Jayme, vol. I, (Munich, Sellier, 2004), pp. 121 et seq. (p. 123).}

However, in fields where EU Member State legislation are yet to be harmonised and where there are consequently appreciable divergences between their respective legal systems (such as in family law and personality rights), we find it highly doubtful that such an approach should be admissible.

Indeed, the inclusion in the national legal system, through mutual recognition, of any situations constituted abroad, regardless of the law under which they were constituted and the existence of minimum harmonisation that ensures the *functional equivalence* of national solutions, would seriously undermine the division of the legislative powers of the Member States effected by private international law and attainment of the values pursued by this discipline.

Indeed, such an approach would amount to the antithesis of the global governance aspired to in private international law with regard to private international relations.

As a rule, recognition of a legal situation constituted abroad entails waiving the power to regulate that situation, i.e. to define the requirements for its valid constitution, even if it is closely connected to the State where recognition is invoked. In our view, that waiver presupposes a sufficiently close connection between the country under whose law the situation was constituted and the facts. If that country, for instance, is that of habitual residence of the party concerned, it appears that nothing should stand in the way of recognition, provided the local law deems itself applicable.

This is precisely the position adopted in Portugal in Article 31(2) of the Civil Code,\footnote{In respect of which see our “La reconnaissance au Portugal des situations juridiques constituées à l’étranger”, in Travaux du Comité Français de Droit International Privé 2014-2016, (Paris, Pedone, 2017), pp. 263 et seq. (reproduced in Direito Internacional Privado. Ensaios, vol. IV, Coimbra, Almedina, 2019, pp. 27 et seq.)} according to which:

“However, legal transactions concluded in the declarant’s country of habitual residence are recognised in Portugal, in conformity with the law of that country, provided that this law deems itself competent.”
But that will not be the case if the situation in question was constituted in accordance with the law of a country without any substantial connection with the facts (such as, for example, the country through which the parties concerned were currently passing when they entered into the legal transaction in question).

In short, mutual recognition of private law situations based on the principles of European Union law must be subordinated to criteria proper to private international law, which may be verified by the judicial authorities of the country where recognition is relied upon.

This equates to saying that mutual recognition must not take place with complete autonomy in relation to the traditional method of resolving conflicts of laws, nor does it constitute a true alternative to that method.55

Indeed, a principle of mutual recognition of any situations constituted in a Member State of the Union could undermine the coordination of national legal systems conducted by private international law and the values it pursues.

The recognition of legal situations constituted abroad is therefore subject to verification of the legitimacy of the law under which those situations were constituted. In other words, that recognition must necessarily be selective in nature.

**VIII. THE RELEVANCE OF EXTRAJUDICIAL MEANS OF DISPUTE RESOLUTION**

Another field where a need has long been felt for cooperation between States with a view to the international regulation of situations involving multiple connections is that of the recognition of extrajudicial means of dispute resolution, notably arbitration.

Today arbitration is the most common means of administering justice in international commerce and that which has succeeded the most in ensuring cross-border enforceability of awards on civil and commercial disputes.

Despite arising fundamentally from private initiative, in order for arbitral awards to have the effects proper to a jurisdictional act, most notably their enforceability and *res judicata* effects, arbitration presupposes the cooperation of State courts.56

In order to enjoy those effects, the award must meet certain minimum requirements. Internationally, these requirements are today largely defined in the

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55 See, along these lines, Dieter Henrich, “Anerkennung statt IPR: Eine Grundsatzfrage”, *IPRax*, (2005), pp. 422 et seq.

1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, so far ratified by 168 States and other jurisdictions.\(^{57}\)

Nonetheless, the Convention still leaves some room for the application of national laws to the matters with which it deals. For example, in accordance with the national treatment principle enshrined in Article III of the Convention, each of the Contracting States will recognise arbitral awards as binding and enforce them in accordance with the procedural rules adopted in the territory in which the award is relied upon, subject to the conditions established in its following articles.

In addition, according to Article VII(1) of the Convention, its provisions neither affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States, nor, by operation of the principle of application of the most favourable law enshrined in that Article, deprive any interested party of any right of availing an arbitral award as allowed by the law or the treaties of the country where its recognition or enforcement is sought.

Due to this “porosity” in the Convention, certain differences between national legal systems on this matter often arise in its application. Indeed, in accordance with the perspective that has prevailed to this day in English law, all arbitration, even if international, is necessarily subject to the law of a given State, the *lex arbitri*, which in principle corresponds to the country of the arbitral seat.\(^{58}\)

This point of view was accepted, in particular, by the English Court of Appeal in *Bank Mellat v. Helleniniki Tecchniki S.A.*,\(^{59}\) decided in 1983, in which Lord Kerr ruled that:

“Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.”

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57 The status of ratifications may be consulted available at: <http://www.uncitral.org> accessed on 13 May 2021.

58 See to this effect, in particular, F.A. Mann, “*Lex Facit Arbitrum*”, in Pieter Sanders, (ed.), *International arbitration. Liber amicorum for Martin Domke* (The Hague, Nijhoff, 1967), pp. 241 *et seq.*, where one may read: “arbitration, like any other institution of municipal law, requires a firm legal basis which can only be found in the recognition and implementation of the idea of *lex facit arbitrum*”.

This approach to arbitration frequently described as *territorial*, which still tends to prevail in England.⁶⁰

A fundamentally different line has been taken in France, at least with regard to international arbitration, which Berthold Goldman has defined as “celui dont la procédure échappe […] à l’application d’un droit étatique”;⁶¹ and which Philippe Fouchard, taking his lead from that author, has characterised as “un arbitrage détaché de tous les cadres étatiques, soumis à tous égards à des normes et à des autorités véritablement internationales, c’est à dire, […] supra-nationales, extra-nationales, ou mieux, anationales”.⁶² This conception of international arbitration has most recently been laid out in legal theory in the work of Emmanuel Gaillard,⁶³ who advocated a “representation” of arbitration “qui accepte de considérer que la juridicité de l’arbitrage puisse être puisée non dans un ordre juridique étatique, qu’il s’agisse de celui du siège ou de celui du ou des lieux d’exécution, mais dans un ordre juridique tiers, susceptible d’être qualifié d’ordre juridique arbitral”.

This approach was accepted in the judgment of the French *Cour de Cassation*, rendered in 2007 in the *Putrabali* case,⁶⁴ which ruled that:

> La sentence internationale […] n’est rattachée à aucun ordre juridique étatique, est une décision de justice internationale dont la régularité est examinée au regard des règles applicables dans le pays où sa reconnaissance et son exécution sont demandées.”

A third way, lying somewhere between those described, has in the meantime gained ground. One of its proponents is Jan Paulsson,⁶⁵ who argues that the efficacy of an arbitral award may derive from a *plurality of legal systems*, not restricted to the *lex arbitri*, but also not comprising a true “transnational” legal order; this is

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⁶⁰ The reader is referred to the Arbitration Act 1996, section 2(1) of which lays down that the provisions of the respective Part I “apply where the seat of the arbitration is in England and Wales or Northern Ireland”.


consistent with the fact that, despite international efforts to harmonise and unify arbitration law, not least through the UNCITRAL Model Law on International Commercial Arbitration, the contemporary world still presents a multiplicity of national legal systems, reflecting the idiosyncrasies and the particular sense of justice proper to each national community.

The most significant normative expression of this idea is found in the New York Convention itself. In effect, this Convention permits the recognition of foreign awards without their prior approval in their respective countries of origin, thereby dispensing with the double *exequatur* required by the 1927 Geneva Convention that preceded it; but it still provides for a refusal to recognise a foreign arbitral award when the agreement on which it is based is invalid under the law to which the parties subjected it or the law of the country where the award was made (Article V(1)(a)) and also when the arbitration procedure has not complied with the parties’ agreement or, failing such agreement, the law of the country where the arbitration took place (Article V(1)(d)) or when the award has not yet become binding on the parties, has been set aside or suspended by a competent authority of the country where, or under the law of which, the award was made (Article V(1)(e)). The Convention accordingly confers a degree of importance on the *lex arbitri* in matters of recognition.

However, the Convention also allows the interested party, as we mentioned above, to avail itself of the more favourable rules of the *lex loci executionis* (Article VII(1)); and, in any case, the last word on issues of arbitrability and public policy belong, under Article V(2) of the Convention, to the law of the country where recognition and enforcement of the award are sought.

There is therefore no single legal system, but rather a plurality of legal systems which are relevant in this matter. For this reason, an arbitral award may be enforceable in one country but not in others.

So, despite the progress achieved by the New York Convention, there is still no uniform set of rules, applicable worldwide, on the recognition and enforcement of foreign arbitral awards. This is the consequence—perhaps inescapable—of the diversity of approaches that tend to prevail in national legal systems in this regard.

Accordingly, also in the field of international commercial arbitration one is far from arriving at true global governance of situations that transcend the frontiers of a single State.

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The same can be said for investment arbitration, for which the applicable legal rules are today scattered between a vast array of sources of varying types, not infrequently contradicting each other. These include multilateral conventions, such as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, concluded in Washington, D.C., in 1965; bilateral investment treaties; and, more recently, European Union law itself, which the 2018 judgment of the Court of Justice of the European Union in the Achmea case ruled to be incompatible with recourse to this type of arbitration in intra-European disputes, given that, as investment arbitral tribunals cannot be deemed a court or tribunal of the Member States, within the meaning of Article 267 TFEU, their awards are not subject to mechanisms, such as preliminary rulings, which ensure the full effectiveness of EU rules.

One of the consequences of this case law is the risk of unequal (less favourable) treatment for European investors in relation to nationals of third States in the settlement of disputes with the EU Member States; this can only be regarded as an unsatisfactory situation from the point of view of the coherence of international rules on the enforceability of extrajudicial dispute-settlement arrangements.

**IX. FREE MOVEMENT OF JUDGMENTS ACROSS FRONTIERS**

The issue with which we have been concerned in this article is also posed in the field of recognition of foreign judgments. The importance of this matter can hardly be overemphasised: the fact that a given legal issue in dispute has been decided by a court of a given country in a judgment with the force of res judicata potentially creates in the parties, and even in third parties, an expectation that the same judgment can have effects abroad. It is therefore the protection of legitimate expectations that legal situations constituted, modified or extinguished opejudicis will extend across borders that underlies the recognition of foreign judgments.

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68 ECLI: EU:C:2018:158.

69 On this matter the Court concluded: “Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept”.

Despite this, there is still no worldwide legal instrument in force that attains this goal. It is true that, on 2 July 2019, the Hague Convention on the Recognition and Enforcement of Foreign Judgments on Civil and Commercial Matters was adopted after more than twenty years of preparatory work and will take effect once the requirements its sets for the notification of the respective instruments of ratification, acceptance, approval or accession are satisfied.

However, this Convention presents a significant number of exclusions from its substantive scope of application, most notably the status and capacity of natural persons, family law matters and matters of succession, insolvency and analogous ones, the validity of entries in public registers, questions related to defamation, privacy and intellectual property and most disputes on competition matters; this is not unrelated to the substantial differences between the legal systems of the Convention’s Contracting States (in particular those of the United States of America and the European Union) with regard to the regulation of these matters and the desirable balance between freedom of expression, on the one hand, and the protection of personality and intellectual property rights, on the other.

Moreover, the Convention enshrines an exhaustive list of factors that make judgments delivered in one of its Contracting States eligible for recognition in the other States. It endeavours to establish a lowest common denominator between the highly diverse perspectives prevailing in this respect in the United States and the European Union, in particular because of the rejection in the former of the forum actoris enshrined in the Brussels I-bis Regulation in favour, for instance, of consumers and employees as well as the absence in the latter of a general ground of jurisdiction based on the respondent’s doing business in the forum state.

Even if the judgment in question falls within the substantive scope of application of the Convention and is eligible for recognition, it may still be rejected in another Contracting State if the respondent has been summoned to the proceedings in a manner incompatible with the fundamental principles of that State or if recognition

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72 Concerning which, in the most recent literature, the reader may see Hans Van Loon, “Towards a Global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters”, in Collection of Papers. Faculty of Law, Niš, (2019), pp. 15 et seq.
73 See Article 28 of the Convention.
74 See Article 2 of the Convention.
75 See Article 5 of the Convention.
76 For a comparison of the European and US systems on this matter, see Peter Hay, Advanced Introduction to Private International Law and Procedure (Cheltenham, Edward Elgar, 2018), pp. 17 et seq.
and enforcement are manifestly incompatible with the public policy of such State, including the respective principles of procedural fairness and situations involving violation of the security or sovereignty of that State.\textsuperscript{77}

The scope of the 2019 Hague Convention is therefore relatively modest. It may therefore be said that it is above all at a regional level, in particular within the European Union, that the most successful efforts have so far been made to ensure the free movement of foreign judgments, particularly through the 1968 Brussels Convention and the subsequent acts of European Law. However, even these efforts are now constrained as a result of Brexit, which, since no agreement on judicial cooperation was entered into between the European Union and the United Kingdom, has caused the Brussels system to cease to apply in relations between them as of the end of the transition period provided for in the Withdrawal Agreement, i.e. 31 December 2020, except in what concerns legal proceedings instituted before the end of that transition period and judgments given in such legal proceedings, and authentic instruments formally drawn up or registered and court settlements approved or concluded before that moment.\textsuperscript{78}

\section*{X. GLOBAL SOCIETY AND LEGAL PLURALISM}

It may be asked whether attempts should be made to go further in implementing a true global governance of private international relations, in particular through uniform substantive regulation of those relations, in accordance with certain universally accepted principles and values.

Doubts may be raised, however, as to the feasibility of such an undertaking in the current state of national legal systems. The divergences between them, even in relation to private international law, are not, as we have sought to demonstrate in another study, merely technical in nature, but can instead be traced back to deeply rooted cultural differences between those legal systems.\textsuperscript{79}

The plurality of national legal systems is therefore an inevitable fact, even in a globalised society. In reality, this is nothing other than the consequence of the \textit{cultural nature} of the law, and of the inescapable plurality and diversity of its expressions across borders.

\textsuperscript{77} See Article 7(1) of the Convention.
The subsidiarity of uniform law in relation to national or local laws therefore reflects the requirement that the law be appropriate to the sense of justice of those it addresses.

Nonetheless, private international law ensures a certain order in the context of that plurality and diversity of national laws: an *ordered pluralism*, in the expression of Mireille Delmas-Marty.\(^{80}\)

It is to this extent – limited, certainly, but not altogether devoid of significance – that a global governance seems possible in the field of private international relations.

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TWAIL-ING TWAIL: A REAPPRAISAL OF TWAIL’S CONCEPTUALIZATION OF REFORM

TAANYA TRIVEDI*

Abstract

This article analyses the utility of Third world approaches to international law (TWAIL) as a lens in international legal scholarship by examining the contribution of TWAIL scholars in the field of scholarship. While the aim of TWAIL scholars is motivated by their agenda to create a universal international law, the scope of their reform continues to derive from within the corpus of existing international law itself, which poses a question on the merit of their claim. This article utilises Kahn’s philosophy of the cultural analysis of law to ascertain the true scope of TWAIL’s reform ambition. This is motivated by examining the core at their reformative ambition to untangle TWAIL’s conundrum and derive its true value to international legal scholarship.

Keywords: TWAIL reform, conceptualization of reform, historical narrative of IL, social movements, human rights discourse

I. INTRODUCTION

Third World Approaches to International law\(^1\) has been chronicled as an “avowedly a scholarly and political movement, with broadly unifying ‘political and transformative commitments’”\(^2\). Perceived as a de-centralised network, theory, method, movement, sensibility, or simply as an approach, TWAIL has engendered scholars who think about the Third world, which socio-politically today would include “most of the world”\(^3\). Being a historically aware methodology\(^4\), TWAIL has successfully brought forth a “chorus of voices”\(^5\) from the third world which

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1 Hereinafter referred to as TWAIL.
do not always blend harmoniously, generating a rich and insightful debate on issues of power, identity and difference in international law.

Conceptually, TWAIL offers a two-fold scope for investigation. First, TWAIL scholars aim to expose the etiological role of colonialism and imperialism in the development of modern IL, by underscoring the experience of the colonial encounter to their re-examination of IL, producing an alternate account of the present corpus of IL. Second, TWAIL scholars explore the continuing remnants of colonial and Eurocentric legacies in the operation of IL prevalent in extant macro edifice of international relations and the international legal regime, “including doctrines, processes, and techniques programmed to preserve a historically contingent structure and the stratification of geopolitical power”. One of the most definite illustration is Anghie’s classic book, *Imperialism, Sovereignty and the Making of International Law*. Through a rigorous historical re-examination of IL’s dominant historical narrative, one of the most crucial insight argued by Anghie is the continuing legacy of colonial subjugation in the contemporary corpus of IL which obscures its ties to the experience of the colonial encounter.

The value of TWAIL as a critical tool concerned solely with the third world in the realm of international legal scholarship cannot be emphasized enough, but what is distinctive is TWAIL’s vast internal plurality, in terms of the differing political, economic, and ideological beliefs of its proponents, developing TWAIL into “an expansive, heterogeneous and polycentric dispersed network and field of study”.

After deeming IL to be a predatory system legitimising, spawning and furthering plunder and subjugation of the Third World by the West, TWAIL does not limit itself to elaborating a detached critique of the inherent entrenched prejudice within IL, rather TWAIL scholars launched a full-fledged normative campaign furthering

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7 Hereinafter referred to as IL.
9 Ibid. p. 117.
11 This term is used not to signify the politico-territorial space of states, but in the same sense as is employed by Mickelson and Rajagopal, see generally, Mickelson, note 5; B. Rajagopal, “Locating the Third World in Cultural Geography”, *Third World Legal Studies*, vol. 15 (1999), pp. 1-20.
12 Mutua and Anghie, note 10.
13 Hereinafter referred to as TWAILers. This term was adopted from Okafor’s keynote speech at the Cairo conference 2015. See generally, Okafor, “Praxis”, note 2.
their claim of IL to be a tool of future emancipation of IL. “Rather than replacement” explain Eslava and Pahuja, “TWAIL scholarship is more interested in overcoming IL’s problems, while still remaining committed to the idea of an international normative regime largely based on existing institutional structures”.

This creates a jarring contradiction: how is TWAIL’s ambition “to create a truly universal IL that promotes a compelling vision of international justice” to be realised after TWAIL vociferously condemns the entire edifice of IL to be irredeemably prejudiced against the Third World? TWAIL scholars counter this attack by employing their analytic of reform mobilised through resistance and critique; TWAILers argue that their critique of the international legal order is premised on a vision “to build on and transform the egalitarian aspects of international law”.

Against the ambition of reform prevalent in legal scholarship, Kahn makes a compelling claim against pursuing reform in scholarship. He urges scholars to abandon the project of reform in order to advance an intellectual inquiry into understanding the object of their study (law) without holding it hostage to questions of practical import (reform), a study which pursues an understanding of extant structure of beliefs which law constitutes through history. Does TWAIL’s ambition of reforming IL also fall within Kahn’s claim? Consequently, diminishing the value of TWAIL’s reform?

This article is geared to answering this question by evaluating TWAIL’s formulation of reform through Kahn’s lens. Resting on Anghie and Chimni’s retrospective categorisation of TWAIL into generations, it is my working hypothesis

18 Ibid., p.5.
to show that although the first crop of anti-colonial Third world scholars\(^{20}\) writing in the period of 1960-1980, fall within the trap of scholarship as reform, in the sense that their ambition of reform emanated solely from IL. The second generation TWAILers propelled into pushing the boundaries of their critique, generated alternate avenues of understanding IL, congruous with Kahn’s essence: to propel inquiry which aims to understand law’s power through examining law’s structuring of ordinary decisions at the microlevel by developing a self-reflexive distance with the object of their study, although they continue to be motivated by their normative political agenda of furthering justice for the third world. Keeping aside these normative considerations, the second generation’s employment and understanding of reform was not born from a devotion to the institution of IL, characteristic of their predecessors, rather the diversity of approaches adopted by second generation TWAILers, supported by a de-centralised framework, without the limitation of developing a singular authoritative text or voice, enabled a formulation of reform which was multidimensional, and brought the examination of lived experiences of peoples of the third world to become a part of its reform formulation.\(^{21}\)

This article is divided into four parts including this introduction. The first part adumbrates Kahn’s claim against reform, which lays a foundation for evaluating TWAIL’s reform formulation. While it is not feasible to elaborate the entire claim made by Kahn for abandoning reform, this section outlines his argument in hopes of providing a working understanding of Kahn’s claim for providing a working framework of measuring reform in TWAIL.

This is followed by the centrepiece of this article which categorically confirms my hypothesis, which is divided into two sections. The first section launches with a short retelling of TWAIL’s history based on the taxonomy propounded by Anghie and Chimni.\(^{22}\) First, I critically revisit some of the scholarship produced by first generation TWAILers: Anand, Bedjaoui and Elias, whose reverence of IL visible in their scholarship laid the foundation for a sharper critical flair in scholarship of the second generation. This is followed by an examination of select works by the second generation TWAILers, what some agree to be TWAIL stalwarts: Anghie, Chimni, Rajagopal, Eslava & Pahuja, Mutua, Parmar, Nesiah and Okafor.\(^{23}\) Both groups distinctively represent the TWAIL movement. My choice of these specific

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\(^{20}\) The term ‘Third world lawyers or scholars’ is used interchangeably to refer broadly to include all scholars who are writing against the hegemony of IL and all its manifestations against the non-Western world. This includes those who do not necessarily come from the Third world.

\(^{21}\) Kahn, *The Cultural Study of Law* conclusion, note 17.

\(^{22}\) Anghie & Chimni, note 14.

TWAILers is founded upon considerations of temporality, as well as my aim to substantiate my argument by illustrating the gradual shift in understanding of reform, evident in the scholarship from the first generation to the next.

However, this must not be inferred to suggest a generalisation that the entire body of scholarship produced by the second generation of TWAILers was effectively able to offer resilient alternative accounts to sharpen TWAIL’s analytical arm. Rather, my selection offers an illustrative collection of scholarship which creatively offered alternatives, which ultimately exhibits the potential of TWAIL’s reform.

It is pertinent to mention here, that following TWAIL’s own circumspection of progressive history writing\textsuperscript{24}, my historical recollection does not progress in a linear manner and should not be construed to suggest a chronological development of TWAIL’s reform analytic\textsuperscript{25}. Rather my analysis of TWAIL’s reform by the second generation has been driven by diverse strands of understanding IL, which TWAILers have brought to light by their own unique understandings of TWAIL’s reform analytic.

The unique conceptualisation of reform developed by the second generation, I argue, essentially counters Kahn’s claim against reform. It is in this sense that my project is ‘TWAIL-ing’ TWAIL, i.e., by applying TWAIL’s methodology of critique and historical reconstruction to explicate TWAIL’s own conceptualisation of reform, expounding TWAIL’s innate paradox which has evoked scrutiny from many scholars.\textsuperscript{26}

The second section analyses some archetypal TWAIL scholarship from Kahn’s lens to argue that the second generation of TWAILers do not fall within Kahn’s claim of scholarship as reform, in the sense that second generations’ scholarship was not constrained in articulating its reform based on a commitment to IL. Rather


\textsuperscript{25}This term is employed synonymously with formulation and conceptualisation.

I illustrate that their critical zeal led them to adopt a self-reflexive\textsuperscript{27} distance from the dominant edifice of IL to develop an alternative understanding to the world conceived by IL, realised from the experience that third world states often acted in ways which were against the interests of their own people, which turned the attention of TWAILers to the evaluation of positivist rules of IL from the perspective of “actualized experience of peoples” rather than those of the states, in the pursuit of their emancipatory agenda.\textsuperscript{28} I highlight some similarities between Kahn’s approach and scholarship produced by second generation TWAILers, to reiterate my argument—despite the paradox which characterises TWAIL, its reform analytic enabled the development of a rich corpus of diverse understandings of extant institutions and structures in the realm of IL, which surpassed traditional boundaries of legal scholarship, as contended by Kahn.

By way of conclusion, I offer some reflections on the utility of TWAIL scholarship in the larger scheme of international legal scholarship.

\textbf{II. KAHN’S PROBLÉMATIQUE OF REFORM}

Kahn’s claim against reform in scholarship is critically persuasive because it proceeds on a premise that legal scholars, trained by law schools remain within the practice of law in their scholarship and thus advance their inquiries with a limited potential of reform, which is based on the law which they condemn, therefore their reformative ambition is limited in the sense that it emanates from a world constructed by the rule of law itself. Abandoning the project of reform marks the point of departure for undertaking Kahn’s cultural analysis of law. Being committed to the rule of law, legal scholars lack necessary distance from the object of their study, and take up the project of reform with the ambition of making the law work, i.e. aiming to improve the system of which they are already a part of. Reform is problematic because it instils a notion of progress in scholarship.

Kahn argues that legal scholars undertake a theoretical study of law from within the practice of law, which leads their scholarship to answering the question “what should law be?” formulating “reform” to be the perfection of law from within the process of law-making, rather than approaching it from outside. This leads to the collapse of an analytical possibility crucial for understanding the conceptual conditions of a legal order.


\textsuperscript{28} Anghie & Chimni, \textit{note 14}, p.186.
The commitment to reform arises from normative judgments about the extant rule of law to be a partial realisation of a community’s efforts to be something other than itself, which instils the notion of progress in scholarship. The need for constant reform, constitutes a set of beliefs internal to the legal order. Ultimately reform offers a possibility in a legal order which never loses its authority.

Kahn argues the rule of law is neither a revealed truth … To study the rule of law outside of the practice of law is to elaborate this history and to expose the structure of these beliefs”. Thus, Kahn’s approach directs enquiry towards how the truth is constituted through belief. The abandonment of reform is essentially the point of departure for Kahn’s approach to the study of law, where legal inquiry does not “commit a scholar to the practices constitutive of the legal order”.29

Essentially Kahn’s argument for abandoning reform in scholarship does not advocate reforming legal scholarship, rather it is about the character of the study of law. He wants to reorient the study of law to understand law’s power: from the commands of legal institutions to power present in “the multitude of ordinary decisions at the microlevel of everyday transactions”, which inheres in “our expectations and beliefs, in the institutional structures that we take for granted, and in countless, mundane daily choices”. One such value is our belief in the rule of law, the commitment to the law, which underpins all ambition of reform in scholarship. The approach that he advocates for does not demand a complete abandonment of reform in legal scholarship. Rather he formulates his approach to jettison demands of practical import requiring scholarship’s reform ambition to produce grander impact on the political order.30

Against Kahn’s articulation of reform, I now proceed to evaluate TWAIL’s conceptualisation of reform.

III. EVALUATING REFORM IN TWAIL SCHOLARSHIP

The reality that international legal discourse constructs is based on categories of understanding the world. TWAILers have argued that IL has historically developed concepts and discourses which has led to the development of an arcane vocabulary which enables characteristic interventions. Although TWAILers provide a trenchant analysis of the way in which IL perpetuates and maintains these foundational discourses they continue to use this language of IL which they criticise and challenge, in furthering their own normative campaigns.

TWAIL has been criticised for formulating its reform which remains captured by the “episteme”31 of a western liberal framework of IL, as TWAILers continue to

29 Kahn, note 17, pp. 6 and 27.
30 Ibid., pp. 128 and 132-137.
31 Used in the sense employed by Ngugi, note 26.
advance their arguments based on this structure which they deplore, never going beyond these foundational categories to offer alternative proposals.\textsuperscript{32} For instance, the concept of sovereignty in IL is a historically particular, culturally dominant concept, as argued by TWAILers\textsuperscript{33}, through which IL constitutes a structure of power in international relations. However, third world lawyers insisted on exercising their “sovereignty” to advance proposals for reform, as seen in the persistent demands of non-intervention in the decolonisation period, and the principle of self-determination.\textsuperscript{34}

The first generation TWAILers identified the oppressive elements of IL which had resulted in the subjugation of their people, but remained captured by the potential of IL to be reformed in favour of the third world, which inevitably led first generation TWAILers to advance their struggle from within the language of IL.\textsuperscript{35} The second generation explicitly broke away from this reverential faith in IL, scrutinising their predecessors’ work, formulating their reform in sharper analytical and critical dimensions.

In the following section I embark on a historical retelling, illustrating the difference in the deployment of reform between the two generations, and the conceptualisation which took shape after by second generation TWAILers. The resulting conceptualisation by the second generation affirms my hypothesis that their reform rebuts Kahn’s criticism, adduced by incorporation of non-legal experiences within the object of inquiry and evaluation, for instance, the impact of social movements on international institutions (IIs).\textsuperscript{36}

\textsuperscript{32} Ibid., pp.75-76; Haskell, note 16, p. 405.
\textsuperscript{33} Anghie, note 24.
A. TWAIL’s Conceptualisation of Reform

Anand is regarded by postcolonial lawyers as one of the founders of TWAIL. As a Nehruvian idealist, Anand was concerned with recovering the lost histories of postcolonial states without outrightly rejecting IL. Writing in a post-colonial period, Anand’s critique of IL remains firmly fixed within the boundaries of existing IL discourse, illustrated in Anghie’s comment that Anand “adopted, on the whole, a conciliatory position: the aim was to reform IL rather than dispense with it”38. His undeterred optimism in the edifice of IL, explicitly visible in- “new states have been and are more interested in participating in the making of new rule than in questioning the validity of the established rules”39 led Anand, to projecting European categories as universal, instead of challenging them.40

Anand’s faith in IL’s potential to deliver truly universal justice led him to develop a narrative which saw productive and emancipatory roles for ex-colonisers, fitting within progressive scholarship which ultimately led to “his co-option for extending an argument that alternative approaches to IL did not exist at all”. Even when deploying resistance in the form of articulating an alternate history of IL developed from pre-colonial India, he emphasised on the inclusion of Afro-Asian countries as civilized states.41

Writing contemporaneously with Anand, Bedjaoui in Towards A New International Economic Order categorically established the claim that there are great disparities in wealth in the world, which resulted from Western exploitation leading to poverty of the Third world.42 The “Third World pays for the rest and leisure of the inhabitants of the developed world”, he argued, and rejected this system of international economic relations. Based on these claims, he argued that- “International law has faithfully interpreted this [international economic] order and has thus consolidated its foundations. Disguised as indifference or neutrality, it is in effect a permissive law intended for a liberal or neo-liberal world economy based on certain peoples’ freedom to exploit others”. Ultimately, he concluded that

traditional IL is not actively unfair, but it had not done enough to reduce the gap between the North and South. Bedjaoui’s solution rested on the efforts of developing states to humanise IL by extracting the “promise of development”. After making a thorough analysis of the contradicting role performed by IL in different economic systems, which divided the world into the “developed” and “underdeveloped”; Bedjaoui entrusted IL “to promote the progress of the international community”. This illustrates his faith in the normative structures of IL laws promoting the NIEO initiative.  

Elias advanced a “weak tradition” of third world legal scholarship, to demonstrate the equal participation of African states in the development of customary IL, contrary to what was claimed by contemporary IL texts published in the West, providing a cultural rather than a structural economic critique of international economic relations. Being at the forefront of the scholars focusing on the reform of international economic principles, Elias’ *Africa And The Development Of International Law* symbolizes more of apologetics, devoid of critical reflection of some important issues, such as the principle of self-determination. Instead of challenging IL, his efforts towards reforming IL stemmed from the links between reform of international economic law principles and development.

The foregoing discussion of the first generation, illustrates that their articulation of reform categorically falls within Kahn’s claim, in as much as their proposals for reform were born from IL itself, and their commitment towards making IL work was axiomatically exhibited in their scholarship.

However, this must not be construed as minimising the significance of their work in shaping TWAIL’s reform analytic. On the contrary, it is recognised that their proclivity towards reforming IL through from within the domain of IL represents a pragmatic approach, and laid the foundation for developing stronger forms of critique and resistance to IL, which ultimately paved the way for a dynamic

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43 Ibid., pp.36, 48-49, 63 and 113.
45 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2006).
47 For e.g., Singh, note 41.
conceptualisation of reform in the works of second generation TWAILers. These include Anghie, Chimni, Okafor, Mutua and others, whose scholarship generated a dynamic and multifaceted analytic of TWAIL’s reform.

The retrospective labelling developed by Anghie and Chimni embodies the shift in TWAIL’s conception of reform. First generation TWAILers who were institutionally closer to the struggle against colonisation, being members of the newly independent states, sought nothing less than a revolutionary re-construction of IL evidenced in the radical overhaul of the international economic order in form of the NIEO. Once their hopes were thwarted the second generation combined this frustration and their hopes to incorporate an analytical and political agenda in their formulation of reform, by moving beyond the confines of IL, to devise a systematic process of resistance accompanied by continuous claims for reform.

This materialised in Chimni’s clarion call towards articulating a radical third world approach to contemporary IL for what he categorised as TWAIL-II. The emphasis on the technology of critique and resistance within the TWAIL network was emphasised to articulate reform- “TWAIL II … hopes to be irreverent in its critique of dominant Western scholarship” striving to transform IL “from being a language of oppression to a language of emancipation”.

This shift is clearly visible in Anghie’s seminal work, *Imperialism, Sovereignty and the Making of International Law* illustrating a strategic embrace of the resistance-reform dialectic and foregrounding historical examination in TWAIL scholarship. From a broader TWAIL perspective, his thorough examination of the inclusion of ‘others’ through what he calls the dynamic of difference directed TWAILers towards a careful political examination of IL, which prompted enquiries to challenge the exclusion of subaltern groups from the historical narrative of IL.


50 Eslava & Pahuja, note 2, pp. 115-116.

51 Ibid.


53 Chimni, note 35, pp. 3-5.

Material changes in second generation TWAIL scholarship was effectuated through employment of technology of irresponsible, sustained and comprehensive critique for examining normative constructs of the international legal order, such as sovereignty, which has resulted in frequent resort to violence and authoritarianism in Third world states. Coupled with an emphasis on the theory of resistance to ‘de-elitize’ IL by incorporating subaltern voices, which could be explored by fortifying IL with literary and art forms.

Chimni’s Manifesto advances a theory of collective resistance to oppressive IL structures through a global coalition of poor countries grounded in strategic and tactical analysis of specific international legal regimes. His action-oriented research strategy emphasised the need to increase accountability of international organisations (IO) and corporations, by formulating praxis through counter-hegemonic discourses.

Parmar argues that TWAIL promises recovering the “subjugated knowledge” through close engagement with the lives of the local populace of the third world whose interests, concerns and struggles are affected by IL, which also have been marginalised through the mainstream narrative of international legal theory. Parmar argues for TWAIL’s engagement with the complexity of ‘local’ in order to study the lived experiences of peoples of the third world, and ultimately succeed in vocalising the third world local, understanding of which has been excluded in mainstream human rights discourses. This will lead to an explication of processes, especially related to colonialism, which shape boundaries of categories and identities which are privileged to be included within IL and those which are excluded, resulting in an exercise of excavating the role of historical and contemporary power relations which maintain these categories. This also enables introspection of the uncritical acceptance of European thought processes which reiterate their meanings and shape

law. The aim is to understand how modern human rights corpus responds or fails to respond to the everyday struggles of third world peoples and continues to produce their suffering through the diffusion of imperialistic language in the form of human rights.\(^6^0\)

Rajagopal in developing his theory of resistance\(^6^1\), argues for incorporating popular protests and social movements which have traditionally been illegitimate in IL, to argue and lead inquiry to demonstrate how forms of “extra-institutional resistance generated in the Third World remain invisible to IL, even though its own architecture is a product of an intense and ambivalent interaction with that resistance”. His analysis provides a robust account delineating an alternative narrative explaining the complex and purportedly invisible change\(^6^2\) within IIs propelled by the Third world. He also illustrates how social movements resisting the impact of developmental projects from IOs, have shaped, reshaped, or been co-opted into global governance initiatives in diverse areas of environment and human rights.\(^6^3\)

More broadly, Rajagopal’s scholarship provides an alternate and critical perspective of the relationship between resistance and legitimacy of IL.\(^6^4\)

In articulating a scathing critique premised on the role of dominant culture\(^6^5\) in effectuating hierarchically engineered concept of universality of human rights, Mutua deconstructs the entire corpus of international human rights through the savage-victim-saviour (“SVS”) metaphor; illustrating the transformation of non-Western culture through the human rights movement which imposes Western political democracy as a panacea for upholding human rights. Conceived as a part of the Eurocentric colonial project, Mutua argues, the human rights corpus, is based on a

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façade of universality of human rights, since the historical narrative of the human rights regime itself denies any recognition of the contribution of anti-colonial struggles of Asian, African and Latin American states. Effectuating the ‘othering’ process, official records omit these struggles and norms borne in non-Western cultures.

He does not demand a complete repudiation of the human rights movement, rather, he attempts to locate the normative structure of the human rights corpus through philosophical, cultural, and historical dimensions. He argues that the human rights movement is destined to fail because of its alienating presence in diverse cultural settings of non-western states. In order to revive itself, it must be born from cultures of all people. He emphasises the need for recognising moral equivalency of all cultures as the basic assumption for a human rights movement which is multicultural and inclusive, to articulate a genuine discourse on rights.66

Unlike Mutua, Nesiah in challenging how the contemporary corpus of human rights came about, adopts a TWAIL-feminist lens in her analysis; although both Mutua and Nesiah essentially analyse the culturally specific universalism embedded in the human rights corpus. Her analysis, through the device of the ‘veil’ demonstrates historical Northern responses to Southern veiling practices to contextualise and deconstruct imperceptible genealogies of religion and secularism within the human rights discourse. Her argument unravels along a continuum of colonial and post-colonial realities, where the North continues to impose dictates of civilised behaviour and modernity on the South through legal and political mechanisms, now embedded in contemporary human rights corpus.

The paradox residing at the core of human rights movement that Nesiah emphasises is in tune with Mutua’s argument: the specific dominant culture which is reflected and applied through putative universality of human rights norms. She demonstrates her claim through the comparison of the ‘unveiling’ of Southern women in colonial Algeria in 1958 and a decision of a French court decades later, ‘tolerating’ the veil of girls in French schools, with the French government setting the standard of civilised society in both instances, moulded as culturally neutral and thus capable of being normatively universalized. The tolerance practised by the French court, of permitting veiling in French schools represents the ultimate test of the emancipatory potential of legal liberalism. It is when the treatment of the ‘veil’ acquires a human rights dimension and functions as a test of liberal tolerance, assimilating ‘difference within the terms of liberal citizenship’, that the Eurocentric bias of the human rights regime is revealed: liberal tolerance perceived as culturally neutral and thus universally applicable, whereas veiling is portrayed as a culturally specific symbol which should be tolerated.

Her evaluation offers a powerful argument to illustrate the contingent nature of the ‘ground’ on which third world feminists make a stand, which is revealed only by challenging the structure of the human rights discourse.\textsuperscript{67}

Eslava and Pahuja adroitly explicate the contradictory tools of resistance and reform, characteristic of TWAIL methodology, by evaluating the concept of universality in IL, the axis within TWAIL around which the concept of resistance-reform pursues justice for the third world.\textsuperscript{68} This dynamic in TWAIL scholarship, is facilitated through commitment to the promise of IL’s universality, which holds out hope\textsuperscript{69} in TWAIL’s methodology of resistance and reform which combine to destabilise and renew IL’s operation.\textsuperscript{70} TWAIL recognises the “impossibility of genuine universality”, which ultimately makes “a fruitful plurality possible”\textsuperscript{71}.

Eslava and Pahuja propose developing a TWAIL praxis by redirecting attention towards “routines, spaces, subjects and objects under the name of the international.” This is based on a recognition of the implied understanding of universality which remains at the core of the TWAIL project, and demands a persevering re-engagement with the promise of IL.\textsuperscript{72} Their praxis is advanced through an examination of the manner in which IL “unfolds on the mundane and quotidian plane through sites and objects which appear unrelated to the international.”\textsuperscript{73} This also involves a critical reflection of sites and areas where TWAILers generally engage: “to pay attention to the ways in which IL constantly constitutes and reconstitutes what we might think of as places, subjects and modalities of administration”. Such a praxis would indisputably enable a deeper understanding of IL, beyond a set of norms or rules.\textsuperscript{74} This requires an engagement with the material life of IL, to move beyond the study of IL as an ideological project. Such praxis empowers TWAIL to examine practices within and beyond traditional histories of IL.

\textsuperscript{68} Eslava & Pahuja, \textit{note 2}, p. 105.
\textsuperscript{70} Eslava & Pahuja, \textit{note 2}, p.110.
\textsuperscript{71} O. Marchart, \textit{Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou And Laclau} (Edinburg University Press, Edinburg, 2007).
\textsuperscript{72} Eslava & Pahuja, \textit{note 2}, pp. 109 and 122.
\textsuperscript{74} Eslava & Pahuja, \textit{note 2}, p. 123.
The concept of praxis within TWAIL scholarly agenda was concretised at the Cairo Conference, 2015. The conference reiterated the inextricability of theory from lived experience (praxis) within TWAIL discourse. The diversity of multidisciplinary and intersecting debates revolving around the axis of praxis generated at this conference signify the continuation of this shift and strengthening of TWAIL’s reform analytic.

Okafor’s articulation of praxis is crucial in shaping TWAIL’s reform within the field of international human rights law. Okafor has argued that TWAIL scholars have always been inclined towards praxis. He defines praxis as the mutual “constitution of conception and execution. While his praxis is oriented towards the human rights movement, one of the most informative reflections he provides is the recognition of intrinsic fluidity of TWAILers in pursuing non-academic praxis, i.e. the possibility of performing dual roles of what Koskenniemi refers to as the ‘Situated Participant’ and the ‘External Observer’. The permeable nature of such roles clearly advocates for a praxis suggesting an adoption of a self-reflexive distance from their scholarship.

Okafor’s work on promoting human rights through a better understanding of the traditional values of humankind further illustrates the way he was able to advance TWAIL’s reform agenda without being confined to the practice of IL. His efforts were premised on the problematic notion adopted by the West that treats Third world cultures or traditional values “in monolithic, and fixed retrograde ways” without knowing enough about their traditional value systems. Emphasising that culture can have both “positive and negative impacts on human rights, depending on its nature and the context.”

The emphasis on praxis in TWAIL suggests the need to bridge the divide that separates TWAILers from on-the-ground-groups and IOs, highlighting a self-reflexive approach. This takes TWAIL scholarship closer to the real birthplaces of

78 Okafor, “Praxis”, note 2, pp.9-10.
79 cf Kahn, Cultural Study, note 17 at Introduction.
81 Ibid., paras 23-24.
human rights, which “are far removed from the ornate norms of diplomatic conferences and are found, rather, in the actual sites of resistance and struggle”\textsuperscript{82}. This again reflects an attempt to move towards an alternative site of norm generation and understanding IL.

Considering TWAIL’s argument that IL continues to work in favour of power, domination, and imperialism\textsuperscript{83} which does not manifest itself in the same forms today\textsuperscript{84}, a move towards praxis also allows TWAIL to map the exact ways through global power, domination and imperialism are recycled today.\textsuperscript{85}

From the foregoing discussion of the scholarship produced by the second generation of TWAIL, a multifaceted and complex conceptualisation of TWAIL’s reform analytic is brought forth. Chimni’s incisive critique of TWAIL-I, underscored his call for a radical reformulation of its reform analytic by the second generation. Seen in Anghie’s macro analysis of IL through a historical re-examination, which pointedly highlighted the significance of culture in effectuating subjugation of the Third world. Chimni’s TWAIL Manifesto provides plethora of avenues to for their critique, although his emphasis remained on shifting focus to examining the lives of third world peoples to devise TWAIL’s reform. This is exhibited by Parmar and Rajagopal, which showcases the significance of the invisible relationship of Third world peoples with international legal discourse. Mutua provides a sharper development of TWAIL’s reform through the SVS metaphor, which annihilates the entire corpus of human rights, and reveals continuing remnants of cultural superiority in international relations in human rights law. Nesiah’s TWAIL-feminist prism of the ‘veil’ provides a multidimensional understanding of the culturally contingent character of the human rights discourses, and the unconscious adoption of culture as a category. Eslava and Pahuja, through their examination of the universal promise of IL, generated a TWAIL praxis which underscores the examination beyond the mundane daily operation of IL. Okafor’s insights on praxis abound in a plethora of reflections, developing a nexus with third world peoples and on-the-ground movements, ultimately emphasising the value of culture.

In all of these, there is an explicit move away from the approach of the first generation, to lead inquiry into categories which IL deploys, based on self-reflexive evaluation which constantly demands questioning categories which IL coerces to


\textsuperscript{85} For instance, Okafor, note 76.
employ. There is an explicit turn towards bringing under examination, the non-legal actual experiences of third world peoples, movements, and NGOs, which contours IL in subtle and invisible ways.  

B. Analysis: Applying Kahn’s Lens

Superficially, it would appear from TWAIL’s conceptualisation of reform that it falls directly within Kahn’s claim against reform because of its inherent devotion to the enterprise of IL, manifesting in its transformative zeal to proactively alter conditions of the third world, by mobilising international legal discourse, driven by the political agenda of promoting justice. However, it would be an oversight to dismiss TWAIL’s multi-dimensional conceptualisation reform as falling within Kahn’s criticism.

To ascertain the import of TWAIL’s reform it is crucial to realise the significance of abandoning reform in Kahn’s argument. Abandoning reform marks the point of departure for Kahn’s approach, which leads inquiry to create an imaginary distance from the world conceived by the rule of law, which makes a critical study possible, leading to a greater understanding of the system of law’s belief and its structure. He propounds his approach by advocating for a temporary suspension of belief, in order to make a critical examination of ordinary norms of the political order possible.  

