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EDITORIAL

The physical world, as we see, is the extrapolation of ourselves. It is constantly shaped by our perceptions, ideas and thinking. It is a product of our innovation and endeavour that has brought about a situation where impossible feats are not only made possible, but also easily achievable and accessible. From the time man learnt to communicate to the present reality where everybody is a click away, the common denominator is ingenuity and the need to better oneself constantly. Constant interaction makes for a volatile society with ceaseless demands which require to be met at every level.

Law has often been described as a tool for social engineering. There arises a necessity to establish a delicate balance among all the possible societal demands arising out of various groups within the society. Consequently, significant changes in the social structure of mankind necessitate change in the legal structure. This is brought about by legal discourse. This discourse starts with the exchange of ideas and requires vision and endeavour to succeed.

Endeavour is the elixir of creation. Creation leads to inspiration. Inspiration begets novelty. Novelty pursues perfection. Perfection aims at excellence. Excellence warrants celebration. It is this pursuit of excellence that is being celebrated by this edition of the RMLNLU Law Review. This edition showcases seminal works embodying ideas and postulates about several issues that define our social structure. With this edition, we hope to bring about another era of legal discourse.

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AN ECONOMIC ANALYSIS OF THE EFFICIENCY AND FUNCTIONING OF JUDICIAL ACTIVISM (PILs) IN INDIA

- *Soumalya Saha* [*]

"*A little incursion into law-making interstitially, as Holmes put it, may be permissible.*"[1]

1. INTRODUCTION

It is from this concept that judicial activism emanated and found expression through judgments of 'activist' judges. The Indian judges have taken upon themselves the task of ensuring maximum freedom to the masses and in the process, to galvanize the executive and the legislature to work for public good.[2] One of the meanings of judicial activism is that the function of the court is not merely to interpret the law but also to mould it according to the passion for social justice.[3]

It has been argued that 'Judicial Activism', by the Hon'ble Supreme Court in particular, has been substituted for the improper functioning of the executive and the legislature. The matters include environmental protection, human rights, fundamental rights, public welfare rights, compensation for the victims, etc. Such a 'Constitutional coup' where one institution (judiciary) replaces the other (the legislative and the executive), is arguably against the doctrine of separation of powers or minimization of the 'transaction costs'.

The researcher will discuss how the judiciary in India has played an active role in guaranteeing various welfare rights to the public at large. Judicial activism in the form of Public Interest Litigation (PIL) has made easy-accessibility to justice in every corner of the society. It will show how the judiciary has stepped in whenever the legislative and the executive failed or lacked in ensuring the public welfare rights in the society. This constitutional entrenchment of

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[1] Justice BN Srikrishna, 'Highways and Bye-Lanes of Justice' (2005) 8 SCC (J) 3.

[2] Arpita Saha, 'Judicial Activism In India: A Necessary Evil' (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979&http:>/ accessed 3 October 2012.

[3] *Sukh Dass v Union Territory of Arunachal Pradesh* AIR 1986 SC 991; *Sheela Barse v Union of India* AIR 1986 SC 1773.

public welfare rights through the process of judicial activism is a success. However, the integrity of the separation of powers along with a proper, balanced spending of the State funds has to be maintained and justified in an economic framework, especially in a developing country like India.

2. TOOLS USED FOR ECONOMIC ANALYSIS OF JUDICIAL ACTIVISM

2.1 TRANSACTION COSTS

The Transaction Costs approach was first designed by economist, Ronald Coase as part of the theory of the institutional structure (firm) and functioning of the economy. According to him, transaction cost is the mandatory consideration for the basic understanding of the working of an economic system and a fundamental basis for establishing an economic policy.[4] Transaction is whenever there is a transfer of any kind of goods and services between provider and user and the "cost of using the price mechanism" of such transaction to that transfer comprises transaction cost as per Coase, which is not only monetary but also in the form of resources, time, energy and other similar factors used by either party in the transaction.[5] As observed by Coase, transaction costs can be three types, *viz.* (a) search and information costs, (b) bargaining and decision costs, and (c) policing and enforcement costs.[6] Thus, all kinds of cost, not only monetary but also in terms of resources and other factors required in a particular transaction would comprise transaction costs. There is no singular definite definition of transaction costs but what is important to understand is that the transaction costs are dependent on the governance or structure of the transaction i.e. on how the transaction is conducted. Similarly, in the context of judicial activism, transaction costs are calculated on the cost of the price mechanism necessary for the processes. Transaction costs can be either internal to the organisation i.e. when it occurs within an organisation, costs include managing and monitoring personnel and procuring inputs; or transaction costs can be external to an organisation i.e. while buying from an external provider, costs will consist of source selection, contract management,

[4] Ronald H Coase, 'The Concise Encyclopaedia of Economics' (2008) <http://www.econlib.org/library/Enc/bios/Coase.html> accessed 28 June 2014.
[5] ibid.
[6] ibid (n 4).

and performance monitoring.[7] Judicial activism consists of both internal and external transaction costs.

2.2 PUBLIC GOODS AND EXTERNALITIES

At the microeconomic level, the two most important and controversial roles of the Government are: (a) providing public goods and (b) dealing with the market failure due to externalities.[8] Government interference is driven by the idea of the failure of marketplace to provide public goods or handle externalities.[9] PIL, a mechanism by the judiciary to enforce public welfare rights can be said to be a pure public good. Pure public goods have two distinct characteristics 1. 'Non- excludability' i.e. when goods are consumed by non-payers, they cannot be excluded from the benefits of the good of service and 2. 'Non-rivalrous consumption, that is, where goods may be consumed by many at the same time with no additional cost.[10] In the present scenario, the question arises whether the Government's mechanism of PILs in the judiciary to guarantee public welfare rights is a public good, rather public service or not? As already discussed above, PILs deal with issues that impact the public at large. The Government provides it in the service of the public. However, that alone doesn't mean that it becomes a public good in an economic context. To understand the same, one should analyse it with respect to the above-mentioned intrinsic features of public goods. It cannot be privately provided because if the Government attempted charging individuals for the enforcement of regulations and policies passed by the judiciary in PILs, thereby giving it the non-excludability angle, it gives rise to a free-rider problem. A free-rider problem is one where each person will seek to "free-ride" by allowing others to pay for the enforcement of the policies and regulations devised by the Courts in PILs, meant for the public at large. Similarly, charging certain individual or groups of individual for the effective implementation of those policies and excluding the ones who are unwilling to pay from the impact of such welfare policies, would not lead to maximization of the cost utility because the impact is so large that such exclusion

[7] 'Transaction Cost Economics' <*http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR865/MR865.chap2.pdf*> accessed 28 June 2014.
[8] 'Public Goods' <http://www2.pitt.edu/~upjecon/MCG/MICRO/GOVT/Pubgood.html> accessed 28 June 2014.
[9] Tyler Cowen, 'Public Goods and Externalities' <www.ezconlib.org/library/Enc1/PublicGoodsandExternalities.html> accessed 28 June 2014.
[10] ibid.

is inefficient in the way that the non-payers could enjoy the welfare-impact without increasing the cost or reducing anyone's enjoyment resulting in non-rivalrous consumption. Thus, PILs can qualify as Public Goods. One classic example is the codification of rules and regulations on safety of women at workplace through the Sexual Harassment Act and Rules, 2013 laid down by the Indian Judiciary in the landmark judgment of *Vishakha v. State of Rajasthan*,[11] which was filed as a public interest litigation. So, in this case all the women at the work place benefit from the legislation, though they might not have made any kind contribution towards the codification of it.

Externalities exist whenever the benefit or cost of consuming goods impact individuals who are not actually consuming it and the relevant costs and benefits are not reflected in the market prices.[12] Externalities can be of two types: (a) Positive Externality[13] where one person gets benefit from the other person's actions, viz. benefits of cleaning up a polluted lake by its owner will be enjoyed by the people living in its vicinity and none of them can be charged for such benefits while, (b) Negative Externality[14] is when one person's action causes harm to the other person, as in the Delhi Air Pollution case, which was again a PIL, where the factory owners did not consider the cost of harms caused due to pollution in the process of production which was much more than the tax they were paying for the pollution caused by the production. Positive Externality and Free-Rider Problem can be said to be the two different sides of the same coin.[15]

3. ANALYSIS OF JUDICIAL ACTIVISM IN INDIA

The transaction costs that arise while the Government implements the policies and decisions of the Judiciary in PILs to enforce certain rights of the public at large are utilized for the purpose of efficient functioning of the society. Thus, this leads to the presumption that in the absence of such transaction costs, the Government's act of implementing the policies will be redundant. In a system with separation of powers, the legislature has the role of creating the law and policy, while the executive executes them and the judiciary takes an interpretational approach to look

[11] *Vishakha v State of Rajasthan* AIR 1997 SC 3011.
[12] Nick Sanders, 'A Brief Discussion of Public Goods and Externalities: Selected Topics from Chapter 15' <http://njsanders.people.wm.edu/1A/Public_Goods.pdf> accessed 29 June 2014.
[13] ibid (n 12).
[14] ibid (n 12).
[15] ibid (n 9).

into the validity of those laws and policies, and the loopholes and at the same time, assign liability if certain rights have not been attended or have been violated partially or fully. [16] But, very often, Governments rely on various power bodies like the bureaucracy while implementing the welfare policies and regulations that have come through judicial activism and have weak incentives to serve the consumers. Moreover, politicians may supply these "public services" guaranteed by such judicial activism to serve their own interests over the interests of the public when the government makes unnecessary expenses in the name of giving effect to a welfare policy given by a judiciary in a PIL matter and then, by compelling people to support projects they don't wish to, leading to the problem of "forced riders". All these put a huge question mark on the social as well as the economic (cost-effectiveness) impact of judicial activism through PILs in India.

3.1 SOCIOLOGICAL IMPACT OF PILS:

A question that arises is whether judicial activism in the form of PIL and the actions of the Indian Judiciary in the arena of public welfare rights have effectively guaranteed these rights in the cases where the court intervened. The evidence in that respect is not overwhelming.

On the one hand, the possibility of a court to intervene in these cases is of course inherently limited by the fact that the court acts in individual cases only and does not have the same authority as the legislature or administrative authority to regulate the public welfare rights more generally. Therefore, the court cannot stop entirely the infringement of these rights or government lawlessness. Its actions in these areas are bound to be symbolic. There is some empirical evidence that the orders by the Hon'ble Supreme Court have led to a substantial guarantee of public welfare rights. As already discussed before, the decisions of the Hon'ble Supreme Court in the landmark cases, have led to substantial improvements in the status of the public welfare rights conferred to the society. The decisions of the Hon'ble Supreme Court like recognition of free primary education as a fundamental right, in *Unni Krishnan v. State of Andhra Pradesh*,[17] or the introduction of mid-day meal schemes in all public schools in

[16] 'Doctrine of Separation Of Powers, Introduction' <www.legalquest.in/index.php/students/law-study-materials/45-administrative-law/407-doctrine-of-separation-of-powers.html> accessed 29 June 2014.
[17] *Unni Krishnan v State of Andhra Pradesh* AIR 1993 SC 217.

People's Union for Civil liberties v. Union of India[18] have brought renaissance in the society. Thus, in the form of judicial activism, the judiciary has brought to light various dormant, but immensely important issues that have been ignored till date without being raised. However, at the same time, there are various factors that work against proper functioning of the judicial activism, *viz.* delays in the implementation of the court's decisions, insufficient investigation into matters leading to gross miscalculations in deciding the risks and the externalities that can affect the process. Further, it has been argued that such an encroachment by the judiciary onto the territory of the executive and the legislature is an absolute violation of the Constitutional Doctrine of the Separation of Powers. The Legislature and the Executive branches of the government are bodies responsible for the allocation of money into the schemes that they either legislate or implement.

3.2 COST-EFFECTIVENESS OF JUDICIAL ACTIVISM:

The costs associated with judicial activism *via* PIL, as they are modelled in economic analyses, can be either private or collective. The latter are those that result from the consequences of a legal decision on society.

From an economic perspective it is especially important to ask the question whether the PIL was cost-effective in the sense that the results were also reached at the lowest costs possible. This question has two separate aspects. On one hand the question arises whether the measures imposed as a result of the PILs were cost-effective, in the sense that the contents of the public welfare rights ordered by the court gave incentives to operators to reach the aspired level of enjoyment of public welfare rights by the members of the society, at the lowest cost possible. On the other hand, whether PIL is the lowest cost alternative to reach this particular goal. To start with the latter question, information on the transaction costs of PIL is not known. One could argue that these costs could be substantial, given that the judiciary has in some cases ordered several rulings, involved many committees, and followed-up a case over many years. The administrative costs for the functioning of the judiciary can, thus, be substantial. However, the essence of PIL is precisely that a plaintiff can start the proceedings at relatively low costs (writing of a letter). Moreover, these (administrative) costs of PILs should, therefore, not

[18] *People's Union for Civil liberties v Union of India* 2004 9 SCC 580; Paul O' Connell, 'Vindicating Public Welfare Rights, International Standards and Comparative Experiences' (Routledge Taylor and Francis Group, London and New York) 94.

necessarily be larger than the costs of the functioning of a regulatory system. In the latter case, an administrative agency needs to intervene to formulate regulatory standards for the entire set up, install a monitoring, enforcement and compliance committees, etc.

PIL is an example of positive externality where the Government spends resources which is enjoyed by people at large without incurring any expenses and that is exactly the precise way of defining efficient production of a good i.e. greater production of a good when the added benefits are more than the added costs.[19] However, simultaneously, we must stop when the added costs exceed the added benefits. Summary of conditions for efficient production (1) all units of the good are produced for which the value to consumers is greater than the costs of production, and (2) no unit of the good is produced that costs more to produce than the value it has for the consumers of that good.[20]

While, at the same time, the idea of judicial activism is a huge expense to the State funds, firstly, in the way that often these cases are funded by the Government with the tax payers' money and thereafter, the expenses used up in the process of litigation and the expensive implementation of the same. Efficient functioning of the three separate tiers under the doctrine of Separation of Powers requires its own transaction costs, not only in monetary terms but also in terms of resources and other similar additional factors. It has been argued that, the transaction costs involved in the functioning of judiciary to step out of its territory and look over the performance over the other two tiers can be considered a drain of the economy. Judicial Activism not only affects the economy, but also minimizes the effective functioning of the legislature and the executive, also known as "unprincipled judicial activism"[21] which thereby, hinders maximisation of profits from the transaction costs spent by the Government on the other two tiers. While often the situation can be that the transaction costs used in the functioning of the legislative and the executive are minimized with a rise in the transaction costs for the judiciary, to overlook the performance of the former two bodies in case of judicial activism.[22]

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[19] 'Explain Externalities and Public Goods and How They Affect Efficiency of Market Outcomes' <http://www.csun.edu/sites/default/files/micro9.pdf> accessed 29 June 2014.
[20] ibid (n 9).
[21] David Lewis Schaffer, 'When it comes to Judges, 'Pragmatic' Means Unprincipled' *The Wall Street Journal* (New York, 9 May 2009) <http://online.wsj.com/news/articles/SB124182908227302619> accessed 29 June 2014.
[22] TCA Anant and Jaivir Singh , 'An Economic Analysis of Judicial Activism' *Economic and Political Weekly* (Mumbai, 26 October 2002) Vol XXXVII No 43 <http://www.epw.in/special-articles/economic-analysis-judicial-activism.html?ip_login_no_cache=00f940d297ffce3c645e6e9bd4ea14d6> accessed 29 June 2014.

Moreover, there are other factors that have to be taken into consideration that might hinder the profit-maximisation process and one of them being insufficient information regarding the risks and externalities.[23] Further, the judiciary has, in many cases, taken expert opinion from various officials of the other two branches of the government while dealing with decisions that would normally be made by one of the other respective tiers, thereby, adding more to the transaction costs in the implementation process of the policies drafted in PILs.

3.3 EFFICIENCY

It is clear, by now, that even if one were to find some evidence that judicial activism in the form of PIL guarantees all the rights, one cannot be certain that they are guaranteed at their maximum efficiency. Indeed, we did not make any analysis whether the PIL is the ideal instrument to reach that goal of guaranteeing the rights at its apex. It is probably impossible to test in practice its efficiency in the sense that one could not test whether this is the legal instrument that optimally contributes to maximizing social welfare. What one can, at best, test is whether it has had any effectiveness in the sense that the rights were actually guaranteed. However, even if one were to find that there is such effectiveness, this does not say too much from an economic perspective for the simple reason that the price to guarantee those rights may have been much too high compared to alternative solutions. Hence, in addition to addressing the effectiveness of judicial activism, one should also pay some attention to its cost-effectiveness by addressing whether the goal set by the legislature of guaranteeing certain rights been reached at the lowest possible costs. Though contractual agreements have been observed as an alternative to overcome such public goods and externality problems, they fail at times. The costs of bargaining and striking a public contract in PIL matters may be very high which can drain the State funds. The agreement may collapse in cases where some parties to the agreement may seek to hold out for a better deal while in other cases it is simply, too costly to contact contract and deal with all the potential beneficiaries of an agreement.[24] In cases such as the Delhi air pollution case, factory owners might find it impossible to negotiate directly with each affected citizen to decrease pollution.

4. JUSTIFYING JUDICIAL ACTIVISM IN INDIAN SCENARIO

[23] ibid.
[24] ibid (n 9).

The particular Indian experience combined with the framework addressed above shows that some indicators can be provided to the circumstances under which PIL may be effective; at the same time some indicators can also be given on how to increase the effectiveness of this PIL.

First, given the still-presumed superior informational advantage of regulatory and administrative authorities to guarantee public welfare rights in a cost-effective way, a standard setting through the judiciary should only take place as a second-best option when (*inter alia*, as a result of capacity or corruption problems) a standard setting through the regulation fails or is not enforced.

