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About CRIL

The Centre for Research in International Law (CRIL), a student-run body at National Law Institute University - Bhopal (NLIU) and the official Bhopal Chapter of the International Law Students Association (ILSA).

About the e-Journal of International Law

The NLIU e-Journal of International Law is a bi-annual online journal which publishes scholarly articles in the field of international law. It seeks to secure collaboration between students, research scholars and professionals interested in international law, from all over the world.

Information for Contributors

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NOTE BY EDITOR-IN-CHIEF

It gives me immense pleasure in presenting to our readers the maiden issue of the NLIU e-Journal of International Law. CRIL has been instrumental in promoting awareness regarding international law through organizing model united nations, conferences, lectures amongst others. This e-Journal is another conscious effort on its part to bring together the academia on a single platform for thought provoking discussions and analysis. The Journal is envisioned to be an invaluable resource of legal information that would draw attention to the contemporary issues that impact our society.

This Issue encapsulates varied aspects of international law, and forays into relatively unchartered domains of legal literature, providing a worthy reflection of the prowess of the legal fraternity. I sincerely hope that this edition helps the readers gain valuable insight into integral legal concepts and enhances their research so as to facilitate intellectual discourse and stimulate legal innovation.

I am extremely thankful to Prof. (Dr.) S.S. Singh, the Director of National Law Institute University, Bhopal for his encouragement, guidance and continuous support. The contributors whose articles are included in this Issue deserve special mention and thanks for making this endeavour a success.

The student body of CRIL and the NLIU e-Journal of International Law deserves a special thanks for successful accomplishing the tremendous job of screening and evaluating the manuscripts submitted to us for publication.

Prof. (Dr.) Raka Arya

Editor-in-Chief

EDITORIAL NOTE

CRIL is gratified to present the 1st issue of Volume I of the NLIU e-Journal of International Law. is an endeavor to increase awareness among law students and academicians and provide a platform for them to contribute to the existing legal literature through well-researched articles.. All of these articles have gone through stringent reviewing and provide clear, simple and comprehensive deliberations on the urgent questions under each subject.

The opening article *'Abuse of Diplomatic Immunity'* sheds light on on abuse of Diplomatic Immunity provided to diplomatic personnel and other staff the by the Vienna Convention and how it has been taken advantage of.

In *'Drone Strikes: A New Form of American Imperialism',* the authors have commented on drone strikes operation being implemented in the interest of America under the veil of counterterrorism measure. The article also discusses the legal status of CIA and conlcudes with recommendation for accountability measures for drone strikes resulting in extrajudicial killing in violation of Human Rights Law, in order to be considered as effective weapons of counterterrorism.

The author in *'Relationship between International Trade and Competition: From the perspective of the National Treatment Obligation'* traces the importance of competition with respect to the National Treatment Obligation which is required to be followed by all WTO members.

'*Demonstrative evidence and expert testimony, with special reference to satellite images and data sensing as evidence'* attempts to throw light on the question of whether expert testimony over satellite images are hindrance for international arbitration practitioners or not? The focus of the article is on two core points: nature of satellite images and other earth observation (EO) techniques as evidence; and expert testimony and opinion on interpretation of such evidences.

In *'Arms Trade: State and Individual Responsibility under International Law'*, the author explores the possibility of making exporters of arms & ammunitions liable under the existing international law for gross violation of human rights committed by the importers of such arms.

The author in *'Challenges to Global Industrialization: Why the International Court of Justice has received zero Intellectual Property cases till date'* tries to elucidate on the failure of International Court of Justice when it comes to the field of disputes relating to Intellectual Property.

The article *'Legality of US airstrikes against ISIS in International Law'* critically examines the recent US airstrikes against ISIS within the realm and in disregard of International Law.

In *'Responsibility to Protect and Humanitarian Intervention: A Step Forward, and then a Step Backward',* the author discusses the origins and development of the principle of responsibility to protect and its interplay with humanitarian intervention. The author raises concerns over the recent international developments with respect to Syria and Libya that have led to responsibility to protect being selectively used, not in response to genuine humanitarian concerns – but based on a criterion independent from them, just like the humanitarian interventions of the past era.

The concluding article *'The Quagmire of Greed and Humanity: The Need for Criminal Liability of Corporations in International Criminal Law'* emphasis on the rising concern over the manner in which no clear form of criminal liability is imputed to transnational corporations under international criminal law. The author suggests attuning the international criminal law to common law frequency of the liability of corporations and explicit recognition of corporations under the Rome Statute in order to rectify the anomaly in order to render justice.

The e-Journal Team hopes that the present issue is successful for all the readers and that the collection of articles on various contemporary issues proves to be both useful and appreciable. We invite comments and criticism on the articles published in this Issue. Kindly feel free to make suggestions and comments for improving the quality and stimulating intellectual discourse.

Tara Hari

Editorial Head

ABUSE OF DIPLOMATIC IMMUNITY

Barkha Khattar[·] & Sahil Agarwal[··]

Purpose: The purpose of this article is to understand the role and appointment of diplomatic personnel and other staff and their protection in the receiving state and also the privileges granted to them by the Vienna Convention. The article argues on abuse of Diplomatic Immunity so provided to them by the Convention and how it has been taken advantage of.

Methodology: Doctrinal approach has been followed for collecting the relevant material for this article. Both definition and classification of Diplomatic Immunity and also abuse of the same are based on the perspectives of International Law. Case studies have also been taken into consideration.

Highlighting the topic: 'Diplomatic agents', as the Article 1 of the Vienna Convention on Diplomatic Relations 1961 prescribes, are the persons who are hosted by the receiving State as representatives of the sending States as their "head of the mission" by whom they are dispatched. Diplomacy, according to Shaw, "is the communication between various parties [such as receiving State and sending State], including negotiations between recognised agents [of those states]". This article seeks to analyze the protection given to a Diplomatic agent in form of immunities and how it is being exploited. Different cases and laws (customary or Conventions) will be referred for the sake of arguments between different views on this topic.

Research Limitation/Implication: The article proposes a definition and a classification as a tool for knowledge exchange and to support knowledge organization and use. However, the classification proposed in this article might not be the only possible solution.

I. INTRODUCTION

Rules related to diplomats have existed since ancient times and can be regarded as "one of the earliest expression of International Law".[1] These rules have developed over the years through customary International Law, various judicial pronouncements and obviously through its codification in the Vienna Convention on Diplomatic Relations. Hence the "institution of diplomatic representatives has -come to be the principal machinery by which intercourse between state is conducted."[2] Diplomacy comprises of means by which the states establish and maintain mutual relations and communicate in order to engage in legal or political transactions. For this purpose the Diplomats are deployed and sent to different states to carry out the mission. Diplomacy may also exist between -States "in a state of war or armed conflict with each other", but the concept in this sense is related to communication only. The States in their intercourse,

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[1] MALCOM N. SHAW, INTERNATIONAL LAW 668 (Cambridge Univ. Press, 5th ed. 2003).

[2] I.A. SHEARER, STARKE'S INTERNATIONAL LAW 383 (Oxford Univ. Press, 11th ed. 1994).

consult with each other or even negotiate for which diplomatic envoys are necessary. This article basically focuses on the abuse of diplomatic immunity. Diplomatic immunity is the legal immunity granted to the head of the mission in the receiving State which ensures inviolability and protection of the premises of the mission, baggage of diplomats, houses in which they reside, courier packages of the nature and also the property related to the mission.

II. BASIS OF DIPLOMATIC IMMUNITY

There are various theories on which the diplomatic immunity is based, three of which are summarised here. First is the *Representative of Sovereign* theory, according to which a diplomatic agent is considered as the representative of the State and any act done by him/her is as if it's done by the State itself. In other words, "a diplomatic envoy personifies the sovereign he/she represents"[3]. This theory was not accepted widely and faced criticism. Some of which were that the personification of the diplomats as the State that they represent- makes them supreme than the receiving State and along with the official acts also cover- the private acts of the diplomatic agents. Second theory is the *Exterritoriality* theory, which is one of the oldest. It adopts the legal fiction that a diplomatic agent is always on his/her own soil wherever he/she may go. So to say that even if the diplomatic agent is hosted by the receiving State, even then the diplomat will be governed as if he/she is living in his/her own state and not a foreign State and the laws of that foreign State will not applicable on the diplomat. Even this theory faced criticism and was not accepted due to its fictitious character. The most popular theory is the theory of *functional necessity*. This theory explains that if such Immunity was not provided to the Diplomats, they wouldn't be able to perform their functions distinctively. - If they were - governed by the laws of the receiving State, then, it would have interfered with their mission and their safety also would have been hampered. Having now known the basis of diplomatic immunity, we can move further to the Vienna Convention on Diplomatic Relations which laid down the ground rules.

III. VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961

The Vienna Convention on Diplomatic Relations, 1961 (referred to as "Vienna Convention"), which came into force in 1964, concerns with the privileges and immunities granted to a Diplomatic agent. This Convention which was adopted at the United Nations Conference on Diplomatic Intercourse and Immunities in Vienna has 190 signatories at present. Article 1 of the Vienna Convention describes a *Diplomatic Agent* as "the head of the mission or a member of Diplomatic staff" and *Head of the State* -is "the person charged by the sending State with the duty

[3] Leslie Shirin Farhangi, *Insuring Against Abuse of Diplomatic Immunity,* 38 STAN. L. REV. 1517 (1986).

of acting in the capacity". Where the Vienna Convention has codified the laws related to diplomats, the case of U.S. Diplomatic and Consular Staff in Tehran Case[4] filled the gaps. It is to be noted that the diplomatic relation between two States is based on mutual consent. For this purpose Articles 2, 4 and 9 can be analysed. As provided in Article 2, "The establishment of diplomatic relations between States, and of diplomatic missions, take place by mutual consent". Before the sending State sends its head of the mission, the receiving State has to give consent to that effect and if it does not, no reasons have to be provided. Similarly, according to Article 9 when the receiving State declares a head of mission, *persona non grata* no reasons have to be provided by it and the sending State is required to call him back. It –– is also brought to - notice that if a State does not want to enter into a diplomatic relation, it cannot be compelled to do so. For the purpose of inviolability of the person, premise and baggage of the diplomatic agent, certain Articles of the Vienna Convention can be analysed. Further it shall also be clear that how privileges that are being provided under these Articles are being abused by the diplomatic agents, who sometimes under the veil of immunity think it - fine to disrespect the laws of the receiving State. Diplomatic agents are assigned functions in a mission that are required to be performed by them. Article 3 lays down the functions that are to performed by the diplomatic agent. Article 3 stipulates:

> "1. The functions of a diplomatic mission consist, inter alia, in:
>
> (*a*) Representing the sending State in the receiving State;
>
> (*b*) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
>
> (*c*) Negotiating with the Government of the receiving State;
>
> (*d*) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
>
> (*e*) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
>
> 2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission."

[4] *The Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), 1980 I.C.J. 3 (May 24).

IV. INVIOLABILITY AND PROTECTION OF THE PREMISE OF THE MISSION

Article 22 of the Vienna Convention speaks about inviolability of the premises of the mission, where it is said that no person of the receiving State can intrude the premises of the mission. Any agent can enter the property only when the permission of the head of the mission is granted to that effect. Along with this, it is also the duty of the receiving State to protect the personnel of the mission. It may also be noted that the term 'premises of the mission' is only meant the property that is currently being used for that purpose. Similarly, Article 30 guarantees the residence of the diplomatic agent inviolability and protection as the premise of the mission. Same can be enjoyed by the family members of the diplomatic agent under Article 37. This is one of the privileges that is granted to the diplomatic agent, hence is subjected to abuse. A case of 1929 can be referred to when French officials got information regarding a person who was being detained at the Soviet Embassy, which was in Pakistan. They entered the premise. Some philosophers are in the favour of this act as "no civilised Sate could permit a foreign legation to be made a place of imprisonment, or, a fortiori, a place of execution"[5]. In 1973, arms were being brought and stored in Embassy of Iraq in Islamabad. When Ambassador of the Embassy was approached for seeking permission, he refused to grant it. The armed police forcefully entered the premise and raided the premise and found huge consignment of arms which was brought for the tribes of Baluchistan. A strong protest was sent by the Government of Pakistan to the Iraq Government and also the Ambassador was declared *persona non grata*. This is an illustration of abuse of the privilege given to them. What we see here is a clear use of immunity to do something that is illegal and would not be easy to perform unless this kind of privilege is not there. The real question is, if it is ethical to smuggle weapons to disrupt national security of the receiving State, a State that obliged you with such privilege (although through obligation of the Vienna Convention)? The receiving State, although under the obligation of the Vienna Convention, respected the privilege. So, it should be the duty of the diplomatic agent -in return to respect the laws of the receiving State. A diplomatic agent (representative theory), personifies the sending State. Hence by disrupting the national security of the receiving State, bad message is being sent.

Along with the principle of inviolability, a correlative duty is on the receiving State or the hosting State to protect the premise and also the documents and archives of the mission, according to

[5] See I.A. SHEARER, STARKE'S INTERNATIONAL LAW (Oxford Univ. Press, 11th ed. 1994).

Article 24.[6] In November 1979, the US Embassy in Tehran was taken possession of by a strong group of militant and Iranian Students. The security force that was deployed by the Iranian Government, for the protection of the US Embassy did not oppose the act and disappeared from there. The protestors, meanwhile seized the buildings, entered the Chancery and took control over the main vault. There also destroyed the documents and archives of the Embassy and took away some of the documents. They held diplomatic and consular staff, thereby holding 52 US Nationals as hostages, including private citizens. On these very facts, the Court held that the Iranian Government had failed in every way to provide protection to the Embassy and had also failed to take appropriate measures- provided under Article 22 of the Vienna Convention. The Court also held that there was also a clear violation of the Articles 25, 26 and 27, which provide for full facilities to be given by the receiving State for the performance of the functions of the mission, freedom of movement and travel of diplomatic personnel and protecting free communication- respectively. According to the above referred cases as illustrations, it can be said that cooperation is needed from both side for - smooth functioning of the diplomatic mission. It is evident from the above cited example that the receiving State did not value the privilege and also breached the duty vested upon it. Protection to the diplomatic premise, baggage, documents, and staff is of utmost importance because they have been sent by their State in order to establish and maintain relations among the states.

Another debatable issue here is of diplomatic asylum. According to Shaw,

> "Whether a right - of diplomatic asylum exists within general international law is doubtful and in principle refugees are to be returned to the authorities of the receiving State in the absence of the treaty or customary rules on the contrary. Wherein treaties exist regarding the grant of asylum, the question will arise as to the respective competences of the sending and receiving State or the State granting asylum and the territorial state."

However, it is on the discretion of the diplomatic agent, as he has the authority to decide whether a refugee meets certain criteria laid down in the treaty between the States for the purpose of granting asylum. It is to be noted in this regard, that even if a refugee is meeting all the criteria laid down in the treaty, the State or the diplomatic agent is under no obligation to grant him asylum. There are no express provisions for Diplomatic Asylum in the Vienna Convention but Article 41(3) provides that the mission should not be used in any manner that is

[6] See United States of America v. Iran, *supra* note 4.

incompatible with the purpose and function of the mission. Also according to Article 6 of the Harvard Research Draft Convention on diplomatic Privileges and immunity 1932, a sending State cannot use its premises in other state as an asylum. But there are exceptional cases where the premises of the mission have been used for the purpose of granting asylum.

V. INVIOLABILITY OF DIPLOMATIC BAG

For the purpose of this section Article 27 of the Vienna Convention shall be analysed. A diplomatic bag comprises of packages, sacks, or possibly trunks and is usually sent in the custody of a diplomatic courier, who according to Article 27(6) "shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag". There is no limit to the size and shape of the diplomatic bag.[7] Article 28 of the International Law Commission Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied be Diplomatic Courier contains provision regarding the inviolability of diplomatic bag. The provision clearly specifies that the diplomatic bag "shall be inviolable where it may be". It also provides for the bag to not be opened or checked by any means, such as directly - electronically -. Usually the bag of diplomatic nature contains physical marks to that effect but no such requirement has been mentioned under the Article. Due to the technological advancements of developed countries, the Article provides that even by the electronic means the bag cannot be checked. As it is evident from the privilege so provided, the diplomatic bag is inviolable and hence subject to abuse. Article 27 of the Vienna Convention says that it is duty of the State to protect free communication between the diplomatic agents with its Sates, which also includes the non-inspection of the diplomatic couriers. Before the Convention of 1961, according to Denza, it was an international practice that where the receiving State had suspicion of abuse of this privilege, it had a right to challenge in respect of the diplomatic bag. To clear the suspicion of the receiving State, the sending State could either allow the bag to be checked in the presence of authorised personnel or be returned back to its place of origin. But now according to Article 27(3) & (4) the diplomatic bag can be - allowed into the receiving state even without being inspected and cannot be opened or detained. The diplomatic bag is inviolable for a reason, to keep the documents and other contents of the bag a secret, as the mission requires confidential means of communication. Yet, it is being used to do illegal acts, such as smuggling of drugs, currency, and other such illegal items from one place to another under the tag of 'diplomatic

[7] See DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW (Thomson Reuters Legal, 7th ed. 2011).

mail'. The courier of such nature is also being used to transmit documents other than the documents that are truly meant for that purpose.

There are many instances of abuse of these immunities and privileges vested on the diplomatic agents. Two remarkable incidents of kidnapping of a person from one territory and sending it to another State in a diplomatic crate can be cited here. In 1964 an Israeli National was drugged and tied and was then packed into a trunk to transported to another State. The trunk was labelled as a "diplomatic mail". At Rome Airport the authorities found the trunk and opened it despite the clear indication on the trunk that said that it was a diplomatic mail. A person was found inside the trunk that was being sent by the Egyptian mission to Cairo. The Head of the Mission of the Embassy was declared *persona non grata* by Italy and two other members of the mission were expelled. Another such incident i.e., Mr. Dikko incident can be traced back to July 1984. A Minister of the overthrown government of Nigeria, who was wanted there on criminal charges, was kidnapped and drugged and packed in a crate in London to be taken to Nigeria. At Stansted Airport somebody complained of the foul odour coming from the crate and the authorities demanded it to be opened. It was claimed to be a diplomatic courier but no such indication was there on the crate.

In some cases the receiving State or the transit State opens the bag that is marked and has clear indication of being a diplomatic bag. One such incident happened in March 2000, when a diplomatic baggage was in transit to British High Commissioner and was forcefully opened and detained by the Zimbabwe authorities. This act was protested vigorously by the UK government.

Some countries reserve their rights to open the diplomatic bag in certain circumstances. In 1984 during the Libya Embassy Siege, the diplomatic bags of Libya were not checked. Yet, it reserved the right to check the diplomatic bag of others if the situation required. Similarly Saudi Arabia and Kuwait have made similar reservations.

VI. PERSONAL INVIOLABILITY (ALSO OF BENEFICIARIES)

Article 29 of the Vienna Convention stipulates: 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity'. According to Denza, this principle is the most fundamental rule of diplomatic law and is also the oldest established rule of diplomatic law. It was held in *Boos v.*

Barry[8] by the US Supreme Court that the State recognises that the protection of the diplomats is a mutual interest founded on functional requirements and reciprocity. The receiving State has an obligation on itself to 'take appropriate steps' for the protection of the diplomatic agents and to prevent any attack on his person, freedom or dignity. "After a period of kidnappings of diplomats, the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected persons, Including Diplomatic Agents was adopted in 1973."[9] According to this Convention the states must make their own laws for the protection of the diplomatic agents and any harm or attack on the person of the diplomatic agent shall be made a crime. It can be further clarified that this inviolability is distinct from the immunity from criminal jurisdiction.[10] The most relevant example of the breach of obligation that is on the receiving State to protect the person of the diplomatic agent is when 50 diplomatic and consular staff of US Embassy were held as hostages by Iranian students and militants in 1979. The Iranian Government had failed to protect their person from such harm.

Further Article 30 of the Vienna Convention states as follows:

> '1. The private residence of a diplomatic agent enjoy[s] the same inviolability and protection as the premises of the mission.
> 2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.'

The private residence of the diplomat (temporary or permanent) shall be inviolable and also enjoy the same privileges as that of the premise of the mission. Even this privilege is subject to abuse like all others. A recent example falling under this Article is that of an ambassador of Saudi Arabia who is accused of raping two women in India. According to the recent news the Saudi Arabia Government has filed complaint against the Indian police who forcefully entered and raided the private residence of the First Secretary Majed Hassan Ashoor after a complaint being filed against him in New Delhi by one of his maid employed at his household.

Article 37 of the Vienna Convention provides immunity to the beneficiaries of the Diplomatic personnel, stating that they shall also "enjoy the privileges and immunities specified in Articles 29 to 36", if not nationals of the receiving State. Hence Article 31 restricts the wife and children of the diplomat who are the nationals of the receiving State, from claiming immunity. The

[8] *Boos v. Barry*, 485 U.S. 312 (1988).
[9] MALCOM SHAW, INTERNATIONAL LAW 681 (Cambridge Univ. Press, 5th ed. 2007).
[10] IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 358 (Oxford Univ. Press, 7th ed. 2008).

immunity also cannot be claimed when the wife and the children are not living under the same roof with the diplomatic personnel. British Foreign office has a practice to treat a diplomat's family that is including the wife and children under the following exceptional circumstances:

> "1. The child of a diplomat [is] between the ages of eighteen and twenty-five clearly resident with and financially dependent on him or her, in full time education at a recognised educational establishment and not engaged in paid full time enjoyment;
> 2. in certain cases, a dependent parent of a diplomat normally resident with him or her."

Article 40 can also be interpreted in the light of a case *R. v. Guildhall Magistrates Court Ex p. Jarrett-Thorpe,*[11] where the husband of the counsellor to the Sierra Leone Embassy had made plans with her to travel back along with her from London to Rome. The counsellor was travelling to London for the purpose of shopping for furniture and her husband who was coming from the sending State to join his wife, would join her in London to help her to take furniture to Rome. The counsellor reached London early and - had also finished shopping and the husband had not yet arrived, so she went alone back to Rome and sent a message to her husband to meet her directly in Rome. The applicant that is the husband had not intended to enter UK and was only waiting for flight at Heathrow Airport to Rome, where he was detained by the British Officials in furtherance to criminal charges that were pending against him in UK. Lawton J. held that Article 40 can be applied as he was the spouse of the Counsellor and hence was entitled to immunity as a family member.

There are various other examples where such immunity granted to the family of the diplomat is misused and taken advantage of. One such incident of India can be cited here. In May 2003, Mansur Ali son of the then Senegal's Envoy Ahmed el Mansour Diop, was charged by the officials in New Delhi of culpable homicide not amounting to murder as their driver Dilwar Singh was found dead. According to the police reports the driver named Dilwar Singh was with Ali in a five star hotel, and Dilwar Singh was not in a state to drive back home, so Ali forcefully snatched away the keys from him, saying that he would drive the car back home. On this a quarrel followed, where Dilwar Singh hit his head on a hard object and died on the spot. Allegations were made against the Son of the Envoy, where the Envoy falsified all the allegations. The police could not make an arrest as Ali was entitled to diplomatic immunity.

VII. EXEMPTION FROM CRIMINAL AND CIVIL JURISDICTION

[11] *R. v. Guildhall Magistrates Court Ex p. Jarrett-Thorpe,* TIMES L. REP., 6 October 1977.

Article 31(1) of the Vienna Convention exempts a diplomatic agent from being charged in any criminal, civil or administrative case in the receiving State. This article also lays down certain exception where exemption is not possible. In the exact words of the article:

> "1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."

According to Article 31(2), a diplomatic agent cannot be obliged by becoming a witness in any case. It is to be noted that the above exceptions are present only in cases of civil immunity. There are no exceptions with respect to immunity from criminal jurisdiction of the receiving state. Hence a diplomatic agent can commit murder or rape and can get away with it without being charged by the receiving state. The diplomatic agent can be charged only if the immunity is waived by the sending State. Even if the immunity is waived everything depends on the extradition treaty between the receiving state and the sending State. In the light of the above Article we can analyse certain instances that led to the abuse of immunity from criminal jurisdiction. The most recent instance that can be cited is of Saudi Arabian Ambassador to India, against whom there are allegations of rape and abuse. The Saudi Diplomat lived in a luxury Apartment in suburb of Gurgaon. In September, 2015 police raided the apartment and found two Nepali women who were employed as house helps by the Diplomat. They were held captive there, raped by - seven men at a time and were also denied food and water. The police officials raided the apartment after a woman who also worked in the house reported this to an NGO who took the matter to the police. These women were from remote rural parts of Nepal and were sent to Saudi Arabia as domestic helps by human traffickers in Nepal. They stayed there and worked under Majed Hassan Ashoor and came to India when he was transferred here. Even after the allegations against the First Secretary Majed Hassan Ashoor are confirmed, the Saudi Arabia Government is holding the entire allegation baseless and has also lodged complaint about

the forceful raid that was conducted on the residence of the diplomat. Hence they are not waiving of the immunity and the Indian officials can take no step in furtherance of arresting the Diplomat as before India could declare him *persona non grata* he and his family have been called back to Saudi Arabia. The Saudi Embassy in India is not cooperating for letting the officials interrogate the diplomat. Hence no justice can be brought to those two women due to the veil of diplomatic immunity that is protecting the accused. Diplomatic immunity that is protecting the diplomatic agent can be waived off under Article 32 of the Vienna Convention but even after the waiver, there should be an extradition treaty between India and Saudi Arabia so that the Diplomat can be tried under Indian Laws.

VIII. IMMUNITY FROM TAXES AND CUSTOM DUTIES

Article 34 of the Vienna Convention provides diplomatic agents exemption from paying taxes. It lays down that diplomatic agent shall be exempted from all dues and taxes, personal or real, regional or municipal. There are also certain exceptions laid down under the Article. First exception of this is the indirect tax that is paid on the goods and services. An example of this can be tax that is applied on hotel charges, has to be paid by the diplomatic agent. Second exception is of dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission, for example house tax or electricity tax. However, no taxes have to be paid for any property or estate that is held by the diplomatic agent on behalf of the sending State and as a part of the mission. Third exception is the estate, succession or inheritance duties levied by the receiving state, subject to the provisions of paragraph 4 of Article 39 has to be paid by the diplomatic agent. Fourth exception is that dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State has to be paid by them. Fifth exemption is that the charges levied for specific services rendered have to be paid by the diplomatic agents. Last exemption is that the payment registration, court or record fees, mortgage dues and stamp duty with respect to immovable property, has to be made by the diplomatic agent himself.

Article 36 further exempts the diplomatic agents and their families from paying custom duties.

With regard to payment of taxes, the provision clearly and expressly lays down all the exemption that is provided to a diplomatic agent so that it cannot be misused or taken advantage of.

IX. WAIVER AND DURATION OF IMMUNITY

To check abuse of the privileges and immunities granted to the diplomatic agent and his staff there can be waiver of these immunities by the sending state. The sending State can waive of the immunity but the waiver should always be in express form. Provision for the waiver of the immunities is provided under Article 32 as:

> "1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.
> 2. Waiver must always be express..."

Para 2 of the above Article makes it mandatory for waiver of immunity to be express. It cannot be implied through earlier state practices. It should be also noted that where a diplomatic agent with immunity initiates a proceeding, he cannot claim immunity in respect of any counter claim that is so connected with the principle claim. As evident from various instances cited above, the waiver of immunity is quite unusual in criminal cases by the sending State. In the case of *Fayed v. Al-Tajir*[12] it was held that 'immunity was the right of the sending State and that therefore only the Sovereign can waive the immunity of its diplomatic representatives'. Para 4 of Article 32 stipulates that waiver of immunity in case of civil and administrative jurisdiction shall not be held to imply waiver in respect of execution of the judgement. For this separate waiver shall be necessary.

According to Article 39, a diplomatic agent is entitled to privileges and immunities so vested upon him under this Convention from the moment he enters the territory of the receiving State for taking his position and if he is already in the receiving State then from the moment his appointment is notified from the Ministry of the Foreign Affairs. The Article further provides - when such privileges and the immunities shall come to an end. Hence when the function of the diplomatic agent enjoying such privileges and immunities comes to an end, the privileges and the immunities also cease to exist the moment that person leaves the country. Hence this is the duration for which the immunities and privileges can be enjoyed by the diplomatic agent.

X. CONCLUSION AND REVIEW

Abuse of diplomatic immunity and privilege that is given to the diplomatic agent is evident throughout the world and the States are taking necessary actions to curb it. Sanctions in International law do not exist or even if they do, cannot be applied *stricto sensu*. Hence for the enforcement of the same, the States enact their own law for the protection of the diplomat and

[12] *Fayed v. Al-Tajir*, [1987] 2 All E.R. 396.

also to check abuse. But the laws so enacted by the State cannot take away the privileges and immunities so granted to them by the Vienna Convention. India is also one of the signatories to the Vienna Convention on Diplomatic Relations 1961. India became a signatory in the year 1965 and in the year 1972, the Parliament under the power vested on it by the Article 253 of the Constitution of India,, enacted Diplomatic Relations (Vienna Convention) Act, 1972. Through the medium of this act Articles 22, 23, 24, and 27 to 40 of the Vienna Convention were extended to India and shall have force of law in India. Still no punishment can be sort to those diplomats who commit the crime in India or in any other State as they are immune to criminal jurisdiction of the receiving State. Receiving State can only take action in case the sending State waive of the immunity, which is very rare and even then if there is an extradition treaty between the receiving State and the sending State then only sending state may be able to take any action for the crime so committed by the diplomatic agent. In all the instances cited above no State has waived of the immunity of the diplomatic agent. So the real question is that: is diplomatic immunity a license for the diplomatic agent to commit a crime and get away with it or is diplomatic immunity a privilege on the diplomatic agents to perform the functions of the mission smoothly and without any interference of the laws of the receiving State. An instance when diplomatic immunity was waived of was in 1997, when a diplomatic agent of Georgia Embassy, Gueorgui Makharadze was out drunk and driving and hit a teenage girl in Maryland. The immunity was waived of and the diplomatic agent pleaded guilty to manslaughter and aggravated assault on the teenage. He faced imprisonment for 21 years. Hence it can be concluded that though the instances are rare when the diplomatic immunity is waived off, but there are States that do it in case of crime that are extreme in nature.

On a concluding remark it can be said that although diplomatic immunity is necessary for performing functions that are laid down under Article 3 of the Vienna Convention, it is also necessary to make certain provisions that can help check the abuse so that justice can be sort to those who deserve it. International Law also follows principles of natural justice, under which fair trial is provided to the party. Diplomatic agent should also respect the laws of the receiving State or the hosting State, when their immunity is being respected by the State. Apart from this certain check should be provided on them so that they can perform the functions of the mission and also respect the laws of the hosting state fearing sanction.

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DRONE STRIKES: A NEW FORM OF AMERICAN IMPERIALISM

Satyajeet Panigrahi[·] & Sanskriti Mohanty[··]

Drone strike, purportedly a counterterrorism measure, has turned out to be an operation that works in the interest of America unapologetically jeopardizing the lives, properties, peace and security of other nations. Hence, this paper broadly seeks to establish that drone program, entailing the targeted killing of the militant groups and consequential indiscriminate killing of civilians without the consent of the concerned states, is "U.S imperialism "in the real sense. The paper, further, delves into the following issues: the legal status of CIA as a "non-combatant enemy" and politics of its stealthy targeted killing: in the context of international law, it elaborates on the inconsistency of drone strikes with the sovereignty of Pakistan, the shallowness of the plea of "self-defense in the armed conflict" with al-Qaeda in view of scant adherence to principles of International Humanitarian Law and drone strikes resulting in extrajudicial killing in violation of Human Rights Law. The paper concludes that drone strikes need concerted international unified efforts resting on "endeavor, participation and cooperation" and strict adherence to international law to be effective weapons of counterterrorism.