TWAIL-II has achieved this in the order envisaged by IL, through its broad dialectic of opposition to IL, manifested through its reactive and proactive response.

The commitment of TWAIL to a critical study of IL is visible in its zeal to deconstruct and unpack the use of IL, utilised for establishing a hierarchical nature of power relations between the west and the non-west. This is also visible in TWAIL’s etiological commitment in its refusal to bracket certain historical artefacts as beyond scrutiny. Mutua’s argument in exposing cultural domination of the west on non-western states through the human rights corpus in the form of the SVS metaphor explicitly demonstrates the depth of TWAIL’s critical examination. The critical sword of TWAIL has also allowed scholars to be vigilant and realise the oppressive potential of universality and develop a cautious distance to enable self-reflection of biases in various regimes of IL, such as international human rights law.

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87 Kahn, note 17.
88 Mutua and Anghie, note 10.
90 See Mickelson, note 5, p. 405; Sunter, note 89, pp. 499 and 503.
For Kahn, the aim of a critical enquiry in law aims to understand how conceptual and historical conditions of multiple social practices structure meaning of extant experience of law. It would be hasty to adjudge that TWAIL unequivocally employs the two-fold line of inquiry offered by Kahn, i.e. tracing the history (‘genealogy’) and the shape of contemporary structuring of law (‘architecture’). It is pertinent that TWAIL has positively examined historical continuities and excavated remnants within present structures of belief in IL and its regimes, which has brought to light their contingent nature upon which the edifice of IL has been built, largely to the prejudice of the third world.  

Anghie’s pioneering work *Imperialism, Sovereignty and the Making of International Law* is the most striking illustration of TWAIL scholarship which engaged in a comprehensive re-evaluation of the historical foundations of IL which generated IL’s most prominent and contemporary doctrines, such as sovereignty, by employing notions of cultural differences between Europeans and non-Europeans, and laid bare its remnants in IL’s present. Anghie’s work not only inspired a plethora of second generation TWAILers to engage in historical evaluation of IL concepts and regimes, but also contributed to the pivotal position of historical evaluation within TWAIL discourse.

Parmar has argued that the place of historical evaluation is extremely crucial for TWAILers because it gives the third world its identity, in the sense of its delegitimization from IL, engendering demand for recognising an alternate history of IL. Crucially, historical evaluation also reveals how this delegitimization is orchestrated in extant rules and norms of IL.

The broader consequences of history and interconnectedness of subject areas of IL has been emphasised by Mickelson, which further strengthened TWAIL’s reform agenda towards examining the contexts within which IL regimes were engendered. The significance of historical examination in TWAIL scholarship also led to the colonial encounter acquiring a centrality within TWAIL discourse.

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91 Kahn, note 17, pp. 41 and 75.
92 Anghie, note 8, pp. 9 and 26.
96 K. Mickelson et al, note 59.
ultimately sharpened its critical sword, as TWAIL sought to challenge IL’s complacency in deeming the colonial encounter as irrelevant.\(^98\)

While TWAIL scholarship is generally motivated by resistance towards IL, its ambition is not deterred by any inhibition of being correct, i.e. TWAILerds do not pursue their scholarship against a separate truth.\(^99\) Rather, TWAIL’s main focus remains to examine structures of believe operating within international legal discourse through which IL organizes and manipulates the lives of states and peoples in diverse sometimes incoherent and overlapping ways.\(^100\) In this sense the diversity of TWAILers has generated a space for multiple accounts of experiences within the rubric of IL, which affect the third world, which consequently has engendered a rich corpus of understanding IL from the perspective of the third world. For instance, the different arguments made by Pamar, Mutua and Nesiah revolve on the axis of international human rights. Parmar’s claim puts forth TWAIL as an epistemological inquiry crucial for retrieving “subjugated knowledges” of the third world local. Whereas Mutua and Nesiah concur on the significance of culture in shaping the extant corpus of human rights, although Nesiah’s argument covers diverse interconnected issues of human rights law, when she dons her TWAIL-feminist lens to analyze multiple ways through which ‘categories’ of human rights are moulded by culture, including the category of culture itself.

TWAIL remains committed to the task of bringing alternative versions of understanding power and domination as exercised in relations with the third world, which perform the function of occluding alternate perspectives from taking shape.\(^101\) Rajagopal’s argument for including social movements in shaping IL and building third world resistance towards IL, is best illustrative of such scholarship within the second generation.\(^102\)

Kahn’s argument ultimately underscores that scholarship should lead inquiry beyond the ordinary sites of law production present in “the multitude of ordinary decisions at the microlevel of everyday transactions”\(^103\). This has been advocated


\(^99\) Kahn, Cultural Study, note 17, p. 65.


\(^101\) Kahn, note 17, p. 65.

\(^102\) For example, see generally, Rajagopal, ‘International Law and Social Movements’, note 36; Rajagopal, ‘Counter-Hegemonic International Law’, note 36; Rajagopal, International Law from Below, note 36.

\(^103\) Kahn, note 17, ch 2.
by Eslava and Pahuja in order to effectuate a TWAIL praxis, to lead towards a
greater understanding of how IL and international legal phenomena operate in our
lives in specific ways.\textsuperscript{104} Rajagopal’s focus on social movements and his theory of
resistance have also successfully provided an effective alternative for analysis,
which have been historically ostracised from IL debates.\textsuperscript{105} Parmar’s argument on
focussing on the complexity of the lived experiences of third world peoples to
recover “subjugated knowledge” also furthers TWAIL inquiries in the direction
beyond ordinary corridors in which international rules are conceived.

Although we can generalise that TWAIL’s reform ambition falls within the
criticism provided by Kahn, scholarship produced by second generation TWAILers
have effectively, albeit unconsciously adopted an approach which is like Kahn’s
genealogy and architecture, with an aim of distilling and bringing to fore, the voices
of third world states and its people, their perception of IL, and experience IL brings
to them. When TWAILers analyse these voices, they unmistakably have a critical
tone, and are full of resistance and hostility towards IL. But the reform that TWAIL
advances by bringing these voices to the front is not just speaking to the practice
of law, they also directly address law’s power which is exercised in international
relations, wherein the third world acquiesces and the first world neglects. TWAIL
through its reform and resistance dynamic provides a constructive mode of in-
depth historical evaluation of contemporary structures of beliefs upon which IL is
founded and advancing alternative accounts of experience of the rule of law which
creates the scope to pursue theoretical study in IL in a self-reflexive and critical
manner, which was the main aim of Kahn’s call for abandoning reform in
scholarship.\textsuperscript{106}

Ultimately TWAIL-II’s reform analytic fulfils Kahn’s aim of providing a
descriptive account of the way historical causal factors, such as colonial relations,
shape contemporary global order, combined with its normative commitments, which
propel TWAIL’s commitment towards interdisciplinary examination to repudiate
any attempt to distort etiological analysis by bracketing certain historical products
as non-examinable. This is evidenced in Nesiah’s and Mutua’s evaluation of the
structure of human rights discourse itself.

\textsuperscript{104} Eslava, and Pahuja, note 2, p. 123.
\textsuperscript{105} Rajagopal, “International Law and Social Movements”, \textit{note 36}; Rajagopal, “Counter-
Hegemonic International Law”, \textit{note 36}; Rajagopal, \textit{International Law from Below}, \textit{note 36};
Rajagopal, “From Resistance to Renewal”, \textit{note 57}.
\textsuperscript{106} For instance, Chimni, “An Outline”, \textit{note 58}; B.S. Chimni, “Legitimating International Rule
of Law” in James Crawford and Martti Koskenniemi (eds), \textit{Cambridge Companion to
International Law} (CUP, 2012); S. Pahuja, “Power and the Rule of Law in the Global
Context”, \textit{Melbourne University Law Review}, vol. 28(2004), pp. 232-252 at p. 245; Mutua,
IV. FINAL REFLECTIONS

I have highlighted the significance of TWAIL as representative of voice of the third world in the realm of international legal scholarship. As is axiomatic from the successful affirmation of my hypothesis, which bears testimony to the unique genetic of TWAIL’s reform analytic; sharpened by second generation TWAILers, paved a way for a multitude of vantage points for understanding the world envisaged by IL today. By examining IL through distinct lenses, both micro and macro, TWAIL offers a panoramic insight into a broad spectrum of ground realities prevailing in the third world which shape the understanding and working of IL, especially ordinary and extra-ordinary sites at which IL operates in and shapes the lives of millions of third world peoples in certain and subtle ways.

My evaluation reveals a distilled version of TWAIL’s reform. However, it is worth noting TWAIL at its core is a political and intellectual project galvanised by an unbridled, geo-politically diverse demographic united in its opposition to an unjust global order, making it vulnerable to Kahn’s criticism. In this sense TWAIL presents a powerful paradox, which my article addressed. As my article illustrates, TWAIL’s reform analytic is an oxymoronic amalgam of resistance and critique- completing a full circle which began with a paradox in TWAIL’s emancipatory ambition to reform IL, followed by its deconstruction, which unpacked its uses and explicated its power in its propensity to stimulate diverse strands of understanding and experience that structure belief in the edifice of IL, which emanated from TWAIL’s conceptual apparatus of historical evaluation. This follows Kahn’s approach in tracing the contemporary structuring of beliefs.

My own application of TWAIL’s reform, through critical reflection on TWAIL’s reform analytic channelized through this distilled version of TWAIL’s reform, also operates to eliminate charges of legal nihilism against TWAIL. By evaluating TWAIL’s reform against Kahn’s claim, I have illustrated that any charge of legal nihilism against TWAIL cannot sustain because of the crucial function that TWAIL’s reform analytic performs- generating a “naturalistically respectable account of how we arrived at our current, conscious self-understandings” of IL, reiterating the importance of TWAIL.

By bringing under examination, the lives and experiences of third world peoples, and the colonial encounter, to their scholarship and development of reform,

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108 Sunter, note 89, p. 490.
TWAILers subtly attempted to challenge the categorization of experience which IL imposes on the world. In this sense, TWAILers driven by their normative considerations of justice for the third world, articulated a reform in the same vein as advocated by Kahn, i.e. by questioning the zealous commitment to the rule of law.
CONCEPT OF STATEHOOD UNDER INTERNATIONAL LAW:
UNDERSTANDING IN THE LIGHT OF SITUATION IN
PALESTINE

B. C. NIRMAL* AND PRakash SHARMA**

Abstract

The International Criminal Court (ICC) on February 5, 2021 said that ICC has jurisdiction over war crimes committed in the Palestinian territories. The ruling was delivered by a pre-trial chamber of three ICC judges. This ruling was a result of the Palestinian Authority gaining formal membership of ICC in 2015, and the fact that the Palestine Authority had referred the situation to the court. According to the ruling, it is not only Israelis and the Israel Defence Forces who could be potentially prosecuted for war crimes, but also Palestinians and groups like Hamas, that have been accused of targeting Palestinian civilians, including using them as human shields. Israel, which is not a member of the ICC, maintained that the court has no jurisdiction over the area in question. However, the court ruled that its jurisdiction do extend to the West Bank, Gaza and East Jerusalem. At the same time, the ruling clarified that the decision does not imply any attempt to determine Palestinian statehood. It is in this backdrop, an attempt is made to first, appraise the role of ICC in closing the gap of accountability for international crimes, and secondly, grapple with the perennial and thorny issue of Palestine’s statehood and in this backdrop to offer some of the reflections on the nature of the international law and the influence of world politics on it. The paper concludes that the decision is pragmatic, historic and futuristic.

Key words: Statehood, war crimes, belligerent occupation, ICC, state recognition.

I. INTRODUCTION

On February 05, 2021, the International Criminal Court (the Court) Pre-Trail Chamber-I (PTC-I) held that (a) Palestine is a State Party to the Statute (unanimous); (b) Palestine qualifies as the State on the territory of which the conduct in question occurred for the purposes of Article 12(2)(a) of the Statute (by majority); and (c) ICC’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem (by majority). The 60 page decision established that ICC can assert its jurisdiction over serious crimes alleged to have occurred in the State of Palestine, which has correctly acceded to the Rome Statute; and it has jurisdiction over

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1 Situation in the State of Palestine ICC-01/18-143 05-02-2021 1/60 EC PT [hereinafter Situation in Palestine], available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF> accessed on 20 June 2021.
crimes committed within the Palestinian territory, since June 13, 2014. The decision opened the door for formal probe and possibly paved the way for a criminal investigation, despite Israeli objections.

The decision prompted swift reactions from Israel, which is not a member of the Court and rejects its jurisdiction; while the Palestinian Authority welcomed the ruling. Other nation-states like United States of America were quick to respond and maintained that ICC can’t exercise jurisdiction over the nationals of non-members. While arguing against jurisdiction, Germany in her amicus curiae, called upon the Court “to conduct an independent assessment of whether Palestine satisfies the normative criteria of statehood under international law”. There were also reports suggesting how Israel is pushing New Delhi to take stand against the ruling.

2 The case was supported with wide ranging observations from as many as 43 amici curiae observations. A total of 22 amici curiae took the view that, for the reasons specified in their observations, the conditions for the exercise of the Court’s jurisdiction in the present Situation have not been fulfilled, and around 20 amici curiae were of the view that, for the reasons specified in their observations, the conditions for the exercise of the Court’s jurisdiction in the present Situation have been fulfilled.

3 This appears to be a contentious issue, since, Israel holds the position that that the ICC has no jurisdiction over Israel/Palestine, and accordingly opted not participate in the proceedings. On 20 December 2019, Attorney General (Israel) Avichai Mandelblit published a 34-page legal opinion explaining how the ICC “manifestly lacks jurisdiction”, especially because “no sovereign Palestinian State is in existence”. See Office of Attorney General, “The International Criminal Court’s Lack of Jurisdiction over the So-called “Situation In Palestine””, available at:<https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20situation%20in%20Palestine%20-%20AG.pdf> accessed on 21 June 2021.

4 On 3 March 2021, the Ministry of Foreign Affairs and Expatriates for the State of Palestine stated that “This is a long-awaited step that serves Palestine’s tireless pursuit of justice and accountability, which are indispensable pillars of the peace the Palestinian people seek and deserve,”, see State of Palestine Statement, available at:<https://english.wafa.ps/Pages/Details/123512> accessed on 20June 2021. Further, the Palestine maintain that the Court has jurisdiction over non-member States if the alleged abuses occurred on the territory of a member State. In this case, the State of Palestine is member.


7 Given geopolitical interest, New Delhi is reluctant to take a stand against the ICC ruling, and responded that “it would not want to comment or take a position on any of the court’s decisions or rulings.” see “Explained: ICC Ruling Says It Has Jurisdiction in Palestinian Territories: Here’s What It Means”, The Indian Express, (16 February 2021), available at:<https://indianexpress.com/article/explained/icc-ruling-israel-palestine-territories-explained-7190979/> accessed on 24 June 2021.
On the contrary, the decision was welcomed by the International Commission of Jurist (one of the amicus curiae), Amnesty International’s Centre for International Justice, Human Rights Watch, etc. Similarly, the Office of the Prosecutor (OTP) issued a statement wherein it welcomed “the opportunity to engage with both the Government of Palestine and the Government of Israel, to determine how justice may best be served within a framework of complementary domestic and international action”. It is in this perspective, the present paper tries to first, address one of the most grappled issue of statehood in the annals of world politics; and secondly, examine the role of ICC in closing the gap of accountability that regrettably still benefits perpetrators of international crimes.

II. PALESTINIAN ISSUES UNDER INTERNATIONAL LAW

Historically, the Palestine statehood dates back to 1923. The Permanent Court of International Justice (PCIJ) rules that Palestine is a State. In 1937, despite being
under the mandate State, the status of Palestine as a State was recognised.\footnote{14} Thereafter, Palestine continued to establish its statehood with the declaration of the Palestine Liberation Organization (PLO) as its government.\footnote{15} In 1993, Israel while negotiating its border acknowledged Palestine’s statehood.\footnote{16} In 1998, by Resolution 52/250 of 7 July 1998, the United Nations General Assembly (UNGA) gave Palestine procedural rights at the United Nations that apply only to States,\footnote{17} and by Resolution 67/19 of 29 November 2012, General Assembly defined the territory of Palestine as that occupied in 1967 by Israel.\footnote{18} The adoption of GA resolution can be regarded as implying ‘collective recognition of statehood’. Significantly this resolution, indeed, became instrumental to allow the Palestine to participate in the activities of ICC by its Assembly of State Parties (ASP) in 2014 and that further paved a way for reconsideration of Palestine issue in ICC in 2015 resulting Palestine to become a

\footnote{14} League of Nations, Permanent Mandates Commission, Minutes of the Thirty-Second (Extraordinary) Session devoted to Palestine, held at Geneva from July 30th to August 18, 1937, including the Report of the Commission to the Council, Tenth Meeting, 5 August 1937, 10 A.M., No. C.330.M.222.


In 15 December 1988, the PLO formally declared itself to be the Government of Palestine, and the General Assembly adopted Resolution 43/177, in which it welcomed the declaration and replaced the designation “Palestine Liberation Organization” with “Palestine” to be used for all purposes within the United Nations, see 43/177 Question of Palestine, A/RES/43/177, available at:https://unispal.un.org/UNISPAL.NSF/0/146E6838D505833F852560D60471E25> accessed on 24 June 2021.


State Party to the Rome Statute. Further, confirmation to statehood was given by the United Nations Security Council in Resolution 2334 of 23 December 2016, in which it said that “it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations.”

The complex web of essentials of State has pushed the State of Palestine into the myriad of uncertainties. It is argued that merely on the basis of law of recognition and rights of self-determination, statehood cannot be availed. However, there are certain relevant factors that do point towards a strong case for statehood for Palestine. There are reference of Palestinian people, territory, normative character

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21 For instance in 2009, the Israel’s Prime Minister, Benjamin Netanyahu, agreed to recognize Palestine as a state of the Palestinian people. He stated, “[i]f we are asked, which we are, to recognize the Palestinian state as the nation-state of the Palestinian people—and we are willing to do so—it is only natural that we ask our Palestinian neighbors to recognize the State of Israel as the nation-state of the Jewish people”. See Benjamin Netanyahu, Speech at the National Defense College Graduation Ceremony, (28 July 2009), available at:<http://www.pmo.gov.il/PMOEng/Communication/PMSpeaks/speechmabal280709.htm> accessed on 24 June 2021.


The advisory decision received mixed reactions, see Michla Pomerance, “The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial”, American Journal of International Law, vol. 99, no. 1 (2005), p. 26. (here the author observed that the ICJ’s participation has essentially rubber-stamped the political positions of the General Assembly, which is the detriment of the ICJ’s authority as a judicial body.

Richard A. Falk, “Toward Authoritativeness: The ICJ Ruling on Israel’s Security Wall”, American Journal of International Law, vol. 99, no. 1 (2005), pp. 42-45. The author believed that answering the question put by the General Assembly is consonant with the ICJ’s role as principal judicial organ within the United Nation’s system, and the implication of the decision would only enhance the ability of United Nation bodies to contribute to a just solution of the Israeli-Palestinian conflict within the framework of international law).

of the UN partition plan, acknowledgement from international institutions, compliance with UN international instruments, and settled diplomatic relations.


24 On 31 October 2011, UNESCO’s General Conference admitted Palestine as a member of the Organisation following Palestine’s submission of a request for admission in 1989, see Records of UNESCO General Conference, 36th Session, 25 October to 10 November 2011, p. 79.

On 29 November 2012 the UN General Assembly adopted resolution 67/19 which accorded to Palestine non-member observer State status in the United Nations, see UNGA Resolution 67/19 (2012), para. 2.

On July 2014, the European Council expressed its support for “an agreement that ends the occupation which began in 1967”, see Council Conclusions on the Middle East Peace Process, 22 July 2014, para. 5.

Subsequently, on 29 December 2015, Palestine has thereby become the 118th Member State of the PCA. By a vote of 54 in favour and 25 abstentions, the PCA Administrative Council concluded its consideration by taking note that the State of Palestine is a Contracting Party to the 1907 Hague Convention for the Pacific Settlement of International Disputes, and a Member of the Permanent Court of Arbitration, available at: <https://pca-cpa.org/en/news/new-pca-member-state-palestine/> accessed on 25 June 2021.

On January 2016, the African Union “reaffirm[ed] its unwavering support for the cause of the Palestinian people, including their inalienable right to the establishment of their independent State within the 1967 borders and their capital ELQODS (East Jerusalem) as well as the right of return for refugees in accordance with relevant UNSC Resolutions 242, 338 and 194”, see AU Executive Council Report, January 2016, p. 6.

On June 2019, the OIC Secretary-General noted that “just and comprehensive peace remains the ideal solution only achievable through negotiations taking into account the Arab Peace Initiative and the two-state solution centered on the establishment of a Palestinian state according to the 4 June 1967 borders, with East Jerusalem as its capital, in line with the resolutions of international legitimacy”, see OIC Press release, 1 June 2019.

25 On 1 April 2014, Palestine signed and acceded to the following 15 international instruments: the four Geneva Conventions of 1949 and the first protocol additional thereto relating to the protection of victims of international armed conflict; the Hague Convention with respect to the Laws and Customs of War on Land and its annex: regulations respecting the laws and customs of war on land; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Torture Convention); the Convention on the Rights of the Child (CRC); the United Nations Convention against Corruption (UNCAC); the Vienna Convention on the Law of Treaties (VCLT); the Vienna Convention on Diplomatic Relations (VCDR); and the Vienna Convention on Consular Relations (VCCR).
with other States.\textsuperscript{26} In doing so, Palestine has established the legal capacity to enter into international treaties as well. Some of these treaties have provisions giving jurisdiction to International Court of Justice (ICJ) to settle disputes between State Parties to that treaty, such as the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention 1948), International Convention on the Elimination of All Forms of Racial Discrimination 1965, etc. Further, the military occupation of Palestine is recognised as illegal by world, including United Nations.\textsuperscript{27} These developments raise numerous legal issues ranging from Palestine’s legal interest to bring the claim, to issues of treaty interpretation, as well as finally the legal consequences of Palestine now having become member of international institutions. In recent past, Palestine filed cases in several dispute settlement forums, an Application on 30 September 2018 before the ICJ against the United States of America for violation of the VCDR, on account of the transfer of the US embassy from Tel Aviv to Jerusalem;\textsuperscript{28} decision on jurisdiction of December 2019 with regard to the inter-State communication brought by Palestine against Israel under Art. 11 (1), CERD.\textsuperscript{29}

Some scholars have held a contradictory view that ascertaining Palestine’s statehood could be difficult in the light of competing claims of governance between Fatah and Hamas.\textsuperscript{30} Likewise, in Construction of Wall case, ICJ observed that Palestine lacks essentials of statehood, the relevant text runs thus:\textsuperscript{31}

The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for


\textsuperscript{27} Here too much emphasis on Resolutions alone would not suffice, especially because practice of States suggests that “it is not the United Nations, rather individual states who recognize states”, see Md. Rizwanul Islam, “The Case of Palestine against the USA at the ICJ: A Non-starter or Precedent-setter?”, Georgia Journal of International and Comparative Law, vol. 48, no. 1 (2019), p. 9.


\textsuperscript{31} Construction of Wall, note 22, para 162. At the same time, ICJ found that the construction of a barrier in the West Bank, which deviates from the Green Line, “severely impedes the exercise by the Palestinian people of its right to self-determination”. Ibid., para 122.
these efforts [the Roadmap and other Security Council resolutions] to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

Further, another significant observation from the Construction of Wall case was that while declaring the construction of walls in occupied territories illegal, ICJ did not ask Israel to compensate Palestine, but rather the persons affected.\(^{32}\) There is however, another twist in the Construction of Wall case. In advisory opinion proceedings only states and international organisations are permitted to make submissions,\(^{33}\) yet Palestine was allowed to make submissions. Here of course, Palestine could not be considered an international organisation, meaning thereby the ICJ did consider that Palestine was competent to make submissions like a State.\(^{34}\)

### III. AFTER UNGA RESOLUTION 67/19: PALESTINE AT INTERNATIONAL CRIMINAL COURT

#### A. Factual Background

In the wake of the 2014 Gaza conflict, the Palestinian officials on 31 December 2014 filed paperwork to join the ICC,\(^ {35}\) and on 1 January 2015, the Government of

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32 Ibid., paras 149-152. ICJ observed that:

Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall’s construction. *Ibid.*, para 153.

This was departure from the Chorzow Factory formula where a state in breach of an international obligation was to compensate the state to whom the obligation was owed. *See* Factory at Chorzow, Judgment, 1928 P.C.I.J. (ser. A) No. 27, at 48 (Sept. 13).

33 ICJ Statute, Article 66.

34 Rizwanul Islam opines that “In doing this, the ICJ took a leap beyond the text of the relevant resolutions of the General Assembly, because none of the resolutions deals with the locus standi of Palestine before the Court”; *See* Md. Rizwanul Islam (2019), *note* 27, p. 12.

35 The reference of Palestine before ICC dated back to 1998 when the possibility of ICC investigations was on the minds of US-Israel diplomats involved in the negotiations or coordination that produced the Rome Statute. *See* David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, Princeton, 2012), pp. 237-242. Also, both USA and Israel signed the treaty in 2000, on the count that
Palestine lodged a declaration accepting the jurisdiction of the ICC over alleged crimes committed in the occupied Palestinian territory, including East Jerusalem. They also submitted a separate declaration providing the court with retroactive jurisdiction back to 13 June 2014. This addition was important because the court acquires jurisdiction sixty days after a member seeks admission to the court.

This was however, not the first time, Palestine had approached ICC. In fact, earlier in 21 January 2009, owing to Israel’s 2008-09 campaign in Gaza strip, which resulted in the deaths of hundreds of Palestinians, the Palestine authorities approached Hague and sought ICC investigation. This resulted in deliberations (for more than 3 years i.e. from 21 Jan, 2009 to 3 April, 2012) on how to pursue investigation. In April 2012, the prosecutor’s office (Luis Moreno Ocampo) decided against pursuing an investigation, following uncertainty in Palestine’s statehood claim. At the same time, the prosecutor acknowledged that the OTP “could in the future consider allegations of crimes committed in Palestine, should competent organs of the UN or eventually the Assembly of States Parties (ASP) resolve the they would not ratify absent changes to the Court’s statute, and after two years of follow-on negotiations that helped define the crimes that the ICC could prosecute and made special efforts to limit Israeli exposure, unsigned in 2002. See David Bosco, “Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court”, Global Governance, vol. 22, no. 1 (2016), pp. 157–58.

36 Presidency, Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I, Annex I, 24 May 2018, ICC-01/18-1-AnxI, p. 2.

37 See Rome Statute, Article 126(2). Absent Palestine’s additional declaration, the court would only have jurisdiction over events in Palestine after 1 April 2015.

38 The Operation was coded as “Operation Cast Lead”, which started from 27 December 2008 until 18 January 2009, resulting in the deaths of 1,400 Palestinians, of whom at least 850 were civilians, including 300 children and 110 women, and wounding of over 5,000 Palestinians. See John Dugard, “Palestine and the International Criminal Court: Institutional Failure or Bias?”, Journal of International Criminal Justice, vol. 11, no. 3 (2013), pp. 563–570.

39 Palestine relied on Rome Statute, Article 12(3).

40 John Dugard (2013), note 38, p. 566.

41 ICC, Office of the Prosecutor, Update on the Situation in Palestine, 3 April 2012. The Office of Prosecutor noted that:

In interpreting and applying Article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction of the Court under Article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term “State” under Article 12(3) which would be at variance with that established for the purpose of Article 12(1). Ibid., para 6.
legal issue relevant to the assessment of Article 12.” As a result, on 29 November 2012, the UNGA, by 138 votes to 9 with 41 abstentions, decided to accord to Palestine ‘non-member observer State’ status. This alone would have allowed the OTP to investigate (since the Declaration of 21 January 2009 remains in force) any international crime that has been committed in the territory of Palestine, including the crime committed in the course of Operation Cast Lead.

However, it was not the case, and Palestine was asked to submit a new jurisdictional declaration. In the meantime, Palestine acceded to the Rome Statute on 2 January 2015 with the ICC instrument entering into force on 1 April 2015. In May 2018, Palestine had formally asked the ICC prosecution to initiate an investigation into allegations of serious crimes committed on its territory and affirmed its commitment to cooperate with the court.

On 20 December 2019, the OTP concluded a nearly five-year-long preliminary inquiry into the Palestine situation and determined that all the necessary criteria to proceed with a formal investigation of alleged serious crimes by Israelis and Palestinians in that territory had been met. The legal question were twofold, namely: whether the danger to civilians was excessive, and whether Israeli forces took adequate precautions to avoid them.

42 Ibid., para 8. The response was not found reasonably correctly for many reasons, including the fact that it took more than three years to reach a conclusion that warranted only a two-page statement. See John Dugard, note 38, p. 566.

43 UN General Assembly, Res. 67/19 (29 November 2012).

44 See David Bosco, note 35, p. 158.

45 Palestine deposited its instrument of accession to the Statute with the Secretary-General of the United Nations pursuant to Rome Statute, Article 125(2). Palestine became the 123rd ICC member state. The move to accede Palestine into the framework of Rome Statute has witnessed harsh reaction from non-member States. While, The United States of America expressed regret about the court’s involvement, and thereby calling any ICC scrutiny of Israel a “tragic irony”, see “Statement on ICC Prosecutor’s Decision,” US State Department, 16 January 2015. The then Israel’s Foreign Ministry described its accession as a “political, hypocritical, and cynical maneuver”, see Israel Ministry of Foreign Affairs, “Palestinian Authority Joins the ICC—Iran’s Response,” 1 April 2015. David Bosco opines that the desire to join international instruments “forms part of a broad strategy of employing international organizations and law to solidify Palestine’s global standing and increase diplomatic pressure on Israel”. Ibid., p. 155.

46 On 22 May 2018, Palestine referred the Situation in the State of Palestine to the Prosecutor pursuant to Articles 13(a) and 14 of the Statute, and on 24 May 2018, the Presidency assigned the Situation in the State of Palestine to the Chamber. See Situation in Palestine, note 1, p. 5.

47 See Rome Statute, Article 8(2)(b)(iv), which prohibits “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects...which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”
Because of Palestine’s request, the OTP did not require judicial authorization to move forward with an investigation but it nonetheless sought guidance from the court’s judges on the ICC’s territorial jurisdiction. On 22 January 2020, the Chamber received the ‘Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’. The OTP specifically asked the court’s judges to confirm that the territory over which the ICC can exercise its authority comprises the West Bank, including East Jerusalem, and Gaza. On 28 January 2020, the Chamber issued the ‘Order setting the procedure and the schedule for the submission of observations’, and invited Palestine, victims, Israel to submit written observations, and other States, organisations and/or persons to submit applications for leave to file such written observations. From 3 to 19 March, 2020, the ICC Pre-Trial Chamber I received observations on the Prosecutor’s Request on behalf of the amici curiae authorised to participate in the proceedings. On 16 March 2020, the Chamber received Palestine’s observations in relation to the request for a ruling on the Court’s territorial jurisdiction in Palestine.

Palestine maintained that it had fulfilled, cooperated and systematically enabled all its obligations under the Rome Statute. In this regard, Palestine emphasising on the object behind preparation of Rome Statute:

[...] the Court was intended to help close the gap of accountability that regrettably still benefits perpetrators of international crimes’ and the criminality concerned in the present case unquestionably involves such a gap. It, therefore, considers that it is ‘critical that the Court enforce its jurisdiction in this case to the greatest extent permitted by its Statute’.

48 On 21 January 2020, the Chamber issued the ‘Decision on the Prosecutor’s Application for an extension of the page limit’, thereby rejected “in limine the Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” and invited Prosecutor to file a new request “of no more than 110 pages, including any references to the Supplementary information to the Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, together with two annexes containing two legal memoranda issued by the State of Israel on 20 December 2019.” See Situation in Palestine, note 1, p. 6.

49 Ibid.

50 Ibid., pp. 7-9.

51 Ibid., p. 7. On 26 May 2020, the Chamber issued the Order requesting additional information by Palestine, and allowed the Prosecutor and Israel to respond to any additional information provided by Palestine. Ibid., p. 11.


53 Ibid., p. 21.
On the other hand, Israel pointed out that in its communication dated 17 July, 1998 it had categorically expressed that:\footnote{54}

‘Palestine’ does not satisfy the criteria for statehood under international law and lacks the legal capacity to join the aforesaid Statute under general international law, as well as under the terms of the Rome Statute and of bilateral Israeli-Palestinian agreements.

The Government of Israel does not recognize ‘Palestine’ as a State, and wishes to place on record, for the sake of clarity, its position that it does not consider ‘Palestine’ a party to the Statute and regards the Palestinian request for accession as being without any legal validity or effect.

According to Israel, various factors leads to the conclusion, especially because (a) the UNGA resolution 67/19 did not purport to make a legal determination as to whether “Palestine” qualifies as a State, and was explicitly limited in its effect to the UN; (b) the actions of the UN Secretary-General as depositary of multilateral treaties, as has made clear, are not determinative of a “highly political and controversial” question such as that of Palestinian statehood; (c) the Palestinian participation in the Court’s Assembly of States Parties cannot be taken to constitute or demonstrate such statehood either.\footnote{55}

Meanwhile, the Prosecutor considered that the ICC’s territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza.\footnote{56} Further, Prosecutor opined that though “the question of Palestine’s statehood under international law does not appear to have been definitively resolved”;\footnote{57} yet reasonable basis to initiate an investigation into the situation in Palestine deems proper. In this regard, while stretching upon the principle of self-determination and relying on its endorsement from other international institutions,\footnote{58} it argued:\footnote{59}

\footnote{55} Israel, Office of the Attorney General, The International Criminal Court’s Lack of Jurisdiction over the So-Called “Situation in Palestine”, 20 December 2019, paras 14-20.
\footnote{56} ICC-01/18-12 22-01-2020 1/112 RH PT at para 4.
\footnote{57} Ibid., para 5.
\footnote{58} Ibid., paras 8-9. The Prosecutor referred to the Security Council Resolution 2334, which observe “that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations”. See UNSC Resolution 2334 (2016), para. 3. The Prosecutor also referred to the Human Rights Council Resolutions 37/35 (2018) and 34/30 (2017), which “[s]tresse[d] the need for Israel, the occupying Power, to withdraw from the Palestinian territory occupied since 1967, including East Jerusalem, so as to enable the Palestinian people to exercise its universally recognized right to self-determination”. See HRC Resolution 37/35 (2018), para. 1, and HRC Resolution 34/30 (2017), para. 1.
\footnote{59} Ibid., para 9.
Based...countless resolutions and pronouncements rendered by the international community over the years, the Prosecution considers that the Occupied Palestinian Territory is “the territory [where] the conduct in question occurred” within the terms of Article 12(2)(a). Accordingly, Court has jurisdiction over alleged crimes committed in that territory. This determination is made strictly for the purposes of determining the Court’s ability to exercise its jurisdiction and the scope of such jurisdiction, and is without prejudice to any final settlement, including land-swaps, potentially to be agreed upon by Israel and Palestine.

B. Reflections on ICC

The idea of creating ICC was to secure universal justice wherein respect for human rights and fundamental freedoms of individuals is extended to all. The then UN Secretary General, Kofi Annan while justifying the establishment of ICC before International Bar Association, observed:60

In the prospect of an International Criminal Court lies the promise of universal justice. That is the simple and soaring hope of this vision...We ask you, as lawyers and tribunes of justice to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights and that those who violate those rights will be punished.

It is in this perspective the establishment of ICC holds greater importance to all. The Preamble of the Rome Statute of the International Criminal Court (Rome Statute) maintains that unimaginable atrocities do shock the conscience of humanity, which must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.61 The greater impetus is made towards global accountability.

ICC is guided strictly by its independent and impartial mandate. As enshrined in the Preamble and Article 1 of the Rome Statute, the Court was established to hold

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individuals to account for some of the most serious crimes of international
concern.\textsuperscript{62} Similarly, other elements like fairness in judicial proceedings,\textsuperscript{63}
independent prosecution,\textsuperscript{64} outreach with communities affected by crimes,\textsuperscript{65}
participation of both witness and victim through “operational and procedural
protective measures”,\textsuperscript{66} etc.

Further, the mandate of the Court is circumscribed by the jurisdictional
parameters defined by the Statute, and the Court may not take any action in the
exercise of its mandate unless these conditions are met or put it differently, whether
the relevant parts of the Statute are able to respond effectively to any given situation.\textsuperscript{67}
Further, the Rome Statute makes clear that the ICC has no obligation to prosecute
all criminal activity over which it has jurisdiction. It is a court with limited resources

\textsuperscript{62} The provision is based on principle of complementarity. The relevant text runs thus:
“International Criminal Court (the Court) …shall be complementary to national criminal
jurisdictions.” This would suggest that ICC can prosecute when the State has failed in its
duty or is unwilling to prosecute and that State shall have preference over the ICC in
prosecuting the criminal activities prohibited by the Rome Statute.

\textsuperscript{63} The Registry provides a number of services to support the work of Defence teams, including
facilitating the protection of confidentiality, providing support during the investigations
activities conducted in the field, assisting arrested persons, persons interviewed by the
Prosecution and the accused to obtain legal advice and the assistance of legal counsel. The
Court also facilitates the necessary facilities for the Defence teams to prepare for cases, and
other logistical support. The Court’s legal aid system ensures that the reasonable cost of
legal representation is paid by the Court for persons who do not have sufficient means to
pay for it. Available at: <https://www.icc-cpi.int/about/defence> accessed on 29 June 2021.

\textsuperscript{64} The Office of the Prosecutor is an independent organ of the Court. It is responsible for
examining situations under the jurisdiction of the Court where genocide, crimes against
humanity, war crimes and aggression appear to have been committed, and carrying out
investigations and prosecutions against the individuals who are allegedly most responsible
for those crimes. Available at: <https://www.icc-cpi.int/about/otp> accessed on 29 June 2021.

\textsuperscript{65} The Court engages with communities directly, in local languages, holding conversations and
consultations, responding to questions, addressing concerns and providing people with
information to promote understanding throughout the stages of the judicial proceedings.
Available at: <https://www.icc-cpi.int/about/interacting-with-communities> accessed on 29 June 2021.

\textsuperscript{66} Here, the ICC Registry offers practical support, courtroom familiarisation, allowances,
protective measures, and special measures for Trauma and vulnerability, see <https://
www.icc-cpi.int/about/witnesses> accessed on 15 March 2021. \textit{See also} Rules of Procedure
and Evidence, Rules 85 and 86, available at: <https://www.icc-cpi.int/resource-library/

\textsuperscript{67} Simon McKenzie, \textit{Disputed Territories and International Criminal Law, Israeli Settlements
designed for exceptionally serious situations that brings a case of situation of ‘sufficient gravity’.  

The concept of sufficient gravity, remains loosely defined. The idea, however, was to limit its workload by applying its discretion to “decline the exercise of jurisdiction on grounds of insufficient gravity”. Here, the role of OTP plays significance in accessing the gravity of a situation or a case. The prosecutor’s office has said that gravity “refers not only to the number of crimes, but also to their type and impact”, yet so far, neither the prosecutor nor the ICC judges have provided clear guidelines on how to apply a gravity test; and past decisions have left only a few markers.

C. Overview of ICC Decision in the Situation in Palestine

The PTC-I affirmed the Courts jurisdiction. In its majority ruling in a 2:1 vote in favour Marc Perrin de Brichambaut of France, and Reine Adélaïde Sophie Alapini-Gansou of Benin and against Péter Kovács of Hungary, the Chamber stressed that it was not determining whether Palestine fulfilled the requirements of statehood under public international law, or adjudicating a border dispute, or prejudging the question of any future borders; it was solely determining the scope of the Court’s territorial jurisdiction for the purposes of the Rome Statute. The Court observed that:

“As such, it must be emphasised that the present decision is strictly limited to the question of jurisdiction set forth in the Prosecutor’s Request

68 Rome Statute, Article 17(1)(d). It reads thus; Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissable where: ….(d) The case is not of sufficient gravity to justify further action by the Court.


This so-called “gravity threshold” has played a critical role in guiding the Prosecutor’s selection of both situations and cases. In addition, the first Pre-Trial Chamber to consider the question has affirmed that Article 17(1)(d) imposes a requirement that must be met above and beyond the jurisdictional mandates of the Rome Statute. Yet, because “gravity” is not defined in the Statute, the appropriate scope of the term remains a matter of substantial debate. Ibid., p. 808.

70 Ibid., p. 809.

71 David Bosco, note 35, p. 163.

72 However, there few factors that the office of prosecutor has followed, are: (a) the scale of the crimes, (b) the severity of the crimes, (c) the systematic nature of the crimes, (d) the manner in which they were committed, (e) the impact on victims, and (f) focus on those individuals who bear the greatest responsibility for crimes within the jurisdiction of the Court. See Susana SaCouto, and Katherine Cleary, note 69, p. 810.

73 Situation in Palestine, note 1, para 60.
and does not entail any determination on the border disputes between Palestine and Israel.”

Speaking about Israel participation in the proceedings, the Court observed that in its ‘Order setting the procedure and the schedule for the submission of observations’, it did invite Israel to submit observations.\(^\text{74}\) Israel, however, chosen not to avail the same. The Court was of the opinion that it does have the mandate to rule on the individual criminal responsibility of persons.\(^\text{75}\)

Further, the Palestinian territories are under occupation by the State of Israel. As observed by the ICJ in its Advisory Opinion on Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory, the State of Israel, being an occupying power, is equipped with the authority “to restore, and ensure, as far as possible, public order and safety”, together with “the duty to secure respect for the applicable rules of international human rights law and international humanitarian law.”\(^\text{76}\)

D. On Jurisdiction

The Court while referring to its jurisdiction under Article 12(2)(a) of the Rome statute,\(^\text{77}\) opined that the sole purpose of establishing individual criminal responsibility requires a determination as to whether or not the relevant conduct occurred on the territory of a State Party. The Court observed that such an assessment enables the Prosecutor to discharge obligation to initiate an investigation, which eventually permits the Court to exercise its jurisdiction over persons alleged to have committed crimes falling within its jurisdiction. The Court observed that:\(^\text{78}\)

The Chamber notes however that the chapeau of Article 12(2) of the Statute stipulates in the relevant part that ‘the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute’. The word

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\(^\text{74}\) The Order invites Israel to submit written observations on the Prosecutor’s Request of no more than 30 pages by no later than 16 March 2020, see ICC-01/18-14, available at: <https://www.legal-tools.org/doc/yfd939/pdf> accessed on 29 June 2021.

\(^\text{75}\) Rome Statute, Articles 1 and 25(1).

\(^\text{76}\) Hague Regulations Respecting the Laws and Customs of War on Land, 1907, Article 43.


\(^\text{78}\) Situation in Palestine, note 1, para 93.
‘following’ connects the reference to ‘States Parties to this Statute’ contained in the chapeau of Article 12(2) of the Statute with _inter alia_ the reference to ‘[t]he State on the territory of which the conduct in question occurred’ in Article 12(2)(a) of the Statute. In more specific terms, this provision establishes that the reference to ‘[t]he State on the territory of which the conduct in question occurred’ in Article 12(2)(a) of the Statute must, in conformity with the chapeau of Article 12(2) of the Statute, be interpreted as referring to a State Party to the Statute. It does not, however, require a determination as to whether that entity fulfils the prerequisites of statehood under general international law.

Also, the above said observation would require that the preconditions to the exercise of the Court’s jurisdiction under Article 12(2) of the Statute are assessed in keeping with the outcome of the accession procedure.79 While discussing the relevant law to the case, the Court opined:80

…in the view of the Chamber, Palestine acceded to the Statute in accordance with the procedure defined by the Statute and, in addition, the Assembly of States Parties has acted in accordance with Palestine’s accession. In view of its accession, Palestine shall thus have the right to exercise its prerogatives under the Statute and be treated as any other State Party would. Moreover, Palestine’s accession has not been challenged under Article 119(2) of the Statute. Palestine is therefore a State Party to the Statute, and, as a result, a ‘State’ for the purposes of Article 12(2)(a) of the Statute. These issues have been settled by Palestine’s accession to the Statute.

Once the issue of jurisdiction was found settled, the Court referred to the Prosecutor observation that she “is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to Article 53(1) of the Statute”.81 The reason for such conclusion was that under Article 53(1)(a) of the Rome Statute it is stipulated that “the Prosecutor shall… initiate an investigation unless he or she determines that there is no reasonable basis to proceed”. Meaning thereby, there must be a satisfaction that the relevant criteria established by the Rome Statute is fulfilled, on the ground that potential cases arising from the situation would be admissible.

79 _See_ Rome Statute, Articles 12(1), 125(3), 126(2) and challenge made under Article 119(2).
80 _Situation in Palestine, note_ 1, para 112.
81 The reasonable believe was that the members of the Israeli Defense Forces, Israeli authorities, Hamas and Palestinian armed groups have committed crimes, _see_ ICC-01/18-12 22-01-2020 1/112 RH PT, paras 93-95.
This means that, although the Prosecutor has not officially announced that she has opened an investigation into the present Situation, such an investigation has, in principle, already been opened as a matter of law.\textsuperscript{82} Herein, the Prosecutor’s satisfaction based on reasonable basis that alleged crimes within the jurisdiction of the Court has been or is being committed, demands \textit{prima facie} jurisdiction to entertain such matter. And it is in this perspective, the Chamber considered it appropriate to determine whether Article 19(3) of the Statute is applicable or not. The Court was of the view that:\textsuperscript{83}

The Chamber considers that a ruling on a question of jurisdiction pursuant to Article 19(3) of the Statute may be sought and issued before a case emanates from a situation. As specified below, it has arrived at this conclusion on the basis of an interpretation of this provision in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Statute’s object and purpose.