Secondly, the case of the Supreme Court of India shows that when standard-setting through the judiciary takes place as an alternative for regulation by the executive, guarantees should be provided that the judiciary has the necessary information to set cost-effective standards.

One way to do this is to make use of committees that can advise the court. One should, however, be careful that the judiciary does not intervene through its decisions in the functioning of the market, for example, by fixing prices for specific commodities like medicines, food commodities, stationery, construction materials etc.

Thirdly, in order to obtain both the guarantee of cost-effective standard setting and the guarantee of effective compliance and enforcement, a high stakeholder involvement in the decision-making by the court is needed, either by having the stakeholders involved in the committees or allowing them to provide information (e.g., status of people enjoying the rights, sections deprived of the enjoyment of those rights) on various alternative options to reach the goals desired by the court at different costs.

Fourthly, reliance on the court and judicial activism *via* PIL only makes sense in cases where it is clear that problems that occur at the level of the legislator or the executive do not occur in the same way with the judiciary. Hence, when PIL is used as a method for ensuring public welfare rights and eradicating corruption problems with the executive, judicial independence should guarantee that better results can be achieved by standard-setting through the judiciary.

Fifthly, given the fact that a court only reacts in one particular case and in a reactive manner, standard setting as a result of PIL can only be a temporary solution to intervene when the political and legislative system (temporarily) fails. Ideally, the result of judicial activism should be to move the regulatory and administrative authorities to fulfil their task of setting cost-effective standards in the PIL and enforcing them in an adequate way as well. Indeed, in the

long run only via standard setting through regulatory authorities' sustainable solutions can be achieved.

Economists Laffont and Meleu[25] have modelled the separation of powers as an instrument against corruption and have shown that the value of such separation is higher in developing countries.[26] Similarly, in a developing country like ours, the question then arises as to whether it is possible to solve the conflicts arising out of judicial activism. Though, there are various opposing theories, in the researcher's opinion, judicial activism in the form of PILs is an efficient and cost-effective method to deal with various important issues of public welfare in a developing country like India. While, at the same time, the question of the process being cost-effective should be answered on a context basis, that is each case should be thoroughly analysed by a committee or a group of personnel qualified to man the job and decide whether or not the case would be for the benefit of the public as a whole.

[25] J Laffont and M Meleu, 'Separation of Powers and Development' Journal of Development Economics' Vol 64, No 1 February 2001, pp 129-145.
[26] ibid.

THE INVISIBLE TRADE: HUMAN TRAFFICKING IN THE DEEP WEB

- *Abhigyan Siddhant & Mohnaa Shrivastava* *

"Today, I want to discuss an issue that ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organised crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery."

- BARACK OBAMA

1. WHAT IS DEEP WEB AND HOW IT WORKS?

Today it is possible to browse trillions of websites on the web and we cannot possibly think of a life without such access. However, the web that is available to us is only a fraction of the entire web. There exist multiple levels of web, only two of which we can access. There are three levels of the web that cannot be accessed by a common browser and are being used to carry out some serious criminal activity. This is the world of a hidden web that contains sensitive information and databases that are not available to all search engines.[1] This is known as the 'Deep Web'. The information available on the Deep Web is invisible to the Surface Web, giving it the names, Invisible Web or the Hidden Web. Research states that the web we know and use in daily life makes up only one percent of the World Wide Web.[2]

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[1] Alex Wright, 'Exploring a 'Deep Web' That Google Can't Grasp' *The New York Times* (New York, 22 February 2009).

[2] Jose Pagliery, 'The Deep Web you don't know about' (*CNN Money*, 2014) <http://money.cnn.com/2014/03/10/technology/deep-web/index.html> accessed 28 April 2014.

The Deep Web functions on the basis of anonymity and un-traceability. Any individual who uses the Deep Web is completely anonymous and cannot be located. This poses great difficulty in banning the websites that give a portal to such activities. What is happening in Syria came on the Deep Web much before it came on the Surface Web only because Deep Web provides for posting such videos without revealing the identity of the person posting them. The access to Deep Web is made through a fake Internet Protocol address. This makes the hunting down of a person difficult.[3] This is a positive facility to people living under an oppressive regime, as they have no fear of being traced. A web crawler follows the Unique Resource Locator links, indexes the content and then relays the results again to search engine central for user query or search.[4] A web crawler cannot produce what it cannot index. The crawlers completely ignore the vast amount of information that lays hidden behind the searchable electronic databases. The browsers that we use in our daily lives cannot index the information that resides in the Deep Web.[5] There are various levels of invisibility in the Deep Web. The first level of invisibility contains only disconnect URLs and stand-alone web pages. The second level, however, consists of those websites that require a password to be accessed.[6] The third level contains Proprietary Web where either registration or fee is needed for an access to be made. The fourth level of invisibility consists of those websites that cannot be reached at all by the search engines.[7] The effective use of the invisible net is only in the cases where the user has a specific query and he wishes to get a specific result and not a million.[8]

On the Deep Web, one can conveniently find services that offer to execute criminal activities.[9] One can hire an assassin, get fake passports and identities made, rent hackers, buy weapons illegally, get the best quality cannabis, high quality counterfeits, illegal pharmaceuticals, child pornography, genital mutilation videos, get humans to conduct experiments on and watch

[3] J Russell and R Cohn, *Darknet* (1st edn, Tbilisi State University, Tbilisi 2012).
[4] E Dragut and others, *Deep Web Query Interface Understanding and Integration* (1st edn, Morgan & Claypool Publishers 2012).
[5] R Amores and P Paganini, *The Deep Dark Web: The Hidden World* (1st edn, CreateSpace Independent Publishing Platform 2012).
[6] Lee Ratzan, 'Mining the Deep Web: Search strategies that work: How to become an enlightened searcher' (*Computer World*, 11 December 2006) <http://www.computerworld.com/s/article/9005757/Mining_the_Deep_Web_Search_strategies_that_work?pageNumber=1 > accessed 29 April 2014.
[7] Nimish Sawant, 'Crawling the Deep Web' (*Live Mint*, 2010) <http://www.livemint.com/Leisure/2Y84mzsoI1AH64A5LKKLhN/Crawling-the-deep-web.html > accessed 29 April 2014.
[8] J Russell and R Cohn, *Invisible Web* (1st edn, Book on Demand 2012).
[9] Adrian Goldberg, 'The dark web: Guns and drugs for sale on the internet's secret black market' (*BBC News Business*, 3 February 2012) <http://www.bbc.com/news/business-16801382> accessed 28 April 2014.

videos of men fighting animals.[10] The ease of access is so much that one can get such services rendered from any part of the world in the least possible time. This is what makes the Deep Web extremely dangerous.[11] The contract amount of one agreement to kill a person begins from 6000 US Dollars. A person can be arranged to take the liability of a particular murder on being paid. The perpetrators shamelessly explain their mode of payment, mode of service and communication. Such is the convenience that the Deep Web provides to those who can pay for these services and those who can render them, making it extremely dangerous. Deep Web has facilitated more crimes than it has helped in research and whistle-blowing. It is the most upcoming threat to the society and is capable of exposing any person, in any part of the world, to any amount of risk.

2. HUMAN TRAFFICKING IN THE DEEP WEB

The Deep Web is a world of its own. There are no rules that apply here, save anonymity. This translates into a safe haven for criminals without any fear of being caught. A number of crimes have flourished in this dark space of the Internet, seldom explored, but often exploited. The Deep Web is the unregulated section of the Web, and thus the authorities have no control over the transactions that take place there. In this corner of the Internet, anyone who chooses to enter is faced with a dreadful reality: the collective disintegration of human morality.

One of the most common crimes on the Deep Web, apart from the illegal drug trade, is that of trafficking in human beings.[12] A simple search on a competent website can provide links to innumerable illegal services, including human beings, all being sold for the right price.[13] Human trafficking on the Internet is the modern rendition of slavery. A person is bought and sold, for many purposes, over the Web, and the primary amongst them is sexual slavery. Online enterprises have spiraled out of control and mushroomed on every step, providing all sorts of release for the perverted desires of the few. These organisations make extensive use of methods including forums, chat rooms, advertisements, job postings and other hidden services to enable

[10] Alun Palmer, 'Deep web: Drugs, guns, assassins, jet planes all for sale on vast anonymous network' *The Mirror* (United Kingdom, 22 September 2012).
[11] Chris Sherman & Gary Price, *The Invisible Web: Uncovering Information Sources Search Engines Can't* (1st edn, OUP 2001) xxii.
[12] Jason Roessle, 'Human trafficking exists across Canada' (*BC Local News*, 26 April 2014) <http://www.bclocalnews.com/news/256836711.html> accessed 28 April 2014.
[13] Dianne Gallagher, 'Peeling Back the Layers of the 'Dark Web' (*WCNC*, 20 November 2013) <http://www.wcnc.com/news/local/The-Dark-Web-232606871.html> accessed 28 April 2014.

a growing industry that cruelly violates all sense of righteousness that a person is bestowed with.[14]

The dire need of regulation arises towards the area of the Internet that deal in child pornography and human trafficking of children.[15] The advent of Internet and the easy access to the wide array of websites and services hidden inconspicuously in the murky dungeons of the Deep Web has made the task of child traffickers infinitely lucrative and possibly easier. A new form of sexual exploitation of children has evolved due to the Internet, which avails the benefits of the webcam chatting services.[16] People around the globe pay for chatting with underage children over webcams and engage them in sexual activities, while remaining anonymous.[17] This has a drastic effect on the reach of the criminals, as they are comfortably hidden from their customers and their victims through the veils of the cyber space, leading to massive difficulty in ever tracking down their operations.

To tackle this, an international charitable organisation called Terre des Hommes conducted a large-scale sting operation to catch people trying to indulge in sexual activities with underage children over the Internet.[18] The organisation used an exceptionally innovative method to achieve this task, as they believed old, traditional methods were miserable in catching any predators, because they just would not come forward.[19] They created a Computer-Generated Imagery (CGI) of an incredibly life-like, but completely virtual, 10-year-old girl from Philippines called 'Sweetie' and then entered the cyber space, looking for predators.[20] All this was done in the Deep Web, for it is here that such chat-rooms flourish and attract the indecent approaches of the morally corrupt. The lack of surveillance and anonymity encourage the deviants to lurk the alleys of the Hidden Web. Terre des Hommes entered various chat forums

[14] Eric Markowitz, 'DARPA Plans to Hunt Down Human Traffickers Using Deep Web' (*Vocativ*, 6 February 2014) <http://www.vocativ.com/tech/infosec/darpa-plans-hunt-human-traffickers-using-deep-web/> accessed 28 April 2014.

[15] Raymond Bechard, 'What You Must Know About the "Deep Web' (*Examiner*, 25 April 2014) <http://www.examiner.com/article/what-you-must-know-about-the-deep-web> accessed 28 April 2014.

[16] Emily Thomas, 'International Child Sex Abuse Sting Operation IDs Hundreds of Suspects' *The Huffington Post* (16 January 2014).

[17] 'Three Australians involved in live child sex abuse webcam ring dismantled by police' (*ABC News*, 16 January 2014) <http://www.abc.net.au/news/2014-01-16/australians-arrested-as-police-smash-online-child-sex-abuse-ring/5203044> accessed 28 April 2014.

[18] Angus Crawford, 'Computer-generated 'Sweetie' catches online predators' (*BBC News*, 5 November 2013) <http://www.bbc.com/news/uk-24818769> accessed 28 April 2014.

[19] Ross McGuinness, 'Sweetie and Terre des Hommes: Is paedophile sting a new form of vigilantism?' (*Metro News*, 6 November 2013) <http://metro.co.uk/2013/11/06/sweetie-and-terre-des-hommes-is-paedophile-sting-a-new-form-of-vigilantism-4175616/> accessed 28 April 2014.

[20] Leslie Katz, 'Meet 'Sweetie,' a virtual girl created to target child predators' (*CNET News*, 5 November 2013) <http://www.cnet.com/news/meet-sweetie-a-virtual-girl-created-to-target-child-predators/> accessed April 28 2014.

where these sexual piranhas loom and made contact with them. The group is said to have received thousands of invitations for chat within minutes.[21]

The sting continued for a period of 10-weeks and received a total approach of about 20,000 people from 71 countries.[22] The group repeatedly identified themselves as being a 10-year-old girl from Philippines so as to ensure that the people approaching knew this fact loud and clear. There was indeed a clear emphasis on this fact. They then proceeded to gather information about these people through legitimate means such as asking them directly about their details as a way of making small-talk, going through their Facebook profiles or other social network such as Skype handles, and obtaining their contact information into their cyber existence.[23] The whole operation was run from an industrial warehouse in Amsterdam and ended up with concrete information about 1,000 people looking to solicit with the 10-year-old virtual girl.[24]

Out of the 1,000 people, 254 people were from the United States, 110 from Britain and 103 hailed from India, making the top three nations for online predators caught in this sting.[25] Furthermore, out of the 1,000 people, 999 were male and one was a female.[26] Thus, they carved out patterns through the data they collected, stating that the people seeking to chat were essentially males from relatively developed countries. Terre des Hommes, after gathering the contact information and details, handed over the dossiers they had prepare from all the data to the Interpol, marking an extremely well thought-out and successful operation.[27]

The Federal Bureau of Investigation estimates that there are around 750,000 paedophiles online at any given moment in time. This is a staggering figure, as it puts into light the sheer magnitude

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[21] 'Meet Sweetie, the girl catching online predators' (*BBC News*, 5 November 2013) <http://www.bbc.com/news/world-europe-24819538> accessed 28 April 2014.

[22] Mark Memmott, 'Virtual 'Sweetie' Uncovered 1,000 Sexual Predators, Group Says' (*National Pubic Radio News*, 5 November 2013) <http://www.npr.org/blogs/thetwo-way/2013/11/05/243245567/virtual-sweetie-uncovered-1-000-sexual-predators-group-says> accessed 28 April 2014.

[23] Thomas Escritt, 'Dutch activists track alleged child abusers with the help of digital "girl"' (*Thomson Reuters*, 4 November 2013) <http://in.reuters.com/article/2013/11/04/us-dutch-childabuse-idINBRE9A30QQ20131104> accessed 28 April 2014.

[24] 'The ten-year-old girl called 'Sweetie' who has caught more than a THOUSAND sexual predators including 110 Britons' *Daily Mail* (UK, 4 November 2013).

[25] '"Sweetie" Sting: Dutch Activists Claim to Nab 1,000 Sex Predators using Computer-Generated "Child"' (*CBS News*, 5 November 2013) <http://www.cbsnews.com/news/sweetie-sting-dutch-activists-claim-to-nab-1000-sex-predators-using-computer-generated-child/> accessed 28 April 2014.

[26] Henry Austin, 'Virtual girl dubbed 'Sweetie' snares thousands of would-be sex predators' (*NBC News*, 5 November 2013) <http://www.nbcnews.com/news/other/virtual-girl-dubbed-sweetie-snares-thousands-would-be-sex-predators-f8C11533188> accessed 28 April 2014.

[27] Adam Taylor, 'This Girl Is the Scary New Face Of A Global Hunt For Pedophiles' (*Business Insider*, 5 November 2013) <http://www.businessinsider.in/This-Girl-Is-The-Scary-New-Face-Of-A-Global-Hunt-For-Pedophiles/articleshow/25273560.cms> accessed 28 April 2014.

of seekers of child prostitution. Terre des Hommes quite rightly points out that if they were able to find 1,000 people in two months with their limited resources, the authorities could easily bust 100,000 such cases annually.[28] They suggested a worldwide collaboration of international police organisations to carry out such operations to gather information about pedophiles and sexual predators globally. This, they believed, was the best way to aptly tackle the problem.

Child pornography is another major example of cyber human trafficking in the Deep Web. It is one of the worst forms of crimes against children as it essentially translates into perpetual sexual slavery of such children. "Every piece of child pornography … is a record of the sexual use/abuse of the children involved."[29] The prevalent, and the correct, presumption in law, and a true fact verified by psychiatric and psychological studies is that the children involved in the world of child pornography, are first and foremost, victims of sexual abuse.[30]

The true nature of child pornography is a very complex one.[31] It is not merely an illicit entertainment business; it is an illegal multi-billion dollar industry that is controlled by the organised mafia.[32] In fact, the industry has become so big that its annual turnover is estimated to be around 12 billion dollars in the US alone. All of this money is absolutely illegal. The Federal Bureau of Investigation in the US estimates that between 1996 to 2005, the number of cases they investigated related to child pornography went up by a staggering 2000%.[33]

There have been certain operations that have been carried out by the police to bust child pornography rackets. One such operation was called Operation Auxin, carried out by the Australian police in September of 2004.[34] In this operation, almost 200 people were arrested on the charges of indulging in child pornography.[35] Across the globe, another such operation

[28] Celia Carr, "This is the story of Sweetie": The Fight to End Webcam Child Sex Tourism' (*The Brock Press*, 19 November 2013) <http://www.brockpress.com/2013/11/this-is-the-story-of-sweetie-the-fight-to-end-webcam-child-sex-tourism/> accessed 28 April 2014.
[29] Kelly and Scott, 'Sex Offenders and the Internet' [1993] 116.
[30] D Finkelhor, 'Current Information on the Scope and Nature of Child Sexual Abuse' [1994] Future of Children.
[31] E Quayle and M Taylor, *Child Pornography: An Internet Crime* (1st edn, Brunner-Routledge Publishing 2003).
[32] Tom Morgan, 'Kids sex victims of mafia' *The Sun* (UK, 1 June 2013).
[33] 'Experts Speak on Growing Prevalence of Child Porn Cases' (*NBC News*, 9 November 2013) <http://www.nbc29.com/story/23920278/experts-speak-on-growing-prevalence-of-child-porn-cases> accessed 28 April 2014.
[34] Philip Cornford, 'Police lift lid on web of abuse' (*Sydney Morning Herald*, 1 October 2004) <http://www.smh.com.au/articles/2004/09/30/1096527869981.html> accessed 28 April 2014.
[35] Mike Sexton, 'Child porn crackdown goes global' (*ABC News*, 9 November 2004) <http://www.abc.net.au/7.30/content/2004/s1239681.htm> accessed 28 April 2014.

to nab similar criminals was carried out by the Toronto Police in Canada called Project Spade.[36] In this operation, conducted over a period of 3 years and concluded in 2013, the Canadian police arrested 348 people in child pornography charges.[37] Over the course of the investigation, more than 350,000 images and 9,000 videos of child sexual abuse were found.[38]

The Department of Homeland Security of the United States of America recently targeted the Deep Web, where all of these child pornography rings flourish, and a child pornography ring was dismantled.[39] The authorities confiscated 2,000 webcam-shot videos and are now going after the 27,000 subscribers to the Deep Web service.[40] The Defense Advanced Research Projects Agency (DARPA) of the United States of America's Department of Defense has now ventured into the Deep Web in order to index all the information and data store in there. This is an ambitious project, and if successful, it would provide a massively vital tool to combat crimes, including human trafficking, in the hidden parts of the Internet.[41]

The operations by the authorities around the world have been hugely successful in bringing the gravity of the problem in the conscience of the people in general. They have effectively outlined the depth to which these criminals have infiltrated the Internet, and taken control of the Deep Web. However, the very scale of this problem makes it impossible for any of these projects to be an absolute success, as no matter how many people are arrested, more criminals are born. The menace of human trafficking online continues unabated, as the reach of the criminals sinks deeper into the Web, and the authorities are rendered helpless in restricting anything done anonymously.