I. INTRODUCTION: TRACING THE ROOTS OF DRONE STRIKES: FROM DRONE TO DRONE ATTACKS

Drone strike is, as it operates now, an egocentric agenda underpinned by the U.S's tacit resolve to demonstrate to the world at large that it can endanger the peace and security of any foreign nation to make its sovereign authority invincible.

Drone strikes legalized by a horror-struck Bush administration under the authorization of use of military forces (AUMF), post-9/11 terrorist attack, are a ramification of the drone's military exploitability from a mere surveillance tool to a missile bomber.[1]

The U.S drone strikes were first undertaken in Afghanistan with the authorization of Security Council and declaration of Afghanistan and its air space as a combat zone but departure from this mandate was soon made with America making geographical expansion of use of drone strikes far beyond Afghanistan to Yemen, North west Pakistan and Somalia on the premise that battlefield follows those designated as enemy for their affiliation to al-Qaeda.[2]Implying that, notwithstanding any prohibition, the U.S is at liberty to undertake drone strikes anywhere in the world basing on its subjective satisfaction of presence of enemy. Thus U.S affirms its stand on the pretext that:

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[1] Milena Sterio, *The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International*, 45 CASE W. RES. J. INT'L L. 197, 198 (2012).

[2] *Id.* at 199.

> *"The war against terrorists of global reach is a global enterprise of uncertain duration."*[3]

Bush's regime, though marked the inception of drone strike, Obama's regime proliferated it to an extent where it has become brutal and a bane to humanity. After assuming the office of president, since 2009, Obama has ordered as many as 361 drone strikes as on January 31st, 2015 whereas Bush had ordered only 52 strikes during his reign[4]. Moreover, the Bush administration had ordered one drone strike over Pakistan in 2004, whereas Obama's administration was ordering a strike every four days during the first two years of his administration when the program was at peak.[5]A Report of Bureau of Investigative Journalism (BIJ) states that 2500 people so far have been killed by the strikes during Obama administration since 2009 and further the report of the bureau reveals that of all the drone attack victims since 2004, more than 76% of the dead fall in the legal grey zone, 22% are confirmed civilians (included 5% minors) and only the remaining 1.5% are high-profile targets.[6]

Evidently, drone has emerged as the core tool of counter terrorism under Obama's administration, given that drones, unmanned and remotely operable, have reduced warfare into a "video game" easy to handle, thereby involving no deployment or loss of the U.S troops in the bloodshed zone of the targeted area where the lethal missile are released through the click of a button by CIA operators tucked to their seats in their Nevada office.[7] But Obama and other officials in his administration justify the resort to drone attack on a more altruistic ground that it causes fewer civilian casualties compared to other bombing technologies. In this context, Obama answered to a pointed question on drone attacks as:

> "A lot of strikes being in the FATA [Federally Administered Tribal areas of Pakistan] going after al-Qaeda suspects actually have not caused a huge amount of civilian casualties."[8]

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[3] The White House, *The National Security Strategy of the United States of America*, (September 17, 2002), http://www.state.gov/documents/organization/63562.pdf. (National Security Strategy-2002)

[4] Jack Serle, *Monthly Updates on the Covert War*, THE BUREAU OF INVESTIGATIVE JOURNALISM, (February 2, 2015), https://www.thebureauinvestigates.com/2015/02/02/almost-2500-killed-covert-us-drone-strikes-obama-inauguration/.

[5] Chris Woods, *'OK, Fine. Shoot him.' Four Words That Heralded a Decade of Secret US Drone Killings*, THE BUREAU OF INVESTIGATIVE JOURNALISM, (November 3, 2012), https://www.thebureauinvestigates.com/2012/11/03/ok-fine-shoot-him-four-words-that-heralded-a-decade-of-secret-us-drone-killings/.

[6] Louis Jacobson, *Do drone attacks comply with International Law*, POLITIFACT, (July 1, 2010), http://www.politifact.com/truth-o-meter/article/2010/jul/01/do-drone-attacks-comply-international-law/.

[7] Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT'L L.J. 729, 735 (2011).

[8] The White House, *President Obama's Google+ Hangout*, (January 30, 2012), https://www.whitehouse.gov/photos-and-video/video/2012/01/30/president-obama-s-google-hangout.

The advocates of U.S drone strikes uphold its use on the basis of its high precision, goal achieving proficiency in targeting and eliminating the suspected "high-value" al-Qaeda leaders while overlooking the high scale civilian casualties caused as a result of such attacks.[9]

In 2009, CIA director Leon Panetta observed that drones are "the only game in town in terms of Confronting or trying to disrupt the al-Qaeda leadership" which remains the position of the Obama administration with regard to drone strikes.[10]

According to Professor O'Connell, an American scholar, paradoxically, drone strikes have killed 750-1000 unintended victims for the sake of killing nearly 20 leaders of Al-Qaeda by October 2009 in Pakistan.[11]

On analysis of the above competing stands, it can be concluded that the success of the drone strikes may seem welcoming when considered from a narrow military front but on a wider strategic plane reckoning with the human rights concerns, the disproportionate killing of innocent people while preying on its targets at a micro level, makes the drone strikes unpalatable and its success dismal. Hence, it reflects the blurred distinction between those targeted to be killed and those actually killed by the drone strikes raising questions on its sustainability and reliability as well as effectiveness.

II. CIA'S MOST PRIVATE AFFAIR: THE DRONE WARFARE

Jane Mayer in her article writes:

> "The U.S. government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based."[12]

Drone strikes by CIA[13] have been categorized into two-the "kill list" targeting and the "signature strikes". Strikes that target anyone on a "kill list", consisting of the details of high level al-Qaeda

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[9] *This Week with George Stephanopoulos,* ABC NEWS (April 29, 2012) http://abcnews.go.com/Politics/week-transcript-john-brennan/story?id=16228333.
[10] *U.S. Airstrikes in Pakistan Called 'Very Effective,'* CNN (May 18, 2009), http://edition.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/.
[11] Mary Ellen O' Connell, *Drones Under International Law,* WASH. UNIV. L. INT'L DEBATE SERIES 590 (October 8, 2010), http://law.wustl.edu/harris/documents/OConnellFullRemarksNov23.pdf.
[12] Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?,* THE NEW YORKER (October 26, 2009), http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.
[13] Central Intelligence Agency (CIA).

leader selected through a complex multilayered sanction procedure, requires ultimate approval of the president, Obama. The second type of operation is the "signature strike", under which CIA exercises the discretion to target any person suspected to be a militant without any official procedure being followed as such[14]. Further, the wall street journal report reveals that the CIA's Pakistan drone strike program was initially exempted from the "imminent threat" requirement until the end of combat operation in Afghanistan.[15]In this context it is to be noted that CIA drone strikes are conducted with high confidentiality, unlike the military run program subject to public scrutiny, and are classified as Title 50 covert actions, defined as "activities of the United States Government . . . where it is intended that the role . . . will not be apparent or acknowledged publicly, but does not include traditional . . . military activities." [16]And this aspect of the drone strike has triggered controversy about the legality of the procedure adopted in the undercover CIA program.

The drone attacks conducted by the CIA have been resented by the international community for their non-combatant status and it has been demanded that they be subjected to legal process for their unlawful killing of civilians amounting to murder. Vogel quoted that CIA operators are "unprivileged belligerent" akin to those militants against whom they are fighting[17]. In fact, intelligence personnel do not enjoy immunity like the military or armed forces, for the same act and thus the CIA personnel could be prosecuted for murder under domestic law of any country in which they carry out the drone strike and could be prosecuted for violation of any U.S law as well.[18]

But the U.S through its political tactics has successfully evaded holding the CIA operators liable for the unlawful killings even under its domestic laws for killing its citizens, as is evident from the 2011[19] incident wherein the CIA was absolved from legal prosecution or accountability for having killed four U.S citizens in Yemen, while specifically targeting one, Anwar al Alwaki suspected to be associated with al Qaeda, without following due process of law. More so, the

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[14] Micah Zenko, *Transferring CIA drone strikes to the Pentagon*, COUNCIL ON FOREIGN RELATIONS (April 16, 2013), http://www.cfr.org/drones/transferring-cia-drone-strikes-pentagon/p30434.
[15] *Id.*
[16] *Id.*
[17] Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 134-35 (2011); Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, THE WASHINGTON POST, (March 12, 2010) at A17.
[18] United Nations, General Assembly, Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Study on targeted killings*, A/HRC/14/24/Add.6, (May 28, 2010), ¶ 72, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf.
[19] Adam Taylor, *The U.S keeps killing Americans in Drone Strikes, mostly by Accident*, THE WASHINGTON POST, (April 23, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/04/23/the-u-s-keeps-killing-americans-in-drone-strikes-mostly-by-accident/.

CIA's liability for having killed two innocent men, held as hostages by the al-Qaeda, in a drone strike on a compound suspected to be inhabited by the al Qaeda operator was also discounted by the U.S Govt. taking responsibility for it and apologizing for the same.[20]

As the operation is clandestine, the government cannot disclose anything about CIA's drone program. Hence, it has been pointed out in this regard that even a threshold of transparency cannot be expected from the CIA program.[21] Therefore, all other legal issues apart, drone strikes by U.S can get over its major legal controversies only when the shroud of secrecy is raised and the operation is transferred to military to bring in transparency and accountability.

III. U.S DRONE STRIKE, WHETHER STATE TERRORISM UNDER INTERNATIONAL LAW?

U.S has been criticized widely of carrying out its drone strikes at the cost of international law in justifying its stand by distorting and giving its own self-favoring interpretation of the various legal integral concepts of international law, thus, attacking the very soul of international law [22]. More so, in a broader sense the drone strikes have become the bone of contention in the international arena owing to:

Firstly, the covertness of the CIA's drone strike program has resulted in skepticism about the legality of the key parameters constituting the targeted killing.

Secondly, the absence of any international instrument specifically dealing and laying down the necessary legal framework on the use of drone strikes renders its position under international law uncertain and contentious.

A. In an armed conflict with al-Qaeda: America's defense for use of drone strikes:

U.S administration has astutely responded to the questions raised on the legal validity of drone program under international law affirming that it is in a continuous armed conflict with al-Qaeda, hence drone strikes comply with the international rule of war as a measure of self-defense.

Obama at the National Defense University, Washington, DC[23] asserted:

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[20] *Obama regrets drone strike that killed hostages but hails US for transparency*, THE GUARDIAN, (April 23, 2015), https://www.theguardian.com/world/2015/apr/23/us-drone-strike-killed-american-italian-al-qaida.
[21] *Supra* note 14.
[22] Rosa Brooks, *Drones and the International Rule of Law*, 28 JOURNAL OF ETHICS AND INTERNATIONAL AFFAIRS, 83, 83-103 (2014).
[23] Rune Ottosen, *Underreporting the legal aspects of drone strikes in international conflicts: a case study of how Aftenposten and The New York Times cover the drone strike*, 13 CONFLICT AND COMMUNICATION ONLINE (2014), http://www.cco.regener-online.de/2014_2/pdf/ottosen2014.pdf.

> *"We are at war with an organization that would kill as many Americans as it could if we did not stop them first. So, this is a just war- a war waged proportionally, as a last resort, and in self-defense"*

Harold Koh, State Department Legal Advisor, at the American Society of International Law Annual Meeting on March 25, 2010, rationalized the use of drones stating:

> "It is the considered view of this Administration that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." In his speech, Koh cited both domestic law (AUMF) and international law as proof that the United States is engaged in armed conflict with al-Qaeda, the Taliban, and "associated forces". [24]

Koh substantiated his argument enumerating the three legal foundations of the drone operation:

First, it is a continuing *war of self-defense* against an enemy that attacked America on September 11, 2001, and before, and that *continues to undertake armed attacks* against the United States.

Second, in Afghanistan, U.S works in partnership with a consenting host government.

And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of *"all necessary measures"* by the NATO countries constituting International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan.[25]

The consistency of the U.S drone strikes with International law will, hence, be examined and determined in light of the U.S argument of use of drone strikes as a measure of self-defense, proportional to the threat posed, in the continuous war with al-Qaeda and the associated force.

B. An issue of Sovereignty, consent and intervention:

No controversies were raised on the first U.S drone strikes carried out in Afghanistan with the authorization of Security Council but the subsequent extension of drone strikes to Yemen, Somalia and Pakistan were widely censured and strongly protested especially in Pakistan on the

[24] Harold Hongju Koh, *The Obama Administration and International Law*, Address at the Annual Meeting of the American Society of International Law, (March 25, 2010), http://www.state.gov/documents/organization/179305.pdf.
[25] *Id.*

ground that drone strikes amounted to state intervention and breach of sovereignty[26]. Ben Emmerson, U.N. Special Rapporteur on counter-terrorism and human right stated that:

> "The U.S. drone campaign "involves the use of force on the territory of another state without its consent, and is therefore a violation of Pakistan's sovereignty."

The Pakistan judiciary also condemned the drone attacks in the *Peshawar case*[27] and ruled:

United States drone strikes on targets in Pakistan illegally breached national sovereignty and were in "blatant violation of Basic Human Rights" and provisions of the Geneva Conventions.

> "That the drone strikes by the CIA & US Authorities, are *blatant violation of Basic Human* Rights and are against the UN Charter, the UN General Assembly Resolution, adopted unanimously, the provision of Geneva Conventions thus, it is held to be a *War Crime*."[28]

The court further held that drone strikes illegally breached Pakistan's sovereignty and ordered the government to "use force" to cease the drone strike within the sovereign territory of Pakistan.

In spite of all these oppositions, U.S continues its drone strike defiantly alleging tacit consent from Pakistan to drone strikes, further also stating that it carries out counter terrorism activities only in the territories of the countries which consented to it or "unwilling or unable" to fight against terrorist groups operating in their territory.[29]

Moreover, U.S has intervened in the internal affairs of Pakistan thus risking the exacerbation of national armed struggle by targeting and killing vast majority of low-level suspected militants who were mostly insurgents rather than international terrorist.[30]

C. Drone strikes, *jus ad belum* and the right of self-defense under the U.N Charter:

Drone strikes constitute extraterritorial use of force against the non-state actors. In this regard the justification forwarded by the U.S is that the use of force is the lawful exercise of its right of

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[26] Siddik Gulluk, *Justification of the US for Drone Strikes in Fighting against Terrorism Under International Law*, (2014) (Unpublished Master Thesis, Lund University) (*available* at http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=5113879&fileOId=5113880).

[27] *Foundation for Fundamental Rights v. Federation of Pakistan*, Writ Petition No. 1551-P/2012, Peshawar High Court, available at http://www.peshawarhighcourt.gov.pk/images/wp%201551-p%2020212.pdf.

[28] Andrew Buncombe, *Pakistani court declares US drone strikes in the country's tribal belt illegal*, THE INDEPENDENT (May 9, 2013), http://www.independent.co.uk/news/world/asia/pakistani-court-declares-us-drone-strikes-in-the-countrys-tribal-belt-illegal-8609843.html.

[29] See *Rosa Brooks*, *supra* note 22, at 90.

[30] Micah Zenko, *Reforming U.S. Drone Strikes Policies*, (Council Special Report No.65, 2013), 10, ISBN 978-0-87609-544-7.

individual or collective self defense, one of the two main exceptions under chapter VII to the general prohibition on the use of force under Article 2(4) of the U.N. Charter. [31]

The restriction under the Charter on the use of force is the central pillar of the concept of *jus ad bellum* which provides the threshold restriction on the recourse to force. *Jus ad bellum* recognizes the use of force by a state when it is in conformity with the requisites of right of self-defense under Article 51 of the Charter:

> "Nothing in the present Charter shall impair the inherent right of collective or individual self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."[32]

The provision contemplates that an armed attack should pre-exist the resort to force as a defensive move and no measures should have been taken by the Security Council in respect of that armed attack.

The defensive stance of America pertaining to terrorist attack of the scale of 9/11 falling within the meaning of an armed attack under article 51 of the Charter remains conflict-ridden as armed attack is not defined either under the Charter or any treaty. So it is pertinent to determine whether terrorist attack qualify as an armed attack under international law with the help of judicial interpretation and juristic writings.

In *Nicargua case*[33], the court affirmed that only acts attributable to a state can constitute an "armed attack" and also assistance to rebels in the form of the provision of weapons or logistical or other support by a state amount to armed attack.

However, labeling terrorist attacks of high magnitude, like 9/11 attack, as armed attack still continues to be at crossroads of contradicting views.

Addressing this issue on the connotation of armed attack, America hinged its argument on the Security Council resolution 1368 passed a day after the 9/11 terrorist attack which at the outset condemned the attack as "such acts, like any act of international terrorism, constitute "a threat to

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[31] U.N. Charter, art. 2, para 4 reads "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."
[32] U.N. Charter, art. 51.
[33] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits*, International Court of Justice (ICJ), (June 27, 1986), ¶ 195.

international peace and security."[34] And in the subsequent resolution of 1373 it also unequivocally recognized ""the inherent right of individual or collective self-defense in accordance with the Charter." [35]

And this move by the Security Council is considered to have brought a paradigm shift in the conception of armed attack ,thus, implying that armed attack also include terrorist attack.

To review the vindication invoking the principle of self-defense, the action has to be assessed on the basis of the twin doctrines of necessity and proportionality laid down in the *Caroline test,*[36] forming the basis for testing the legitimacy of pre-emptive or anticipatory self-defense.

Alston , the U.N special Rapporteur has, further, insisted on seeking immediate approval of the Security Council for the strikes to be lawful, as a measure of self-defense ,which U.S has defiantly flouted through its stealthy program.[37]

U.S's actions which has continued for over a decade now hardly seems to be satisfying either the requirement of 'imminence of threat' as a stimulus for attack under the doctrine of necessity or the requirement of proximity of action and purpose under the rule of proportionality, given the extent of civilian casualties.

D. *Jus in bello* and U.S drone strikes:

Jus in bello or the rules of war govern the actions of the states and protect the individuals against excessive use of violence by hostile powers in a conflict situation. For a state action under *jus in bello* to be valid, there should be an armed conflict as contemplated under Geneva Convention and it should conform to the fundamental rules of proportionality, precautionary in attack, distinction and the weapons prohibited and considered unlawful under IHL should not be employed.

An assessment of the drone program with the available little public information indicates that America's adherence to the cardinal working principles of *jus in bello* has been murky as it has resulted in the disproportionate death and damage to civilians amounting to indiscriminate attack

[34] S.C. Res. 1368, U.N. Doc. S/RES/1368 (September 12, 2001).
[35] S.C. Res. 1373, U.N. Doc. S/RES/1373 (September 28, 2001).
[36] 'Lawful right of self-defense exists where there is a 'necessity of self-defence, instant, overwhelming, and leaving no choice of means, and no moment for deliberation and also, 'the actions must be proportional, as the acts justified by the necessity of self-defense must be limited by that necessity, and kept clearly within it' – Letter dated July 27, 1842 from Mr. Webster, US Department of State, Washington, DC, to Lord Ashburton.
[37] *Supra* note 18 at ¶ 40.

violating rule of proportionality.[38] This reflects, the failure of the program in meting out humane treatment to those not taking part in the conflict and civilians and distinguishing them from the legitimate targets, persons actively participating in the conflict or combatant.[39] Further the adoption of signature strikes to strike suspected militants basing on rudimentary behavioral pattern has resulted in blatant violation of rule of distinction.

E. Drone attacks: extra-legal arbitrary execution under international human rights law

Kofi Annan quoted:

> "We should all be clear that there is no trade-off between effective action against terrorism and protection of human rights…In the war against terrorism, human rights norms are not respected by many states but if great powers become the violators of such norms then it will open doors to "unrestricted wars."[40]

Human rights law, centered on right to life and liberty and the corollary rights guarantying the former, is of inexhaustive, universal application. Irrespective of the situation, it is firmly established under international human rights law and humanitarian law that the right to life of an individual cannot be dispensed with in any situation of emergency or war without just reasons.[41] Furthermore, the use of deadly force is strictly limited by the requirement that a person not be "arbitrarily" deprived of life. The International Covenant on Civil and Political Rights provides for right to life under Article 6 and states that:

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[38] International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, 2005, Volume I: Rules, Rule 14 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.'

[39] See Common Article 3 of the Geneva Conventions.

[40] Kofi Annan, Address to the UN Security Council meeting on Counterterrorism Measures, New York, (January 18, 2002), SG/SM/8105SC/7277, *available* at http://www.unis.unvienna.org/unis/pressrels/2002/sgsm8105.html.

[41] The ICJ in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ, (July 8, 1996) and *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, (July 9, 2004), rejecting the analogy that International Convention on Civil and Political Rights only applies to peace time, recognized that ICCPR has an all-time universally binding effect; Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of November 4, 1950 provides that in times of war and other public emergency, the respective State Party is allowed to "take measures derogating from its obligations under this Convention". However, the human rights enshrined in the ECHR may be limited only to the extent strictly required by the exigencies of the situation; Clause 39 of the Magna Carta proclaims: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.;" The United States constitution, imports the clause from the United Kingdom with some variation in the New York Ratification Resolution 1788 "No Person ought to be taken imprisoned or disseised of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law."

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[42]

Therefore, the arbitrary deprivation of life, ultravires the law, through drone strikes by U.S. constitutes extrajudicial killing.

Amnesty International puts that:

> "International law permits the use of lethal force in very restricted circumstances. But from the little information made available to the public, U.S. drone strike policy appears to allow extrajudicial executions in violation of the right to life, virtually anywhere in the world"[43]

IV. CONCLUSION

It can be concluded from the above discussion that the U.S unilateral drone strike policy has reaped more political nuances than military success. As it is rightly said *"every cloud has a silver lining*", the dawn of a just war against terrorism can also be heralded by doing away with the repulsive *unilateral* drone strikes and carving out an international legal framework fostering participation, transparency, communication and allegiance among the states and ensuring prevalence of rule of law.

An organized adversarial power can be fought only by concerted unified efforts and not by monopolized programs.

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[42] *International Covenant on Civil and Political Rights*, (December 16, 1966), United Nations, Treaty Series, vol. 999, p. 171, art. 6, para.1.

[43] *Killing outside the bounds of law?*, AMNESTY INTERNATIONAL USA, http://www.amnestyusa.org/our-work/issues/security-and-human-rights/drones.

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RELATIONSHIP BETWEEN INTERNATIONAL TRADE AND COMPETITION: FROM THE PERSPECTIVE OF THE NATIONAL TREATMENT OBLIGATION

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Since the WTO does not directly or explicitly provide for a relationship between International Trade and Competition in any of its provisions, various scholars have tried to understand the significance of this relation through several WTO judicial decisions and pronouncements. Considering the vastness of the topic, I have limited the understanding of my study to the National Treatment Obligation, particularly the Article III: 4 of the GATT, 1994 and its exceptions as provided in other Articles. The paper begins with an introductory section which traces the very first instance when the term "competition" was given importance in the field of International Trade. It is then divided into three sections. Since the research consists of a few technical terms, the first section of the paper provides a preliminary reading on these concepts. It explains the meaning, definition, nature and scope of subsidy, relevant market, like products, etc. These concepts are further elaborated upon in subsequent sections of the paper. The second section introduces the National Treatment Policy as understood within the meaning of Article III: 4 of the GATT, 1994. The second section of the paper specifically discusses the National Treatment Principle, as given under Article III: 4. The three elements, which determine the violation of the National Treatment Principle, as laid down by the Appellate Body in the WTO ruling of US – Tuna II (Mexico), are discussed extensively. The concept of "treatment no less favourable" forms the heart and soul of the non-discrimination principle and is given utmost importance. The third section of the paper discusses the exceptions to the National Treatment Obligation. They are provided for under the Articles III: 8, XVIII: C and XX of the GATT, 1994. The fourth section marks the end of the paper with a conclusion as to whether the rationale of the research project was achieved or not.

INTRODUCTION

The scope of the National Treatment Policy, with respect to competition, was first laid down in the case of Italy – Agricultural Machinery. According to the Panel, Article III: 4 refers to "any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market."[1] This, therefore, demanded an equality of conditions in the competitive market. This view was later re-affirmed in various other WTO and pre- WTO GATT panel reports.[2]

In this paper, I have traced the importance of competition with respect to the National Treatment Obligation which is required to be followed by all WTO members. The rationale of this research project is: What role does competition play within the field of international trade?

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[1] Report of the Panel, Italy – Discrimination Against Imported Agricultural Machinery, L/833, (October 23, 1958) GATT BISD (1959) (Italy-Agricultural Machinery).

[2] Report of the Panel, US – Section 337 Tariff Act, L/6439 (November 7, 1989).

A few other questions that need to be answered are-

1. Determine how the balance between competition and International Trade is achieved, especially with respect to Article III: 4 of the GATT, 1994.
2. *Whether, the Policy requires there to be equality amongst the conditions of competition in the relevant market.*
3. Whether the exceptions to this Policy fit into the scheme of competition .If yes, then till what extent?

The study of International Trade and competition and their relationship with each other, is not directly mentioned in the provisions of the GATT, 1994. Therefore, the rationale of this paper can only sought to be achieved through a careful analysis of various judicial reports given by the WTO or during the pre-WTO era, over the past few years. These questions that are posed above are analysed in the subsequent sections of the paper with respect to the study of such judicial pronouncements, rather than simply interpreting the textual provisions of the Agreement.

SECTION I- PRELIMINARY READING

Since this research involves certain technical terms, the paper will discuss a few of these concepts preliminarily.

The Oxford dictionary defines the term subsidy as "A sum of money granted by the state or a public body, to help an industry or business keep the price of a commodity or service low." Going by the concept of a subsidy, as understood in the context of the WTO, it is pertinent to refer to the Subsidies and Countervailing Measures Agreement(SCM) and the General Agreement on Trade and Tariffs, 1994(GATT). Article 1 of the SCM Agreement defines and identifies the term 'subsidy', in the same sense as GATT, 1994. According to this provision, a subsidy is deemed to exist in the presence of three elements; (i) there must be a financial contribution, (ii) by a government or public body which (iii) confers a benefit on the receiver.[3] The last condition which discusses the conferring of benefit on the receiver of the said subsidy has been under much debate and speculation before the WTO panels. Although in the past, the Appellate body (Appellate Body) ruled that such benefit conferred would be judged on a case-by-case basis[4], the Appellate Body and panels have consistently used a couple of traditional criteria in analysing the same. First, the said financial contribution by the government or public body should be provided to the recipient, on terms that are better than those available to the

[3] Appellate Body Report, US – Softwood Lumber IV, WT/DS257/AB/RW (December 5, 2005).
[4] *Id.*

recipient in the same market.[5] This brings us to the understanding of the term "relevant market.**"** It is defined as the area of economic activity in which buyers and sellers come together, and forces of supply and demand affect the prices.[6] This would be further explained in the subsequent sections of the paper.

Second, the recipient should be at an advantageous position than it would have been in the absence of the financial contribution.[7] This is in reference to the concept of "relevant market." Therefore after establishing the existence of a subsidy, as per the conditions mentioned above, it is important to determine the "specificity" of such subsidies. Only that subsidy which is specific in nature, would be subject to the provisions of the SCM Agreement and GATT, 1994. A subsidy is said to be specific within the meaning of Article 2 of the SCM Agreement when it is specifically given to a particular class, or, certain enterprises.[8] According to this article, the granting of the subsidy may also include participation of different authorities in providing a particular subsidy.[9]

The SCM Agreement consists of two types of specific subsidies; prohibited and actionable subsidies. The two types of prohibited subsidies are Export and Local content subsidies. We will focus on the Local Content Subsidy which are prohibited because they are contingent, solely or otherwise, upon the use of domestic goods over imported goods. This is where Article III: 4 of GATT, 1994 comes into play, which will be discussed in the subsequent sections of the paper. Also, any subsidy falling within the ambit of Part III SCM Agreement, and is therefore, a prohibited subsidy is also deemed to be a specific subsidy.[10] Once established that it is prohibited, a separate analysis of its specificity under Article 2 is not required.

The concept of relevant market and subsidy are later introduced in Section II and Section III of the paper respectively.

SECTION II- NATIONAL TREATMENT POLICY

[5] Appellate Body Report, US – Lead and Bismuth II, WT/DS138/AB/R (May 10, 2000); Appellate Body Report, EC and Certain member States – Large Civil Aircraft, WT/DS316/AB/R (May 18, 2011).
[6] Appellate Body Report, US – Upland Cotton, WT/DS267/AB/R (March 3, 2005).
[7] Report of the Panel, EC – Countervailing Measures on DRAM Chips, WT/DS299/R (June 17, 2005); Appellate Body Report, US – Softwood Lumber IV, ABR (December 5, 2005) WT/DS257/AB/RW; Appellate Body Report, Canada – Aircraft, WT/DS70/R (April 14, 1999).
[8] Appellate Body Report, US- Measures Affecting Trade In Large Civil Aircraft (Second Complaint), WT/DS353/AB/R (March 12, 2012).
[9] *Id*.
[10] Report of the Panel, Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54/R (July 2, 1998); Appellate Body Report, US – Upland Cotton, WT/DS267/AB/R (March 3, 2005); Report of the Panel, US – Tax Treatment for Foreign Sales Corporation, WT/DS108/R (October 8, 1999).

"Do to no one what you yourself dislike. Give to the hungry some of your bread, and to the naked some of your clothing."[11]It is interesting to note that the basic principle derived from the National Treatment obligations of the GATT can be understood from the very spirit of this old biblical testament.

As per the text of Article III: 4 of the GATT, 1994,[12] the imported products belonging to the territory of a contracting party must not be discriminated against the domestic products that belong to the territory of another contracting party. This means that such imported products are not to be given a "less favourable treatment" as compared to the domestic products. This principle however, would only be applied if both the imported and domestic products fulfil the condition of being "like products" Such a differential treatment may be in the form of "internal sale, offering for sale, purchase, transportation, distribution or use." However, it will not include differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

This brings us to the following questions, which are pertinent in understanding National Treatment Policy, as provided under Article III: 4 of the GATT, 1994-

> What are like products in a relevant market? Why is their understanding important within this article?
>
> What constitutes discrimination between imported and domestic like products?
>
> What is understood by the term "less favourable treatment?"