At this juncture, one needs to be clear that this is not an investigation, but rather the process by which the OTP examines the available information in the public domain to determine whether there is a reasonable basis to believe that Rome Statute crimes have been committed and so to proceed to the opening of a criminal investigation pursuant to the criteria established by the Statute.

\textbf{E. On Oslo Accords}

Palestinian authorities currently exercise limited criminal jurisdiction with respect to certain parts of the occupied Palestinian territories on the basis of the 1993 Declaration of Principles on Interim Self-Government Arrangements (Oslo-I),\textsuperscript{84} and the 1995 Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (Oslo-II).\textsuperscript{85}

\begin{flushright}
\footnotesize
82 Article 19(1) provides that ‘[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it’. Article 19(2) stipulates that ‘challenges to the jurisdiction of the Court may be made by’ an accused, a person for whom a warrant of arrest or a summons to appear has been issued, or certain States. Article 19(3) provides that ‘[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction’.

83 \textit{Situation in Palestine}, note 1, para 68.


85 The Agreement contains clauses which limit the scope of the jurisdiction of the ‘Palestinian Interim Self-Government Authority’. The Agreement was concluded on 28 September, 1995, and in its article XVII(2)(c) it is stipulated that ‘[t]he territorial and functional jurisdiction of the [Palestinian Interim Self-Government Authority] will apply to all persons, except for Israelis, unless otherwise provided in this Agreement’. Similarly, Article I(1)(a)
\end{flushright}
The Court observed that though the international community has expressed support for the position agreed to by Israel and the Palestine in the Oslo Accords boundaries, yet the Oslo accords do not bind the Court’s jurisdiction. In this regard, the Court observed:\footnote{Situation in Palestine, note 1, para 126.}

As briefly outlined above, two lines of argument may be drawn from the observations submitted to the Chamber regarding the Oslo Agreements. On the one hand certain victims and \textit{amici curiae}, relying on the \textit{nemo dat quod non habet} rule, have argued that, in accordance with the Oslo Agreements, Palestine could not have delegated part of its jurisdiction to the Court. On the other hand, the Prosecutor, Palestine, certain victims, and certain \textit{amici curiae} have argued that the Oslo Agreements did not affect the jurisdiction of the Court, although, in the view of some, they could affect matters of \textit{cooperation} with the Court.

According to the Chamber, the correct view is that the effect of certain agreements entered between the States is not a matter for consideration, especially in relation to the authorisation of an investigation under the statutory scheme. Accordingly, the Court observed:\footnote{Ibid., para 129.}

\ldots the Chamber finds that the arguments regarding the Oslo Agreements in the context of the present proceedings are not pertinent to the resolution of the issue under consideration, namely the scope of the Court’s territorial jurisdiction in Palestine. The Chamber considers that these issues may be raised by interested States based on Article 19 of the Statute, rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a State under Articles 13(a) and 14 of the Statute. As a consequence, the Chamber will not address these arguments.

\textbf{F. On Issue of Politics}

The Chamber was of the opinion that controversial contents which are politically based or motivated (strictly remain outside the preview of court), however, if they form part of the legal contours of the situation and whose legal consequences

\footnote{of Annex IV to the Agreement, the ‘Protocol Concerning Legal Affairs’, provides that ‘[t]he criminal jurisdiction of the [Palestinian Interim Self-Government Authority] covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this article’. See UN website, available at: <https://www.un.org/unispal/document/auto-insert-185434/> accessed on 29 June 2021.}
might need to be addressed for the purpose of the jurisdictional activity than the Court has right to interfere. The ICC rightly confirmed:\(^{88}\)

\[\ldots\]the judiciary cannot retreat when it is confronted with facts which might have arisen from political situations and/or disputes, but which also trigger legal and juridical issues. The judges can and must examine the emerging legal issues, as long as they are framed by the contours.

This aspect was also addressed by ICJ in its Advisory Opinion on *Western Sahara*, which runs thus:\(^{89}\)

> It is true that, in order to reply to the questions, the Court will have to determine certain facts, before being able to assess their legal significance.

Indeed, the creation of a new State pursuant to international law is a political process of high complexity far detached from international court's mission. And for this reason the Court observed:\(^{90}\)

> The present decision shall thus not be construed as determining, prejudicing, impacting on, or otherwise affecting any other legal matter arising from the events in the Situation in Palestine either under the Statute or any other field of international law.

At the same time too much sensitivity about political questions may render the Court virtually ineffectual.\(^{91}\) In the *Construction of Wall* case the ICJ stated that “the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial

\(^{88}\) *Ibid.*, paras 55 and 56.


\(^{90}\) *Note 86*.

\(^{91}\) See the observation of Judge Weeramantry in *Lockerbie Case (Provisional Measures) (Libya v. U.K)* [1992] ICJ Rep 3. In this case, while concurring with Judge Bedjaoui, Judge Weeramantry stated:

> A great judge once observed that the laws are not silent amidst the clash of arms. In our age we need also to assert that the laws are not powerless to prevent the clash of arms. The entire law of the United Nations has been built up around the notion of peace and the prevention of conflict. The Court, in an appropriate case, where possible conflict threatens rights that are being litigated before it, is not powerless to issue provisional measures conserving those rights by restraining an escalation of the dispute and the possible resort to force. That would be entirely within its mandate and in total conformity with the Purposes and Principles of the United Nations and international law…If international law is to grow and serve the cause of peace as it is meant to do, the Court cannot avoid that responsibility in an appropriate case. *Ibid.*, p. 70.
task.92 The test therefore is, as long as the courts find that there is a legal dispute, the political sensitivity alone should not bar the courts from proceeding with the case.93

IV. PALESTINE CLAIM FOR STATEHOOD AND INTERPRETATION OF ICC DECISION

A. Meaning of Statehood: Its Essential Characteristics

Nation-states are immensely central to international law. So much so that international law is created by, for and primarily designed between them. The determination of statehood is one of the key functions of international law and the absence of precision and certainty in this critical task cannot simply be passed over or disregarded. For instance, in the Situation in the State of Palestine case, one of the objection raised by Israel was that Palestine isn’t a State and is therefore ineligible to be an ICC member.

A State exists when a people are settled in a territory under its own sovereign government. Thus, there must be a “people”, constituting “an aggregate of individuals who live together as a community;” there must be “a territory in which the people is settled”; there must be a government; and the government must be sovereign.94

The Montevideo Convention sets out the statehood criteria, namely: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.95 This definition is not entirely followed

92 Construction of Wall, note 22, para 58.
95 See Montevideo Convention on the Rights and Duties of States, 26 December 1933, Article 1 [hereinafter Montevideo Convention].
and in fact has been subject to criticism.\textsuperscript{96} The qualifications set out are therefore required to be read in conjunction with other international legal developments, including the universal recognition of the right to self-determination.

The reliance over the text of the Article 1 of the Montevideo Convention has been termed as the “best known definition of a State”, which has been used time and again “in questions relating to the creation and formation of States. In fact, reliance on them is so widespread that in some quarters they are seen as reflecting customary international law.”\textsuperscript{97} The qualifications do constitute a presumptive paradigm i.e. the element of sovereignty or independence from the control of other States.

At the same time, the practice amongst significant nation-states has applied Montevideo Convention criteria’s quite flexibly. The Turkish Republic of Northern Cyprus, for instance, is not accepted as a State, even though it satisfies them. Similarly, India was admitted as a member of the League of Nations and later as an original member of the United Nations in 1945, even though its independence came only in 1947. Israel was admitted to the United Nations in 1948, even though its borders were the subject of considerable dispute at the time.\textsuperscript{98} In fact, even the so-

\textsuperscript{96} John Quigley is of the opinion that Article 1 of the Montevideo Convention does not create a test for statehood. See ICC-01/18-66 03-03-2020 1/31 RH PT. He asserts that:

The drafting of the Montevideo Convention was promoted by Latin American states which sought to preclude the United States’ practice of refusing to deal with governments in those states that may have come into power in arguably non-constitutional ways. The Convention came at a time in which these states thought they could take advantage of the fact that a new administration in the United States, under President Franklin Roosevelt, would be favorable to recognition. In particular, Roosevelt adopted a “good neighbor” policy towards Latin America that departed from the United States’ previous practice of frequently intervening in the domestic affairs of Latin states. \textit{Ibid.}, para 38.

Malcolm N. Shaw believes that Montevideo definition continues to exert considerable influence, see Malcolm Shaw, “The League of Nations Mandate System and the Palestine Mandate: What did and does It say about International Law and What did and does It say about Palestine?”, \textit{Israel Law Review}, vol. 49, no. 3 (2016), pp. 287-308. However, there is another view given by Georg Schwarzenberger and Edward Duncan Brown, \textit{Manual of International Law} (Stevens, London, 1976). In their volume, the authors argued that an entity must satisfy a minimum of three conditions before it can be considered an independent State. These were:

\begin{itemize}
  \item[a.] The entity must possess a stable government which does not recognize any outside superior authority;
  \item[b.] The government must rule supreme within a territory which has more or less settled frontiers; and
  \item[c.] The government must exercise control over a certain number of people. \textit{Ibid.}, p. 43.
\end{itemize}

\textsuperscript{97} Prosecutor v. Slobodan Milosevic, IT-02-54-T.

called “failed states” are treated States, despite lack of control by any governmental administration. In *Deutsche Continental Gas-Gesellschaft* case, the German Polish mixed arbitral tribunal stated:

In order to say a State exists….it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.

The possession of effective government, which is an important criterion (since all the other requirements depend upon it) in application has also been far from straightforward. The State practice concerning requirement of government, in this regard is largely indifferent.

Here, independence is also a *decisive* criteria of statehood. In other words, the State must be independent of other State legal orders. It must therefore be in a position to both claim as well as command sovereignty. The issue of title to territory had been a concern and would continue to remain a concern for world community, especially because international law is too obsessed with the requirement of territory. This understanding is perhaps, formed on a wrong assumption. In fact, Article 1

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101 Ibid., p. 15.

102 James Crawford however, puts the correct position and concludes thus:

First, to be a State, an entity must possess a government or a system of government in general control of its territory, to the exclusion of other entities not claiming through or under it.

Secondly, international law lays down no specific requirements as to the nature and the extend of this control, accept, it seems, that it includes some degree of maintenance of law and order.

Thirdly, in applying the general principles to specific case, the following must be considered: (i) whether the statehood to the entity is opposed under title of international law; (ii) whether the government claiming authority in the putative State, if it does not effectively control it, has obtained authority by consent of the previous sovereign and exercises a certain degree of control; (iii) in the latter case at least, the requirement of statehood may be liberally construed; (iv) finally, there is a distinction between the creation of the new State on the hand and the subsistence or extinction of an established state on the order. There is normally no presumption in favor of the status of the former, and the criterion of effective government therefore tends to be applied more strictly. James Crawford, *note* 99, p. 45.


104 See 8 ICC-01/18-75, para 18.
of the Montevideo Convention speaks of defined territory, and not defined borders, meaning thereby, the requirement of territory with clear and undisputed borders would not be sufficient and proof of effective control over a size of territory would alone suffice.

A. What Does Not Constitute Existence of Nation-State?

There are two legal principles, and are considered as supplemental to the Montevideo Convention criteria, but they do not replace any one or all of them. These are: (a) Recognition, and (b) Principle of Self-determination. These additional factors may be relevant as criteria for States. They, however, are not generally regarded as constitutive elements for a State and it is agreed that what matters in essence is territorial effectiveness.

(i) Recognition

Mere recognition is not a condition of statehood, and a nation-state may be so characterized notwithstanding the presence or absence of recognition. Professor Shaw opines that “a state may be so characterized notwithstanding the presence or absence of recognition.” Professor Crawford suggests that sometimes recognition is required as the necessary criterion, however, that “an entity is not a State because it is recognized; it is recognized because it is a State.” In this regard, recognition is usually no more than evidence that the three requirements, i.e. a permanent population; a defined territory; and government, from the Montevideo convention are satisfied.

The American Law Institute, in its Restatement (Third), emphasised upon the fourth criterion, i.e. capacity to enter into relations with other States, although with certain qualifications, it runs thus:

An entity is not a State unless it has competence, within its own constitutional system, to conduct international relations with other States, as well as the political, technical, and financial capabilities to do so.


106 American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States (1987), vol. I, para 201. See also Montevideo Convention, Article 3, it reads thus: The political existence of the State is independent of recognition by the other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other States according to international law. Ibid.
In most cases the facts will be so clear that recognition will not make any difference, however in borderline cases recognition “can have an important effect”. Therefore, recognition may constitute an evidence of status, without as such establishing or determining the status. At the same time, though widespread recognition by other significant nation-states does compensate for a certain level of indeterminacy as to effective control by the relevant government, yet it is no remedy.

As a matter of international law, recognition is not constitutive of statehood for third states not involved in the act of recognition. The difficulty here would be twofold: (a) unrecognized State may not be the subject to the duties imposed by international law and may accordingly be free from such restraints; and (b) there will be no clarity as to how a State is recognized by some but not by other nation-states. Therefore, the requirement is (a) widespread and uncontroverted recognition by nation-states, and (b) some degree of effective control exercised by the government. Here, the question of recognizing a government arises when new government comes to power, through unconstitutional means, like coup d’état or civil war.


108 In fact in international law, “recognition is one of the most difficult topics and it is a confusing mixture of politics, international law and municipal law. The recognition of an entity is affected by political or legal thoughts, but which have legal consequences.” *Ibid.*, p. 82.


First, there is no doubt that recognition is political act, governed only in part by legal principle…. Second, we must ask ourselves whether it is consistent with the operation of any system of law that legal personality under it should depend on the subjective assessment of third parties… Third, assuming we accept the constitutive theory, in practical terms what degree of recognition is required in order to “constitute” a State? Must there be unanimity among the international community, or is it enough that there be a majority, substantial minority or just one recognizing State? Again, is membership of an international organization tantamount to collective recognition and, if so which organizations? Are some states or groups of States (e.g. USA, EU) more important when it comes to recognition? *Ibid.*, p. 129.

110 Malcolm N. Shaw, *International Law* (Cambridge University Press, New York, 2003). Shaw observes that: “…as far as statehood is concerned, the factual situation will be examined in terms of the accepted criteria and different considerations apply where it is the government which changes. Recognition will only really be relevant where the change in government is unconstitutional.” *Ibid.*, p. 377.
(ii) Right to self-determination

Similarly, the right of all peoples to self-determination is a norm of international law,\(^{111}\) which is also affirmed as customary international law.\(^{112}\) A vast majority of jurists have gone a step further and accept self-determination as a principle of \textit{jus cogens}.\(^{113}\) It has undergone dramatic alterations in many aspects, from application to issues such as decolonisation, to justification for the break-up of multi-ethnic states, and most recently, extended towards indicating a right of self-determination for indigenous people.\(^{114}\) The right authorises all peoples to freely determine their political status and freely pursue their economic, social and cultural development, which applies to mandate, trust and non-self-governing territories.\(^{115}\) In this sense, the right of self-determination is an important subject, but with limitations.

One crucial element of the right of self-determination is that of \textit{choice} as to political organisation and not the \textit{consequences} of such choice. Meaning thereby, the right to self-determination did not provide a mandate for any people to unilaterally exercise that right in any manner they saw fit. The right may also lead to varied consequences \textit{viz.} full independence, free association, full merger, and establishment of other state, yet it does not automatically result in secession and independence. Nevertheless, the right to self-determination may be relevant to the criteria for statehood in one of three ways, \textit{first}, a claim to statehood made in contravention to


\(^{112}\) \textit{See} Marija Batistich, \textit{“The Right to Self-Determination and International Law”}, \textit{Auckland University Law Review}, vol. 7, no. 4 (1995), pp. 1014-15. The Author argues that there should be universal application of the right so as to bring stability and integrity of the international system. The relevant text runs thus:

It also seems apparent that the right to self-determination is, or ought to be, universal. The fears of nation states and superpowers of threats to stability raised by a universal right to self-determination must be remedied by the international system itself, in order to create certainty. A procedural model may be the answer in terms of clearly stating the factors required to be present, and the issues to be addressed before any analysis may begin. By developing a process, as an effective mechanism for dealing with claims, the international system would be creating an atmosphere of stability. Although stability does not mean that things will remain as they are, it means that peoples and nation states alike will have a much clearer indication of where they are going. It is from such certainty that the international system will have greater confidence in acknowledging a universal right to self-determination. \textit{Ibid.}, pp. 1036-37.


\(^{114}\) Guyora Binder, \textit{note} 111, pp. 263-269.

\(^{115}\) \textit{See} General Assembly Resolutions: 637-A (VII) of 1952; 1541 (XV), adopted on 15 December 1960; and 2625 (XXV) of 1970.
the right is likely to be controversial, secondly, self-determination may arguably serve to mitigate the absence of effective governmental control where the colonial power is contesting the proclaimed independence of the accepted colonial self-determination unit, and thirdly, the application of the requirement of effective government may be mitigated in recognized cases of self-determination where the new state is in the throes of a civil war.\textsuperscript{116}

\textbf{B. The Outcome}

Irrespective of what appears to be the fateful outcome of the Israel-Palestine situation, all that appears reasonably prudent is the fact that the issue of Palestine statehood needs to be analysed based on the rules followed by the international community in accepting entities as State. The International Commission of Jurists in its \textit{amicus curie} observations submits that Palestine is a State under international law, since it comprises (a) people who live together as a community; (b) there is a defined territory in which the people are settled; (c) the existence of a sovereign government; and (d) demonstrable capacity to exercise State authority and to enter into relations with the other sovereign States.

The international community has grappled with the issue of Palestinian statehood.\textsuperscript{117} The determination of statehood is important for Palestine, and, it cannot be construed in a strict manner alone. The claims of minorities, ethnic communities \textit{etc.} against colonialism, foreign domination and illegal occupation—must not go unnoticed. Therefore, efforts ought to be made towards not only satisfying some degree of fulfilment of Montevideo criteria, but also an expansive reading to the additional measure of recognition and self-determination.\textsuperscript{118} In this manner, one

\textsuperscript{116} Shaw, \textit{note} 110, pp. 162-3.


\textsuperscript{118} \textit{See} B.C. Nirmal, \textit{The Right to Self Determination in International Law} (Deep and Deep Publications, New Delhi, 1999), pp. 62-64. It was argued that violation of the right of self-determination by nation-states ought to be treated as an international crime. \textit{See also} S. K. Verma, \textit{An Introduction to Public International Law} (Satyam International, New Delhi, 2014).
could overcome any deficiencies regarding the Montevideo Criteria and thereby bring a case for rightful expansion of the afore-mentioned measures. It is unfortunate that while most of the colonies and peoples under racist regimes have attained self-determination, people under alien domination (Palestine) are still struggling to realise their right of self-determination.

V. NATURE OF INTERNATIONAL LAW AND WORLD POLITICS IN THE CONTEXT OF PALESTINE ISRAEL CONFLICT

Although international law has seen remarkable movement over recent decades to a more universal, democratic and secular outlook, many of its loftiest principles, such as the sovereign equality of States, the nature of democracy, and the international rule of law, continue to remain conditioned by a legal system, which is largely asymmetric in distribution of power. Additionally, the impact of neo-colonialism, has made it difficult to predict today whether international law is free from the strictures of power politics. As a result, international law is preponderantly but not necessarily exclusively, a law of power. The powerful States have been successful in serving their national interests, which not only promotes and encourages unequal power relationships in the global order but also ensures their unswerving dominance and hegemony on the world scene.

Power politics has a protean face, and the rules of the game that were crafted by the great powers for this purpose inevitably change. For instance under the guise of dynamic nature of international law, novel measure of recognition as

120 The focus of international legal scholarship has moved away from debating whether international law matters and toward trying to explain when, and why, states commit to and comply with international legal agreements, see Adam Chilton & Dustin Tingley, “Why the Study of International Law Needs Experiments”, Columbia Journal of Transnational Law, vol. 52, no. 1 (2013), p. 177.
legitimate interlocutor and legitimate representative were justified. Yet, there remains controversy over the question of statehood of Palestine, which had on many occasions presented justified reasons to obtain statehood. It is ironical that while powerful States are delaying the recognition of Palestine’s statehood on one or the other pretext, they seem to be readily willing to recognise non state actors (wars of national liberation) as representatives of the peoples of Libya and Syria.

The fact that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip demands proper investigation. However, this would require the situation to fall under the ICC’s jurisdiction, which is what had been addressed in the decision. The Court observed:

...in accordance with the ordinary meaning given to its terms in their context and in the light of the object and purpose of the Statute, the reference to “[t]he State on the territory of which the conduct in question occurred” in Article 12(2)(a) of the Statute must be interpreted as a reference to a State Party to the Statute.

The Court further observed:

...its conclusions in this decision are limited to defining the territorial parameters of the Prosecutor’s investigation in accordance with the Statute....without prejudice to any matters of international law arising from the events in the Situation in Palestine that do not fall within the Court’s jurisdiction. In particular, by ruling on the territorial scope of its jurisdiction, the Court is neither adjudicating a border dispute under international law nor prejudging the question of any future borders.

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125 In fact, on two occasions Palestine had approached International Court of Justice. First, through a written statement to an ICJ advisory proceeding in 2004, see Construction of Wall, note 22, and thereafter on September 28, 2018, Palestine filed an application to institute proceedings against the United States for recognizing Jerusalem as Israel’s capital and moving its embassy there, see Relocation of the United States Embassy, note 28.

126 Situation in Palestine, note 1, para 109.

127 Ibid., para 130.

Hereafter, the next step is to investigate possible instances of crimes. The Prosecutor is expected to now immediately open an investigation with a view to establish the facts about crimes, and identify and prosecute those who are responsible for such atrocities.\textsuperscript{129} Here, it would be necessary to understand that the investigation would be unbiased, particularly when it even targets the Palestinian perpetrators of war crimes (in the context of hostilities between Israel and Palestinian armed groups). In this regard, the decision will serve a long-awaited path to justice for Israeli and Palestinian victims of serious international crimes.\textsuperscript{130}

Due credit must be given to the judges rendering this decision, who on the correct interpretation of the Rome Statute, came to their own understanding and decision on the scope and practical operation of the provisions of the Statute. The decision has made Palestine join Uganda, Kenya, Libya, Mali, Georgia and half a dozen other conflict zones currently under ICC investigation. Here, all 123 member states of the Court are obligated to cooperate, however, practice appears to convey otherwise. Earlier, Canada, for instance, told the Court that it doesn’t recognize Palestine and therefore won’t cooperate with her requests on the matter.\textsuperscript{131} Nevertheless, the investigation will proceed without Israel’s involvement, and if Israel blocks ICC investigators on the ground, witness testimonies could be taken in other countries or at the Hague.

**VI. CONCLUDING OBSERVATIONS**

Over the years, the State of Palestine has entered into various treaties, established diplomatic relations,\textsuperscript{132} and is engaged in strategic litigation before various international

\textsuperscript{129} The United Nations Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory. See Report of the detailed findings of the independent International Commission of Inquiry on the protests in the Occupied Palestinian Territory A/HRC/40/CRP.2, available at: <ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A_HRC_40_74_CRP2.pdf> accessed on 23 July 2021. The Report finds, “The Commission found reasonable grounds to believe that the Israeli security forces killed and maimed Palestinian demonstrators who did not pose an imminent threat of death or serious injury to others when they were shot, and where there shooting did not thwart any such threat. Less lethal alternatives remained available and substantial defences were in place, rendering the use of lethal force neither necessary nor proportionate. The Commission therefore found reasonable grounds to believe that demonstrators were shot in violation of their right to life”. \textit{Ibid.}, para 694.

\textsuperscript{130} Depositary notification C.N.57.2015.TREATIES-XVIII.10, which states that the Permanent Mission of Canada notes that “Palestine” does not meet the criteria of a State under international law and is not recognized by Canada as a State.

\textsuperscript{131} Palestine UN Mission Diplomatic Relations, \textit{note 26}.


courts to pursue all possible legal avenues that perhaps, reflect upon its willingness to rely upon international law against powerful adversaries. At the same time, ICC does not have the competence to determine statehood where the international community has clearly not so declared, yet one can foresee how the case for State of Palestine to attain statehood is slowly gaining momentum. The exercise of jurisdiction by the Court constitutes a unique contribution to the fight against impunity for past, ongoing and future crimes committed in the Palestinian territory. Any effort to undermine the decision would result in questioning the independence of the Court, besides it would also undermine its objective to “put an end to impunity for the perpetrators of crimes and thus to contribute to the prevention of such crimes”, and to “guarantee lasting respect for and the enforcement of international justice”. The decision is also relevant in the sense that it will silence many of the voices that do question ICC’s future. In its one moment of brilliance, the Court has addressed three fundamental concerns. First, the decision has demolished the accusation of the court becoming a political tool to bully leaders of poor nations alone; secondly, the decision authoritatively affirms that the most serious crimes of concern to the international community as a whole must not go unpunished; and thirdly the decision has upheld the delicate and carefully crafted system of checks and balances regulating the exercise of the Court’s jurisdiction. Further, the PTC-I decision makes a significant development in the field of international law in three respects: extension of the territorial jurisdiction of ICC to the Situation in Palestine extends to Occupied Palestinian Territory (OPT); people living under an occupation will have protection of the ICC; and the occupant power will now be under an obligation to refrain from committing war crimes.

134 Rome Statute, Preamble.
THE LEGALITY OF USE OF ARMED DRONES IN INTERNATIONAL LAW AGAINST NON-STATE ACTORS

GURPREET SINGH*

Abstract

This article examines the legality of drone strikes under international law, particularly against non-state actors. The States have been justifying the use of drone strikes based on international norms such as consent of the host State, self-defence, anticipatory/self-defence and unwilling/unable test. The consent on the part of de-jure government is valid consent under international law. There is a growing number of countries that have been claiming the “right of preemptory/anticipatory self-defence” against non-state actors either under Article 51 or under international customary law. Besides, there are two groups of scholars who either support or oppose the inclusion of “preemptive/anticipatory self-defence”. Unwilling/unable is another doctrine that has been invoked by the First World in order to justify the use of force in self-defence against the non-state actors if the host State is unwilling/unable to take action against them. However, at present, this doctrine is also vague and controversial. Lastly, this article also traces India’s position on this issue and finds a drastic shift in India’s approach, particularly at the Arria Formula meeting, where India argues in favour of the right of “preemptory self-defence” against non-state actors if the situation is “imminent” and “demands necessary, immediate, and proportionate action.” It also offers some parameters to regulate armed drones and calls for an international convention to regulate the use of armed drones.

Keywords: Drone strikes, consent, pre-emptive/anticipatory right to self-defence, non-state actors, unwilling/unable Test.

I. INTRODUCTION

In recent years, drone strikes have been carried out in Pakistan, Afghanistan, Yemen, Syria, Iraq, Libya, Palestine, and Somalia largely by the US, England, and France. The use of drone strikes against the Third World has generated considerable controversy as it violates their sovereignty. Wherever drone strikes took place, they killed more innocent civilians than the actual targets. The killing of terror suspects by drones without fair trials is illegal and unjustified under international criminal law as it goes against the basic tenet that a person is innocent until proven guilty. Further, in order to whitewash the deaths of civilians, the West terms them as “collateral damage” or “a case of mistaken identity”. Thus, the language is used as a “powerful political tool” to minimise the gravity of offences.

The States have been justifying the use of drone strikes based on international norms such as consent of the host State, self-defence, anticipatory or pre-emptive

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strike in self-defence and unwilling/unable test. This article explores these justifications.

The article proceeds as follows. Section II examines the issue of consent of a State and argues that valid consent can be a good defence. However, in a majority of cases, the valid consent of the Third World States is missing owing to the weakest form of governments, lack of mass support, and tenuous control over their territories. It is submitted that only the consent on the part of de-jure government is a valid consent under international law.

Section III analyses the use of armed drones under the right of self-defence. The analysis pinpoints that the right of self-defence under Article 51 of the UN Charter has a narrow scope and cannot be interpreted to include “right of anticipatory self-defence” and “pre-emptive right of self-defence”. However, after 9/11 incidents, the right of self-defence has undergone a sea change as there are a growing number of countries that have been advocating for the inclusion of the “right of preemptory self-defence” against the non-state actors if some requirements are met. Some scholars argue that the right of preemptory/anticipatory self-defence can be traced in customary international law. Further, sub-section III.A highlights the inherent difficulty of determination of the right of self-defence in the absence of any independent international body whereas sub-section III.B notes the underline politics of the use and abuse of armed drones.

Section IV examines the customary nature of the “right of anticipatory self-defence” and argues that the right of anticipatory self-defence, at the most, is a regional customary right and confined to some States in the West whereas, the “right of the pre-emptive strike” is neither a customary right nor a widespread practice even among the Western States except in the USA.

Section V examines the evolving doctrine of “unwilling or unable” and it reveals that at present, this doctrine is itself surrounded with doubts and vagueness. Therefore, the “pre-emptive strikes” cannot be justified on the basis of this doctrine.

In section VI, the position of India on the “right of preemptory self-defence” has been examined. A drastic change in the Indian position has been noticed at the Arria Formula meeting where the Deputy Permanent Representative of India to the UN contended that India has the “right to pre-emptive strike” in a situation of “imminent” and “demands necessary, immediate, and proportionate action”. Thus, India has become part of that group of states which claim the right of preemptory self-defence.

Section VII lays down certain parameters/guidelines for the use of armed drones in the wake of their extensive use by the West. It also argues the case for an
international convention for the regulation of armed drones. The conclusion is given in section VIII.

II. CONSENT OF THE STATE

The consent of the host State where drone strikes are to take place can be a solid ground of defence for the striking State. Consent may be given ad hoc or in advance via treaty. It may always be restricted in scope and depending on the form, of consent can be withdrawn unilaterally.\(^1\) In *Armed Activities Case*, the International Court of Justice (ICJ) has acknowledged the lawfulness of such activities, conducted with the full consent of the State in conflict.\(^2\) However, any valid defence preconceives a legitimate government in a host State. This government must truly represent the vast majority of the population of that State and enjoy their confidence and respect. The status of consenting government becomes problematic particularly when the *de-facto* government has sponsored the foreign intervention.\(^3\) It is submitted that only the consent on the part of *de-jure* government is valid consent under international law. Any intervention or drone strike on the basis of State consent is best supported by clear evidence of its genuine character. Thus, it is impermissible for a puppet government established by an external power to call for the presence of that power on the territory of the State in question.\(^4\)

Article 20 of the International Law Commission Draft Articles on State Responsibility provides, ‘Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.’\(^5\) Thus, according to Article 20, “valid consent” of a host State is *sine qua non* requirement before using armed drones by another State.\(^6\) However, this provision does not

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2. See *Democratic Republic of The Congo v Uganda*, ICJ Reports 2005, para 51. Uganda, at the hearings, pointed out that Ugandan forces entered Eastern Congo in May 1997 at the invitation of Mr. Kabila, to work in collaboration with his forces to arrest the activities of the anti-Uganda rebels. Ugandan forces remained in Eastern Congo after Mr. Kabila became President, again at his invitation.
6. *Democratic Republic of The Congo v Uganda*, note 2. The Court held that a state (Congo) can withdraw its consent at any time ‘without further formalities being necessary’. “The Court notes [that] no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soil.”.
provide the conditions for “valid consent” particularly when there are many disparities between the First World and the Third World. “Valid consent” contemplates the “free consent” without any fear, duress, and undue influence. Therefore, both parties must be on equal footing to negotiate and give “valid consent”. However, the weak and relatively dependent States in the Third World are not in an equal position to give “free consent” owing to economic inequalities and other disparities. There are also many instances of drone strikes where the First World did not take prior consent of host States and later on, justified those strikes on the basis of the right of anticipatory self-defence.7

Further, except Pakistan, many States like Somalia, Yemen, Syria and Afghanistan have the weakest form of governments that do not control their entire territories. In fact, many warlords and rebellious groups have control over the vast territories in these states. Therefore, these governments have a legitimacy crisis and cannot be considered de-jure in nature. Their consent could not be considered as valid on account of lack of mass support and tenuous control over their territories.8

It is also pertinent to note that many of these States have puppet regimes installed by the West. They do not have their independent policies and programmes, and what they have, are dictated by the West. Even in the case of Pakistan, all governments, until now, have remained hugely dependent upon the USA to get economic and military aid and to remain in power against the military coup.

In the last, it is also submitted that the consent may be misused by both States. The host State in connivance with the striking State can give consent to eliminate political opponents who are vocal critics of government policies and actions under the pretext of the killing of terrorists, whereas there is always a danger of exceeding the “limited consent” by the striking State. International law, particularly under the doctrine of responsibility to protect imposes a duty upon a State to protect its population from ethnic cleansing, genocide, and serious violation of

7 See, “US Drone Strike Killings in Pakistan and Yemen Unlawful”, BBC News, 22 October 2013. Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan, available at: <http://livingunderdrones.org> accessed on 20 May 2020. The Bureau of Investigative Journalism (TBIJ) reported that from June 2004 through mid-September 2012, available data indicate that drone strikes killed 2,562 - 3,325 people in Pakistan, of whom 474 - 881 were civilians, including 176 children. The TBIJ also reported that these strikes also injured an additional 1,228 - 1,362 individuals. The UN investigation also found that the US drone strikes had killed at least 400 civilians in Pakistan, far more than the US has ever acknowledged. The UN special rapporteur Ben Emmerson accused the US of challenging international legal norms by advocating the use of lethal force outside war zones.

human rights. Therefore, the killing of innocent civilians through armed drones vitiate valid consent, if any, and is contrary to international legal norms.

III. SELF-DEFENCE JUSTIFICATION

The right of self-defence is an “inherent” right of every state acknowledged by the UN Charter in Article 51. It could be a lawful basis for drone strikes if such strikes fulfil the requirements of Article 51. Article 51 of the UN Charter provides, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

The right under Article 51 is not absolute. Under this Article, there must be an armed attack first. Unless the use of force crosses the threshold of an armed attack another State does not have the right to self-defence. Thus, the States are expected to renounce forcible self-defence until an armed attack occurs. Only if and when the prohibition of the use of force rises to an armed attack, the State concerned can resort to forcible measures for its defence. But even this authority is limited in two ways: first, the State acting in self-defence must observe the principle of proportionality; second, it has to report immediately to the SC the measures taken, and it has to discontinue them as soon as the latter itself has taken the measures necessary for the maintenance of international peace.

The notion of armed attack under Article 51 is very important as its interpretation and definition determine its nature and scope. It is important to note that there is no universally acceptable definition of armed attack. Mere frontier incidents, such as the incursion of an armed border patrol into another State’s territory, may well be

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10 Article 51 of the UN Charter. Article 51 of the UN Charter allows not only individual but also collective self-defence. This provides the weaker states to take the protection of the superior states, otherwise weaker states would feel unprotected and at the mercy of military superior states. It is, therefore almost accepted that the right to collective self-defence authorises a non-attacked state to lend its assistance to the attacked state.

11 Article 2.4: All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

characterised as a use of force contrary to Article 2(4), but hardly as an armed attack.\textsuperscript{13} As per Nicaragua judgment, the participation of a State in the use of force by unofficial armed bands, groups, and irregulars, mercenaries also fall within the ambit of armed attack.\textsuperscript{14} However, it is doubtful whether a State which provides aid and support to rebel groups without actually sending them against another State has committed an “armed attack”.\textsuperscript{15}

The “use of force” in response to international terrorism is controversial as this issue has been constantly raised after the 9/11 attacks since 2001. Whether the activities of non-state actors constitute an “armed attack” within the meaning of Article 51 of the UN Charter is debatable as the UN Charter is itself silent regarding this. In the Wall advisory opinion, the ICJ simply remarked, ‘Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of [an] armed attack by one State against another State, thereby apparently excluding non-state actors.’\textsuperscript{16} The majority of judges in the DRC v Uganda Case declined to address this issue.\textsuperscript{17} However, it appears that in Nicaragua judgment, the Court allowed the State to use force against non-state actors if they are under the effective control of a foreign State. As per Brownlie, there are three potential arguments where the “use of force” may be within Article 51.

1. Notwithstanding the Wall opinion, Article 51 of the Charter does permit the exercise of self-defence against non-state actors.

2. The criterion in the Nicaragua case for the attribution of the actions of irregular forces to a State should be loosened.

3. Where non-state actors are taking refuge in a state unable to exert the control necessary to prevent attacks, Article 51 ought to permit action in self-defence.\textsuperscript{18}


\textsuperscript{14} Ibid.

\textsuperscript{15} Crawford, note 1, p. 748.

\textsuperscript{16} Ibid., p. 771.

\textsuperscript{17} Democratic Republic of The Congo v. Uganda, note 2, in separate opinions, Judge Koojiman repeated his position that Article 51 of the UN Charter did not require any specific source of the attack, and also asserted that “it would be unreasonable to deny the attacked state the right to self-defense merely because there is no attacker state, and the UN Charter does not so require”. Judge Kateka interpreted the original intention of Article 51 to ensure the ability to defend oneself when others break the prohibition against the use of force. This interpretation upholds that the right to self-defense should be applicable regardless of the attacker.

\textsuperscript{18} Crawford, note 1.
The state practice till 2001 was also in consonance with the *Wall Advisory* opinion. The unilateral action in response to the activities of non-state actors free of the effective control of a State was frowned upon, primarily due to the infringement of sovereignty it represented, but also because acts of “self-defence” actually carried out during this period appeared rather to be punitive reprisals.  

The considerable change in state practice after 2001 has been noticed and the “use of force” in self-defence against independent non-state actors has arguably become a more accepting norm. Brownlie contends, ‘The primary evidence of this shift was the attitude of the international community towards Operation Enduring Freedom, the invasion of Afghanistan in October 2001, following SC Resolution 1386 identifying terrorism as a threat to the peace under Article 39 of the Charter.’  

The Security Council in Resolution 1373 of 2001 directed States to “take the necessary steps to prevent the commission of terrorist acts”, language which arguably authorized the use of force.  

However, Brownlie also notes, ‘the international reaction to other extra-territorial uses of force directed against non-state actors has been more equivocal: it is too much to argue that these instances reflect what would be a major shift in customary international law.’ To date, the actual practice of States has been notably lacking in clarity. The second, more nuanced argument for using force against independent non-state actors in the context of Article 51 involves acceptance of the dictum of the majority in the *Wall case* that self-defence can only be exercised in response to an armed attack by a State, but at the same time arguing for the relaxation of the test of “effective control” imposed in *Nicaragua* that permits the acts of non-state actors to be attributed to States. This position was foreshadowed in the dissent of Judge Jennings in the *Nicaragua case*. On this view, an armed attack occurs in

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19 *Ibid.*, p. 748. The Israeli bombing of Beirut airport in response to the earlier bombing of an Israeli plane in Athens was condemned by the Security Council. A subsequent Israeli attack on Tunis targeting the headquarters of the Palestine Liberation Organization was similarly censured. The 1986 US bombing of Tripoli in response to the terrorist bombing of a nightclub in Berlin was condemned as disproportionate, though an attempt to express this opprobrium via SC Resolution was promptly vetoed. The Council was similarly divided with respect to the US bombing of the headquarters of the Iraqi secret police in 1993 in response to the attempted assassination of former President Bush Sr, and its 1998 cruise missile attacks on terrorist training camps in Afghanistan and a pharmaceutical plant were the subject of condemnation by the Arab states, the Non-Aligned Movement, Pakistan, and Russia.  

20 *Ibid.* Acceptance of Enduring Freedom was conditioned heavily on the manner in which the US linked the Taliban ‘government’ of Afghanistan to al-Qaeda.  


22 Crawford, *note 1*.  

situations where a State makes its territory available to non-state actors carrying out the actual attack with a view of facilitating the attack or providing logistical support or safe haven. An obvious parallel in this respect is the concept of aiding or abetting, which has the advantage of being able to take into account a broader range of activities than those contemplated in Nicaragua, as well as the intention of the State in question. The criminal law analogy is not a perfect one, however for example, States that merely sympathize or give “moral support” to terrorists could not be held responsible for their actions.

The final argument for the unilateral use of force against independent non-state actors arises in the context of so-called “failed states”, where the central governments are simply unable to control non-state actors operating within their territory. This has led some to argue for a right of self-defence in such circumstances even where the acts in question cannot be attributed to the State. In Armed Activities, Judge Kooijmans referred to a phenomenon which in present-day international relations has unfortunately become as familiar as terrorism, viz., the almost complete absence of government authority in the whole or part of the territory of a State. If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require. In accordance with this line of reasoning, there is an exception to the notion that only inter-state violence can constitute an armed attack. Brownlie however, argues that the integrity of the international system requires that such matters be left to the Security Council. Certainly, it has demonstrated that it is capable of handling such situations, for example when responding to Somali pirates raiding commercial shipping in the Gulf of Aden from 2008.

Thus, in this context, the self-defence through drone strikes may be legal when the attacked State is either itself host or connive or promote the internationally unlawful acts which amount to an armed attack.

Some authors interpret Article 51 as merely confirming the pre-existence right of self-defence and consider the anticipatory measures of self-defence to be admissible under the conditions set up by the US Secretary of State, Daniel Webster.

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24 Ibid. Thus, States giving humanitarian aid to private groups would be in a different position, provided they were unaware that their support was being used to commit atrocities abroad.
25 Ibid.
26 Ibid.
28 Ibid.
in the Caroline incident.\textsuperscript{29} According to Webster, the principle of non-intervention is of a salutary nature. It was for a State [Great Britain] to justify its actions by demonstrating a: “necessity of self-defence, which must be instant, overwhelming, leaving no choice of means, and no moment for deliberation”.\textsuperscript{30} Not only such conditions necessary before self-defence became legitimate, but the action taken in pursuance of it must not be unreasonable or excessive, “since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it”.\textsuperscript{31}

The current debate on the right of anticipatory self-defence has revived after 9/11 terror attacks in the USA. ‘The Bush administration denounced the “reactive posture” of the past, refusing to wait for enemies such as “rogue states and terrorists” to strike first and announcing its readiness to act to prevent threats from potential adversaries, even in the face of uncertainty as to the time and place of an attack. This goes further than pre-emptive self-defence into the realm of preventive self-defence; it lacks any legal basis and is not generally accepted.’\textsuperscript{32} The development of the law, particularly in the light of more recent state practice, since the Caroline incident, suggests that action, even if it involves the use of armed force and violation of another State’s territory, can be justified as self-defence under international law where:

1. the necessity of self-defence, which must be instant, overwhelming, leaving no choice of means, and no moment for deliberation;\textsuperscript{33}

2. an armed attack is launched, or is immediately threatened, against a state’s territory or forces;

3. there is an urgent necessity for defensive action against the attack;

4. there is no practicable alternative to action in self-defence, and in particular, another authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;

5. the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, i.e., to the needs of defence; and

\textsuperscript{29} Simma & Mosler, \textit{note 12}, p. 675.

\textsuperscript{30} \textit{Ibid}.


\textsuperscript{32} Crawford, \textit{note 1}, p. 752.

\textsuperscript{33} Simma & Mosler, \textit{note 12}, p. 675.
6. in the case of collective self-defence, the victim of an armed attack has requested assistance.\textsuperscript{34}

A. Support and Opposition for Inclusion of Anticipatory Right of Self-Defence

There are many scholars who oppose the inclusion of the anticipatory right of self-defence under Article 51. An anticipatory right of self-defence will be contrary to the wordings of Article 51 (if an armed attack occurs) as well as to its object and purpose, which is to cut to a minimum the unilateral use of force in international relations.\textsuperscript{35} The right of anticipatory self-defence can also be opposed on one more ground that it can easily be abused by the powerful States as there is no international independent body to decide upon its legitimacy.\textsuperscript{36}

Article 51 must be interpreted narrowly as containing a prohibition of anticipatory self-defence. This interpretation corresponds to the predominant state practice, as a general right to anticipatory self-defence has never been invoked under the UN Charter.\textsuperscript{37} From an international relations and policy perspective, adopting such a conservative approach is quintessential for maintaining international peace and security.\textsuperscript{38}

However, scholars like Thomas Frank and D.W. Greig support the right of anticipatory self-defence. Frank argues that the collective action by the UN Security Council has proved to be an illusion because of mutual conflicts among the five permanent members.\textsuperscript{39} Besides, there is no mechanism in international law to determine conclusively which State is an aggressor and which is aggrieved. The modern practice of warfare has changed and indirect means of war such as guerrilla movement, war of aggression, infiltration, subversion carried on by proxy through national liberation movements and other deceptive methods are adopted by the States.\textsuperscript{40} Article 51 does not, however, on its face, recognize the existence of these newer modes of aggression, or attempt to deal with the new problems of characterization which they create for international law. Lastly, in the age of nuclear


\textsuperscript{35} Simma & Mosler, \textit{note 12}, p. 676.

\textsuperscript{36} \textit{Ibid.}

\textsuperscript{37} \textit{Ibid.}


\textsuperscript{39} Thomas Frank, “Who Killed Article 2(4) or Changing Norms of Governing the Use of Force by States”, \textit{American Journal of International Law}, vol. 64, no. 5 (1970), p. 809-837.