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[36] Diana Mehta, 'Project Spade, massive international child porn bust centered on Toronto, nets 348 arrests in 'horrific sexual acts'' (*National Post*, 14 November 2013) <http://news.nationalpost.com/2013/11/14/at-least-386-victims-rescued-after-project-spade-a-massive-child-porn-bust-that-started-in-toronto/> accessed 28 April 2014.

[37] 'Hundreds held over Canada child porn' (*BBC News*, 14 November 2013) <http://www.bbc.co.uk/news/world-us-canada-24944358> accessed 28 April 2014.

[38] 'Project Spade nets 341 on child porn charges' (*eNews Channel Africa*, 15 November 2013) <http://www.enca.com/world/safricans-among-arrested-global-child-porn-ring> accessed 28 April 2014.

[39] Patrick Howell O'Neill, 'Feds dismantle massive Deep Web child porn ring' (*The Daily Dot*, 19 March 2014) <http://www.dailydot.com/crime/ice-tor-operation-roundtable/> accessed 28 April 2014.

[40] Eric Tucker, 'Feds Bust Online Child Exploitation Network: 14 Men Arrested' *The Huffington Post* (18 March 2014).

[41] Elena Malykhina, 'DARPA Pursues Deep Web Search Tools' (*Information Week*, 12 February 2014) <http://www.informationweek.com/government/leadership/darpa-pursues-deep-web-search-tools/d/d-id/1113796> accessed 28 April 2014.

3. THE NEW CURRENCY OF CRIME: BITCOIN ARRANGEMENT IN HUMAN TRAFFICKING

Bitcoin as a term is quickly becoming part of the language for the general public around the world. It is a term that is gaining popularity and the consequences of it are still being fathomed. Bitcoin is a virtual currency that is maintained on a computer and functions on a peer-to-peer basis.[42] It is a new segment of currency, known as crypto-currency that exists exclusively online.[43] There are no physical traces of this currency, and the records of all the transactions that have ever occurred are maintained in a digital ledger on the Bitcoin network itself, and each transaction is recorded in what is termed as a digital wallet that may either be downloaded onto a computer or created online by the user.[44]

Every transaction that has ever occurred is completely open and available for anyone to view. However, the transactions do not give any details about the people conducting the said transfer, as no information to this effect is available. It offers only a digital transaction address and it is thus that the Bitcoin transactions are anonymous. More often than not, they can never be traced, as unlimited new transaction addresses can be created for every transaction.[45] There is no central authority or regulatory body for this currency and it is therefore a decentralized currency. This means that there is a distinct lack of laws or rules regarding the currency and is hence impossible for authorities to trace or tax.[46]

This has a direct bearing on crimes that occur online. Any criminal act often originates from a business deal. A crime, especially a cyber-one, is usually committed solely for the purpose of profit. This means that there is an exchange of money for a service provided. Post the introduction of Bitcoin in 2009, the task of exchanging money turned completely anonymous and digital. It was no longer possible to trace a transaction to any person and the crime on the

[42] Noel Randewich, 'Factbox: What is bitcoin and how does it work?' (*Thomson Reuters*, 25 February 2014) <http://www.reuters.com/article/2014/02/25/us-bitcoin-mtgox-factbox-idUSBREA1O21M20140225> accessed 28 April 2014.
[43] 'What is Bitcoin and how is it used?' (*NDTV Profit*, 29 November 2013) <http://profit.ndtv.com/news/cheat-sheet/article-what-is-bitcoin-and-how-is-it-used-373459> accessed 28 April 2014.
[44] 'Bitcoin: What is it?' (*Khan Academy*) <http://www.khanacademy.org/economics-finance-domain/core-finance/money-and-banking/bitcoin/v/bitcoin-what-is-it> accessed 28 April 2014.
[45] Joseph Adinolfi, 'Bitcoin Goes to Washington, Senate To Hold Hearing On Virtual Currencies' (*International Business Times*, 18 November 2013) <http://www.ibtimes.com/bitcoin-goes-washington-senate-hold-hearing-virtual-currencies-1474094> accessed 28 April 2014.
[46] 'Bitcoin: more than just currency of digital vice' (*The Guardian*, 4 March 2013) <http://www.theguardian.com/business/2013/mar/04/bitcoin-currency-of-vice> accessed 28 April 2014.

Internet flourished.[47] So much so, in fact, that now all the transactions in the Deep Web take place in terms of Bitcoin or other similar crypto-currencies, absolutely untraceable.[48]

The increased usage of Bitcoin has directly been linked to a visible surge in human trafficking on the Deep Web, with the former having a causal effect on the latter. The easily available Bitcoin allows the trafficker to anonymously buy or sell a human being for sex without the fear of any legal repercussion.[49] For the depraved of mind, this is the ideal way to earn all the illegal wealth there is to accumulate in the alleys of the Deep Web. A serious argument against the crypto-currency was this very fact: it is a safe haven, better than any offshore bank account, for those looking to circumvent the law.[50] Human traffickers lead this section of criminals, as it is often the most difficult, yet the most lucrative offence.

As per an estimate, sex slavery and human trafficking generate close to $9.5 billion in the United States of America annually.[51] It is impossible to transact with this huge an amount without raising a few eyebrows and arousing curiosity amongst the law enforcement agencies. With the introduction of Bitcoin however these agencies find themselves lost in the shadows of powerlessness and the crimes in the dark depths of the Deep Web radiate with life, unhindered.

4. OBSERVATIONS AND SUGGESTIONS

Human trafficking is a crime that been mocking the deep essence of humanity since known history. This crime has not only increased in number but has also diversified in its functioning on the global level. We believed that the concepts of freedom, equality, and fraternity have swept into our systems and have made us victorious over the horrors that the humans faced in

[47] 'Bitcoin: Monetarists Anonymous' (*The Economist*, 29 September 2012) <http://www.economist.com/node/21563752> accessed 28 April 2014.
[48] Jay Newton-Small, 'Why The Deep Web Has Washington Worried' (*Time Magazine*, 31 October 2013) <http://swampland.time.com/2013/10/31/the-deep-web-has-washington-worried/> accessed 28 April 2014.
[49] Michelle Lillie, 'Bitcoin Fuels the Human Trafficking Market' (*Human Trafficking Search*, 22 April 2014) <http://humantraffickingsearch.net/wp/bitcoin-fuels-the-human-trafficking-market/> accessed 28 April 2014.
[50] EJ Fagan, 'Why Bitcoin (And Other Cryptocurrencies) Will Inevitably Become Tools Of The Rich, Powerful, and Criminal' (*Business Insider*, 4 December 2013) <http://www.businessinsider.in/Why-Bitcoin-And-Other-Cryptocurrencies-Will-Inevitably-Become-Tools-Of-The-Rich-Powerful-and-Criminal/articleshow/26811029.cms> accessed 28 April 2014.
[51] EJ Fagan, 'Bitcoin and international crime' (*The Baltimore Sun*, 25 November 2013) <http://articles.baltimoresun.com/2013-11-25/news/bs-ed-bitcoin-20131125_1_bitcoin-transactions-law-enforcement> accessed 28 April 2014.

history. However, we cannot shy away from the dark realities that exist hidden behind closed doors in the shady corridors of the bordellos we think have been almost eradicated. Human trafficking through the Deep Web is an issue that compels attention because of the lack of awareness among people. It imposes a duty on the State to regulate the instruments through which this crime is festering through the Deep Web. The State must engage in facilitating specific research projects that help in attaining a better understanding of the vast anonymous mesh of technology constantly being used for buying and selling of humans for sex. There must also be an integrated effort towards developing smarter indexing robots and discovering the scope of such technology that ultimately makes the exclusion from indexing difficult.[52] What can be a necessary step towards increasing governmental control to an extent is the drafting of a law that regulates the flow of Bitcoin and other crypto-currencies and their transactions.[53]

The question of limited jurisdiction over the websites and the location of their servers must be dealt with and an international partnership between the law enforcement authorities of various nations must be brought into existence. Establishment of an international Internet policing authority is the need of the hour. Also, it is of utmost importance that more operations like Project Auxin, Project Spade and Operation Round Table are conducted in order to penetrate the hierarchy of the crime that is being committed so easily. The Sweetie Experiment was an eye-opener to all the law enforcement agencies of the world and indicated a stealthy method of attacking the offenders hidden under the blanket of anonymity. We cannot ignore this modern form of slavery in any manner and there have to be relentless efforts towards thwarting the unknown forces of human trade. Trafficking of human beings in the Deep Web haunts the conscience of humanity, as it continues to remind us that our bodies can be equivalent to sacks of meat waiting to be plundered for some coins that don't even exist in real life.

[52] Liat Clark, 'Darpa reinventing search engines to fight crime' (*Wired UK*, 11 February 2014) <http://www.wired.co.uk/news/archive/2014-02/11/darpa-memex-human-trafficking> accessed 28 April 2014.
[53] Rob Wile, 'The Senate Bitcoin Hearing' (*Business Insider*, 19 November 2013) <http://www.businessinsider.in/LIVE-The-Senate-Bitcoin-Hearing/articleshow/26004204.cms> accessed 28 April 2014.

BETSY'S CASE RE-OPENING THE WHO IS A HINDU DEBATE*

- *Akshat Agarwal**

1. INTRODUCTION

Derrett while discussing religious affiliation and laws defines personal law as:

> "*Personal law' is now the system of rules applicable by any court to an individual in respect of the topics covered by that law, determined with reference to the religion which he professes or purports to profess or is presumed to profess; for the law determines what a man's religious affiliation is for purposes of application of personal law by methods peculiar to itself.*"[1]

Thus the question of the religion professed, presumed or purported to profess is the most important when determining the applicability of personal laws. It is this dilemma, which is central to the case of *In Re Betsy and Sadanandan*.[2] In this case, the lower court refused to grant divorce by mutual consent on the ground that the marriage, which had been solemnized under the Hindu Marriage Act, was invalid since one of the parties to the marriage (originally born a Christian) had failed to show that she had converted to Hinduism. Upon appeal, the High Court had to consider what the test for conversion to Hinduism should be. Answering this question further required investigation of what being a Hindu entailed.

This paper critically examines religious conversions and the corresponding change in personal law applicable especially in the context of conversion to Hinduism. The special nature of the problem stems from the fact that the term 'Hindu' is difficult to define, thereby complicating furnishing of any proof for conversion.

The paper while dealing with the 'Who is a Hindu' question defines the same in terms of applicability of Hindu law and does not go into the theological questions of Hindu beliefs. Here it must be clarified that the line is extremely thin since personal law follows religion at all times

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[1] JDM Derrett, *Religion, Law and The State in India* (OUP 1999) 39.
[2] *In Re Betsy and Sadanandan* 2009 (4) KLT 631.

but the paper tries to stay clear of that conundrum by maintaining a line of separation between religion as a personal question and religion as a legal question.[3]

2. OF 'HINDUISM' AND 'HINDUS'

Hinduism as a 'religion', contrary to popular belief, has a much more recent history than the vast pantheon of cultural practices of the subcontinent with which it is often conflated with. The term 'Hindu' was conceptualized only in the nineteenth century, in the colonial context.[4] The study of western representations has informed our understanding about how certain views about religion were perpetuated as an aid to colonial domination. These representations relied upon the portrayal of the people of subcontinent as the 'other' with words such as 'mystic', 'magical' , 'fanatic' becoming common tropes of characterization.[5]

This discourse created by the likes of western scholars such as Monier Willimas and Sir William Jones, which was based on study of ancient India texts, soon crept into the self-consciousness of the people of subcontinent who came to identify themselves as Hindus. Policies such as the Indian census[6] and functioning of the courts[7] further led to the reification of identities. In fact, the social acceptability of the classification was so great that even the Nationalist movement rallied around these artificially constructed identities.[8]

The construction of the term 'Hindu' becomes especially relevant to administration of law. Hastings's plan charged the courts with administering different personal laws for Hindus and Muslims.[9] In the process, initially the aid of *Pandit's* and *Maulvis's* was taken but soon the British realized that the codified personal law which had been derived from ancient Indian scriptures was not in consonance with the variety of customary laws that were being observed. In the common law quest for uniformity, the courts thus classified people into neat legal categories based on religion and religion-based law, which led to the eventual displacement of personal laws.[10]

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[3] RW Neufeldt, 'To Convert or Not to Convert: Legal and Political Dimensions of Conversion in Independent India' in R D Baird (ed), *Religion and Law in Independent India* (2nd edn, 2005) 381.
[4] John Stratton Hawley, 'Naming Hinduism' (1991) 15 The Wilson Quarterly <http://www.jstor.org/stable/40258117?seq=1#page_scan_tab_contents> accessed 2 May 2017.
[5] R King, 'Orientalism and the Modern Myth of "Hinduism"' 46(2) Numen (1999) 146.
[6] B S Cohn, *An Anthropologist Among Historians and Other Essays* (4th edn, 1996).
[7] A Shodhan, *A Question of Community: Religious Groups and Colonial Law* (2001).
[8] S Kaviraj, 'The Imaginary Institution of India' in P Chatterjee and G Pandey (eds), *Subaltern Studies VII – Writings on South Asian History and Society* (1999) 1.
[9] C Mallampalli, 'Escaping the grip of Personal law in Colonial India: Proving Custom, Negotiating Hindu-ness' (2010) Law and History Review 1043-1044.
[10] W Menski, *Hindu Law: Beyond Tradition and Modernity* (2003) 156-163.

The works of Menski[11], Galanter[12] and Derrett[13] have all contributed towards showing how the so-called Hindu law implemented by the British was not the traditional law practised before the advent of British rule but something that was painstakingly constructed by the British in a quest for uniformity. This however meant muddying of the 'Hindu' category itself, as the definitions imposed did not match the social realities that existed on the ground.

The series of post-independence decisions and the variety of tests they suggest while defining who a Hindu is bears testimony to this confusion. Thus, the possibility of any one neat test or definition in consonance with social reality was excluded since the category being defined was at best an imaginary community.

3. OF THE PRESUMPTION OF 'HINDUISM'

A number of legislations collectively referred to as the Hindu code were introduced 1955-56, as an effort to codify the Hindu laws and provide a working definition of the term Hindu had to be created in order to identify those to whom the provisions of these laws would be applied. The legislations followed identical definitions and extended the sweep of the term 'Hindu', "*to any person who is a Buddhist, Jaina or Sikh by religion."*[14] This was in keeping with the constitutional admission, as Baird points out,[15] that the term 'Hindu' would be treated as both a religious and legal category.[16]

Thus the Hindu code bills created an all-encompassing legal definition of Hindu distinct from its religious connotation. Further, the legislations lay down that they would apply, "*to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion."*[17]This negative definition implied that there was general presumption as to applicability of Hindu law and any deviation from it would have to be proven otherwise.[18]

This presumption as to Hinduism or more precisely Hindu law is thus usually a given and would apply to a person even though he may be an atheist or might even abhor Hindu rituals. But if there is such an overarching presumption why does it become imperative to give a definition? The need for a definition arises whenever there is a contestation of identities. In

[11] W Menski, *Hindu Law: Beyond Tradition and Modernity* (2003) 156-163.
[12] M Galanter, 'The Displacement of Traditional Law in Modern India', (1968) Journal of Social Issues 65.
[13] JDM Derrett, *Religion, Law and The State in India* (OUP 1999) 39.
[14] Hindu Marriage Act 1955, s 2(1)(b).
[15] R D Baird, 'On Defining "Hinduism" as a Religious and Legal Category' in RD Baird (ed), *Religion and Law in Independent India* (2nd edn, 2005) 69.
[16] The Constitution of India 1950, art 25.
[17] Hindu Marriage Act 1955, s 2(1)(c).
[18] ibid (n 15) 70.

India a major site of this contestation is in the context of religious conversion, which opens a Pandora's Box ranging from the question of eligibility for affirmative action benefits to application of a different personal law.[19]

In fact, *Betsy's* case raises the 'Who is a Hindu?' debate in the backdrop of conversion to Hinduism. The Hindu code bill allowed for its application to, "*any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.*"[20] The requirement of a settled standard to prove conversion naturally necessitates the characterization of who is a Hindu.