These questions will be answered in subsequent sub- sections. But before that, let us take look at the general overview of the nature and purpose of this National Treatment Policy. Before dwelling into the specificities of this Article, it is important to understand the intent of the drafters while framing them in the first place. The National Treatment Obligation within the ambit of the Article III of the GATT, 1994 seeks to help the "weaker placed foreigners from the government abuse abroad."[13] It can therefore be described to be protectionist in nature. It serves to protect the rights of the parties that are violated by a higher authority. The purpose of this policy was laid down by the Appellate Body in the case of Japan-Alcoholic Beverages. According to the Appellate Body, the policy aims to "avoid protectionism in the application of internal and

[11] *Tobit*, 4:15.
[12] General Agreement on Tariffs and Trade 1994 (GATT 1994), 1867 U.N.T.S. 187.
[13] Nicolas Dimascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin? 102* AM. J. INT'L L. 48 (*2008*).

regulatory measures."[14] In this case, the panel had considered whether the law in Japan taxed the domestically produced alcohol beverage, "Shochu" more favourably than the other imported alcoholic beverages. The claim by the complainants was held to be legitimate which resulted in Japan amending its Liquor Tax Law. In another landmark ruling, the Appellate Body stated that the objectives of Article III: 4 also required "equality of competitive conditions and protecting expectations of equal competitive relationships."[15] These objectives are applicable when such competitive conditions are understood in the sense of "imported and like domestic products."[16] The WTO report by the Appellate Body in Korea — Various Measures on Beef, established three conditions which would constitute a violation under Article III:4. They are, "(i) the imported and domestic products at issue are 'like products'(ii) that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use' and,(iii) the imported products are accorded 'less favourable' treatment than that accorded to like domestic products."[17]

II (a) What exactly determines the likeness between any two given products?

The shared characteristics between any two products in the market are indicative of their substitutability[18] and therefore help in determining the extent of competitiveness in the relevant market place. This substitutability of the products along with the extent of competitiveness between them form the basis of determination of these so-called "like products."[19] The relevant market, as has already been introduced in the previous section, covers both geographical and product market of the subsidizing member. A relevant market does not necessarily have to consist of a geographical focus; it can either be a national or world market. The relevant product market mainly depends on the conditions of competition and the homogeneity of the conditions of the competition of the products in question. To put it simply, it can be said that products that exercise competitive restraint are substitutable, and are therefore like products.[20] However, the rigidity of this condition was somewhat discarded over a period of time. It has been seen in various WTO reports that a hard and fast rule is not necessary to adjudge the likeness amongst the given products. Adopting a flexible approach would be more in consonance with the modern International Trade law and specifically, the non-discrimination obligations adopted by the

[14] Appellate Body Report, Japan –Taxes on Alcoholic Beverages II, WT/DS8/AB/R (November 1, 1996).
[15] Appellate Body Report, Korea-Alcoholic Beverages, WT/DS75/AB/R (February 17, 1999).
[16] Appellate Body Report, Canada-Certain Measures Concerning Periodicals, WT/DS31/AB/R (July 30, 1997).
[17] *Id*.
[18] Panel Report, Chile - Taxes On Alcoholic Beverages, WT/DS87/R, WT/DS110/R (June 15, 1999).
[19] Appellate Body Report, Japan - Taxes on Alcoholic Beverages II, WT/DS8/AB/R,WT/DS10/AB/R, WT/DS11/AB/R (November 1, 1996).
[20] Panel Report, EC and Certain Member States Large Civil Aircraft, WT/DS316/R (June 30, 2010).

WTO. Therefore, it has been held in numerous cases that the products in question do not necessarily have to be "directly competitive or substitutable."[21] They are not required to be identical or extremely similar to each other. Even a few shared qualities amongst them would be sufficient to determine, whether they can be considered to be like or not.

In the WTO report of EC-Asbestos,[22] two criteria were established to adjudge the likeness between any two given products. *First* is the extent of similarity between the functions of the two products in question, or their "end-use". *Second* is the extent of usage of these functions by customers, or the "consumers' taste and habits."[23] Further, the relevance of physical characteristics of the products was emphasised in this particular report. It went on to label "toxicity" or "carcinogenicity", to be the defining physical characteristics to determine the likeness between "Chrysotile asbestos" and the "PCG fibres" in their relevant marketplace. [24]

This view was further reiterated in a number of WTO reports where it was considered to be an established principle that any two like products should be judged on the basis of their "end use", "consumer's taste" and their "nature and quality."[25] Two products are said to be like products if they satisfy a "similar taste and need"[26] of the consumers. Even if origin is the only criteria which distinguishes the two products, they are still considered to be alike, within the ambit of Article III:4 of GATT,1994.[27] A competitive relationship is only said to exist between and amongst like products and only they, exclusively, come within the ambit of the National Treatment Policy. Even though unlike products can be treated differently[28] , similar treatment has to be accorded to like products for a regulation to be non-discriminatory.

The understanding of like products within the meaning of Article III:4, GATT, 1994 is very much important, since there is a chance of the imported goods getting "less favourable

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[21] Appellate Body Report, Korea-Alcoholic Beverages, WT/DS75/AB/R (February 17, 1999).
[22] Appellate Body Report, European Communities- Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R (March 12, 2001).
[23] *Id.*
[24] *Id.*
[25] Appellate Body Report, Japan –Taxes on Alcoholic Beverages II, WT/DS8/AB/R (November 1, 1996); Panel Report, United States – Standards for Reformulated and Conventional Gasoline WT/DS8/AB/R, (May 20, 1996).
[26] Panel Report, Chile- Taxes On Alcoholic Beverages, WT/DS87/R, WT/DS110/R (June 15, 1999).
[27] Appellate Body Report, India - Measures Affecting the Automotive Sector, WT/DS146/AB/R WT/DS175/AB/R (April 5, 2002).
[28] MISTUSO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 236 (Oxford Univ. Press, 2nd ed. 2006)

treatment" than the domestic goods which exercise a competitive relationship in the relevant marketplace.[29]

II (b) Meaning and scope of Discrimination and "Treatment No Less Favourable"

After having laid down the different principles which determine the likeness between two products in the relevant market place, it is important to accord meaning to the term "less favourable treatment", given under Article III: 4 of GATT, 1994. The mere establishment of "likeness" does not result into a violation of the National Treatment Policy. It has to be proved that the imported goods were given a less favourable treatment than their competitive and substitutable counterparts, which are the domestic goods.[30] Here, it is important for the domestic and imported goods to be like products in the same relevant market.

The members of WTO are allowed to "pursue their domestic goals" through any sort of internal regulation, laws or taxation. They are free to take measures or form regulations for the furtherance of their trade, either nationally or internationally. This is one way the WTO encourages the development of International Trade amongst all its members. The pursuance of these principles should however, not be in conflict with their obligation under Article III: 4 under which they are obliged to follow the National Treatment Policy.[31] Violating this obligation would mean violating the non-discrimination principle of the WTO, which constitutes the heart and core of the international trading system. Such a form of distortion of trade under Article III: 4, does not have to be significant in number. The distortion can be of any volume as long as it violates the "equal competitive relationship between imported and domestic products."[32]

The term "no less favourable" as given in the Article, refers to the "effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products."[33] This definition is clearly indicative of the demand for equality in the competitive conditions of

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[29] Appellate Body Report, European Communities- Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R (March 12, 2001).
[30] *Id.*
[31] Appellate Body Report, Japan -Taxes on Alcoholic Beverages WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R (November 1, 1996).
[32] Appellate Body Report, Japan -Taxes on Alcoholic Beverages WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R (November 1, 1996); Appellate Body Report, Canada-Certain Measures Concerning Periodicals, WT/DS31/AB/R (July 30, 1997).
[33] Appellate Body Report, United States -Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (May 20, 1996)

the imported and the domestic products.[34] The Appellate Body in the case of EC-Asbestos defined the term "no less favourable" as a "group of imported products not be accorded less favourable treatment than that accorded to the group of domestic like product".

In the case of *US — Gasoline*, the panel considered whether a particular measure caused "less favourable treatment" towards the imported gasoline sellers who were not subjected to an individual baseline as opposed to the sellers of domestic gasoline, who in fact, had access to work under an individual baseline. The panel held that the concept of "less favourable treatment" cannot be invoked when the treatment given to imported gasoline was the same as given to "similarly situated" domestic party. The panel ruled in the favour of the complainant since the domestic seller had far more "favourable sales conditions" then the imported seller.

A WTO panel report[35] considered whether a particular tax stamp should be on a certain brand of cigarette packets in the territory. This measure was supposed to be applicable towards both imported and domestic products in the territory of the Dominican Republic. However, it was struck down by the Panel since it was in violation of the National Treatment Policy under the Article III:4 of GATT, 1994. This is because, according to the panel, the fixing of tax stamps on imported cigarette packets required an additional cost which was absent in the case of domestic products. Even though there was uniformity in the application of rules and regulations towards both domestic and imported products, the measure was still said to be discriminatory in nature. Therefore, as per the report, there may be "formally equal rules" in the sense of "formally identical legal provisions", applied to both imported as well as domestic products. But this does not indicate that a treatment "no less favourable" may not be given to the said imported products. The Appellate Body in the same report but in reference to another issue, reversed the panel's finding and established that even in the presence of a "less favourable treatment" in certain cases, the same could not be compensated or "balanced by more favourable treatment" of those products in other cases. This is because such a balancing act would violate the equality of conditions of competition between domestic and imported products, as discussed previously. Such an act would be in conflict of the very intention and purpose based on which the National Treatment Obligation was drafted in the first place.[36]

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[34] Japan - Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (March 31 1998*);* Japan - Taxes on Alcoholic Beverages WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R (November 1, 1996); Report of the Panel, US – Section 337 Tariff Act adopted on L/6439 (November 7, 1989).

[35] Appellate Body Report, Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/AB/R (May 19, 2005).

[36] Report of the Panel, US – Section 337 Tariff Act adopted on L/6439 (November 7, 1989).

In another WTO ruling,[37] the Appellate Body reiterated that the phrase "accorded treatment no less favourable" contemplated whether the particular laws or regulations or any measure for that matter, "modifies the conditions of competition in the relevant market to the detriment of imported products." In this particular matter, the Appellate Body stressed upon the importance of a "detailed factual analysis, focusing on the "thrust and effect" of the measure so applied by the domestic country.[38]

Again in the Appellate Body ruling of EC-Bananas III, it was considered whether the allocation of tariff quota of bananas by the EC was in violation of the National Treatment Policy given under Article III: 4 of the GATT, 1994. The facts of the issue were such that certain "hurricane licenses" were issued by the EC and other producer organizations to import bananas for the operators who suffered from hurricanes and other similar natural calamities as such. These licenses however were only exclusively issued to the EC producers and other certain other producer organizations. This led to an increase in their export sales of the parties supplying the bananas. Therefore the issuing of such licenses "constitutes an incentive for operators to market EC bananas to the exclusion of third-country and non-traditional ACP bananas." This distorted the conditions of competition within the relevant market and turned to biased towards the EC Bananas.

As can be seen by the various case laws stated above, the treatment given to imported product, therefore, must be "no less favourable" than the domestic products. This implies that the "conditions of competition" must be no less favourable in the case of the imported as well as the domestic products.[39]

SECTION III- EXCEPTIONS TO THE NATIONAL TREATMENT POLICY

A critical and in-depth analysis of the National Treatment obligations as given under Article III: 4 of the GATT, 1994, would remain incomplete if its exceptions are not discussed. The exceptions can be found in Article III: 8 and XX of the GATT, 1994.

According to Article III:8(a), governments are allowed to show preference towards the domestic products of their country. "Government procurement" in a country's domestic policy is an exception to the National Treatment obligations that have to be followed by the WTO members. The second sub clause (b) of this article allows "payment of subsidies exclusively to domestic

[37] Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R WT/DS169/AB/R (January 10, 2001).
[38] *Id*.
[39] Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R WT/DS169/AB/R (January 10, 2001).

producers". However, that is only allowed if the subsidies do not violate the Principle of non-discrimination, which forms the very heart and soul of the WTO Organisation. The granting of such subsidies should not result in negative effects of trade. The nature and scope of Article III: 8 was first established in the WTO ruling of Indonesia — Autos. According to the Panel, the term "payment of subsidies" as given in the text of Article III: 8 of the GATT, 1994, must be read in accordance with the definition of 'subsidies', as provided by Article 1 of the SCM Agreement. It has to be stressed upon, that if and only if, the subsidies provided to the producer are not discriminatory in nature and do not differentiate between domestic and imported products, they would be in consonance with Article III of the GATT, 1994. Otherwise, such a payment to domestic producers would violate the provisions of National Treatment. The Panel held that "subsidies to producers are subject to the national treatment provisions of Article III when they discriminate between imported and domestic products."

As per Article XVIII: C of the GATT, 1994, focus has been given to developing countries and raising their standard of living. Because of the difference in their economic conditions, as compared to other developed WTO members, government support may be given to them, without being in violation of Article III: 4 of the GATT, 1994. After intimating other members of the WTO, such countries are allowed to take measures which would conflict with almost all the provisions of the GATT, including Article III.

Another important provision which lays down general exceptions to the GATT are found in Article XX. The text of Article III must be read in accordance to the provisions of Article XX of the GATT, 1994, which gives justification to the measures adopted by the WTO members, that would normally be violative of the "substantive obligations of the GATT."[40] These exceptions help the members to preserve their "national sovereignty" over "domestic policy issues."[41] Therefore, Article III: 4 of GATT, 1994 must be read in consonance with Article XX, which lays down its exception. These exceptions give a leeway to WTO members to exercise or maintain measures which are inconsistent with Article III: 4, and in this case, specifically the National Treatment Policy.[42] In fact, these exceptions are not only applicable to Article III: 4, but also the other obligations to be followed by all WTO members, as laid down in the GATT.[43] The scope

[40] STEFAN ZLEPTNIG, NON-ECONOMIC OBJECTIVES IN WTO LAW: JUSTIFICATION PROVISIONS OF GATT, GATS, SPS AND TBT AGREEMENTS 105 (BRILL, 2010).
[41] CHRISTIANE R. CONRAD, PROCESSES AND PRODUCTION METHODS IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS 247, (2011) ("Article XX recognizes that the ability of any sovereign nation to act and promote the listed policy purposes is more important, even if such action is in conflict with various GATT obligations.").
[42] *Id.*
[43] Appellate Body Report, United States -Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (May 20, 1996).

and nature of Article XX of GATT, 1994 was established by the Appellate Body in the landmark ruling of US-Shrimp. It was held that the measures are only considered as exceptions to "substantive obligations", as given under the GATT, 1994. Also, these obligations consist only of those domestic policies which are considered to be "legitimate in character". Further, the Appellate Body emphasised on the importance of striking a balance between the "right of a member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members."

A three-part test must be followed for a measure to fall within the ambit of Article XX of the GATT, 1994. This is in regards to when such a measure is in conflict with any of the obligations of the GATT, specifically; *First*, the measure has to fall within the ambit of a policy interests laid down in the subparagraphs of the Article XX. Second, the measure must "satisfy a relational cause" of that subparagraph. *Third*, the measure has to meet all the requirements as demanded by the chapeau. [44] To be protected under the Article XX of GATT, 1994 must satisfy two requirements. First it must fulfil the exceptions as listed in the paragraphs (a) to (j) of the Article. Second, it must fall under the conditions imposed in the opening clauses of the Article. [45] It is pertinent to note here, the order in which this test has been laid down. The sequence of this two-tier test is important and has not been laid down randomly.[46] Article XX of the GATT, 1994, is a protectionist article. In this particular research, we only study it from the perspective of the National Treatment obligation of the WTO members. Considering that, it protects the interests of the domestic countries with respect to the National Treatment obligation as given under Article III: 4 of the GATT, 1994. When we talk about this two-tier analysis, the claim for such a protection by the complainants, as discussed above, makes it difficult for the Panel to assess the matter. It can only do so after it first determines what specific exceptions the claim of the complainant falls under. Further, even though the complainants have to claim protection under the exceptions of this Article with sufficient evidence to support their arguments,[47] the burden of proof to determine which exception they fall under, does not rest upon them.[48] This view was reiterated by the Appellate Body in Brazil- Retreaded Tyres, which further established the

[44] *Id.*
[45] *Id.*
[46] United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam, WT/DS429/AB/R (April 22, 2015).
[47] Appellate Body Report, European Communities- Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R (March 12, 2001).
[48] Appellate Body Report, United States -Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (May 20, 1996).

necessity to follow both the conditions the two-tiered test to fall within the ambit of Article XX of GATT, 1994.

There are three types of discrimination that come within the ambit of Article XX. They are Arbitrary discrimination, Unjustifiable discrimination and Disguised restriction on international trade. Arbitrary discrimination is applicable between and amongst countries where equal conditions of competition prevail and unjustifiable discrimination is the kind of discrimination that consists of the same qualifier. The concept of "arbitrary and unjustifiable discrimination" has to be read along with the concept of "disguised restriction on international trade."[49] The term disguised restriction was described as "the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination."[50]

This brings us to the understanding of the nature of such discrimination and whether it would include both importing and exporting countries, or just the conditions amongst various exporting countries. It was held by the Appellate Body, that the "same conditions between countries", means that "discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned."[51]

Therefore, for a measure to fulfil the requirement of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail," three elements are required to be fulfilled.[52] First, the measure must originate from indiscrimination. Second, such discrimination should be either "arbitrary" or "unjustifiable". Third, such discrimination should be "between countries where the same conditions prevail." [53]

The Appellate Body in its report on US-Shrimp considered whether the US applying a uniform standard scheme in all its territories, regardless of certain competitive conditions in some of the territories was discriminatory or not. It was held that such an act was not in harmony with the "international trade relations" and was therefore discriminatory; "when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries." Therefore, even if the

[49] *Id.*
[50] *Id.*
[51] United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam, WT/DS429/AB/R (April 22, 2015); Appellate Body Report, United States -Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (May 20, 1996).
[52] United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam, WT/DS429/AB/R (April 22, 2015).
[53] *Id.*

government of a country is allowed to adopt a uniform standard policy for all its citizens, it is not acceptable in the light of international trade "for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members." Further, the certification process that was required to be followed by the exporting countries to form a contract with the United States of America, was "slightly informal and casual" and lacked a certain amount of transparency. It denied them of a fair opportunity a reasonable basis for their rejection to enter into trade with the country. This process did not give a just cause for not accepting their applications and was therefore considered to be "arbitrary and unjustifiably discriminatory."

In another WTO ruling[54], the panel considered whether a certain European drug scheme called the "European Communities Drug Arrangements" was in conflict with the exceptions laid down in Article XX of GATT, 1994. As per the scheme, the countries that were most affected by drugs stood as beneficiaries. However, this scheme arbitrarily excluded Iran from its scheme even though it was more drug affected than the countries that had been entitled as beneficiaries. The inclusion of Pakistan and exclusion of Iran, even though Iran was a more deserving country, was a matter of concern for the panel in this particular report. It was therefore held by the panel that "it cannot conclude that the criteria applied for the inclusion of Pakistan are objective or non-discriminatory. Moreover, the European Communities has provided no evidence on the existence of any such criteria."

In Brazil- Retreaded Tyres, the Appellate Body held that exempting MERCOSUR countries from an import ban on "remoulded tyres" was not arbitrarily or unjustifiably discriminatory. The exemption from the ban did not arise from a non-transparent or unfair process. It had a reasonable basis to its application since it was in consonance with another Article of the GATT, Article XXIV, which allowed for preferential treatment of the WTO members. This abided by other WTO reports,[55] that to adjudge the arbitrary nature of discrimination, the analysis of the cause of such discrimination has to be considered rather than the effect of such discrimination. In this case, the so called "discrimination" arose from a preferential treatment, as has been

[54] Appellate Body Report, European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R (April 20, 2004).
[55]Appellate Body Report, United States -Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (May 20, 1996); United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam, WT/DS429/AB/R (April 22, 2015).

guaranteed by the provisions of the GATT, 1994 itself. Hence it was established by the panel that this was not the case of arbitrary or unjustifiable discrimination. However, soon after the Appellate Body reversed the findings of the panel. It was then established, that an act of discrimination would be considered to be arbitrary in the presence of a relational cause with the objectives that the measure sought to achieve, when exercised by the domestic country. It was then established that an act of arbitrary discrimination may even arise from a reasonable or "rational behaviour" if it is not in relation to the objectives of the measure undertaken.

SECTION IV- CONCLUSION

The basic rationale of this research project was to determine what role competition plays within the system of international trade. Whether there is still a balance between maintenance of conditions of competition within the relevant market place and protecting the national sovereignty of the WTO members in pursuing their domestic goals. If this balance exists, what are the measures taken by the government to achieve it? Do the provisions laid down in the Agreement and several judicial pronouncements for that matter, aim at protecting competition in the market or the interests of the WTO members or both? In short, how exactly does the balance between these two fields work?

Through my research on this topic, I have managed to conclude that even though importance is given to promotion of International trade and increasing one's standing in the global forum with respect to their market share, export sales, etc., it is also equally important for the WTO members to follow their non-discrimination obligation. The non discrimination principle of the WTO, which also finds a mention within its preamble, is the heart and soul of the Agreement. All WTO members are required to abide by it. It is a substantive obligation, not only found in GATT but various other treaties and agreements under the WTO.

Taking Article III: 4 of the GATT, 1994, into specific account and more importantly, the concept of treatment "no less favourable", it can be seen that it requires "equality in the conditions of competition." That means the imported and domestic products have to be accorded the same footing in terms of rules and regulations applied by the domestic government. For this, the domestic and imported products have to be "like" in the same relevant market place. It is precisely, from the perspective of this very Article, and especially the concept of "less favourable treatment", that the balance between competition and International trade is maintained.

The WTO reports quoted in the paper have not only managed to compensate for the lack of clarity upon role of competition in the field of International Trade, but have also raised the standards in terms of protecting the balance between the two fields. This view is strengthened from the study of the exceptions that have been laid down in Articles III: 8, XVIII (C) and XX of the GATT, 1994. The study of the National Treatment Principle requires for it to be read in conjunction and consonance with the various exceptions that are laid down in the above mentioned Articles. These exceptions are protectionist in nature, which aim at preserving the national sovereignty of domestic countries. They allow domestic governments to take certain measures in order to protect their domestic products against foreign imports.

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RESEARCH AREA: DEMONSTRATIVE EVIDENCE AND EXPERT TESTIMONY, WITH SPECIAL REFERENCE TO SATELLITE IMAGES AND DATA SENSING AS EVIDENCE

Aastha Tushar Mehta·

"Science of today, is technology of tomorrow" *-Edward Teller*

The above quote is apt for the present paper as the author is going to focus on science and international arbitration practice. Science has given us so much to thank for, and with every step science makes legal field faces a new challenge. The challenge before us, and addressed in the paper is that of satellite images as demonstrative evidence. The focus is on two core points; the first being nature of satellite images and other earth observation (EO) techniques as evidence, and second the issue of expert testimony and opinion on interpretation of such evidences". The paper is making an attempt to throw light on whether expert testimony over satellite images are hindrance for international arbitration practitioners or not. The law on the point of admissibility of satellite evidence is not clear, but the author has given an overview of the existing literature. The main problem which faces the international arbitral field is the uncertainty of the use of expert testimonies for such satellite data, and this is author's research area. The significance of this study lies in the fact that a clear solution is provided in last section for the future discussions and may act as a source of literature for academicians interested in this area. The paper may serve as a comprehensive piece of academic work, for image experts and arbitrators in international arbitration.

I. INTRODUCTION

The subject is the rising debate about should experts be made a de facto decision maker by putting reliance on such demonstrative evidences which necessarily require them to rely on their subjective sight. The author has made an attempt to bring together something which is not in public eye, but is gaining attention. Should parties hold back altogether from presenting scientific evidence or should there be some middle way out? **The research majorly focuses on how and why satellite images as evidence are more convenient to arbitration rather than documentary evidence, which has led the author to relate it specifically with the requirement of experts in this domain on interpretation.** The basis for countries to employ peaceful means to resolve their dispute is derived from Article 33 of UN Charter which provides for methods of dispute resolution among nation, one among them being arbitration.[1]The body of the paper, has major emphasis on jurisprudence evolved in ICC, ICJ and PCA, and how satellite images are inherently stronger for a party due to their visual value. **The research area on expert testimonies over satellite images and data will be of most importance in the times to come due to the growing arbitrations in the world among countries.**

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[1] U.N. Charter art. 33.

II. CONTEMPORARY ISSUES

In this part, author presents research questions and answers them in the backdrop of the current legal position and gives solution to the main theme of the paper.

A. How does demonstrative evidence affect the psychology of the arbitrators?

Demonstrative evidence is defined in Black's Law Dictionary as "physical evidence that one can see and inspect (i.e. an explanatory aid) such as a chart, map and computer stimulations and that while of probative value and usually offered to clarify testimony, does not play a direct part in the incident in question.[2] This definition has been many a times relied on by different courts. Arbitration is one forum wherein unlike litigation, the conventional rules of evidence are not attracted and the tribunal is not bound by any dictionary meaning. Therefore, at the stage of presentation of evidence, it becomes a function of the tribunal to see how evidence is going to be appreciated. **Article 19 of UNCITRAL Model Law**[3], gives freedom to parties, to choose any procedure to be followed by the tribunal for conducting the proceedings and upon failure to choose any procedure, arbitral tribunal subject to other provisions of the Model Law can conduct proceedings in the manner they think appropriate. The Model law further clarifies that this power which is conferred on the tribunal to decide its own proceedings **also includes power to determine admissibility, relevance, materiality, and weight of any evidence.** In practice, "IBA Rules on taking Evidence in International Commercial Arbitration"[4] (revised in 2010) are adopted by parties expressly or impliedly, and it is recently observed in international community that IBA rules are indeed the most preferred way for managing the evidence proceedings. 85% of parties who were interviewed by a survey stated that they found IBA very helpful for the proceedings. [5] IBA rules define "document in the following manner- writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means" which shows that IBA rules go beyond the conventional written evidence and recognize new upcoming technological evidences also under the scope of "document". **The reason for referring to IBA is to show that current trends favor the evidence presentation not only limited to documentary evidences but**

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[2] BLACK'S LAW DICTIONARY 636 (9th ed. 2009).

[3] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* 1994, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

[4] International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), *available at* http://www.ozgunlaw.com/Uploads/image/files/IBA%20Rules%20on%20the%20Taking%20of%20Evidence%20in%20Int%20Arbitration%20201011%20FULL.pdf.

[5] White & Case, *2012 International Arbitration Survey: Current and Preferred Practices in Arbitral Process, available at* http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf

newer forms of evidences making a case stronger. If Model law and IBA rules are interpreted harmoniously, demonstrative evidence, which can be called pictorial and visual evidence also, have a valid scope to be admitted by the parties in order to give their case a more impactful dimension. **While addressing the question of demonstrative evidence, impact it makes on the psychology of an arbitrator comes into play.** Psychology is equally relevant while considering evidences which are not plain black and white paper, and in this research question author proposes to present how demonstrative evidence should be admissible, but along with exceptions.

There are two points on which author has focused on,

i. Demonstrative evidences are known to be visually appealing and make an impression on the arbitrator's mind.

In this research note, **satellite images are looked at in specific as a form of demonstrative evidence**, and therefore used as an example to explain this argument. Satellite images are bound to be taken from different angles, different longitudes and latitude locations for showing the landscape in its entirety. A nation which is involved with other nation in a boundary dispute is bound to make use of maps and such location devices in order to satisfy their claim over land, and in order to further their argument. **Human brain is wired in such a way that when words and graphics are put together, it conveys the information in a better manner, and can be very effective. [6]Therefore, when claim over a territory is substantiated by a satellite image of the area from different orbital positions, it will make arbitrator interested in your claim, which is otherwise, a plain claim over a piece of land.** When any demonstrative evidence like maps, satellite data or other geographical data in the form of visuals is given to tribunal, it enhances their ability to understand the conflicting claims over territories in an easier manner. Scholars have supported this point of view for admitting visual evidences and the best way in which it has been theorized is as follows, *"Photographs, diagrams and demonstrative evidence should be used to illustrate technical terms and processed so the Panel can visualize them. Once the arbitrators visualize the concepts, verbal descriptions can be understood and can refine them."*[7]However technically, demonstrative evidence is rarely considered to have high probative value, since it is also said to be supporting the primary evidence on record. However it has a major role in

[6] ARTHUR ROVINE CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 191 (MartinusNijhoff Pub., 2012).
[7] Doak Bishop, *Advocacy in International Commercial Arbitration: United* States, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 337 (Doak Bishop ed., Juris Pub. 2004).

effective persuasion strategy, visually stimulating the audience (i.e., the members of the arbitral tribunal) and communicating the advocate's evidence and arguments.[8]

ii. Current arbitration system is more open and receptive to demonstrative evidence, as it helps the arbitrators grasp more in a shorter period of time.

Before showing the reasons for growing acceptance of demonstrative evidence, it becomes necessary to understand why demonstrative evidence evolved. Demonstrative evidence has been used by national courts in foreign jurisdictions, especially America, due to the memory retention such evidences offer. One of the major studies conducted indicated that people retain the information more when they are given that information, orally and visually, which will be the same case in arbitrations since arbitrators will remember the arguments of the advocates more clearly in cases where arbitration stretches to multiple hearings. **The study conducted by Weiss-McGrawth showed that people remember 65% information even after 72 hours if information is given in a combination of visuals and orally.[9] This is the main reason, why practically advocates appearing in international arbitrations, who represent a country in big boundary disputes, would want to admit such demonstrative evidences of satellite images, remote sensing data, graphs etc. since such hearings take many days and months, and if such evidence is presented, there are high chances of it have longevity in the minds of arbitrators.** It is important to see that after looking into multiple of cases on boundary disputes between nations, counsels for the parties representing the countries have invariably relied on such satellite images, or in older times on maps, which gives us an idea that advocates always showed a trend towards visual effects in order to show the land and its geography as it is on the earth.

There are **multiple reasons why demonstrative evidence is useful in boundary dispute arbitrations**:

- Firstly, in case of boundary disputes, **site-inspections take a lot of effort of the tribunal and also prolong the arbitration proceedings. It is also not a cost effective solution, for the arbitral tribunal to have on site inspections. The very essence of arbitration, which makes it different from litigation in courts, is that arbitration is a flexible and speedy mechanism for dispute resolution.** Site visits to the disputed land may also

[8] Bernd Ehle, *Effective use of Demonstrative Evidence in International Arbitration*, CZECH (& CENTRAL EUROPEAN) Y.B. ARB. 43, 45 (2012), *available at* http://www.lalive.ch/data/publications/CYArb_Ehle_last.pdf
[9] H. WEISS & J. B. MCGRAWTH, TECHNICALLY SPEAKING: ORAL COMMUNICATION FOR ENGINEERS, SCIENTISTS AND TECHNICAL PERSONNEL (Mcgraw-Hill, 1963).

involve governmental permissions and would take time for the arbitrators or surveyors (either appointed by parties or tribunal) to start their on-site inspection. This would annihilate the very idea of speedy mechanism for coming to a solution, coupled with the fact that it will also prove costly to parties who would bear the brunt of paying for the costs of the arbitrators on such inspection visits. Therefore, **presenting satellite images and such other geographical photos taken from satellites would help the tribunal and the parties in saving time and cost respectively.**

- Second reason for such acceptance of demonstrative evidence is its **usefulness in multiple areas of arbitrations.** Not only are boundary disputes solved by such evidences, but it is also helpful in negotiation of treaties between countries for legal demarcation of boundaries[10] (which in turn may be taken up as evidence if in future dispute arises between those two countries) and also in energy disputes (to depict pipeline trails)[11] and oil spill detections in sea water.
- Lastly, satellite images help in showing the real situation, since the chances of concocting such evidences, though not impossible is very rare and advocates would not resort to fabricating such scientific evidence which would require high degree of knowledge in computer graphics. So the chances of evidence being manipulated are lesser in such cases, when compared to older methods of documentary evidences etc. Contrary views are aplenty, which state that like any other electronic evidence satellite images are also prone to manipulation with the help of current system of technology.[12] **However it becomes important to note that this should not be a source of skepticism for tribunals, since courts might look at it with disdain. But as tribunal is not overburdened like courts, it can also have the images cross-checked by the expert of forensic technology to see signs of manipulation, if there is allegation from either of the party that such images are doctored after being derived as raw date from the satellite.**

Exception: In practice, arbitral tribunals are composed of three experienced international arbitrators from different legal systems, and they approach the questions of reception of

[10] Mohammed Al Sayel & Peter Lohmann, *The Use of Satellite Images in Preparation for the Establishment of International boundaries, in* 8 EARSEL WORKSHOP ON REMOTE SENSING FOR DEVELOPING COUNTRIES IN CONJUNCTION WITH GISDECO (2008). *available at* http://www.ipi.uni-hannover.de/uploads/tx_tkpublikationen/Alsayel_lohmann_istanbul.pdf

[11] *Supra* note 7 at 54.