\textsuperscript{40} \textit{Ibid.}
weapons, it would be doomed if a State requires to await an actual strike first against its territory before taking forceful measures under Article 51.\textsuperscript{41}

D.W. Greig also observes that it is hardly likely that those who drafted Article 51 would have been prepared to disregard the lessons of recent history and to insist that a State should wait for the aggressor’s blow to fall before taking positive measures for its own protection. There is no need to read Article 51 in such a way, and it would be totally unrealistic to do so.\textsuperscript{42} However, before acting in circumstances other than those of armed attack, the prior obligations such as the settling of disputes by peaceful means should be exhausted. But if there appears no likelihood of the various procedures providing adequate or a \textit{fortiori} if they have been tried and found wanting, States retain a residual power to act in self-defence even in circumstances where no armed attack has occurred.\textsuperscript{43}

Australia also ‘regards anticipatory self-defence as a right of States under customary international law’ and ‘refers to the resort to force in response to an imminent (rather than an actual) armed attack’.\textsuperscript{44} Interestingly, Australia makes the distinction between anticipatory self-defence and pre-emptive self-defence and holds that Australia ‘does not adhere to any doctrine of so-called “preemptive” self-defence. Preemptive use of force is an entirely different thing from the use of force in anticipation of an imminent threat.’\textsuperscript{45} Thus, according to Australia’s view, ‘[the] States are not permitted to use force to respond to threats which have not yet crystallised but which might materialise in the future.’\textsuperscript{46} Thus, the armed drones may be used in anticipatory self-defence and not in a case of pre-emptive self-defence.

\textbf{B. Right to Self-Defence and Politics of Drone Strikes}

The above discussion on the right of self-defence shows that drone strikes can only be justified if they meet the criteria under Article 51 of the UN Charter and \textit{Caroline case}. However, the drone strikes carried out by the West in the majority of cases do not meet any criterion.

The arguments that the right to self-defence has accrued to the USA after the 9/11 attacks and still it continues are also not tenable in the light of the interpretation of Article 51 of the Charter because the Charter does not grant the right to self-
It seems that 9/11 proved more beneficial for the West than a tragedy because the West, particularly the USA, has attained enormous power after 9/11. It has become a base for the expansion of the hegemonic role of the West over the East. The West interventions in the Middle East and Afghanistan, right of anticipatory self-defence, pre-emptive strikes and enormous use of drone strikes were outcomes of 9/11 attacks which have been used for justification and legitimisation purposes. After all, only those States which have the capacity to avail the right to self-defence can enjoy it; for others, it is still a myth.

The United States has often been invoking the right of pre-emptive self-defence in order to defend its actions. This doctrine was adopted by former US President, George W. Bush as a part of foreign policy to strike down the terrorist camps operating in many Third World countries. The United States often brands these States as “failed states”, “rogue states”, or “terrorist states” which is a threat to the peace and security of the US. Branding these States as such legitimises the USA’s illegal actions and helps in the unilateral expansion of the right of self-defence in the form of pre-emptive drone strikes. Thus, according to Shah, “forced acquiescence to an expansive right to self-defence relative to global terrorism had dangerously allowed some powerful states an excuse to unilaterally and pre-emptively attack relatively weaker states illegally.”

IV. Customary International Law and Armed Drones

Under this section, an attempt has been made to consider whether drone strikes are permissible under international customary law in the absence of codified international law. However, the opinio juris regarding the right of anticipatory self-defence is divided between the North and South. The USA, England, Australia and France regard the right of anticipatory self-defence as a part of customary international law, whereas many countries, Pakistan, Yemen, Afghanistan and Syria oppose it. Their opposition is well-grounded. The right of anticipatory self-defence is a the

47 Rosa Brooks, “Drones and the International Rule of Law”, Journal of Ethics and International Affairs, vol. 28, no. 1(2014), pp.83-103. Security Council Resolution 1337 acknowledges that any act of international terrorism gives rise to a right to self-defense and calls upon UN member states to “work together to prevent and suppress terrorist acts” and “take the necessary steps to prevent the commission of terrorist acts.” The United States appears to regard such generic statements as sufficient international legal basis for discrete, ongoing uses of force against suspected terrorists around the globe. From a broader rule-of-law perspective, however, this interpretation presents several difficulties. For one thing, it seems to be an open-ended invitation for States to engage in the unilateral use of force against suspected terrorists. But if it is open-ended, it renders meaningless the UN Charter’s proviso that the right to use force in self-defense lasts “until the Security Council has taken [the] measures necessary to maintain international peace and security.”

48 Shah, note 38.
brainchild of the West and has always been availed against the Third World. None of the Third World States could dare avail this right against the West. Even, in most cases of drone strikes, the States never justify their use on the basis of customary international law. On another hand, the Third World opposition to such drone strikes is obvious as they passed the resolutions opposing such drone strikes. In such kind of scenario, there is the least possibility that the universal right of anticipatory self-defence may emerge as customary international law. At the most, the right of anticipatory self-defence could be regarded as a regional customary right rooted in the Caroline incident and is confined to some States of the First World.

Another important question is whether a State can claim the right of anticipatory self-defence against the non-state actors. In Nicaragua judgment, the ICJ held that a State can invoke the right of anticipatory self-defence under Article 51 of the UN Charter against the non-state actors if another State sponsors them. But the legality of drone strikes as anticipatory self-defence against non-state actors not sponsored by a State directly or indirectly is a controversial proposition of international law. While interpreting Article 51 of the UN Charter, the ICJ in Congo v. Uganda case did not rule about the availability of the right of self-defence against non-state actors. ‘The Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.' Here, the ICJ missed an opportunity to settle this question once for all.

The armed drones, in the majority of cases, are used as pre-emptive strikes. The USA draws the legality of such strikes under Article 51 of the UN Charter and the customary right of pre-emptive self-defence.

Pre-emptive strikes can be opposed on many grounds. It is against the principle of non-intervention under Article 2(4) of the UN Charter. Article 2(4) prohibits “the threat or use of force against the territorial integrity or political independence of

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49 “NA Unanimously Passes Resolution against US Drone Strikes”, Dawn, 10 December 2013. “The House strongly condemns the drone attacks by the allied forces on the territory of Pakistan, which constitute violation of the principles of the Charter of the United Nations, international laws and humanitarian norms. Such drone attacks must be stopped forthwith.”


51 Ibid., para 149.

52 Pre-emptive strikes were part of the former US President, George Bush’s doctrine which was the outcome of the September 11, 2001, terrorist attacks on the United States. The Use of Force and Pre-Emption: A Legitimate Practice Under the UN Charter?, available at: <http://classic.austlii.edu.au/au/> accessed on 21 August 2020.

53 See Article 2(4) of the UN Charter.
any state.”53 This principle has been reaffirmed in a number of the General Assembly resolutions and the ICJ decisions.54

However, in academia, there are two opposite views on Article 2(4). On one hand, Dr Thomas Frank and W. Michael Reisman argue incompatibility of Article 2(4) and Frank declared the death of Article 2(4) way back, in 1970, on another hand, Prof. Louis Henkin and Oscar Schacter rejected their arguments and contend that both Articles 2(4) and 51 were drafted after careful deliberation and are still relevant.55 Frank, while declaring the death of Article 2(4) argues that the “[UN] Charter itself provided enough exceptions and ambiguities to open the rules to deadly erosion.”56 Holding the great Powers (Permanent Five Members of the UN Security Council) largely responsible for the death of Article 2(4), he argues that inaction by the part of the Security Council due to mutual rivalry among them, indirect means of war such as proxy war and guerrilla methods, the possibility of recognition of different regimes by two great Powers, and non-applicability of Article 2(4) in mini-wars or quasi-wars are some factors which have caused the death of Article 2(4).57 Following the same line, Reisman also argues to construct Article 2(4) in the context of other provisions of the Charter and keeping in mind the “real politic” prevalent in the present scenario.58 He justifies the use of force against the oppressive government as it is a very common feature of all social life and an indispensable component of the law. Thus, the coercion can be applied in support of the community and to restore the minimum order.59

Henkin rejects the above arguments and contends that the death certificate given by Frank is “premature”.60 While acknowledging the grave conditions of Article 2(4), he argues that Frank’s arguments brought out the ills of the international body politics and the vitality of the law cannot be judged by looking only at its failures.61 No governments have ever acknowledged the death of Article 2(4). ‘Article

54 See, General Assembly Resolution No 377 (V) titled as Uniting for Peace Resolution (1950). Also see the ICJ judgments on Nicaragua and Congo cited above.
56 Frank, note 39.
57 Ibid.
58 Reisman, note 55.
59 Ibid.
60 Henkin, note 55.
61 Ibid.
2(4) was written by practical men who knew all about national interest. They believed the norms they legislated to be in their nations’ interest, and nothing that has happened in the past twenty-five years suggests that it is not. Schacter also argues that Reisman’ interpretation of Article 2(4) is a “mistaken interpretation” as a matter of law and policy. If his interpretation is followed, it would weaken a key principle of “minimum world public order” essential for peace and security. Finally, he argues that the rule against the use of “unilateral force” has attained the status of “jus cogens”.

Moreover, the illegal use of armed drones as pre-emptive strikes in disregard to existing international legal norms is itself a big impediment in the development of any customary law. Lastly, in the absence of opinio juris and the lack of constant and uniform states practice, there is no possibility of developing such kind of customary international law in the near future too.

V. UNWILLING OR UNABLE TEST

Unwilling or/and unable is another doctrine that has been invoked by the First World in order to justify the use of force in self-defence against the non-state actors if the host State is unwilling or/and unable to take action against them. The unwilling/unable doctrine can be described as “the right of a victim State to engage in extraterritorial self-defence where the host is either unwilling or unable to take measures to mitigate the threat posed by domestic non-state actors, thereby circumventing the need to obtain consent from the host State.” Whether the requirements of both elements, “unwilling” and “unable” are required to be fulfilled

62 Ibid.
63 Schacter, note 55.
64 Ibid.
65 Madeline Holmqvist Skantz, The Unwilling or Unable Doctrine - The Right to Use Extraterritorial Self-Defense Against Non-State Actors (Thesis submitted to Stockholm University, Spring 2017). During the 1990’s until the 9/11 attacks, the Unwilling or Unable Doctrine was invoked an unprecedented number of times. In 1993, Israel again invoked self-defense in general terms against Hezbollah, Popular Front of the Liberation of Palestine, and others on Lebanese territory. Subsequently, in 1996, the Israeli ambassador to the UN addressed the UNSC stating that the Lebanese Government did not have the ability or the will to control Hezbollah activities, thus allowing Israel the right to defend its national security by all necessary means. Also See Letter dated 26 July 1993 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council, UN Doc. S/26152, 26 July 1993 and UN Security Council, 3653rd meeting, UN Doc. S/PV.3653, 15 April 1996.
before using the force is a divisive question of international law. It may be a situation when a State may be “willing” to take action but “unable” to do so because of its limitations (like lack of resources or skills) whereas if a State is always “unwilling” to take an action per se is ipso facto “unable” to take action as “willingness” is a necessary condition for making the State “able” to take action. Thus, “willingness” on the part of the host State is a prior element to make a State “able” to take action. Further, it is also important to note that the host State non-cooperation and non-consent can be considered as “unwillingness”.

Skantz concludes in his thesis that the doctrine of unwilling or/and unable is a vague concept and needs a more precise definition. He asserts, ‘however, at this moment state practice and opinio juris is not sufficiently general and consistent in order to create a legal ground by customary international law for the Doctrine, and are hereby not a valid legal ground for extraterritorial self-defence against non-state actors.’ Another scholar also approves this conclusion by saying, ‘I argue that even if one would accept this doctrine as a benchmark to determine acceptable use of force against an NSA (Non-State Actors) in a third State, it sets an ambiguous and arbitrary standard that undermines the legal framework regulating the use of force building on collective security.’ He concludes that the invocation of this doctrine “may undermine the prohibition on the use of force, risking the collective security.” Thus, this doctrine has created a tension between two important fundamental principles of international law, state sovereignty and the right to self-defence. First, the host State’s territorial integrity “precludes any non-consensual penetration of another sovereign’s territory”. Second, the victim State has an inherent right to self-defence to protect itself.

69 States which explicitly endorse this doctrine are: United States, United Kingdom, Germany, Netherland, Czech Republic, Canada, Australia, Russia, Turkey and Israel. States which oppose this doctrine are: Syria, Venezuela, Ecuador, Cuba, Brazil, and Mexico. See Elena Chachko and Ashley Deeks, “Which States Support the ‘Unwilling and Unable’ Test?”, Lawfare, (10 October 2016), available at: <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> accessed on 23 July 2020.
70 Skantz, note 65, p. 71.
72 Ibid.
74 See, Article 51 of UN Charter.
The UN Charter does not provide guidelines regarding this doctrine of unwilling/unable. Under Article 51, no mention of this doctrine has been found. Many scholars believe that there should be criteria that must be followed in order to invoke this doctrine. However, finding an exact legal criterion to satisfy the requirement of unwilling or unable may be elusive, and a victim State will most likely find it hard to point at an explicit statement from the host State saying it is not willing to remove the threat. Another controversy associated with this doctrine is that it favours the victim State without the sufficient interest of the host State.

Since the “doctrine of unwilling or/and unable” is itself surrounded with doubts and vagueness, the preemptive strikes cannot be justified on the basis of this doctrine. Another problem with this doctrine is, who will decide whether the given state is unwilling/unable to avert attack? In absence of an international body to determine such kind of situation poses a problem and the USA is the sole arbiter of its own actions with zero transparency. ‘It determines which laws to apply and it comes up with its own interpretation of core concepts. Or, to put it in more familiar terms, the United States is judge, jury, and executioner all rolled into one.’ The USA interprets that the State does not give consent to drone strikes inside its territory, then that State is unwilling/unable to suppress the threat posed by the individual being targeted.

The legality of the doctrine of unwilling/unable has been always contested. There are two opposite positions among the scholars. Those who support this doctrine argue that this doctrine is legally valid when the host State gives its consent, or if the armed attack is attributed to the host State. This doctrine is part of Article 51 of the UN Charter. For instance, Deeks argues that the state practice suggests that if State A is a victim of an armed attack committed by a non-state actor in State B and State B is unwilling or unable to prevent the threat, then State A can use the force lawfully. He asserts that this doctrine is often invoked by the States and is believed to be bound by this doctrine. Thus, it is an indicator of opinio juris and is part of the customary international law of self-defence. The opponents while

75 Williams, note 66 and Deeks, note 67.
76 Skantz, note 65, p. 148.
77 Ibid.
78 Brooks, note 47.
79 Ibid.
81 Deeks, note 67.
opposing these arguments, states that this doctrine is not part of the UN Charter or any treaty. Nor such doctrine is found in the ICJ interpretation in any case.\textsuperscript{82} Interpreting the doctrine of unwilling/unable into Article 51 is an unnecessary extension.\textsuperscript{83} In opposition to Deeks’ point of view, Williams argues that the mandatory element of \textit{opinio juris} appears to be largely absent, despite growing state practice in favour of this doctrine. He further argues that there are no such cases in which States have cited using the Doctrine out of legal obligation.\textsuperscript{84}

Since the doctrine is being controversial, some guidelines have been suggested by scholars like Deeks, Williams and Dinstein.\textsuperscript{85} The following guidelines are necessary to make this doctrine neutral and impartial.

1. The Doctrine must be based upon valid self-defence under Article 51,

2. The extraterritorial use of force must be the response to an armed attack (which is imminent or just occurred). The armed attack in question must have been launched from, or assisted by bases, from the territory of the host State which territorial integrity will be violated,

3. The use of force must be in accordance with Article 51 and customary international law. Hereby, it must be necessary, proportionate and immediate. The target must be the non-state actor in order to stop an armed attack. The UNSC must be notified in accordance with Article 51. This would lead to some sort of oversight of the conduct by the victim State, and

4. The use of force must be the last resort where consent and less remedies already have been taken. In addition, the victim State must assure that the host State is unwilling or unable to remove the threat itself. The victim State must have used all diplomatic solutions possible.

5. In addition, Deeks adds a requirement that the host State must address the threat within a reasonable time.\textsuperscript{86}

\textbf{VI. India Position on Right to Pre-emptory Self-defence}

India has been facing the threat from non-state actors operating from the Pakistan territory since 1989. On 26 February 2019, India carried out the airstrikes at Balakot, PoK (Pakistan Occupied Kashmir) in preemptory self-defence in repose to a terrorist

\begin{itemize}
\item \textsuperscript{82} Skantz, \textit{note 65}, pp. 34-35.
\item \textsuperscript{83} There are some treaties like the treaty of the African Union under Article 1(c) and Rome Statue of ICC under Article 17(1) give hints regarding this doctrine.
\item \textsuperscript{84} Williams, \textit{note 66}, pp. 634 and 639.
\item \textsuperscript{85} Skantz, \textit{note 65}, pp. 34-35.
\item \textsuperscript{86} \textit{Ibid.}
\end{itemize}
attack on a convoy of vehicles in Pulwama resulting in the deaths of 46 Central Reserve Police Force. While briefing the press, the Foreign Secretary, Vijay Gokhale said, ‘The Government of India is firmly and resolutely committed to taking all necessary measures to fight the menace of terrorism. Hence, this non-military preemptive action was specifically targeted at the (Jaish-e-Mohammad) JeM camp.’

The justifications for Balakot airstrikes are: First, the information regarding the location of training camps in Pakistan and PoK has been provided to Pakistan from time to time. Pakistan, however, denies their existence. Pakistan was unwilling/unable to check non-state actors. Secondly, there was credible intelligence regarding suicide terror attacks in various parts of India. ‘In the face of “imminent danger”, a “preemptive strike” became absolutely necessary. The Government of India is firmly and resolutely committed to taking all necessary measures to fight the menace of terrorism. Hence, this non-military preemptive action was specifically targeted at the JeM camp. The selection of the target was also conditioned by the desire to avoid civilian casualties.’

Although, India did not invoke Article 51 in its statement yet the use of phrases such as “imminent danger” and “preemptive strike” fairly refer to the right of self-defence. Further, the ‘reference to “non-military” must have been intended to convey that the attack only targeted the non-state actor on the territory of Pakistan and was not in violation of Pakistan’s territorial sovereignty or political independence.’ However, as per the International Law Association (ILA), the use of “non-military preemptive action” does not exclude it from the definition of force whether used against non-state actors or the State itself. In both cases, the use of force must be justified by the “self-defence or Security Council authorization”. The use of such force is not a violation of Article 2(4) “as it would be a lawful exercise of an exception to the prohibition”. Lastly, non-invocation of the right of self-defence


89 Note 87.

90 Ibid.

91 Srinivas, note 87.

under Article 51 and unable/unwilling test on the part of India makes India’s position ambiguous.93

However, a significant departure from this position can be noticed from the statement of India’s Deputy Permanent Representative to the UN, K. Nagaraj Naidu at the Arria Formula meeting.94 ‘Naidu told the meeting that exercising self-defence is a primary right of States to be exercised when the situation is “imminent” and “demands necessary, immediate, and proportionate action” and that customary international law has long recognised the principles governing the use of force in self-defence.’ He noted that Article 51 of the UN Charter is not confined to “self-defence” in response to attacks by States only.” The right of self-defence applies also to attacks by non-state actors. In fact, the source of the attack, whether a State or a non-state actor, is irrelevant to the existence of the right of self-defence.95

“Pre-emptive actions taken to fight the menace of terrorism, even without the consent of the State hosting the non-state actors, meets this criterion because such actions are not of reprisal since their prime motive is for protecting the affected states’ national integrity and sovereignty.” Naidu told the meeting that non-state actors such as terrorist groups often attack States from remote locations within other host States, using the sovereignty of that host State as a “smokescreen”.96

Srinivas Burra viewed the above statement as “India’s decisive turn on the right of self-defence”.98 According to him, there are three important takeaways from the statement of India’s Deputy Permanent Representative. ‘Firstly, through this statement, India for the first time, expressly contextualises its position on the question of the right of self-defence against the acts of non-state actors in international law. Secondly, the statement articulates the position that is arguably

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93 Ibid. The possible reasons seem to be India’s long-term association with Non-Alignment Movement (NAM) and being an ardent votary of the UN Charter.
94 “Exercising Self-defence is a Nation’s Primary Right: India at U.N.”, The Hindu (25 February 2021).
95 Ibid.
96 Ibid.
97 Ibid. Noting that Article 2(4) of the UN Charter requires that States refrain from the use of force, Naidu said the drafting history of Article 51 of the UN Charter and the relevant San Francisco Conference Report of June 1945 that considered Article 2(4) of the UN Charter mentions that “the use of arms in legitimate self-defence remains admitted and unimpaired.” He added that Article 51 also explicitly acknowledges the pre-existing customary right of self-defence, as recognised by the ICJ and the UN Security Council by stating that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence.”
expansive than other States’ positions on the issue. Thirdly, the statement makes a clear departure from its hitherto followed practice and implied views on the right of self-defence against the acts of non-state actors. Thus, the current position of India is that the “right of self-defence” and the “right of preemptory self-defence” are part of customary international law. It is not only confined to the State. It is also available against non-state actors if it meets some criteria. Finally, Burra also points out that India’s statement is expansive in its scope as it is not confined to unwilling/unable test like other States. If there are repeated attacks or the state sponsors the non-state actors, even then the right of pre-emptive self-defence can be availed against non-state actors.

VII. NEED FOR INTERNATIONAL PARAMETERS FOR USE OF ARMED DRONES

Existing nascent norms under the enactments of the States only governs the use of non-armed drones within their borders. Drones are not specifically mentioned in weapon treaties or other legal instruments of international humanitarian law. However, the use of any weapon system, including armed drones, in armed conflict situations is clearly subject to the rules of international humanitarian law as discussed above.

Since armed drones have become an integral part of modern warfare, therefore, there is a need for the development of international parameters which will regulate the use of armed drones. The holistic use of armed drones can be beneficial for humanity if they are used strictly under some international parameters and to eliminate the terrorists/non-state actors. For this purpose, an international convention may be called under the auspices of the United Nations. There are some examples of international parameters/guidelines for the use of armed drones:

1. Armed drones must be used as a last resort when all necessary means are exhausted and proven ineffective.

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99 Ibid.
100 The use of word “inherent” in Article 51 of the UN Charter also indicates the pre-existence of the right of self-defence even before making of the UN Charter.
101 Ibid. Criteria as put in by Burra contains: i. The non-state actor has repeatedly undertaken armed attacks against the State. ii. The host State is unwilling to address the threat posed by the non-state actor. iii. The host State is actively supporting and sponsoring the attack by the non-state actor.
102 Ibid.
2. Before using armed drones, the striking State\textsuperscript{104} must make a reasonable request to the stroked State for taking some actions against the non-state actors.

3. A reasonable time and opportunity must be given to the stroked State to take necessary action.

4. The above two conditions are not necessary only in a case where the stroked State is either itself an accomplice, or if it helps and promotes internationally wrongful acts. However, even in such a scenario, a due warning must be given by the striking State before launching a strike.

5. Armed drones should only be used if the threat is imminent, instant, overwhelming, leaving no choice of means, and no moment for deliberation along with the possibility of irreparable loss.

6. Drone strikes must be limited to what is necessary to eliminate or prevent terrorist activities and internationally wrongful acts. The use of force must be proportional and just. If such strikes result in civilian casualties, then the striking State must be held responsible for this and adequate reparation/compensation must be given to the victims of drone strikes.

7. Drone strikes must not be carried out if there is enough time to approach the UN Security Council. Only in a case of imminent emergency, drone strikes can be carried out by prior informing the members of the Security Council if possible. However, the striking State must also explain to the international community regarding the emergency situations subsequent to such strikes.

8. If such explanation is not convincing and reasonable or if a dispute arises between the striking State and the stroked States, then, there must be a legal mechanism\textsuperscript{105} to solve such dispute and to hold a State responsible for the abuse of international norms governing the use of armed drones.

9. The use of armed drones as pre-emptive self-defence must be according to the above laid down conditions and conditions set up in the Caroline incident. Further, the use of armed drones must be subject to Article 51 and other provisions of the UN Charter governing the use of force, and International Humanitarian Laws.

\textsuperscript{104} The term ‘striking State’ used here refers to the State which carries out such strike whereas, the term, ‘stroked State, refers to that State where the strike takes place.

\textsuperscript{105} The ICJ may be an appropriate forum for this purpose or a new legal mechanism can be established for the settlement of such disputes provided that legal mechanism must be impartial, free from influence, and transparent etc.
10. The clandestine practice of the use of the armed drone must be condemned. The striking States must be made legally bound to compile the data regarding the use of armed drones. This data must consist of the number of strikes, circumstances for such strikes and the number of civilian causalities along with the reparation/compensation if made etc. The compilation of such data is necessary to make the use of armed drones more transparent.

These parameters are necessary to make the use of armed drones more transparent and to hold a State accountable for misusing them. They will provide certainty to the meanings of some legal concepts and also help to establish the “rule of law”. As Rosa Brooke point out, ‘When key international law concepts lose any fixed meaning, consensus breaks down about how to evaluate State behaviour; and although legal rules may continue to exist on paper, they no longer ensure that States will behave in a predictable, nonarbitrary fashion.”

VIII. CONCLUSION

The armed drones are not illegal per se as they are part of weapons used by the States for their defensive purposes. But “how” they are used make them legal or illegal. The use of armed drones against non-state actors has been increasing among the States. “Valid consent” of a host State is a good legal defence for the use of armed drones provided it must be of de jure government and free from any external pressure.

After 9/11, States have been invoking Article 51 in order to justify their use of force against non-state actors. The passing of Resolutions 1373 and 1386 in 2001 by the UN Security Council against terrorist acts indicates the acceptance of this new approach. However, it is also noted that in absence of authoritative pronouncement on this issue by ICJ and lack of clarity in the practice among states often result innivocation of customary right of self-defence. The acknowledgement of the customary right of self-defence has been itself made in Article 51 of the UN Charter through the use of the word “inherent” and in the ICJ judgements, particularly in Nicaragua.

The right of anticipatory self-defence is often traced in the Caroline incident. However, only a few States in the West have been invoking this right. The right of anticipatory self-defence, at the most, is a regional customary right mainly prevalent among a few States whereas, the right of pre-emptive self-defence is neither an international customary right nor a general practice prevalent among the States except the USA and recently acceptance by India at the Arria Formula meeting.

Scholars are divided on the issue of interpretation of Article 51. Those who support the wider interpretation of Article 51 including the right of anticipatory

106 Brooks, note 47.
self-defence argue that in changing world scenario, wider interpretation is necessary to deal with the new problems of characterization which newer modes of aggression (such as terrorists and non-state actors) create for international law. Those who oppose these arguments contend that a wider interpretation of Article 51 would create unnecessary trouble for the world order and literal interpretation is necessary for maintaining international peace and security.

Under the customary right of self-defence, a State can use force against non-state actors if they are sponsored by the State. However, the legality of drone strikes as anticipatory self-defence against non-state actors not sponsored by a State directly or indirectly is a controversial proposition of international law. Article 2(4) of the UN Charter, despite differences among scholars regarding its interpretation, restricts the States to use the “threat or force against the territorial integrity or political independence of any State”. Further, in the absence of opinio juris and the lack of constant and uniform states practice, there is no possibility of developing a general customary right of anticipatory/pre-emptive self-defence in the near future too.

The Unwilling/Unable Doctrine is also controversial and highly debatable amongst scholars and nations. The differences among them range from its origin to its substantive provision, scope and legality. However, this doctrine requires improvements in terms of its definition and objective requirements for its invocation against host States which are usually weak. Lastly, this doctrine can also fill the gap in international law and the victim State can take necessary measures against non-state actors.

India has two positions regarding the right to preemptory self-defence against non-state actors. In an earlier position, India did not invoke Article 51 while justifying non-military preemptory airstrikes against the terrorists in Balakot, Pakistan. However, a drastic shift in position has been noticed at the Arria Formula meeting where India argued in favour of wider scope of Article 51 including the right of preemptory self-defence. Thus, the current position of India is that the right of self-defence and the right of preemptory self-defence are part of customary international law. It is no longer confined to the State. It is also available against non-state actors if it meets some criteria.

The power can be regulated through law. The clear-cut parameters/guidelines at least, serve the symbolic purpose to determine the legality of drone strikes. There is a need to call an international convention for drafting the detailed rules comprising all aspects such as, when, how, and where the armed drones can be used and what would be liabilities for violating these rules along with the provisions for adequate reparation to the victims. Some parameters given above may be considered for this purpose.
THE JADHAV CASE: INQUIRIES INTO THE INTERPLAY OF SOURCES

FARHEEN AHMAD

Abstract

This paper endeavors to analyze the ICJ’s verdict in the Jadhav Case. While ascertaining questions of violation of the VCCR 1963, the ICJ was called upon to decide complex questions of treaty law obligations and its interface with customary international law (CIL) and subsequent agreement. It finds that exceptions to treaty rule are to be explicitly given and both treaties and CIL are susceptible to evolution by the passage of time. Since the evidence of treaties is more readily accessible, determining the obligations enshrined in treaty becomes relatively easy. The development of CIL, on the other hand, is an apparently ambiguous process and its relationship with treaty remains a subject of interest. There are circumstances when new customary rules may emerge, which diverge from treaty formulations. The Court was found to have fallen short of discussing this aspect. On the question of relationship between a multilateral convention and subsequent bilateral agreement, while some contend that treaty obligations may be modified through contradictory subsequent practice, the recent work of ILC on subsequent practice has curtailed this possibility. The Court rightly found that considering the nature of obligation under the present treaty, they can only be modified to amplify rights, not curtail it. The note finally discusses the Court’s refusal to enter into questions of ICCPR as a matter of absence of jurisdiction. The note concludes with the present position of both the countries regarding the case.

Key words: VCCR, consular access, CIL, fair trial, human right, treaty obligations.

I. INTRODUCTION

On 17th July 2019, the International Court of Justice (the court) delivered its judgment in the Jadhav Case between India and Pakistan. The Court, by a majority of 15-1, held Pakistan responsible for breach of its obligations under the Vienna Convention on Consular Relations (VCCR), 1963. This case note is an attempt to examine the Court’s approach to treaty obligation, the normative interplay between treaties and CIL and relationship between multilateral and subsequent bilateral agreements. The note also deals with Court’s assessment of interplay between treaties by looking at the question of right of consular access as a form of human right. The court’s decision in Jadhav is critical for not just discharging its mandate under international law, but for also being cautious of its institutional limitations by...
II. THE ARREST AND TRIAL

An Indian national named Kulbhushan Sudhir Jadhav (hereinafter ‘Mr. Jadhav’) was held in the custody of Pakistani authorities since 3rd March 2016. After a gap of three weeks, i.e. on 25th March 2016, Pakistan brought this to the notice of the Indian High Commissioner in Islamabad substantiating it with a video claiming Mr. Jadhav’s confession to his involvement in acts of espionage and terrorism in Pakistan at the behest of ‘Research and Analysis Wing’ (RAW), India’s foreign intelligence agency. Pakistan also notified the UN Security Council of the matter. The Indian authorities in Islamabad, quickly on the same day and later repeatedly sought consular access ‘at the earliest’ to Mr. Jadhav.

Mr. Jadhav’s trial commenced on 21st September 2016 before a Field General Court Martial wherein Pakistan asserted that due process was followed in the trial through steps such as grant of an additional period of three weeks to prepare for defence, appointment of qualified field officer, recording of witness statements under oath and cross examination of witnesses.

On 21st March 2017, Pakistan sent a response to the Indian High Commission indicating that India’s request for consular access would be considered “in the light of Indian side’s response to Pakistan’s request for assistance in investigation process and early dispensation of justice”. On 31st March 2017, India replied that “consular access to Mr. Jadhav would be an essential pre-requisite in order to verify the facts and understand the circumstances of his presence in Pakistan”. Both the Parties reiterated these arguments in subsequent diplomatic exchanges as well.

On 10th April 2017, Pakistan announced that the accused had been awarded capital punishment. As per Pakistan’s domestic law, the official recourse available to the accused included an appeal before a Military Appellate Court within 40 days of the sentence; a mercy petition addressed to the Chief of Army Staff within 60 days of the Military Appellate Court’s decision; and a similar petition addressed to the President of Pakistan within 90 days of the decision of the Chief of Army Staff. On 26th April 2017, on behalf of Mr. Jadhav’s mother, the Indian High

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2 Ibid., para 23.
3 Ibid., para 25.
4 Ibid., para 28
5 Ibid.
6 Ibid., para 29.
Commission communicated to Pakistan, an ‘appeal’ under Section 133 (B) and a petition to the Federal Government of Pakistan under Section 131 of the Army Act of Pakistan. india alleged that the appeal and petition had to be prepared on the basis of the information available in the public domain as Pakistan had denied it access to the case files.

II. PROCEEDING BEFORE THE ICJ

Alleging violations of VCCR, on 8th May 2017, India instituted proceedings against Pakistan. On the same day, India also submitted a request of provisional measure. This request was granted on 18th May as per which the Court required Pakistan to undertake all measures to ensure that Mr. Jadhav is not executed pending the final decision of the Court. Also, since the Court did not include any judge of the nationality of Pakistan, by its right under Article 31 (2) of the ICJ Statute, ad hoc judge Mr. Tassaduq Jilani was appointed to the bench.

India invoked the jurisdiction of the ICJ under Article 1 of ‘Optional Protocol’ to the VCCR which states,

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Pakistan did not contest that the dispute relates to the interpretation and application of VCCR. According to the Court, since both India and Pakistan are parties to the Convention and the Protocol, its jurisdiction in the present case arises from Article I of the Optional Protocol.

However, Pakistan contested the admissibility of the case on three grounds i) abuse of process, ii) abuse of rights and iii) doctrine of unclean hands. The ICJ rejected these grounds on the conclusion that India did not abuse its procedural rights when it requested indication of provisional measures as Articles II and III of Optional Protocol do not contain preconditions to the Court’s exercise of its
jurisdiction; non-existence of any doubts with respect to Mr. Jadhav’s nationality; and India’s conduct did not circumvent Pakistan of its obligation to abide by its international obligations.

III. SUBSTANTIVE ISSUES AND THEIR ANALYSES

Broadly, on substantive grounds, Pakistan raised three arguments for non-application of VCCR. It deemed VCCR non-applicable in cases of espionage, argued that customary international law allows exceptions to treaty obligation in VCCR and reckoned the ‘2008 Consular Agreement’ as the appropriate applicable law between India and Pakistan. These arguments were rejected by the Court. A nuanced analysis of the reasoning provided by the Court opens new dimensions in the exercise of treaty interpretations as well as the nature and scope of human rights law. Nevertheless, the Court displayed judicial restraint by not overstepping fully into the domain of human rights law enshrined in ICCPR since it was not the applicable law in the present case. These issues are elaborated in the fourth section.

A. Exception to Treaty Law

Pakistan argued that Article 36 of the VCCR, which provides for right of communication and contact, does not apply in ‘prima facie cases of espionage’. In its view, the travaux préparatoires of VCCR demonstrate that cases of espionage do not fall within the ambit of the convention, and that matters of national security and espionage constitute a ‘justifiable limitation’ to a sending State’s ‘freedom to communicate’ with its arrested nationals in the receiving State. India refuted that Article 36 prescribes any exception. India relied upon the travaux préparatoires to demonstrate that the drafters considered espionage to be covered by the principles governing consular access, otherwise a receiving State would deliberately deny basic rights provided in VCCR by alleging acts of espionage.

On this issue, since neither India nor Pakistan have ratified the Vienna Convention on the Law of Treaties 1969 (VCLT), the Court decided to interpret VCCR according to the customary rules of treaty interpretation which are reflected in Articles 31 and 32 of the VCLT. It determined that none of the provisions of VCCR, including Article 36, contain any reference to cases of espionage. When read contextually and in light of the object and purpose of the Convention, Article 36 does not exclude from its scope “certain categories of persons, such as those suspected of espionage”. In order to demonstrate the object and purpose, the

12 Jadhav case, note 2, para 73
13 Ibid., para 75
14 Ibid., para 83-85.
Court, *inter alia*, relied upon the preamble of VCCR: “Having in mind...promotion of friendly relations among nations”. The purpose of Article 36, as indicated in its introductory sentence, is to “facilitate the exercise of consular functions relating to nationals of the sending State”. Consequently, consular officers may, in *all cases*, exercise the rights relating to consular access set out in that provision for the nationals of the sending State. The Court, therefore, held that it would run counter to the purpose of that provision if the rights it ascribes could be disregarded when the receiving State alleges that a foreign national in its custody was involved in acts of espionage.

**B. Interfaces between Treaty Obligations and CIL**

Pakistan also contended that CIL governs cases of espionage in consular relations and allows States to make exceptions to the provisions on consular access contained in Article 36 of VCCR. It also suggested that CIL prevails over the treaty text of Article 36 of VCCR since an espionage exception existed in CIL in 1963 and as per the VCCR preamble “the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention”. India rebutted that the limited instances cited by Pakistan, wherein States have denied consular access to individuals suspected of espionage or have granted them access after a considerable delay, can neither constitute established state practice nor affect the interpretation of Article 36.

The Court, noting that Article 36 of the Convention “expressly” regulates the question of consular access without making exception to cases of espionage, held that Article 36, and not CIL, governs the matter at hand in the relations between the Parties. It found that the Preamble to VCCR assigns a residual role to CIL. When a treaty codifies a rule of international law, such as in the present case, and both states are parties to the treaty without any reservation or declaration, then the treaty rule would apply, as held by the Court. It did not deem it necessary to answer, if, at the time of adoption of VCCR, an exception to espionage existed under CIL. Noticeably, the question, i.e., if after the ratification of the treaty, a new

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CIL which creates an exception to espionage could have developed was also not dealt with by the Court.\textsuperscript{17}

A possibility exists because prevailing jurisprudence suggests that normative obligations exist on States through treaties and CIL, \textit{simultaneously and independently}.\textsuperscript{18} The Court could have potentially clarified this interplay between two sources of international law in the present judgment which, in turn, would have enriched the jurisprudence on this issue. The present case involved claims which would have thrown light on different interfaces between CIL law and treaty law. It is widely accepted that not only can CIL be incorporated in a treaty, a treaty may also initiate a CIL if subsequent state practice follows. In the present case, the treaty text does not contain an espionage exception. This raises pertinent questions on the viability of formation of CIL after the coming into force of a multilateral treaty which has achieved near universality. Can states contract out of a treaty to create a new CIL? Would a new CIL necessarily entail a derogation from the treaty? In that case, would it attract the question of state responsibility? While there is possibility of CIL emerging in contradiction to existing treaties due to state practice,\textsuperscript{19} it seems that it would be a violation of the existing norms.\textsuperscript{20} Given that CIL is a "mysterious phenomenon"\textsuperscript{21} whose identification involves a "delicate and difficult" process, state practice may exist which contradicts existing treaty norm. A legal rule is distinguishable because there is an assumption that its violation would lead to remedies. If the international legal system reacts to a violation of a rule by not

\textsuperscript{17} In \textit{Military and Paramilitary Activities in and against Nicaragua [1986] ICJ Rep} 14, the Court found that where both custom and treaty appeared to be relevant in the relations between two or more States, then “even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence”.


\textsuperscript{21} \textit{Ibid.}

punishing the violator, it may give birth to a new rule. These enduring questions on sources of international law could have been addressed by the Court.

C. Relationship between Multilateral Treaty and Subsequent Bilateral Treaty

The third issue that Pakistan raised was the question of the 2008 Agreement on Consular Access between India and Pakistan (hereinafter the 2008 Agreement). Provision (vi) of the 2008 Agreement provides that ‘In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits’. Also, clause 2 of Article 73 of VCCR allows state parties to conclude agreements which ‘confirm’ or ‘supplement’ or ‘extend’ or ‘amplify’ the provisions of VCCR. As per Pakistan, the 2008 Agreement ought to regulate the matter of consular access between India and Pakistan rather than Article 36 of the VCCR. Pakistan claimed that since the 2008 Agreement ‘supplements’ or ‘amplifies’ the provisions of VCCR it is consistent with Article 73 of the VCCR (and Article 41 of the VCLT). India refuted this interpretation by arguing that the 2008 Agreement cannot modify the rights and obligations stated in Article 36 of VCCR. It contended that there is nothing in the 2008 Agreement which suggests that either party intended to derogate from Article 36 of VCCR.

The Court found that provision (vi) of the 2008 Agreement cannot be read as denying consular access in the case of an arrest or detention or sentence which has been made on political or security grounds. Underlining the importance of the rights guaranteed under Article 36, the Court deemed that any intention to restrict these essential rights would have to be clearly reflected in the 2008 Agreement. The Court expounded that Article 73 of VCCR allows parties to enter into subsequent agreements but such Agreements can only ‘confirm, supplement, extend or amplify’ the provisions of VCCR. A harmonious reading of provision (vi) of the 2008 Agreement with Article 36 can neither curtail nor displace the existing consular rights.

In the present case, the 2008 Agreement has been interpreted by the Court using Article 73 of VCCR. The 2008 Agreement has also been adjudged as a subsequent agreement by the Court within the rubric of Article 73. It is a bilateral agreement concluded with the intention of “providing humane treatment to nationals of either country arrested, detained or imprisoned in the other country.”

The question here arises: What is the scope of taking into account subsequent agreements

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that restrict rights under VCCR? The answer to this question can be analysed by answering two sub-questions.

The first question is whether subsequent agreements get ruled out due to the presence of Article 73. When the ILC was drafting rules relating to consular relations it intended to codify the existing “general customary law”\(^\text{25}\) without affecting the existing bilateral agreements.\(^\text{26}\) The provision automatically maintained the existing bilateral agreements wherein the present convention would only apply to questions not covered by the bilateral agreements, and included the scope of entering into new agreements.\(^\text{27}\) But this scope of future agreements needed to be delineated. The provision was thus amended at the Vienna Conference on Consular Relations,\(^\text{28}\) based on the proposal by the representative of India, Mr Krishna Rao.\(^\text{29}\) It was felt that International law can further develop within the framework of the convention but sovereign states did not have unhindered freedom to contract. Judge Jilani, in his dissenting opinion, was of the view that the general law of treaties does not preclude two states from entering into a subsequent agreements which “govern differently their relations \textit{inter se}.”\(^\text{30}\) While this is generally true, the drafting history of Article 73 shows that any subsequent bilateral agreement has to be read in a particular way. There cannot be any presumption that a later treaty containing incompatible clauses modifies the earlier treaty, it is understood to complement it.\(^\text{31}\) The Court applied Article 73 in the present case to harmonize the object and purpose of VCCR with the 2008 Agreement.

The second question is whether inter-se subsequent agreements are to be interpreted restrictively due to VCLT. The Court in its judgment viewed the 2008

\(^{25}\) \textit{Ibid.}, para 85.


\(^{27}\) After the ILC’s draft on Consular Relations was finalized and submitted to the General Assembly, the General Assembly via its Resolution 1685 (XVI) of 18 December 1961 decided to convene an international conference of plenipotentiaries to consider the question of consular relations and to embody the results of its work in an international convention.

\(^{28}\) Proposal submitted by India, UN Doc. A/CONF.25/C.1/L.155 read as : 1. Nothing in the present convention precludes States from concluding bilateral agreements or conventions confirming or supplementing or extending Annexes — Proposals and amendments submitted in the First Committee or amending the provisions thereof or affect the continuance in force of such conventions.

\(^{29}\) \textit{Jadhav Case (India v. Pakistan),} [2019], ICJ, Dissenting Opinion of Judge Jilani, para 24.


\(^{31}\) Article 41 of VCLT is related to modification of multilateral treaties between certain of the parties only.
Agreement as a subsequent agreement under the VCCR, it did not make use of the interpretative tools under VCLT. In its written submission, Pakistan had proposed reliance upon Articles 31 and 41 of the VCLT. Interestingly, the Court which had resorted to the rules of interpretation under VCLT to interpret Article 36 VCCR, did not further take note of it while dealing with the 2008 Agreement. Article 41 of VCLT allows modification of a treaty only when i) the parent treaty allows or when ii) the parent treaty does not prohibit it and the new agreement does not derogate from the parent treaty to make them incompatible. Judge Iwasawa, who explored into this possibility in his separate opinion, thus concluded that if a subsequent agreement under Article 41 derogates from the obligations of VCCR, VCCR prevails. Even a scenario in which Article 73 did not exist and the 2008 Agreement was applicable, the travaux préparatoires of the 2008 Agreement show that “a clear exception to consular access to individuals charged with political or security offences was...deliberately removed and replaced with a broad requirement to give consular access to all nationals” as is evident through the Declaration of Judge Sebutinde. The 2008 Agreement only allows the receiving State to examine the merits of the case in determining the release and repatriation, it does not give the state discretionary power to deny consular rights.

Furthermore, Article 31 of VCLT is used to interpret treaties through tools such as the text, the context, the object and purpose, subsequent agreements, subsequent practices and other related rules. In the present case, the 2008 Agreement was deemed to be a subsequent agreement by the Court. The ILC in its draft conclusions on Subsequent Agreements and Subsequent Practice defines subsequent agreement as an agreement between the parties regarding the interpretation of the treaty or the application of its provisions. Subsequent agreements (and practice) are treated as authentic means of interpretation of a treaty as “it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.” In other words it is proof of the conduct of the parties and reflects their common

32 Jadhav Case (India v. Pakistan), [2019], ICJ, Declaration of Judge Iwasawa, para 12.
34 Ibid., para 28.
37 Ibid.
understanding. However, it is not necessarily legally binding since the interpreter only has to take subsequent agreement “into account”. This means that this tool of interpretation does not override other tools of interpretation, and is thereby not the most conclusive factor. This, however, does not mean that the parties to a treaty may not enter into binding subsequent agreements. Sir Humphrey Waldock in his report as Special Rapporteur for the Law of Treaties had pointed that it may be difficult to distinguish between subsequent agreement under Article 31 which is only to be taken into account with other means of interpretation and an agreement which the parties have adopted as binding. Also, Draft Conclusion 7 of the ILC Report notes that the possible effect of subsequent agreements may result in narrowing, widening, or otherwise determining the range of possible interpretations. The ILC commentaries show how Courts and Tribunals have used subsequent agreements or practices to clarify the ordinary meaning or object and purpose of a treaty text, by narrowing or widening the understanding of the parties. At the same time, Draft Conclusion 7 also notes that there is a presumption that the parties to a treaty intend only to interpret the treaty not to amend or to modify it. Article 31 of VCLT can be used, if the parties desire, to achieve a broader understanding but it cannot amend the obligations imposed. This is only reasonable since Article 31 is a mere tool of interpretation which cannot lead to imposition of new obligations or abrogation of agreed obligations between states.