This question becomes even thornier when affirmative action benefits have to be ascertained that is when there is an intersection between caste identity and religious conversion.[21] In this regard it is important to note that India has followed what can loosely be termed as the constitution-religious model.[22] This involves a justice-based approach to law based on equality.[23] The more traditional and hierarchical views of religion have thus been tried to be replaced. Provisions such as abolition of untouchability,[24] removal of prohibitions from temple entry[25] are perhaps the best examples of the same. These concerns have further informed the manner and contexts in which the courts have dealt with the term 'Hindu'.

4. OF CONVERSIONS AND CHANGING TESTS

Standard commentaries of Hindu law including Mayne[26] and Mulla[27] have used terms such as 'elastic', 'broad' and 'amorphous' while dealing with the term 'Hindu'. It is by virtue of these absorptive powers of the Hindu religion that elements of Hindu law have been found applicable to otherwise distinct religions such as Buddhism, Sikhism and Jainism.[28] Thus broadly speaking Hindu law not only governs the so-called Hindus (religious connotation) but also a large number of other communities (legal connotation).

[19] R J Stephens, 'Sites of Conflict in the Indian Secular State: Secularism, Caste and Religious Conversion' (2007) Journal of Church and State 251, 252.
[20] Hindu Marriage Act 1955, s 2(1).
[21] ibid (n 19) 251.
[22] L D Jenkins, 'Legal Limits on Religious Conversion in India', (2008) Law and Contemporary Problems 108, 111.
[23] ibid (n 15) 69-70.
[24] The Constitution of India 1950, art 17.
[25] The Constitution of India 1950, art 25.
[26] John D Mayne & Vijender Kumar, *Mayne's Treatise On Hindu Law & Usage* (16th edn, Bharat Law House 2012).
[27] Dinshah Fardunji Mulla & Satyajeet A Desai, Mulla Hindu Law (21st edn, LexisNexis 2013) 94, 95.
[28] *Rani Bhagwan Kaur v JC Bose* (1903) 30 IA 249.

This paper though while focussing on the former, as has been stated earlier, restricts itself only to the question of applicability of personal law. Hindu law applies either by birth or religion.[29] This means that one can either be a Hindu in the legal sense if one is born as one, or if one undergoes a religious conversion.

It is the latter condition which is the concern of this paper. In *Betsy's* case it was this sufficiency of a test to show conversion to Hinduism that became the bone of contention. The Court's response to this predicament in the past has been varied and multifarious but before going into that it is important to understand the premise behind personal laws and religious affiliation.

The noted legal scholar Derrett argues that religious affiliation is not a question of personal belief but of social belonging.[30] This view has also evolved into a primary argument against conversions which views them as being disruptive of social life and motivated by political considerations.[31] Religion when viewed as a social question, ties in well if the premise behind personal laws is assumed to be the recognition of distinct legal communities observing their own practices in domains such as that of marriage and succession. But, in light of the work done by post-colonial theorists[32] who explain that these so-called legal communities as at best artificial and constructed, the argument becomes slightly tenuous.

At the same time it must be borne in mind that the Constitution under Art. 25[33] subject to public order, morality and health recognizes the freedom of conscience and the right freely to profess practise and propagate religion. But does this freedom of conscience entitle the convert to change her personal laws needs to be analyzed. This becomes intrinsically linked to the issue in *Betsy's* case since a test for conversion to Hinduism and hence the definition of a Hindu for that purpose is limited by religious affiliation to law. The investigation is thus undertaken within this intersection of law and religion.

Thus the issue in *Betsy's* case can be seen at two different levels, the first concerns the definition of Hindu in terms of the application of Hindu law and the second is in terms of a religious conversion into Hinduism, such that it warrants a simultaneous change in personal law. Thus the need to ascertain a necessary and sufficient test to conclude that religious

[29] ibid (n 27) 67.
[30] ibid (n 13) 58.
[31] ibid (n 3) 381.
[32] ibid *(*n 15).
[33] The Constitution of India 1950, art 25.

conversion to Hinduism in not in the realm of the vagaries of belief but rather merits the application of a new personal law.

Perhaps one of the most influential expositions on the essentials of 'Hinduism' was by Gajendragadkar C.J. in the case of *ShastriYagnapurushdasji* v. *Muldas.*[34]The plea raised was that the provisions of the Bombay Temple Entry legislations would not be applicable to the places of worship of the Swaminarayan sect, since its members, the Satsangis were not Hindus. The Supreme Court did not restrict itself to the question of whether Satsangis were Hindu or not but rather asked the larger question of who a Hindu was?

The court generously relied upon the views of Dr Radhakrishnan and freedom fighter Tilak to finally delineate the features of Hinduism as, "*acceptance of Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse; and the realization of the truth that the number of gods to be worshipped is large*."[35] The philosophical nature of this definition is of little assistance when trying to ascertain the application of person law but then judgement in *Satsangi'*s case was not really concerned with that issue.

In the case of *Punjab Rao* v. *Mesh Ram*[36] the election to the legislative assembly under Scheduled Caste Order of 1950 was impugned. The Court held that a public declaration of conversion to Buddhism was sufficient to establish conversion and thus the election was set aside. Mayne criticizes this judgement as he compares the application of law to an existing status and a new status, in his opinion, can only be created by converting into such a religion that would destroy the old status.[37] He thus advocates an approach which takes into account one's historical or geographical background and factors the opinion of the community in which he lives.[38]

In the case of *Perumal*v. *Ponnumsawmi*,[39] wherein a Christian Nadar woman had married a Hindu Nadar man, it was held that since the marriage was conducted in accordance with Hindu ceremonies and parties has lived as Hindu, coupled with the prevalent practice in the community that Christian woman were considered Hindu upon marriage, the court held:

[34]*Shastri Yagnapurushdasji v Muldas* AIR 1966 SC 1119.
[35] ibid.
[36]*Punjab Rao v Mesh Ram* AIR 1965 SC 1179.
[37] ibid (n 27) 69.
[38] ibid (n 27).
[39] *Perumal v Ponnumsawmi* AIR 1971 SC 2352.

> "*A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. But a bona fide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion.*"[40]

The test in *Perumal* has largely been established as the position of law with respect to religious conversion.[41] It is important to note that by *bona fide* the court implies that the conversion cannot be for the purpose of committing a fraud upon the law. This situation has arisen more frequently in cases involving conversions to Islam. The Supreme Court in the case of *Rakhiya Bibi* v. *Anil Kumar Mukherjee*[42] held that inquiries into the intention can be conducted by the courts. To prove this element of *bona fide* the court in *Perumal* insisted upon the need for unequivocal conduct. At the same time if the conversion has led to unjust outcomes, the court has not shied away from creating remedies.[43]

Unlike other religions such as Islam or Christanity which have more or less settled tests for conversion Hindu texts such as the *Dharmshastras* do not prescribe a test.[44] The Arya Samajists though have come up with the *shuddhi* ceremony which was held to be sufficient to prove conversion[45] but the practice is neither universal nor widespread.

Similarly a formal conversion was considered sufficient to establish the religion of a European woman in the case of *Ratansi D. Morarji* v. *Administrator General.*[46] Here, again it must be pointed that though Hindu Missionary activity of the sort seen in the above-mentioned case is indeed prevalent but instances of the same have only been few and far between and are usually specific to a sect or community rather than to Hinduism generally.[47]

In an unusually large number of cases, the question of caste has also become intertwined with religious conversion. This goes on to show how the tussle for affirmative action benefits has

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[40] ibid.
[41] Law Commission of India, *Conversion/reconversion to another Religion – Burden of Proof,* (Law Com No 11 2010).
[42] *Rakhiya Bibi v Anil Kumar Mukherjee* ILR (1948) 2 Cal 119.
[43] *Sarala Mudgal v Union of India* 1995 AIR 1531.
[44] Paras Diwan & Peeyushi Diwan, *Modern Hindu Law* (22nd edn, Allahabad Law Agency 2013).
[45] *Kusum v Satya* (1903) 30 Cal 999.
[46] *Ratansi D Morarji v Administrator General* (1928) 55 MLJ 478.
[47] ibid (n 3) 387, 388.

become a ripe ground for defining the term 'Hindu.' As recent as in the case of *M. Chandra* v. *M. Thangamuthu*[48] the Supreme Court held that, "*It is a settled principle of law that to prove a conversion from one religion to another, two elements need to be satisfied. First, there has to be a conversion and second acceptance into the community to which the person converted".*[49]

However it must be kept in mind that in this case the Supreme Court was primarily resolving the question of whether upon reconversion the person gets back the membership of her caste or not. In this regard the case law seems to be fairly settled and there seems to be a series of authorities supporting the proposition that in order to prove membership of caste upon re-conversion there has to be acceptance by the members of the concerned caste-community.[50]

The reasoning behind such test of community rests on the premise that caste disabilities are always recognised in a community context and therefore caste identity cannot be seen in exclusion of it. Whether a similar test can be applied to religion, even though suggestions to the effect were made in the *Thangamuthu* case, is a separate question. Notions of religious community are much more abstract than that of caste, and it will be almost impossible to come up with a settled standard of community acceptance in today's context.

In the case of *Mohandas* v. *Dewaswan Board*[51] the Kerala High Court further diluted the test laid down in *Perumal.* The case revolved around a devotional singer named Jesudas who was prevented from entering the temple on the ground that he was not a Hindu. The court however concluded that a declaration on his part that he was a Hindu was enough to prove his conversion. The Court thus held that if a person declared that she was a Hindu and if that declaration was *bona fide* and without any ulterior motive or intention she would deem to have been converted.

The tests for proving conversion have thus been varied and changing, depending upon the context the courts have enunciated tests ranging from, formal ceremony of conversion, *bona fide* intention accompanied by unequivocal conduct expressing that intention, declaration of being a Hindu to acceptance by members of the caste. In *Betsy's case* after concluding that none of the above tests were satisfactory the court advocated a kind of amalgamation and held that any assertion of the party had to be given due weight. This assertion had to be explained

[48] *M Chandra v M Thangamuthu* AIR 2011 SC 146.
[49] ibid.
[50] *Kothapalli Narasayya v Jammana Jogi* AIR 1976 SC 937; *CM Arumugam v S Rajgopal* (1976) 1 SCC 863.
[51] *Mohandas v Dewaswan Board* 1975 KLT 55.

by conduct such as nature of marriage, worship of Hindu gods and general self-identification in the world as a Hindu.[52]

The judgement in *Betsy* citing the immense uncertainty attached to proving religious conversion thus called for a national level legislation for standardizing conversion and in pursuance of the same requested the Law Commission to look into the matter.[53] The Law Commission while considering the matter concluded that, "*statutory prescription of procedure to establish conversion or nature of proof is neither desirable nor practicable."*[54] The premise behind the conclusion was that such a procedure lay within the domain of appreciation of evidence and statutory requirement for the same would lead to further complications.[55] Further, the Registrar's office was the suitable forum for deducing whether the claim was *bona fide* or *mala fide*.[56]

In a country as diverse as India with varying levels of literacy and access to justice, documenting every conversion is almost an impossible exercise. This should not serve as a deterrent for creating such a mechanism but at the same time it should not be made mandatory as that would render all possible *bona fide* conversions illegitimate. In keeping with this view the Law Commission finally suggested an option for registration to formalize conversion.[57]

Since the famous decision in *Abraham v. Abraham*[58] it is now the settled position that one can change the law applicable to oneself by religious conversion. However, this relationship between personal laws and religion does not play out so simplistically in courts where often the contest may arise due to marital, succession or dispute relating to affirmative action benefits. Thus it becomes necessary to devise some working test to characterize such conversion. The courts in different settings have come up with test of varying degrees.

These tests assume a distinct complexity since the conversion in these cases is to Hinduism which when called upon to, has been characterized by words such as 'subtle' and 'indescribable'. But as was remarked in *Betsy's* case, "*the courts cannot throw their hands up. Resolve they must, in the event of controversy or conscientious and objective doubt (even when*

[52] *In Re Betsy and Sadanandan* 2009 (4) KLT 631).
[53] ibid.
[54] ibid (n 41) 10.
[55] ibid.
[56] ibid.
[57] ibid (n 41) 20-22.
[58] *Abraham v Abraham* 9 MIA 195.

parties raise no controversy) of the question whether there was conversion or reconversion to Hinduism."[59]

5. CONCLUSION

The question 'Who is a Hindu?' in a sense is a redundant question in most instances for the purpose of application of personal law. This is because of an overarching presumption of Hinduism which has been envisaged in the Hindu code bill. Coupled with the fact that the term Hindu does not reflect actual social realities but is a category that was constructed in the colonial context for the purposes of administration of law implies that any endeavour to substantively define a Hindu would prove futile.

However, in instances where there is a conflict which are cases primarily involving marital/ succession disputes or affirmative action benefits. A majority of these cases concern religious conversion which is undoubtedly an area of conflict even in secular state like India. Keeping the amorphous definition of a 'Hindu' in mind it is apparent that religious conversions to Hinduism come with their own brand of difficulties.

The courts in this regard have formulated a number of tests, the latest in the long line being *Betsy* which goes to the extent of a formal registration. But sadly all of them come with inherent difficulties. Perhaps the test laid down in *Perumal* seems to be the most comprehensive and just due to its requirement of *bona fide* intention and unequivocal conduct to support that intention. However, while applying the same the courts cannot follow a laconic approach and mere assertions cannot be held to be conclusive. Rather while interpreting the test the courts need to keep in mind the premise behind religious affiliation and thus appreciate that the conduct should prove conversion in the social sense.

[59] *In Re Betsy and Sadanandan*, 2009 (4) KLT 631.

'TAMING THE CORPORATE LEVIATHAN': THE PROSPECTS OF THE UNITED NATIONS GLOBAL COMPACT AS AN ENFORCEABLE INTERNATIONAL MECHANISM OF CORPORATE SOCIAL RESPONSIBILITY

- Arindrajit Basu [*]

"*[The corporation] is a pathological institution, a dangerous possessor of the great power it wields over people and societies*." – Joel Bakan[1]

1. INTRODUCTION

As aptly stated by Joel Balkan, due to their large annual turnovers[2] and transnational presence, multinational enterprises (hereinafter 'MNEs') exercise an inordinate amount of influence and tremendously impact government policies, human rights[3], environment and the day-to-day lives of many people residing and working in the countries they operate in.[4] Yet, until very recently, MNEs operating in developing countries felt no need to seriously consider the human rights violations by their operations or that of their subsidiaries, because they were largely immune from any adverse repercussions.[5]

This immunity has been diluted by the recent trend of increasing consumer awareness, galvanised by the increasing influence of the media on daily lives, a rapid advancement in tele-communications, including the use of Internet with consequent dissemination of information regarding corporate practices.[6] This could potentially cause a paradigm shift in the current state

[*] Student, 3rd Year, BA LLB, West Bengal National University of Juridical Sciences, Kolkata.
[1] Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Random House, 2004) 2.
[2] Ilias Bantekas, Coca Cola Company, The Coca Cola Company Announces Second Quarter and Year-To-Date 2003 Results <http://www2.coca-cola.com/presscenter/earnings07172003.html> accessed 17 July 2014; The World Bank Group, World Development Indicators Database (World Bank Report, 2003) <http://www.worldbank.org/data/databytopic/gdp.html> accessed; Ilias Bantekas, 'Corporate Social Responsibility in international law' (2004) 22 BUILJ 309, 310.
[3] Ken-Saro-Wiwa, 'Shell pays out $15.5m over Saro-Wiwa killing' (*The Guardian*, 9 June 2009) <http://www.theguardian.com/world/2009/jun/08/nigeria-usa> accessed 26 October 2014.
[4] MichaelI Krauss, 'Ecuador, Chevron and Steven Donziger: The travesty described in detail' (*Forbes*, 9 August 2014) <http://www.forbes.com/sites/michaelkrauss/2014/09/08/ecuador-chevron-and-steven-donziger-the-travesty-described-in-detail/> accessed 26 October 2014.
[5] Donald J Smythe, 'The Rise of the Corporation, the Birth of Public Relations and the Foundations of Modern Political Economy' (2011) 50 Washburn LJ 635.
[6] Don Tapscott & David Ticoll, 'The Naked Corporation: How The Age of Transparency Will Revolutionize Business' (Free Press 2003) 68, 73.

of affairs. Consumer practice has been predicated on the methods which corporations use to manufacture their goods and the impact their operations may have on third-parties.[7]

This paper analyses the possibility of a scenario where, as a result of this increasing public pressure and consumer activism fuelled by an active media and participation of bodies such as Non-Governmental Organisations (hereinafter 'NGOs'), the MNEs are compelled to self-regulate. This voluntary self-regulation of a corporation's practices is known as corporate social responsibility (hereinafter 'CSR')[8]. The concept of CSR has its origins in 'stakeholder theory' which states that corporations owe duties not just to their shareholders, consumers and investors but also to all other 'stakeholders', who are people or communities that may be directly or indirectly affected by their actions.[9] However, this self-regulation can only happen if consumers are able to judge the viability of the practices undertaken by corporations. Parameters of corporate conduct set in international guidelines such as the United Nations Global Compact (hereinafter UNGC)[10], the ILO Tripartite Declaration[11] and the Organisation for Economic Co-operation and Development (hereinafter 'OECD') Guidelines[12], if utilised effectively could potentially serve as powerful tools that could enable consumers to understand corporate behaviour. This mechanism can only function effectively if the standards of corporate reporting ensure that the stakeholder is able to engage with the corporation and analyse, through these reports, whether the parameters of acceptable conduct have been lived up to.