[12] S.H. Hodge, *Satellite data and environmental law: Technology ripe for litigation application,* 14-2 PACE ENVTL. L. REV. 710, 713 (1997).

evidence in a pragmatic way.[13] This can be further substantiated by the fact that civil law arbitrators tend to be more inquisitorial in nature, those from common law countries are not. Arbitrators also need not always be from the legal field, and there have been instances where arbitrators are also technical experts or people representing the trade/industry.[14] Since arbitrators have grown up in countries which follow different national legal systems, their ideas on evidence and presentation of evidence are going to differ completely, to the extent of it being a contrast of ideas among them. However, in international arbitration irrespective of their own nationality, arbitrators approach the evidences with an open mind. Herein, the applicable law of the arbitration agreement can help, resolving the issue of admissibility of evidence which usually also governs rules of evidence. However, it is also believed there is diffusion and synthesis of common law and civil law philosophies, especially in IBA rules of evidence, which have been drafted by experts representing all the legal systems. [15]

The exception which needs to be taken care of while advocates use such images and other visual evidences is the background of arbitrators and their attitude towards such demonstrative evidences. Writers in international arbitration also suggest that colors being used in such visual evidences should also be taken care of, so as not to be offensive to any arbitrator's culture.[16] However such color scheme might not be applicable to satellite and geo-information data since that would show the earth in all its beauty and its natural color, which cannot be modified in any circumstances. Therefore it is always better to take permission of the tribunal during the initiation of proceedings for admitting such evidences, looking at the cultural background to which the arbitrators belong.[17] When such a permission is taken, it will act as an intimation to the other party that their opposing party is going to use demonstrative evidence, maps, charts etc. due to which they are not taken by surprise[18] and put in disadvantageous position, by not having sufficient time to prepare or rebut such evidences.

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[13] ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 6.89 (Oxford, 2009).

[14] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: INTERNATIONAL AND USA SPECTSCOMMENTARY AND MATERIALS 448 (Kluwer Law Int'l, 2001).

[15] KATHERINE L. LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 300-1 (Kluwer Law Int'l, 2003)

[16] Pierre-Yves Tschanz, *Advocacy in International Commercial Arbitration:* Switzerland, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION, 195, 218 (R. D. Bishop ed., Juris Pub. 2004). See *also* Charles R. Ragan, Arbitration in Japan: Caveat Foreign Drafter and Other Lessons, 7 (2) ARB. INT´L 93, 112 Fn 72 (1991).

[17] *Supra note* 6 at 309, 352.

[18] Bernard Hanotiau, *Massive Productions of Documents and Demonstrative Exhibits in Written Evidence and Discovery*, in INTERNATIONAL ARBITRATION: NEW ISSUES AND TENDENCIES 357, 361 (T. Giovannini & A.Mourre eds., ICC Pub. 2009).

Further scholars also put many limitations on use of such evidences, which are not codified anywhere but are evolved through various real-life instances.

Demonstrative evidences are therefore, a more skillful way of presenting one's arguments, due to the psychological impact it has on arbitrators and also the fact that satellite images are the ground reality of the dispute, they should be given proper consideration by arbitral tribunals. The author has herein, tried to show how demonstrative evidence blend into the entire arbitration concept, and is a friendly mechanism for parties and the tribunal alike. Demonstrative evidence can help countries to ensure that their arguments are not only presented in an effective manner, but also give arbitral tribunals various advantages in making the arbitral process faster. The advantages and the utility of such demonstrative evidence is further reiterated in coming sections of the research note, where arbitral tribunals, forums and courts across the world have used such evidences to reach a conclusion. Author would summarize by drawing note to the fact that demonstrative evidences, are the next big thing for arbitrations.

B. How does satellite image differ from conventional means of evidences and do they contribute in making arbitrations more arbitrator friendly?

This Research question is inspired from the first research question, and further elaborates why satellite images are superior to the traditional documentary evidences or even the normal photographs submitted by parties to the tribunal. It is essential to note one point before the author further delves into main arguments which pertains to how law and science need to go together sometimes and especially in matters of evidence, wherein anything and everything might be used as evidence by parties. and it is for the courts and tribunals in case of arbitration to sift the relevant evidence and give them appropriate weight. When science and law meet, introduction of "incontrovertible scientific facts" take the case away from the art of advocacy[19], and makes the case a mixture of many fields, giving it a multi-faceted dimension.

Author has come to the conclusion that indeed scientific evidence, which is demonstrative and pictorial in nature, e.g. satellite images and other geo-spatial data are more effective than conventional evidence, e.g. documentary evidence, photographs.

In support of such a conclusion, author presents certain **key arguments** as given herein below,

a) Satellite images come within the category of demonstrative and scientific evidence both at the same time. Scientific evidences are always seen to have a stronger value when

[19] Bruce S. Marks, *Dispute Resolution in Space Age: Forensic Applications of Earth Observations Satellite Data Through Adaptation of Technical Standards similar to DNA Fingerprinting protocols* 5:1 OHIO ST. J ON DISPUTE RESOLUTION 33 (1989).

placed with the documentary evidence or other evidences which are paper based. In the Hague Conference in 2010 conducted by International Law Association, in its fourth report on "Legal Aspects of the Privatization and Commercialization of Space Activities" (predecessor of Sophia Conference of 2012) this point of satellite image as evidence was raised. Representative of Denmark, Kaare Bangert had brought attention to this argument by stating that when scientific evidence are used in courts for cases of the law of sea, and evidences of geologists and fisheries are not questioned, same should be the case with satellite evidence also, wherein certain evidence have proper scientific base and therefore their technicality should be beyond dispute. [20]

b) US Courts have frequently given weight to such evidence, and there are number of cases wherein different methods of remote sensing data are admitted as evidence. In the matters of environmental litigation, the court used the satellite images for knowing dispersion of taconite tailings by a mining company.[21]Author Ruwantissa Abeyratne has given a more detailed account of satellite image's admissibility with respect to US courts, wherein some light is thrown on how such data should be handled by the lawyers.[22]**In the current situation, with growing literature on the acceptability of satellite images and other remote sensing applications as evidence, even arbitral tribunals need to see how these evidences can be useful for a better and effective adjudication.** Arbitral tribunals do need to see that courts are applying certain well established principles of science and law together, which even though might not bind the arbitral tribunals, but may act as an academic help on the subject when inter-government disputes come up.

c) There is so much more to satellite images than mere visuals that these remote sensing techniques can help the tribunals in many more different ways, as and when the dispute arises between countries. For example, it might also be used in river-water disputes, in which international tribunals have frequently taken part in resolving such disputes. Recently the *Kishenganga River Arbitration* between India and Pakistan (before PCA in 2010) showed that even though the evidence put on record was confidential and did not

[20] *Supra* note 35, at 10, Further see International Law Association, Hague Conference "Legal Aspects of Privatization and Commercialization of Space Activities: Fourth report".
[21] United States v. Reserve Mining, 380 F.Supp 11.
[22]Ruwantissa Abeyratne "Air Navigation Law" Springer Science and Business Media p. 62 (2012).

come to public domain as to whether satellite images were used or not, the public statements refer that parties did rely on satellite data. [23]

In an ICJ case of *Argentina v. Uruguay*[24] pertaining to growth of algal bloom, which was polluting the river of Argentina, and it was alleged that this occurred due to a Uruguay Company, which had done certain industrial activities due to which the water conditions were becoming favorable to growth of algal bloom. Uruguay dismissed the satellite images brought by Argentina by referring to them as mere "snapshots" and also brought conflicting images showing the growth was not due to Uruguay Company. Though the tribunal by 13-4 found that Uruguay Company was not responsible, all of them placed reliance on the images presented by the parties, **however the interpretation to the satellite images by the majority and the dissenting arbitrators was different.** One more case of European Court of Justice (ECJ) is also important case law, which made satellite data admissible to monitor and control the growth of algae and higher forms of life in Humber Estuary of UK. [25] These examples show that satellite data techniques have multiple uses, which in such cases cannot be proved by any documentary evidence, since hardcore evidence of the ground reality is required. And in cases of such important environmental concerns the reason why satellite images prove to be useful is due to the fact that it can give out the different conceptions of what is happening in reality. It can give images spanning various months, and it can even be presented in the form of different water levels, which existed before the dispute and after the dispute, showing different circumstances about the place of dispute.

d) Certain **other advantages** which can be a better source for arbitrator compared to documentary evidence are as follows given by **London Institute of Space Law and Policy**:

"1. Providing a potential source of geographic evidence allowing for a flexible and robust response to geographical questions;

2. Improved quality and accuracy of information about temporal and spatial relationships;

[23] London Institute of Space Law and Policy, *Evidence from Space: Study for the European Space Agency on use of space-derived earth observation information as evidence in judicial and administrative proceedings, available a*t http://www.space-institute.org/app/uploads/1342722048_Evidence_from_Space_25_June_2012_-_No_Cover_zip.pdf.
[24] Pulp Mills on the River Uruguay (Argentina v. Uruguay) [2006] ICJ Rep 113.
[25] European Commission v. United Kingdom (Portugal intervening) [2009] All ER (D) 224 (Dec).

3. Cost savings in gathering evidence;

4. Improved chances of prevailing in litigation; and

5. Improved implementation and enforcement of legal standards"

e) Lastly, satellite images and geo-spatial information by using earth observation techniques help in the longer run as, it gives an impetus to evidences which provide precision to arbitral proceedings, and which have a scientific base to them. When there is any evidence which has a verifiable source to it, and it is quantitative in nature, it will help the arbitral tribunal to check the veracity of such evidence.

Concluding this section, the author has provided the key points of distinction between how satellite images are as evidence inherently different from conventional means of evidence. The need of the hour is not to rely on strict rules of evidence, since in arbitrations many issues are at stake attached to the outcome of the arbitral proceedings and therefore evidences of different nature should be made admissible. e.g. in environmental degradation arbitrations where the country is likely to suffer in terms of bio diversity etc. the evidences of maps, geological studies, satellite mappings etc. should be given appropriate weight keeping in mind the issue before the tribunal. The same should applied for satellite images, and the author has made an attempt to show how these images and remote sensing options have been used time and again, to validate their position as a strong piece of evidence. In inter-state arbitrations, where shifts of foreign policy and international relations will take place due to arbitration awards, satellite images should not be shied away from as a piece of evidence.

C. Can international arbitration take help from law laid down in ICJ, ICC and PCA on the question of admissibility of satellite images as evidence?

Under this research area, author broadens the scope of type of disputes dealing not only with boundary disputes between countries, but also other issues which are settled by arbitration among countries, which touch upon variety of areas ranging from violations of environmental norms and transgression into resources of other countries to human rights degradation between countries. Herein it is also important to note that author not only specifically takes "satellite images" as evidences, but also other ancillary and connected modes of remote sensing, and other "Geo-information systems" (GIS), which have time and again come before tribunals. It needs to be mentioned that science tends to make "our tomorrow, our today" and so arbitration also should be receptive to scientific progress and be in tune with it. Answering the above question posed in this section, the focus is more on the approach of the jurisprudence and the precedents

laid down by ICJ, ICC and PCA. Satellite imagery is a bigger subset of aerial photography. Satellite images are not defined in any UN document, but a general consensus on its meaning when compared to aerial photography has been reached i.e. "satellite imagery is capable of capturing large spatial data in relatively small amount of time and are way of providing unbiased, non-intrusive and reliable data useful for observations during an investigation and documentation in evidence in litigation."[26] Remote sensing is defined in UN Principles Relating to Remote Sensing of the Earth from Outer Space[27] under Principle I (a) as "The term "remote sensing" means the sensing of the Earth's surface from space by making use of the properties of electromagnetic waves emitted, reflected or diffracted by the sensed objects, for the purpose of improving natural resources management, land use and the protection of the environment".[28]

There are two things which the author wants to bring to light by comparing the law given by court forums with the rising debate on admissibility of such evidences in arbitration forum.

i. Satellite imagery as evidence is an accepted norm for many international legal forums.

There is vast amount literature available on evidentiary value of satellite images from institutions like International Court of Justice (ICJ), International Criminal Court (ICC) and Permanent Court of Arbitration (PCA). This gives sufficient authority to make it a well-recognized piece of evidence. The Author has considered in depth each of these institutions and the approach which has been taken by them in admitting such geo-spatial evidences.

ICC: In the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*[29] prosecution used satellite images in order to show a village in Democratic Republic of Congo, and it was used to know the geographical configuration of that village. Also 360 degree aerial and satellite photographs were shown as part of evidence using earth observation techniques (EOT). Herein the 360 degree photographs were taken by an expert and some taken by drone to provide 360 viewpoint of the area, which was admitted as evidence. Similarly in the case of *Prosecutor v. Thomas LubangaDyilo*[30] wherein also aerial photography and satellite images were presented by prosecutor, as evidence. [31] But research observation shows that ICC has never expressly taken cognizance of such satellite imagery but has merely reviewed them and taken them into consideration as useful

[26] GREGORY A. ELMES ET AL., FORENSIC GIS: THE ROLE OF GEOSPATIAL TECHNOLOGIES FOR INVESTIGATING CRIME AND PROVIDING EVIDENCE 56 (Springer, 2014).
[27] United Nations Office for Outer Space Affairs, *Treaties and Principles on Outer Space, available a*t http://www.unoosa.org/pdf/publications/ST_SPACE_061Rev01E.pdf.
[28] *Id*.
[29] ICC -01/ 4-01-07, *available at* http://www.icccpi.int/iccdocs/doc/doc571253.pdf.
[30] ICC-01/ 4-01/06, *available at* http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf.
[31] Further See , RAY PURDY & DENISE LEUNG, EVIDENCE FROM EARTH OBSERVATION SATELLITES: EMERGING LEGAL ISSUES 235 (MartinusNijhoff Pub., 2014).

piece of information, never elevating to the position of a strong evidence. In another case for arrest warrant against Sudanese President, prosecutor relied on satellite images and aerial photographs about attacks and destruction of villages.[32]Reports by the Satellites Sentinel Project (SSP) have been used as evidence in the ICC investigation of recent alleged crimes in Sudan.[33] In support of admissibility of such satellite evidence **Article 69 of Rome Statute**[34] (which is the treaty establishing ICC) comes in handy, which gives freedom to parties to keep on record as evidence, all that they consider as relevant. **The two requirements under this rule are that evidence must be relevant and it should be necessary for the determination of the truth. These parameters can be a guiding factor for arbitral tribunal, in determining the necessity of satellite images as piece of evidence and if images fulfill these Article 69 criteria then there is no reason for not having them admitted by parties.**

ICJ: Satellite images are also taken into consideration as evidence to substantiate the base claim, as happened in case of *Georgia v. Russian Federation*[35]wherein images from UNOSAT were admitted to show that Russian forces intentionally burnt villages. However, this was added to other plethora of different evidence and did not prove to be the evidence of prime importance. There are certain boundary disputes also which happen to be our main focus from the perspective of arbitration which has gone to ICJ wherein Earth Observation (EO) information and images have been used as evidence. However they are generally taken to support the maps, and other charts of the geographical location. This can be seen in *Case Concerning Kasikili/Sedudu Island (Namibia v Botswana)*[36] wherein experts also interpreted the images taken during the course of the years 1925 to 1985, but the satellite images were used to a minimal degree for the deciding the boundary.[37] Herein one important question arises, which will be dealt with later in the research paper, about expert testimonies being conflicting on the same images, due to different interpretations given to the same image. The evidence of satellite images was held to be inadmissible in ICJ due to conflicting opinion of the expert testimonies.[38]

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[32] Annex A, public redacted version of the Prosecutor's Application under Article 58 (ICC-02/05-156-AnxA 12-09-2008). July 14, 2008. (accessed on 15th August, 2014). http://www2.icc-cpi.int/iccdocs/doc/doc559999.pdf.
[33] Ana Cristina Núñez M. "Admissibility of remote sensing evidence before international and regional tribunals" (accessed on 15th August 2014) Available at http://www.amnestyusa.org/pdfs/RemoteSensingAsEvidencePaper.pdf.
[34] International Criminal Court, *Rome Statute of International Criminal Court, available at* http://www.icc-cpi.int/iccdocs/PIDS/publications/RomeStatutEng.pdf.
[35] CR 2008/25:23, *available at* www.icj-cij.org/docket/files/140/14719.pdf#view=FitH&pagemode=none&search=%22satellite%22.
[36] 1999 I.C.J. 1045.
[37]ATSUYO ITO, LEGAL ASPECTS OF SATELLITE REMOTE SENSING 136(MartinusNijhoff Pub. 2011).
[38] Nigeria v. Cameroon, *2002* I.C.J. 303 (Oct. 10).

PCA: PCA has had the opportunity to see satellite images as evidence in the arbitration between Eritrea and Ethiopia[39] which pertained to human rights violations. High resolution photographs from IKONOS were submitted by Eritrea. Therein satellite images were used as evidence by both the sides. However, they were only termed as "useful" but had significant limitations. "The limitations were not from legal point of view so as to say but there weren't many images to present, and those which were presented were not on the relevant dates, in order to damage done due to war. Even some pictures showed that building and other properties were in normal condition, which made the Tribunal skeptic about the use of such satellite images."[40]

More recently PCA has given an award on 7th July 2014 on the maritime boundary dispute between Bangladesh and India, wherein also satellite images formed a substantial part of the arguments.[41]. There were conflicting claims from both the sides for demarcation and delimitation of Maritime boundaries and EEZ, and on specific islands. The main contention of Bangladesh was that the nature of certain islands such as New Moore island etc. are instable in nature whereas India countered it as being stable and also relied on the following satellite image. [42] This case happens to be an important source for understanding how practically satellite images are presented, and what are the arguments that should be placed as a counsel before the tribunal for satellite images. This case shows, how arbitral tribunals are increasingly considering such images, and the extended use of such images in arbitrations by state parties show the emerging trend of bringing the best evidence on the record. However eventually India lost a major chunk of the sea territory to Bangladesh, and retained specific islands, which it is feared may have drowned in recent years.[43] PCA, does not have much literature on satellite images and their admissibility per se, however parties generally do present satellite images in order to bring about a strong case by showing different locations and timings of the claimed territory.

ii. Analysis of existing law

Returning our focus to the main question at hand , do the case laws quoted above broaden our understanding about the evidentiary value of the satellite images. It definitely helps us in

[39] AAAS, Scientific Responsibility, Human Rights and Law Program, *Geospatial Technologies and Human rights-Ethiopian Occupation of Border Region of Eritrea Case Study, available at* http://www.aaas.org/page/ethiopian-occupation-border-region-eritrea-case-study-summary.
[40] SEAN D. MURPHY ET AL., LITIGATION WAR: MASS CIVIL INJURY AND ERITREA –ETHIOPIA CLAIMS COMMISSION 208 (Oxford Univ. Press, 2013).
[41] In the matter of the Bay of Bengal Maritime Boundary Dispute (Between People's Republic of Bangladesh v. Republic of India) 7th July, 2014.
[42] *Id.* at 46.
[43] Further See , Charu Sudan Kasturi, *Gone: sea larger then Bengal, UN Tribunal awards Dhaka marine chunk,* THE TELEGRAPH (June 9, 2014), *available at* http://www.telegraphindia.com/1140709/jsp/frontpage/story_18596046.jsp#.U_AYmnKSzOc.

understanding the approach taken by other legal forums in the world. **Author, opines that the trend in all case, especially ICC and ICJ is to have specific images, and preferably images which are taken after the aftermath of a violent event, to be regarded as a proof of an event being occurred**. The trend clearly shows that when parties do not make specific arguments on the geography, or the situation on site, satellite images are no more than pictures. Linked with good advocacy, it is on the counsel to ensure that satellite images are given a legal value by intertwining them during the course of their arguments.

Scholars all across the world have participated in many conferences which aimed at bringing about a clearer situation as to space litigation and also on trying to find out what are the way in which the approach on admissibility of satellite evidence can be unified for all international litigation forums, such as ICJ and ICC. **In New Delhi Conference of ILA in the year 2002, a study was presented, which was undertaken by British Institute of International and Comparative law[44] to look into rising number of cases before international forums which had seen a rising spat in satellite evidence being brought as record, which had given rise to different divergent interpretation. Ultimately the outcome was that their conflictive interpretations had caused confusion to the courts instead of clarifying the situation.[45]**One of the most disappointing cases decided by ICJ, which breaks the momentum gained by the idea of having satellite images as evidence was given in *Burkina Faso/Mali*[46] boundary dispute in 1986. It was stated that "digital maps are not binding documents or a territorial title by themselves, whatever their precision and technical value, unless the parties had previously agreed on the value of this means of evidence.[47] However in 1990s and afterwards in 2000s, the trend of allowing such evidence as primary evidence is observed. **The author agrees that satellite evidence might not be the sole evidence on which parties should rely, which generally doesn't happen, and till this extent the approach of ICC, ICJ and PCA seems plausible. However, complete denial of its presentation as in Burkina Faso dispute and other cases of these forums might discourage the use of technological methods in solving disputes, where it can be important source of information for the arbitrators, in coming to a balanced conclusion.** As noticed in the preceding research question, IBA rules should be seen as preferable mode of solving the question of admissibility of differences. After research the author opines that arbitration tribunals need to be more open while considering and

[44] Available at http://www.ucl.ac.uk/laws/environment/satellites/docs/EOdataLegalSector.pdf.
[45] INTERNATIONAL LAW ASSOCIATION, SOFIA CONFERENCE: LEGAL ASPECTS OF PRIVATIZATION AND COMMERCIALIZATION OF SPACE ACTIVITIES: FIFTH AND FINAL REPORT 289 (2012), *available at* ila_report_sofia_2012_pdf_final.pdf (accessed at August 17, 2014).
[46] 1986 ICJ Rep. 554.
[47] 1986 ICJ Rep. 186, ¶ 54-56.

evaluating evidence. The reason being that though, arbitral tribunals are bound institutional arbitration rules such as LCIA, ICC etc. the freedom of taking evidence on record and relying on them ultimately lies with the arbitrator. Supporting this, there are commentaries on **IBA rules, specifically Rule 9.1** which state that the authority completely is with the tribunal for deciding weight, admissibility, relevancy of the evidence adduced by the parties. In one of the arbitration case, which was decided by African Supreme Court, the court decided that discretion of the arbitrator remains wide, in admitting any evidence, therefore arbitrator does not commit any judicial error, if he admits disputed evidence also.[48] **Therefore when it comes to satellite maps, images and other such data sensing evidence from outer space, arbitrators should not view it with narrow rules and should see the high level of accuracy the images bring to the claims of the parties**. The reason why satellite images are admitted is to show the real situation, and there happens to be an elaborate process also which occurs for procuring such images from concerned autonomous space institutions. This ensures that process of getting such images is not completely in the hands of the parties, which increases their genuineness quotient. Arbitrators should look at the entire situation, keeping in mind that countries are involved and their national pride may also depend upon such disputes. ***Author is of the view that the decisions of ICJ, ICC and PCA may be viewed as a persuasive piece of law but should not put constrains on the arbitral tribunal's power to decide whether such evidence should be considered or not.*** If the context of the case requires reliance on digital sources, and other information about the on-ground situation in the case of environmental disputes, and human rights violations etc. is not available, such evidences about the maps and images obtained from satellites can be a valuable source of information for arbitrators.

Concluding, author considers it necessary that literature and approach which ICJ, ICC and PCA has given on this subject should not be altogether discarded, however they might not act as barriers for tribunals. The overall view of the scholars seem that though satellite image as evidence is at its preliminary stage to due to lack of current legal document on it, or specific arbitral cases laying down the law, even then it should be viewed with positive scope for growth. It should be considered as an emerging piece of evidence in such disputes, and therefore arbitrators should attach higher weight to it than tradition means, if the context and factual matrix requires.

[48] Telecordia Technologies Inc. v. Telecom S.A Ltd., 5 B.C.L.R. 503(2007).

III. EVALUATION: RESULTS AND RECOMMENDATIONS

In this section the author provides a solution for how expert testimonies which are considered as pitfall for the acceptance of satellite images as evidence. There is no doubt about the fact that tribunals are considering satellite images as an innovative form of evidence and they are used frequently before arbitral tribunals. In this section the author tries to present certain methods in which these conflicting expert testimonies should be reduced and the process can be made smoother and more cost effective as well.

A. Concept of Witness Conferencing

This is a new method which is gaining immense popularity in the practical field, and was popularized by Swiss Arbitrator Wolfgang Peter. **Here the arbitral tribunal, after it has got the opinion of experts and has gone through their respective reports can have an informal meeting with party appointed experts wherein the scope of evidence, i.e. satellite images are narrowed, the number of images are limited after consulting the parties counsel, and there is an exchange of divergent ideas among experts which will further limit the disagreement between the ideas, which will be addressed in the main hearing.** Moreover exact concept can be described in following words "*party appointed experts are supposed to co-ordinate through meetings and discussions to identify and reach agreement on issues on which they have to provide an opinion, prepared and exchange draft outline opinions which shall be without prejudice and privileged from production to tribunal*".[49] What is intended to be done by this method is that the experts can meet and limit the scope of disagreement to be addressed in the final hearing. In this meeting the counsels representing their respective nations can assist the experts in order to ensure that their client's interest in not harmed. By this, the number of images can also be agreed upon. It is usually seen that parties present plethora of satellite images of the same land during a span of different months, on different times and by way of different angles which will give the tribunal a tough time in analyzing all this data. In witness conferencing the experts can also question each other on their own respective findings, which would be better than counsels for parties cross-examining them at the stage of cross-examination as that would give the tribunal an idea that each expert has cogent reasons for his/her report and will lead to healthy discussion also. So the pitfall that there is too much subjectivity and conflicting expert testimonies will be reduced as experts will already have given a proper explanation to their reports, and finally parties would jointly with consensus make a statement of issues which need arbitral tribunal, making the process shorter. If X_A is Party A and X_B is Party B, which have submitted different

[49] *Supra* note 48 at 58.

and conflicting images, then if X_A and X_B have already discussed where disagreement lies, which images and data to be presented and how much dispute over images need to be decided, it will be comparatively easier for Y(Y refers to tribunal) to address such disagreements on interpretation by applying their own thought to it. Here, not only X_A and X_B participate but counsel for A and B, as well as Y can sit and make this conference of value by deciding on such key points**. This will definitely induce confidence among the tribunal on the expert's opinion as well give an impetus to satellite images being used by the parties.**

B. Supervision at All Stages of Satellite Data Collected by Parties

This recommendation has been approved by scholars all across the globe as a way of checking that data is not manipulated by the parties. **As we saw that manipulated satellite images can cause wrong interpretation, and such manipulations might not be discovered by human eye.** In order to solve the problem, wherein parties do not fake anything in such data, in the Rio de Janeiro Conference held in 2008 by International Law Association[50] scholars and other dignitaries met and intended to work out a framework, which contemplated strict data supervision from the time parties request remote sensing authorities and organizations for such pictures till the time they are presented and arbitral tribunal takes them. **The following are some of the guidelines provided, which the author fully endorses and also it is further stated that it can be of huge help if international arbitration uniformly applies them.**

> *Indian representative Y.S Rajan was of the opinion that "remote sensing satellite operators are required to keep archives with a record of the raw data so that it would be possible to return to it when manipulation was suspected."*[51]
>
> *British Representative Ray Purdy recommended and stressed the importance of training the legal sector in the development of these technologies given the unawareness of what this technology can offer and its limitations. There might be greater public awareness of satellite technologies through internet programs such as Google Earth -downloaded by millions- but many in the legal sector have probably never seen a satellite image in a legal context."* [52]

When data is supervised, it will save the tribunal from going into the question of authenticity of satellite images provided by parties. There will often be counter-arguments by both sides stating other side's evidence is manipulated, and in such situation arbitral tribunal can either appoint its

[50] International Law Association, *3rd Report on the Legal Aspects of the Privatisation and Commercialisation of Space Activities* 7 (Rio De Janeiro Conference, 2004)
[51] *Id*. at 631-637.
[52] *Id*.

own expert who will check the authenticity of the images, or can send it to an independent organization doing work in this field. This can also be connected to the preceding point wherein by way of witness conferencing the experts can agree on the procedure or any guideline to be followed for interpretation of such data, which is generally acknowledged in their field of work. Author will not discuss such guidelines as it would be out of scope of the research paper. It would be of immense help to the field of science and arbitration if parties themselves act prudently by providing authenticated copies of such images, with proper data analysis certificate which are generally provided by state agencies, which will lower the doubt in expert testimony being biased, or digital data being manipulated.

IV. CONCLUSION

Author concludes that this area of research is still to be explored, and arbitral tribunals should be open minded when they consider such evidence, as that will pave a way for international community to bring about a clear position through some convention, or draft rules. It will further facilitate the parties who resort to arbitration, in our case the nations, to come up with national guidelines on this subjects, or may also prompt international organization to make more study into this subject and come out with a treaty, specifically focused on arbitral tribunals. In the end, author states that the field needs some sort of clarity, from the arbitration community also, and perhaps arbitration institutions can in their draft rules, incorporate the status of demonstrative evidence and images. Even before this may happen, scientific community should join hands to provide guidelines for experts, which help the arbitration proceedings and will boost confidence in satellite images as evidence in the minds of arbitrators.

During this process, it should also not be forgotten that arbitration, is a preferred form of dispute resolution, as opposed to litigation because of absence of rigid procedures, and a more amicable and flexible atmosphere. Therefore, the essence shouldn't be lost, while engaging into the admissibility questions of satellite images and demonstrative evidence by overburdening the parties and tribunals with procedures. Over-reliance or complete ignorance of such satellite images, isn't the correct approach, especially in specific type of disputes that the author has referred to in the paper. Efforts should be made to increase acceptability of these images, by removing all the apprehensions that are attached to such kind of evidence, that have been mentioned in the paper. Therefore, the author further concludes that nations and arbitral tribunals, as well as counsels of the parties should work out within themselves a mode of working which increases confidence in such type of evidences.

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ARMS TRADE: STATE AND INDIVIDUAL RESPONSIBILITY UNDER INTERNATIONAL LAW

Rishabh Garg·

Former United States President Dwight Eisenhower in a speech delivered in Washington DC on April 16, 1953, said, "Every gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who hunger and are not fed, those who are cold and are not clothed. This world in arms is not spending money alone. It is spending the sweat of its labourers, the genius of its scientists, the hopes of its children."[1] The arms industry thrives on potential of its weapons to cause human suffering. In this paper, I explore the possibility of making exporters of arms & ammunitions liable under the existing international law for gross violation of human rights committed by the importers of such arms. For this purpose, I shall first evaluate the reasons why such arms trade should be criminalised, and then, I shall look at the existing international law in place to examine whether it is capable enough to deal with such trade practices.