Therefore, the rules of treaty interpretation under Article 31 nor the rule of treaty modification under Article 41 be used to defeat the purpose of an agreed treaty. It can be concluded that regardless of the presence or absence of Article 73 of VCCR, Article 36 of VCCR cannot be abrogated because of the nature of rights it provides. These rights of consular access have even been deemed to be a part of human rights. This issue is explored further in the next section.

IV. JURISDICTION AND CONSULAR RIGHTS

Technical arguments aside, a broader engagement with the jurisprudential nature of right to consular access was long overdue and in this case the ICJ rose to the
occasion and set the record straight on a number of issues. While the present approach of the Court has broad and liberal connotations for it allows for addition of rights and not their curtailment, it is possibly a direct consequence of the wordings of Article 73 of VCCR rather than the Court’s novel interpretation. Consequently, the Court determined that Pakistan had indeed failed to honor its obligations under Article 36 of the VCCR on the grounds that it did not inform the accused of his rights, reneged its commitment to inform India of the arrest and detention without delay and breached its obligation to grant consular access. The Court interpreted that the right under Article 36 could not be seen as contingent and reciprocal in nature. In fact, the Court found that India’s failure to cooperate in the investigation process does not relieve Pakistan of its obligation to grant consular access.

Consular access doesn’t only exist in case of arrest or detention of a foreign national. Under Article 36(1)(a) of VCCR a consul as a general matter has a right to communicate with co-nationals, and co-nationals have a right to communicate with a consul. Few commentators have remarked that “these rights are not qualified by the circumstance of arrest or detention”. Thus, even if it is unclear whether the sending-state national is under detention, a consul who seeks to communicate is entitled to do so, and similarly the national is entitled to communicate with the consul.” The function of consular assistance is to enable foreign nationals to defend themselves properly and thus to ensure that trials are fairly conducted. This raises the question if consular access is one aspect of due process, which is an integral part of human rights law. Although not having any precedential value, the approach of the Inter-American Court of Human Rights in the 1999 Advisory Opinion signifies jurisprudential coherence on this issue. Judge Cancado elucidated this jurisprudence in his Separate Opinion. In the Advisory Opinion, Mexico queried the Court if a denial of consular access, including omission to advise about consular access, might bring into question the receiving state’s compliance with the international obligations to provide due process of law, importantly when the criminal case might lead to capital punishment. The Court gave its Advisory Opinion to hold

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47 The Court is an organ of the Organization of American States. It deals with human rights either with one state suing another, or by way of advisory opinions. Its competence to issue advisory opinions includes providing interpretation of human rights treaties that apply in the Americas, which the Court takes to include universal treaties like VCCR, because OAS member states are signatories.


49 Emphasis added.
that a failure to inform a detained foreign national of that right constituted a due process violation and stipulated strict compliance with the right of consular access as codified in the VCCR. Noticeably, and in contrast to the ICJ’s approach in Jadhav’s case, the American Court of Human Rights deemed that a death sentence rendered in a case in which a foreign national has not been informed of the right of consular access cannot stand.\footnote{Quigley, Aceves and Shank, note 45, p. 88. Scholars have pointed to one argument against viewing consular access as a due process issue. Since the rights under VCCR Article 36 is one of contact and communication, not one of any actual assistance, VCCR Article 36 requires a receiving state to facilitate access, but it does not require a sending state to provide assistance. Thus, unlike a right to an attorney, where domestic law requires that an attorney actually assist, a right to consular access does not necessarily require consular assistance.} The Court, thus, found consular access to be an element of due process.\footnote{Jadhav Case (India v. Pakistan) Separate Opinion of Judge Cancado Trindade, [2019], ICJ Rep 1, para 32-42.} This is the argument India pursued before ICJ in the matter of Jadhav.

India had argued that Article 36 is a significant element of international human rights which affected the right of fair trial and was a violation of Article 14 of ICCPR. The Court, however, declined to enter into questions of violation of ICCPR since it had found its jurisdiction on the basis of Optional Protocol to VCCR and thereby could only adjudge its violation.

This approach was criticized by both Judge Cancado Trindade and Judge Robinson in their Separate Opinion and Declaration respectively. Judge Trindade found that any violation of the right to consular notification would evidently have brought in the question of violation of the right to fair trial and due process.\footnote{Ibid., Para 68.} He observes that the Court’s strict view overlooks both the interrelationship between these rights and the interrelationship between law and justice.\footnote{This understanding is based upon an identical reasoning made by Judge Trindade in Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) Separate Opinion of Judge Trindade, [2020] ICJ, para 49.} Therefore, as both contending parties are party to ICCPR and have made references to the Covenant in their Pleadings, their consent for jurisdiction is already present.\footnote{Jadhav Case (India v. Pakistan), Declaration of Judge Robinson, [2019], ICJ Rep 1, para 2(i) to 2(vi).} Likewise, Judge Robinson views the fair trial rights in Article 14 of ICCPR and the right to consular access as a bundle of human rights available to all persons.\footnote{Ibid., para 2(ix).} He reasons that “without a foreign national’s consular officer being able to arrange for his legal representation,
it is very likely that none of the seven rights set out in Article 14 of the Covenant would be given effect.\footnote{Ibid., para 2(xi). For more on systematic integration, see Panos Merkouris, \textit{Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave} (Brill, 2015).} But in his view, \textit{jurisdiction may be derived through the principle of systematic integration} in Article 31(3)(c) of the VCLT.\footnote{Report of the Special Rapporteur Shinya Murase, Fifth report on the protection of the atmosphere, Doc. A/CN.4/711, 2018, para 87.}

These conflicting positions between the approach of the Court and these judges can be understood through two principles of international law: \textit{non ultra petita} and \textit{juranovit curia}. As per \textit{non ultra petita}, the Court is barred from judging beyond what it has been asked to decide by the parties by only relying upon agreed facts.\footnote{Ibid., para 89.} However, as per \textit{juranovit curia}, it is for the Court to find the applicable law regardless of whether this particular law was proved or asserted by any of the parties.\footnote{Luigi Fumagalli, \textit{Jura Novit Covia}, Max Planck Encyclopedia of International Procedural Law, (2018), para 39.} This principle is equally applicable to matters of jurisdiction.\footnote{Ministry of External Affairs, Official Spokesperson’s statement on the matter of Shri Kulbhushan Jadhav (July 16, 2020) available at: <https://www.mea.gov.in/response-to-queries.htm?dtl/32833/official+spokespersons+statement+on+the+matter+of+shri+kulbhushan+jadhav>accessed on 25th July 2020.}

In the present case, the Court felt bound by procedural limitations upon its jurisdiction and gave primacy to the will of the parties in contending only the violation of VCCR. On the other hand, Judge Trindade and Judge Robinson found that ICCPR should also be applied, although they both found ICCPR applicable through different means.

The Court nevertheless, as a portion of remedies, declared that Pakistan was under obligation to provide effective review and reconsideration of the conviction and sentence, of which due process and fair trial are essential components. Therefore, even though it did not expressly enter into questions of ICCPR, it did underscore the importance of these principles of human rights by implicitly relying upon them as well as being mindful of its own jurisdiction.

\textbf{V. CONCLUSION}

As is evident from history, controversies between India and Pakistan have often culminated into disputes and attained heightened scrutiny at different levels. The present case which reached the ICJ has all the potential to impact the bilateral relations and consequently regional peace and order. As is omnipresent in most international disputes, while the Court played its role in conclusively deciding the legal matter before it, the related domestic political elements continue to grab
headlines. The Court in granting remedies imposed an obligation upon Pakistan to provide effective review and reconsideration of the conviction and sentence of Mr. Jadhav ensuring that full weight is given to the effect of the violation of the rights set forth in Article 36 of VCCR. On 16th July 2020, only four days before the final date for filing a review petition under a Special Ordinance, Indian authorities were allowed to provide consular assistance to Mr. Jadhav. Official statement issued by India on this regard states that neither ‘unimpeded, unhindered and unconditional access’ was provided as had been previously requested nor were the officials allowed to obtain Mr. Jadhav’s written consent for arranging his legal representation. Pakistan claims that it is following up the Court’s order as its National Assembly approved the ICJ (Review and Re-consideration) Bill, 2020. The Bill provides for a convicted person to appeal to the High Courts for review and reconsideration. India, views this Bill as insufficient as municipal courts cannot be the arbiter of whether the State has fulfilled its obligation under international law. The ultimate result of the dispute remains uncertain. It is only expected of States that they display the commitment and respect towards international law and abide by ICJ’s verdict, both in letter and spirit. Political machinations aimed at undermining a well-rounded and legally coherent verdict will not only exacerbate continuing political tensions between the two nations but may also endanger international peace and security by endorsing a culture of contempt and recalcitrance.

61 Available at: <Scroll.in>, Pakistan Assembly passes bill to allow Kulbhushan Jadhav right to appeal, 11th June 2021
The following sections present India's engagement on several aspects of international law during the period January to June 2021. They cover a variety of topics linked to international law such as extradition law, IPR, laws of international institutions and the law of the sea etc. The influx of Rohingya refugees in India led to a number of cases that were decided by the Indian courts. It also summarizes cases pertaining to international commercial arbitration. In addition to a compilation of few domestic laws adopted recently and case law, the state practice includes other relevant information related to India's statements in the UN bodies. It also provides information on some efforts undertaken by India's ministries.

1. INDIAN JUDICIARY

A. Public International Law

(i) Mohammad Salimullah and Another v. Union of India and Others

Mohammad Salimullah, petitioner, registered as refugees with the United Nations High Commission for Refugees (UNHCR), has filed writ petition in 2017 before Supreme Court of India praying for the issue of an appropriate writ directing the Union of India to provide basic human amenities to the members of the Rohingya Community, who have taken refuge in India. While pending disposal of his main writ petition, he came up with the present interlocutory application seeking (i) the release of the detained Rohingya refugees; and (ii) a direction to the Union of India not to deport the Rohingya refugees who have been detained in the sub-jail in Jammu. In view of the reports appeared in the first/second week of March 2021 in The Wire, The Hindu, The Indian Express and the Guardian that there are more than about 6500 Rohingyas in Jammu and that they have been illegally detained and jailed in a sub-jail now converted into a holding centre, Mohammad Salimullah argued appearance of new circumstances to the effect that about 150-170 Rohingya refugees detained in a sub-jail in Jammu face deportation back to Myanmar. Shri Chandra Uday Singh, learned senior counsel representing the Special Rapporteur appointed by the United Nations Human Rights Council (UNHRC) also attempted to make submissions, but serious objections were raised to his intervention. Mohammad Salimullah (petitioners) contended that (i) that the principle of non-refoulement is part of the right guaranteed under Article 21 of the Constitution; (ii)
that the rights guaranteed under Articles 14 and 21 are available even to non-citizens; and (iii) that though India is not a signatory to the United Nations Convention on the Status of Refugees 1951, it is a party to the Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights, 1966 and the Convention on the Rights of the Child 1992 and that therefore non-refoulement is a binding obligation. The petitioners also contended that India is a signatory to the Protection of All Persons against Enforced Disappearances, Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment. The petitioners also relied upon a recent judgment of the International Court of Justice (ICJ) in *The Gambia vs. Myanmar* dated 23 January 2020 to show that even the International Court has taken note of the genocide of Rohingyas in Myanmar and that the lives of these refugees are in serious danger, if they are deported.

The Union of India has filed a reply contending *inter alia* (i) that a similar application in I.A. No.142725 of 2018 challenging the deportation of Rohingyas from the State of Assam was dismissed by this Court on 4 October 2018; (ii) that persons for whose protection against deportation, the present application has been filed, are foreigners within the meaning of Section 2(a) of the Foreigners Act, 1946; (iii) that India is not a signatory either to the United Nations Convention on the Status of Refugees 1951 or to the Protocol of the year 1967; (iv) that the principle of non-refoulement is applicable only to “contracting States”; (v) that since India has open/porous land borders with many countries, there is a continuous threat of influx of illegal immigrants; (vi) that such influx has posed serious national security ramifications; (vii) that there is organized and well-orchestrated influx of illegal immigrants through various agents and touts for monetary considerations; (viii) that Section 3 of the Foreigners Act empowers the Central Government to issue orders for prohibiting, regulating or restricting the entries of foreigners into India or their departure therefrom; (ix) that though the rights guaranteed under Articles 14 and 21 may be available to non-citizens, the fundamental right to reside and settle in this country guaranteed under Article 19(1)(e) is available only to the citizens; (x) that the right of the Government to expel a foreigner is unlimited and absolute; and (xi) that intelligence agencies have raised serious concerns about the threat to the internal security of the country. It is also contended on behalf of the Union of India that the decision of the International Court of Justice has no relevance to the present application and that the Union of India generally follows the procedure of notifying the Government of the country of origin of the foreigners and order their deportation only when confirmed by the Government of the country of origin that the persons concerned are citizens/nationals of that country and that they are entitled to come back. The Supreme Court of India (SCI), on 8 April 2021 in this case, observed that the rights guaranteed under Articles 14 and 21 are available to all persons who may or may not be citizens, but the right not to be deported, is
ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e). SCI took note of two facts in reply of the Union of India related to (i) the threat to internal security of the country; and (ii) the agents and touts providing a safe passage into India for illegal immigrants, due to the porous nature of the landed borders. SCI has also noted that they have dismissed I.A. No. 142725 of 2018 filed for similar relief, in respect of those detained in Assam. Therefore, it is not possible to grant the interim relief prayed for. However, SCI has made clear that the Rohingyas in Jammu, on whose behalf the present application is filed, shall not be deported unless the procedure prescribed for such deportation is followed. Interlocutory Application is disposed of accordingly.

(ii) **Nandita Haksar v. State of Manipur & Others**

The petitioner, Ms. Nandita Haksar, a human rights advocate, espoused the cause of seven named Myanmarese citizens, who entered India illegally, to travel to New Delhi to seek protection from the United Nations High Commissioner for Refugees (UNHCR). These seven Myanmarese entered India and took shelter at Moreh in Tengnoupal district, Manipur. They sought the help of the petitioner as they feared that they would be sent back to Myanmar by the Assam Rifles, an Indian armed force, as they had come without proper travel documents. Their fear was that the Ministry of Home Affairs, Government of India, had directed the authorities of the border States in the North-East of India and the Assam Rifles to check the flow of illegal migrants coming into India from Myanmar, vide letter dated 10.03.2021. The petitioner pointed out that this communication did not draw a distinction between a ‘migrant’ and ‘refugee’. However, letter dated 29.03.2021 was issued by the Government of Manipur stating that it would come to the aid of Myanmarese nationals who had illegally entered the State. Given these circumstances and as the seven Myanmarese individuals are handicapped in approaching this Court on their own, the petitioner/party-in-person espoused their cause and seeks their safe passage to approach the UNHCR at New Delhi for protection. The Chief Justice Mr. Sanjay Kumar, Justice Lanusungkum Jamir of the High Court of Manipur on 20 April 2021 held that these 7(seven) persons need to be protected and are under constant threat of apprehension/deportation by the authorities, there shall be a direction to respondent (Manipur Government and Union of India) to forthwith arrange for the safe transport and passage of these 7(seven) Myanmarese individuals from Moreh.

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2 Supreme Court Bench comprising Chief Justice of India Justice S.A. Bobde, Justice A. S. Bopanna and V. Ramasubramanian.

3 In the Supreme Court of India, Interlocutory Application No. 38048 of 2021, In Writ Petition (Civil) No.793 Of 2017.

Ms. Nandita Haksar, the petitioner/party-in-person advanced the arguments on merits. She relied upon the *Louis De Raedt v. Union of India and others* [(1991) 3 SCC 554] and *State of Arunachal Pradesh v. Khudiram Chakma* [1994 Supp. (1) SCC 615] where, even a ‘foreigner’ is entitled to protection of life and personal liberty under Article 21 of our Constitution. Nandita Haskar pointed out that though India may not be a signatory to the Refugee Convention of 1951, its obligations under other international declarations/covenants, read with Article 21 of our Constitution, enjoins it to respect the right of an asylum seeker to seek protection from persecution and life or liberty-threatening danger elsewhere.

Be it noted that the petitioner’s prayer presently is only to safeguard that right by enabling these seven persons to approach the UNHCR at New Delhi for protection. While respondent (Union of India and others) relied upon the several provisions of the Foreigners Act 1946; the Foreigners Order 1948; and the Registration of Foreigners Act 1939; and argued that these seven persons, who admittedly entered the country illegally, should first face the consequences of their unlawful acts and cannot be granted protection by this Court, ignoring patent violations of domestic laws. He would further assert that the Constitutional freedoms available under Article 19 are limited to citizens and these seven persons cannot claim such freedoms under Articles 19(1)(d) and 19 (1)(e), with regard to moving freely or residing/settling in any part of the territory of India. While relying upon the judgment of *Dr. Malavika Karlekar v. Union of India and another* [Writ Petition (Criminal No.) 583 of 1992 dated 25.09.1992, the High Court of Manipur comprising Hon’ble the Chief Justice Mr. Sanjay Kumar and Hon’ble Mr. Justice Lanusungkum Jamir held on 3 May 2021 that it would be essential for these seven Myanmarese persons to first approach the UNHCR at New Delhi and only thereafter, the Union of India would be in a position to take a call as to whether they can be granted refugee status and asylum in India, as was done earlier. The High Court of Manipur observed further that “the recent order dated 08.04.2021 of the Supreme Court in *Mohammad Salimullah and another v. Union of India and others* [Interlocutory Application No.38048 of 2021 in Writ Petition (Civil) No. 793 of 2017] is of no avail. The said order was an interlocutory order and no ratio was laid down therein, constituting a binding precedent under Article 141 of the Constitution. Further, denial of interim relief in that case turned upon a perceived threat to the internal security of our country and the possibility of illegal ‘immigrants’ being provided safe passage due to the porosity of our borders. Neither of those aspects arises in this case.”

The High Court of Manipur found that it just and proper to extend

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protection under Article 21 of the Constitution to these seven Myanmarese persons and grant them safe passage to New Delhi to enable them to avail suitable protection from the UNHCR.  

(iii) Ibrahim Ali v. the Union of India and 6 Others

The petitioner Ibrahim Ali, has made an interim prayer for his release in terms of the directions given by the Hon’ble Apex Court in the order dated 13.04.2020 in Suo Moto Writ Petition (Civil) No.1/2020 (In Re: Contagion of Covid 19 virus in prisons), which had been followed by a Division Bench of this Court in WP(C) (Suo Moto) No.1/2020 (Gauhati High Court v. Union of India & Ors.) in its order dated 15.04.2020. While the petitioner (Ibrahim Ali) being in Tezpur Detention Centre since the date of his arrest, i.e. 24.10.2019 who was declared as a foreigner earlier by the order dated 13.08.2019 passed by the Foreigners Tribunal No. 4th, Morigaon in F.T. (C) Case No.236/2016. This matter is yet, to be decided on its merits. Petitioner arguing for his release, he relied on the terms of the order of the Supreme Court of India, a detenue who has already remained in detention for more than two years, is liable to be released on his furnishing personal bond and surety. This order has been continuously followed by this Court.

The Gauhati High Court on 9 June 2021 held that although the petitioner technically has not completed two years as of now, but would be short of two years by around 4 months, yet considering the unusual, strange and difficult situation of COVID-19 pandemic which is in its second wave and also on consideration of the fact that the jails and the detention centres are to be decongested under the present circumstances, we are inclined to pass an order of release in favour of the petitioner, as has been done in other cases as well. Mr. J Payeng, learned Standing Counsel, Foreigners Tribunal, has very fairly submitted that due to the present circumstances, he would have no objections if the petitioner is released from jail. Consequently, the High Court directed that the present petitioner be released on his furnishing personal bond of Rs.5000/- and one surety of like amount. The other conditions which are already there in the order dated Page No.# 4/4 15.04.2020 passed in WP(C) (Suo Moto) No.1/2020 will apply in the present case as well.

(iv) Ibrahim Ali & Others v. Union of India & Others

The present petition has been filed by three Petitioners who claim to be citizens of Bangladesh. This writ petition is filed through Mr. Kamlesh Kumar Mishra with

7 Ibid.
9 Gauhati High Court bench comprising Hon’ble Chief Justice Mr. Sudhanshu Dhulia and Hon’ble Mr. Justice Achintya Malla Bujor Barua.
10 In the High Court of Delhi at New Delhi, W.P.(C) 3959/2021.
Ms. Ritu Maity and Mr. Abhishek Anand, Advocates. It is unclear as to how they reached Delhi. It is further claimed that they are presently residing in a night shelter at Asaf Ali Road, Delhi. A notice was issued to Union of India, Respondents to enquire about the Petitioners’ whereabouts and also as to whether they are involved in any cases or not and file a status report in this regard. Though the Foreigners Regional Registration Officer (FRRO) was not impleaded in this case, and they have been allowed as a Respondent to respond on the petition. FRRO agreed to file a status report as to the steps to be taken in order to repatriate the Petitioners, if a clear verification report is filed by the Delhi Police. Justice Pratibha M. Singh, Judge, Delhi High Court on 14 April 2021 issued an order directing to all respondents to file their respective status reports. Later on learned counsel for the petitioners submits that all the three petitioners have been issued the necessary exit Visa by respondent no.1, and will be leaving the country on or before 30.09.2021. He, therefore, submitted that since the grievances of the petitioners stand redressed, he does not press the petition any further. In view of the aforesaid, Justice Pratibha M. Singh, Judge Delhi High Court in her order dated on 21 September 2021 dismissed the petition along with pending application as having been rendered infructuous.¹¹

(v) Challenge before Supreme Court of India to the Grant of GI over Basmati to APEDA

The Supreme Court on 4 October 2020 issued notice on a plea by Madhya Pradesh and the state’s Basmati farmers challenging a Madras High Court order dismissing objections to the grant of GI (Geographical Indication) tag on Basmati to the Agricultural and Processed Food Products Export Development Authority (APEDA) to the exclusion of the state’s farmers.¹² A bench of Justices L Nageswara Rao, Hemant Gupta and Ajay Rastogi also extended the HC’s interim order against restraining the MP farmers from using the term Basmati for their produce. Counsel appearing for the Madhya Kshetra Basmati Growers Association Samiti, claimed that the GI registration granted to APEDA was overbroad since it covers 108 districts spread across 2,89,576 square km in seven states when in fact it did not deserve to be more than 35 districts spanning 9,500 square km. The counsel further claimed that this had resulted in dilution of the Basmati brand. Earlier APEDA had in 2008 applied for grant of registration on GI for the rice. The application claimed five entire states/UT namely Delhi, Punjab, Haryana, Uttarakhand and Himachal Pradesh and parts of Uttar Pradesh and erstwhile state of Jammu and Kashmir as traditional Basmati-growing areas. The MP government and the farmers’ body Madhya Kshetra

¹¹ In the High Court of Delhi at New Delhi, W.P.(C) 3959/2021 & CM APPL. 23813/2021.
¹² Special Leave Petition No. 8461/2020, Supreme Court of India, Madhya Pradesh Basmati Growers Association Samiti v. The Intellectual Appellate Board, Chennai and Others.
Basmati Growers Association Samiti opposed this, stating that the application was incomplete due to non-inclusion of 13 districts of the state “which have been cultivating Basmati at least for over a century”. Seeking a stay of the HC order dated 27 February 2020¹³, the Madhya Pradesh State claimed that the matter involves the livelihood of 80,000 farmers across the 13 districts. The Supreme Court, in its interim order, restrained the APEDA from taking coercive action against the Petitioners according to the GI registration granted in favour of APEDA over Basmati.

(vi) **KLA Const Technologies v. The Embassy of the Afghanistan and Matrix Global v. Ministry of Education, Ethiopia**¹⁴

This case dealt with the issue whether a Foreign State can claim a Sovereign Immunity against enforcement of an arbitral award arising out of a commercial transaction? The petitioners, Indian Companies (KLA Const Technologies and Matrix Global) are seeking enforcement of arbitral awards against Foreign States (The Embassy of the Afghanistan and Ministry of Education, Ethiopia). The petitioners (both Indian companies) had entered into contracts with the government/ government entities of Afghanistan and Ethiopia, respectively, for rehabilitation of the embassy premises and for supply and distribution of certain books. Disputes that had arisen between the parties were referred to arbitration seated in India, resulting in arbitral awards in favour of the petitioners. Both petitioners then approached the Court under Section 36 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) seeking enforcement of the awards against the assets of Afghanistan and Ethiopia in India. The two important questions of law have arisen for consideration before this Court in these petitions: (a) whether the prior consent of Central Government is necessary under Section 86(3) of the Code of Civil Procedure to enforce an arbitral award against a Foreign State? (b) Whether a Foreign State can claim Sovereign Immunity against enforcement of arbitral award arising out of a commercial transaction? Single bench Justice R. Midha, Judge, Delhi High Court on 16 June 2021 held that there exists a conceptual difference between a decree simpliciter and an arbitral award, which only for the purpose of being enforced may be treated at par with a decree of a court. With this, the Delhi High Court has unequivocally held that no prior consent of the Central Government under Section 86, CPC was necessary for the petitioners to pursue enforcement of their respective arbitral awards against Afghanistan and Ethiopia. The Delhi High Court held that “Section 36 of the Arbitration and Conciliation Act treats an arbitral award as a “decree” of a Court for the limited purpose of enforcement of an award under the Code of Civil Procedure which cannot be read in a manner which would defeat the very underlying rationale of the Arbitration and

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¹³ WP No. 9564/2016, Madras High Court.
¹⁴ (COMM) 82/2019; (COMM) 11/2016; and OMP (ENF) (COMM) 82/2019 & I.A. No. 7023/2019, Delhi High Court.
Conciliation Act namely, speedy, binding and legally enforceable resolution of disputes between the parties.” Delhi High Court further held that “Section 86 of the Code of Civil Procedure is of limited applicability and the protection thereunder would not apply to cases of implied waiver. An arbitration agreement in a commercial contract between a party and a Foreign State is an implied waiver by the Foreign State so as to preclude it from raising a defense against an enforcement action premised upon the principle of Sovereign Immunity.”

In the proceedings, on 15th March, 2021 the Central Government placed on record e-mail dated 22nd May 2019 from the Under Secretary (E&SA), East & Southern Africa Division, Ministry of External Affairs according to which, prior consent of the Central Government is not necessary for enforcement of an arbitral award under Section 86(3) of the Code of Civil Procedure. Relevant portion of the e-mail of the Ministry of External Affairs is reproduced hereunder:

“This has reference to your mail requesting consent to Matrix Global Pvt Ltd. Under Section 86 (3), Code of Civil Procedure, 1908 for execution of the arbitral award/degree against the Ethiopian Government. In this regard, I have been directed to convey the views of the Legal and Treaties Division of this Ministry that “the execution proceedings in respect of an arbitral award cannot be regarded as a suit for the purpose of Section 86 of the CPC. Thus, we understand that, for execution of an arbitral award, MEA’s concurrence under Section 86 (3) CPC may not be required.”

Importantly, it is relevant to highlight that India became a signatory to the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004 on 12 January 2007, though it has not proceeded to ratify this Convention. Article 10 of the Convention prohibits a Foreign State from resorting to Sovereign Immunity in the case of disputes arising out of commercial transactions. More particularly, Article 19 of the Convention expressly restricts a Foreign State from invoking the defense of sovereign immunity against post-judgment measures of constraint, such as attachment, arrest or execution, against a property of the State in cases arising inter-alia out of an international commercial arbitration. Thus, in brief, the intention is clear to not extend Sovereign Immunity in cases of international commercial arbitration.

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(vii) Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd. and Others

On 25 May 2021, India’s National Company Law Tribunal (‘NCLT’) (Bangalore Bench) ordered the liquidation of Devas Multimedia (‘Devas’), on grounds of it having been incorporated for fraudulent purposes. The order has come in a winding up petition filed by Antrix Corporation Ltd. While dismissing Devas’ challenge on grounds of limitation and jurisdiction,18 the NCLT concluded that Devas had been operating fraudulently since its inception while passing an order under Section 273 of the Companies Act 2013 (Companies Act).19 Earlier in 2005, Devas entered into a lease agreement with Antrix Corp. (‘Antrix’), the private sector arm of the Indian Space Research Organization (a government-owned body). Under the Agreement, Antrix had agreed to build, operate and launch two satellites and lease spectrum capacity on those satellites to Devas. On the other hand, Devas promised to use such satellites and spectrum to offer multimedia broadband casting services across India. The 2005 Agreement was terminated on 25 February 2011 by Antrix due to certain disputes and revised policy decisions of the Central Government. Aggrieved by the termination, Devas invoked the arbitration clause contained in the Agreement. Ultimately, the International Chamber of Commerce (ICC) on 14 September 2015 awarded Devas USD 562.5 million with interest for the damages caused by Antrix’s wrongful repudiation of the Agreement. Since the matter would have serious ramifications and Devas was suspected of committing various fraudulent activities, the Central Bureau of Investigation (CBI) and the Enforcement Directorate (ED) investigated the matter. It was discovered that Devas was indeed involved in various illegal activities. While the investigations into the nature of frauds committed by Devas and other litigation were pending, Antrix arrived before the NCLT praying for Devas to be wind up on account of committing fraud under Section 271(e) of the Companies Act 2013. A Bench comprising Rajeshwara Rao Vittanala (Member-Judicial) and Ashutosh Chandra (Member-Technical) delivered the NCLT verdict while allowing a company petition filed Antrix on January 19, 2021 after obtaining sanction from the Central government to liquidate Devas (stated by two former employees of ISRO) on the charges of fraud in execution of contract.

(viii) Cairn’s Dispute with India

On 14 May 2021, Cairn filed a law suit in the United States District Court for the Southern District of New York against Air India Ltd (“Air India”), requesting a Money Judgment against Air India and to hold Air India jointly and severally liable

17 Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd. and Ors., C.P.No.06/BB/2021.
in pursuance of the pending petition for the enforcement of the award against India. Cairn’s case is built on the factors laid down by the United States Supreme Court in the case of National City Bank v. Banco Para El Comercio Exterior de Cuba (“Bancec”). In Bancec, the US Supreme Court held that a foreign creditor can enforce its judgement against an instrumentality of the sovereign debtor. However, such enforcement against an instrumentality is justified only in exceptional circumstances where such instrumentality is “so extensively controlled by the State that a relationship of principal and agent is created, or giving a separate legal identity to the instrumentality would result in fraud or injustice.”

Earlier on 22 March 2021, India has challenged the award in the Permanent Court of Arbitration, claiming the arbitral award as “highly flawed”. India contends that the exercise of jurisdiction by the tribunal over a national tax dispute is improper. India argues that the claim is based on the alleged violation of the Indian Income tax laws, which is not covered within the scope of the India – United Kingdom BIT, and that India did not offer or accept the offer to arbitrate a tax dispute. Moreover, India has reportedly made an argument that the award ratifies Cairn’s scheme to avoid paying taxes to any sovereign, which is a matter of significant concern to all the governments worldwide and a matter of public policy.

(ix) Massimilano Latorre and others v. Union of India and others

The Supreme Court of India (comprising Justice Indira Banerjee and Justice M. R. Shah), by Order of 15 June 2021 in Special Leave Petition (Civil) No 20370 of 2012: Massimilano Latorre and Ors v. Union of India and Ors, quashed the criminal proceedings against the Italian marines involved in the ‘Enrica Lexie’ Incident and disposed of all related pending matters before the court (Order, Paragraph 7). This order of 15 June 2021 was made by the Supreme Court in view of the earlier the PCA Arbitral Tribunal Award in The ‘Enrica Lexie’ Incident (Italy v. India), Paragraph 1094(B)(3), which had decided “India must take the necessary steps to cease to exercise its criminal jurisdiction over the Marines”. Likewise, in respect of The ‘Enrica Lexie’ Incident (Italy v. India) Award, Paragraph 1094(B)(6)(b) concerning compensation due by Italy, Italy and India “agreed to the amount of INR 100,000,000 (INR 100 million) to be paid by Italy as total compensation under all the four heads of compensable loss identified by the Arbitral Tribunal’s award”
(Order, Paragraph 3). Finally, concerning Italy’s commitment to resume its criminal investigation, expressed during the ‘Enrica Lexie’ Incident (Italy v. India) proceedings, “Italy will resume its criminal investigation in the events of 15.02.2012 and that both India and Italy will cooperate with each other in pursuit of that investigation” (Order, Paragraph 3).

The Supreme Court of India also further directed that the amount of Rs. Ten Crores now lying with the Registry of this Court shall be transferred to the High Court of Kerala, out of which Rupees Four Crores will be paid to the heirs of each deceased and Rs. Two crores will be paid to the owner of the boat – St. Antony. The Supreme Court requested the Hon’ble Chief Justice of the Kerala High Court to nominate a Judge to pass appropriate order of disbursement/investment of the amount to be paid to the heirs of each deceased (Rupees Four Crores each) so as to protect the interest of the heirs and ensure that the compensation is duly received by the heirs and not diverted/misappropriated. The order of disbursement/investment should be passed after hearing the heirs of each deceased and appropriate order be passed, protecting the best interest of the heirs of each deceased. The remaining amount of Rs. Two Crores has to be paid to the owner of the boat – St. Antony by an account payee cheque.23

B. Private International Law

(i) PASL Wind Solutions Private Ltd. v. GE Power Conversion India Private Ltd24

The present case dealt with questions – as to whether two companies incorporated in India can choose a forum for arbitration outside India – and whether an award made at such forum outside India, to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) applies, can be said to be a “foreign award” under Part II of the Arbitration and Conciliation Act, 1996 and be enforceable as such.

The appellant PASL Wind Solutions Private Ltd. and respondent GE Power Conversion India Private Ltd entered into a settlement agreement dated 23.12.2014. Under clauses 5.1 and 5.2 of the settlement agreement, the respondent agreed to provide certain delta modules along with warranties on these modules for the working of the converter panel. Clause 6 of the settlement agreement contained the dispute resolution clause which reads as follows:

“6. Governing Law and Settlement of Dispute

23 Ibid.

24 In the Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal No. 1647 of 2021 [Arising Out of SLP (Civil) No.3936 Of 2021], available at: <https://indiankanoon.org/doc/79928496/> accessed on 25 May 2021.
6.1 Any dispute or difference arising out of or relating to this agreement shall be resolved by the Parties in an amicable way. (A minimum of 60 days shall be used for resolving the dispute in amicable way before same can be referred to arbitration).

6.2 In case no settlement can be reached through negotiations, all disputes, controversies or differences shall be referred to and finally resolved by Arbitration in Zurich in the English language, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, which Rules are deemed to be incorporated by reference into this clause. The Arbitration Award shall be final and binding on both the parties.

Disputes arose between the parties pursuant to the settlement agreement whereby the appellant claimed that warranties that were supposed to be given for converters were not so given, whereas the respondent argued that the warranties covered only the delta modules and not the converters. Thus, on 3 July 2017, the appellant issued a request for arbitration to the International Chamber of Commerce (ICC). On 18 August 2017, the parties agreed to resolution of disputes by the sole arbitrator appointed by the ICC. It was agreed between the parties, as was reflected in the request for arbitration and in the terms of reference to arbitration, that the substantive law applicable to the dispute would be Indian law. The respondent filed a preliminary application challenging the jurisdiction of the arbitrator on the ground that two Indian parties could not have chosen a foreign seat of arbitration. Importantly, the appellant opposed the said application and asserted that there was no bar in law from this being done. By Procedural Order No.3 dated 20 February 2018, the learned sole arbitrator, Mr. Ian Leonard Meakin, dismissed the respondent’s preliminary application, holding as follows: “The Tribunal finds that two Indian parties can arbitrate outside India”. As the appellant failed to oblige, the respondent initiated enforcement proceedings under sections 47 and 49 of the Arbitration Act before the High Court of Gujarat. At this stage, the appellant asserted that the seat of arbitration was really Mumbai, where all the hearings of the arbitral proceedings took place. So asserting, the appellant filed proceedings. The Appellant argued that two Indian parties cannot designate a seat of arbitration outside India as doing so would be contrary to section 23 of the Indian Contract Act, 1872 read with section 28(1)(a) and section 34(2A) of the Arbitration Act. The Gujarat High Court found that Zurich was the seat of the arbitration, and that Indian law did not prevent two Indian parties from choosing a foreign arbitral seat. As the proceedings were seated in Zurich, the award was a foreign award that was subject to the enforcement regime in Part II of the Act. The Gujarat High Court, however, rejected GE India’s request for interim relief on the basis that Section 9, contained in Part I of the Act,
only applied to “international commercial arbitrations,” as defined in Section 2(1)(f) read with Section 2(2) of the Act. It therefore held that, Section 9 could not apply in this case as both parties were Indian.

PASL filed a Special Leave Petition before the Supreme Court seeking to set aside the Gujarat High Court’s judgement which, in key part, reiterated its argument before the High Court that two Indian parties could not choose a foreign seat. PASL raised three main arguments before the Supreme Court: (1) Mumbai (and not Zurich) was the seat of arbitration; (2) only an award issued in an “international commercial arbitration” as defined in Section 2(1)(f), can be considered a foreign award and be enforced under Part II of the Act; and (3) two Indian parties designating a foreign arbitral seat would be contrary to Section 23 and 28 of the Indian Contract Act, 1872 (“Contract Act”), read with Section 28(1)(a) and 34(2A) of the Act. GE India also filed a cross-objection, challenging the Gujarat High Court’s refusal to grant interim relief under Section 9 of the Act.

On 20 April 2021, the Supreme Court of India rejected PASL’s appeal and each of its arguments on whether two Indian parties could choose a foreign seat. The Supreme Court of India also upheld GE India’s cross-objection and granted it interim relief to prevent the dissipation of PASL’s assets. It therefore argued that the award was not a “foreign award,” but was Indian-seated. The Supreme Court disagreed the contention made by PASL that the enforcement proceedings initiated under Sections 47 and 49 of the Act only applied to “foreign awards,” and that those provisions did not apply to this case because, applying the closest connection test, Mumbai (and not Zurich) was the seat of arbitration. The Supreme Court held that, in this case, it was clear from the arbitration agreement that the seat was Zurich. The arbitral tribunal had also determined that the seat was Zurich. The Supreme Court thus held that there was no basis to apply the closest connection test to determine the arbitral seat.

The Supreme Court of India rejected PASL’s arguments and, in particular, its attempts to read the definition of “international commercial arbitration” contained in Section 2(1)(f) in Part I of the Act into the definition of “foreign awards” contained in Section 44 in Part II of the Act. The Supreme Court of India found that the arbitral award in this case satisfied all four elements and was therefore a “foreign award” under Part II of the Act. The two questions before the Supreme Court were (i) whether Section 28 of the Contract Act prohibits two Indian parties from choosing a foreign arbitral seat; and (ii) whether permitting them to do so would be a contravention of public policy under Section 23 of the Contract Act. On GE India’s cross-objection, the Supreme Court concluded that GE India’s request for interim relief was valid, rejecting the Gujarat High Court’s conclusion that Section 9 of the Act could not apply in aid of a foreign seated arbitration between two
Indian parties. In brief, the decision has strongly reinforced the primacy of party autonomy.

(ii) Interdigital Technology Corporation v. Xiaomi Corporation & Others25

This case dealt with the applications seeking anti-enforcement injunctions. The Delhi High Court in Interdigital Technology Corporation v. Xiaomi Corporation & Others held, inter alia, that it is impermissible for a court in one sovereign jurisdiction to injunct a party before it from pursuing its cause before a court in another jurisdiction, where such latter jurisdiction is the only competent forum. The Delhi High Court carved out an exception holding that such an injunction would be permissible in rare instances where continuation of the later proceedings are ‘vexatious’ or ‘oppressive’ to the proceedings pending before the injuncting court. Having laid down this principle, the Delhi HC granted an anti-enforcement injunction in favour of Interdigital against an anti-suit injunction passed by a court in Wuhan. This judgment adjudicates IA 8772/2020, whereby the plaintiff Interdigital has sought an injunction, against Defendant Xiaomi, restraining them from enforcing, against the plaintiff, an anti-suit injunction order dated 23rd September, 2020, passed by the Wuhan Intermediate People’s Court, (the Wuhan Court), pending final disposal of the proceedings. The case was regarding the alleged use of technology of Interdigital’s standard essential patents (SEPs) by Xiaomi sans proper permission.

The facts of the case were as follows: Xiaomi Corporation (Xiaomi) approached the Wuhan Intermediate People’s Court (Wuhan Court) on 9 June 2020 and sought fixing of a global FRAND royalty rate, basis which they could obtain licence from Interdigital to operate and use Interdigital’s patented technology (Wuhan Suit/Wuhan Proceedings). Interdigital instituted a civil suit against Xiaomi before the Delhi HC on 29 July 2020 and summons were issued on 4 August 2020. In the Civil Suit, Interdigital alleged infringement of certain Standard Essential Patents (SEPs) held by Interdigital’s name and registered in India, and sought an injunction against Xiaomi from using the SEPs without valid licences at rates which are fair, reasonable and non-discriminatory.

In the Wuhan Suit, Xiaomi further filed an application seeking an anti-suit injunction against the Civil Suit (Anti-Suit Injunction Application) on 4 August 2020 i.e., same day when the Summons in the Civil Suit was issued. On 23 September 2020, the Wuhan Court allowed Xiaomi’s application and passed an order directing Interdigital and its affiliates to withdraw their application seeking any temporary/permanent injunction before the Delhi HC, and restrain them from filing any such application before the Delhi HC or any court in China. The Wuhan Court also ordered that if Interdigital or its affiliates (collectively referred to as Interdigital) do

25 I.A. 8772/2020 in Delhi High Court and CS(COMM) 295/2020.
not comply with its ruling, a fine of RMB 1 million yuan per day would be imposed (Anti Suit Injunction Order).

Present suit, where Interdigital filed an interlocutory application before the Delhi HC pressing for: (i) an injunction against Xiaomi and the other defendants restraining them from enforcing the Anti Suit Injunction Order, pending final disposal of the Civil Suit; (ii) a direction to Xiaomi to immediately withdraw its Anti-Suit Injunction Application in the Wuhan Suit; and (iii) imposition, on the Defendants, of costs equivalent to the costs likely to be imposed on the Plaintiffs by the Wuhan Court.

In the final judgment delivered on 3rd May 2021, the Delhi High Court confirmed and made absolute India’s first anti-enforcement injunction granted in favour of US technology giant and innovator, Interdigital and against Chinese multinational Xiaomi Corporation. The Delhi High Court observed that the Wuhan Court failed to consider the fact that the cause of action arose in India as the proceedings before it was of perceived infringement of six specific Indian patents.

(iii) M/S. N. N. Global Mercantile Pvt. Ltd. v. M/S. Indo Unique Flame Ltd. & Others

This case dealt with respect to the application of the doctrine of separability of an arbitration agreement from the underlying substantive contract in which it is embedded; whether an arbitration agreement would be non-existent in law, invalid or un-enforceable, if the underlying contract was not stamped as per the relevant Stamp Act; and, whether allegations of fraudulent invocation of the bank guarantee furnished under the substantive contract, would be an arbitrable dispute. The facts of the case were as follows: Indo Unique and Global Mercantile entered into a contract, a Transport Work Order, for transportation of coal. The Transport Work Order provided for Global Mercantile to furnish a security deposit in the form of a bank guarantee in Indo Unique’s favour, which it did, and for settlement of any disputes through arbitration. Disputes arose between the parties. Indo Unique invoked the bank guarantee. Global Mercantile challenged this invocation by way of a suit which Indo Unique resisted and sought a reference to arbitration under Section 8 of the Indian Arbitration and Conciliation Act, 1996. Global Mercantile opposed the reference, amongst others, on the ground that the Transport Work Order that contained the arbitration agreement was not stamped as per the Maharashtra Stamp Act, 1958. It argued that the arbitration agreement did not exist in law. The Supreme Court of India comprising three judges, Justice Dr Dhananjaya Y Chandrachud, Justice Indu Malhotra, Justice Indira Banerjee on 11 January 2021 decided that “[t]he arbitration agreement would not be rendered invalid, un-enforceable or non-

26 Civil Appeal Nos. 3802 - 3803 / 2020, Supreme Court of India.
existent, even if the substantive contract is not admissible in evidence or cannot be acted upon on account of non-payment of Stamp Duty” for the following four reasons. First, and the most fundamental, the doctrine of separability. After ferreting a warren of classic cases on separability and examining Section 16 of the Indian Arbitration Act (which is based on Article 16 of the UNCITRAL Model Law of International Commercial Arbitration) the Court found ample support to state that the arbitration agreement is a separate agreement and therefore, would survive independent of the substantive contract. Second, the legislative policy of minimal interference by courts whilst referring matters to arbitration following the recent amendments to the Indian Arbitration Act. On a combined reading of Sections 5 and 16 of the Indian Arbitration Act and the insertion of Section 11 (6A) (which amendment only requires courts to determine the existence (and not validity) of an arbitration agreement—and not of the underlying contract—before referring parties to arbitration), the Court held that the question as to whether the substantive contract was voidable for non-payment of stamp duty could be resolved by the arbitrator deferring to kompetenz-kompetenz. Since the Court was satisfied of the existence of the arbitration agreement, it ought to refer parties to arbitration despite any such apparent defect. Third, SMS Tea Estates v. M/s Chanmari Tea Co. (SMS Tea Estates) and Garware Wall Ropes v. Coastal Marine Constructions and Engineering Ltd. (Garware Wall Ropes), these two prior decisions of the Supreme Court, did not reflect the correct legal position on this issue. It overruled SMS Tea Estates for two reasons: (i) it predated the insertion of Section 11(6A) that further curtailed court interference and (ii) it wrongly did not extend separability to salvage the arbitration agreement from an unregistered contract. As for Garware Wall Ropes, which was inspired by SMS Tea Estates and did not give due respect to separability by holding that the arbitration agreement did not exist in law till stamp duty on the substantive contract was paid. According to the Court, this judgment failed to appreciate that the two agreements were separate. Fourth, since the Maharashtra Stamp Act (a state legislation equivalent to the Indian Stamp Act) did not specifically subject an arbitration agreement to payment of stamp duty, it did not impede enforcement of the independent arbitration agreement.