This paper does not advocate complete de-regulation of corporations by government or suggest that attempts to bring corporations within the purview of international law should be dispelled with. It solely seeks to answer two central questions: Whether flexible guidelines such as the UNGC can contribute to increased corporate accountability, particularly with respect to the

[7] Opinion Research Corporation International, '2002 Cone Corporate Citizenship Study' (Executive Summary, July 29 2002) <http://www.coneinc.com/Pages/pr_13.html> accessed 25 October 2014.
[8] Jenifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International law* (Cambridge University Press 2006) 54, 62.
[9] Archie B Carroll & Ann K Buchholtz, *Business & Society: Ethics, Sustainability and Stakeholder Management* (9th edn, Cengage Learning 1994) 70.
[10] UN Global Compact, 'The Ten Principles' (United Nations Global Compact, 2000) <http://www.unglobalcompact.org/Portal/?NavigationTarget=/Roles/portal_user/aboutTheGC/nf/nf/theNinePrinciples> accessed 25 October 2014.
[11] *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (4th edn, 2006) <http://www.ilo.org/empent/Whatwedo/Publications/lang--en/docName--WCMS_094386/index.htm.> accessed 27 October 2014.
[12] Organisation of Economic Co-operation and Development, *The OECD Guidelines for Multinational Enterprises* 19, OECD Doc OECD/GD (97)40 (2000) <http://www.oecd.org/dataoecd/56/36/1922428.pdf> accessed 26 October 2014.

actions of multinationals in Less Economically Developed Countries (hereinafter 'LEDCs')? If so, what enforcement mechanisms, particularly reporting standards and other associated stakeholder initiatives, should be used to supplement them? The paper will be accordingly divided into three parts.

1. Part I will discuss the flaws that have been witnessed with other mechanisms which attempted to regulate corporate behaviour and establish a need for the concept of CSR in the present day.
2. Part II will analyse provisions of the United Nations Global Compact and evaluate its applicability in the present day scenario.
3. Part III will discuss how the theoretical constructs in the UNGC can be implemented most effectively through reporting standards such as the Global Reporting Initiative.

The UNGC has been chosen as a case study because it is the most wide-reaching CSR mechanism today with over 8,000 signatories[13] and has established a concrete framework, at least at a theoretical level, for the rules devised therein to be implemented and engaged with. Likewise, the GRI was chosen because their guidelines have come to become universally accepted standards of reporting that could be utilised to monitor and regulate corporate conduct.

2. THE NEED FOR CORPORATE SOCIAL RESPONSIBILITY

The need for corporate social responsibility stems from the relatively unsuccessful outcomes of other attempted methods of regulating corporate activity. First, the rise of multinational corporations towards the end of the twentieth century coincided with the global liberalization of trade and commerce.[14] This meant that LEDCs suffering from external debt, high levels of unemployment and a lack of financial capital saw the influx of MNEs into their countries as a necessary and highly profitable source of foreign investment.[15] A lack of effective legislative, regulatory and judicial mechanisms in these LEDCs, coupled with rampant corruption in their administrations, has given MNEs *carte blanche* authority to operate in these host states

[13] United Nations Global Compact, 'UN Global Compact Participants' (United Nations Global Compact, 24 June 2014) <https://www.unglobalcompact.org/ParticipantsAndStakeholders/Index.html> accessed 26 October 2014.
[14] Smythe (n 5).
[15] Bantekas (n 2); Vivien A Schmidt, 'The New World Order, Incorporated: The Rise of Business and the Decline of the Nation State' (1995) 125 Daedalus 75.

(countries of operation), where they abuse their position due to the low chances of effective prosecution or detection.[16]

Second, courts in the parent state have generally abstained from prosecuting MNEs by referring to the doctrine of *forum non-conveniens* ('forum not agreeing').[17] The use of the Alien Tort Claims Act, 1798[18] [hereinafter 'ATCA'] in the United States (hereinafter 'US'), which gives US courts the jurisdiction to hear aliens for the violations of human rights in foreign territory, could mark a positive trend towards corporate accountability in the parent state (country of origin).[19] Starting with *Filartiga v. Pena-Irala*[20], which was decided in 1980, the United States Supreme Court found that the ATCA enabled US courts to hear claims by aliens brought before it for violations of international law. This essentially implied that the courts of the United States could serve as a forum for adjudicating disputes with regard to human rights abuses committed on foreign soil. In this case, a Paraguayan citizen was allowed to sue the policeman who was accused of torturing his son to death. The court used customary international law to justify torture as a private cause of action. Similarly, in *Sosa v. Alvarez-Machain*[21], the Court held that violation of a norm of international law that was specific, universal and obligatory could serve as a cause of action under ATCA. The court took a great step forward in *Sarei v. Rio Tinto*[22], which held that in cases where the defendant is a multi-national corporation, it is not necessary for the company to have its headquarters in US. The establishment of a branch or office of the company was sufficient. Further, in *Bauman v Daimler Chrysler*[23], the court evolved two tests to assess the case for personal jurisdiction over a corporation where the defendant is a subsidiary accused of committing human rights violations in foreign territory. The first test, known as the 'alter ego' test hinged on proving parental control over the subsidiary in question and that there is sufficient evidence to show that they are not separate entities. The second test, known as the 'agency test' was based on proving that the services rendered by a subsidiary in their country of operation were of 'special importance' to the parent company, and the absence of such a subsidiary would impede the functioning of the parent company significantly. The

[16] Bantekas (n 2) 310-311.
[17] *Piper Aircraft Co v Reyno* 454 US235 [1981]; *Re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December* 1984 634 F Supp (SDNY1986).
[18] [1994] 28 USC, s1350.
[19] *Doe v Unocal Corp*, 963 F Supp 880 (CD Cal 1997); Steven R Ratner, 'Corporations and Human Rights: A theory of legal responsibility' (2001) 111 Yale LJ 443,459; Kathryn L Boyd, 'Collective Rights Adjudication in US Courts: Enforcing Human Rights at the Corporate Level' (1999) BYUL Rev 1139.
[20] *Filartiga v Pena-Irala* [1980] 630 F 2d 876 (2d Circ).
[21] *Sosa v Alvarez-Machain* [2004] 542 US 692.
[22] *Sarei v Rio Tinto* [2008] USCA (9th Circ).
[23] *Bauman v Daimler Chrysler* [2011] No 07-15386 DC No CV-04-001194-RMW.

satisfaction of either one of these tests was sufficient for the court to exercise its jurisdiction over a claim raised through ATCA. However, the court took a giant leap backward in 2013 when it declared in *Kiobel v Royal Dutch Petroleum*[24] that only claims with respect to human rights violations committed within U.S. territory or on the high seas, could be entertained under the ATCA. Further, apart from the European Union (hereinafter 'EU'), where claims by aliens can be admitted in the European Court of Human Rights through Article 6 of the European Convention on Human Rights[25], no other jurisdiction does have ATCA-like provisions in their municipal law, thereby fettering global corporate accountability through this route.[26]

The construct of international law has also failed to regulate corporations as only states are subjects of international law and bear obligations under treaty or customary international law. International legal personality must be predicated on precise legal capacity stemming from customary international law or binding treaties.[27] This has enabled MNEs to take advantage of the 'state veil' and evade the provisions of international law as they are non-state actors whose misconduct is attributable to the host state.[28] Further, given that only states can be parties to a dispute at the International Court of Justice, prosecution for violations of multilateral instruments can only be done effectively if the host state is able and willing to prosecute them, which has not been the case.[29] Recently, scholars[30] have advocated extending the duties emanating from international law to non-state actors. However, in order to use international law as a means of increasing corporate accountability, not only should all duties and obligations be directly affixed upon corporations but also an enforcement mechanism must be made available. The 1998 International Criminal Court Statute[31] does hold individuals responsible for violations of the crimes contained therein. The enforcement of the provisions of the statute is done either through the domestic courts or the International Criminal Court itself. This enables the casting of legal personality on the individual perpetrators. In the absence of a treaty

[24] *Kiobel v Royal Dutch Petroleum* [2013] 133 SCt 1659.
[25] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5.
[26] Saulius Katuoka & Monika Dailidaite, 'Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools' (2012) 19 Jurisprudence 4, 1301, 1303.
[27] ibid.
[28] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (2nd edn, Clarendon Press 1995) 50.
[29] The International Court of Justice (1945) Art 35(1), 33 UNTS 993.
[30] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002)20 Berkeley Journal of Intl Law 45, 84; Steven R Ratner, 'Corporations and Human Rights: A theory of legal responsibility' (2001) 111 Yale LJ 443, 459-470.
[31] United Nations: Rome Statute of the International Criminal Court (July 17, 1998) 37 ILM 999UN DocA/CONF183/9.

that directly casts such duties and obligations on corporations in the present scenario, there is no enforcement mechanism that furthers the cause for corporate accountability via the international law route.

Finally, empirical studies[32] show that the traditional 'command and control' regulation also faces various challenges when attempting to bring about corporate accountability. Concerns raised by various commentators include arguments revolving around delays in responding to new harms and changing expectations, a lack of workable enforcement measures and inefficiency in assessing compliances.[33] The most significant problem of this form of regulation was the imposition of uniform 'one-size fits all' rules on all corporations regardless of the socio-economic conditions a firm was working in.[34] This mandatory imposition had two related problems. First, the obligations were 'bolted onto'[35] companies, which meant that certain MNEs might have had to alter their business strategy to comply with the norms. Second, due to their rigid nature, firms started to engage in minimum technical compliance to these rules without striving towards developing practices within their capabilities that were more sustainable.[36] The other extreme option of leaving MNEs to self-regulate on ethical grounds without any form of intervention was also dismissed because private players can never be expected to weigh public interest over private needs in the absence of active public involvement that compels them to do so.[37] CSR, through consumer-fuelled regulation, could develop a mechanism that plugs some of these gaps and compels companies to devise sustainable economic practices that are 'built in'[38] to their long-term strategy. We need to bear in mind that the fundamental problem with this type of self-regulation is asymmetrical distribution of information. The firm will always know more than the associated stakeholders about its practices, and if harmful practices are going undetected, it will have no incentive to report. Hence, the efficacy of this mode of regulation hinges on how expediently it can remove this asymmetry and detect instances of non-disclosure or disguised disclosure. The UNGC and its

[32] David Hess, 'Corporate Social Responsibility and The Law' in Jose Allouche (ed), *Corporate Social Responsibility* (Palgrave Macmillan Publishers 2006).
[33] ibid; David Hess, 'The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue and Development' (2008) 18 Business Ethics Quarterly 4, 447, 458.
[34] Jenifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International law* (Cambridge University Press 2006) 54-62.
[35] Maike J Scholmerich, 'On the impact of corporate social responsibility in the light of Sen's capability approach' (2013) 2 Asian J Bus Ethics 1, 2.
[36] David Hess (n 32) 4, 447, 453, 458.
[37] Lester M Salamon, 'The New Governance and the Tools of Public Action: An Introduction' (2001) 28 Fordham Urb LJ 1611, 1635.
[38] Scholmerich (n 35) 1, 2.

associated Global Reporting Initiative (hereinafter 'GRI') have the potential to develop into a mechanism that fulfils this purpose.

3. A THEORERICAL FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY: THE UNITED NATIONS GLOBAL COMPACT

The UNGC was launched in 2000 as a multilateral scheme that sought to develop sustainable business practices across the globes.[39] The most integral part of the scheme was the ten business principles which corporations were expected to voluntarily adhere to.[40] These directory principles[41] are derived from the principles espoused in international instruments such as the Universal Declaration of Human Rights (hereinafter 'UDHR')[42] and the Rio Declaration[43]. Along with these principles, the UNGC has also published a set of guidelines that describes steps through which the goals enshrined in these principles can be attained.[44] Corporations that sign the Global Compact become a certified 'UNGC company' and are subsequently required to publish a 'Communication on Progress' (hereinafter "COP") report that shows measures they have undertaken to comply with the guidelines set in the ten principles.[45] The UNGC also calls for participation from other stakeholders, including non-governmental organisations, members of civil society and academic institutions, to review and vet the COP report.[46] After the vetting process, the corporate participants are given an 'Active' or 'Advanced' rating based on the level with which they have demonstrated compliance with the objectives of the Compact and the principles enshrined therein.[47]

The principles, when read along with the guidelines, form a cohesive set of parameters that could be used to monitor the actions of MNCs. Most of the guidelines associated with each principle list fairly concrete steps that the corporations could take to adhere to the principles.

[39] United Nations Global Compact, 'Overview of the UN Global Compact' (United Nations Global Compact, 22 April 2013) <https://www.unglobalcompact.org/AboutTheGC/index.html> accessed on 23 October 2014; Andrea Rasche & Sandra Waddock, 'Global Sustainability Governance and the UN Compact: A rejoinder to Critics' (2014) 122 JBus Ethics 209
[40] UN Global Compact (n 10).
[41] ibid.
[42] Universal Declaration of Human Rights (1948), GA Res 217, UN GAOR, 3d Sess, Preamble, UN Doc A/810.
[43] Rio Declaration on Environment and Development, UN Conference on Environment and Development (1992), Annex I, Agenda Item 21, at 8-11, UN Doc A/CONF151/26 (Vol I).
[44] 'Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles' (UN Global Compact, 2002) 51 <http://www.unglobalcompact.org/ content/Public_Documents/gcguide.pdf > accessed 26 October 2014.
[45] UN Global Compact, 'How are COPs used?' (United Nations Global Compact, 20 March 2013) <https://www.unglobalcompact.org/COP/analyzing_progress/index.html> accessed 25 October 2014.
[46] UN Global Compact' (n 10).
[47] UN Global Compact (n 45).

However, these guidelines are not absolutely rigid, and companies could adapt them to the social context in which they are operating, in order to incorporate them within the usual business practices of the firm.

Principle 5 of the UNGC, which deals with the abolition of child labour, is an example which shows us how the flexibility of these guidelines is a benefit.[48] The International Labour Organisation's (hereinafter 'ILO') Minimum Age Convention[49] calls for the fixing of a minimum working age at around 15. MNEs working in LDCs find this difficult to implement because child labour is an essential source of family income.[50] Eliminating this labour from the factories operated by them could force the children to work in the informal sector under even more precarious working conditions or cause great economic hardship to the family. Here, reading principles along with the Guidelines may serve as more appropriate indicators of desired corporate conduct. Principle 5 of the UNGC states that "businesses should uphold the effective abolition of child labour."[51] The guidelines associated with the principles suggest steps that companies should take to achieve the goal set out in Principle 5. These steps encourage companies to "be aware of regions, sectors, economic activities where there is a greater likelihood of child labour, [engage in] development and implementation of mechanisms for the detection of child labour, and in communities, encourage and assist in launching supplementary health programs for children removed from dangerous work and provide medical care."[52] The guidelines set out a framework for the development of company policy with regard to the abolition of child labour. The nature of 'health programs' or 'identification measures' used to detect and deal with child labour can be devised by a company according to its capabilities. The company would have to demonstrate in the COP report, measures it has taken to eliminate child labour and justify how they are in line with the guidelines provided by the UNGC. [53]

At this juncture, it is imperative that we dispel the notion that the concept of the UNGC is flawed in its entirety. The first major objection is the fact that participation in the Compact is

[48] UN Global Compact (n 10), Principle 5.
[49] Convention Concerning Minimum Age for Admission (1976), Art 2 (3).
[50] Iftikhar Ahmed, 'Getting Rid of Child Labour' (1999) 34 EPW 2, 1815-1816; OP Maurya, 'Child Labour in India' (1999) 36 IJIR 4, 492,499; UN Global Compact, The Ten Principles (n 183) Principle 5.
[51] United Nations Global Connect, Principle 5.
[52] UN Global Compact (n 44).
[53] UN Global Impact (n 45).

voluntary and currently comprises of a relatively small number of firms[54] (8,000 in 2014[55] out of 82,000 transnational corporations[56]). Further, critics claim that the Compact only attracts firms with a poor social and environmental image that desire to lend UN legitimacy to their actions.[57] The first concern is fallacious because the UNGC was instituted only 15 years back and getting 8000 signatories on board is impressive.[58] Greater public awareness about the UNGC and its principles through a protracted coverage by the international media and enhanced reporting standards will lead to a more rapid increase in the number of participants. Further, Perez Batres[59] argues that widespread public acknowledgment of the UNGC and its principles gives signatories of the UNGC competitive advantage over firms that are not, due to their improved public image, thereby incentivizing more firms to join. Further, initiatives such as the UNGC have a significant consensus-building and engagement function, which critics tend to ignore. Such consensus-building is significant, particularly in nations such as China and India, where the CSR agenda is still in the making. The UNGC framework facilitates learning and improvement by enabling corporations to interact with each other and thereby arrive at satisfactory rules of corporate conduct within the framework of the ten principles. Participation does not mean that all participants will immediately be able to alter their strategy to bring them in line with the ten principles. It rather implies that the corporation is willing to make an attempt. Zadek's 2004 study[60] on Nike's association with the UNGC is one such example. The second concern is also invalid because one of the core principles underlying the UNGC as well as CSR is the self-regulation of business practices by firms which were indulging in harmful behaviour in the past. The guidelines contained in the UNGC facilitate this cleansing and thus encourage such firms to join them.

A further concern is that the UNGC may only be effective when regulating MNEs which produce consumer goods and are hence dependent on consumers for their profits. Companies engaging in non-consumer oriented activities, such as drilling oil, do not face the same forms

[54] S Prakash Sethi and Donald H Schepers, 'United Nations Global Compact: The Promise-Performance Gap' (2014) 122 J Bus Ethics 193,194.
[55] UN Global Compact (n 13).
[56] UN Conference On Trade and Development (Unctad), World Investment Report, Annex I (2014).
[57] Sol Picciotto, 'Rights, Responsibilities and Regulation of International Business' (2003) 42 Colum J Transnat'l L 131,142.
[58] ibid (n 10).
[59] Perez Batres, 'Institutionalizing sustainability: an empirical study of corporate registration and commitment to the United Nations global compact guidelines' (2005) 19 Journal of Cleaner Production 8, 843-851.
[60] Simon Zadek, 'The Path to Corporate Responsibility' (2004) 82 Harvard Business Review 12, 125-32.

of pressure.[61] While this criticism is valid to a certain extent, we must also understand that a better utilization of the principles of the UNGC will also make shareholders and investors more aware of the actions of the MNEs they are investing in.[62] As public image may be a concern for these shareholders, they may put pressure on the companies to comply with the guidelines.[63]

The third major concern is the relative flexibility of these guidelines when compared with traditional 'command-and-control' regulation which gives companies the benefit of doubt when attempting to justify policy within the parameters of a certain principle.[64]A solution to this legitimate issue lies in developing more efficient corporate reporting standards, which not only enable corporations to disclose all their practices under the auspices of the UNGC but also subject them to greater scrutiny in order to ensure their credibility.