I. INTRODUCTION

The United States of America, United Kingdom, France, Russia, and China, the five permanent members of the United Nations Security Council, are the major exporters of conventional arms. In 2011, the United States led the global arms deliveries for the eighth year in a row making nearly $16.2 billion or 36.5% of the total value of all arms deliveries worldwide. Russia ranked second, making $8.2 billion in such deliveries, while United Kingdom ranked third making nearly $3 billion. These top 3 suppliers of arms, in 2011, collectively delivered nearly $27.9 billion or 62.9% of all arms delivered worldwide by all suppliers in that year.[2]

While the major suppliers of arms are a few, the buyers of these equipments are spread all over the world. Some of the largest buyers are from the Middle East and South and East Asia. Most of these are developing nations. In 2011, developing nations collectively accounted for 63.3% of the value of all international arms deliveries.[3] Tanks and Self-Propelled Guns, Artillery, Supersonic Combat Aircrafts, Warships, Missiles etc. are some of the weapons that are sold. While there are treaties and conventions in place prohibiting use and transfer of radiological, nuclear, chemical and biological weapons, for the purpose of this paper, I limit my arguments

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[1] Dwight D. Eisenhower, The Chance for Peace (Washington DC, 16 April 1953), Social Justice Speeches (March 25, 2016, 06:07 p.m.), http://www.edchange.org/multicultural/speeches/ike_chance_for_peace.html.

[2] Richard F. Grimmett's Congressional Research Service Report for Congress, Conventional Arms Transfers to Developing Nations 2004-2011 (24 August 2012), (March 25, 2016, 06:12 p.m.), http://www.fas.org/sgp/crs/weapons/R42678.pdf.

[3] *Id.*

only to use and transfer of conventional and small and light weapons, the trade in which is highly unregulated.

Most of these developing nations set aside a majority of their military budget for procurement of these equipments. Some governments spend more on procuring arms than on health, social development, and infrastructure combined. Much equipment is needed for legitimate defence purposes. However, legitimate defence requirements are negligible in comparison with the volume of the current arms trade: arms sales in 1998 from OECD countries and developing countries amounted to some $156 billion.[4] Heavy militarisation of a region results in a cycle of violence. The more the ready access to arms supplies, the more likelihood of a nation to use them in a conflict. The Middle East is a current example. It starts from the oppression of local people, which consequently, results in violent reactions from those oppressed. Let us now explore these issues in greater detail.

II. THE ISSUES WITH INTERNATIONAL ARMS TRADE

The arms trade is a major cause of human rights abuses. The United Kingdom Government's Human Rights and Democracy: The 2014 Foreign and Commonwealth Office Report[5] identified 27[6] countries where the United Kingdom had concern over the human rights situations. However, in 2014, it approved arms export licences to 18 of these countries.[7] Ingrid Detter while writing about the disjunction between State responsibility to prevent human rights abuses and their economic interest says, "Here, there is often a dichotomy between the interests of arms manufacturers, together with the economic interests of their home State in the developed world, and the obvious hazards of Third World countries importing large quantities of such weapons. Developed countries have a vested interest in selling weapons 'to secure employment' and are often disproportionately pleased to announce that they have secured large orders for their arms industry, even if those weapons may eventually be used against their own soldiers, as was the case in the Gulf War. Thus, when arms are sold to the Third World, industrialised States are often content that such arms sales will bring in foreign exchange and enhance employment."[8] As such, significance is given to the fact that arms are being sold rather than who they are sold to. France, the United Kingdom, Russia, and Sweden have all been accused in recent years of

[4] OECD, Report, 1998, referred to in, INGRID DETTER, THE LAW OF WAR (2nd ed. 2000).
[5] Foreign & Commonwealth Office, Human Rights and Democracy: The 2014 Foreign and Commonwealth Office Report, (Cm 9027, 2015), (March 25, 06:16 p.m.), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415910/AHRR_2014_Final_to_TSO.pdf.
[6] *Id.* at 109.
[7] Human Rights Abuse, Campaign against Arms Trade, 1 September 2015, (March 25, 2016, 06:21 p.m.), https://www.caat.org.uk/issues/introduction/human-rights.
[8] INGRID DETTER, THE LAW OF War 125 (2nd ed. 2000).

stirring up trouble in countries like Rwanda, Serbia, Sierra Leone, East Timor by the supply of arms.[9]

Fortunately, the international community has taken interest in ensuring that the arms trade does not lead to ready availability of equipments to human rights violators. The United Nations and other international organisations like the European Union have imposed arms embargoes on conflict affected nations such as Armenia, Libya, Iran, Iraq, Syria, Yugoslavia etc. which have a history of human rights violations. Treaties have also been entered into between States to prohibit trade in certain types of arms such as nuclear, chemical and biological weapons, radiological weapons, and weapons of mass destruction.

However, it is the conventional and small and light weapons which are the cause of concern here as trading in these weapons are highly unregulated. The term Conventional Weapons generally denote all armament and armed force, except atomic weapons and weapons of mass destruction. These mostly include machine guns, mortars, rifles, and grenades. These are the weapons which importing nations have often described as necessary to procure for defence purposes. There is little State control on conventional arms trade. In fact, it can be said that there is a strong State support for such trade. The United Kingdom Trade and Investment (UKTI), Department for Business, Innovation and Skills, a government department which helps businesses sell their products worldwide employing 235 civil service staff in its London headquarters for 15 core sectors, employs 128 civil service staff in its Defence & Security Organisation (UKTI DSO) to promote arms exports.[10] Moreover, the UKTI DSO organises an arms fair named 'Defence and Security Equipment International' (DSEI) every two years in London where around 1500 exhibitors from around the world display their military equipments, and they are visited by military delegations of nations around the world, including those from nations with a history of human rights violations and conflict.

"Even when sanctions are imposed to on supply of these goods to a particular country, as was the case in Rhodesia, arms still find their way into those countries, often via several third parties ostensibly constituting the ultimate destination of those arms, as indicated on several letters of credit and bills of lading and other title documents. Alternatively, as happened in South Africa

[9] *Id.*
[10] Department for Business, Innovation and Skills, UK Trade and Investment: Written Question - 211850, asked on 24 October 2014 by Paul Flynn, answered on 11 November 2014 by Mathew Hancock, (March 25, 2016, 6:26 p.m.), http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2014-10-24/211850/.

during the apartheid era, sanctions merely encourage a country to start their own weapons production, gradually even exporting arms and thereby expanding the international arms trade."[11]

The international arms trade is also considered to be one of the three most corrupt businesses in the world, according to Transparency International, the leading global organisation monitoring corruption.[12] Professor Robert Neild of Cambridge University notes the following about the arms trade, "Bribery in the arms trade has not subsided since the end of the Cold War. On the contrary, as military spending has been cut back the arms firms have been seeking markets abroad more fiercely than before…. One recent estimate reckons that in the international arms trade "roughly $2.5 billion a year is paid in bribes, nearly a tenth of turnover.… [With regards to corruption,] the relevant feature of arms trade is that … government ministers, civil servants and military officers have become so intimately involved in the arms export business that they must have been unable to avoid condoning bribery (for example, by turning a blind eye to it), if not encouraging it (for example, by providing advice when serving in embassies overseas about which members of the local hierarchy it was best to approach and how); or obtaining funds from it for the benefit of themselves, or in the case of politicians, for their political party."[13]

Further, most of these arms exporting companies have retired government ministers as their employees, and so, these companies are in a position to influence political policies and turn them in favour of arms exports. The influence is a key reason why most of these companies enjoy heavy subsidies from the government. The revolving door is the key feature of the relationship between the arms industry and the government. Among many striking examples is that of Sir Sherard Cowper-Coles. As Britain's Ambassador to Saudi Arabia, he pressured the Serious Fraud Office to drop its investigation into BAE-Saudi arms deals. On leaving the Foreign Office he was given a job with BAE Systems. However, it goes far deeper than the choices of a group of individuals. It is systemic. Research by The Guardian[14] found that senior military officers and Ministry of Defence officials had received approval for 3,572 jobs in arms companies since 1996.[15]

III. STEPS TAKEN TO REGULATE ARMS TRADE AND THEIR SHORTCOMINGS

[11] INGRID DETTER, THE LAW OF WAR 121 (2nd ed. 2000).
[12] Ida Karlsson, POLITICS: Unchecked Arms Trade Fuelling Conflict, Poverty, Inter Press Service, United Nations, October 9, 2008, (March 25, 2016, 06:29 p.m.), http://www.ipsnews.net/2008/10/politics-unchecked-arms-trade-fuelling-conflict-poverty/.
[13] ROBERT NEILD, PUBLIC CORRUPTION; THE DARK SIDE OF SOCIAL EVOLUTION 139-140, 142-143, 195 (2002)
[14] MoD staff and thousands of military officers join arms firms, The Guardian, October 15, 2012, (March 25, 2016, 06:32 p.m.), http://www.theguardian.com/uk/2012/oct/15/mod-military-arms-firms.
[15] Political Influence, Campaign against Arms Trade, November 13, 2014, (March 25, 2016, 06:33 p.m.), https://www.caat.org.uk/issues/influence.

The statistics clearly show the need to regulate arms trade. The exporting States cannot, knowing that the exported arms are going to be misused to commit core international crimes and gross violations of human rights, freely participate in such deals, that too without any risk of being accountable for it.

The notion that exporting States should be made liable for assisting importing States in committing international law violations has been recognised by the International Law Commission (ILC). Article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted in the Commission's fifty-third session, in 2001, attributes international responsibility on a State which aids or assists another State in the commission of an internationally wrongful act, if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State. Further, paragraph 9 of the Commentary to Article 16 says that, "The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations."

However, the Commentary to Chapter IV dealing with responsibility of a State in connection with the act of another State provides that the State primary responsible under Article 16 is the acting State and the assisting State only has secondary or derivative responsibility. This distinction between primary and derivative responsibility seems baseless. If a State has a legal and moral duty to prevent or not indulge in facilitation of a crime under international humanitarian law, then there seems to be no substantial ground attributing only derivative responsibility for breach of such duty. Crawford, in his book on ILC's Articles has reiterated the same.[16] Further, for the assisting State to be responsible, the internationally wrongful act must be committed by the acting State. The implication of these is that the responsibility of the assisting State, in a case where it is clear that an internationally wrongful act has been committed, will not extend to compensating for the act itself. The situations covered under Chapter IV are exceptions to the principle of independent responsibility.

[16] CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 147-148 (Cambridge, 2002)

Nonetheless, the recognition of responsibility of an exporting State by the International Law Commission paved the way for adoption of the Arms Trade Treaty.

The United Nations took note of the widespread availability and misuse of conventional weapons and adopted the Arms Trade Treaty (ATT) in New York on April 02, 2013. It entered into force on December 24, 2014. The ATT is a multinational treaty aimed at regulating international trade in conventional weapons. 78 States have ratified the Treaty till date. The United Nations felt it necessary to regulate arms in the wake of rising attacks on the UN peacekeeping and humanitarian efforts at conflicted nations.[17] In 2003, three non-governmental organisations, Amnesty International, Oxfam, and the International Action Network on Small Arms formed the Control Arms coalition to campaign for governments to adopt the treaty. They hailed this move of the United Nations as a dream come true. However, many other anti-arms trade organisations have been skeptical about the ATT and have raised fears that the treaty might actually benefit the arms industry. The skepticism appears justified if one goes through the text of the ATT carefully. A critical evaluation of the same follows.

Firstly, the preamble of the treaty only underlines the need to regulate illicit trade of conventional arms while respecting legitimate interests of States to acquire conventional arms to exercise their right to self-defence and peacekeeping operations: and to produce, export, import, and transfer conventional arms. This distinction between illicit trade and legitimate trade is hard to establish in practice. Exporting of arms to nations with a history of human rights violations is completely legal.

Secondly, Article 7 of the treaty requires a State to self-assess the potential of the importing state to use the conventional arms or items to commit or facilitate, among other thing, serious violations of international humanitarian law. It is doubtful, in such a case, whether an exporting state would objectively and impartially assess such potential effects of arms trade, more so if the exporting state has an interest in the ongoing conflict in the importing nation. For instance, the United State would have obviously not denied arms to South Vietnam during the Vietnamese War.

Thirdly, there is no enforcement agency to enforce the treaty and there are no sanctions for violating it. Moreover, the United States Secretary of State John Kerry made it clear in a speech

[17] United Nations Office for Disarmament Affairs, The Arms Trade Treaty, (March 25, 2016, 06:35 p.m.) http://www.un.org/disarmament/ATT/#Significance%20for%20UN.

on September 25, 2013 during the Arms Trade Treaty signing ceremony, that the United States would not accept creating of an international body to enforce the treaty.[18]

In such a scenario, Article 6 of the treaty prohibiting arms trade in cases where the State knows, at the time of authorisation of such arms, that the arms or items would be used for commission of core international crimes such as genocide, war crimes, crimes against humanity etc. becomes meaningless.

The United Kingdom Foreign Secretary William Hague, while giving evidence to the Foreign Affairs Committee on July 16, 2013, in response to a question by Mark Hendrick that if Russia were to comply with the treaty, would it prohibit its arms supplies to Syria, said, "… they [Russia] would argue that they would be within their rights to supply the Assad regime with weapons and that would not change…"[19] And therefore, it is unlikely that the Arms Trade Treaty would make any difference in controlling international arms trade.

With the lack of agencies to enforce international law attributing State responsibility for arms supplies, the States are likely to continue to shrug their responsibilities for internationally wrongful acts committed by the importing States. In such a scenario, the only viable option seems to be to prosecute individuals, who are at the helm of such arms trade, under the international criminal law, in order to push States to act more responsibly.

IV. INTERNATIONAL CRIMINAL LAW TO THE RESCUE?

Can we turn to international criminal law in order to remedy the issues related to arms trade? Does the international criminal law have the potential to encompass within its provisions such deliberate acts of States of exporting arms to human rights violators?

Article 5 of the Rome Statute of International Criminal Court (ICC) enlists crimes of genocide, crimes against humanity, war crimes, and the crime of aggression as crimes over which it shall have jurisdiction. Under the scheme of the Statute, individuals can be made liable in various ways. The most obvious way is that to prosecute the person as a direct perpetrator, the person who is at the helm of all the planning of his intent to commit the crime, even though he might not execute the plan himself. Another way of attributing responsibility on an individual is through the principle of superior responsibility under Article 28 of the Rome Statute, according

[18] US Department of State, John Kerry, United States Signs Arms Trade Treaty on September 25, 2013, The Arms Trade Treaty signing ceremony, September 25, 2013, (March 25, 2016, 06:36 p.m.) http://www.state.gov/t/isn/armstradetreaty/.

[19] HC Deb 16 July 2013, (March 26, 2016, 06:38 p.m.), http://www.publications.parliament.uk/pa/cm201314/cmselect/cmfaff/c268-i/c26801.htm.

to which, a superior is criminally liable for acts done by forces under his command if he knew or had reasons to know of the occurrence of such crimes, and failed to prevent such occurrence or punish the perpetrators of such crimes. A third way under which an individual can be made responsible is by attributing 'complicity' under Article 25 of the Statute. Let us examine this in detail.

Article 25 of the Rome Statute provides for criminal responsibility and liability of persons for the commission of crimes within the jurisdiction of the court. It divides individual acts into 4 different types for recognising various modes of participation in commission of the crime. Article 25(3)(a) recognises commission of the crime as a principal perpetrator, regardless of whether participation is individual or jointly with another; 25(3)(b) criminalises ordering, soliciting, or inducing of such crimes; 25(3)(c) criminalises aiding, abetting, or assisting in commission of the crime, including providing the means for such commission; and 25(3)(d) criminalises contribution in any other way to commission of such crimes by a group with a common purpose.

The act of exporting arms by an individual of the State, with the knowledge that the arms would be used in commission of a crime or would at least be attempted in commission of a crime can be made liable under Article 25(3)(c) of the Rome Statute.

In order to establish what 'knowledge' entails, it would be pertinent to look at the prosecution of Radislav Krsti by the International Criminal Tribunal of the Former Yugoslavia (ICTY).[20] In 2001, Krsti became the first person to be convicted of genocide that took place in Srebrenica in the year 1995, where around 7000-8000 Bosnian Muslims were systematically murdered and the remainder were forcibly transferred out of the enclave, by the Trial Chamber of the ICTY. He was the Chief of Staff of the Drina Corps of the Bosnian Serb Forces. The Trial Chamber concluded, beyond reasonable doubt, that even though Krsti may not have devised the plan or participated in the initial decision of destruction of Bosnian Muslims, the moment he learned of the widespread and systematic killing and became involved in their penetration, he shared the genocidal intent to kill. The Trial Chamber sentenced him to 46 years of imprisonment. However, the Appeals Chamber of the ICTY reduced the punishment and sentenced him to 35 years of imprisonment. The Appeals Chamber in its judgment observed that the evidence failed to establish Krsti direct involvement in the mass executions. It only established Krsti 's knowledge that the killings were occurring and that fact that he permitted the main staff of the

[20] *Krstić*, ICTY (AC), Judgment of 19 April 2004.

army to use the personnel and resources under his command to carry them out. It held that Krsti was guilty of aiding and abetting genocide and not of being a principal co-perpetrator.[21]

In paragraph 140 of the judgement, the Appeals Chamber examined the degree of knowledge that an individual charged under the ICTY Statute needs to possess in order to be convicted. It says, "… whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator's specific genocidal intent, or whether he must share that intent. The Appeals Chamber has previously explained, on several occasions, that an individual who aids and abets a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent behind the crime. This principle applies to the Statute's prohibition of genocide, which is also an offence requiring a showing of specific intent. The conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal."

The Appeals Chamber, further in paragraph 141 of the judgment, examined the laws of various civil and common law jurisdictions which take the same approach with respect to *mens rea* for aiding and abetting, and often expressly apply it to the prohibition of genocide. It says, under French Law, the aider and abettor only needs to know that he is aiding the actual perpetrator through his contribution.[22] Similarly, under German Law, in offences requiring proof of specific intent, the aider and abettor need not possess the same degree of *mens rea* as the actual perpetrator, but only need to know of the perpetrator's intent.[23] Among the common law jurisdictions, the criminal law of England follows the same approach, specifying that the aider and abettor need only know the specific intent of the actual perpetrator.[24]

Further, for attributing liability for assisting the perpetrator, it is not necessary that the crime would not have been committed but for the assistance.[25] However, the assistance must be of a substantial nature, the absence of which would have made the commission of the crime substantially less likely.[26]

Now, let us turn to the case most relevant to our discussion, i.e., the case of Charles Taylor. The Trial Chamber II of the Special Court for Sierre Leone (SCSL), in its judgment dated 18 May,

[21] The ICTY Statute is analogous to the Rome Statute of the ICC. The provisions for aiding and abetting are enshrined in Article 7 of the ICTY Statute.
[22] *Code Pénal* art. 121-7.
[23] Section 27(1) of the German Penal Code (*Strafgesetzbuch*). According to section 2 of the German Code of Crimes Against International Law (CCIL), section 27(1) of the German Penal Code is applicable to crimes of genocide.
[24] *National Coal Board v. Gamble* [1959] 1 Q.B. 11.
[25] *Blaskić*, ICTY (AC), Judgement of 29 July 2004 [48].
[26] Gerhard Werle & Florian Jessberger, Principles of International Criminal Law at 216, (3rd ed. 2014)

2012[27], convicted Charles Taylor, among other things, of aiding and abetting commission of 11 counts of crimes he was indicted for. On its findings on physical elements of aiding and abetting, it found that during the indictment period, Taylor directly or through intermediaries supplied or facilitated the supply of arms and ammunitions to the Revolutionary United Front (RUF).[28] The arms and ammunitions provided by Taylor were used by the Liberian fighters during various military offensives in which crimes were committed. These crimes involved widespread or systematic attacks on the civilian population, specifically, acts of terrorism, rape, sexual slavery, outrages upon personal dignity, cruel treatment, other inhumane acts, conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, enslavement, and pillage.[29]

The Trial Chamber found, beyond reasonable doubt that the provision of facilitation of arms and ammunitions by Taylor constituted practical assistance to the commission of crimes by the RUF,[30] which made substantial contribution to the commission of crimes charged in the indictment.

On its finding on mental elements of aiding and abetting, the Trial Chamber found that Taylor knew that supply of arms would constitute practical assistance, encouragement, or moral support to RUF in the commission of crimes during the course of their military operations.[31] Taylor was also aware of the "essential elements" of the crimes committed by RUF, including the state of mind of the perpetrators.[32] The Trial Chamber sentenced Taylor to a jail term of 50 years for his role. On September 26, 2013, the Appeals Chamber of SCSL upheld the conviction and sentencing of the Trial Chamber.[33]

Thus, in this case, it was held that performance of an act, possession of mere knowledge that such an act would facilitate commission of a crime, was made punishable.

Therefore, individuals exporting arms with knowledge of their misuse are liable under international criminal law. By making individuals liable, States can also be made indirectly responsible under international law for failing to prevent such exports.

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[27] *Charles Ghankay Taylor,* SCSL, Judgment 18 May 2012.
[28] *Id.* at 6910
[29] *Id.* at 6911
[30] *Id.* at 6912
[31] *Id.* at 6949
[32] *Id.* at 6951
[33] *Charles Ghankay Taylor,* SCSL (AC), Judgment of 26 September 2013.

However, even the international criminal law might prove to be inefficient in prosecuting such individuals, because of its principle of 'complementarity'. As per the principle enshrined in Article 17 of the Statute, the ICC does not have primary jurisdiction to prosecute perpetrators of crimes under Article 5 of the Statute. The ICC can only admit a case if the nation, of which the individual is a citizen, fails to prosecute the individual due to its unwillingness or inability to prosecute. The ICC is the court of last resort. It only supplements domestic investigation and prosecution.

In such a situation, given the profitability of exports of arms and ammunitions, it is highly unlikely that national authorities would investigate and prosecute its individuals for supply of weapons. Further, the fact that these exporters are some of the most powerful and developed nations, it would be impossible for ICC to prove 'inability to prosecute' in order to admit a case. Of course, 'unwillingness' can be proved under Article 17(2) where initiation of proceedings by national authorities are meant to shield the person from criminal responsibility of crimes. However, proving such 'unwillingness' is extremely difficult in practice. Also, initiation of such a step by the ICC is doubtful given its record of initiating proceedings only against some of the least developed and developing African countries.

V. RECOMMENDATIONS

While there are enough laws in the international arena which attribute liability, both to the State and the Individual, for exporting arms, there are certain loopholes that defeat the purpose of these provisions.

For starters, there should be an international agency under the Arms Trade Treaty to enforce and interpret its provisions, attribute liability, and initiate actions against violating States. Without an overlooking enforcement agency, the States will continue to interpret the terms of the treaty in ways suitable to their interests.

Secondly, the Rome Statute of the ICC should amend its provisions and inculcate 'complicity' in the definition of the crimes itself. That way, the individuals can be made responsible for commission of the very crime and not just for aiding and abetting it. Further, the word 'intent' appearing in Article 6 of the Rome Statute defining genocide as acts done with the "intent to destroy, in whole or in part" should be interpreted in such a manner as to envisage under the definition 'knowledge' of the intent to destroy, so that knowledge that supply of arms will assist

in a State's intent to commit genocide can be used to attribute responsibility for the act of genocide on the assisting State itself.[34]

Further, there should be a lenient interpretation in favour of admitting the case under Article 17 of the Rome Statute when it comes to decide 'unwillingness', in cases where it is apparent on the facts of the case, that a State has legitimate interest in shielding the perpetrator.

[34] Alexandar K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 COLUMBIA L. REV. 2259 (1999)

CHALLENGES TO GLOBAL INDUSTRIALIZATION: WHY THE INTERNATIONAL COURT OF JUSTICE HAS RECEIVED ZERO INTELLECTUAL PROPERTY CASES TILL DATE

Debadatta Bose·

The International Court of Justice is the most successful attempt at having an International Court till date and has adjudicated many decisions till date upholding justice and resolving conflicts between sovereign nations. However, the International Court of Justice has its drawbacks[1] and this paper will examine only one aspect of the drawback, that is – What happened with the Court when it came to conflicts based on international disputes of Intellectual Property? To say that the International Court of Justice has miserably failed in the arena of International Intellectual Property would be gentlemanly language towards appraising the situation that has arisen today in the disputes of International Intellectual Property. The International Court of Justice has received absolutely zero references of Intellectual Property disputes till date[2] even though it has mandatory jurisdiction[3] over the Berne Convention[4], Paris Convention[5] and the like, and being one of the most powerful and important organs of the United Nations Organization. Why then, has the International Court of Justice failed so miserably to do its job when it came to the field of disputes relating to Intellectual Property? This paper examines the various conventions, examines the enforceability of the decisions of the International Court of Justice, studies various alternative remedies and seeks to find the answer to the question dwelling in the minds of a lot of people.

I. LITERATURE REVIEW

Intellectual Property, in the international arena is a hot-bed of disputes, ranging from a wide variety of industries, like pharmaceuticals and electronics to even wine and cheese. To be able to comprehend the sheer volume of disputes that intellectual property rights entail nowadays is quite a feat. As any reader of public international law might know, the most celebrated, and most used body of settling international disputes is the International Court of Justice which sits at the Peace Palace in Hague, The Netherlands. However, a problem peculiar to intellectual property disputes is that, even though the International Court of Justice has jurisdiction over most of the international intellectual property matters, till today, not a single entity has knocked the doors of

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[1] See Eric A. Posner & Miguel De Figueiredo, *Is the International Court of Justice Biased?,* U. CHICAGO L. ECON., OLIN WORKING PAPER 234 (2004), Roberto Ago, *Binding Advisory Opinions of the International Court of Justice.* AM. J. INT'L L. 85 (1991): 439 and Thomas Nagel, *The problem of global justice*. PHILOSOPHY & PUBLIC AFFAIRS 33.2 (2005): 113-147.

[2] D. W. Greig *The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States*. INT'L COMP. L.Q. 15.2-3 (1966): 325-368.

[3] See Agreement Regarding Intellectual Property, 34 I.L.M. 881 and Memorandum of Understanding on the Protection of Intellectual Property, Jan. 17, 1992, 34 I. L. M. 676

[4] See Berne Convention for the Protection of Literary and Artistic Works art. 33(2).

[5] Paris Convention for the Protection of Industrial Property.

the Court to adjudicate their disputes, even when the International Court of Justice has exclusive jurisdiction over some issues.

To address the issue would require the analysis of going deep into the problem – why has the International Court of Justice received zero special agreements for adjudication in the first place? To be able to answer this, one cannot but look into the scanty literature that is present on this topic. However, to the reader's and the author's delight, there exists coherence and complementarity between the views of various authors – there seems to be little conflict of opinion when this topic is concerned.

To begin with, the literature lists one of the major factors at play are the availability of alternative specialized adjudication tribunals which are far more specialized and competent than the justices of peace in the International Court of Justice. Some authors have said the non-availability of a substantive intellectual property law is the major reason, and hence the International Court of Justice misses out on cases of intellectual property disputes. One author[6] (Askew 2000), however has pointed out a very valid reason that the International Court of Justice accepts only State parties before the Court, and so unless it opens its doors to individuals, there can be no case of intellectual property dispute brought before itself. The relevant portion is reproduced below for the reader's convenience:

> "If another judicial organ, like a specialized court or chamber within the ICJ, was formed within the UN to handle only international intellectual property issues, we might come closer to the harmonization of intellectual property law issues like that in the EU. As mentioned earlier, chamber decisions of the ECJ are considered to carry as much weight as the full court, which is good for the plaintiff because it would help to expedite his cause of action quicker than having to wait until he could get docked in the full court. Some other benefits of such a creation might be complete harmonization of intellectual property laws within UN States, resolution of intellectual property disputes more quickly, an increase in the caseload of the ICJ, agency access, like the WIPO, to bring disputes, and additional support for the ICJ to enforce its judgments. Also, a UN patent system similar to the EPC and CPC could help protect international intellectual property inventors as well as establish consistency and continuity in the UN.

[6] Lee A. Askew, *ECJ, the ICJ and Intellectual Property: Is Harmonization the Key, The*, 7 TULSA J. COMP. & INT'L L. 375 (1999), *available at* http://digitalcommons.law.utulsa.edu/tjcil/vol7/iss2/4.

> However, some changes would need to be made to the procedural law of the ICJ in order for such results to occur. For instance, the ICJ would need to consider opening its jurisdiction to individuals to bring inactions, like the ECJ has done. Also, a Community law equivalent-like a "UN law" would be helpful in establishing precedent in the ICJ. Such law would probably need to be created by the ICJ. A "UN law" would help the intellectual property owner to know how to more adequately protect his inventions and ideas since the ICJ does look to its earlier decisions and earlier chamber decisions to help it resolve disputes."

In addition to the above, there is literature[7] (Janis 1987) which argues that the effectiveness and binding capacity of the decisions of the International Court of Justice is doubtful and arbitrarily exercised by the United Nations Security Council which discourages parties seeking to approach the International Court of Justice to actually approach the Court to get their matter adjudicated upon.

Thus, most of the authors present their sides of the argument but fail to provide an exhaustive list or rather practically, a more comprehensive analysis of the issue through the years on why there has been no intellectual property disputes before the International Court of Justice. This paper aims to connect the dots between the probable causes by analysing the various views of prior authors with the author's own views. This paper further fulfils the cause of furthering the aim of improving the International Court of Justice with critical opinion as to its jurisdiction and method of legally obligating its parties to the case before it. To consolidate the available views, and not leave the issue hanging, this paper's main aim is to find a solution after the discovery of the cause behind the issue in question.

II. INTELLECTUAL PROPERTY AND THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice is an organ of the United Nations and is the primary judicial branch of the United Nations, though not the exclusive one[8]. The jurisdiction stems from various different statutes and treaties. Article 93 of the United Nations Charter states that all members, currently 193, are parties to the Statute of the International Court of Justice. Article 93(2) provides for non-members of the United Nations to become parties to the Statute of the International Court of Justice. The jurisdiction of the International Court of Justice also flows from the Universal Copyright Convention vide Article 15, Rome Convention for the Protection

[7] Mark Weston Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*. 81 AM. J. INT'L L. 144 (1987), *available at* http://ssrn.com/abstract=1104023.
[8] *Supra* note 1

of Performers, Producers of Phonograms and Broadcasting Organizations vide Article 30, the Berne Convention for the Protection of Literary and Artistic Works vide Article 30 and the Paris Convention for Protection of Industrial Property vide Article 28.

However, there lies a catch. In all the treaties related to intellectual property mentioned above, a State party can declare itself to not be bound by the jurisdiction of the International Court of Justice. This is done via Article 28(2) of the Paris Convention and Article 33(2) of the Berne Convention. Thus, there is a statutory entitlement of a State party to abrogate the jurisdiction of the International Court of Justice from the very Statute that tries to establish a stern judiciary to enforce the rights and obligations under the treaty – the International Court of Justice is the sentinel on the *que vive* with no powers. The only exception to this is the Rome Convention which does not provide for opting out of the compulsory jurisdiction of the International Court of Justice under its Article 30, and hence maintains the sterns that a treaty is supposed to maintain as a treaty with no procedure of enforcement is as good as a Penal Code with no police.