II. INDIAN LEGISLATURE

(i) The Major Port Authorities Act, 2021, NO. 1 OF 2021

The Major Port Authorities Act, 2021 received the assent of the President on the 17th February 2021 which replaced the previous Major Port Trusts Act 1963. The

27 Ibid.
28 Ibid.
29 Available at: <https://egazette.nic.in/WriteReadData/2021/225265.pdf> accessed on 16 June 2021.
Major Port Authorities Bill 2020 was passed by the Lok Sabha on 23 September 2020 and by the Rajya Sabha on 10 February 2021. The Major Port Authorities Act, 2021, is aimed to provide for regulation, operation and planning of Major Ports in India and to vest the administration, control and management of such ports upon the Boards of Major Port Authorities and for matters connected therewith or incidental thereto.

(ii) Unmanned Aircraft System Rules, 2021

Ministry of Civil Aviation issued Unmanned Aircraft System Rules, 2021 vide Notification No. F. No. AV-11012/4/2019-DG on the 12th March 2021. It aims to regulate the use and operation of Drones or Unmanned Aerial System (“UAS”) for civilian purposes in India. The Rules prohibits flying of drones over a Prohibited Area. Rules specifies Prohibited Area as ‘the airspace of defined dimensions, above the land areas or territorial waters of India within which the flights of unmanned aircraft are not permitted.’ The new UAS Rules also impose equivalent compliance requirements with even stricter penalties for use of unmanned aircraft for any unfortunate future use. Further, these Rules have also been laid on the Table of Rajya Sabha on 24 March 2021 and on the Table of Lok Sabha on 25 March 2021.

(iii) The Arbitration and Conciliation (Amendment) Act, 2021

The Arbitration and Conciliation (Amendment) Bill, 2021 was introduced in Lok Sabha on 4 February 2021. It seeks to amend the Arbitration and Conciliation Act, 1996. The Bill was passed by the Lok Sabha on 12 February 2021 and by the Rajya Sabha on 10 March 2021 and became the Arbitration And Conciliation (Amendment) Act 2021 on 11 March 2021 after getting assent of the President of India. This Act contains provisions to deal with domestic and international arbitration and defines the law for conducting conciliation proceedings. The Act replaced an Ordinance with same provisions promulgated on 4 November 2020. The Act specifies that a stay on the arbitral award can be provided (even during the pendency of the setting aside of the application) if the court is satisfied that: (i) the relevant arbitration agreement or contract, or (ii) the making of the award, was induced, or effected

32 Ibid.
33 Available at: <https://prsindia.org/billtrack/the-arbitration-and-conciliation-amendment-bill-2021> accessed on 15 June 2021.
34 Available at: <https://egazette.nic.in/WriteReadData/2021/225832.pdf> accessed on 15 June 2021.
by fraud or corruption. This change will be effective from October 23, 2015. The Act also specified certain qualifications, experience, and accreditation norms for arbitrators in a separate schedule.

(iv) Copyright (Amendment) Rules, 2021

Ministry of Commerce and Industry, the Government of India has notified Copyright (Amendment) Rules, 2021 vide Gazette notification under reference G.S.R. 225(E) dated 30th March, 2021. In India, the copyright regime is governed by the Copyright Act, 1957 and the Copyright Rules, 2013. The Copyright Rules, 2013 were last amended in the year 2016. The amendments have been introduced with the objective of bringing the existing rules in parity with other relevant legislations. It aims to ensure smooth and flawless compliance in the light of the technological advancement in digital era by adopting electronic means as primary mode of communication and working in the Copyright Office. A new provision regarding publication of a copyrights journal has been incorporated, thereby eliminating the requirement of publication in the Official Gazette. The said journal would be available at the website of the Copyright Office. To reinforce transparency in working of copyright societies a new rule has been introduced, whereby the copyright societies will be required to draw up and make public an Annual Transparency Report for each financial year. The amendments have harmonised the Copyright Rules with the provisions of Finance Act, 2017 whereby the Copyright Board has been merged with Appellate Board.

(v) Unstarred Question No. 1427: Legal Assistance to Women

Shri Gopal Chinnaya Shetty, Shrimati Poonam Mahajan and Shri G. M. Siddeshwar, Members of Parliament, in the Lok Sabha sought information about scheme of legal assistance to Indian women who have been abandoned by their Indian husbands living in foreign countries (a) the details of the countries where the scheme to provide legal assistance to Indian women who have been cheated/abandoned by their Indian husbands living in foreign countries are being implemented; (b) the nation-wise number of women benefited from the said scheme during the last three years; (c) whether the Government proposes to bring such scheme in other countries also; and (d) if so, the steps taken in this regard.

Shri V. Muraleedharan, the Minister of State in the Ministry of External Affairs, replied on 10 February 2021 in the Lok Sabha and stated that (a) The Indian Community Welfare Fund (ICWF) has been setup in all the Indian Missions & Posts abroad for assisting Overseas Indian nationals including Indian women who

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36 Available at: <https://mea.gov.in/lok-sabha.htm?dtl/33490/QUESTION_NO1427_LEGAL_ASSISTANCE_TO_WOMEN> accessed on 15 June 2021.
have been cheated/abandoned by their Indian husbands living in foreign countries; 
(b) Under this scheme, a total of 60 women have been provided legal assistance 
during last three years by the Missions & Posts abroad. He provided the details of 
nation-wise number of women benefited from this scheme during last three years; 
and (c) & (d) Not applicable.37

(vi) Unstarred Question No. 399 Depicting J & K and Ladakh in a Different 
Colour in the Map of World Health Organization Website

Shri Jyotiraditya M. Scindia, Member of Parliament in the Rajya Sabha asked question 
pertaining to use of a different colour in the Map by WHO (a) whether a map of 
India on the website of World Health Organization (WHO) is depicting the Union 
Territories of Jammu & Kashmir and Ladakh in a totally different colour; (b) if so, 
the details thereof; (c) whether Government of India has lodged any protest with 
WHO in this regard; and (d) if so, the steps taken by Government to ensure that 
such incidents may not recur in future?38 Shri V. Muraleedharan, the Minister of 
State in the Ministry of External Affairs replied on 4 February 2021 in the Rajya 
Sabha and wherein he stated with respect to questions no. (a) to (d). The issue of 
wrong depiction of the map of India on World Health Organization (WHO) website 
has been raised strongly with WHO including at the highest level. In response, 
WHO has informed the Permanent Mission of India in Geneva that they have put a 
disclaimer on the portal saying “The designations employed and the presentation of 
these materials do not imply the expression of any opinion whatsoever on the part 
of WHO concerning the legal status of any country, territory or area or of its 
authorities, or concerning the delimitation of its frontiers or boundaries. Dotted 
and dashed lines on maps represent approximate border lines for which there may 
not yet be full agreement.” Nevertheless, Government of India’s position on the 
right depiction of its boundaries has been unambiguously reiterated.39

(vii) Unstarred Question No.409 Repatriation of Indians Lodged in Foreign 
Prisons

Prof. Manoj Kumar Jha, Member of Parliament, Rajya Sabha asked questions 
pertaining to repatriation of Indian lodged in foreign prisons (a) the details of Indian 
nationals lodged in foreign prisons, domicile-wise, sex-wise and offence-wise; (b) 
the total number of applications for repatriation received and total number of Indian 
nationals repatriated from foreign prisons since the enactment of the Repatriation 
of Prisoners Act in 2003; (c) the number of countries with which India has bilateral

37 Ibid.
38 Available at: <https://mea.gov.in/rajya-sabha.htm?dtl/33465/QUESTION_NO399_ 
DEPICTING_JampK_AND_LADAKH_IN_A_DIFFERENT_COLOUR_IN_THE_ 
MAP_ON_WHO_WEBSITE> accessed on 23 June 2021.
agreements in regard to repatriation of prisoners; and (d) the inter-ministerial process of interaction in this regard between different Ministries and Departments and the average time taken to process such repatriation requests?40

Shri V. Muraleedharan, the Minister of State in the Ministry of External Affairs in his reply on 4 February 2021 in the Rajya Sabha provided information (a) As per the information available with the Ministry, the number of Indian prisoners in foreign jails as of 31.12.2020 is 7139 which also includes under-trials. However, due to strong privacy laws prevailing in many countries, the local authorities do not share information on prisoners unless the person concerned consents to the disclosure of such information. Even countries which share information do not generally provide detailed information about the foreign nationals imprisoned. The state-wise, sex-wise and offence-wise detailed list as per the available information is placed before this house; (b) After the enactment of the Repatriation of Prisoners Act in 2003, 205 applications for repatriation have been received and 73 Indian prisoners have been repatriated from foreign prisons; (c) So far, India has signed bilateral agreements with 31 countries; (d) There is a regular process of inter-Ministerial meetings, consultation and coordination between the Ministries of External Affairs and Home Affairs on the issue of repatriation of Indian nationals in foreign prisons including in the context of bilateral agreements for Transfer of Sentenced Persons (TSP). Transfer of sentenced persons involves several stages of processing, namely obtaining consent of the transferring country, availability of complete documentation necessary for processing the request, obtaining comments of the State Government concerned and identification of the specific prison where the prisoner is to be lodged, making escort arrangements by the State Government concerned for transfer from foreign country to India, clearance from various agencies etc. All these factors have to be attended to while processing request transfer. Therefore, no rigid timeline can be fixed for completion of such requests as the fulfilment of requirement depends on receiving complete documentation and clearance from foreign Governments, State Governments and other relevant agencies etc.41

(viii) Unstarred Question No. 404 Attacks on Indian Fishermen by Sri Lankan Navy

Shri Vaiko, Member of Parliament, Rajya Sabha sought information (a) the number of fishermen attacked, arrested and released by Sri Lankan Navy in the last one year; (b) the number of boats and trawlers of Indian fishermen seized or damaged;

39 Ibid.
40 Available at: <https://mea.gov.in/rajya-sabha.htm?dtl/33474/QUESTION_NO409_REPATRIATION_OF_INDIANS_LODGED_IN_FOREIGN_PRISONS> accessed on 23 June 2021.
41 Ibid.
(c) the steps taken by Government to protect the Indian fishermen including deployment of Indian Coast Guard on the disputed water zone; and (d) the diplomatic efforts made by Government to bring a solution to the perennial problems being faced by Indian fishermen, the details thereof?42

Shri V. Muraleedharan, the Minister of State in the Ministry of External Affairs, gave reply on 4 February 2021 in the Rajya Sabha. With respect to (a) & (b): In 2020, 74 Indian fishermen were arrested and 11 boats were confiscated by the Sri Lankan authorities. With sustained diplomatic efforts the Government has secured the release of all these fishermen. At present, 12 Indian fishermen, arrested along with 2 boats in January 2021, are in Sri Lankan custody. They have been provided consular and legal assistance by our High Commission in Colombo and Consulate in Jaffna. Efforts are ongoing to secure the release of these fishermen. Presently, 62 boats of Indian fishermen are in Sri Lankan custody. With respect to (c) & (d) Government of India has been taking up the matter of the release of our fishermen and their fishing boats with the Government of Sri Lanka at high levels through diplomatic channels. Following the 2+2 initiative in November 2016 when the Foreign and Fisheries Ministers of the two countries met in New Delhi, a bilateral Joint Working Group (JWG) mechanism and meeting of the Ministers for Fisheries of the two countries was institutionalized to address the fishermen issues with Sri Lanka. On December 30, 2020, 4th Round of JWG talks was held between the two governments where the entire gamut of issues related to fishermen were discussed.

(ix) Unstarred Question No. 401 Negotiations with China to Address Border Disputes

Shri Anand Sharma, Member of Parliament, Rajya Sabha sought information (a) whether Government has held negotiations with China to address border disputes in Ladakh and Arunachal Pradesh; (b) if so, the details thereof and number of talks held; (c) whether such discussions have led to any agreements to address these disputes, both short and long term; and (d) if so, the details thereof?43

Shri V. Muraleedharan, the Minister of State in the Ministry of External Affairs on 4 February 2021 in the Rajya Sabha gave reply of questions (a) to (d). In order to explore the framework for a boundary settlement from the political perspective of the overall bilateral relationship, India and China have each appointed a Special

42 Available at: <https://mea.gov.in/rajya-sabha.htm?dtl/33469/QUESTION_NO404_ATTACKS_ON_INDIAN_FISHERMEN_BY_SRI_LANKAN_NAVY> accessed on 12 June 2021.

43 Available at: <https://mea.gov.in/rajya-sabha.htm?dtl/33467/QUESTION_NO401_NEGOTIATIONS_WITH_CHINA_TO_ADDRESS_BORDER_DISPUTES> accessed on 20 June 2021.
Representative (SR). There have been twenty two meetings of SRs so far with the last meeting held in New Delhi on 21 December 2019. The two sides have agreed to seek a fair, reasonable and mutually acceptable solution to the boundary question through dialogue and negotiations. They also agree that pending final settlement of the boundary question, maintenance of peace and tranquility in the border areas is an essential basis for the overall development of the bilateral relationship. In 2005, the two sides signed ‘Agreement on the Political Parameters and Guiding Principles for the Settlement of the India-China Boundary Question’.

From April-May 2020, there had been an enhanced deployment of troops and armaments by the Chinese side in the border areas and along the Line of Actual Control (LAC) in the Western Sector. Since mid-May the Chinese side attempted to transgress the LAC in several areas of the Western Sector of the India-China border area. These attempts were invariably met with an appropriate response from our side. To address the issues arising from such attempts, the two sides have been engaged in discussions through the established military and diplomatic channels. The Senior Commanders from both sides have held nine meetings on 6 June 2020, 22 June 2020, 30 June 2020, 14 July 2020, 2 August 2020, 21 September 2020, 12 October 2020, 6 November 2020 and 24 January 2021. In addition, six meetings of the Working Mechanism for Consultation and Coordination on India-China border affairs (WMCC) have also been held on 24 June, 10 July, 24 July, 20 August, 30 September and 18 December 2020. Raksha Mantri met the Chinese Defence Minister General Wei Fenghe on 4 September 2020 in Moscow. Raksha Mantri conveyed that the two sides should resolve the ongoing situation and outstanding issues in the border areas peacefully through dialogue. External Affairs Minister met Chinese Foreign Minister Wang Yi on 10 September 2020 in Moscow. Both Ministers had a frank and constructive discussion on the developments in the India-China border areas and reached a five point agreement to address the ongoing issues along the LAC. The two Foreign Ministers agreed that the current situation in the border areas is not in the interest of either side. They agreed therefore that the border troops of both sides should continue their dialogue, quickly disengage, maintain proper distance and ease tensions.

III. INDIAN EXECUTIVE

(i) Government of India Notification to Give Effect to the Extradition Treaty between India and Afghanistan

The Extradition Treaty between the Republic of India and the Islamic Republic of Afghanistan was signed at New Delhi on 14th day of September, 2016 and the
Instruments of ratification of the Treaty were exchanged at Kabul on 24th day of
November 2019. This treaty entered into force with effect from the 24th day of
November 2019 in accordance with the provisions of paragraph (2) of Article 22
of the said Treaty. This treaty is notified S.O. 977(E) by the Ministry of External
Affairs Order on the 1st March, 2021.46 The Central Government, in this notification,
hereby, given effect and directs that the provisions of the said Act, other than the
provisions of Chapter III, shall apply to the Islamic Republic of Afghanistan with
effect from the date of entry into force of this extradition treaty. The parties of the
Treaty is desiring to make more effective the cooperation of the two countries in
the suppression of crime by making further provision for the reciprocal extradition
of offenders.47

(ii) India Statement on Syria (Chemical Weapons) in UN Security Council
Open VTC Meeting

While condemning the use of chemical weapons, Indian Ambassador T. S. Tirumurti,
Permanent Representative stated in UN Security Council Open VTC Meeting on
allegations of use of chemical weapons in Syria held on 5 January 2021 that “India
has consistently underlined the need for an impartial and objective investigation
into any alleged use of chemical weapons, scrupulously following the provisions
and procedures laid down in the Convention. Any concerns should be addressed on
the basis of consultation among all concerned parties. In our view, politicization of
the issue is neither helpful nor productive”.48 He further mentioned that “India
remains concerned about the possibility of such weapons falling into the hands of
terrorist organizations and individuals. Terrorist groups have taken advantage of
the decade long conflict in Syria to entrench themselves posing a threat to the
entire region. The world cannot afford to give these terrorists any sanctuary or
dilute its fight against these terrorist groups.”49 He pointed out that “India has
consistently called for a comprehensive and peaceful resolution of the Syrian conflict
through a Syrian-led dialogue, taking into account the legitimate aspirations of the
people of Syria. We have also contributed to the return of normalcy and rebuilding
of Syria through humanitarian assistance and human resource development.”50 He
concluded by saying that “we also remain supportive of both the Geneva and the
Astana processes for an expeditious resolution of conflict in Syria.\(^{51}\) India maintained this position in subsequent meeting of the UNSC. Mr. R. Ravindra, Deputy Permanent Representative - Political Coordinator in UNSC meeting/consultations on Syria (Chemical weapons) held on 3 February 2021 reaffirmed India’s position and stated that “India has consistently underlined the need for an impartial and objective investigation into any alleged use of chemical weapons, scrupulously following the provisions and procedures laid down in the Convention”.\(^{52}\) It was again reiterated by Mr. R. Ravindra, Deputy Permanent Representative - Political Coordinator in UN Security Council Briefing on Middle East (Syria)-chemical weapons on 4 March 2021\(^{53}\) and again in UNSC Briefing on Middle East (Syria Chemical Weapons) held on 6 April 2021\(^{54}\) and again in UNSC briefing on Syria (Chemical Weapons) held on 3 June 2021\(^{55}\).

(iii) India Proposed the Action Plan on International Cooperation in Combating Terrorism in UN Security Council Open Debate

On the occasion of the 20th Anniversary of Security Council Resolution 1373 (2020) and the establishment of the Counter Terrorism Committee, India’s External Affairs Minister H.E. Dr. S. Jaishankar in UN Security Council on 12 January 2021 proposed an eight points\(^{56}\) that could in a way be an Action Plan: i) First, we must all summon up the political will to combat terrorism. There must be no ifs and buts in this fight. Nor should we allow terrorism to be justified and terrorists glorified. All member States must fulfill their obligations enshrined in international counter terrorism instruments and conventions; ii) Two, we must not countenance double standards in this battle. Terrorists are terrorists; there are no good and bad ones.

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51 Ibid.  
52 Statement by Mr. R. Ravindra, Deputy Permanent Representative - Political Coordinator UN Security Council briefing/consultations on Syria (Chemical weapons), 3 February 2021, available at: <https://www.pminewyork.gov.in/IndiaatUNSC?id=NDE1Ng,,> accessed on 12 May 2021.  
53 Statement by Mr. R. Ravindra, Deputy Permanent Representative - Political Coordinator in UN Security Council Briefing on Middle East (Syria)-chemical weapons, 4 March 2021, available at: <https://www.pminewyork.gov.in/IndiaatUNSC?id=NDE4NA,,>  
54 Statement by Mr. R. Ravindra, Deputy Permanent Representative - Political Coordinator, UNSC Briefing on Syria (Chemical Weapons), 6 April 2021, available at: <https://www.pminewyork.gov.in/IndiaatUNSC?id=NDIxNQ,,> accessed on 13 May 2021.  
Those who propagate this distinction have an agenda. And those who cover up for them are just as culpable; iii) Accordingly, we must reform the working methods of the Committees dealing with Sanctions and Counter Terrorism. Transparency, accountability and effectiveness are the need of the day. The practice of placing blocks and holds on listing requests without any rhyme or reason must end. This only erodes our collective credibility; iv) Four, we must firmly discourage exclusivist thinking that divides the world and harms our social fabric. Such approaches facilitate radicalization and recruitment by breeding fear, mistrust, and hatred among different communities. The Council should be on guard against new terminologies and false priorities that can dilute our focus; v) Five, enlisting and delisting individuals and entities under the UN sanctions regimes must be done objectively, not for political or religious considerations. Proposals in this regard merit due examination before circulation; vi) Six, linkages between terrorism and transnational organized crime must be fully recognized and addressed vigorously. We, in India, have seen the crime syndicate responsible for the 1993 Mumbai bomb blasts not just given State protection but enjoying 5-star hospitality; vii) Seven, combating terrorist financing will only be as effective as the weakest jurisdiction. The Financial Action Task Force (FATF) should continue to identify and remedy weaknesses in anti-money laundering and counter-terror financing frameworks. Enhanced UN coordination with FATF can make a big difference; viii) and Eight, adequate funding to UN Counter Terrorism bodies from UN regular budget requires immediate attention. The forthcoming 7th review of the UN’s Global Counter Terrorism Strategy offers an important occasion to strengthen measures to prevent and combat terrorism and build capacities of member states.

(iv) India Statement on “Upholding the Collective Security System of the UN Charter” in UNSC Arria Formula Meeting

While placing on record India’s reservations against the Arria format of meetings, Ambassador K. Nagaraj Naidu, Deputy Permanent Representative from India on 24 February 2021 stated that “the theory and practice of the use of force during the 19th and early 20th centuries legitimised, in some ways, the “resort to war” in international law as a procedure of self-defence as long as certain criteria were met. The Covenant of the League of Nations represented a first significant break with the traditional theory and practice and rendered the “resort to force” as unlawful in certain specific circumstances. While the spirit of the Covenant has been incorporated in the various articles of the UN Charter, the customary right of self-defence has remained unimpaired.”\(^{57}\) He further pointed out that “Article 2(4) of

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the UN Charter requires that states refrain from the use of force. However, the
drafting history of Article 51 of the UN Charter and the relevant San Francisco
Conference Report of June 1945 that considered Article 2(4) of the UN Charter
mentions that “the use of arms in legitimate self-defence remains admitted and
unimpaired.” Article 51 also explicitly acknowledges the pre-existing customary
right of self-defence, as recognized by the International Court of Justice and the
UN Security Council by stating that “nothing in the present Charter shall impair the
inherent right of individual or collective self-defence.” He reminded that “Customary
international law has long recognized the principles governing the use of force in
self-defense. Exercising self-defense is a primary right of States to be exercised
when the situation is imminent and demands necessary, immediate, and proportionate
action.” He emphasized that “Article 51 is not confined to “self-defense” in response
to attacks by states only. The right of self-defense applies also to attacks by non-
state actors. In fact, the source of the attack, whether a state or a non-state actor,
is irrelevant to the existence of the right of self-defense.” He underlined that “Non-
state actors such as terrorist groups often attack states from remote locations
within other host states, using the sovereignty of that host state as a smokescreen.
In this regard, a growing number of States believe that the use of force in self-
defense against a non-state actor operating in the territory of another host State
can be undertaken if: (i) The non-state actor has repeatedly undertaken armed
attacks against the State; (ii) The host State is unwilling to address the threat posed
by the non-state actor; (iii) The host State is actively supporting and sponsoring
the attack by the non-state actor.” He highlighted that “A State would be compelled
to undertake a pre-emptive strike when it is confronted by an imminent armed
attack from a non-state actor operating in a third state. This state of affairs exonerates
the affected state from the duty to respect, vis-a-vis the aggressor, the general
obligation to refrain from the use of force. In fact, Security Council resolutions
1368(2001) and 1373(2001) have formally endorsed the view that self-defense is
available to avert terrorist attacks such as in the case of the 9/11 attacks.” He
recalled that “the 1974 UNGA ‘Declaration on Principles of International Law,
Friendly relations and Cooperation among States in Accordance with the Charter of
the United Nations’ requires positive action on the part of a member state so as not
to acquiesce or tolerate terrorist activities originating from within its territory, nor
allow the territory under its control to be used for terrorism against another state.
The Security Council also mandates all States to refrain from providing any form
of support, active or passive, to entities or persons involved in terrorist acts.” He
has drawn attention to the fact that “despite this, some states are resorting to proxy

58 Ibid.
59 Ibid.
60 Ibid.
war by supporting non-state actors such as terrorist groups to evade international censure. Such support to non-state actors has ranged from providing and equipping the terrorist groups with training, financing, intelligence and weapons to logistics and recruitment facilitation. India for decades has been subject to such proxy cross-border and relentless state-supported terrorist attacks from our neighborhood. Whether it was the 1993 Mumbai bombings, or the random and indiscriminate firings of 26/11 which witnessed the launch of the phenomenon of lone-wolves or more recently, the cowardly attacks in Pathankot and Pulwama, the world has been witness to the fact that India has repeatedly been targeted by such non-state actors with the active complicity of another host State.\footnote{Ibid.} He concluded that “while we believe that instances where states have exercised the right of self-defense to attack non-state actors located in other states must be consistent with Article 2(4) of the UN Charter, preemptive actions taken to fight the menace of terrorism, even without the consent of the state hosting the non-state actors, meets this criterion because such actions are not of reprisal, since their prime motive is for protecting the affected states’ national integrity and sovereignty.”\footnote{Ibid.}

(v) India Statement on Maintenance of International Peace and Security: Mine Action in UNSC Open Debate

India has shown a deep concern that terrorist groups such as Da’esh, Hayat Taharir Al Sham [HTS], and Al Nusra Front, have resorted to land mines and IEDs as low cost and effective options to spread terror and threaten innocent civilians. Shri Vikas Swarup, Secretary (West), Ministry of External Affairs in UNSC Open Debate on Maintenance of International Peace and Security: Mine Action held on 8 April 2021 stated that “India is fully committed to the Convention on Certain Conventional Weapons and is a signatory to all five of its Protocols. We attach high priority to the full implementation and universalization of Amended Protocol-II as it strikes the right balance between humanitarian concerns and legitimate defense requirements of States, particularly those with long borders. We have a moratorium on the export and transfer of landmines and are committed towards reducing the dependence on Anti-Personnel Mines (APM’s). We believe that the availability of militarily effective alternative technologies that are also cost-effective can help facilitate the goal of complete elimination of APMs.”\footnote{Statement by Shri. Vikas Swarup, Secretary (West), Ministry of External Affairs, UNSC Open Debate on Maintenance of International Peace and Security: Mine Action, 8 April 2021, available at: <https://www.pminewyork.gov.in/IndiaatUNSC?id=NDIxNg,,> accessed on 16 June 2021.} He highlighted that “India has enacted the Right of Persons with Disability Act 2016 which addresses the concerns of persons with disabilities, including landmine survivors. In October 2018, the ‘India for Humanity’
initiative was launched as a part of Mahatma Gandhi’s 150th anniversary celebrations, with a focus on Mahatma Gandhi's philosophy of compassion and service to humanity. Under this initiative, 13 artificial limb fitment camps have been held by India in 12 countries and more than 6500 artificial limbs have been fitted, mainly in Asia and Africa. We are pleased to convey that the limb fitment camps, which aim to provide for the physical, economic and social rehabilitation of the affected persons and help them regain their mobility and dignity, have now been extended up to March 2023. In this context, we acknowledge the association of BMVSS Jaipur, led by Dr. D.R. Mehta, for contributing artificial limb “Jaipur Foot” for thousands affected by disabilities brought by conflicts and land mines.  

He emphasized that “India is a leading contributor to UN peacekeeping operations and has extended assistance towards international de-mining and rehabilitation efforts. We have also undertaken specialist training on Counter IED, bomb disposal and de-mining operations with numerous partner countries, including Australia, Cambodia, Indonesia and Uzbekistan. Our 12-member team of experts participated in a joint counter explosive threat task forces training exercise Ardent Defender-2019 in Ontario, Canada. About 130 personnel from 13 African States participated in exercise AFINDEX, a multinational exercise on demining and unexploded ordinance held in India in March 2019. In addition to providing training in demining, India had also provided seven demining teams to clear landmines in the Northern part of Sri Lanka in 2010 which helped facilitate the return of IDPs to rebuild their lives.”

He concluded stating that “we remain willing to share our best practices with member states and the United Nations with respect to minimizing damages from IED development and proliferation and stand ready to contribute towards capacity building, victim assistance and victim re-habilitation”.

(vi) India Statement in the UNGA on IGN Process on Security Council Reforms

India aligns itself fully with the statements of St Vincent and the Grenadines on behalf of the L.69, and of Germany for the G.4. India also extended her support to the statements of Sierra Leone for the African Group and of Guyana for the CARICOM. While emphasizing on the need to expedite the IGN progress, Indian representative Ambassador T.S. Tirumurti, Permanent Representative of India to the United Nations, in 75th Session of the United Nations General Assembly held on 25 January 2021, proposed some key steps that must be taken in this session, if we are to achieve progress: “First - Immediate application of GA Rules of Procedure to the IGN Process: this will ensure openness, transparency, and an institutional

64 Ibid.
65 Ibid.
66 Ibid.
memory for this process, which is essential if genuine negotiations are to take place. Second – An outcome text: This draft outcome document should ideally be the result of a rolling text, updated after each meeting by the Co-Chairs, to capture the views and positions expressed by all delegations, with attributions. These two are the minimum outcome we would like to see this session. In addition to these two, we will need the following operational changes: One - Live broadcast/webcast of the proceedings: This issue of web-casting becomes even more critical this year, as the COVID-19 related restrictions threaten to hamper delegations’ ability to participate fully in the discussions. Two - Making the best use of the calendar available to us by minimising the time spent on repetition of cluster-based positions, and by focusing on discussion of a single draft outcome document.”

At another occasion Ambassador Tirumurti at second round meeting held on 16 February 2021 reflected upon UNSC reforms agendas especially on “categories of membership” and “the question of veto”. While expressing India’s position in favour of expansion of UN Security Council membership in both the permanent and non-permanent categories, Indian representative stated that “in the 2015 Framework Document, on the issue of “Categories of Membership”, a total of 113 Member States, out of 122 who submitted their positions in the Framework Document, support expansion in both of the existing categories specified in the Charter. This means that more than 90% of the written submissions in the document are in favour of expansion in both categories of membership specified in the Charter. This data is readily available in the Framework Document of 2015 and just needs to be reflected clearly in our single negotiating document.” While responding to some arguments claiming that expansion in the permanent category would be ‘undemocratic’, Indian Ambassador pointed out that “we do not understand how something that is clearly being called for by the majority of the membership would be ‘undemocratic’. We cannot continue to be hostage to a minority in the IGN.” He recalled that “we all acknowledge the fact that the present structure of the Security Council is not reflective of contemporary realities and that there is urgent need to reform it”. He stated that “India believes that the problem lies in the imbalance of influence within the Security Council between the permanent and non-permanent categories.”

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69 Ibid.

70 Ibid.
members. Expanding only in the non-permanent category will not solve the problem – in fact it will widen the difference between permanent and non-permanent members even more, further entrenching a dispensation that may have been relevant in the immediate aftermath of World War II, but is no longer valid. This is why a balanced enlargement in both categories is the only way to ensure an equilibrium that reflects the current situation.  

He argued that “a larger permanent membership will ensure enhanced representation and say in the decision making from the regions and members which are currently not represented or under represented compared to their role and input so far. This would increase the legitimacy, effectiveness and responsiveness of the Council by ensuring that the decisions taken reflect the interest of the broad membership and thus will be better implemented.” On the issue of “the question of veto”, Indian representative stated that “India’s national position has been and remains that all permanent members must be treated as equals, and must enjoy the same rights, responsibilities and prerogatives. This means that as long as the veto exists, veto must be held by all permanent members. We therefore support the Common African Position in regard to the veto.”
Committee on the Elimination of Racial Discrimination

Inter-State communication submitted by the State of Palestine against Israel: decision on admissibility*,**

Applicant: State of Palestine
Respondent: Israel
Date of communication: 23 April 2018 (initial submission)
Date of adoption of decision: 30 April 2021
Subject matter: Effective protection and remedy against any act of racial discrimination; generalized policy and practice with regard to inter-State communications; obligations of the State

Procedural issue: Admissibility of the communication
Substantive issue: Discrimination on the ground of national or ethnic origin

Articles of the Convention: 2, 3, 5, 11 (2), (3) and (5) and 12 (1)

1. The present document was prepared pursuant to article 11 (3) of the Convention.
2. The State of Palestine (the applicant) acceded to the Convention on 2 April 2014. Israel (the respondent) ratified the Convention on 3 January 1979. The applicant claims that the respondent has violated articles 2, 3 and 5 of the Convention with regard to Palestinian citizens living in the Occupied Palestinian Territory, including East Jerusalem.
3. The present document should be read in conjunction with CERD/C/100/3, CERD/C/100/4 and CERD/C/100/5.
4. On 23 April 2018, the applicant submitted a communication against the respondent under article 11 (1) of the Convention.
5. On 7 November 2018, the applicant again referred the matter to the Committee, in accordance with article 11 (2) of the Convention. The present document contains a summary of the main arguments regarding admissibility raised by both parties pursuant to the Committee’s decision of 14 December 2018, in which the Committee requested the parties

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* Adopted by the Committee at its 103rd session (19–30 April 2021).
** The present decision on admissibility has been adopted with the participation of the following members: Sheikha Abdulla Ali Al-Misnad, Chinsung Chung, Ibrahima Guissé, Gun Kut, Mehrdad Payandeh, Vadili Mohamed Rayess, Verene Shepherd, Stamati Stavrinaki, Faith Dikeledi Pansy Tlakula and Yeung Kam John Yeung Sik Yuen. The following members, who signed a dissenting opinion regarding the decision on jurisdiction adopted on 12 December 2019 at the 100th session, indicated that they did not participate in the drafting and adoption of the present decision on admissibility: Marc Bossuyt, Rita Izsák-Ndiaye, Ko Keiko and Li Yanduan. Four members were absent.

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to inform it whether they wished to supply any relevant information on the issues of the jurisdiction of the Committee or the admissibility of the communication.¹

6. On 12 December 2019, at its 100th session, in accordance with article 11 (5) of the Convention, following the oral statements delivered by the representatives of both States parties concerned, the Committee decided that it had jurisdiction to deal with the inter-State communication submitted by the State of Palestine against Israel.² The Committee noted that the applicant and the respondent had submitted arguments on both jurisdiction and admissibility and decided that submissions made on the issue of admissibility would be considered at a later stage.³

I. Observations of the respondent regarding admissibility

7. The respondent, through its responses dated 3 August 2018, 23 September 2018, 14 January 2019 and 20 March 2019, submitted that the applicant’s complaint was inadmissible.

8. Firstly, the respondent argues that the allegations raised by the applicant are subject to judicial review and numerous domestic remedies are available. Without prejudice to the inadmissibility of the communication, or to its position regarding the substance of the case, the respondent submits that it rejects out of hand the baseless and sweeping Palestinian claim regarding the ineffectiveness of local remedies.⁴

9. Secondly, in its submission dated 23 September 2018, the respondent states that it is necessary to distinguish between the preliminary question of the (in)admissibility of the communication and other admissibility issues, including those that relate to efforts made by the parties to adjust the situation and those related to the exhaustion of domestic remedies.⁵ The respondent also states that what is at issue before the Committee at this stage is the inability ab initio of the applicant’s communication to trigger the article 11 mechanism at all, given the absence of treaty relations between Israel and the Palestinian entity under the Convention. This is distinct from “admissibility” issues that arise as part of the article 11 process and that would need to be addressed, in accordance with the timeline and procedures established by the Convention, only in circumstances in which this process was applicable and lawfully initiated.

10. Thirdly, in its submission dated 14 January 2019,⁶ concerning the Committee’s decision of 14 December 2018, the respondent submits that the communication is inadmissible because of the applicant’s failure to invoke and exhaust local remedies, as required under article 11 (3) of the Convention. The communication is not relevant since the Committee lacks jurisdiction to consider it; therefore, the article 11 mechanism cannot be regarded as being activated and, consequently, questions of admissibility do not arise.

¹ Since both parties provided arguments on both jurisdiction and admissibility, the arguments already submitted are used in the present decision.
² See CERD/C/100/5.
³ Due to the coronavirus disease (COVID-19) pandemic and its effect on the Committee’s sessions in 2020, the matter was brought before the plenary during the 103rd session of the Committee.
⁴ See, for example: High Court of Justice of Israel, Abu Safiyeh et al. v. Minister of Defense et al., HCJ 2150/07, Judgment, 29 December 2009; El-Arah et al. v. Central Commander of the Israeli Army and another, HCJ 2775/11; Supreme Court, Anonymous v. State of Israel, CHR 8823/07, Decision, 11 February 2010; and Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Israel Defence Forces Central Commander, HCJ 3799/02, Judgment, 6 October 2005.
⁵ The respondent indicates that the transmittal of its reply to the applicant dated 3 August 2018 is without prejudice to the absence of treaty relations between the parties and to the question of the legal admissibility of the communication.
⁶ The respondent indicates that its submission is made without prejudice to its position that it does not recognize the “Palestinian entity” as a State, and that it has no treaty relationship with it under the Convention.
II. Observations of the applicant regarding the exhaustion of local remedies

11. On 15 February 2019, the applicant submitted additional observations, addressing the different issues raised in the respondent’s submission of 14 January 2019, including the issues of the burden of proof, the exhaustion of local remedies and the lack of efficient local remedies.

12. In that submission, the applicant submits that the Committee had determined in its decision adopted on 14 December 2018, at its ninety-seventh session, that the matter had not been adjusted to the satisfaction of both parties.

13. The applicant submits that the respondent, the occupying Power, continues to deny the applicability of the Convention in the occupied territory of the State of Palestine and has proven that it is not willing to engage in any meaningful dialogue with the State of Palestine as to its observance of its international obligations vis-à-vis the Palestinian people. The applicant also submits that the object and purpose of its communication under article 11 of the Convention relate to a widespread and systematic system of racial discrimination and segregation inherent in the “Israeli settlement project”, which cannot be remedied by minor or cosmetic changes such as those referred to in the respondent’s observations of 14 January 2019.

A. Burden of proof with regard to the exhaustion of local remedies

14. The applicant submits that under generally recognized principles of international law, it is for the party arguing the non-exhaustion of local remedies to prove that effective local remedies exist, and that they have not been exhausted. The applicant also argues that the respondent has relied on the role and availability of the court system in protecting individual rights, and has failed to refer to case law demonstrating effective legal protection for Palestinian nationals.

15. Regarding the first argument, the applicant indicates that this was confirmed as early as 1959 by the arbitral tribunal in the Ambatielos case when it stated that, “in order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used”. This has also been confirmed by various human rights treaty bodies, in particular when it comes to inter-State complaints. Thus, already in its very first inter-State case, brought by Greece against the United Kingdom of Great Britain and Northern Ireland, the European Commission of Human Rights decided that in accordance with the said generally recognised rules of international law it is the duty of the Government claiming that domestic remedies have not been exhausted to demonstrate the existence of such remedies.

16. The applicant submits that this approach is further confirmed by the practice under the Convention on the Elimination of All Forms of Discrimination against Women, and references in particular article 69, paragraph 6, of that Committee’s rules of procedure, which explicitly provides that if a State party concerned disputes the contention of the author or authors of a communication that all available domestic remedies have been exhausted, the State party must give details of the remedies available to the alleged victim; that is, the State party carries the burden of proof in relation to the exhaustion of local remedies. This approach

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8 The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland), p. 119. The applicant emphasizes that, in the case at hand, “the defendant State” is Israel.

9 Ibid.
is also confirmed by the African Commission on Human and Peoples’ Rights\textsuperscript{10} and the Inter-American Court of Human Rights.\textsuperscript{11}

17. The applicant adds that the respondent, the occupying Power, has generally referred to the role and availability of its court system in protecting individual rights; however, it has failed to specifically refer to case law that would demonstrate the possibility for nationals of the State of Palestine to, even in theory, seek effective legal protection from acts of the occupying Power. This holds true, in particular, when it comes to the systematic set-up of illegal settlements throughout the occupied territory of the State of Palestine.

B. Exhaustion of domestic remedies

18. The applicant submits that Palestinian nationals do not have access to the territory of the respondent and therefore are barred from bringing claims before Israeli courts, unless they are supported by Israeli non-governmental organizations or are able to gain a permit to enter Israel. For this reason, Palestinian nationals cannot be expected to exhaust local remedies. The applicant submits that this approach was confirmed by the jurisprudence of the African Commission on Human and People’s Rights, which in 2003 dealt with a comparable occupation of eastern border provinces of the Democratic Republic of the Congo by armed forces from Burundi, Rwanda and Uganda. This approach must apply mutatis mutandis to the nationals of the applicant.

19. The applicant also submits that the exhaustion of local remedies is not required given that the respondent’s violations of the Convention amount to an administrative practice. The Palestinian population living in the occupied territory as a whole faces systematic violations of the Convention, which extend beyond individualized cases.\textsuperscript{12} Under such circumstances, each and every violation of the treaty cannot be expected to have been raised in individual proceedings before local courts of the occupying Power. The applicant affirms that the requirement of exhaustion of local remedies does not apply if it is a legislative or administrative practice that is being challenged.\textsuperscript{13} While an administrative practice can only be determined after an examination of the merits, at the stage of admissibility prima facie evidence, while required, must also be considered as sufficient.\textsuperscript{14} Such prima facie evidence of administrative practice exists where the allegations concerning individual cases are sufficiently substantiated and considered as a whole in the light of the submissions of both the applicant and the respondent.\textsuperscript{15} The observations of the Committee with respect to the respondent’s general policies and practices violating the Convention\textsuperscript{16} demonstrate systematic violations amounting to prima facie evidence of administrative practice. As such,

\textsuperscript{10} Rencontre africaine pour la défense des droits de l’Homme (RADDHO) v. Zambia, para. 12.
\textsuperscript{11} Inter-American Court of Human Rights, Velásquez Rodríguez v. Honduras, Judgment (Preliminary Objections), 26 June 1987, para. 88. See further developments of this rule, which according to the Court not only derives from the specific provision of the American Convention on Human Rights dealing with the exhaustion of local remedies, but is also rooted in general international law (Inter-American Court of Human Rights, Advisory Opinion OC-11/90 on exceptions to the exhaustion of domestic remedies (articles 46 (1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights)), 10 August 1990, para. 41. See also Inter-American Court of Human Rights, Escher et al. v. Brazil, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 6 July 2009, para. 28.
\textsuperscript{12} CERD/C/ISR/CO/14-16, para. 24.
\textsuperscript{14} European Commission of Human Rights, France, Norway, Denmark, Sweden and the Netherlands v. Turkey, Application Nos. 9940/82–9944/82, Decision, 6 December 1983, para. 22.
\textsuperscript{15} Ibid., para. 22.
\textsuperscript{16} CERD/C/ISR/CO/14-16, para. 25.
in line with general principles of international law, this constitutes an additional reason why there is no need to exhaust local remedies before triggering the inter-State complaint procedure under articles 11 to 13 of the Convention.

C. Lack of efficient local remedies

20. Under generally recognized principles of international law, domestic remedies must be available, effective, sufficient and adequate. A remedy is available if the petitioner can pursue it without impediment in practice. It is effective if it offers a reasonable prospect of success to relieve the harm suffered. It is sufficient if it is capable of producing the redress sought after. Purely administrative and disciplinary remedies cannot be considered adequate and effective;¹⁷ local remedies must be available and effective in order for the rule of domestic exhaustion to apply;¹⁸ domestic remedies are unavailable and ineffective if the national laws legitimize the human rights violation being complained of,¹⁹ if the State systematically overlooks the access of the individuals to the courts²⁰ and if the judicial remedies are not legitimate and appropriate for addressing violations, further fostering impunity;²¹ the enforcement and sufficiency of the remedy must have a binding effect and decisions should not be merely recommendatory in nature, as a State would be free to disregard such decisions;²² and the court must be independent and impartial.²³

D. Israeli judicial system

21. The respondent’s judicial system is illegitimate, futile, unavailable, ineffective and insufficient. The respondent overlooks the interests of Palestinian nationals living in the occupied territory while protecting the interests of the illegal settlers. In the case of Abu Safiyeh et al. v. Minister of Defense et al., the High Court of Justice of Israel denied the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) to the occupied territory and maintained a selective position regarding the applicability of international humanitarian law, thereby undermining the collective and individual rights of the Palestinian people.²⁴ The Court has also avoided rendering decisions by holding that the general question of settlements is political and therefore must be resolved by other branches of government.²⁵ Even where the Court appears to rule in a manner consistent or aligned with international law, these rulings are not respected or implemented. As such, resorting to local remedies would be futile.