4. CORPORATE REPORTING STANDARDS: THE GLOBAL REPORTERS INITIATIVE

The success of the UNGC with regard to promoting the sustainability of corporate practices depends on the extent to which consumers are able to analyse and are made aware of the performance of the companies with regard to their principles. This can only happen through the development of stringent reporting standards and a greater awareness of the UNGC itself among consumers. Professor Carol and Beiler trace the evolution of corporate social auditing back to the 1940s.[65] This form of auditing envisioned the development of a system of reporting through which stakeholders could ascertain the contribution of a firm to the overall goals of society, such as health, education and literacy, rather than merely focusing on the traditional profit-making incentives. The second jump came in the 1950s when Howard R. Boven[66] developed a system for the evaluation of the performance of corporation against these indicators by external auditors. At this stage, however, the audit was not supposed to be made public and was only to be used by the corporation in order to ameliorate their strategies. The 1970s saw increasing tension between social auditing for public use and auditing for internal

[61] Arvind Ganesan, 'Human Rights, the Energy Industry, and the Relationship with Home Governments' in Asbojn EIde (eds), *Human Rights and the Oil Industry* (Interstetia 2007).
[62] Tapscott and Ticoll (n 6).
[63] Jenifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International law* (Cambridge University Press 2006) 101-140.
[64] Jette Steen Knudsen, 'Which Companies Benefit Most from UN Global Compact Membership' *European Business Review* (November 24, 2011) <http://www.europeanbusinessreview.com/?p=3167> accessed 26 October 2014.
[65] Archie B Carroll & George W Beiler, 'Landmarks in the evolution of the social audit' (1975) 18 Acad Mgmt J 589, 59.
[66] ibid 589, 594.

decision-making only.[67] However, the pressure for external auditing continued to rise, and finally in the 1990s, spurred by a growing rise in socially aware investors and consumers, public social auditing became the norm. It was in this climate that the organisation Coalition for Economically Responsible Economies (hereinafter 'CERES') started the Global Reporting Initiative[68] in 1997. Partly supported by the United Nations Development Program now, the GRI's objective is to develop guidelines that may aid the auditing of the economic, environmental and social performance and encourage companies to engage affected stakeholders for the purpose of chalking out more effective company policy.[69]

In May 2013, the GRI issued the fourth edition of these guidelines.[70] They include certain core criteria which a company must report against, unless a company determines that a certain indicator is not 'material'[71] to the context they are operating in. A typical report should comprise of three parts.[72] First, the reporting company should state the basic characteristics of the organisation (e.g. size, type of operations, geographical areas of operation) which describe the sustainability issues that prevail with regard to devising their corporate strategy and describe how they devised the report by detailing, *inter alia*, the types of stakeholders engaged.[73] Second, the MNE should disclose the policies implemented by them to resolve the issues. Third, the company must check off certain performance criteria which are divided into sections of economic, environmental, labour practices, human rights, and society and product responsibility.

A further set of reporting principles published by the GRI is used to judge the quality of the reports.[74] The principle of 'completeness', for instance, envisages a compete representation of the organisation's actual performance. Other principles are balance, comparability, clarity, accuracy, timeliness and reliability.[75] Here, we must note that the principle of clarity requires the report to be presented in a manner that is understandable and accessible by the GRI's

[67] Raymond Augustline Bauer & Dan Huntington Fenn, *The Corporate Social Audit* (Russel Sage Foundation 1972) 24, 57.
[68] Global Reporting Initiative, 'What is GRI?' (Global Reporting Initiative, 2000) <https://www.globalreporting.org/information/about-gri/what-is-gri/pages/default.aspx> accessed 26 October 2014.
[69] ibid.
[70] Global Reporting Initiative, 'G4 Sustainability Reporting Guidelines' (Global Reporting Initiative, 7 May2013) <https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf> accessed 26 October 2014.
[71] 'G4 Sustainability Reporting Guidelines' (n 243).
[72] ibid 11, 14.
[73] ibid (n 25) 454-456.
[74] ibid (n 67).
[75] ibid.

diverse range of stakeholders. This essentially means that the report should avoid technical terms or other jargon which stakeholders such as consumers may not be able to comprehend. Further, the GRI encourages companies to submit a self-declaration on the level with which they have complied with the reporting guidelines. These grades are referred to as "Application Levels" and range from A/A+ to denote reports that have met all required parameters to C/C+ to denote reports that only meet the bare minimum criteria stipulated by the GRI. The "+" designation can only be used when there has been external auditing of the firm's reporting standards by an academic institution or think-tank recommended by the GRI.

Apart from setting these reporting guidelines, the GRI has attempted to build a nexus with the UNGC principles. In a Publication entitled, *Making the Connection*,[76] the GRI assigns a list of disclosures that should be made when reporting under any UNGC principle. So, under Principle 5, which seeks to uphold the effective abolition of child labour, the GRI stipulates that the company should specifically disclose "operations and suppliers, identified as having risk for incidents of child labour, and measures taken to contribute to the effective abolition of child labour" in their reports.[77]

Empirical studies on the GRI show however, that corporations have been able to dissemble disclosures by reporting favourable information under most criterions while withholding unfavourable ones.[78] They have been able to do this largely because the reports have not been scrutinized or made accessible to the public in a manner through which they can effectively engage with them.[79]Therefore, corporations seeking to improve public image by demonstrating compliance with the guidelines have felt no need to stick to the standards set by the GRI. Bansal and Clelland[80] find that firms with low performance on the environmental front (earned from negative press coverage) are able to reduce stock market risk merely by an expression of commitment to environmental goals. 'Stakeholder engagement' very often turns into the more spurious art of 'stakeholder management'. A Klynveld Peat Marwick Goerdeler survey[81] of large corporations in 2005 found that only eight per cent of the corporations responded to any feedback they received from stakeholders on their reports. Therefore, essentially, instead of

[76] ibid 19.
[77] ibid.
[78] Sylvie Berthelot et al, 'Environmental Disclosure Research: Review and Synthesis' (2003) 22 J Accounting Lit 1; David Hess & Thomas W Dunfee, 'The Kasky-Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution' (2007) 17Bus Ethics Q5.
[79] ibid.
[80] Pratima Bansal & Iain Clelland, 'Talking trash: Legitimacy, Impression Management and Unsystematic Riskin the Context of the Natural Environment' (2003) 47(1) Acad MgmtJ 93.
[81] KPMG, *Global Sustainability Services* (KPMG Survey of Corporate Responsibility Reporting, 2005) 4, 11.

using dialogue to alter their strategy through interactions with stakeholders, corporations are utilising information gained through this engagement to improve their communications strategy and consequently, their profits.

This is where the media needs to aid non-governmental organisations in the analysis and dissemination of the material contained in the report. Without increased stakeholder awareness in this form, the entire concept of corporate self-cleansing dissolves into oblivion. In this scenario, the clarity principle of the GRI could be problematic. Enabling corporations to use non-technical jargon that can be more comfortably digested by non-specialists allows them to cloak some of their technical flaws in everyday jargon and escape detection. A far more efficient mechanism of moving forward would be to use NGOs and other academic analysts as intermediaries who process the reports and then make their analysis of these reports through the media in a form that they are able to understand and assimilate. It is only through this nexus between greater media coverage and more cogent reporting standards that the underlying object not just behind the UNGC or the GRI but also the foundational principles behind CSR and voluntary self-regulation as an ideology can be actualized. The implementation of these goals needs the development of multi-stakeholder initiatives that enable the consumer to process these reports and respond to them in a rational manner. Improved disclosure will lead to improved dialogue as stakeholders now have access to information that they can use for making decisions regarding corporations. Corporations will have to back their claims with real data rather than "anecdotal accounts or politically motivated claims and public relations counter-claims."[82] This engagement will in turn compel corporations to develop sustainable strategies that they can build into their business models, thereby ensuring that the standards contained in the UNGC are met without compromising on their profit.

CONCLUSION

This paper evaluated the prospects of a new approach to corporate accounting which focused on self-cleansing by the corporations due to increasing consumer activism. It found that this phenomenon, known as corporate social responsibility, can only function effectively if the stakeholders involved in the corporate processes are able to access and understand business processes against a set of universally accepted parameters. This is where mechanisms such as the UNGC along with reporting initiatives like the GRI can potentially be very useful. The

[82] Archon Fung, 'Deliberative Democracy and International Labor Standards' (2003) 16 (1) Governance: An International Journal of Policy, Administration, and Institutions 51, 52.

flexibility of the guidelines mentioned in the UNGC enable the corporations to devise measures that become integral parts of their economic strategy rather than compelling them to stick to 'one-size fits all' standards regardless of their capabilities. This, used in conjunction with the strict reporting standards set out in GRI guidelines, could theoretically be utilized to inform the consumers about corporate action, and through engagement with the corporation, either through a boycotting of their products or otherwise, contribute to corporate accountability. However, the flexibility of these guidelines remains a cause for concern with respect to the implementation of these mechanisms. Hence, the media, coupled with other organisations such as academic institutions and think-tanks must step in and ensure that the contents of the reports are being disseminated to the public in an effective manner. Any corporation existing in the 21st century relies on public image for its profit. Instead of dismissing the notion of consumer-fuelled cleansing entirely, it is imperative that we seek to plug some of the gaps that exist with regard to its implementation and channelize consumer activism in a manner that compels MNEs to respond to it.

EXTRATERRITORIALITY IN ANTI-TRUST LAWS OF EUROPE

- Saras Muzumdar and Naman Jain [*]

1. INTRODUCTION

In modern times, where the authority of the government is restricted by geographical boundaries, the Extraterritorial Jurisdiction (hereinafter 'ETJ') is basically the government's legitimate right to exercise authority beyond those usual geographical limits. According to Goyder (2003), it conjures up images of a law being applied beyond the territorial ambit of its sovereign legitimacy.[1] The ultimate goal for overcoming the limitations imposed on the territorial jurisdiction is to tackle the issue of anticompetitive conduct in foreign territory which either has an impact on the competition within its own jurisdiction or on the competitive character of its corporations at home and abroad. In Europe, this doctrine of ETJ is applied by the European Commission to all the units which are not the members of the Community and those that tend to have repercussions - directly or indirectly on members of that Community. Despite the fact that the 'effects based rationale' for extraterritorial administration is widely accepted to be within the purview of public international law, the European institutions have justified their application of ETJ on the premise that the external entity is accountable for its actions that occur in, as opposed to have effect in, Europe. In the globalised economy of modern era, the concern over ETJ is extremely ubiquitous, where the effects of anticompetitive behaviour can be experienced far away from where they actually originate (Microsoft). Also, given the declining state of the world economy post-2008, the significance it has on mergers and cartels cannot be ignored. In this article, we shall trace the legal grounds and the tactics used by the Commission in claiming ETJ and also refer to landmark cases to explain how the approach of the Commission has changed and progressed.

2. THE CONCEPT OF EXTRATERRITORIAL JURISDICTION

The question of ETJ forms an integral part of the comprehensive debate which deliberates upon the powers of a State to exercise its jurisdiction outside its territory. International law,

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[1] Goyder DG, *EC Competition Law* (4th edn, Oxford University Press, 2003).

characteristically, differentiates between two kinds of jurisdictions; prescriptive and enforcement. The former establishes the rights of States to create their independent laws that are applicable to persons, territory or situations, while the latter empowers the States, with their right, in executive capacity, to put into effect the compliance with those laws. It is vital for a State to have the enforcement jurisdiction through which its establishments can conduct investigations, gather evidence, assist in proceedings and recover penalties abroad. In the case of *Ahlstrom Oy* v. *EC Commission* (1988)[2], the Advocate General Darmon made this division, signifying that a mere obligation of an economic sanction is only prescriptive and that the enforcement necessitates taking of coercive actions in the territory of a foreign sovereign by the state.

Although 'pure' criminal actions are liable to be punished, the notion of anticompetitive conduct being contrary to public good and that it should be penalised is reliant upon the economic and political ideology of the state. In States where competition laws are well established, the specifics of those laws may fluctuate – for instance in the concerned cases of *Boeing v McDonnell Douglas* (1997)[3] and *GE v Honeywell* (2004)[4], the United States (hereinafter 'US') and the European Community (hereinafter 'EC') asserted conflicting viewpoints while cooperating closely. It is generally accepted that the two undoubted basis for criminal jurisdiction in international law are nationality and territory. Territoriality primarily covers two facets – subjective i.e. the jurisdiction over acts that originated in its territory and other being objective i.e. jurisdiction over acts that originated in foreign sovereign but were accomplished, at least partly, within its territory.

The EC has been cautious of extraterritorial enforcement and instead of permitting itself to be seen as protruding into other autonomous territory, the institutions of the EC have formulated several legal tests that focus on bringing the conduct and culprits within the realm of EC law.[5] One of such tests is the 'group economic test', in which the foreign parents are credited with the accountability for any anticompetitive activity by their active and existing subsidiary in Europe. These parents or any other related members of the group are brought under the control of European Union (hereinafter 'EU') law if they apparently exercise some control or may have exerted control over such subsidiaries.[6] The courts, rather than laying focus on whether or not

[2] *A Ahlstrom Oy v EC Commission* [1988] ECR 5193.
[3] *Boeing v McDonnell Douglas* [1997] OJL 336 16.
[4] *GE v Honeywell* [2004] OJL 48 1.
[5] Jones, A and B Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford University Press, 2011).
[6] ibid.

the control should be exercised, have given priority to the competence of the government to exert control. In some cases, this can be revealed by straightforward assessment of the undertaking's corporate organisation graph.

3. CHALLENGING THE EFFECTS DOCTRINE: ICI V. COMMISSION

Under the Treaty for the Functioning of the European Union (hereinafter TFEU), Articles 101 and 102 are quiet as to whether or not they can be applied extraterritorially. Earlier, it was the evolution of the '*doctrine of single pecuniary entity*' that averted the necessity for determining this issue. But, the *Wood Pulp*[7] case unmasked an uncertainty in the EC Merger Regulation[8] vis-à-vis the opening of latter's jurisdiction which may catch concentrations between undertakings based outside EC so long as the EC turnover thresholds set out in the Regulation are satisfied. Also, in a particular case[9], Imperial Chemical Industries (hereinafter 'ICI') was suspected to have abetted in concerted practices by providing price directives to its exclusively held subsidiary incorporated in Belgium. ICI being a parent company was neither a member nor had indulged in trading with the European Community. The pertinent point to be noted is that the ICI had the majority of shares in the subsidiary that were present in the dye market and had oligopolistic competition at that time. The issue that was raised in the instant case was whether EC law essentially had an *'effects doctrine'*. The European Commission investigated a suspected cartel amongst the manufacturers of aniline dyes. At that point of time, the ICI was based in the United Kingdom and was not a part of the EC. Thus, ICI had breached Article 81(1) (Article 101(3) since amendment in the year 2009) because of its aforementioned concerted practices. Hence, the Commission imposed a heavy fine on ICI. The arguments that were raised by the Commission were that (i) considering the subsidiary as merely an agent of the parent, ICI was a part of the Community as it had the corporate control and it was authorised to exercise that control over its subsidiary and (ii) the conduct of ICI had an effect on competition within the common market.

Another facet of the argument was presented by Advocate General Mayras. He acknowledged that exercising its jurisdiction outside its legal grounds was acceptable under international law. But it cannot be overlooked that the Commission had built its right to take action exclusively on the '*effects doctrine'*, which in the instant case was not satisfied to provoke action. However,

[7] *Wood Pulp* (n 2).
[8] The EC Merger Regulation [2004] OJ L 24/1.
[9] *ICI v Commission* (*Dyestuffs*) [1972] ECR 619.

not contradicting Mayras, the EC carefully continued on a less debateable route in establishing its verdict on the *group economic unit* theory on the principle that in spite of the subsidiary having a distinct legal personality, it is not adequate enough to mitigate the likelihood of attributing its behaviour to the parent company. ICI refuted the group economic unit theory by raising the argument that accrediting the actions of an entirely owned subsidiary to its parent company shadows the separate corporate status and further contested that the Commission's application of competition rules was outside the EC. The evidence presented were the Telex messages linking the 1964 increase in price and circumstances of sale to be met, and the Commission supposed that the 1965/67 increase were of the same matter; this verified that the subsidiary did not hold any 'real autonomy.'

The Commission subsequently fined ICI 50,000 units of account. The real importance of the instant case is the exemplification of the doctrine by which parents and subsidiaries are treated as one undertaking for the determination of applying competition rules.

4. CONFIRMING THE EFFECTS DOCTRINE: WOOD PULP

In the *Wood Pulp* case[10], the Commission had taken a legal action against a foreign consortium for floating prices within the European market. The case focused on the existence of an '*effects doctrine'*. The defendant (ICI) who manufactured the bleached sulphite pulp was not the member of the Community but still engaged in price fixing arrangements. The producers exported directly to purchasers, branches, agencies or subsidiaries in the Community. The European Commission found forty-one manufacturers and two trade corporations engaging in intensive practice *au contraire* to Article 101(3). These intentional practices had a substantial effect on the Common market. The Courts held that the infringing behaviour comprised of formation of a contract and subsequently its implementation. The Court also maintained that the channel by which the corporation executed it was inconsequential; rather the fact that it was executed (via marketing organisation of a state that is member of the Community) turned it into a European matter. The defendant appealed on the grounds of jurisdiction and argued that they were involved in concerted practices. The European Commission did not apply the *effects doctrine*, but as previously noted, Darmon determined that the *effects doctrine* was an effective ground for extending jurisdiction. Others including Van Germon have found that the two doctrines can lead to different results. The implementation may not establish jurisdiction in

[10] *Wood Pulp* (n 2).

cases of direct sales by companies to customers within the Community in the absence of any type of marketing organisation.