This option to reject the jurisdiction of the International Court of Justice has been exercised by most developed countries vide the clauses in the Paris and Berne Conventions. Thirty countries, including the People's Republic of China has chosen to exclude the International Court of Justice as the adjudicating authority and sixteen countries have chosen so in the Berne Convention[9].

The problem thus remains even though the Rome Convention does not allow opting out and sets the International Court of Justice as the sole exclusive adjudicating authority on International Copyright Law. Since 1948, the International Court of Justice has sat in anticipation of receiving a copyright related dispute under the Rome Convention, for the related rights since 1961 and under the Brussels Convention of 1974[10], and industrial property rights since 1967 under the 1967 Stockholm Act of the Paris Convention. The disputes cannot be brought from the Permanent Court of International Justice to the International Court of Justice as all the treaties are lacking such a clause thereby effectively excluding Lebanon and New Zealand from the jurisdiction of the International Court of Justice under the Brussels Act of the Berne Convention as their obligations remain with the 1928 Rome Convention. Similar is the situation with Iran, Syria, Nigeria and the Dominican Republic whose rights and obligations

[9] See WIPO Document 423E, 4-9.
[10] Convention Relating to the Distribution of Programme–Carrying Signals Transmitted by Satellite (Brussels 1974).

remain fixed with the Permanent court of International Justice under the 1967 Stockholm Act of the Paris Convention.

Thus, as the scenario stands, many parties are not subject to the International Court of Justice's jurisdiction due to lacunae in the treaties which do not allow them to be part of the new machinery for international adjudication. Some other who are subject to the jurisdiction have opted out of the same by the due process provided in the treaties. There are still so many other States that are subject to the jurisdiction of the International Court of Justice but none of them have chosen to adjudicate even one single matter before this Court. Allen Z. Hertz, advisor to the Privy Council of Canada and Prime Minister of Canada, puts forth his argument that there can be two possible reasons for this outcome, but are still very unclear nonetheless. The first possibility being that States do not generally leave such huge questions of economic policy in the hands of third-party judges lest they go against State interest. The second possibility is that States consider this subject matter to be too trivial so as to attach international importance to settlement of intellectual property disputes[11].

Another reason for non-existence of justiciable disputes is the language of the Paris and Berne Conventions. These conventions were written at a nascent stage of international law development and contains language unsuitable and unlikely drafted for international intellectual property agreements. The general language has shrouded over the foreseeability of the framers of the text wherein they provide no particular details about procedure and substance. The Paris Convention does not even mandate domestic intellectual property law to exist, but sets minimum standards for party States nonetheless. The Berne Convention, drafted at a later date fares a little better than the Paris Convention on being vague and general. The Berne Convention's text is more precise and lucid than its predecessor. For example, the Paris Convention does not set a minimum Patent term whereas the Berne Convention sets the term at 50 years after the death of the author of the literary or artistic work. Why has then the International Court of Justice not received any Berne Convention disputes till date? The answer is unclear here. One explanation might be that the Gulf countries didn't sign the Convention till 2000s, the economically advanced Asian countries didn't sign it until the 1990s and the United States of America signed it in 1988. By that time, other adjudicative machinery was already available and being used by the countries to settle international intellectual property disputes.

III. AVAILABLE REMEDIES BEFORE THE INTERNATIONAL COURT OF JUSTICE

[11] D.W. GREIG, INTERNATIONAL LAW 521 (2d ed. 1976)

To begin with, let us assume a hypothetical situation that the International Court of Justice *has* the requisite measures and jurisdiction to try an international intellectual property case before itself. Typically, the International Court of Justice hears a case and proclaims a declaratory judgment or awards damages to the party as a reparation for wrong. Article 36(2)(d) of the Statute of the International Court of Justice[12] gives the Court the competence to order the latter, but only in cases where the parties accept the compulsory jurisdiction of the International Court of Justice.

Now, ideally, the goal of a Court of international competence would be to bind the States according to the treaties which would bring up cases like the following illustration:

State of A and State of B, are trade partners in let's say, pharmaceuticals, and both have signed the Paris Convention. Now, in the case that State of A suddenly decides to not give national treatment to the pharmaceutical patents of companies from State B who have duly applied for the same would be a blatant violation of the law laid down in the Paris Convention. In this case, State B would ideally go to the International Court of Justice to compel State A to conduct itself according to the treaty and declare their domestic law violating the treaty null and void – they wouldn't really ask for damages when it is an ongoing process and hampers international trade relations.

In a more scholarly language, "*It seems that the most it can do is to state whether the actual or intended conduct of a State . . . is or is not in conformity with international law, including treaty-law, binding on the States before it. That is not a form of decision likely to afford adequate satisfaction to a State whose interests are injured by non-performance or malperformance of a treaty by its contracting partner or partners."* (Rosenne 1989)[13]

To elaborate further on this issue, what we are essentially talking about is an order of 'specific performance' of the treaty borrowing the concept from the domain of contract law for a treaty is no less than a binding contract between parties. Specific performance is ordered to perform contractual duty mandatorily when damages would not be an adequate remedy. However, the remedy of specific performance is theoretically available in public international law as an order of

[12] Article 36(2) states: "2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation."
[13] SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 at 62 (1989).

restitutio in integrum. To quote the *Chorzow case*[14] to explain what *restitutio in integrum* is: "… *as far as possible, to wipe out all the consequences of the illegal act and to re-establish the situation which would, in all probability, have existed if that act had not been committed.*" However, a grant of an order of a *restitutio in integrum* is a rarity, and to assist us, we turn again to one of the authors previously quoted, Shabtai Rosenne[15]: "*The ICJ is unable to deal with a treaty obligation in all its aspects, and to give judgment for "specific performance" (to use a common law term). . . . The International Court is thus constitutionally incapable of laying down positively how a treaty is to be performed.*"

IV. ENFORCEABILITY OF DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

This is not unknown to any person acquainted with the field of international law that the enforceability provisions of the International Court of Justice are far from being practicable. The sheer number of cases of non-enforceability triumphantly tower of the mere little number of cases where enforceability has taken place in the name of justice. If a State is willing to comply, they will; if they are not, they won't and the story ends there.

Quoting a previously cited author[16] again to reflect upon this issue, "*Albania refused to pay reparations to Great Britain in Corfu Channel, Iran disregarded the Court's order to refrain from nationalizing a British corporation pending a final judgment of the Court or agreement between the parties in Anglo-Iranian Oil Co., Iceland refused to obey an order not to enforce a fifty-mile fishing zone until the Court ruled on suits brought by West Germany and the United Kingdom in Fisheries Jurisdiction, Iran rejected the Court's Order and Judgment that it release the American hostages in Diplomatic and Consular Staff.*" Then again, towering above all is the *Republic of Nicaragua v. United States of America* case[17] – USA has shown such contempt for the International Court of Justice as no other country could – paying not a single penny for the exemplary damages awarded in a fourteen-one ratio judgment.

The permanent members of the Security Council of the United Nations have a further veto power to nullify enforcement of decisions from the International Court of Justice. Enforcing of decisions relating to Intellectual Property is highly unlikely to happen as it concerns serious questions of economic policy of a country. The ongoing conflict between United States of America and the People's Republic of China will hence never appear before the International Court of Justice owing to the veto power of the nation's being a permanent member of the United Nations Security Council.

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[14] Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J.
[15] *Supra* note 8.
[16] *Supra* note 2.
[17] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ Rep. 392 (June 27, 1986).

V. CONCLUSION

Customary international law relating to Intellectual Property has little or a very feeble effect on any sort of international intellectual property law. The very essence of Intellectual Property jurisprudence is its national treatment, and hence ousts all jurisdictions of other Courts, national or international. The European Court of Justice ruled that it is not a competent Court for exercising jurisdiction and surveillance over Intellectual Property[18]. Coming back to the enforceability argument, any prudent person in the field of international law would readily agree that WTO decisions, or UNSC decisions are much more enforceable than those of the International Court of Justice, and both have the power to mould and enforce change in Intellectual Property Statutes of a country.

Then there lies the problem of public disclosure of the patent worldwide when it is pending in only one jurisdiction. To illustrate this, an inventor might be unable to obtain a patent in another jurisdiction just because his application was precluded from being filed within twelve months due to domestic sanctions. His own invention will operate as a prior art bar to his filing of the application[19]. Thus, we see that international Intellectual Property law is very complex and is at its nascent stage of development. Newer law making treaties like TRIPS, administered by WTO and NAFTA seem to be the future. WTO is yet to address questions of the International Intellectual Property jurisprudence, but it seems to be on its way to doing so and putting authoritative decisions on questions long debated and were only of academic importance[20].

The main advantage of the TRIPS, GATT and NAFTA over its older counterparts include compulsory third-party arbitration as an effective dispute settlement method[21], thus effectively curbing the shortcomings of the older Berne Conventions, Paris Conventions etc. which provided the International Court of Justice as its guardian. A noteworthy mention is of the difference of GATT with the newer TRIPS and NAFTA. The former presented panel

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[18] Marco C.E.J. Bronckers, "*WTO Implementation in the European Community: Antidumping, Safeguards and Intellectual Property*" 29 J. WORLD TRADE 94-95 (1995).
[19] See Paris Convention on the Protection of Industrial Property art. 4.
[20] For example, Berne Convention, art. 18, subject to certain exceptions, requires protection for all Berne Union copyright works existing on the treaty's entry into force. This provision's meaning may soon be elucidated by a possible WTO panel about sound recordings. TRIPS, arts. 14(6) and 70(2), apply Berne Convention, Article 18, *mutatis mutandis* to the rights of record producers of WTO Members. Japan's failure to apply a fifty-year term of protection retrospectively to the existing rights of WTO Member record producers for recordings first fixed in WTO Member countries as far back as 1946, prompted the USA to request (Feb. 9, 1996) consultations pursuant to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 4: Consultations; GATT 1994, art. XXII: Consultation; and TRIPS, art. 64: Dispute Settlement. See Bhushan Bahree, "U.S., European Union Turn to WTO To Make Japan Extend Music Protection," Wall Street J., Feb. 12, 1996, at A10; "US, EU Complain About Music Piracy in Japan," Feb. 9, 1996, Reuters News Service, Geneva.
[21] See TRIPS Art. 64 and NAFTA Chaps. 11, 17, 20.

investigations as its method of inquiry and dispute settlement, while the newer ones provided for arbitration and mediation. Panel investigations suffered from their own infirmities such as bias, time consumption and non-involvement of aggrieved parties in the process.

Thus we can classify the treaties into generations based on their dispute settlement method:

- First Generation: Berne Convention, Paris Convention etc.
- Second Generation: GATT
- Third Generation: TRIPS, NAFTA etc.

It is the third generation treaties that have taken over the older generations which provide for the International Court of Justice and the legal powerlessness associated with it.

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LEGALITY OF US AIRSTRIKES AGAINST ISIS IN INTERNATIONAL LAW

Lakshana R·

The nature of terrorism has witnessed a normative change. With the advent of the Islamic State of Iraq and Levant (ISIL) or the Islamic State of Iraq and al- Sham (ISIS), terrorists have been growing indurate to collateral damage like inadvertent mass civilian casualties. I dare say that their reckless unconcern for human life is only paralleled by the US's defiant disregard of International Law. But it can be safely held forth that, the obduracy of both parties become obvious especially when American interests are even remotely concerned. The ISIL is a regional threat localised in Iraq and Syria, which perpetuates terror through unlawful activities managing to evade state relations and thus the vigil of International Law. Hence, are unlawful means rationalized in dealing with them? But firstly, where do we locate the recent US airstrikes against ISIS within the realm of International Law? Is it the last nail in the coffin of International Law? But have we not said this one too many times? Though it may be compelling to prima facie bluntly term the situation a blatant breach of International Law, the issue warrants careful consideration under the pertinent parameters of the International Law and an elaboration of the attendant aspects. This is an essay in that direction.

I. INTRODUCTION

The legality question of the US airstrikes against the ISIS has generated much academic debate and commentary and this essay seeks to locate itself amongst the literary work and scholarly compositions in this regard.

The initial section explores the legal definition of 'occupation' and 'effective control', and contends that the *sui generis* para-state ISIS is 'occupied Iraqi and Syrian territory' pursuant to the standards set forth in International Law. It is followed by a brief discourse on the concept of State responsibility. Focus is then shifted to the legal rational of self-defence to extend it to include non-state entities like the ISIL. The following section seeks to provide a comprehensive legal analysis of the US airstrikes against ISIS and this section also systematically dismantles the legal foundation articulated by the concerned authorities. The legality question is then examined under the lens of emerging norms in International Law, namely the Responsibility to Protect (R2P or RtoP) and Humanitarian Intervention. The penultimate also seeks to briefly address the concepts of a moral imperative to act supported by moral claims and their legal weight. The conclusion, drawn after a cautious consideration of the rich and extensive literature on the issues involved, proffers a stand on unilateralism in International Law to justify the US air strikes

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against ISIS as a policy and political imperative from a geostrategic perspective, if not a moral imperative.

Reliance is placed upon doctrinal data like secondary literature to substantiate the arguments while adopting a theoretical methodology. Brevity has been given precedence over elaboration in order to provide principles of practicality. Also, owing to the fact that the topic is based on recent and contemporary events, several opinions posited herein, could not be verified for authenticity, at authoritative levels. Moreover, wherever ambivalence in law was encountered, the favourable legal interpretations have been adopted. Though the drawbacks are deeply regretted, they could not be recompensed.

II. NATURE OF ISIS, OCCUPATION AND THE TEST FOR EFFECTIVE CONTROL

It can be persuasively argued that the Islamic State is Not State, but merely para-state, for want of legitimacy and the capacity to enter into international relations. The question whether the ISIL is an occupant in the Sovereign domains of Iraq and Syria- exercising effective control over the region surrounding the Euphrates and the Tigris rivers- is a matter of legal interpretation and factual analysis. Though the law of occupation has traditionally been understood to refer only to the relationship between sovereign states, [1] it can be extended further to subsume the instant issue. Also, it should be remembered that Statehood and occupancy neither complement each other nor are they mutually exclusive. [2]

A three-part legal test to assess effective control and determine occupancy is proposed herein based on the Fourth Geneva convention, [3] The Hague Regulations [4] and the *Hostages* case. [5] The legal test seeks to determine who has the authority and who operates a military in the disputed territory, who performs Governmental functions there and who effectively excludes the other party from that region. [6]

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[1] See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2 U.N.T.S. 287 (asserting the Convention's application to occupying sovereign powers and delineating the restrictions on the exertion of their effective control).
[2] Elizabeth Samson, *Is Gaza Occupied? Redefining the Status of Gaza under International Law*, 25 AM. U. INT'L L. REV. 915- 967 (2010).
[3] *Supra* note 1.
[4] See Hague Convention (II) with Respect to the Law and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, July 29, 1899, arts. 23, 42-43, 187 Consol. T.S. 429 (banning the use of certain types of modern technology in war); Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277.
[5] *United States v. List (Hostages Case)*, U.N. WAR CRIMES COMMISSION, LAW REPORTS ON THE TRIALS OF WAR CRIMINALS, VOL. 6-10, at 55-56 (William S. Hein 1997) (1948).
[6] Supra 2.

The ISIL exercises control over the oil fields in and the borders of the occupied territory and it is also not without its own para-military structures. As set forth in the legal precedent- *Hostages case-* [7] the fundamentalist organisation has proclaimed a caliphate Government replacing the incumbent Civil Government. It also precludes Syrian and Iraqi troops from entering its domain. But the legitimacy and the capacity of the unrecognised Caliphate Government to enter into international relations is questionable. Also, though it controls the waterways, exclusionary and effective control over the air space remains far-fetched on account of the successful US drone strikes. Thus the more factors we consider, the more complicated the situation becomes. Therefore, it is posited that an intermediary status should be declared for the ISIS since it evades classification under the existing strict categories.

For the sake of this essay, a *sui generis*[8] status is conferred upon the Islamic State since it is one that is of its own unique character. [9] Granting a '*sui generis'* status would be a positive step towards relieving Syria and Iraq from the unjust attribution of State responsibility without conferring statehood upon ISIL and granting it undeserved legitimacy. Hence, the Islamic State is understood to be effectively under the control of the occupant para-state ISIL within the Syrian and Iraqi territories.

III. RESPONSIBILITY OF STATES FOR THE CONDUCT OF PRIVATE ACTORS

Traditionally the conduct of occupant private actors like the ISIS would not be attributable to the sovereign State in which they are localised. [10] Though the legal attribution of terrorist acts to States is more complicated than political condemnation, it is plausible in some scenarios: when the private actor is the de facto organ of the State, [11] or an agent of the State, [12] or when the State has effective or overall control over the acts of the private entity. In the case of Al-Qaeda, the terrorist activities of the private entity were attributed to the Taliban Government because it was held that the Taliban had overall control over the functioning of the Al-Qaeda. [13]

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[7] Supra 5.
[8] (*Sui generis* status has been conferred upon Kosovo, Namibia and Gaza among others) see CARSTEN STAHN, THE LAW AND THE PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION 103-04 (2008); see also supra 2.
[9] BLACK'S LAW DICTIONARY 1286 (5th ed. 1979).
[10] OPPENHEIM'S INTERNATIONAL LAW, 1 at, 502–503 (R. Jennings & A. Watts eds., 9th ed., 1996, Harlow: Longman).
[11] See G. Townsend, *State Responsibility for Acts of de facto Agents*, 14 ARIZ. J. INT'L & COMP. L. 643-44 (1997); for a summary of the court's ruling on the matter of responsibility.
[12] *Id.*
[13] René Värk, *State Responsibility for Private Armed Groups in the Context of Terrorism*, JURIDICA INT'L L. R. (2006); See for example, British Government. Responsibility for the Terrorist Atrocities in the United States, 11.09.2001— An Updated Account. Available at http://www.number-10.gov.uk/output/page3682.asp (1.06.2006), para. 4.

Here, the responsibility for ISIL's terrorist activities can be attributed to the respective territorial sovereigns if they were seen to be harbouring and directly supporting the ISIS by giving them a tacit approval. [14] If State responsibility can be imputed, the right to self-defence can be invoked against Syria and Iraq to justify the offensives.

But the Syrian and the Iraqi States are themselves threatened by the ISIL which is secessionist, insofar as it has established a fundamentalist para-state in the occupied territory and has proclaimed a caliphate. Since, the principle of State responsibility should primarily be based on a realistic concept of responsibility, [15] their actions cannot be attributed to the territorial sovereigns.

Also, it is argued in some quarters that the ISIL is being funded by jihadists in the Arab world. [16] Hence, without going so far as to allege indirect aggression [17] on part of Saudi Arabia, the question of attributing state responsibility to Saudi Arabia, based on the principle of extraterritorial jurisdiction, [18] naturally arises. But the mere financing, training or equipping of ISIS would not suffice; proof of the outside power's involvement in organising, coordinating and planning the activities of the terrorist outfit is necessitated. [19] Owing to the lack of clear and convincing evidence [20] in this regard, this ingenious idea has to be sacrificed.

The legal tests to determine state responsibility are the test of effective control and the test of strict control. [21] The strict control test which establishes whether a secessionist group is the de facto organ of an outside state on the basis of agency, [22] is irrelevant owing to the chronic lack of evidence. An analysis of the same, is beyond the scope of this essay.

The effective control test is of relevance and it is dwelt up on throughout the essay because the UN Secretary General Ban-Ki Moon endorsed the US airstrikes in Syria by saying that the

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[14] See *The Corfu Channel case (Merits),* ICJ Reports (1949) 4, at 111- 13; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (adopted at the 53rd session, Nov 2001) Arts 49- 50.
[15] *Judgement, (Prosecutor v. Dusko Tadić),* 1999, I.C.T.Y, App. Ct., (Ser. A) No. (Jun. 15).
[16] Tim Arango & Eric Schmitt, *Baghdadi of ISIS Pushes an Islamist Crusade,* N. Y. TIMES, August 10, 2014,
[17] See Resolution of Institut de Droit International on the Principle of Non-Intervention in Civil Wars, 56 ANN. INST. DR. INT'L 544, 549 (1975); see also LAW AND CIVIL WAR IN THE MODERN WORLD (J. Moore ed. 1974) (especially the essays by Moore and Bowett and the comments by Falk, Farer, and Sohn).
[18] Stefan Talmon, *The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist*, 58 INT'L COMP. L. Q. (2009).
[19] *Prosecutor v Kordić & Čerkez,* Case No IT-95-14/2-T, Judgment, 26 Feb 2001, ¶ 115, and Case No IT-95-14/2-A, Judgment of 17 Dec 2004, para 361. See also *Prosecutor v Naletilic & Martinovic,* Case No IT-98-34-T, Judgment of 31 Mar 2003, ¶ 198
[20] See Dinah Shelton, *Judicial Review of State Action by International Courts,* 12 FORDHAM INT'L L.J. 361 (1989).
[21] See M Milanovic, *State Responsibility for Genocide,* 17 EUR. J. INT'L L. 533- 604, at 576 (2006).
[22] See Military and Paramilitary Activities (Nicar. v USA), 1986 ICJ 4 (June 27).

impugned territory was not the sovereign domain of Syria, since Syria no longer had effective control over it. [23]

His contention raises a question whether the Syria can be considered a 'failed state.' [24] He is implicitly suggesting that Syria no longer has an effective Government and hence it fails to fulfil the conditions for statehood. Therefore, it should not qualify for the protection conferred by art. 2(4), at least with regard to action directed at terrorists.[25] But the presumption that Governments once established retain legal authority even if they subsequently lose effective control, [26] is too forceful to ignore. Thus, it can be submitted that the inability of a State to perform an essential duty does not relieve it of that duty. [27] So, here the purported inability to effectively perform Governmental functions, should not be perceived as a deprivation of Statehood. Moreover, without going so far as to bravely seek to resolve the academic debate, it can be safely submitted that this essay does not concur with the Secretary General's viewpoint.

Hence, the terrorist activities of ISIS in Syrian and Iraqi territories cannot be attributed to the respective States. The defence of legitimate self-defence has to be invoked against the ISIS, a para-state, located in parts of Syrian and Iraqi territory. To fully appreciate the legal rationale, a brief excursion into the concept of legitimate self-defence is necessitated.

IV. RIGHT TO SELF-DEFENCE AGAINST NON-STATE ACTORS

Self- Defence is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day. [28] Though a norm governing the right to self-defence against non-state actors has not yet crystalized, it is an emerging one necessitated by the current context. [29] It can be persuasively argued that the legal restraint on the use of force against non-

[23] U.N. Secretary-General Ban Ki-moon, Statement on U.S. Airstrikes in Syria (Sept. 23, 2014), available at http://justsecurity.org/15456/remarkable-statement-secretary-general-airstrikes-syria/.
[24] See generally Daniel Thtirer, *The "Failed State" and International Law,* 81 (836) INT'L REV. RED CROSS 731 (Dec. 1999).
[25] For a suggestion to this effect, see Michael Reisman, *International Legal Responses to Terrorism,* 22 Houston J. INT'L L. 3 at 51-4 (1999).
[26] See FE Oppenheimer, *Governments and Authorities in Exile*, 36 AM. J. INT'L L. 568 (1942); STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE (Oxford: Clarendon Press, 1998).
[27] See Infra 63.
[28] See Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors*, 772 AM. J. INT'L L. 774 (2012).
[29] See JEFF A. BOVARNICK et. al., LAW OF WAR DESKBOOK 35 (Brian J. Bill ed., 2010); see also RYAN GOODMAN, AUSTR ALIA, FRANCE, NETHERLANDS EXPRESS LEGAL RESERVATIONS ABOUT AIRSTRIKES IN SYRIA, JUST SECURITY, Sept. 25, 2014, http://justsecurity.org/15545/australia-france-netherlands-express-legal-reservations-airstrikes-syria/.

state actors is outmoded on account of the it having been framed in a different context when the current security concerns and threats could not have been visualised. [30]

Moreover, the most serious threats to international security today arise within States. [31] The Security Council resolutions 1368 [32] and 1373 [33] have recognised and reaffirmed the right of self-defence in the context of terrorism, without any suggestion of attribution to a State. The NATO has also expressly acknowledged the changing nature of threats to international security and it reflects the need to re-evaluate the right of self-defence in light of these changes. [34] Moreover, Israel's right to self-defence which was recognised during its offensive against Lebanon to eliminate Hezbollah, [35] indicates evidence of an emerging norm permitting self-defence against non-state actors, particularly when a state is unwilling or unable to address the threat by itself. [36]

Further, self-defence is Customary International Law [37] since the UN Charter does not define the content of this right. Thus it can evolve to address effectively the realities of contemporary threats. [38] Even Judge Simma, after emphasising on the need for a more dynamic approach to the right to self-defence, opined on an outline of requirements for claiming the right to self-defence against non-state actors. Aligning it along traditional considerations, he also proposed a legal framework to allow for the factual and circumstantial analysis of the right. [39] Therefore International Law should be extended to include non-state actors and this can be legitimised based on the Security Council resolutions and authoritative opinions. [40] Hence, for the purpose

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[30] See, eg, M GLENNON, THE NEW INTERVENTIONISM: THE SEARCH FOR JUST INTERNATIONAL LAW, 78/3 FOREIGN AFFAIRS 2 at 4 (1999); WM Reisman, In Defense of World Public Order 95 AM. J. INT'L L. 833 (2001); AC Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q., 89 at 97-99 (2003); AD Sofaer, *On the Necessity of Pre-emption*, 14 EUR. INT'L L. J., 209 (2003); R Wedgwood, The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense, 97 AM. J. INT'L L. 576 at 582-584 (2003).

[31] L. Feinstein & A.M. Slaughter, *A Duty to Prevent*, 83 FOREIGN AFFAIRS 136 at 137 (1st ed., 2004).

[32] S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

[33] S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

[34] Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), available at http://www.nato.int/docu/pr/2001/p01-124e.htm.

[35] See Press Release, Security Council, Security Council Debates Escalating Crisis Between Israel, Lebanon; UN Officials Urge Restraint, Diplomacy, Protection of Civilians, U.N. Press Release SC/8776 (July 14, 2006).

[36] Airstrikes, Iraq, and the Islamic State: An Emerging Role for Self-Defense Under International Law | MJIL Online, http://mjilonline.org/?p=1018#_edn1 (last visited Dec 22, 2014).

[37] See generally IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 231-80 (Oxford: Clarendon Press, 1963); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 661-78 (Bruno Simma ed., Oxford Univ. Press, 1994).

[38] See Daniel Bethlehem, *Self-Defence Against an Imminent or Actual Armed Attack by Non-state Actors*, 772 AM. J. INT'L L. 773 (2012).

[39] Discussed in detail in the subsequent section: Legal take on the US airstrikes against ISIL.

[40] *Infra* 41.

of this essay, Justice Simma's [41] progressive view is abided by and the right to self-defence is understood to be available against non-state players like para-states as well.

V. LEGAL TAKE ON THE US AIRSTRIKES AGAINST ISIL

The US air strikes can be analysed under several legal categories which are independent normative frameworks- vague and varied- and they cannot be reduced to a simple threat argument. [42]

Firstly, intervention by invitation is a possible legal justification. [43] Since, Iraq had requested assistance in suppressing the terrorist groups, the air strikes targeting the ISIS camps in Iraqi territory is inarguably legal. But the impugned strikes- those carried out in the sovereign territory of the neighbouring country Syria- are on an understandably ambivalent ground. Though it can be argued that the Syrian Government was informed beforehand, it would be stretching the law beyond a point where it can no longer provide a substantial legal foundation.

Another plausible legal rational is the endorsement of the UN Security Council which is theoretically the arbiter of all armed conflict in the world. [44] Art. 2(4) proscribes the use of force [45] except pursuant to a UN Security Council resolution, [46] which shall be sanctioned when the Council members are satisfied that a situation of breach of peace and the principles of International law has risen. [47]

A motion to wage war can be initiated at the demand of the UN Secretary General when he perceives a threat to international peace and security [48] and it is the duty of every member state to hold available its air force contingents for combined international enforcement actions. [49] The US earlier had the Security Council's mandate for its war in Afghanistan. [50] But this option was

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[41] See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 15 (Dec. 19) [hereinafter *DRC Opinion*] (separate opinion of Judge Simma).
[42] Jutta Brunnée and Stephen J. Toope, *The Use of Force: International Law after Iraq*, 53 INT'L & COMP. L. Q. 785-806 (4th ed., Oct., 2004).
[43] G.A. Res. 83, U.N. GAOR, 56th Sess., U.N. Doc. A/56/49 (Vol. I)/ Corr.4.
[44] See, e.g., I Hurd, *Legitimacy, Power, and the Symbolic Life of the UN Security Council*, 8 GLOBAL GOVERNANCE 35 (2002).
[45] U.N. CHARTER, art. 2 ¶ 4.
[46] Required under Art. 39, supra 45.
[47] Supra 45, art. 51.
[48] Id, see art. 99.
[49] Id, see art. 45.
[50] V. S. Mani, *The Fifth Afghan War and International Law*, 37 ECON. & POL. WKLY., Jan. 26 - Feb. 1, at 294-298 (4th ed., 2002).

out of the question now since Russia has been vocal about its intentions to veto any motion to wage war against the ISIS. [51]

Hence, the US has to resort to the last solid international legal justification: the international legal right of each state to individual and collective self-defence.

This legal rationale warrants special space because it has been proffered by the US in its letter to the other members of the Security Council. [52] In the epistle, US envoy to the UN, Samantha Power, asserted the legality of the drone strikes against the ISIL in Syria saying that they were launched to protect Iraq and other allies from air strikes by degrading ISIS's capability to launch them. [53] Thus, she has consciously invoked the legal protection of individual and collective self-defence.

As construed historically under Art. 51, collective and individual self-defence is an exception to the Nuremberg principles incorporated in International Law: [54] an act of aggression against a sovereign state shall be punished as an international crime. For the sake of this paper a restrictive interpretation of art. 51 [55] is favoured and self-defence is understood to be limited to cases of armed attack. [56] The ingenious customary norm of inherent right to self-defence [57] is not recognised here since it exceeds the limits of this essay.

Moreover, the US airstrikes in Syria were purely pre-emptive and they should not satisfy the condition of armed attack.[58] But Daniel Webster, in the landmark *Caroline* incident [59] recognised pre-emptive self-defence and also formulated that legitimate anticipatory self-defence should be restricted to situations of imminent threat. He expanded the law and said that **states have a**

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[51] Paul Harris in New York, Martin Chulov, David Batty & Damien Pearse, *Syria resolution vetoed by Russia and China at United Nations*, THE GUARDIAN, February 4, 2012.
[52] Representative of the U.S. to the United Nations, Letter dated Sept. 23, 2014 from Representative of the U.S. to the UN to the U.N. Secretary-General (Sept. 23, 2014), available at http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/.
[53] *Id.*
[54] G.A. Res. 95, U.N. Doc. A/64, at 188 (1946).
[55] See ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 167-230 (1963).
[56] See Report of the International Law Commission to the General Assembly, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. INT'L L. COMM'N 52-53 & nn.174-75, U.N. Doc. A/CN.4/SER.A/1980/Add.1/pt.
[57] See Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 187-193 (1976); see also M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-44 (1961); But see HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 58-62 (1952); see also LOUIS HENKIN, HOW NATIONS BEHAVE 314-39 (2d ed. 1979141-45 (discussing the importance that the drafters of article 51 attached to the phrase "if an armed attack occurs").
[58] See, eg, M Byers, *Pre-emptive Self-defence: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 180 (2nd ed., 2003).
[59] 2 THE CAROLINE, MOORE DIGEST OF INT'L L 409 (1837); also see RY Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

right to pre-emptive self-defence when the threat is overwhelmingly necessitated at that instant leaving no moment for deliberation and no choice of alternate means. [60] The objective criteria defined by Webster seems more idealistic than realistic.