¹⁸ Human Rights Committee, Vicente et al. v. Colombia (CCPR/C/60/D/612/1995), para. 5.2.
²⁴ HCJ 2150/07, Judgment, 29 December 2009, paras. 21 and 38.
E. Non-independent nature of the Israeli judicial system

22. The applicant submits that the High Court of Justice is not independent, as it has been placed under the responsibility of the army, the body being investigated.26 The structural deficiency and intrinsic lack of independence and impartiality was noted by the committee of independent experts on international humanitarian and human rights laws established pursuant to Human Rights Council resolution 13/9, in reference to the Military Advocate General, who conducts prosecutions of alleged misconduct carried out by the Israel Defense Forces.27

23. Although the respondent argues that the High Court of Justice, as a civilian court, reviews the decisions of the Military Advocate General, it is unable to effectively do so, given that its competence and rules of procedure are invoked only in exceptional circumstances.28 The High Court of Justice has also affirmed that it is unable to rule on violations of international humanitarian law.29

F. Legitimation of human rights violations within the national law

24. The applicant submits that Israeli law has been the instrument of oppression, discrimination and segregation. The basic law on Israel as the nation-State of the Jewish people states that the exercise of the right to national self-determination in Israel is unique to the Jewish people, thus excluding the Palestinian right to self-determination. Further, the basic law stipulates that the State views the development of Jewish settlement as a national value, and will act to encourage, promote and consolidate its establishment.

25. The military law system is inaccessible to Palestinian victims, who de facto are unable to file complaints with the Military Police Investigation Unit directly, but must rely on human rights organizations or attorneys to file the complaints on their behalf. The Military Police Investigation Unit has no jurisdiction in the occupied territory and Palestinian nationals are not allowed to enter Israel without a special permit. Statements are usually collected in Israeli district coordination offices. Where complaints are received, their processing is often unreasonably prolonged, thus the soldiers who are the subjects of the complaints are often no longer in active service and under military jurisdiction.30

26. Palestinian nationals face excessive court fees, the prevention of witnesses from travelling to court, and the inability of lawyers to travel to and from the occupied territory to represent their clients.31 In addition to the payment of court fees, the courts require the payment of a court insurance/guarantee (set at a minimum of 10,000 new shekels, but usually much higher, reaching to over 100,000 new shekels in some cases, equivalent to $28,000), before the case can proceed. The applicant states that article 519 of the Israeli Civil Code grants the High Court of Justice the right to request payment of a guarantee, before the case begins, to cover the expenses of the parties in the event that the case is lost; the policy is applied only against Palestinians.

III. Further observations of the respondent

27. In its note verbale dated 20 March 2019, the respondent provided further observations on the admissibility of the communication. It reiterated its position on the non-exhaustion of

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27 A/HRC/15/50, para. 91. See also A/HRC/16/24, para. 41.
29 The applicant cites Thabit v. Attorney General, HCJ 474/02, Judgment, 30 January 2011.
domestic remedies, including with regard to the burden of proof, the domestic legal frameworks, the effectiveness of the domestic remedies, and the reliability of the Israeli justice system and access thereto by Palestinian victims.

A. Onus on the applicant to demonstrate the exhaustion of available domestic remedies

28. The applicant has failed to demonstrate the exhaustion of domestic remedies and seeks to shift the burden of proof on the respondent, despite it being well recognized under international law that the burden of proof lies with the applicant. Once the applicant has demonstrated the exhaustion of domestic remedies, the respondent may point to domestic remedies that are indeed available and have not yet been exhausted.

29. Recognizing its failure to meet the legal burden, the applicant argues that, because the alleged violations occurred outside Israeli territory in an area of occupation, the Palestinian nationals are de facto barred from seeking remedies before Israeli courts and that the exhaustion of domestic remedies is not required where the alleged violations constitute an “administrative practice” of a State. Contrary to this argument, in the Demopoulos case, the European Court of Human Rights ruled that “as a general rule applicants living outside the jurisdiction of a Contracting State are not exempted from exhausting domestic remedies within that State, practical inconveniences or understandable personal reluctance notwithstanding”. The Court ultimately found that the domestic mechanisms available for the Greek Cypriots provided “an accessible and effective framework of redress” and that applicants who had not exhausted the mechanism must have their complaints rejected for failure to exhaust domestic remedies. As such, the fact that Palestinian nationals reside outside Israeli territory does not exempt them from exhausting local Israeli remedies.

30. As to the argument that Israeli “administrative practice” violates the Convention, Israeli courts have the jurisdiction to conduct both constitutional and administrative review of legislative and executive actions, meaning that there are avenues to challenge legislative or administrative practices domestically. In light of the existence of such domestic legal avenues, the applicant has failed to meet the requirement of presenting prima facie evidence of an administrative practice. In cases in which the State has a mechanism in place that could potentially provide an effective remedy, it would be premature to absolve an applicant from first exhausting that remedy before adjudicating the matter at the international level.

B. Domestic legal frameworks

31. The respondent refutes the assertions that the High Court of Justice facilitates the settlement enterprise or allows for the existence of two separate legal regimes. Rather, the Court routinely examines the actions or decisions of the Israel Defense Forces military commander pertaining to the West Bank in light of the humanitarian obligations set forth in the Fourth Geneva Convention and any obligations in customary international law pertaining

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32 The State party refers to rule 92, paragraph 7, of the Committee’s rules of procedure, expressly related to individual complaints under article 14 of the Convention, and not inter-State communications.


35 Demopoulos and others v. Turkey, Application No. 46113/99 and others, Decision on Admissibility, 1 March 2010, para. 98.

36 Ibid., para. 127.

37 Ibid.
32. Security measures are implemented and executed in accordance with the military commander’s responsibility to ensure public order and safety. While their application may affect Israeli and Palestinian nationals differently, they are not a systematic attempt to dominate or discriminate against the Palestinian population.

C. Effective domestic remedies

33. The High Court of Justice of Israel has heard thousands of cases involving Palestinian interests over the years and has not hesitated to strike down executive policy and even legislation when these have been found to excessively contravene individual rights. Palestinians seeking to undertake legal proceedings before Israeli courts must receive permits to enter, which are regularly granted. Instituted guidelines and mechanisms ensure that access to the courts and the ability to conduct legal proceedings are not hindered, including with regard to the procedural criteria for the entry of claimants and witnesses from the Gaza Strip to Israel for legal proceedings, and guidelines issued by the State Attorney pertaining to litigation by Gaza Strip residents following the 2008–2009 Gaza Strip conflict (Operation Cast Lead). Further, the Court has determined that, while security is of concern, it is the position of the State that maximum procedural fairness is achieved. Following this determination, the State formulated relevant procedures to facilitate the carrying out of legal proceedings in Israel by Gaza Strip residents, which the Court deemed adequately addressed the challenges raised, prompting it to dismiss the petition.

34. In response to the applicant’s argument that individuals are de facto barred from bringing claims before Israeli courts, the respondent refers to jurisprudence in which the European Court of Human Rights recognizes that the right to access a court includes the right to institute civil proceedings, but does not entail a general right to be physically present in court in civil proceedings. According to jurisprudence of the Human Rights Committee,

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38 See, for example, Abu Sallu ’et al. v. IDF Commander in the West Bank et al., HCJ 7015/02, 3 September 2002.
39 Al-Taliya v. Minister of Defense, HCJ 619/78, 28 May 1979; Abu Sallu ’et al. v. IDF Commander in the West Bank et al., HCJ 7015/02, Judgment, 3 September 2002; Ja ’amait Ascan el-Ma’dudheh el-Masafulyyeh, Cooperative Society Registered at the Judea and Samaria Area Headquaters v. IDF Commander in Judea and Samaria and the Supreme Planning Committee in the Judea and Samaria Area, HCJ 393/82, 28 December 1983; Association for Civil Rights in Israel and others v. Central Commander and another, HCJ 358/88, Judgment, 30 July 1989;
40 See the Convention respecting the Laws and Customs of War on Land, article 43, and the annex to the Convention (Regulations respecting the Laws and Customs of War on Land).
42 Coordinator of Government Activities in the Territories, procedure for processing requests for legal proceedings (October 2014).
43 Coordinator of Government Activities in the Territories, procedure for the review of requests by Palestinian residents of the Gaza Strip for the purpose of managing legal proceedings in Israel (May 2013).
44 The respondent refers to High Court of Justice, The Palestinian Center for Human Rights v. The Attorney General, HCJ 9408/10, Supplementary Response for the State.
45 See the procedure for the review of requests. The authorities tasked with reviewing requests may consider security or criminal considerations pertaining to the requesting individual, whether a denied request would be detrimental to a legal proceeding, and exceptional humanitarian circumstances that warrant deviation from general policy. Decisions rejecting entry into Israel are reviewable by Israeli courts.
D. High Court of Justice

35. The applicant erroneously states that the High Court of Justice is not independent and has been placed under the responsibility of the army. Rather, judges of the Court are selected by the Judicial Selection Committee, which is independent. The court system is separate from the military, and there is no connection between the two.49

36. The High Court of Justice has determined that it has jurisdiction to hear cases pertaining to the actions of the State in the West Bank and the Gaza Strip, and petitions filed by residents of the West Bank and the Gaza Strip.50 The Court also conducts constitutional review of Israeli legislation applicable to both Palestinians and Israelis. Constitutional review in favour of individuals has been carried out with respect to cases concerning detention hearings of suspects in absentia,51 and the exception to State liability for tort damages caused in a zone of conflict as a result of acts of security forces.52

37. Furthermore, the applicant erroneously claims that a legal challenge of the basic law on Israel as the nation-State of the Jewish people before the High Court of Justice was rejected, evidencing the Court’s “role as a tool of oppression and discrimination”. The respondent asserts, rather, that 14 petitions relating to that basic law are currently pending before the Court.

38. In addition, the applicant alleges that payment of a guarantee imposed by the courts is an impediment to conducting legal proceedings, particularly before the High Court of Justice. However, it is not the general practice of the Court to impose security deposits in High Court of Justice petitions. The Supreme Court has given guidelines in its case law for the lower courts on imposing a security deposit on plaintiffs, which call for the consideration of the complexity of proceedings, the identity of the parties and the extent of the claimant’s good faith in initiating proceedings.53 As a result, legal proceedings are regularly conducted by Palestinian claimants before Israeli courts, despite the requirement of the said deposits.54

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47 PERTERER v. AUSTRIA (CCPR/C/81/D/1015/2001), para. 9.3.
48 The judges are appointed by the President, following a recommendation of the Judicial Selection Committee, which is chaired by the Minister of Justice and whose members include another Cabinet minister, the President of the Supreme Court, two other justices of the Supreme Court, two Members of the Knesset, and two representatives of the Israel Bar Association. Thus all three branches of government, and the Israel Bar Association, are represented in the Committee.
49 See Israel, Basic Law: The Judiciary.
51 The respondent refers to CI.AP. 8823/07 ANONYMOUS v. THE STATE OF ISRAEL, 2 November 2010.
52 Adalah: Legal Center for Arab Minority Rights in Israel et al. v. Minister of Defense et al., HCJ 8276/05, HCJ 8338/05 and HCJ 11426/05, 12 December 2006.
54 Recent examples include Beersheba District Court, Estate of the late Abu-Halimeh et al. v. State of Israel, Ci.C. 35484-08-10; Jerusalem District Court, Estate of the late Abu al-Ayash v. State of Israel, Ci.C. 40777-12-10; Beersheba District Court, Ali-Halo et al. v. State of Israel, Ci.C. 7503-01-11, 10 December 2018; and Beersheba District Court, Estate of the late Abu Sayid v. State of Israel, Ci.C. 21677-07-12.
E. Accessibility

39. Any interested party is entitled to petition the Supreme Court directly to claim that a certain government action or policy is ultra vires unlawful or unreasonable.\(^{55}\) In 2017, over 2,500 petitions were filed with the Court in its capacity as the High Court of Justice alone, and in 2016, 2,270 petitions were filed.\(^{56}\) Additionally, the High Court of Justice has gradually widened the scope of its judicial review to include matters which were previously regarded as non-justiciable or “off-limits” in many other jurisdictions.\(^{57}\) Moreover, the Court has taken a particularly staunch position regarding the justifiability of alleged violations of human rights.\(^{58}\)

40. In numerous cases, the Government of Israel has revised its position in the course of the proceedings themselves, whether at the Court’s urging or as a result of a dialogue with petitioners.\(^{59}\) In some cases, even if the Court ultimately dismisses a petition, it may set forth guidelines for the Government to follow in order to ensure that the State’s actions conform to its legal obligations.\(^{60}\) Even with respect to petitions relating to sensitive operational military activity, the Court has required senior military personnel to appear before it and provide information regarding activities on the ground in real time.\(^{61}\)

41. These examples demonstrate that the availability of legal recourse before the High Court of Justice has a substantive impact on the tailoring of executive policy and decision-making pertaining to issues of national security and human rights. The effect of litigation before the High Court of Justice on the state of human rights in the West Bank and the Gaza Strip is reflected not only in rulings in favour of petitioners, but also in alternative manners of resolution of disputes before the Court. The Court has earned international respect and recognition for its jurisprudence, as well as for its independence in enforcing the law.\(^{62}\)

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\(^{57}\) Physicians for Human Rights and others v. Prime Minister of Israel and others, HCJ 201/09; and Gisha Legal Centre for Freedom of Movement and others v. Minister of Defence, HCJ 248/09, Judgment, 19 January 2009.


\(^{62}\) Supreme Court of Canada, Application under section 83.28 of the Criminal Code, Judgment, 23 June 2004, para. 7.
F. Jurisprudence of the High Court of Justice of Israel pertaining to Palestinian rights in the West Bank

42. The High Court of Justice regularly addresses claims of alleged violations of the freedom of movement, including cases concerning Palestinians seeking travel permits, in the context of security concerns, the broad discretion of the Ministry of Defense, and the military commander’s duty to ensure public order and safety. The High Court of Justice has decided in favour of Palestinian nationals in cases concerning workers’ rights, in particular those with respect to employment rights of Palestinian employees working in Israeli settlements, pension deductions, minimum wage and the cost of living allowance.

43. The High Court of Justice has also reviewed allegations relating to proceedings before military courts in the West Bank, including the accessibility of documents, and the length of detention periods. The proceedings before the Court contributed to a major reform in the criminal procedure of the military courts in the West Bank, which included: the establishment of a specialized juvenile court in the West Bank; the raising of the age of majority; full separation between adults and minors during the judicial process; a special shortened statute of limitations; and parental involvement.

44. In consideration of international law, the Court has reviewed the operational activities of the Israel Defense Forces, including extended detention periods, local-resident-assisted arrests, and time periods for examining entry requests.

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64 Parents Circle-Families Forum, Bereaved Families for Peace and Combatants for Peace Ltd. v. Minister of Defense and the IDF Commander in Judea and Samaria, HCJ 2964/18, Judgment, 17 April 2018.
65 Abu Safiyeh et al. v. Minister of Defense et al., HCJ 2150/07, 29 December 2009, para. 35.
68 The respondent indicates that after the Kav LaOved [Worker’s Hotline] decision, Order No. 967 (1982) regarding employment of workers in certain areas (Judea and Samaria) was amended in order to provide an entitlement to a minimum wage and cost of living allowance for Palestinian employees.
70 Beit Sourik Village Council v. Government of Israel and the Commander of the IDF in the West Bank, HCJ 2056/04, 30 June 2004; and Mara’abe et al. v. Prime Minister of Israel et al., HCJ 7957/04, Judgment, 15 September 2005.
71 El-Arab et al. v. Central Commander of the Israeli Army and another, HCJ 2775/11.
72 Ministry of Palestinian Prisoners and others v. Minister of Defense and others, HCJ 3368/10, Judgment, 6 April 2014.
73 Mat’ab et al. v. IDF Commander in the West Bank, and Judea and Samaria Brigade Headquarters, HCJ 3239/02, Judgment, 5 February 2003.
74 Adalah: Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF, HCJ 3799/02, Judgment, 6 October 2005.
G. Civil and criminal proceedings

47. The civil courts of Israel are available to Palestinian residents of the West Bank with respect to property rights, for instance rightful ownership.76 The High Court of Justice has also considered cases concerning compensation for damage or injury caused by security forces in the West Bank.77

48. Criminal courts in Israel have jurisdiction over crimes committed by Israelis in the West Bank. The Israeli criminal courts have prosecuted and convicted Israelis for crimes committed against or with respect to Palestinians,78 in particular, the criminal courts have decided on cases concerning racially motivated or discriminatory crimes.79

H. Military criminal justice system

49. As to the applicant’s comments with respect to the independence of the Israeli military criminal justice system, the respondent stipulates that the Military Advocate General’s Corps is composed of two units: the law enforcement unit, responsible for enforcing the law throughout the Israel Defense Forces,80 and the legal advice unit, responsible for providing legal advice to all military authorities.81 The head of the Corps is appointed by the Minister of Defense, a civilian authority,82 and is subject to no authority but the law.83 The military courts, which adjudicate charges against Israel Defense Forces soldiers for military and other criminal offences, are independent of both the Military Advocate General and the Israel Defense Forces chains of command. The military court system includes regional courts of first instance, as well as the Military Court of Appeals, whose decisions are subject to review by the High Court of Justice.

50. The primary entity for investigating allegations of criminal offences is the Military Police Criminal Investigation Division, which is a unit entirely separate from the Military Advocate General’s Corps and enjoys complete professional independence.84 With respect to principles of independence, impartiality, effectiveness, thoroughness, promptness and transparency, the Turkel Commission also favourably compared the investigations system of Israel to the systems of Western nations.85

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79 The respondent refers to State of Israel v. Cohen, Cr.C. 41705-08-14, 19 September 2017; and The State of Israel v. Avraham Gafni et al., Cr.C. 55372-08-15.
81 The respondent refers to Military Justice Law, sect. 178 (1), and Israel Defense Forces Supreme Command Order 2.0613. See also the Attorney General’s Directive (No. 9.1002) on the Military Advocate General, version of April 2015, para. 2 (b).
82 Military Justice Law, sect. 177 (a).
83 The respondent refers to Israeli Defense Forces Supreme Command Order 2.0613 and Attorney General’s Directive No. 9.1002, para. 3.
I. Civilian administrative and judicial review of the military criminal justice system

51. The military criminal justice system in Israel is subject to civilian oversight by the Attorney General and the Supreme Court. Any interested individual can seek review of a decision made by the Military Advocate General on whether to open a criminal investigation or to file an indictment in cases concerning alleged violations of international humanitarian law by referring the issue for review by the Attorney General; this is routinely done. The Attorney General may also examine or convey his opinion regarding general legal matters pertaining to the military.

52. This is in addition to the avenue of judicial review by the High Court of Justice of all decisions of the Military Advocate General and of the Attorney General. The Court may review and reverse decisions of the Military Advocate General and the Attorney General, including decisions whether to open a criminal investigation, to file a criminal indictment, to bring certain charges, or to appeal a decision of the military courts. Although the Military Advocate General and the Attorney General are generally afforded broad discretion by the High Court of Justice, where it finds their decision unreasonable, the Court will intervene.

IV. Consideration of admissibility

53. The Committee recalls its decision dated 12 December 2019 declaring its jurisdiction concerning the communication. That decision referred to the Committee’s decision dated 14 December 2018, in which the Committee decided that, for the purposes of article 11 (3) of the Convention, the matter had not been adjusted to the satisfaction of both parties. Therefore, the Committee considers that other alternative mechanisms were not able to settle the matter brought to its attention.

54. With regard to the admissibility of the communication, the Committee observes that the respondent raises in particular the issue of non-exhaustion of local remedies.

55. The Committee notes that the respondent argues that the claims submitted are subject to judicial review and numerous domestic remedies are available, while the applicant submits that such remedies are neither available nor effective.

A. Exhaustion of domestic remedies

56. Under article 11 (3) of the Convention, the Committee is required to ascertain that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. In its responses of 23 September 2018, 14 January 2019 and 20 March 2019, the respondent argues that the applicant has failed to establish that local remedies are not available.

B. Availability of domestic remedies and requirement of exhaustion of domestic remedies

57. With regard to the question of the availability of domestic remedies, the Committee notes that the applicant submits that the fact that its nationals do not have access to the respondent’s territory, except when a travel permit is granted, seriously hinders their ability to bring their claims before Israeli courts. The Committee also notes the applicant’s argument that the exhaustion of local remedies is not required where the violations amount to

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86 The respondent refers to Avivit Atiyah v. Attorney General, HCJ 4723/96, Judgment, 29 July 1997.
87 Attorney General’s Directive No. 9.1002, para. 2 (b). See also directives from the Ministry of Justice regarding the Military Advocate General and Review of the Military Advocate General’s decisions.
88 Thabit v. Attorney General, HCJ 474/02, Judgment, 30 January 2011.
89 Avery v. Military Advocate General, HCJ 11343/04, 9 October 2005; and Abu Rahma et al. v. The Military Advocate General et al., HCJ 7195/08, Judgment, 1 July 2009.
administrative practice and that the observations of the Committee with respect to the respondent’s general policies and practices violating the Convention illustrate systematic violations amounting to prima facie evidence of administrative practice.

58. In its reply dated 20 March 2019, the respondent argues that for decades, the judiciary of Israel has opened its doors to Palestinians wishing to bring forward legal challenges against the State of Israel and that Palestinians have continued to conduct legal proceedings in Israel even during times of intense hostilities. The respondent also argues that the Palestinians have failed to meet the requirement of presenting prima facie evidence of an administrative practice and that to the extent that Israeli legislation or policy is considered by the Palestinians to violate the norms embodied in the Convention, there are avenues available to challenge such legislative or administrative practices domestically.

C. Effectiveness of local remedies

59. With regard to the effectiveness of domestic remedies, the Committee notes that according to the applicant’s submission of 15 February 2019, the local remedies provided by the respondent are not efficient and the Israeli judicial system is used as an instrument of oppression and discrimination, including most especially by serving as a rubber stamp to the discriminatory policies of Israel that violate the basic tenets of international law, including the Convention. The applicant asserts that the judicial system is not independent and that if any judgment appears to be ruled in favour of international law and Palestinian rights, the ruling remains ineffective and not enforced. The applicant also states that Israeli national law legitimizes human rights violations against Palestinians and that Israeli law does not include all acts considered as grave as racial discrimination. The applicant states that, on the contrary, it has been an instrument of oppression, discrimination and segregation.

60. In its response of 20 March 2019, the respondent argues that Israel dedicates extensive resources to facilitate litigation by Palestinians before Israeli courts and that the arguments based on the “inadequacy of Israel’s legal system are deconstructed” and reveal a failure on the part of the Palestinians to show exhaustion of domestic remedies and why exhaustion of domestic remedies in those cases is unnecessary. The Committee notes that the respondent argues that the High Court of Justice reviews numerous petitions annually pertaining to a myriad of issues relevant to Palestinians.

D. Burden of proof

61. The Committee furthermore notes that, according to the respondent, allegations of administrative practice do not absolve the applicant from exhausting local remedies. The respondent submits that even though the alleged violations occurred outside the Israeli territory in an area of occupation, the Palestinians should exhaust local Israeli remedies. The onus is on the applicant to demonstrate the exhaustion of available domestic remedies. The Committee notes the above position of the respondent, while also noting that when reporting to the Committee pursuant to article 9 of the Convention the respondent insisted that it had no obligation to report on the human rights situation in the Occupied Palestinian Territory (territories under the effective control of the State party, except East Jerusalem, which it claims to have annexed).91 The Committee notes that the applicant submits that under generally recognized principles of international law, it is for the respondent, arguing the non-exhaustion of local remedies, to prove that effective local remedies exist and that they have not been exhausted.

V. Decision on admissibility

62. The Committee points out that under article 11 (3) of the Convention, the requirement that all available domestic remedies have been invoked and exhausted applies in conformity

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90 CERD/C/ISR/CO/14-16, para. 25.
91 CERD/C/ISR/CO/14-16, para. 10.
with the generally recognized principles of international law. Against this background, the Committee notes the well-established jurisprudence of human rights courts and human rights commissions on the requirement of the exhaustion of domestic remedies in the context of inter-State communications and applications. In this context, the Inter-American Commission on Human Rights has recognized an exception to the rule of exhaustion of domestic remedies in cases of an “alleged existence of a generalized practice of discrimination”. Building on the jurisprudence of the European Commission of Human Rights, the European Court of Human Rights has held that the rule of exhaustion of domestic remedies “does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice”. The Court further held that “an administrative practice involves two distinct elements: a repetition of acts and official tolerance”.44

63. Against this background, the Committee considers that the allegations of the applicant refer to measures taken as part of a policy ordered and coordinated at the highest levels of government, which may amount to a generalized policy and practice with regard to a range of substantive issues under the Convention. The Committee considers that exhaustion of domestic remedies is not a requirement where a generalized policy and practice has been authorized.45 In line with the jurisprudence of regional human rights commissions and courts, the Committee considers, however, that it is not sufficient that the existence of such a generalized policy and practice is merely alleged; rather, prima facie evidence of such a practice must be established.

64. In this context, the Committee recalls the concerns expressed in its concluding observations on the combined seventeenth to nineteenth periodic reports of Israel with regard to the maintenance of several laws that discriminated against Arab citizens of Israel and Palestinians in the Occupied Palestinian Territory, and that created differences among them, regarding their civil status, legal protection, access to social and economic benefits, or right to land and property.46 The Committee furthermore expressed concern about the lack of detailed information on racial discrimination complaints filed with the national courts and other relevant Israeli institutions, as well as on investigations, prosecutions, convictions and sanctions, and on the reparations provided to victims, and that people belonging to minority groups, including Palestinians, could face obstacles in accessing justice while seeking remedies for cases of discrimination.47 Furthermore, the Committee expressed concern regarding the continuing segregation between Jewish and non-Jewish communities.48 The Committee also expressed its concern regarding reports that the judiciary might handle cases of racial discrimination by applying different standards based on the alleged perpetrator’s ethnic or national origin.49 In light of the submissions of the States parties as well as in light of the concluding observations of the Committee, the Committee is satisfied that the threshold of prima facie evidence of a generalized policy and practice that touches upon substantive issues under the Convention is fulfilled and that, consequently, the rule on exhaustion of domestic remedies does not apply.

VI. Conclusion

65. In respect of the inter-State communication submitted on 23 April 2018 by the State of Palestine against Israel, the Committee rejects the objections raised by the respondent State concerning the admissibility of the inter-State communication.

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92 Nicaragua v. Costa Rica, Interstate Case No. 01/06, Decision, 8 March 2007, paras. 253 ff.
93 European Court of Human Rights and Georgia v. Russia (II), Application No. 38263/08, Decision, 13 December 2012, Georgia v. Russia (II), para. 85, with further reference to previous case-law.
94 Ibid.
95 CERD/C/99/4, para. 40.
96 CERD/C/ISR/CO/17-19, para. 15.
97 Ibid., para. 19 (b).
98 Ibid., paras. 21 ff.
99 Ibid., para. 26 (c).
The Committee requests its Chair to appoint, in accordance with article 12 (1) of the Convention, the members of an ad hoc Conciliation Commission, which shall make its good offices available to the States concerned with a view to an amicable solution of the matter on the basis of States parties’ compliance with the Convention.
Annex

List of submissions

2. Observations of the State of Palestine, dated 29 October 2018, referring the matter again to the Committee in accordance with article 11 (2) of the Convention.
3. Observations of Israel, dated 30 April 2018.
5. Additional observations of Israel, dated 28 September 2018.
8. Observations of Israel, dated 14 January 2019, concerning the Committee’s decision of 14 December 2018.
IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
SPECIAL LEAVE PETITION (CIVIL) NO. 20370 OF 2012  
(IA No.58644/2020 – for directions)

Massimilano Latorre and others  …Petitioners

Versus

Union of India and others  …Respondents

O R D E R

M.R. SHAH, J.

1. In an unfortunate incident which took place on 15.02.2012, two fishermen who were onboard the boat “St. Antony” registered in India, namely, Valantine @ Jelestine, aged 44 years and Ajeesh Pink, aged 20 years, while fishing off the coast of Kerala, were fired at from a passing ship (an Italian Vessel M.V. Enrica Lexie), due to which the aforesaid two fishermen died. An FIR being Crime No. 2 of 2012 came to be registered against petitioner nos. 1 & 2 herein for offence punishable under Section 302 IPC and other offences under IPC. That the aforesaid vessel which was registered in Italy was reportedly sailing from Singapore to Egypt. That during the investigation two Italian Marines – petitioner nos. 1 & 2 herein were identified as the ones who had fired at the fishing boat. Petitioner Nos. 1 & 2 were apprehended by the police and produced before the learned Chief Judicial Magistrate, Kollam. Petitioner Nos. 1 & 2 challenged the jurisdiction of the State of Kerala and the Circle Inspector of Police, Kollam, District Kerala to register the FIR, to conduct the investigation or to arrest and produce the Italian Marine Naval officials before the Magistrate by filing Writ
Petition No. 4542 of 2012 before the High Court of Kerala at Ernakulam. That the petitioners filed Writ Petition No. 135 of 2012 under Article 32 of the Constitution of India before this Court seeking directions to respondent no.1 to take all steps to secure the interest of petitioner nos. 1 & 2 herein – Italian Military Naval officials and makeover their interest to petitioner no. 3 herein. That petitioner no.3 herein – Republic of Italy made ex-gratia payment of compensation to the legal heirs of the deceased persons in the month of April, 2012. This Court also passed an order in S.L.P(Civil) No. 11942 of 2012 dated 2.5.2012 allowing the vessel to sail away, subject to certain terms and conditions along with all 24 crew members. Vide order dated 9.5.2012, this Court in Article 32 writ petition passed an order directing the State of Kerala to consider the representation of the Republic of Italy concerning the shifting of petitioner nos. 1 & 2 Military Naval officials to a safe house. Thereafter chargesheet came to be filed against petitioner nos. 1 & 2 herein on 18.05.2012 for the offences punishable under Sections 302, 307, 427, 34 of the Indian Penal Code and Section 3 of Suppression of Unlawful Activities Act. The learned Chief Judicial Magistrate committed the case to the learned Court of Sessions, Kollam. Thereafter, by the impugned judgment and order dated 29.05.2012, the learned Single Judge of the High Court dismissed Writ Petition No. 4542 of 2012, inter alia, upholding the assumption of the jurisdiction by the State of Kerala and the concerned Circle Inspector of Police at Kollam.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of Kerala at Ernakulam in dismissing Writ Petition No. 4542
of 2012, the chargesheeted accused – Italian Marine officials and the Republic of Italy have preferred the present special leave petition.

3. It is the case of the petitioners that India and Italy having signed and ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS) agreed to settle the dispute concerning the incident in question, in terms of the binding dispute resolution mechanism provided under Annex VII of the UNCLOS.

In consequence of the Provisional Measures Order dated 24 August 2015 passed by the International Tribunal for the Law of the Sea (ITLOS) requiring both Italy and India to suspend all court proceedings, this Court by its order dated 26.08.2015, as modified by order dated 2.9.2015, recording the agreement of both the parties, stayed till further orders all proceedings in the pending matters. By its order dated 6.3.2017, this Court required that the award passed by the Arbitral Tribunal constituted under Annex VII of the UNCLOS be placed on the record of this Court. That thereafter Annex VII Arbitral Tribunal has delivered its award dated 21.05.2020, importantly the Arbitral Tribunal in its award dated 21.05.2020 has duly recorded Republic of Italy’s commitment that following the award, Italy will resume its criminal investigation in the events of 15.02.2012 and that both India and Italy will cooperate with each other in pursuit of that investigation. That under the award, the Republic of Italy had agreed to the amount of INR 100,000,000 (INR 100 million) to be paid by Italy as total compensation under all the four heads of compensable loss identified by the Arbitral Tribunal’s award, excluding the amount of INR 21.7 million already paid by Italy to the families of the victims. It appears that during the course of the proceedings, the
Ministry of External Affairs, Government of India vide its Note Verbale No. WI(A)/415/06/2012 dated 26.11.2020 emphasised the implementation of the award dated 21.05.2020 of the Arbitral Tribunal constituted under Annex VII of the 1982 UNCLOS concerning the incident in question.

4. The Union of India has filed I.A. No. 58644 of 2020 for an appropriate direction to dispose of the proceedings in conformity with the award dated 21.05.2020. The aforesaid application came up for hearing before this Court on 9.4.2021. Learned counsel appearing on behalf of the Republic of Italy submitted that amount of compensation payable in terms of the award dated 21.05.2020 will be deposited by the Republic of Italy with the Union of India in the particular account to be specified by the Ministry of External Affairs. This Court directed that after the amount is received by the Union of India, the same shall be deposited in this Court within a period of one week. It is reported that thereafter the Republic of Italy deposited the amount of Rs.10,00,00,000/- (Rupees Ten Crores only) with the Republic of India. It is reported that thereafter the Union of India has transferred a sum of Rs. 10,00,00,000/- (Rupees Ten Crores only) into the bank account of the Registry of this Court. That pursuant to the order passed by this Court, the heirs of the deceased fishermen are also impleaded in the present proceedings. The Government of Kerala has also placed on record the letter addressed to the Foreign Secretary of Ministry of External Affairs, Union of India that the Government of Kerala have consulted the dependents/victims of the Enrica Lexie incident through the District Collectors concerned and informed that the Italian Government has offered a compensation of Rs. ten crores out of which State
Government proposes to disburse Rs. four crores to the dependents of each deceased and Rs. Two crores to the owner of the boat – St. Antony. It was also mentioned in the said letter that the legal heirs of each deceased and the owner of the boat have agreed to the proposal and consented in writing to accept the amount of compensation offered to them. In light of the above, it is prayed to dispose of the present proceedings and to quash the criminal proceedings in exercise of the powers under Article 142 of the Constitution of India.

5. We have heard Shri Tushar Mehta, learned Solicitor General of India, Shri Sohail Dutta, learned senior counsel appearing on behalf of the Republic of Italy and the petitioners, Shri K.N. Balagopal, learned senior counsel appearing on behalf of the State of Kerala and Shri Unnikrishnan, learned counsel appearing on behalf of the heirs of the deceased.

5.1 Learned counsel appearing on behalf of the respective parties have stated at the bar that their respective clients – Republic of Italy, Union of India, State of Kerala and the heirs of the deceased fishermen and the owner of the boat have agreed to accept the award dated 21.05.2020 of the Arbitral Tribunal. All of them have prayed to dispose of the present proceedings and quash the criminal proceedings in the larger interest of the victims and the heirs of the deceased, more particularly when the long-drawn dispute is being settled amicably.

6. Having heard the learned counsel appearing on behalf of the respective parties and considering the fact that the Arbitral Tribunal constituted under Annex VII of UNCLOS has delivered its award dated 21.05.2020 under which the Republic of Italy
has agreed to pay the compensation of Rs. Ten crores, over and above the amount of ex-gratia amount already paid and that the Arbitral Tribunal has also duly recorded Republic of Italy’s commitment that following the award Italy will resume its criminal investigation into the incident of 15.02.2012 and now the Republic of Italy has deposited the amount of Rs. Ten Crores with the Union of India and thereafter the Union of India has transferred the said amount to the Registry of this Court and the State of Kerala as well as the heirs of the deceased fishermen and even the owner of the boat which was damaged have agreed to accept the award and even the Union of India has also accepted the award dated 21.05.2020 passed by the Arbitral Tribunal constituted under Annex VII of UNCLOS and when the long-drawn proceedings are coming to an end and we are satisfied that the amount of compensation of Rs. Ten Crores over and above the ex-gratia amount of compensation already paid to the heirs of the deceased fishermen offered and deposited by the Republic of Italy, deposited pursuant to award dated 21.05.2020 passed by the Arbitral Tribunal can be said to be a reasonable amount of compensation and can be said to be in the interest of heirs of the deceased, we are of the view that this is a fit case to close all the proceedings in India including criminal proceedings in exercise of powers under Article 142 of the Constitution of India.

However, at the same time, while disbursing the amount of compensation to the heirs of the deceased fishermen, i.e, Rs. Four Crores to the dependents/heirs of each deceased, their interest is also required to be protected so that the amount of compensation paid to them is not frittered away, by investing the amount in the name
of the dependents/heirs of each deceased in a Fixed Deposit in a nationalised bank for some time and they will be paid the periodical interest accrued thereon.

7. In view of the above and for the reasons stated above and in exercise of the powers under Article 142 of the Constitution of India, we dispose of/close the present proceedings by directing as under:

(a) FIR No.2/2012 of Coastal PS, Neendakara, Kollam, Kerala re-registered as FIR No. R.C. No. 04/2013/NIA/DLI dated 4 April 2013, under Sections 302, 307, 427 read with Section 34 of the Indian Penal Code, 1860 and Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 registered by the National Investigation Agency, New Delhi, and all proceedings emanating therefrom including the proceedings pending before the Ld. Special Designated Court, Patiala House Courts, New Delhi are hereby quashed;

(b) The Bail-Bonds dated 2 June 2012 executed by Chief Master Sergeant Massimiliano Latorre and Sergeant Major Salvatore Girone as also Mr. Vishal Talwar and Mr. Vikas Talwar who stood as Sureties, in connection with the aforementioned FIR before the Ld. Special Designated Court, Patiala House Courts, New Delhi and the Ld. Registrar General of this Court are hereby discharged;

(c) The Ld. Registrar General of this Court shall release the original Bank Guarantees bearing Nos.0071IGFIN000618 and 0071IGFIN000418, both dated 11 June 2018 for Rs. Two Crores each, issued by the UCO Bank, Kollam Branch, extended through Letters of Extension Nos. UCO/KOLLAM/BG/02/2020-21 and UCO/KOLLAM/BG/01/2020-21 dated 28 May 2020, given on behalf of the two Sureties, Mr. Vikas Talwar and Mr. Vishal Talwar;

(d) All pending matters before this Hon’ble Court including (1) the Special Leave Petition (C) No. 20370 of 2012, (2) Writ Petition (C) No. 236 of 2014, (3) Writ Petition (C) No. 919 of 2014 and all pending I.As in the said proceedings are
disposed of with no order as to costs.

(e) As per the award dated 21.05.2020 and even as agreed by the learned senior counsel appearing on behalf of the Republic of Italy, learned Solicitor General appearing on behalf of the Union of India and the learned senior counsel appearing on behalf of the State of Kerala, now the Republic of Italy shall resume its criminal investigation in the events of 15.02.2012 and it is further directed that the Union of India, Republic of Italy and the State of Kerala shall cooperate with each other in pursuit of that investigation.

8. We also further direct that the amount of Rs. Ten Crores now lying with the Registry of this Court be transferred to the High Court of Kerala, out of which Rupees Four Crores be paid to the heirs of each deceased and Rs. Two crores be paid to the owner of the boat – St. Antony. We request the Hon’ble Chief Justice of the Kerala High Court to nominate a Judge to pass appropriate order of disbursement/investment of the amount to be paid to the heirs of each deceased (Rupees Four Crores each) so as to protect the interest of the heirs and ensure that the compensation is duly received by the heirs and not diverted/misappropriated. The order of disbursement/investment be passed after hearing the heirs of each deceased and appropriate order be passed, protecting the best interest of the heirs of each deceased. The remaining amount of Rs. Two Crores be paid to the owner of the boat – St. Antony by an account payee cheque.

.................................................J.
[Indira Banerjee]

New Delhi; ..................................................J.
June 15, 2021 [M.R. Shah]
ITEM NO.43 Court 11 (Video Conferencing) SECTION XI-A

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 20370/2012

(Arising out of impugned final judgment and order dated 29-05-2012 in WPC No. 4542/2012 passed by the High Court Of Kerala At Ernakulam)

MASSIMILANO LATORRE & ORS. Petitioner(s)

VERSUS

UNION OF INDIA & ORS. Respondent(s)

[OFFICE REPORT FOR DIRECTIONS]
(IA No. 58644/2020 - APPROPRIATE ORDERS/DIRECTIONS IA No.78649/2020 – INTERVENTION/IMPLEADMENT)

Date : 15-06-2021 These matters were called on for hearing today.

CORAM : HON’BLE MS. JUSTICE INDIRA BANERJEE
HON’BLE MR. JUSTICE M.R. SHAH
(VACATION BENCH)

For Petitioner(s) Mr. Suhail Dutt, Sr. Adv.
Mr. Diljeet titus, Adv.
Mr. Jagjit Singh Chhabra, AOR
Mr. Ujjwal Sharma, Adv.
Mr. Baljit Singh Kalha, Adv.
Mr. Ninad Laud, Adv.
Mr. Akshat Bhatnagar, Adv.
Ms. Ananyaa Mazumdar, Adv.
Mr. Saksham Maheshwari, Adv.

For Respondent(s)
Mr. Tushar Mehta, SG
Mr. Aman Lekhi, ASG
Mr. S.A. Haseeb, Adv.
Mr. Suhashini Sen, Adv.
Mr. Rajat Nair, Adv.
Mr. B. V. Balaram Das, AOR

Mr. G. Prakash, AOR
Mr. Jishnu M.L., Adv.
Ms. Priyanka Prakash, Adv.
Ms. Beena Prakash, Adv.

Mr. C. Unnikrishnan, Adv.
Mr. A. Karthik, AOR
Ms. Smrithi Suresh, Adv.
Ms. Sreepriya K., Adv.
Mr. Arsh Khan, Adv.

UPON hearing the counsel the Court made the following

ORDER

Application(s) for impleadment is/are allowed.

This Court pronounced the reportable order concluding part of

which reads as under:

“7. In view of the above and for the reasons stated
above and in exercise of the powers under Article 142 of
the Constitution of India, we dispose of/close the
present proceedings by directing as under:

(a) FIR No.2/2012 of Coastal PS, Neendakara,
Kollam, Kerala re-registered as FIR No. R.C. No.
04/2013/NIA/DLI dated 4 April 2013, under
Sections 302, 307, 427 read with Section 34 of
the Indian Penal Code, 1860 and Section 3 of the
Suppression of Unlawful Acts Against Safety of
Maritime Navigation and Fixed Platforms on
Continental Shelf Act, 2002 registered by the
National Investigation Agency, New Delhi, and all
proceedings emanating therefrom including the
proceedings pending before the Ld. Special
Designated Court, Patiala House Courts, New Delhi
are hereby quashed;

(b) The Bail-Bonds dated 2 June 2012 executed by
Chief Master Sergeant Massimiliano Latorre and
Sergeant Major Salvatore Girone as also Mr.
Vishal Talwar and Mr. Vikas Talwar who stood as
Sureties, in connection with the aforementioned
FIR before the Ld. Special Designated Court,
Patiala House Courts, New Delhi and the Ld.
Registrar General of this Court are hereby
discharged;

(c) The Ld. Registrar General of this Court
shall release the original Bank Guarantees
bearing Nos.00711GFIN000418 and 00711GFIN000418,
both dated 11 June 2018 for Rs. Two Crores each,
issued by the UCO Bank, Kollam Branch,
extended through Letters of
Extension Nos.UCO/KOLLAM/BG/02/2020-21 and
UCO/KOLLAM/BG/01/2020-21 dated 28 May 2020, given
on behalf of the two Sureties, Mr. Vikas Talwar
and Mr. Vishal Talwar;
(d) All pending matters before this Hon’ble Court including (1) the Special Leave Petition (C) No. 20370 of 2012, (2) Writ Petition (C) No. 236 of 2014, (3) Writ Petition (C) No. 919 of 2014 and all pending LAs in the said proceedings are disposed of with no order as to costs.

(e) As per the award dated 21.05.2020 and even as agreed by the learned senior counsel appearing on behalf of the Republic of Italy, learned Solicitor General appearing on behalf of the Union of India and the learned senior counsel appearing on behalf of the State of Kerala, now the Republic of Italy shall resume its criminal investigation in the events of 15.02.2012 and it is further directed that the Union of India, Republic of Italy and the State of Kerala shall cooperate with each other in pursuit of that investigation.”

8. We also further direct that the amount of Rs. Ten Crores now lying with the Registry of this Court be transferred to the High Court of Kerala, out of which Rupees Four Crores be paid to the heirs of each deceased and Rupees Two crores be paid to the owner of the boat – St. Antony. We request the Hon’ble Chief Justice of the Kerala High Court to nominate a Judge to pass appropriate order of disbursement/investment of the amount to be paid to the heirs of each deceased (Rupees Four Crores each) so as to protect the interest of the heirs and ensure that the compensation is duly received by the heirs and not diverted/misappropriated. The order of disbursement/investment be passed after hearing the heirs of each deceased and appropriate order be passed, protecting the best interest of the heirs of each deceased. The remaining amount of Rs. Two Crores be paid to the owner of the boat – St. Antony by an account payee cheque.”

Pending application(s), if any, stand disposed of.

(MANISH ISSRANI)          (MATHEW ABRAHAM)
COURT MASTER(SH)            COURT MASTER(NSH)

(Signed reportable order is placed on the file)
ITEM NO.43  Court 11 (Video Conferencing)  SECTION XI-A

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 20370/2012

(Arising out of impugned final judgment and order dated 29-05-2012
in WPC No. 4542/2012 passed by the High Court Of Kerala At
Ernakulam)

MASSIMILANO LATORRE & ORS.  Petitioner(s)

VERSUS

UNION OF INDIA & ORS.  Respondent(s)

(\[ OFFICE REPORT FOR DIRECTIONS \]
(IA No. 58644/2020 - APPROPRIATE ORDERS/DIRECTIONS IA No.78649/2020
– INTERVENTION/IMPLEADMENT)

Date : 15-06-2021 These matters were called on for hearing today.