The importance of the *Wood Pulp* case[11] is that it not only gave credibility to the operation of Article 81(1) [101(3)] and it's extraterritorially, but it also enunciated the concept of extraterritorial jurisdiction to the Community rather than merely implementing the *effects doctrine*. The fact that the European Commission does not necessitate proof for effect of anticompetitive practices in order to justify a claim of extraterritorial rule means that some actions, which must not be probed at all, may come under DG Comp's magnifying glass. This could result in covering too many harmless occasions into inquiry, which from an economic welfare viewpoint is a wastage of resources.

5. MERGER REGULATION: THE TURNOVER TEST

Another method of bringing foreign undertakings within European jurisdiction is through the Merger Regulation. The Regulation will only apply where a concentration has a Community dimension which entails meeting the requisite level of sales within Europe - €5000 million turnover worldwide, €250 million Community turnover (A.1(2)). A.1 does not say anything about where the undertakings concerned are located, and A.5(1) goes on to specify that Community turnover consists of products sold or services provided to undertakings or consumers in the Community or in a member state. Unlike the Court's approach in *Wood Pulp*[12], no distinction is made between direct sales or sales through a branch or subsidiary in the Community by a foreign undertaking. This definition avoids any outright admission of extraterritorial application of European law to foreign undertakings. The way in which the Community dimension threshold is formulated can also attract transactions which involve only undertakings located outside the Community with few assets inside it, and transactions which have minimal impact inside the Community.

In *Gencor v. Commission* (1999)[13], the Commission blocked a merger between two companies incorporated in South Africa which would have otherwise impeded competition in the common market through the creation of a dominant duopoly in the platinum and rhodium markets respectively. Although not made public, it was thought that the parties involved, Gencor and Lonhro Platinum Division, each accounted for 15-17% of world sales. The market for platinum

[11] *Wood Pulp* (n 2).
[12] ibid.
[13] *Gencor v Commission* [1999] ECR II-753.

is a world market, of which the EU is one of the three largest consumers and the effect of price hikes would be felt in every country. In language bearing overtones of the *effects test*, the Commission argued that the merger would have an immediate and substantial effect in the Community and later concluded that creating a dominant duopoly position in a world market would also impede competition in the Community significantly, which is an integral part of that market. The South African government considered that two fairly equally sized competitors (the merging firms and their rival Anglo-American) would be preferable to a market with Anglo-American as the dominant firm and a fringe of smaller competitors.

Firstly, Genor argued that if the *Wood Pulp*[14] criterion was applied, then implementation of the concentration outside the community would not pose any problems. Secondly, Genor argued that the Commission cannot claim jurisdiction in respect of a concentration on the basis of future or hypothetical behaviour. The Court of First Instance (Herinafter 'CFI' looked first at the Regulation itself and concluded that, the place of production is immaterial, and greater weight should be placed on sales in A.1. When returning to *Woodpulp*, it stated that implementation of an agreement is satisfied by a mere sale in the Community. The CFI did not expressly adopt the *effects doctrine*, but rather considered that the threshold was an application of the *Woodpulp* implementation principle. However, if implementation in a merger case is satisfied by a mere jurisdiction of the merged firm's products, then implementation means effects. Gencor is a striking demonstration of the implications of the effects/implementation doctrine; the EC forbade a merger between non- members because of sale of the product in the Community. The interests of South Africa did not come into play because South Africa did not require the transaction to take place, and a conflict of interest would only have arisen if South Africa required it, rather than simply allowing it. Fox (1999)[15] makes the point that the prohibited transaction is likely to have a more serious impact on the economy of South Africa than on European consumers. Fox argues that South Africa's diplomatic stance (no opposition) made resolution of jurisdictional problem in Gencor an easy one, compared to what would have been the case had South Africa fought for its merger. Gencor and Boeing raise the issue of the need for an international merger protocol.

6. ISSUES OF INTERNATIONAL CONFLICT IN EXTRATERRITORIAL JURISDICTION

[14] *Wood Pulp* (n 2).
[15] Fox, E 'The Merger Regulation and its Territorial Reach' (1999) ECLR 334.

In *Boeing/McDonnell Douglas*, the Commission exercised its jurisdiction over a merger between two US corporations on the basis that both parties exceeded the turnover requirements. In the context of merger control, the propriety of the effects test was made clear by the Court. The creation of the world's largest aerospace manufacturer was of great concern, as it reduced the number of manufacturers from three to two, and opened a Phase II investigation under A. 6(1)c. The Commission communicated its concerns to the FTC, but the FTC subsequently cleared the merger, on the ground that Boeing was already dominant. The FTC had further stated that prohibiting the merger could have harmed important US defence interests. The Commission sanctioned the merger when several conditions were agreed upon to resolve any anticompetitive effects. The case illustrates that despite bilateral cooperation arrangements between like-minded competition authorities, clashes cannot always be avoided.

In *Commercial Solvents v. Commission* (1974),[16] the key point of friction was the refusal to supply in order to exclude competitors from ancillary markets. Whatstein (1992) elucidates the relevance of this case to the extraterritorial argument.[17] Commercial Solvents of New York had a controlling interest in its Italian subsidiary of 51% shareholding and 50% representation on the board etc. Commercial was the world's only producer of aminobutanol and the Italian subsidiary Instituto acted as a reseller and having conferred with Commercial, it was prohibited from selling aminobutanol to third parties. The Court upheld the Commission's decision that it was abusive of Instituto to refuse to supply to Zoja, a downstream firm which produced a drug of which aminobutanol was an essential ingredient.

The companies argued that they have always acted independently, so that they cannot be deemed responsible for each other's actions. For the purposes of this case, Commercial wanted to shift the blame on Instituto, on the ground that it only acted within the boundaries of the Community. The Court considered the 'group economic unit' theory in determining that refusal to supply was a united action and with regard to their relations with Zoja, the two companies must be deemed to be an economic unit and that they are jointly responsible for the conduct complained of. In comparison with *Dyestuffs*, where it had to be shown that the subsidiary follows instructions of the parent, and Continental Can, which required that the subsidiary follows instructions in determining its market behaviour, Commercial Solvents relied on the existence of a unified economic unit only with respect to the condemned

[16] *Zoja v Commercial Solvents* [1972] OJ L299/51; [1973] CMLR D50.
[17] Whatstein, L "Extraterritorial Application of EC Competition Law - Comments and Reflections" (1992) 26 ILR 195.

behaviour, rather than the overall economic activity of the subsidiary, which was found to be a sufficient basis in order to pierce the corporate veil.

7. CROSS BORDER COOPERATION

The Community is acutely aware that it cannot rely on its own concepts and procedures to act against foreign business conduct and that extraterritorial enforcement brings many politically negative externalities. In 1991, the Community and the US entered into their first antitrust cooperation agreement.[18] It contains what are known as passive, or traditional comity provisions, which permit an active communication of information and consideration of a trading partner's interests, but do not involve any 'triggering' of enforcement activity in another jurisdiction. Positive comity, on the other hand, provides for the possibility of one authority to request the other to take enforcement action. The agreement provides for the reciprocal notification of cases under investigation by either authority where they may affect the important interests of the other party, as well as periodic meetings and coordination of their enforcement activities.

In 1998, the Community and the US entered into a separate accord expressly supplementing these positive comity commitments; it specified the conditions under which the party requesting enforcement action should suspend its own enforcement activities and let the requested party take the lead. This suspension agreement was limited to 'competitor only' complaints dealing with allegations of export restraints. A similar agreement was entered into with Canada in 1999.

The principle of positive comity applies where undertakings from one party to a cooperation agreement are being harmed by the anticompetitive practices occurring within the territory of another party. As the injured party cannot itself initiate extraterritorial enforcement proceedings (because of the absence of evidence of harm to competition in its own market) it has to rely on the other party taking action on its behalf. The most public informal case of positive comity involved joint investigations by the Community and the US into the bundling/tying of terms of contracts in one country with those in another by A.C. Neilson, a US company that tracks retail sales.[19] Its major Information Resources, Inc. (hereinafter IRI) filed the complaint and as to whether Neilson offered customers more favourable terms in

[18] EU/US Competition Cooperation Agreement OJ L95 27/04/1995 47.
[19] Press Release, US Dep't of Justice, Justice Department Closes Investigation into the Way AC Nielsen Co Contracts its Services for Tracking Retail Sales (3 Dec 1996).

countries where it had market power as means of ensuring that customers use Neilson in countries where it faced competition (Rill et.al, 2005)[20] As the practice took place within the Community's jurisdiction, the Commission took the lead and it was found that Neilson had indeed implemented various exclusionary practices to impede IRI from entering the European market. Similarly, in *SABRE-Amadeus* (1997),[21] the US referred to the Commission to investigate possible anticompetitive conduct by Amadeus, a dominant computer reservation system in Europe, which was preventing SABRE from competing in some EU member states.

The agreement meant that when anticompetitive activities occurred in the whole or a substantial part of the territory of one of the parties and affected the interests of the other party, the latter would normally defer or suspend its enforcement activities in favour of the former. This is expected to happen particularly when these anti-competitive activities do not have a direct, substantial and reasonably foreseeable impact on consumers in the territory of the party deferring or suspending its activities. This new agreement represented a commitment between the parties to cooperate with respect to antitrust enforcement in certain situations, rather than seeking to apply their antitrust laws extraterritorially. However, EC merger rules are not in the scope of the 1998 agreement, as they do not allow for deferral or suspension of action.

Both the US and Canadian agreements with the EC have a confidentiality provision whereby parties can refuse to disclose any information if it is prohibited under the law of the party that holds the information or if it would be incompatible with the important interests of the party that holds it. This gives each party some discretion as to how far confidentiality can extend, which is motivated by the fear of dispatching the information about a company to its competitors. The Community distinguishes between business and agency information; the latter pertaining to the investigation, and the former being company specific which can only be disclosed to the US with the consent of the company. The US does not make this distinction and requires consent of undertakings for disclosure of any information. The Microsoft case in 1994 waived the rights to confidentiality to allow information exchanges as it was easier for the company to work with both authorities together.

[20] Rill, JF & H Rosenblatt, 'Coordinated interaction and collective dominance: a remarkable journey towards convergence' in P Lugard and L Hancher (eds), *On the Merits: Current Issues in Competition Law and Policy* (Antwerp, Intersentia, 2005) p 127–156.

[21] Thea Freese, 'Coordination in multijurisdictional competition cases developing a main impact principle in international law' SABRE/ Amadeus IP/ 91/784 (1991) < https://europa-kolleg-hamburg.de/fileadmin/user_upload/documents/Study_Papers/SP_12_2_Freese.pdf> accessed 9 January 2015.

Finally, positive comity can only apply where the anti-competitive practice is illegal in the jurisdiction of the requested party. For example, the US approaches vertical restraints in a more lenient manner than the Community does; the latter prohibits arrangements that may significantly restrict competitors' access to a market. It is interesting to note that Europe is not home to as many near monopolies or dominant firms of substantial size such as Microsoft, Apple, Wal-Mart or General Electric. As such, it is less likely that the FTC would take action against vertical restraints which impedes entry of a European competitor, unless they substantially lessen competition in both sides of the Atlantic. As Atwood elucidates – 'it is not realistic to expect one government to prosecute its citizens solely for the benefit of another.' Thus, positive comity is likely to be effective where both parties have a mature legal infrastructure propounded by a mutual consensus on the role of competition policy.

8. CONCLUSION

There have been many initiatives and plans undertaken by the Community to formulate mechanisms for increasing cooperation over these anti-trust laws and avoiding conflicts. This has taken the form of working with the United Nations Conference on Trade and Development, OECD and World Trade Organisation in attempting to establish multilateral cooperation. However, these attempts have still been precipitated by divergent cross-border views and the idea of a global competition law regime is still in its infancy given the economic status of these global countries.

The practice of claiming ETJ is engulfed with political ramifications of international proportions. In applying ETJ, competition authorities must bear in mind the consequences which it may spur such as strained future relations, trade barriers (which would impact the enforcer's economy) and perhaps less cooperation, which may prevent the mitigation of future anticompetitive conduct. For example, if a small open economy such as Ireland took a lawsuit against Apple (an abstract but illustrative example), given that the sale of electronic appliances to Ireland may only represent a small proportion of the company's sale, Apple could decide to cut off selling to Ireland directly, which would have heavy repercussions on consumer welfare. This conjures up a type of trade-off between short run enhanced competition and perhaps long run economic consequences, as in the case of *Gencor*. Despite the theoretical weaknesses and ambiguous scope of the *Wood Pulp*[22] formula, it is clear that trading into the Community as well as trading with the Community falls within the reach of the Community's jurisdictional

[22] *Wood Pulp (*n 2).

competence. The “implementation” formula is an elusive concept that can actually embrace all business transactions with a Community dimension, regardless of the territory in which the transaction crystallises and the location of the headquarters of the undertakings involved.

COMMERCIALISATION OF OUTER SPACE ACTIVITIES: NEED FOR A LEGAL REGIME IN INDIA

- *Biswanath Gupta[*] and Dr. Raju KD[**]*

1. INTRODUCTION

The stars, the galaxy and the sky, from time immemorial, have been a matter of great attraction to the poets, scientists and even common human beings. The best of our scientific knowledge tells us that there is no life on any of the planet or galaxies other than the earth.[1] Very few experts in the space-faring community are aware of the current technologies, policies, law and economic initiatives and the recent trends in the rapid development of space research. The main mandate of the outer space exploration is peaceful exploration and non-appropriation of outer space. We need to develop our outer space to be sustainable and conflict free. Freedom and equality to proceed with the recent trends should form the basis of the core principle of common heritage of mankind.[2]

The ingress into outer space after the second half of the twentieth century is undeniably one of the greatest achievements in the human history.[3] Space discovery resulted in a number of scientific and technological breakthroughs. The internet technology, direct television broadcasting, communication, weather forecasting, etc. are the direct results of the artificial satellites activity in space exploration. Space technology can also be used for the sustainable advancement of the humanity as a whole, in fields like information technology, telemedicine, tele-education, etc. In this era of twenty-first century and scientific development, the states are extending their scientific experiments and technological capability beyond the perimeter of the earth. They are also exploring the space not just to find newer dimensions of science & technology but also for economic advancement and benefit of entire mankind.

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[1] Fabio Tronchetti, *Fundamental of Space Law and Policy* (Springer 2013).
[2] Edythe E Weeks & Ayodele A Faiyetole, 'Science, Technology and Imaginable social and behavioural impacts on outer space developments' (2014) 95 ActaAstronautica 163-173.
[3] S Marchisio & Nandasiri Jasentuliyana, 'The Legal Dimension of the Sustainability of Outer Space Activities: The Draft Code of Conduct on Outer Space Activities' (2012)55 Proceedings of International Institute Of Air And Space Law 1, 3-22.

The year 1957 is a very important milestone for space exploration. In 1957, the Union of Soviet Socialist Republics (hereinafter 'USSR') sent its first spacecraft to the outer space. From 1957 to 1979, international space law has seen five international conventions which constitute the jurisprudential base of space law.[4] Apart from this, different states developed their own national legal frameworks also for dealing with outer space developments. But in the early 1980s, space law has seen a gigantic shift from scientific exploration to commercial exploration and private use of outer space. This shift changed the picture of outer space exploration a lot. Since the establishment of Indian Space Research Organisation (hereinafter 'ISRO') in 1969, India has witnessed fast developments in space science and technology. India, despite being the signatory to four major space conventions, could not yet enact any national space legislation for regulating the space activities and the developments of the nation. This is mainly attributed to the non-privatisation of the space sector in India.

2. HISTORICAL DEVELOPMENTS BEFORE 1957

The genesis of space law actually comes from aviation law. The flying history starts by the design of first aircraft (a hot air balloon) conceived by Montgolfier Brothers. The very next year 'lieutenant police' in Paris passed an ordinance to prohibit balloon flights to fly without special permission. It is the first air law in its kind. In 1785 and 1786, a similar type of prohibition was made in council of Namur, Belgium and senate of Hamburg respectively.[5] In 1819, the first resolution in safety of air navigation was passed during harvesting time considering the decision of 1815, where the court decided that the aeronaut will be liable for any damage done by the balloon.[6] Again in 1822, the New York Supreme Court came up with

[4] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, (adopted on Dec. 19, 1966, entered into force on Oct 10, 1967) 18 UST 2410, 610 UNTS 205 [hereinafter OST 1967]; Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, (adopted on Dec 19, 1967, entered into force on Dec 3, 1968)19 UST 7570, 672 UNTS 119; Convention on International Liability for Damage Caused by Space Objects, (adopted on Nov 29, 1971, entered into force on Sept 1, 1972) 24 UST 2389, 961 UNTS 187; Convention on Registration of Objects Launched into Outer Space, (adopted on Nov 12, 1974, entered into force on Sept 15, 1976)28 UST 695, 1023 UNTS 15; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,(opened for signature on 18 Dec 1979, entered into force on 11 July 1984) GA Res 34/68, Dec 5,1979; Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, GA Res 37/92 (Dec 10, 1982); Principles Relating to Remote Sensing of the Earth from Outer Space, GA Res 41/65 (Dec 3, 1986); Principles Relevant to the Use of Nuclear Power Sources in Outer Space, GA Res 47/68 (Dec 14, 1992); Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking Particular Account of the Needs of Developing Countries, GA Res. 51/122 (Dec 13, 1996).

[5] Peter H, 'A Historical Survey of International Air Law before Second World War' (1957) 1 Mcgill LJ 7, 24-42.