So, it would be persuasive to argue that the US, in the face of the ISIS's terrorist activities in regions where the territorial sovereign was unable or unwilling to protect them, legitimately felt the imperative to act. [61] But to prove imminence of threat, requisite intention and capability [62] should be established. The ISIL had not been vocal about any intentions to threaten US interests, nationals or its emanations, though it undoubtedly had the capability to do so. So the situation, apparently fails to qualify as the most compelling emergency. [63] Hence, the US air strikes have no logical basis and were rather unwarranted even if purely pre-emptive.

Furthermore, Judge Simma opined that any act in self-defence should initially attain a minimal scale. [64] The US drone strikes in Syria were highly offensive and by means could they be construed as the least possible use of force. Hence, the US airstrikes fail to satisfy another crucial category of legitimacy.

Moreover, the Webster formula, which has been regarded as a definitive statement of the conditions for exercising the right to self-defence in *opinio juris*, proscribes any unreasonable or excessive action by the injured state and prescribes that an act, justified by the necessity of self-defence, must be limited by that necessity. [65]

Necessity can be easily established by arguing that in a situation of imminent threat a State may reasonably believe that employing non-forcible measures like negotiations or imposing sanctions like embargo might not provide adequate redress. [66] So the situations compels what ought to be the last resort to become the first choice. [67] Hence it can be concluded that air strikes targeting ISIS were necessitated to stall the current threat and foreclose future threats. But the fact that all soft measures were disregarded without attempt in a situation of complete anticipatory self-defence, weakens this argument.

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[60] 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906); see also L. HENKIN, R. PUGH, O. SCHACHTER & H. SMT, INTERNATIONAL LAW: CASES AND MATERIALS 890-91 (2d ed. 1980).
[61] See Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1633- 45 (1984).
[62] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA*) (Merits) [1986] ICJ Reports, ¶ 64.
[63] Elizabeth Wilmshurst, *The Chatham House principles of international law on the use of force in self-defence,* 55.04 INT'L COMP. L. Q. 963 (2006).
[64] See *DRC Opinion, supra* 41, at ¶ 13.
[65] British Foreign and State Papers 1840–1841, 29 at 1138 (1841).
[66] Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 1 at 113-146 (Winter, 1986).
[67] See *DRC Opinion, supra* 41, ¶ 146-47.

Furthermore, proportionality is the crucial criteria that differentiates legitimate self-defence from illegal reprisals. [68] An external evaluation of proportionality would inform that it, complemented by the legal condition of necessity, seeks to eliminate entirely self- serving and tendentious claims in self-defence. [69] Thus the objective must be reasonable, and the action must be limited by the objective. The US airstrikes seemed to be achieving an unsaid object of obliterating the ISIS rather than the said objective of eliminating a threat to Iraq. [70] Also, it is imperative to note that unilateralism has not expanded to include preventive strikes. [71] Thus the US airstrikes fail to satisfactorily meet the legal requirements of proportionality, necessity and imminence of threat.

Therefore, the US air strikes do not have a solid legal basis in the accepted principles of International Law, despite several academic arguments that seem to favour it.

VI. RESPONSIBILITY TO PROTECT

In the absence of a hard legal justification under International Law, what remains is a softer, amorphous justification under the emerging legal norm of the "responsibility to protect" particularly threatened populations. There is no customary norm in this regard except probably in situations of impending genocide. [72] Also, this doctrine has no grounding in the UN charter, but academic commentary has recognised foreign military intervention on moral grounds. [73]

Though the US has not offered this concept as an independent legal rational, it has been adduced to complement and substantiate the threat arguments. But this developing norm necessitates a UN Security Council sanction and hence, it is neither of much weight nor of much relevance here.

VII. UNILATERAL HUMANITARIAN INTERVENTION

Unilateral Intervention on humanitarian grounds is the sublimation of the chasm between the normative aspirations of the people and the legal requirement of a Security Council resolution to thwart humanitarian catastrophes. It bolsters a moral claim that real people and their suffering warrants greater consideration than abstract concepts like sovereignty. Like in the case of Iraqi

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[68] See Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 33- 36 (1972).
[69] For a pointed assessment see See TM Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 at 620.
[70] Craig Whitlock, *U.S. military leaders: Strikes in Syria are just the start of a prolonged campaign*, WASH. POST, September 23, 2014.
[71] See *Supra* 42.
[72] See SJ Toope, *Does International Law Impose a Duty upon the United Nations to Prevent Genocide?*, 46 MCGILL. L. J., 187 (2000).
[73] See WM Reisman, *Hollow Victory: Humanitarian Intervention and Protection of Minorities*, 91 AM. SOC'Y INT'L L., 431 (1997).

war, the post facto rhetorical flourishes brandished by the US have been productive of normative moral claims. [74] Sadly, like the previous instance, they do not hold much weight and the integrity of an intervention by the US on moral grounds, continues to remain threadbare. In any event, the stark incongruity of invoking a humanitarian argument in response to Islamist fundamentalism should have precluded this rationale at the outset.

VIII. CONCLUSION: IT TAKES A ROGUE STATE TO RAVAGE A ROGUE STATE

The multifaceted ISIS issue cannot be reduced to a simplistic binary narrative with the legality question. It is the inevitable result of a previous American Middle East policy. Now the US has to look east and it must return east. It is in global interest that such customary realities like unilateralism in International Law could not and should not be reified into concrete legal grounds. Hence, rogue states [75] shall ravage rogue states and it is neither legal nor illegal; but it is a policy and political matter which is the only recourse from a geostrategic perspective, if not a moral imperative.

[74] See President GW Bush, Radio Address, 5 Apr 2003 <http://www.whitehouse.gov> ('Village by village, city by city, liberation is coming. The people of Iraq have my pledge: Our fighting forces will press on until their oppressors are gone and their whole country is free.').

[75] See National Security Strategy of the United States of America (Sept 2002) <http://www.whitehouse.gov/nsc/nss.pdf> at 14-15.

RESPONSIBILITY TO PROTECT AND HUMANITARIAN INTERVENTION: A STEP FORWARD, AND THEN A STEP BACKWARD

Samarth Chaddha·

I. HUMANITARIAN INTERVENTION AND THE BIRTH OF R2P

In 2005, governments felt the need for a collective response to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.[1] The legacy of the 20th century could not be repeated in the new millennium,[2] and Secretary-General Kofi Annan along with his High-level panel on Threats, Challenges and Change[3] in his report "In larger freedom"[4] gave birth to a concept. The responsibility to protect, or R2P marked a historic commitment by all Heads of State and Government at the 2005 World Summit.

Thus, international society would take 'timely and decisive' action through various provisions set out in the UN charter in the likelihood that states failed to protect their citizens from genocide and mass atrocities.[5] Since 2005, R2P is now the new poster-boy for intervention, as seen in Security Council Resolutions 1674 (2006) and 1894 (2009). But can such moral advocacy in the name of humanitarian intervention be a third exception to the use of force, apart from the two provided already in the Charter? Perhaps not, since unilateral interventions made in the garb of humanitarian interests actually mask non-humanitarian economic and political interests.[6] If states intervene unilaterally, the idea of achieving diplomatic solutions through other means is also compromised. Also, the idea is premised on the notion of help – which suits doctors trying to cure a disease more than countries requiring help to survive.[7] Also, humanitarian interventions were "illegal but legitimate"[8] but they focused on interests of states rather than humanitarian

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[1] *Report of the Secretary-General: Timely and Decisive* Response, General Assembly 66th Session, A/66/874-S/2012/578.

[2] The Holocaust, the killing fields of Cambodia, the genocide in Rwanda, the mass killings in Srebrenica mentioned *Ibid*.

[3] A/59/565 and Corr.1.

[4] "In larger freedom: towards development, security and human rights for all," (A/59/2005).

[5] GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (Brookings Institution, 2009); ALEX BELLAMY, THE RESPONSIBILITY TO PROTECT: GLOBAL EFFORT TO END MASS ATROCITIES (Polity, 2009).

[6] Dr. Vesselin Popovski, *R2P Concept: Achievements and Challenges in Light of the Arab Spring*, Talk given, recorded on YouTube, https://www.youtube.com/watch?v=IS66xljRpgY.

[7] *Id*.

[8] THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (Oxford Univ. Press, 2000).

concerns, making consensus very difficult. This lack of consensus gave rise to the doctrine of "responsibility to protect," or "R2P" – seeing "sovereignty as responsibility."[9]

Some see this new doctrine as a "Western," or "neo-liberalist" concept.[10] It actually has very little to do with Western "intervention," since only 0.33% of R2P is military intervention.[11] The scope is much narrower: to prevent or respond to atrocity crimes, utilizing negotiation and mediation in domestic, bilateral, regional, and UN systems.[12] It is a third way, between non-intervention (and respect for state sovereignty) and international intervention (with respect for international sovereign responsibility).[13] This way the clash between intervention and sovereignty has also been reduced which was present in the 'clash of rights' in the days of humanitarian intervention.[14]

The humanitarian intervention in the 1990's revolved around issues of legality and the ethics of intervention.[15] These were the good days, since those supporting intervention would also argue against notions of dominant sovereigns forcing others to submit to their agenda. But, with the Obama administration claiming the "necessity" of military intervention in Libya, the scenario is very different. A very small minority now speaks of the erosion of Libyan sovereignty – with many supporting that the R2P based intervention will lead to a "humanitarian" political settlement.[16] However, the reality is that R2P doesn't apply to non-state actors, or even to large-scale human rights violations simply because they do not get to the level of a genocide, or crime against humanity.[17]

II. ADDRESSING THE CRITICISM OF THE RESPONSIBILITY TO PROTECT

R2P has been called a 'Trojan horse' for Western interventionism, and neo-imperialism.[18] Instead of challenging what should have been the question of whether it is legitimate to breach sovereignty by intervening in another country, R2P has contributed "little of substance or

[9] Francis Deng (1994); 1994 African Union Charter: Art 4(h) 'intervene in a Member State in respect of grave circumstances, namely war crimes, genocide, crimes against humanity'; K. Annan, "Two Concepts of Sovereignty,' Economist 1999; International Commission on Intervention and State Sovereignty, Co-Chair Gareth Evans Mohamed Sahnoun.
[10] David Chandler, *There's nothing good about the war in Libya,* SPIKED *available at* http://www.spiked-online.com/newsite/article/10441
[11] *Supra* note 6.
[12] 2009 SG Report 'Implementing R2P' and GA Resolution 63/308.
[13] *Supra* note 10.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Supra* note 6.
[18] Alex Bellamy, *The Responsibility to Protect: Added value or hot air*? 48(3) COOPERATION AND CONFLICT 333-357 (2013).

prescriptive merit."[19] It has made it difficult to incentivize changes in state behavior,[20] and could actually be just a slogan that masks the big power agenda to recolonize Africa.[21] Such a sentiment was especially apparent in the discussion to bring regime change in Libya and Cote d'Ivoire, which meant little had changed from military intervention in the 1990's to the modern day nefarious use of responsibility to protect.[22]Western complicity in crimes is often ignored in favor of institutional command by establishing an indirect mechanism for policing and military intervention.[23] R2P has diminished international law's political and institutional capacity to prevent and respond effectively to genocide and mass atrocity since international responsibility has been hollowed out.[24]

However, to be fair to the ICISS report,[25] it reflected some of the problems with military intervention and recast the "right to intervene" accruing to Western military actors as the "responsibility to protect."[26] It shifted the focus from the interveners to the objects of intervention that was shown in the report's use of a continuum of responsibility: to prevent, to react and to rebuild.[27] It did not argue for non-consensual military intervention.[28]To give credit to those crying for breach of sovereignty, it is possible this continuum may have led to certain areas of domestic policy that were "out of bounds," for countries especially in time of a conflict. Or it could mean assisting a "weak" state that was "unable" to protect its citizens.[29] Even in the case of Somalia in 2006, had it not been for R2P, perhaps the Security Council would have never reached a compromise on matters such as the establishment of a political office for the IGASOM and the AMISOM.[30] In the days of military intervention the focus was on Western-led military interventions, but now the dialogue was more about conflict prevention.

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[19] Aidan Hehir, *The Responsibility to Protect: 'Sound and Fury Signifying Nothing*?, 24(2) INT'L RELATIONS 218-239 (2010).
[20] *Id*.
[21] MAHMOOD MAMDANI, SAVIORS & SURVIVORS: DARFUR, POLITICS AND THE WAR ON TERROR (Pantheon Bk., 2009).
[22] Elizabeth O'Shea, *Responsibility to Protect in Libya: Ghosts of the Past haunting the Present*, 1(1) INT'L HUM. RTS. L. R. 173-190 (2012).
[23] David Chandler, *The Paradox of the responsibility to protect*, 45(1) COOPERATION AND CONFLICT 128-134 (2010).
[24] David Chandler, *Unveiling the paradox of the responsibility to protect*, IRISH STUD. INT'L AFF., 20:27-39 (2009).
[25] International Commission on Intervention and State Sovereignty, *Report of the International Commission on Intervention and State Sovereignty: The responsibility to protect* (Ottawa, 2001).
[26] *Supra* note 10.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*; African Union Mission to Somalia (AMISOM) and IGAD Peace Support Mission in Somalia (IGASOM).

It was not that R2P did not have anything in "substance." The Security Council, through Resolution S-15/1, used the language of R2P to call upon the Libyan government to meet its responsibility to protect its population.[31] The resolution expressed concerns over the deteriorating situation and condemned indiscriminate attacks on civilians, arbitrary arrests, detention and torture of peaceful demonstrators.[32] It later adopted Resolution 1970[33] that put forward a set of coercive measures such as an arms embargo, a travel ban on key people in Libya, and asset freezes. After reviewing the situation and the failures of the Libyan government in complying, Resolution 1973 was born.[34] This authorized coercive military intervention in another sovereign state without the consent of its governing authorities.[35] NATO could use its military forces to protect civilian protected areas that were under any threat of any attacks.[36] A no-fly zone was created to force the government to deviate from flagrant abuses of human rights – thus allowing R2P to be used to shape an international military intervention designed to prevent occurrence of potential atrocities in Libya.[37]

R2P then is not a mask for a desire to recolonize Africa. In fact, it is specific in its focus on potential victims of mass atrocity. Humanitarian intervention of the 90's was broad enough to allow countries of global North to engage in civilizing missions in countries of the global South.[38] R2P is about prevention, but it is here where the criticism of the doctrine is strong. Despite its clear intentions, there is a sincere lack of clarity over the boundaries of R2P that were born from the ICISS report and "muddled over the waters" separating R2P from the right to intervene.[39]Even if the proponents of R2P loudly proclaim that R2P is all about "prevention," it is difficult to conceptually perceive it as a concept once we rule out coercive military intervention as legitimate.[40] Even if the situation in Myanmar is characterized as a "human rights and democracy problem," who decides the process of deciding between that and say a R2P situation in the making? Or is it a mix of pressure and persuasion that will work? What is the criteria to be

[31] Situation of Human Rights in the Libyan Arab Jamahariya, GA Res. S-15/1, UN GAOR, 15th spec sess, 2nd mtg, UN Doc A/HRC/RES/S-15/1 (3 March 2011, adopted 25 February 2011) ('Resolution S-15/1'), adopted by the UN Security Council in Resolution 1970, UN Doc S/RES/1970.
[32] *Id.*
[33] Resolution 1970, UN Doc S/RES/1970.
[34] SC Res 1973, UN SCOR, 66th Sess, 6498th mtg, UN Doc S/RES/1973 (17 March 2011) Preamble para. 12 (Resolution 1973).
[35] Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELB. J. INT'L L. 59 (2012).
[36] *Id.*
[37] *Id.*
[38] *Supra* note 10.
[39] *Id.*
[40] *Id.*

used to decide about R2P practices that will take the form separate from international responses to a 'human rights and democracy' problem?[41]

III. DECONSTRUCTING R2P: HIDDEN AGENDA

It is a foregone conclusion that R2P has moved away from the 'right of humanitarian intervention' from the Kosovo War of 1999. Back then, humanitarian intervention had threatened to challenge the legitimacy of UN action, and the power of the Security Council to intervene. What used to be then the question of the sovereign right to intervene has transformed into a discussion of international governance that legitimizes the UN's moral agenda over the Western powers and other decolonized states.[42] Development assistance, and conflict prevention are the new buzzwords of this good governance ideal that R2P strives to uphold. It depends upon the idea that through experts of a non-political, administrative and technical nature the UN can resolve conflict.[43]It must reduce social, economic, and political problems to issues that can be solved by a coordinated response by UN members. Liberal institutionalism and the framework of neoliberalism are the tools within R2P's arsenal which it uses to slice and dice ideas for mass atrocity prevention by re-interpreting the atrocities of the past.[44]

The more that international actors engage with the institutions of the "failing" state the more the international system can transform that state's capacity to live up to its own responsibilities. Looking at the report of the Secretary-General[45] it is clear that the State here is the loci of the responsibility to protect, whose purpose is to enhance sovereignty and not diminish it. If humanitarian intervention was about undermining sovereignty, the new-found R2P is all about the state's capacity building.[46] During the Kosovo War there was a dilemma for international actors as to whether to intervene or not to intervene – but now R2P was about relationship management whereby regulatory frameworks are recast to regulate security interests in regions such as Africa.[47] Also, regional organizations such as the African Union have been encouraged to find African solutions for African problems.[48] This is very different from the liberal interventionist idea of interfering in the affairs of other countries to protect human rights

[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] United Nations, *Implementing the Responsibility to Protect: Report of the Secretary-General,* A/63/677 (January 2009).
[46] ALEX BELLAMY, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES (Polity, 2009).
[47] *Id.*
[48] *Supra* note 24.

prominent in the sovereignty as responsibility era of humanitarian intervention.[49]If humanitarian intervention was about enhancing Western power, R2P is about trying to lessen its role.

IV. R2P: A FEW STEPS FORWARD, A FEW STEPS BACKWARDS

R2P does suffer from a "false friends" problem, as there is always the risk that its supporters will use it as a springboard for other forms of adventurism.[50] Also, what is alarming is the enthusiastic support for military force that can be used preventively without the Security Council's endorsement.[51] According to Algeria, R2P is extremely difficult to distinguish from humanitarian intervention that countries rejected back in 1999,[52]and Egypt found the legal backing behind the theory of R2P unclear.[53] The emerging legal norm is still a way for the powerful states to impose their interests and values on the weaker states.[54] The Non-Aligned Movement felt that R2P could not operate in an impartial way to protect human rights.[55] Instead of enhancing sovereignty, it reduces sovereignty of the weaker states in the name of universal considerations – thereby enhancing only the sovereignty of the stronger nations.[56] Since the power to authorize interventions is in the hands of the Security Council that are run by the strongest nations, power still remains elusive.[57] No nation will give up their right to veto an intervention – interventions that breach a country's right to self-determination.[58]

R2P has not succeeded in generating consensus on the topic of humanitarian intervention. States are too busy in their own security issues post 9/11, and do not want to commit to protecting people in a distant part of the world in which results may be uncertain. [59] Humanitarian intervention is viewed as an imperialist notion, and while nobody doubts the abstract need to intervene on humanitarian grounds, it is the legal admissibility of humanitarian intervention that fails to attract consensus.[60] The idea of responsibility stems from contemporary norms on human rights and international humanitarian law, but to extract from these the admissibility of

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[49] *Id*.
[50] Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WISCONSIN INT'L L. J. 3 (2006).
[51] Lee Feinstein & Anne-Marie Slaughter, *A Duty to Protect*, 83 FOREIGN AFF, 136, 137 (2004).
[52] UN doc. A/59/PV.86, p.9.
[53] *Id* at 13.
[54] Carlo Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, 13.2 J. CONFLICT SEC. L. 191-213 (2008).
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] Alex Bellamy, *Preventing Future Kosovo's and Future Rwanda's: The Responsibility to Protect after the 2005 World Summit*, POLICY BRIEF 1, 5 (2006).
[60] *Supra* note 54.

humanitarian intervention is arbitrary.[61]R2P swings between power and obligation to intervene.[62] The responsibility to prevent, as a legal concept, is not of much value as its content is far too broad.[63]One can bring any measure under the ambit of this principle, as it remains unclear as to what circumstances this notion would come into play.[64] Perhaps it would have been better had R2P been confined to just the reaction phase – on the question of the use of force for human protection purposes.[65]

A step backwards was taken in not distinguishing conceptually between human rights and humanitarian intervention as per a treaty or customary international law.[66] The admissibility of humanitarian intervention could be drawn by a way of interpretation through interpretative criteria in a treaty however in customary international law the absence of general state practice or opinio juris would make this difficult. [67] Another step in the backward direction was when there were no clear criteria prescribed to measure a state's lack of capacity and unwillingness to protect its own citizens.[68]This was further exacerbated when there was a failure to distinguish between different types of interventions – one that was in an institutionally strong state versus one in a failed state.[69] It would have been helpful had the ICISS report cleared the ambiguities by clarifying which kind of cases would the Security Council not have the responsibility to protect![70]

So then is the R2P just a more sophisticated way of legitimizing humanitarian intervention?[71] Or is it a kind of military humanism[72] that legitimizes non-consensual intervention?[73] This new norm legitimized humanitarian intervention and governments were using it to legitimize coercive interference since its conception.[74] It has been called a "Trojan Horse" for legitimizing unilateral

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[61] *Id.*
[62] *Id.*
[63] Gelijn Mlier, *Humanitarian Intervention and the Responsibility to Protect after 9/11,* 53(1) NETHERLANDS INT'L L. R. 37 (2006).
[64] *Id.*
[65] *Id.*
[66] *Supra* note 54.
[67] L. Boisson de Chazournes & L. Condorelli, *De la 'Responsabilite' de Proteger', ou d'une Nouvelle Parure pour une Notion deja Bien Etablie* 1 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 11 (2006).
[68] *Supra* note 54.
[69] *Id.*
[70] *Id.*
[71] Yevgeny Primakov, *UN process, not humanitarian intervention is world's best hope*, NEW PERSPECTIVES QUARTERLY (2004); Jennifer M. Welsh, *Conclusion: humanitarian intervention after 11 September, in* HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 176 (Jennifer M. Welsh, ed., Oxford Univ. Press 2004).
[72] Statement by India's Ambassador to the UN at the informal thematic consultations of the General Assembly on the Report of the Secretary-General entitled "In Larger Freedom: Towards Development, Security and Human Rights for all," (A/59/2005).
[73] Alicia L. Bannon, *The responsibility to protect: the UN World Summit and the question of unilateralism*, 115:5 YALE L. J. 1157 (2006).
[74] Stephen John Stedman, *UN transformation in an era of soft balancing*, 83:5 INT'L AFF. (2007).

intervention because of instances such as the French government's attempt to use R2P to persuade the Security Council to authorize the distribution of humanitarian assistance post Cyclone Nargis in 2008.[75] Despite committing to prevention, the main focus of the ICISS report was on intervention.[76] Even in Libya, the question remains unanswered as to whether bombing and targeting destruction of government buildings falls within the UN's 'civilian protection' mandate.[77] Perhaps protecting civilians would not have been possible without regime change, but there is no way that Resolutions 1970 and 1973 could have permitted extension of conflict beyond the protection of civilians.[78] Such a "mission creep"[79] was an abuse of the mandate of the Security Council, and perhaps went beyond the UN charter as well.[80]

A step forward was taken in constructing just cause thresholds[81] and precautionary principles[82] to make it harder for states to abuse humanitarian justifications as it would be difficult to satisfy such criteria were it a non-genuine case.[83] According to Thakur,[84] the consensus on criteria[85]was supposed to make it more difficult for coalitions of the willing to appropriate the language of humanitarian intervention. R2P has set the bar even higher than the Security Council that authorizes peace operations under Chapter VII to those that do not fit the R2P thresholds.[86] Many steps forward can be taken if R2P can detect some "capacities"[87] such as genuine political grievances, and this can help in resolving moral hazards to which civilian populations may be at risk of facing.[88]

Kouchner's decision to refer to R2P to enforce aid into Burma for Cyclone Nargis was a step forward, but it was also criticized for being unnecessarily confrontational.[89] The Chinese were of

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[75] Alex Bellamy, *The Responsibility to Protect and the Problem of Military Intervention,* 84:4 INT'L AFF. (2008).
[76] Only 9 of its 85 pages were dedicated to prevention, whilst 32 pages were devoted to intervention as mentioned in *Ibid*.
[77] *Supra* note 35.
[78] James Pattison, *The Ethics of Humanitarian Intervention in Libya,* 25:3 ETHICS & INT'L AFF. 271, 273-4 (2011).
[79] *Id*.
[80] *Supra* note 35.
[81]Large scale loss of life, large scale ethnic cleansing.
[82] Right intention, last resort, proportional means, and reasonable prospects.
[83] *Id*.
[84] Ramesh Thakur, *A shared responsibility for a more secure world,* 11:3 GLOBAL GOVERNANCE 281 (2005).
[85] Ramesh Thakur, *Iraq and the responsibility to protect,* 62:1 BEHIND THE HEADLINES 1 (2004).
[86] Thomas Weiss, *The sunset of humanitarian intervention? The responsibility to protect in a unipolar era,* 35:2 SECURITY DIALOGUE 135 (2004); MICHAEL BYERS, HIGH GROUND LOST OF UN'S RESPONSIBILITY TO PROTECT (Winnipeg Free Press, 2005).
[87] Idea of "capacity" taken from Alan J, Kuperman, *The moral hazard of humanitarian intervention: lessons from the Balkans,*52:1 INT'L STUD. Q. 49 (2008).
[88] *Id*.
[89] *Supra* note 75.

the view that R2P did not apply to natural disasters,[90] and R2P was deemed as a militaristic step backwards. So on the hand, we have humanitarian aid that is commendable, but on the other hand should western countries fight their way into Burma, this is regrettable.[91] For every Latin American country that welcomed the ICISS report, there is an East Asian country who is cautious and a Russia or a China who reject R2P. The ex post facto humanitarian intervention justifications given for Iraq highlight the potential for abuse.[92] For stressing that sovereignty was a right dependent upon respect for a minimum standard of human rights, there is the conflict whether the principle of non-intervention yields to international responsibility to protect.[93]

The notion of responsibility is based upon a continuum of responsibility to prevent, to react and to rebuild. But this still has the potential to divide the world into "civilized" and "uncivilized" zones that could risk us going back to semi-colonial practices.[94] The P5 will still get to determine which human rights abuses justify a departure from the principle of non-intervention.[95] Could R2P become another euphemism for American hegemony?[96] The "good old days"[97] of humanitarian intervention stuck to the minimalist principles of the International Committee of the Red Cross but now there are politically motivated interpretations of R2P. UK has made the R2P into a global management system of its asylum seekers, with an attempt to avoid its responsibilities under the 1951 Refugee Convention and other human rights treaties.[98] Despite attempts to incorporate diverse perspectives into the R2P debate, the dialogue is still confined to the liberal internationalist discourse.[99] This can never form a universal response on the issue of humanitarian intervention.[100]

Ironically, the "responsibility to protect" debate has taken many steps forward, but has probably taken just as many backwards. It has enabled anti-interventionists to argue against intervening by claiming that the primary responsibility rests on the state.[101] Instead of arguing on the sovereignty

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[90] Julian Borger & Ian MacKinnon, *Bypass junta's permission for aid, US and France urge*, GUARDIAN (May 9, 2008).
[91] Ivo Daalder and Paul Stares, *The UN's responsibility to protect*, INTERNATIONAL HERALD TRIBUNE (2008).
[92] S Neil MacFarlane, Carolin J Thielking & Thomas Weiss, *The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?,* 25:5 THIRD WORLD QUARTERLY 977 (2004).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] ROSEMARY FOOT, S NEIL MACFARLANE & MICHAEL MASTANDUNO, THE UNITED STATES AND MULTILATERAL ORGANIZATIONS, (Oxford Univ. Press, 2003); MICHAEL BYERS & GEORGE NOLTE (EDS), UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Cambridge, 2003).
[97] DAVID RIEFF, A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS (Vintage, 2002).
[98] *Supra* note 92.
[99] *Id.*
[100] *Id.*
[101] Alex Bellamy, *Responsibility to protect or Trojan horse? The crisis in Darfur and humanitarian intervention after Iraq* 19:2 ETHICS & INT'L AFF. 31 (2005).

as absolute claims, the opponents have found newer grounds to make their arguments by invoking R2P.[102] They could now argue that the situation in Darfur did not reach the threshold enough for intervention.[103] Thus, even though the ICISS report changed the language of humanitarian intervention from sovereignty v. human rights to levels of responsibility, it could not end up changing R2P's inherent political dynamic.[104] The line between regime change and protection of civilians is not always so clearly drawn and in some situations, regime change may be the only viable strategy to protect government atrocities.[105] But in the Libyan case it would have been better had the NATO confined its status to a watching-brief role by maintaining the no-fly zone and attacking only when civilians were put at risk.[106] R2P has been put in danger by the juxtaposition of an assertive reaction in Libya, and then complete paralysis in Syria. There is indecision in the Security Council about how to respond to hard cases such as Syria, especially an incident like the chemical attack in Al-Ghoutta -- which is encouraging a return to old style geopolitics – through China and Russia relying on the misuse of Resolution 1973 to kill resolutions to save Syria.[107] The situation is further exacerbated with the "breakdown of trust" during the mandate of intervening in Libya.[108] This sends out the message that R2P would be selectively used, not in response to genuine humanitarian concerns – but based on a criterion independent from them, just like the humanitarian interventions of the past era. Then, after all these steps forwards and backwards, have we moved further at all?

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[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] Ramesh Thakur, *R2P, Libya and International Politics as the Struggle for Competing Normative Architectures, in* THE RESPONSIBILITY TO PROTECT: CHALLENGES AND OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION (e-International Relations, 2011).
[106] Gareth Evans, *Interview: The R2P Balance Sheet after Libya, in* THE RESPONSIBILITY TO PROTECT: CHALLENGES AND OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION (e-International Relations, 2011).
[107] Mohammed Nuruzzaman, *Revisiting "Responsibility to Protect" After Libya and Syria*, E-INTERNATIONAL RELATIONS (March 8, 2014) http://www.e-ir.info/2014/03/08/revisiting-responsibility-to-protect-after-libya-and-syria/
[108] Gareth Evans, *R2P down but not out after Libya and Syria*, OPENDEMOCRACY.NET (Sept. 9, 2013) https://www.opendemocracy.net/openglobalrights/gareth-evans/r2p-down-but-not-out-after-libya-and-syria.