CORAM : HON'BLE MS. JUSTICE INDIRA BANERJEE
HON'BLE MR. JUSTICE M.R. SHAH
(VACATION BENCH)

For Petitioner(s)  Mr. Suhail Dutt, Sr. Adv.
Mr. Diljeet titus, Adv.
Mr. Jagjit Singh Chhabra, AOR
Mr. Ujjwal Sharma, Adv.
Mr. Baljit Singh Kalha, Adv.
Mr. Ninad Laud, Adv.
Mr. Akshat Bhatnagar, Adv.
Ms. Ananya Mazumdar, Adv.
Mr. Saksham Maheshwari, Adv.

For Respondent(s)  Mr. Tushar Mehta, SG
Mr. Aman Lekhi, ASG
Mr. S.A. Haseeb, Adv.
Mr. Suhashini Sen, Adv.
Mr. Rajat Nair, Adv.
Mr. B. V. Balaram Das, AOR

Mr. G. Prakash, AOR
Mr. Jishnu M.L., Adv.
Ms. Priyanka Prakash, Adv.
Ms. Beena Prakash, Adv.

Mr. C. Unnikrishnan, Adv.
Mr. A. Karthik, AOR
Ms. Smrithi Suresh, Adv.
Ms. Sheepriya K., Adv.
Mr. Arsh Khan, Adv.

UPON hearing the counsel the Court made the following ORDER

This Court pronounced the reportable order concluding part of

which reads as under:

"7. In view of the above and for the reasons stated above and in exercise of the powers under Article 142 of the Constitution of India, we dispose of/close the present proceedings by directing as under:

(a) FIR No.2/2012 of Coastal PS, Neendakara, Kollam, Kerala re-registered as FIR No. R.C. No. 04/2013/NIA/DLI dated 4 April 2013, under Sections 302, 307, 427 read with Section 34 of the Indian Penal Code, 1860 and Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 registered by the National Investigation Agency, New Delhi, and all proceedings emanating therefrom including the proceedings pending before the Ld. Special Designated Court, Patiala House Courts, New Delhi are hereby quashed;

(b) The Bail-Bonds dated 2 June 2012 executed by Chief Master Sergeant Massimiliano Latorre and Sergeant Major Salvatore Girona as also Mr. Vishal Talwar and Mr. Vikas Talwar who stood as Sureties, in connection with the aforementioned FIR before the Ld. Special Designated Court, Patiala House Courts, New Delhi and the Ld. Registrar General of this Court are hereby discharged;

(c) The Ld. Registrar General of this Court shall release the original Bank Guarantees bearing Nos.00711GFIN000618 and 00711GFIN000418, both dated 11 June 2018 for Rs. Two Crores each, issued by the UCO Bank, Kollam Branch, extended through Letters of Extension Nos.UCO/KOLLAM/BG/02/2020-21 and UCO/KOLLAM/BG/01/2020-21 dated 28 May 2020, given on behalf of the two Sureties, Mr.
Vikas Talwar and Mr. Vishal Talwar;

(d) All pending matters before this Hon’ble Court including (1) the Special Leave Petition (C) No. 20370 of 2012, (2) Writ Petition (C) No. 236 of 2014, (3) Writ Petition (C) No. 919 of 2014 and all pending LAs in the said proceedings are disposed of with no order as to costs.

(e) As per the award dated 21.05.2020 and even as agreed by the learned senior counsel appearing on behalf of the Republic of Italy, learned Solicitor General appearing on behalf of the Union of India and the learned senior counsel appearing on behalf of the State of Kerala, now the Republic of Italy shall resume its criminal investigation in the events of 15.02.2012 and it is further directed that the Union of India, Republic of Italy and the State of Kerala shall cooperate with each other in pursuit of that investigation."

8. We also further direct that the amount of Rs. Ten Crores now lying with the Registry of this Court be transferred to the High Court of Kerala, out of which Rupees Four Crores be paid to the heirs of each deceased and Rs. Two crores be paid to the owner of the boat – St. Antony. We request the Hon’ble Chief Justice of the Kerala High Court to nominate a Judge to pass appropriate order of disbursement/investment of the amount to be paid to the heirs of each deceased (Rupees Four Crores each) so as to protect the interest of the heirs and ensure that the compensation is duly received by the heirs and not diverted/misappropriated. The order of disbursement/investment be passed after hearing the heirs of each deceased and appropriate order be passed, protecting the best interest of the heirs of each deceased. The remaining amount of Rs. Two Crores be paid to the owner of the boat – St. Antony by an account payee cheque.”

Pending application(s), if any, stand disposed of.

(MANISH ISSRANI)                  (MATHEW ABRAHAM)
COURT MASTER(SH)                  COURT MASTER(NSH)
(Signed reportable order is placed on the file)
Emilia Justyna Powell, Islamic Law and International Law: Peaceful Resolution of Disputes (Oxford University Press 2020), XiV + 314 pp

The scholarships in comparative law in general and those linked to Islamic law in particular are instinctively divided between the external and internal scholars i.e., the scholarships that come from a Muslim and a non-Muslim. Whereas both offer a significant contribution to the literature, the external scholarships often lack the depth necessary to understand a legal tradition such as Islamic law which is foreign to them. However, E J Powell’s monograph seems to have managed to considerably avoid this pitfall. For instance, the author’s claim – that in the literature blanket claims are made about the attitudes of all ILS towards international law (p3) – is heavily relied on Western literature rather than those from ILS but she acknowledges this although without offering any further details as to how this is being done. However, the only pitfall in the monograph is the lack of appreciation of the longstanding effect of colonialism in ILS. For instance, the author’s claim - that historical patterns seem unhelpful in providing any solid answers in this regard (Islamic milieu and international law in the context of peaceful resolution of disputes) (p2) – disregards the colonial effect in the development of a consistent Islamic legal framework in ILS. However, the author recognises the intermingling of the Islamic and secular laws in ILS that shaped their state practice, but she abstains from offering a scholarly analysis of the relevant law that can be said Islamic. For instance, usury (Riba) is prohibited in Islam so any disputes concerning the legality of a usury agreement whether between individuals and states are void in Islamic law. If any state changes this law by mixing up with secular law that does not prohibit in business transactions, that state cannot be said an Islamic Law State (ILS) as the law is not Islamic. However, that can still be called a Muslim state where the majority of the population are Muslims. The secular law that Islamic law interacts and intermingles with is the continuous effect of colonialism in the Muslim world which E J Powell does not consider to be the key overarching reason. The author only states that the interaction between Islamic and secular law became more evident when the former came into contact with the European nation-state system (p 59) but she abstains from emphasising that the forceful imposition of the latter during the colonial period and even after decolonisation when Muslim states became officially free from the colonial power and its rule most of the states could not actually set themselves free from the neo-colonialism from the former colonisers. Therefore, the book is purely based on state practices of the ILS which are more Muslim majority states rather than Islamic per se. Hence, the term ‘Islamic milieu’ to identify the state practices of ILS is logical.
The author argues that if Shari’ā is implemented as the official law of an ILS that has a different status than Shari’ā as a symbol (p9) but this argument remains unsubstantiated. This is because Shari’ā is not a non-legal source (although some of it can be non-legal but not its entirety) in Islamic legal tradition but it has the same status of official law irrespective of whether the government or ruler implemented it as official law or not. The status quo of Shari’ā is already given by default in the key sources of Islamic law such as the Qur’an and Sunna. It does not need official recognition. Therefore, any state which has recognised Islamic law as its official law but does not implement Shari’ā hardly falls within the category of ILS. This is because their claim to be an ILS is itself inconsistent with the fundamental principle of Islamic law i.e., the status of Shari’ā as the key source of Islamic law that evolved from the Qur’an, Sunna, Ijma, and Qiyas in Islamic jurisprudence (usul al-fiqh). Therefore, the claim that it addressed the compatibility between Islamic and international law is questionable. Rather, the author’s claim should be that the monograph addressed the compatibility between the laws of ILS and international law. This approach also requires explaining the use of the term ILS. This is because, although these states officially acknowledged Islamic law in their constitution and other domestic legal instruments, they do not necessarily apply this in practice. The author incorporates into the category of ILS those states with an identifiable substantial segment of their legal systems that are charged with the obligatory implementation of Islamic law, and where Muslims constitute at least 50 per cent of the population (p 42). This categorisation is questionable for the reasons outlined above. However, the author rightly recognises the tensions relevant to this categorisation and focuses on the state practices that currently prevail rather than their nexus with Islamic law (p 43) for empirical reasons i.e., states’ behaviour.

The monograph is more about dispute resolution in international law as opposed to Islamic law (p 6). The author states, in the introduction, that the monograph explores the compatibility between Islamic and international law concerning the peaceful resolution of disputes (p 2). In terms of their compatibility, this monograph offers a great deal of analysis about the procedures that ILS observe. However, the author only offers a cursory analysis of the Islamic substantive law on dispute resolution which is known as Shura. As Shura offers dispute resolution mechanisms to resolve disputes between states, individuals, and states and individuals, the literature in this area is an excellent source to study. E J Powell does not explore this. However, this area of law has not been explored adequately by scholars from outside of the ILS either. As a result, Western scholars often conclude that there is a lack of development or inconsistency in the resolution of disputes among the ILS. So, this monograph has adopted an indifferent approach like many other scholarships from the West.
The monograph argues the need for an understanding of the evolution of Islamic theological and doctrinal evolution (citing Bassiouni) but it argues for the effect of a balanced approach between secular law and religious law that shaped ILS’s preference to recourse to international law (p 5). However, what Bassiouni has emphasised here is the Islamic theological and doctrinal evolution but not merely the practice of a state which claims its domestic legal framework to be Islamic. Therefore, this argument is misleading to some extent. The monograph offers an analysis of the compatibility between the state practices of ILS and that of international law. However, the key argument is clear and cogent where the author claims that the attitude of ILS heavily depends on the amalgamation of secular laws with religious laws. So, the author offers a practical approach to international law concerning the peaceful resolution of disputes based on the state practices of the ILS aligned with their domestic laws as they stand - which may not be particularly Islamic. However, the author rightly argues that Islamic and international law share many similarities in the basic principles of inter-state laws.

The author discusses international law, Islamic law, and Islamic international law in chapter 2. Although the discussions are mostly descriptive, this chapter offers a particularly good outline of the nature of these laws. Hence, this chapter is an excellent resource for anyone who wants to understand the functioning of these legal systems in outline. However, the section on ‘Islamic law’ is based on a holistic approach between Islam and culture that is prevalent in different Muslim states (p 33). This is because the author does not offer the classical Islamic law and its evolution in the modern world but she clarifies this by stating that ‘… efforts should not be misunderstood as equating Shari’a with merely a legal system of laws’ (p 34). While this is a good warning to give, on the one hand, it is concerning on the other hand because in a discussion about Islamic law any reader would appreciate a discussion about the role of Shari’a and its interplay in shaping the law. However, the author redirects the readers to Bassiouni who discussed the relationship between the Shari’a and Islamic law as the former is the source of the latter. Although Bassiouni offered a very good discussion on the relationship between Sharia and Islamic law, the readers would need at least a basic understanding of the evolution of Islamic jurisprudence and its role in making Islamic law. For instance, the Shari’a is a source of Islamic law but how that Shari’a has been evolving through Islamic jurisprudence on the resolution of international disputes, which is the focal point of this book, would be an excellent contribution to the literature. The question here is ‘how one can claim that a state law is Islamic without offering analysis about the nexus between the Shari’a (as a key source) and law?’ Instead, the author leaves this question for the scholars of Islamic and comparative law to answer (p 35). However, chapter 2 discusses the definition of Shari’a offered by scholars, its characteristics, constitutive elements, and the relationship between Shari’a, secular institutions, and Islamic law. Chapter 2 also discusses the relationship...
between Shari’a and secular law and governance. The author refers to An Na’im to support the view that “Shari’a contains not only legal but also non-regal rules which makes this diverse and even contesting” (p 37) but this scholar blatantly refuses to accept that Shari’a can be the basis of state law.\(^1\) However, the section of this chapter on ‘Islamic international law’ offers a very good insight on the different sources of Islamic international law such as Siyar. It offers many references to Islamic classical scholars like Al-Shaybani.

The author suggests one of the aspects of the diverse nature of Islamic law in ILS i.e., the frequent renegotiation between Islamic and Secular law (p 50). Whereas this is a very good aspect of this book, it abstains from discussing another important aspect (which is perhaps the most important aspect) of Islamic law i.e., the legal-political legacies that emerged by its evolution throughout history. For this reason, a state like Turkey can still be recognised as a Muslim state due to the legal-political legacies that this country has incorporated from Islam not only as a religion but also as a source of law.\(^2\) Moreover, the ruling party’s imposition of Islamic law as opposed to secular law in public sphere shows the country’s potential drift towards Islamic law rather than a balanced framework of Islamic and secular law. Whereas the author recognises the diversity within ILS that shapes the law as empirically observed, this is not only because of a balanced approach between Islamic and secular law but also between the diversity of the schools of thought in a nation-state setting. For instance, the interaction among Hanafi, Maliki, Shafi, and Hanbali jurists and the interpretation of the Shari’a. Therefore, E J Powell’s book is more about the Islamic law that has mingled with secular law in a Muslim majority state rather than the Islamic law that has evolved in line with the Shari’a and under the auspices of Islamic jurisprudence from diverse schools of thought.

Chapter 3 discusses the relationship and differences between international law and Islamic law concerning the resolution of disputes. It offers an excellent account of the historical interaction between these two potentially conflicting legal systems. The author offers a very careful approach by neither adopting the extreme approach to these systems based on dissimilarities nor advocating for the similarities by ignoring the dissimilarities. Rather, the author takes a stance in the middle to discuss both the similarities and dissimilarities in the interaction. This chapter argues this interaction as a step forward to the development of an inter-civilizational dialogue. This is a good methodological approach for which this monograph stands out. Chapter 4 is a well-structured chapter that emphasises the procedural convergence between Islamic and international law that provides the platform for increased

The focus of this chapter is on the Islamic approach to conflict management that shapes the inter-state relationship between ILS. It also contrasts the dispute resolution cultures between the ILS and international law. The author’s observation in this chapter regarding the interjection of Shari’a in the resolution of inter-state disputes is very interesting and shows the empirical understanding of the functioning of the Shari’a at the state level and inter-state level.

Chapter 5 builds on the argument made in chapter 1 that ILS do not stick to any particular method of dispute. In other words, ILS’s choice of dispute resolution mechanisms is somewhat irregular. This chapter offers a cogent analysis of the state behaviour in the resolution of territorial disputes between ILS themselves as well as ILS and other states. In this regard, the author offers a great deal of discussion of the key methods of dispute resolution that ILS frequently resort to such as arbitration and adjudication. The chapter also discusses the role of less formal methods of dispute resolution such as conciliation, mediation, negotiation, and good offices. The discussion on the Islamic conception of land ownership and sovereignty is fascinating. Also, the data covered in the empirical study on the ILS’ attempts at peaceful settlement of territorial disputes are very extensive which covers from 1945 to 2012. Because the data does not cover beyond 2012 and the book is published in 2020 it does not offer the most recent state practices of the ILS. This aspect of the study is particularly important for ILS which have undergone a significant socio-political change since 2012 that occurred from the Arab Spring. However, this author’s analysis of the ICJ’s jurisprudence on matters involving one or more Muslim states, discussed in chapter 6, is commendable. The argument that ILS puts a premium on conciliation over adjudication and often prefer to less formal methods of dispute resolution is based on empirical analysis of the very common state practices of the ILS.

Chapter 7 shifts into a more investigative discussion about the difference in the schools of thought and also the geographic location of ILS. It offers a regional understanding of the characteristic of ILS in the resolution of disputes such as in the Middle East, Asia, and Europe. The author’s view here is that the emphasis on the idea that different regional versions of Islamic law may shape the relationship between ILS and international conflict management is relatively little (p 240). The author has put forward this view in a very systematic way as she offered an in-depth analysis of the regional variations of the ILS in terms of developing their jurisprudence surrounding the resolution of international disputes. Also, the argument that legal schools in the Islamic milieu have substantially weakened over time is very true. However, the author slightly overlooks the scholarly engagement of the schools of Islamic thought in addressing the legitimacy of Public international law in Muslim states.
Whereas the influence and incorporation of secular law in ILS is a strong and empirical argument made by the author, this methodology overlooks the role and purpose of Shari’a that shaped Islamic law throughout the history and in the modern world under the auspices of Islamic jurisprudence which is not limited to any single domestic jurisdiction. For instance, the Arab Spring in the 21st Century gives the world a strong message about the aspiration of Muslims to establish Islamic legal and political entities at the state level and inter-state level. This message is clear from the Muslims in general and those of young generations in particular for Muslim states to revive Islamic law rather than negotiating with foreign law. Although this message does not directly single out secular law, it endorses an Islamic conception of diversity and cooperation between Muslims and non-Muslims as opposed to a balance between a secular and Islamic legal system. For instance, the legitimacy of the Afghan government supported by the West was always questioned for not being Islamic enough by the Taliban authorities although the former claimed the country as an Islamic Republic. Similarly, how Islamic is the Taliban government would be when they form a government would depend on the application of Islamic law according to the Sharia and Islamic jurisprudence rather than a mixture of Islamic law and Taliban’s interpretation of that law. Likewise, answer to the question how Islamic is the Islamic Republic of Pakistan, would depend on the application of Islamic law according to the Shari’a and Islamic jurisprudence rather than adopting a balanced approach between Islamic law and Secular law by state authorities who found this suitable for political purposes.

Powell’s monograph is a welcome addition to the literature that examines ‘the interaction between the laws of Muslims states with that of international law concerning the peaceful resolution of inter-state disputes’ from an empirical perspective. There is much to be earned from a close reading of the arguments and analyses which explore many Muslim states in the Middle East, Asia, and Africa. This monograph offers an excellent analysis of the empirically obtained data in Muslim states in order to identify their legal characteristics at the state level and inter-state level. Therefore, this monograph is an excellent read for scholars and lawyers of international and comparative law. If international comparative law scholarship in general, and Islamic law and international law scholarship in particular, is to make a real progress, more work of this sort is needed.

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The law of copyright, an important branch of intellectual property law, is the breeding ground of a system that seeks to balance between two conflicting interests of the private creator and the public. While the copyright provides a bundle of rights that are recognized under any contemporary copyright statute, the western development of intellectual property law profoundly influenced the development of copyright law in India. The book under review as the name suggests explores the law relating to copyright for the governance of the country. It attempts to underline the existing law of copyright in India with a comparative analysis of international copyright law and English and American copyright law.

When the first edition of the book was published in 2015, there was no readable and dependable book for the general reader interested to be acquainted with the changing features of the law of copyright immediately after the enactment of the Copyright (Amendment) Act 2012. Since the publication of this book in 2015, the Supreme Court of India and the High Courts have delivered a large number of judicial decisions on the subject. The author has surveyed all such Court decisions and analyzed them and inserted them in appropriate places of the book. It presents not only the provisions of the Copyright Act 1957 in the form of a normative but points out the changes made thereon by formal amendments as well as conflicts of law that have been settled by judicial interpretations. Besides this, in 2017 the Finance Act has replaced the Copyright Board by [Appellate Board] as has been created under the Copyright Act. Further, in *Myspace Inc. v. Super Cassettes Industries Ltd.*, the Delhi High Court held that Sections 79 and 81 of the Information Technology Act 2000 and Section 51(a)(ii) of Copyright Act 1957 have to be read harmoniously. The Court further observed:

Accordingly, proviso to Section 81 of the Information Technology Act, does not preclude the affirmative defence of safe harbor for an intermediary in case of copyright actions. Section 51(a)(ii) of the Copyright Act, in the case of internet intermediaries, contemplates actual knowledge and not general awareness. Additionally, to impose liability on an intermediary, conditions under Section 79 of the Information Technology Act, have to be fulfilled.

Over the last century and a half or so, the proposition that copyright is rooted entirely in a property paradigm has been applied increasingly and its logic has been

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1 Substituted by the Finance Act 2017 (7 of 2017), Section 160(a) for “Copyright Board,” [w.e.f. 26 May, 2017].
2 2017 (69) PTC 1 (Del): 236 (2017) DLT 478.
extended with ever greater force. In *Common Cause v. Union of India*,\(^3\) the scope and ambit of cable television network has been examined by the Apex Court and observed: “No cable operator shall carry or include in his cable service any program in respect of which copyright subsists under the Copyright Act 1957 unless he has been granted a licence by owners of copyright under that Act in respect of such program.” Again, in *Ferani Hotels Pvt. Ltd. v. The State Information Commissioner*,\(^4\) the Supreme Court held that there would be no such infringement if there is reproduction of any work in a certified copy made or supplied under any law for the time being in force. Section 52 of the Copyright Act 1957 permits certain activities which do not amount to infringement. In *Super Cassettes Industries Ltd. v. Shreya Broadcasting Pvt. Ltd.*,\(^5\) the Delhi High Court held that in the “exception list” of copyright the important ones are reproduction of literary, dramatic, musical, or artistic works for educational purposes, e.g., research, review, etc., and reporting in newspapers, magazines, and periodicals, etc.

The book is divided into ten chapters. Chapter one of the book provides a detailed outline of the theoretical foundations of the law of copyright and explains whether copyright is a property or not. Over the last century and a half or so, the proposition that copyright is rooted entirely in a property paradigm has been applied increasingly and its logic has been extended with ever greater force. However, an examination of eighteenth-century sources shows that the concept of copyright as a form of property was neither the only nor even the dominant, paradigm in circulation at the time.\(^6\) The author of a copyrighted work under copyright laws has been given little power and less money and the intermediaries own the copyrights and can structure licenses to maximize their revenue while shrinking their pay-outs to authors. The word “property” is derived from the Latin word “proprius” which means “one’s own” and “what cannot be shared with others”. In this sense, with the pre-choice and eventual acquisition of things, it becomes one’s own, a part of one’s embodied self. The most important feature of the property is that the owner of the property may use it as he wishes and nobody else can lawfully use his property without his authorization. It is commonly agreed that people may own real property and tangible objects. Thus, under property law, certain rights or interests in movable and immovable property are protected. As science developed, the need for the publication of knowledge became inevitable. This was necessitated as some form of protection is given to the creator. The work of an author, therefore,

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4 2018 (5) CHN (SC) 238: 2018 (13) SCALE 672.
becomes the subject matter of the copyright law and an owner of copyright indisputably has a right akin to the right of property. Copyright expansionists have long argued that “copyright as property” supplies an appropriate and economically efficient template for copyright. Conversely, copyright critics have seen property talk about copyright as the root of copyright’s recent expansion. The idea of “property” casts a long shadow within copyright law, and thus, the question has persisted whether all understandings of property law are applicable in the law of copyright. Nevertheless, the author concludes thus:

The property includes not only real and personal property but also incorporeal rights such as patents, copyrights, leases, chooses in action, and every other thing of exchangeable value which a person may have, “profit a prendre”, such as a right to catch fish in another’s tank, the carcass of an animal belonging to a person.

Admitting certain variations it can be said that while under property law possession is the root of title and the nature of property is tangible and is of indefinite duration, the same under copyright law is for a limited period and intangible in nature. Under the property law, adverse possession ensures title while under copyright law a manuscript is the author’s property, and thus even if the manuscript is found in the hands of anyone, it still would be the author’s property. Every scholar of copyright law is often investing a considerable amount of skill, labour, and judgment to find out the difference between property law and copyright law. Again, property law’s “right” actively enables the exclusive use of the “res” and operates within the domain of positive liberty, while copyright law’s “right” disables others from copying the expression and operates as a form of negative liberty. Despite these variations, it is prudent to note that copyright is a property right as wrestling with the variations is one of the defining and foundational features of the law relating to copyright. The fact that copyright is subject to statutory restriction, but this restriction does not diminish its status as an inherent property right. It is precisely for this reason that copyright’s exclusive right to copy is heavily dependent on its correlative—”the duty not to copy”—for its disabling function, without which the right becomes functionally infructuous. Thus, the author in Chapter one pointed out that the law of copyright is a branch of intellectual property law and also explains the expanded meaning of intellectual property and its impact on copyright law, nature and meaning of copyright, general principles, special features, and justifications for providing copyright to authors.

Chapter two of the book discusses the origin and development of the law of copyright at the international level and its utility in India. The author has mentioned

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7 Chapter 1, p. 2.
8 Ibid., p. 3.
that a large number of international instruments define the scope and ambit of copyright. The law relating to copyright was recognized as conventional law through the 1886 International Convention for the Protection of Literary and Artistic Works. Subsequently, a large number of treaties and conventions were adopted at the international level to determine the scope and ambit of copyright law. The 1886 Convention was the first international convention on copyright which was revised several times at Berlin in 1908; at Rome in 1928; at Brussels in 1948; at Stockholm in 1967; at Paris in 1971, to meet the various challenges posed by the technological developments. In 1996, WIPO adopted two treaties on copyright, Performances, and Phonogram Treaty. Thus, there are two international covenants entered into by the countries that are members of the World Intellectual Property Organisation which are known as WIPO Copyright Treaty 1996 (WCT) and WIPO Performance and Phonograms Treaty 1996 (WPPT). The Provisions of these treaties are fully applicable in a digital environment. In addition to the aforesaid treaties, three more treaties were also adopted in the field of neighbouring rights: Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (Rome Convention), Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971 (Geneva Phonograms Convention) and Convention Relating to the Distribution of Programme Carrying Signals Transmitted by Satellite, 1974 (Brussels Satellite Convention). Apart from this, in 1994, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) was adopted. The TRIPS Agreement requires members to grant specific rights to performers, phonogram producers, and broadcasting organizations. It mandates the members to give performers the right to communicate their performances to the public or broadcast them by wireless means, to fix their unfixed performances, and to reproduce fixations. The Beijing Treaty on Audiovisual Performances, 2012 desires to develop and maintain the protection of the rights of performers in their audiovisual performances in a manner as effective and uniformly as possible. Thus, Chapter two presents the rudiment principles of various international conventions and treaties on the law of copyright which are applicable in India,9 while Chapter three of the book10 demonstrates the origin and development of the law of copyright in England, America, and India and concludes:11

The English Statute of Anne of 1709 is the first copyright statute in the World. Following the Statute of Anne, the Congress of the United States of America in 1790 passed a series of copyright statutes. Indian copyright law has grown out of English common law. The Copyright Act, 1957 which

9 Chapter 2, pp. 48-77.
10 Chapter 3, pp. 78-109.
11 Ibid., p. 78.
is the current statute in India has followed the principles of English copyright law. The 1957 Act has been amended from time to time. The Copyright (Amendment Act) 2012 was enacted bringing changes to copyright law in India.

The most important debatable issue in copyright law is “works in which copyright subsists”. Chapter four\textsuperscript{12} of the book is devoted to this aspect. Section 13 of the Copyright Act, 1957 enumerates six categories of works that are eligible for protection. Accordingly, all “original” literary, dramatic, musical, and artistic works, as well as cinematographic films and sound recordings, are eligible for protection under the Act. However, in the case of a cinematograph film and a sound recording, such protection is not available if a substantial part of it is an infringement of copyright in any other work. The requirement of originality is absent for claiming copyright in cinematograph films and sound recordings. The position in the case of literary, dramatic musical, or artistic works seems to be different. Thus, there are four categories of works eligible for copyright protection under the umbrella of “original” under Section 13 of the Act. But the word “original” is not defined by the legislature in UK, USA, and India. English Courts equated “originality” with the degree of skill, labour, and judgment that went into the creation of the work.\textsuperscript{13} In the United States, the judicial trend, to trace out the elements of originality in a given work was to focus on the “sweat of the brow” test or the industriousness.\textsuperscript{14} Nevertheless, there is a shift in this judicial approach. Hence, in 1991, in \textit{Feist Publications, Inc. v. Rural Telephone Service Co.},\textsuperscript{15} there is a glaring example of this shift wherein the Supreme Court of the United States was categorically observed that “as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a \textit{de minimis quantum} of creativity”. The Court held that the originality requirement in copyright law is based on the Constitutional mandate of some minimal degree of creativity and an author who claims infringement must prove the existence of intellectual production, of thought, and conception. Thus, in the US there is a respectable body of judicial opinion holding that some kind of creative or artistic quality must be present for copyright protection. Thus, in \textit{Eastern Book Company v. D.B. Modak},\textsuperscript{16} the Supreme Court of India has adopted a new approach. In this case, the Apex Court was categorical to observe:

\textsuperscript{12} Chapter 4, pp. 110-211.
\textsuperscript{13} See, \textit{University of London Press Ltd v. University Tutorial Press Ltd.}, (1916)2 Ch 601.
\textsuperscript{14} See, \textit{Alfred Bell & Co. v. Catalda Fine Arts, Inc.}, 191 F. 2d 99: 102 (2nd Cir. 1951).
Copyrighted material is that what is created by the author by his skill, labour, and investment of capital, may be it is a derivative work that gives a flavor of creativity.

Besides the aforementioned developments, the author has also discussed in Chapter four the idea and expression dichotomy, copyright in the common property and actual events, determination of literary work including computer software and databases, dramatic, musical and artistic works, cinematograph films, and sound recording. These controversial issues have been determined and re-determined by the courts from time to time. Section 38 of the Copyright Act, 1957 enumerates another two categories of works that are eligible for protection, namely, video film and a performer’s performance. What are the rights which can be the subject matters of a copyright under the Act contained in Sections 13 and 38? The author concludes:17

A conjoint reading of Sections 13 and 38 shows that copyright subsists in eight classes of works, i.e., literary work, dramatic work, musical work, artistic work, a cinematograph film including video film, a sound recording, and a performer’s performance.

Chapter five of the book18 explores various issues relating to the meaning of work, publication of work, the meaning of the author, the legal status of work of joint authorship, ownership of copyright, the first owner of the copyright, the meaning of contract of service, and contract for service, transfer of ownership of copyright such as assignment, relinquishment and licensing of copyright, various recognized rights of the copyright owner. The bundle of rights conferred by the Copyright Act, 1957 can broadly be classified into four groups, viz, (i) economic rights, (ii) moral rights or author’s special rights, (iii) performers’ rights, and (iv) broadcast reproduction rights. Section 14 of the Act enumerates certain basic economic rights, viz, (i) the reproduction right; (ii) the distribution right; (iii) the adaptation right; (iv) the public performance right; (v) the rental right; (vi) the cable casting right; (vii) the broadcasting right. There are certain other rights recognized under the Act as the “moral rights” or “author’s special rights”, viz, (i) the right to be identified as the author of a work; (ii) the right of an author of a work- the “integrity right”; (iii) a general right, that every person has, not to have a work falsely attributed to him; and (iv) right against piracy. The right to store work in electronic medium is a newly recognized economic right of an author under the Copyright Act, 1957.

17 Chapter 4, p. 112.
18 Chapter 5, p. 212 -297.
The Copyright (Amendment) Act, 1984 amended Section 14(1)(a)(i) which provided “to reproduce the work in any material form including the storing of it in any medium by electronic means”. The author has elaborately discussed this right. The right to make adaptation of the work has been given a separate economic right status to presumably strengthen the basic right of reproduction of the author. Sometimes the economic right of adaptation may also overlap with the moral right of integrity, which similarly empowers the authors to control changes in their work that “allows arrangement or transcription of the musical work.” The author clarifies that the 1886 Berne Convention (as revised in Paris in 1971) under Article 14(3) makes it clear that copyright in an adaptation is without prejudice to the copyright in the original work. Article 12 of the Berne Convention provides that authors of literary and artistic works “shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their work”. In the case of artistic works, especially, the “works of architecture” as defined under Section 2 (b) of the Copyright Act 1957 which means any building or structure having character or design, or any model for such building or structure, the owner of the work such as building often alters the maps of the buildings from time to time to make the house more modern as per the trend in the property market or otherwise, that may frequently lead to conflict with the copyright of the author of the work, who in this case would be an architect.\(^{19}\) In addition to the exclusive economic rights, moral rights are also available to the performer and author under Sections 38B and 57 of the Indian Copyright Act, 1957, respectively. The WIPO Copyright Treaty, 1996 (WCT) and WIPO Performances and Phonograms Treaty, 1996 (WPPT) together known as the “Internet treaties” address the challenges relevant to the dissemination of protected material over digital networks such as the Internet. The Copyright (Amendment) Act, 2012 was amended to harmonize the Copyright Act, 1957 with WCT and WPPT.\(^{20}\)

The term of copyright, licensing of copyright, international copyright, and registration of copyright is the subject matter of Chapter six.\(^{21}\) Article 7 of the Berne Convention 1886 (Revised in 1971) provides a floor limit of the life term of the author plus 50 years. At the national level, the governments are free to provide a longer-term protection. For example, in England and the United States of America, the period of protection of works is the lifetime of the author plus seventy years. In India, the law relating to determining the period or duration for the subsistence of copyright is given under Sections 22 to 29 of the Copyright Act, 1957. Section 22 deals with the term of copyright in published literary, dramatic, and musical or artistic work and stipulates that such term shall be sixty years from the beginning

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\(^{19}\) Ibid., p. 280.

\(^{20}\) Ibid., p. 287.

\(^{21}\) Chapter 6, pp. 298-335.
Sections 30 to 32B of the Copyright Act, 1957 deals with the aspect of licensing which is merely a permissive right and is a way of limiting the rights of the licence by the owner of the copyright. Sections 40–43 of the Act recognize international copyright. In exercise of the powers by Section 40 of the Act and in suppression of the International Copyright Order, 1991, the Central Government framed the International Copyright Order, 1999. Sections 44 to 50A of the Copyright Act, 1957 provide provisions for registration of copyright while according to Sections 13 and 14 of the Copyright Act, 1957 which defines the copyright and its meaning do not require registration. Thus, it is a general question of copyright law whether copyright registration is mandatory? This issue has been discussed by the author in detail.\(^2\)

The rights of broadcasting organizations and performers (neighbouring rights) are the subject matter of Chapter seven.\(^2\) The broadcast reproduction right is comparatively new in comparison to copyright protection for literary, dramatic, musical, and artistic works as well as cinematographic films and sound recordings. The owner of copyright in a broadcast has the exclusive right. The rights of performers have developed in parallel with copyright and the exercise of these rights is very often linked with the exercise of copyright. These rights have been recognized for the benefit of various kinds of performers like actors, dancers, musicians, jugglers, acrobats, and so on. These rights are somewhat analogous to broadcast reproduction rights. The special rights are recognized for broadcasting organizations in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961. The Brussels Satellite Convention, 1974 also provides protection for broadcasting organizations. According to Article 14(3) of the 1994 TRIPS Agreement, broadcasting organizations have the right to control the fixation, reproduction, wireless rebroadcasting, and communication to the public of broadcasts. India being the signatory to the TRIPS Agreement the Copyright Act, 1957 was amended through the Copyright (Amendment) Act, 1994 to incorporate broadcast reproduction right under Section 37. Article 14 of the TRIPS Agreement recognizes the rights to performers. Thus, under the TRIPS Agreement performers are given the possibility of preventing the unauthorized fixation, reproduction, wireless broadcasting, and communication to the public of their performances. The 1996 WIPO Performance and Phonograms Treaty give economic rights and moral rights to the performers. The 2012 Beijing Treaty on Audiovisual Performances was adopted to strengthen the economic rights of film actors and other performers. Sections 38A, 38B, and 39A have been inserted into the Copyright Act, 1957 by the Copyright (Amendment) Act, 2012. The new

\(^2\)Ibid., p. 331.
\(^2\)Chapter 7, pp. 336-373.
Section 38A deals with the exclusive right of performers while Section 38B provides for the moral rights of the performers. Section 39A provides for certain provisions to apply in case of broadcast reproduction right and performer’s right. These developments have been discussed by the author very lucidly with the latest case laws.  

Internet is the greatest communication medium of the contemporary era and there is an inherent link between the law of copyright and the internet. Therefore, Chapter eight is devoted to discussing various issues relating to the “protection of copyright in internet”. The question is who will take the responsibility to monitor violations of rights on the Internet? Can the providers of the Internet service be held responsible for the violations that take place on the Internet of which he may or may not have any information? If so, to what extent? Do they have the responsibility to monitor the violation? Can they absolve the responsibility even if the violations are brought to their notice? Are their activities like providing access by linking including deep linking, system caching, framing, etc. violations of the right of reproduction? Similarly, the question of the liability of the users of the Internet is controversial in the contemporary era. Are the activities of browsing, downloading, storing, and transmitting of works for any non-commercial purposes violating the rights? Is this to be treated as fair use or use with implied licence? How should the right of authors be defined and what are the exceptions and limitations to be permitted to such rights? How are the rights of authors to be enforced and administered in this digital environment? Can the existing worldwide copyright law adequately protect the interests of those who hold the copyright or are changes to the existing rules required? To answer these questions the author has discussed various concepts, acts, and uses on the internet and their copyright implications.  

In this context, the right to reproduction in the Internet is relevant. Under Section 14(i)(a) and (e) of the Copyright Act, 1957 the right to reproduction of a literary, dramatic, musical work, sound recording in any medium by electronic means are recognized. The WIPO Copyright Treaty, 1996 protects the Internet/online communication of the works. It protects the service providers who provide mere physical facilities for Internet communication. It is obligatory on the part of nations to take adequate measures to protect the technological measures and right management system. Article 19 of the WIPO Performances and Phonograms Treaty, 1996 (WPPT) recognized the “rights management information.” The Copyright (Amendment) Act, 2012 has introduced provisions relating to protecting the electronic right management system and circumvention of technological measures.

24 Ibid., p. 365.
25 Chapter 8, pp. 374-420.
26 Ibid., p. 376.
27 Ibid., p. 405.
A new Section 65A has been introduced to provide for the protection of technological measures used by a copyright owner to protect his rights on the work. The author has also discussed the liability of internet service providers as well as jurisdictional issues in Internet disputes.

Infringement of copyright is an often phenomenon in the contemporary era. While Chapter nine demonstrates the law relating to infringement of copyright and defences of copyright liability, Chapter ten explores remedies against infringement of copyright. Copyright provides a bundle of rights but these rights are not an absolute right of the owner. Hence, several defences are available in case of copyright infringement. The questions which often arise: When copyright is deemed to be infringed? What are the tests for determining infringements? What are the recognized defences of copyright liability? When fair dealing/use doctrine would be applied? And when would the doctrine “public domain” be given preference? The author rightly concludes inter-alia that the term “public domain” and “fair use” are distinct from each other and once the work comes within the ambit of “public domain” then there is no question of involvement of the fair use doctrine because the term “public domain” means there is no copyright protection available at all to the concerned work.

Enforcement of copyright in India became more controversial especially since the time of adoption of TRIPS Agreement in 1994. Part III of the TRIPS Agreement provides for “Enforcement of Intellectual Property Rights.” Comparing provisions of the TRIPS Agreement, this chapter discusses the administrative remedies such as border measures as well as the role of the Copyright Society, Office and Board in enforcing copyright in India. So far as the judicial remedies are concerned, both civil and criminal remedies are available for infringement of copyright. Thus, the judiciary has developed a strict framework of theories for providing remedies in case of infringement of copyright. Injunction, damages, accounts of profits are some traditional remedies that are available for this purpose. The TRIPS Agreement introduced a number of new doctrines like Anton Piller Order, John Doe Order for providing judicial remedies.

Comparing the provisions of the TRIPS Agreement in the context of remedies against infringement of copyright in India, the author has discussed in detail with case laws all the aforementioned matters relating to the enforcement of copyright in India.

The book addresses various important aspects of the law of copyright. It provides good insights into the historical and contemporary issues on copyright. The task of evaluating the international law of copyright as well as domestic laws of various countries on copyright protection has been meticulously performed by

28 Ibid., p. 410.
29 Chapter 9, p. 473.
30 Chapter 10, pp. 493-602.
the author. The work maintains consistency and coherence. It is highly informative and fills the gap in the existing literature. Nevertheless, the book contains case laws upto the year 1999. Hence, the later developments that have taken place after the publication of the book will have to be incorporated in the next edition of the book.

*Jai S. Singh*

This book is an edited volume consisting of twenty-five chapter in essay format which has been written in the honor of Prof. Autar Krishen Koul. There could not have been a better way to honor Prof. Kaul than by giving a platform to the established as well as the emerging international legal writers to compile their ideas in one volume.

This book is woven around topics of international law which includes areas such as international trade law, IPR protection, Human Rights, IDPs, State responsibility etc. The book does not confine itself to the traditional topics of international law alone but also incorporates the challenges of artificial intelligence and has also covered the recent COVID 19 impact.

In international law, the common critique that often surfaces is with respect to the euro-centric nature of the subject as most of the work in this field emerges from western scholars. This book adds to the effort of the third world scholars popularly known as *Third World Approach to International Law* (TWAIL) in educating the students about their idea of international law with easiness in language.

The opening section of the book i.e., the first chapter has been written by V. K. Ahuja which enlists the academic and administrative journey of late Prof. Koul. Since, the book consists of 25 chapters, it would not be proper to give a summary of each chapter. However, the book catches the attention of the reader for many reasons. First, the diversity of the scholars and second the Indian perspective to international law which strengthens Indian position as an emerging face in the area of international legal scholars.

The book has incorporated the views of Secretary General of AALCO, member of International Law Commission, professor, practitioners, doctoral scholars and law students. This itself shows the international legal diaspora. Apart from this, the book has incorporated Indian’s stand to various international legal problems and its response in compliance with international law which shows India’s effort in upholding the majesty of international law.

It is necessary here to mention some of the chapters which clarifies India’s position on certain international legal issues.

Aniruddha Rajput in “international law and non-military pre-emptive strike by India in Pakistan” puts forth argument concerning the “surgical strike” done by India in wake of the Pulwama attack. The author argues it as an act of “non-military pre-emptive strike by India in Pakistan”. It states that the actions were taken against prospective terrorist actions in consonance with the *Caroline* test.
Anupam Jha in “Law on Letter of Credit: An examination of judicial response in India” encapsulates the evolution of law on letter of credit which is an important means of payment used extensively in trade transactions between businessmen belonging to different countries. It lists out several cases decided by the Hon’ble Supreme Court which has examined the issue in consonance with the Uniform Customs and Practices for Documentary Credits, the common law principles of contract, indemnity and surety ship.

Ambuj Kumar Sonal and Shubhangi Tiny in “Restrictions on opportunistic takeover by India: Possible claims of China under China-India BIT” analyses China-India BIT in light of the recent amendment on FDI. It throws an open-ended question to the readers as well the authorities to decide whether this amendment will be in consonance with FEMA and also raises caution against the trade rift between India and China due to the amendment.

Anand Kumar Singh and Anirudh Panicker in “Understanding the Interface between Anti-dumping and Competition Law in India” analyses the relevance of anti-dumping law in light of the competition law in India. In their analysis, it seems that the two regimes compliment each other and at the same time in certain situations also contradict each other. However, in view of the findings the authors suggest that anti-dumping regime should be replaced with a robust competition regime as anti-dumping regime has outlived its purpose.

K. Syamala in “Innovation and IPR Status of India at the Global Platform: A Study” argues that innovation quality of a country is majorly dependent upon the standards of IP protection. The chapter also analyses the position of India in comparison to other countries in the WIPO-Global Innovation Index (2019) and highlights the strengths and weaknesses of India. It also analyses the various legislative, regulatory and policy changes brought in by India in the recent years to boost the innovation and enhance the IP standards in the country.

Shivanshu Kumar and Rahul Dubey in “Arbitrability of Intellectual Property Disputes: International Scenario vis-à-vis India’s Position” discusses the dispute resolution mechanism related to commercializing Intellectual Property through licenses, assignments, agreements etc. The authors states that the IPR infringement and/or passing-off action through arbitration is in muddied waters in India. It also cites series of cases decided in India with respect to arbitration and the scope of arbitration act. The authors argue that throughout the world, mostly the judicial trend has been that IPR disputes are arbitrable allowing parties to have quick and convenient adjudication of their disputes. In India, the traditional approach has been to declare such disputes as non-arbitrable. However, the recent trend by the judiciary shows some liberal approach by holding the same to be arbitrable.
Nidhi Gupta in “The Hague Convention on Choice of Court Agreements” A new reason for India to reconsider its stance towards International Conventions” states that choice of court agreements in the commercial contracts have been an important device adopted by the contracting parties to have certainty on the issue of forums where disputes can be litigated and cites the Hague Conference on Choice of Court Agreements (HCCA) 2015 as the basis to which India is not a signatory. This chapter hence analyses India’s approach towards this convention along with the arguments that whether India should sign the treaty or not. The authors list a series of cases wherein the parties have already mentioned the jurisdiction of specific courts in case of any dispute. Since, there is similarity in Indian approach and the objective of the Convention, the author states that prima facie there appears no case as to why India should not sign this treaty. However, things are not black and white as it appears to be as the convention can restrict India’s claim in many ways. One of them being the unequal bargaining power of the developed and developing countries.

Apart from these chapters clearing out or at least listing out India’s stand on major international legal issues, there are other issues of international importance as well which has been focused upon. It includes key areas such as human rights, IDPs, private international law, IPRs, trade, outer space etc. However, these chapters should also have incorporated India’s position to make the case of India’s contribution to TWAIL more pertinent.

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Articles:


* Librarian, Indian Society of International Law, New Delhi.

Conconi, Paola and other, “EU Trade Agreements: To Mix or Not to Mix, That Is the Question”, *Journal of World Trade*, vol. 55 (2) (2021), pp. 231-260.


**Air and Space Law**

**Articles:**


Ridha Aditya Nugraha and others, “Air and Space Law Education: Preparing for the Future in China, Indonesia, Italy and Thailand”, *Hasanuddin Law Journal*, vol. 7(3) (2021), available online at DOI: http://dx.doi.org/10.20956/halrev.v7i3.3197.


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