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THE QUAGMIRE OF GREED AND HUMANITY: THE NEED FOR CRIMINAL LIABILITY OF CORPORATIONS IN INTERNATIONAL CRIMINAL LAW

Bhagirath Ashiya·

In a globalized world, the transnational character of corporations raises concern over the manner in which no clear form of criminal liability is imputed to them under international criminal law. The crux of the issue lies in the disillusionment created by the way of jurisprudential analysis on the legal character of corporations in contrast to the justice approach on normative and rational grounds. The immediate response in the form criminal liability is not only a deterrent to errant corporate entities but a vindication of man's triumph over greed. The exclusion of corporations has been a political debacle to cater to the legal protection and stability required for investment in foreign nations rendering a relatively ineffectual issue of the quagmire of the law. The liability of corporations under the realm of international criminal law has gained consensus over the years, with regard to enforcing criminal liability. The question that arises is the manner in which bilateral trade agreements provide protection rather than criminal liability for actions of the corporates in investment agreements where the concept of international minimum standards supervene the obligations of corporations under the international trade regime. The investor arbitrations that have been invoked to settle disputes render criminal actions as a mere question of violation of obligations under bilateral treaties. The requirement is for attuning international criminal law to common law frequency of the liability of corporations. The need is for explicit recognition of corporations under the Rome Statute in order to rectify the anomaly that renders justice, a mere quixotic elixir outside the domain of international criminal law.

I. INTRODUCTION – THE CONFLICTING JURISPRUDENTIAL DISCOURSE:

'Commerce is entitled to a complete and efficient protection in all its legal rights, but the moment it presumes to control a country, or to substitute its fluctuating expedients for the high principles of natural justice that ought to lie at the root of every political system, it should be frowned on, and rebuked.'

-James Fenimore Cooper[1]

The phenomenal growth of international trade through bilateral investment treaties has provided the much needed stability and legal protection to harness the power of economic growth. After World War II, the Nuremberg trials did acknowledge the liability of corporate actors in international crimes in the Krupps[2], Krauch[3] and Zyklon[4] cases, which renders the strides

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[1] J. FENIMORE COOPER, THE AMERICAN DEMOCRAT 169 (H.&E. Phinney, 1838).

[2] United States v. Krupp, The United Nations War Crimes Commission, 10 Law Reports of Trials of War Criminals 130 (1949)

towards direct and indirect criminal corporate liability rational and an entrenched principle of international criminal law. The global impunity that persisted during the Cold War with regard to the direct perpetrators of international crimes impeded the deliberation over the legal responsibility of corporate entities.[5] The continued state of flux with regard to the liability of non-state actors in international law has created a legal and jurisprudential dilemma. The legal discourse on one hand tends to completely reject the very idea of the obligations of non-state actors under international law, whilst providing scope for the misuse of the concept of separate legal personality.

The classical approach considers only states as the subjects of international law,[6] but the corporate criminal liability as a concept emerges when states as juristic entities do entail liability under international law. The legal protection granted under bilateral investment treaties and the subsequent arbitration proceedings that follow have led to flawed discourse on approaching the concept of deciding the form of liability of corporations**.** The conditioned need to attract investment leads to developing states lowering the standards of liability applicable to corporations. The Nash equilibrium illustrates this phenomenon, whereby developing countries sacrifice their own interests to advance investment, whilst in the end other factors determine the benefits of investment.[7] As per the HRC Report,[8] the juxtaposed miscalibration of the corporation's capacity to perpetuate crimes and the ability of the governments to respond through governance creates a governance gap.[9] This anomaly is particularly present in developing countries,[10] which demonstrates the impunity that persists not only in the legal framework, but also the governance structure. Moreover the protection granted under investment treaties which provide for arbitration as a dispute settlement mechanism apply principles in contradictory stances, whilst exonerating the corporations from the fundamental question of criminal liability.

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[3] United States v Krauch, (I. G. Farben), 8 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952).
[4] The Zyklon B Case, The United Nations War Crimes Commission, 1 Law Reports of Trials of War Criminals 92 (1947).
[5] Wolfgang Kaleck & Miriam Saage-Maab, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges*, 8 J. INT'L CRIM. JUSTICE 703 (2010).
[6] Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law,* 6 HARV. L. & POL'Y REV. 339 (2012).
[7] Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23(3) AM. U. INT'L R. 489 (2007).
[8] Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/4/035, 9 February 2007.
[9] Joanna Kyriakakis, *Developments in international criminal law and the case of business involvement in international crimes*, 94 IRRC 985 (2012).
[10] *Supra* note 8.

The inability to impose criminal liability upon corporations in international forums as an immediate consequentiality denounces the erga omnes obligations arising under international human rights instruments. The globalization has reduced the scope for the exercise of state power with the increase in the dominance of corporations and non-financial institutions such as the International Monetary Fund (IMF) and the World Bank.[11] The resultant impact that emerges tends to defeat the purpose of criminal accountability as enforcement of foreign awards and the arbitrations clauses in investment agreements, provides necessary protection to the corporation. The advent of globalized markets has resulted in a focus on corporate rights rather than corporate responsibilities[12], which inadvertently leads to repercussions for the developing world. The balancing of competing interests of trade and human rights, is compromised in the new world order where the emphasis has shifted from a right based to duty centered obligations in the case of corporations. The reluctance to provide for corporate criminal liability in the international arena aptly forecloses the access to justice for the victims of crime.

The criminal liability that society imposes upon a natural person differs when this aspect of law is extended to legal entities. The seminal question that arises while traversing international criminal law is the approach of holding legal persons such as states and corporations criminally liable. The adage that 'guns don't kill people, people kill people' entails the similar dilemma of the law.[13] The limitation imposed upon the International Criminal Court to only deal with natural persons under the Rome Statute, excluding legal persons constitutes a major flaw in international criminal jurisprudence. The argument that one deals whilst putting forth the proposition of amending the Rome Statute to include legal persons, must first reconcile with the alternative mechanisms of dispute settlement such as exercising extraterritorial jurisdiction. The lacunae that lies in superimposing foreign awards and their subsequent execution, at times does not meet the ends of justice, due to the lack of enforceability in transnational scenarios of corporate existence.

There is an objection that corporate entities are incapable of possessing the requisite mens rea; they are amoral, and have no will of their own.[14] The pertinent question whilst considering corporations subject to criminal law lies in the '*presence of guilty mind*'.[15] The answer to this question lies much more in jurisprudential analysis rather than the prevalent scope of the

[11] Nora Gotzmann, *Legal Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute*, 1 QLSR 40-41 2008.
[12] Harvard Law Review Association, *Corporate Liability for Violations of International Human Rights Law* 114 HARV. L. REV. 2031 (2001).
[13] NINA H.B. JORGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 74 (Oxford Univ. Press, 2003).
[14] Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective* 43 ICLQ 495-96 (1994).
[15] *Supra* note 11 at 42-43.

common law enunciation of corporate criminal liability. The ability of the corporations to enter into contracts demonstrates the mind and free will, then 'where does the mind and the will disappear when we turn to the penal law?'[16] Therefore, mere rhetoric answers the dilemma of corporate criminal liability and the resultant implications for human rights instruments and their enforcement. The prevalent 'laissez faire mindset'[17] was contented by the UN Sub-Commission on the Promotion and Protection of Human Rights,[18] which laid down the obligations that corporates were bound by in international law. Though only soft law instruments have laid down guidelines than binding obligations, the requirements necessitate a treaty to codify the corporate criminal liability, which has been recognized as a common law principle.[19]

II. THE NEED FOR IMPOSING CRIMINAL LIABILITY ON CORPORATIONS

"It is sad truism that there is nothing that people will not do to other people".[20]

In order to deal with the issue of corporate complicity in international crimes, the solution lies in holing corporations criminally liable, as mere self-regulation does not churn effective results. The capacity for good as well as evil is enormous considering the economic stronghold of corporations on international trade and investment. In the legal milieu that persists with regard to liability of corporations, the solution lies in providing a distinction line between negligent acts and the presence of the subjective mental element.[21] The former can be dealt through administrative and civil actions whilst the latter requires the application of criminal law.[22] Article 25(3)(d) of the ICC Statute is related the concept of crime 'by a group of persons acting with a common purpose'.[23]Although the article does not define Joint Criminal Enterprise (JCE) but it certainly reflects a reference to the JCE doctrine.[24] The JCE doctrine has been criticized on the

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[16] M. Kremnitzer and H. Genaim, *The Criminal Liability of a Corporation*, in A. Barak (ed.) B SHAMGAR ROOK 67 (2003). Mordechai Kremnitzer, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 J. INT'L CRIM. JUS. 912 (2010).

[17] Menno T. Kamminga, *Corporate Obligations under International Law*, Maastricht Centre for Human Rights. Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, 2004.

[18] Responsibilities of transnational corporations and other business enterprises with regard to human rights, Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16 (August 13, 2003).

[19] Elidiana Shkira, *Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries, available at* SSRN 2290878 (2013).

[20] ANDRE NOLLKAEMPER & HARMEN VAN DER WILT, SYSTEMIC CRIMINALITY IN INTERNATIONAL LAW 42 (Cambridge Univ. Press 2009).

[21] Mordechai Kremnitzer, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 J. INT'L CRIM. JUS. 910 (2010).

[22] *Ibid.* at 911-12.

[23] Rome Statute art. 25(3)(d).

[24] Hans Vest, *Business Leaders and the Modes of Individual Criminal Responsibility under International Law*, 8 J. INT'L CRIM. JUS.), 865-866 (2010).

grounds of trading in guilt by association,[25] this is clearly not the case concerning another group of non-state actors: the individual. It is acknowledged that the individual is obliged by international criminal law and may be prosecuted for the commission of international crimes before the ICC. The ICC statute must be amended to include legal persons as a rectification for holding corporations liable[26], as in some cases states collaborate with corporations in the commission of crimes. Thus rendering the justice enforcement mechanism in the hands of states, who themselves have acted in violation of law, defeats the ends of the criminal justice system. The limitations that exist when pursuing an individualistic approach towards holding corporates criminally liable does not address the issue of the structure and organization of the corporation.[27] The separation of power within the corporation distorts the detection of the crime and proof of its commission.[28] Thus a complementary prosecution of the individuals as well as the corporation condense the legal issue into a panacea for the evils of the unregulated abuse of power by transnational corporations. The rationale purports an incoherent conclusion when the law is applicable to corporate personnel but not the corporate entity. Similarly, corporations possess rights under international law, it would be legally detrimental if rights do not follow the necessary binding obligations upon the corporate entity.

Most domestic jurisdictions have recognized the criminal liability of corporations29, in contradistinction to the stand adopted in international criminal law. The United Nations Special Representative on Human Rights and Transnational Corporations found that two-thirds of the allegations of human rights abuses were in relation to the corporate complicity in crimes against humanity.30 The recognition of the corporate legal personality halts the unimpeded march of the corporate entity, by ensuring that individuals do not take shelter under its veil nor can the entity hide behind the criminal liability of individual members.31 Moreover the economic interests of the state overshadow the human rights violations, as it becomes an economic issue rather than a clear violation of human rights. Such instances lead to 'domestic jurisdictions having restrictive approaches to defining human rights violations, compromising domestic enforcement.[32] Under International Human Rights law, the corporation has been accorded legal personality possessing

[25] MARK OSIEL, MAKING SENSE OF MASS ATROCITY, 71-72 (Cambridge Univ. Press 2009).
[26] International Criminal Court Statute, 2002 art. 25(1).
[27] *Supra* note 21 at 910-912.
[28] *Supra* note 16.
[29] Anita Ramasastry & Robert C Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Jurisdictions* (FAFO, 2006).
[30] UNSRSG Interim Report, *Promotion and Protection of Human Rights* (2006) UN Doc: E/CN.4/2006/97.
[31] Nora Gotzmann Legal *Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute*, 1 QLSR 43 (2008).
[32] *Ibid.* at 45-46.

rights as well as liabilities. The self-imposed restriction with regard to the jurisdiction of the ICC does not bode well with the established principles of corporate criminal liability in various countries.

III. THE ATTRIBUTION OF LIABILITY TO THE STATES: THE STATE AS A CORPORATE ENTITY

The attribution of liability upon states for the acts of corporations has also been recognized on the basis of the nature of the act rather than mere shareholding of the corporation. The *Iran-US Claims* Tribunal was of the view that when a State appoints an individual for a purpose, the act is attributed to the State.[33] It further stated that "…as a result of the appointment, the corporation loses its independence so as to become an extension of the government…". Thus the liability of the corporation is also dependent upon the intention with which the corporations operate in a particular country. The exclusion of corporations from the purview of the International Criminal Court provides scope for perpetrating crimes in the international domain through the complicit protection of bilateral treaties and exemption from criminal liability. The legal recourse available to the victim state and its people is to resort to arbitration as per the investment agreement, especially in the case of developing countries or approach the International Court of Justice. The purpose for which the ICC was formed stands defeated when both the arbitration mechanism and the exclusion of legal persons perpetuates injustice by acting as an incentive to commit international crimes.

In the *EDF case*[34] it was held that attribution could occur where a state actually instructs a corporation to do a certain thing; where this occurs, one need not have reference to anything more than the fact of directive.[35] It further stated, "…the Ministry…issued instruction and directions to state owned-corporations…in order to achieve a particular result." On this basis, Romania was found responsible for the acts of the corporations.[36] The principles that have evolved in the international legal framework, deal with corporation liability with regard to the State, so as to impute responsibility and ensure adequate compensation. This is reiterated in Article 8 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001, (ARSIWA) which states, "*The conduct of a person or group of persons shall be considered an act of a State*

[33] JAMES CRAWFORD STATE RESPONSIBILITY: THE GENERAL PART 164 (Cambridge Univ. Press 2013).
[34] EDF Services Limited v. Romania, ICSID Case No. ARB/05/13,2009, Award, 190 (Oct. 8, 2009).
[35] *Id.*
[36] *Id.*

under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." [37]

Article 5 of ARSIWA provides:

> "The conduct of a person or entity which is not an organ of the State…but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." [38]

The commentary of ARSIWA states, "The generic term "entity" reflects the wide variety of bodies which…may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies…"[39] Further, the tribunal in the *Noble Ventures case*[40] rejected the position of distinguishing governmental and commercial conduct for the purposes of attribution[41] and held that 'the ILC- draft does not maintain or support such a distinction'.[42] Thus the act of a PSU or a state owned corporation will be attributed to its State. In the obiter dictum in *Barcelona Traction case*,[43] the Court had established an essential distinction between obligations that arise for a State with regard to another State, and obligations of a State towards the international community as a whole.[44] The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.[45] The commentary further provides that 'it does not matter that the person or persons involved are private individuals…'[46] Thus the concept of liability in international law is indifferent to the corporation being public or private, vindicating the emergence of corporate criminal liability in the domestic law of various countries. The inability to sue corporations in the international forums has led to the imposing the liability upon the state of registration of the corporation, when the State itself is involved in the acts leading to the violations by the corporation in the host State.

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[37] Rep. of Int'l Law Comm'n, 53rd Sess., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* art. 8 (Nov. 2001), G.A., 56th Sess., Supp. No. 10 (A/56/10), [hereinafter ARSIWA].
[38] ARISWA, art. 5.
[39] *Id*.
[40] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, (Oct. 12, 2005).
[41] RUDOLF DOLZER AND CHRISTOPH SCHREUER PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 203 (Oxford Univ. Press 2008).
[42] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 81 (Oct. 12, 2005).
[43] Barcelona Traction, Light and Power Company Limited, Second Phase (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 304 (Feb. 5).
[44] *Id*.
[45] Zafiro Case [D. Earnshaw and Others (Great Britain) v. U.S], (1955) 6 R.I.A.A.160.
[46] *Supra* note 37.

There are no specific criteria for a norm to be considered peremptory.[47] The International Law Commission (ILC) has stated that "There is no simple criterion by which to identify a general rule of international law as having the character of jus cogens."[48] Even though there is no normative criterion to identify *jus cogens*, recourse must be taken to various authors.[49] Thus the most accepted criteria would be: First, the object and purpose of the norm must be the protection of a state community interest. Second, the norm must have a foundation in morality. Third, the norm must be of an absolute nature. Fourth, the vast majority of states must agree to the peremptory nature of the international norm.[50] Moreover the protection of environment is essential to human well-being and the enjoyment of basic human rights including the right to life. Environmental protection has been recognized in international conventions,[51] judicial decisions,[52] general principles of law recognized by civilized nations,[53] and highly qualified publicists.[54] The peremptory norms also extend to crimes against humanity, where no exceptions can be invoked for their breach. Therefore international law clearly provides for liability for violation of these norms, but the distinction of person as legal and natural under the Rome Statute, defeats the enforceability of these violations over non-state actors as a collective measure rather than individual prosecutions. The ICJ first mentions *jus cogens* in the context of international environmental protection in Judge Weeramantry's dissenting opinion to the Advisory Opinion to the *WHO's request on the legality of nuclear weapons*.[55] He states that state obligations in respect of the environment "may range from obligations *erga omnes,* through obligations which are in the nature of *jus cogens,* all the way up to the level of international crime."[56] Similarly the appraoch with regard to corporate criminal liability must be of a jus cogens character considering the legal ramifications that result out of the non-recognition of legal persons and their ostensible liability under internatonal criminal law. The attribution of liability on non-state actors such as corporations in international law provides an emerging jurisprudential approach, towards blurring the lines between public and private corporate entities.

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[47] Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms Georgetown*, 11 INT'L ENVTL. L. REV. (1998).
[48] Reports of the Commission to the General Assembly, 2 Y.B. INT'L L. COMM'N 247-48 (1966).
[49] W.T. Gangl, *The Jus Cogens Dimensions of Nuclear Technology*, 13 CORNELL INT'L L.J. 63, 74-77 (1980).
[50] *Id.*
[51] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; UNCLOS, CBD, RAMSAR, African charter on Human and People's Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5.
[52] Lac Lanoux Arbitration (France v. Spain), 12 R.I.A.A. 285, 289, 315, (1957).
[53] Subhash Kumar v. State of Bihar, AIR 1991 SC 420; M.C. Mehta v. Union of India, (2001) 4 SCC 577.
[54] Daniel M. Bodansky, *International Law and the Protection of Biological Diversity* 28 VAND. J. TRANSNAT'L L. 623 (1995).
[55] Legality of the Use by a State of Nuclear Weapons in armed Conflict, Advisory Opinion, 1996 I.C.J. 66.
[56] *Id.*

IV. THE PROTECTION OF BILATERAL INVESTMENT TREATIES:

It is a basic rule that the protection of a corporation is, accordingly, a matter for its parent State,[57] i.e., the State where the corporation is incorporated. This basic rule set out by ICJ in *Barcelona Traction Case*[58] states that: "…where it is a question of an unlawful act committed against a company …the general rule of international law authorizes the State of the company alone to make a claim."[59] This rule has been reiterated in number of cases.[60] The 'place of incorporation test' has been recognized in various cases[61] where States have right to exercise diplomatic protection, when the parent corporation is registered in that State. Under international law, the basic presumption remains that the acts of a state-owned corporation are now, merely by virtue of shareholding, not attributable to the state.[62] The Privy Council took the similar stand[63] where a claim was brought against a mining company owned by the Republic of the Congo.[64] It made reference to ARISWA[65] Articles 4 and 5,[66] and further *Barcelona Traction*[67] stating, "Where a separate juridical entity is formed by the State for commercial or industrial purposes, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities."[68]

Article 4 of the ARISWA[69] is not attracted, as the condition for the attribution of the liability to the State requires the entity to be a 'State organ'. The commentary on ARISWA[70] further clarifies, "The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf."[71] As stated in *EDF case*,[72] "The mere ownership of an entity by a state, does not automatically convert that entity into an organ of the

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[57] JAMES CRAWFORD, OXFORD COMMENTARIES ON INTERNATIONAL LAW: THE LAW OF INTERNATIONAL RESPONSIBILITY 1006 (Oxford Univ. Press, 2010).
[58] Barcelona Traction, Light and Power Company, Limited (Belg. *v.* Spain) 1970 I.C.J. 47.
[59] *Id*.
[60] Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2011 I.C.J., 1006 (Nov. 30); Panevezys-Saldutiskis Railway (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No.76 (Feb. 28).
[61] S.S. Wimbledon (U.K., Fr., It. & Japan v. Ger.) 1923 P.C.I.J. (ser. A) No. 1 at 1008 (August 17); Anglo-Norwegian Fisheries, (U.K. v. Norway, Order), 1951 I.C.J. 117, 1008 (Jan. 18).
[62] Schering Corporation v. Islamic Republic of Iran, 5 Iran-U.S. Cl. Trib. Rep. 361, 368-71 (1984).
[63] FG Hemisphere Associates LLC v Democratic Republic of Congo and La Generale des Carrieres et de Mines (2010 JRC 195).
[64] JAMES CRAWFORD STATE RESPONSIBILITY: THE GENERAL PART 162 (Cambridge Univ. Press, August 2013).
[65] Rep. of Int'l Law Comm'n, 53rd Sess., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* art. 4,5 (Nov. 2001), G.A., 56th Sess., Supp. No. 10 (A/56/10), [hereinafter ARISWA.]
[66] *Supra* note 37. Art 4, 5.
[67] Barcelona Traction, Light and Power Company, Limited (Belg. *v.* Spain) 1970 I.C.J. 3 (Feb. 5).
[68] FG Hemisphere Associates LLC v. Democratic Republic of Congo and La Generale des Carrieres et de Mines (2010) JRC 195.
[69] ARISWA. art. 4.
[70] *Id*.
[71] *Id*.
[72] EDF Services Limited v. Romania, ICSID Case No. ARB/05/13,2009, Award, 190 (2009).

state."[73] Therefore a highly contrasted view exists in international with regard to the liability of corporations.

V. THE INTERNATIONAL MINIMUM STANDARD: UNFAIR PROTECTION AND EXPLOITATION IN DEVELOPING COUNTRIES

The manner in which the FET standards are invoked in order to provide protection to the corporations and resolve matters through arbitration, does not lead to an effective remedy for the victims of corporate crimes. The violation of the FET standard under customary international law[74] involves the question as to whether the purported conduct was arbitrary[75] and against the investor's legitimate expectations.[76] The respect for the investors' legitimate expectations is the most predominant element of the fair and equitable treatment.[77] The tribunal in *Tecmad*,[78] awarding Mexico to pay compensation to the operator of the landfill, held that 'authorities should base their decision on the factors explicitly mentioned in the national legislation'.[79]A stable legal and business environment is an essential element of the fair and equitable treatment, and suspension amounts to its breach.[80] Under the 'Sole Effects' doctrine, an expropriation may take place without or regardless of any intention to expropriate on the part of the host State.[81] The doctrine has been applied as the only factor of determining indirect expropriation.[82] It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the exercise of its police powers, they adopt regulations that are aimed at the general welfare.[83] The mere loss of value does not suffice as an expropriation, as the investor still has full ownership and control.[84] In the Sporrong case[85] the authorities had imposed a construction ban, which the court held was not sufficiently severe to amount to an expropriation.

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[73] *Id*.
[74] Saluka investments BV v. Czech Republic, UNCITRAL, p. 291 (Final Award, 3 November 2008); Occidental Exploration and Production Company v. Ecuador, LCIA/UNCITRAL UN3467 Award, p. 189–190 (2004).
[75] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2 Award (2000).
[76] Tecnicas Medioambientales Tecmed SA v Mexico, ICSID Case No. ARB(AF)/00/2, Award, 510 (2003).
[77] Saluka investments BV v. Czech Republic, UNCITRAL, Final Award, 301 (2008).
[78] Tecnicas Medioambientales Tecmed SA v Mexico, ICSID Case No. ARB(AF)/00/2, Award, 510, p.127 (2003).
[79]*Vattenfall Europe Generation* AG *v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration, 15-20 (2009).
[80] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, (2007)
[81] Norwegian Shipowners' Claims (Nor. v. U.S.) 1 R.I.A.A. 307, Award, (1922).
[82] U. Kreibaum, Regulatory Takings, *Balancing the interest of the Investor and the State*, 8 THE JOURNAL OF WORLD INVESTMENT AND TRADE 724 (2007).
[83] Saluka investments BV v. Czech Republic, UNCITRAL Arbitration Proceedings, p. 255 (Final Award, 2008); Methanex v.United States, UNCITRAL Arbitration Proceedings, p. 7 (Award, 2005).
[84] CMS *Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 264 (2005).
[85] Sporrong and Lonnroth v. Sweden, Eur.Ct.H.R., 23 (1982) A 52, 264.

Thus the assessment of the reasonableness takes into account not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.[86] The present jurisprudence has emphasized that the legitimate expectations are based on the legal order of the host state as it stands at the time when the investor acquires the investment.[87] Moreover Birnie, Boyle and Redgwell note in discussing the Ogoniland case[88] that corporate crimes and breaches against human rights is a legitimate ground to deny an investor the protection of an international instrument.[89] Therefore the investor rights and obligations under international law are recognized, but the issue of criminal liability excluded under the garb of trade protection and stability. The various principles enunciated under arbitration such as the police powers and sole effects doctrine, result in contradictory stances, which do not entail effective deterrence over the activities of corporations. The flaws of arbitration and national legal systems can be overcome with the criminal liability of corporations under the ICC.

VI. CONCLUSION:

'*If greed is the sin of capitalism, envy is the vice of socialism*'[90], these words aptly summarize the juxtaposed situation between the competing societal and individual interest in international criminal law. The third world countries in their efforts to attract investment make the trade-off between the rights of their citizens for the perceived benefits of investment. The bilateral investment treaties which are invoked by the corporations eventually lead to arbitration, which as a dispute settlement mechanism has provided contradictory results and has been divided on ideological lines. The international framework that persists due to the lack of political will abhors the very idea to include corporations under international criminal law. The Maslow's Heirarchy of Needs presents a similar example of how the human psyche tends to classify its interests from mere biological needs to the attainment of self-actualization.

This represents the prevailing policy towards investment protection and the criminal liability of corporations, which does not go beyond the lower strata of greed towards effective implementation of justice in international forums such as the ICC. The unbridled power that the

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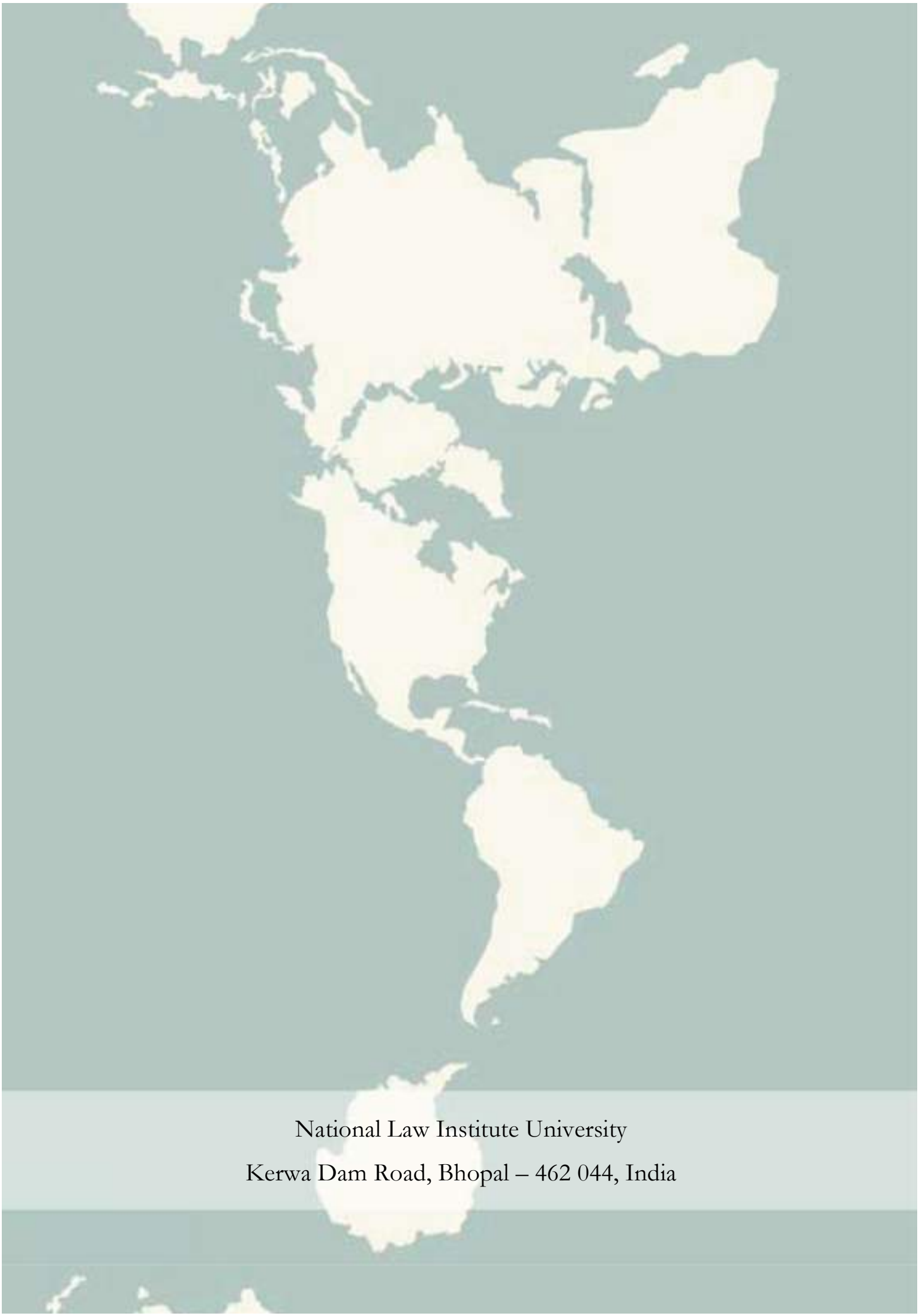
[86] *Duke Energy Electroquil* Partners & Electroquil S.A. *v. Republic of Ecuador*, ICSID Case No. ARB/04/19 Awards, 340 (2008).
[87] Rudolf, GAMI v. Mexico, Award, 2004, 44 ILM (2005) 93.
[88] Fons Coomans, The Ogoni Case before the African Commission on Human and Peoples' Rights, 52 ICLQ (2003) 749-750.
[89] BIRNIE, BOYLE AND REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 327 (Oxford Univ. Press, 2009).
[90] GURCHARAN DAS, THE DIFFICULTY OF BEING GOOD 28 (Penguin Books, 2012).

corporations exercise can be compared to the concept of 'banality of evil'[91] whereby the evil disappears due to the excessive repetition of the act. In a similar manner the abstention from the recognition of legal persons within the ambit of the Rome statute, represents an acceptance of perpetuating the immunity granted to corporations. The applicability of criminal liability before the ICC, would provide the necessary deterrence effect and regulate the unregulated corporate entities. The current mechanism of self- regulation of corporations through soft law instruments[92] also does not provide the substantial check on the activities of transnational corporations. The ineffectual manner, in which the domestic enforcement mechanisms are unable to cope with the transnational nature of crimes and their subsequent enforcement, necessitates a complete overhaul of the strategy employed to deal with the concept of invoking criminal liability for corporations. The tendency of proponents of perceived justice to advocate 'what the law should be' rather than 'what it is' seems to evoke an approach divergent to the means employed to achieve justice. The corporate criminal liability under international criminal law would necessarily as a legal as well as normative justification require the amendment of the Rome Statute.

[91] M. CHIEF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORIC EVOLUTION AND CONTEMPORARY APPLICATION 64 (Cambridge Univ. Press, 2011)
[92] The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, 2006; United Nations Global Compact, 2000.



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