[6] *Pickering v Rudd* [1815] 4 Camp219; 1 Stark 56; 16RR**777;** Kuhn, Arthur K, 'The Beginniugran Aerial Law' (1910) Am J Int'l L 109-132.

a decision for fixing tortuous liability to the aeronaut for destroying harvesting by common people while watching the balloon.[7] Following the year of 1903, the Wright brothers successfully carried out human flight. The second incident was the flying of German balloons in the French territory and the reaching of agreements between them. Further, these developments resulted in the 1910 Paris Convention and the Warsaw Convention of 1929.[8] Warsaw Convention 1929 makes sure that the country that possesses the land also possesses the sky. But after the Second World War, space law began as a separate branch of legal domain.[9]

The development of space law started in the late twentieth century. It is evident from the history that by 1955 the literary work was already done on how to regulate space flight. Until 1950, all the literature and discussion was mainly over the sovereignty of the air limit. There was no substantial legal progress in space law during this period 1910 to 1950. Like Mandl, other authors in the 1940s and 1950s argued for a specific legal regime for rockets crossing the atmosphere.[10] First book was published by a Czech engineer, attorney, inventor, pilot and author Vladimir Mandl in 1932. Again in 1926 in an air law conference in Moscow, a paper was presented by a senior official of the Soviet Union Ministry, V.A. Zarhar.[11] But the content of the paper was mainly on the sovereignty of the aerospace.[12]

The first book on space law was written by Dr. Vladimir Mandle. The name of his book is 'Das Weltraum-Recht: Ein Problem der Raumfaurt'. The book was written on the needs and the extent of law that would emerge relating to space flight activities. But the first article of the twentieth century was written by a French writer& lawyer, named Emile Laude in 1910. At that time, he was essentially writing on air law. However, it is clear that after the launch of Sputnik 1 in 1957 that the real space age had started. Emile Laude ended his discussion with a comment.

> *"But the term will never apply to the air proper…all the problems raised by the new locomotion are going to move beyond the air…a new law will govern*

[7] *Guille v Swan* [1822], 9 Johns (NY), 381; (1928) *USA v R*, 53; *CCH A v Cas* 1 (1947).
[8] Tang u Fong, 'Air Law, Aeronautical Law', <www.dsaj.gov.mo/EventForm/DisplayEvent.aspx?Rec_Id=494> accessed August 28 2014.
[9] ibid (n 5).
[10] Rita M Lauria, 'The Space Age-United States Beginnings' <http://www.lacba.org/Files/Main%20Folder/Sections/International%20Law/InternationalLawNewsletter/files/Doyle.pdf > accessed April 30 2014.
[11] V A Zarhar, "Mezhondunarodonoye Publichnoye Vozdushnoye Pravo" (Public International Air Law).
[12] ibid (n 13).

the new juridical relations. These will no longer Aerial law… but it is certainly it is question of law of the space." [13]

3. DEVLOPMENT AFTER 1957

The decades of the 1960 and 1970 saw a substantial and significant success of the United Nation Committee on Peaceful use of Outer Space (hereinafter 'UNCOPUOS') mainly in drafting international space law. The first and foremost important document is 1963 Declaration of Legal Principles Governing the Activities of the States in the Exploration and Use of Outer Space.[14] During 1960 to 1970 United States (hereinafter 'US') and USSR were the only substantial players in the space activities. Thus, the United Nations' (hereinafter 'UN') concern to find out some solution for peaceful use of outer space, so that both the powers should agree and assent to international agreement for space flight activities.

Most significantly in 1992 the UN came up with an Office of the Outer Space Affairs in the UN secretariat. After the establishment of Committee on the Peaceful Uses of Outer Space (hereinafter 'COPUOS'), it successfully drafted five important treaties governing the outer space activities. Apart from this different states also developed national legal framework for dealing with outer space developments. But in the early 1980s, space law saw a gigantic shift from scientific exploration to commercial exploration and private use of outer space. This shift changed the picture of outer space exploration a lot. From the establishment of ISRO in 1969, India has seen a fantastic development in the space science and technology. India despite being the signatory of four major space conventions has so far failed to enact any national space legislation for regulating the space activities and the developments of the nation.

4. RIVALRY BETWEEN US AND RUSSIA

It is common understanding that the space age was a product of the rivalry between US and USSR during the Cold War. It was USSR that first launched the artificial satellite Sputnik 1 in 1957, and in response, US launched its first satellite the very next year in 1958 named, the Explorer 1. The efforts for exploring new paths were started but with a caution to maintain peace and security in outer space.[15] Due to these alarming developments, UN began discussing the way out for the peaceful use of the outer space. The bilateral discussion between US and USSR resulted the creation of new forum and COPOUS came into picture out of this discourse.

[13] ibid.
[14] General Assembly Resolution, 1962 (XVIII).
[15] Eligarsadeh, *Space Politics and Policy: An Evolutionary Perspective* (Springer, 2002).

COPOUS in turn created two sub committees: the Scientific and Technical Subcommittee and another, the Legal Sub-Committee. The Legal Sub-Committee is the primary forum for discussion and negotiation of international agreements relating to outer space.

5. COMMERCIALISATION OF OUTER SPACE

It is said that world is at its third industrial revolution, concerning the ability to extend the work and live in the outer space. The development of commercial space activities offers a new hope for the profitable development. After the year 1980, the commercialisation and privatisation of outer space began in the US.[16] The terms commercialisation and privatisation are used interchangeably, although they have significantly different meanings in space business. Commercialisation means using domestic capabilities for the economic development of a country.[17] It includes also using the advancement of the space technology for commercial purpose by the concerned state, e.g. launching facilities, telecommunication, remote sensing, etc. On the other hand, privatisation means, shifting to private sector for acquisition of goods or services required for space activities. The development of private commercial space activities is, however, underestimated by many of the space capable countries. The possibilities of commercialisation and privatisation are enormous. However, it is important to keep in mind that considerable efforts are necessary to realise profitable development in space business. Those efforts must not only be technological but legal too.

It is quite evident that commercialisation of space is not possible without the desirable development in the legal field, especially dealing with the private commercial activities. A trend already has been set by the US by implementing effective rules for the space commerce. The US is one of the first nations to introduce space legislation for commercial purpose namely, the Commercial Space Launch Act 1984 (hereinafter 'CSLA'). Domestic legislation is very important in bringing changes to space commerce. Both public international law as well as private international law play an important role in conduction of commercial space activities. For the first fifty years of space law development, the world has witnessed a progress in public international space law. However, little has been done for the private international space law.

[16] Zach M, 'Private Commercialisation of Space in International Regime: A Proposal for Space District' (2010) 30Nw J Int'l L& Bus 241, 241-61.
[17] Huang Huikang, 'Space Law and the Expanding Role of Private Enterprises, with Particular Attention to Launching Activities' (2001)5 Sing J Int'l & Comp L 55 55-62.

Development of space private international law is important for the proper development of privatisation and commercialisation of space activities.

Commercial space activities can be classified mainly into Satellite Telecommunication, Remote Sensing, Global Navigation Satellite System, Space Tourism and Space Transportation. Firstly, Satellite Telecommunication is defined as "*any transmission, emission, or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems or any transmission, emission, or reception of signs, signals, writings, images, sounds, or information of any nature by wire, radio, visual, or other electromagnetic systems*."[18] Secondly, "*Remote Sensing means Sensing earth from outer space. Thirdly, Global Navigation Satellite System implies a complex satellite system, gives information to the receiver about his actual position on the earth. Space Tourism means taking people to the space for visiting purpose. Lastly, the Space Transportation is a business where one country gives facility to another country to launch their space object to the required orbit.*"[19]

6. COMMERCIALISATION OF OUTER SPACE IN INDIA

Over the past few years, after the successful launching of 'Chandrayaan 1' and 'Mangalyaan' into outer space, the world's perception of India's space capabilities has changed dramatically. Not only this, Government of India's attitude towards the space industry also changed for the last few years.[20] Now Government of India is seriously thinking about the space commercialisation and privatisation. There is no doubt that commercialisation and privatisation will give more competence to the capability in space exploration and scientific discovery. This capacity building will strengthen the space industry in India, which can help earn huge foreign currency to the Indian reserve. The Citizen Charter issued by Department of Space also specifies that India is committed to achieve indigenous capacity for the design and development of spacecrafts, technologies for communications, the survey of national resources, research and development in space science and associate knowledge and technologies, and the application of space program for national development. To facilitate the space industry in India, ISRO has established its commercial entity, the Antrix Corporation Ltd. in the year 1992, for

[18] International Telecommunications Union, Radio Regulations Geneva, January 1, 1998.
[19] Yun Zhao, 'An International Space Authority: A Governance Model for a Space Commercialisation Regime' (2004) 30 J Space L 277277-96.
[20] Ranjana Kaul & Ram Jakhu, Space Law in the Era of Commercialisation (2010) (1st edn, Eastern Book Company).

commercialisation of space products, technical consultancy service and technology transfer.[21] Though India has made significant development in the space exploration but there is hardly any legal development for governing space exploration. Considering the scientific and technological development, India needs a legal governance system for better flourishing of this sector.

Though the five space conventions have not defined the term outer space, but it is customary practice that space beyond 100 miles above the sea bed is considered as outer space.[22] The outer space is mainly divided into four kinds of orbit for satellite communication.[23] The most important is the Geostationary Orbit (hereinafter 'GSO') at approximately 35700 km from the earth.[24] GSO satellites take the same speed as the Earth. GSO is mainly used by Telecommunication Satellites. The Low Earth Orbit (hereinafter 'LEO') is another important orbit, where most of the modern telecommunication satellites operate.[25] This orbit can hold a larger number of satellites than the GSO. The Middle Earth Orbit (hereinafter 'MEO') is a compromise in between LEO and GSO.[26] The last is a Near Earth Orbit (hereinafter NEO). NEO is mainly used for remote sensing and military inspection.

7. COMMERCIALISATION AND PRIVATISATION OF OUTER SPACE AND LEGAL IMPLICATIONS

International space conventions are mainly entered between state actors. There is little scope for private entities to play a role in these conventions. So far as the basic five conventions are concerned, they only marginally deal with space commerce (except Article VI of the OST 1967 where non-governmental organisation are mentioned; here, non-governmental means actors other than state parties, i.e. private companies). Therefore, it is very difficult to find any legal solution for commercialisation and privatisation of outer space under the existing international space conventions. The OST 1967 is considered as a jurisprudential pedestal for law of the

[21] Antrix Corporation Limited, <http://www.antrix.gov.in/> accessed December 14, 2014.
[22] Jasentuliyana, Review of the Work of the United Nations Committee on the Peaceful Uses of Outer Space, (1983)11 JSpaceL125.
[23] Yates JM, Spanbauer BW, Black JT Geostationary Orbit Development and Evaluation for Space Situational Awareness (2012) 81 Acta Astronautica 256, 256–272.
[24] Loo KW & Giam H, 'Geostationary Earth Orbit Satellite Model Using Easy Java Simulation' Ministry of Education Technology, Singapore <http://arxiv.org/ftp/arxiv/papers/1212/1212.3863.pdf > accessed 18 December 2014.
[25] Inter-Agency Space Debris Coordination Committee, September 2007.
[26] NASA, <http://gcmd.nasa.gov/User/suppguide/platforms/orbit.html> accessed December 17 2014.

outer space. The entire treaty is based on the premise of exploration and peaceful use of outer space by the states.

According to the Registration Convention 1975, registration is compulsory for any spacecraft (Article 2) before launching to the outer space in order to ensure that if any accident occurs, liability can be attributed to the launching state. Articles II and III of the Liability Conventions clearly say that liability will be determined by national laws, hence the liability will be determined by private international law and not by the public international law or by Liability Convention or Registration Convention. The important point here is that until and unless international law exists, supplemented by national law, it is almost impossible to determine the liability of private parties. Further, the issue of fixing the highest ceiling limit of insurance by domestic law (as France and the US have done by making legislation for fixing the upper limit of private companies' financial liability) in commercial space contracts in space business is very important.

The Liability Convention 1972 makes the launching country liable for any accidental situation in the outer space as well as in the earth.[27] However, this provision will discourage states to employ private bodies to enter into space commercialisation. On the other hand, if any state by national law shifts complete liability to private body, this will also discourage private bodies to enter into space commercial transaction as there is no mention for private bodies.

Legal aspects of space commercialisation from the point of view of the manufacturer are very important. Manufacturers are those, who supply different equipment or parts to space agencies for building spacecrafts. Taking into account the possible litigation from space activities, the main financial consequence of defective items supplied and the technical complication that manufacturers are facing in the particular environment in the outer space itself is a subject matter for better understanding of the complex space commercialisation issues.

In addition, the product liability in space is a matter of concern. Product liability is similar to manufacturer liability. Products are the different parts of spaceflight and a part of the spaceflight as a whole. According to the Registration Convention preamble paragraphs numbered 2 and 3, the registered country will be liable for any damage. Here, the question is how the product liability will be shared by the manufacturer and the registered country in the

[27] Convention on International Liability Caused by Space Objects 1972, Preamble para 2, 3 and art III, IV.

absence of any guiding principles. Most importantly the absence of any national law in a particular country is a matter of concern.

For fixing product liability under international space law, absolute liability is the only option under the existing international space regime. Absolute liability means fixing the liability even when there is no fault. If any damage has been done, the liability will be fixed automatically in spite of due care and caution undertaken.[28] On the other hand, national space laws impose fault-based liability or put a limitation on liability. There is therefore, a vast difference in the determination of liability from any damage in the international and national regimes. To prove Absolute Liability, establishment of negligence is important, but in space related activities, the determination of liability is not an easy option. Secondly, breach of 'implied warranty' arises from the party. For fixing product liability under the international regime, the Hague Convention 1973 is extremely relevant.[29] Articles 4, 5, 6 and7 describe the applicable provisions in case of dispute between the parties. The Hague Convention 1973 says the applicable law will be internal law of the state of injury (Articles 4 and 7) or Habitual Residence of the suffered person or the place of the business (Articles 5, 6and 7).

Space law disputes and dispute settlement mechanism are also an area of major concern. The Permanent Court of Arbitration formulated new Arbitration Rules in 2011 for the settlement of space disputes. Law of the place of injury or defendant's place of business will be applicable (Articles 18and 23 of the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities 2011) for dispute settlement under these Rules. The Liability Convention attaches liability to the launching state. But, to transfer the liability to a third person, the country needs domestic law. As in the US, the Commercial Space Launch Act 1984 provides safety and financial viability to the launching provider. United Kingdom (hereinafter 'UK') also developed national legislation, i.e. Outer Space Act 1986 to deal with the outer space activities. Like the UK, France and Germany also developed national legislations for space activities, that is, the France Space Operation Act 2008 and the Law Governing the Transfer of Responsibility of Space Activities 1990 respectively.

Launching and operating spacecraft is a highly specialised field requiring both spacecraft launch and operation to comply with national and international regulations. The acquisition of spacecraft licenses, responsibility and supervision of launching space objects, national security

[28] Hanneappel PPC Product Liability in Space Law, (1979-1980) 2 Hous J Int'l 55.
[29] The Hague Convention on the Law Applicable to the Product Liability, October 2, 1973.

and liability for damage are the issues of legal concern in spacecraft launching. The legal implications are multiple and complex due to the characteristics of space transportation. Various legal regimes are involved in launching and operating a spacecraft. Space law has been developed from 1960 to deal with the commercial launchings. Apart from this, launching states also developed national laws to deal with the situations and countries aspiring to launch businesses also need to develop national law to streamline the process of commercialisation. However, the innovative market has displayed the necessity to bring a legal framework to handle the governmental and non-governmental launching facilities. In space business, launch and related activities such as licensing process, management of liability risk, etc. are challenging tasks.

Apart from the new possibilities that open up with deregulation of space activities from the government or public sector, the presence of private players in the galactic business raise a number of specific issues and questions about Intellectual Property Rights, safety and liability. Hence, any legislation with regard to controlling and directing private activities has two facets, the international, where the legislations are guided by '*jus cogens*', UN conventions, international treaties like The Hague Convention on Product Liability 1973 etc.,[30] and the national, which imposes an obligation on states to formulate the legislation to clarify liability of private space parties in case of accidents or solutions to problems relating to safety, liability and IPR in space inventions. Thus, a need for an international treaty along with a model national legislation for regulating the private players in space arena is imperative.[31]

Except for the 1979 Moon Treaty, India is signatory to all the important space treaties such as the OST 1967, the Rescue Agreement 1968, the Liability Convention 1972, and the Registration Convention 1974. Article 51 (Promotion of international peace and security) of the Indian Constitution provides that India should respect its international treaties. Further, the Article provides a duty incumbent upon the state for maintaining international peace and security. It obligates the implementation of international treaties into domestic legislations. India is now morally and legally bound to the international community to enact domestic law to give application to these treaties. However, so far India does not have any domestic space legislations. The commercial outer space legal issue creates two categories of legal problems. First, the International Treaty obligations of a particular country who is a signatory to the space

[30] Malcolm N Shaw, *International Law* (Cambridge University Press 2008) 481.
[31] ibid (n 22).

conventions. Second, the legal issues that will arise when private companies come to the market to fulfil the demand space services. The first problem can be given effect by enacting national laws, and as India is a signatory of the OST as well as other important treaties relating to outer space, the concept of absolute liability (Article VI of the OST 1967) of the launching state for outer space activities is applicable. On the other hand, other countries which are involved in commercial outer space activities have their domestic laws in place. Their domestic laws clearly prescribe the limitation of liability as well as insurance for liability. In the US, the ceiling limit for the third party is $500,000,000 and $100,000,000 for US property. If the claim surpasses the amount, then the US government undertakes to pay up to $ 1,500,000,000.[32] Private companies are cautious and hesitant in their Indian endeavours, unsure of regarding India's legal position. In case of any damage, it is not clear whether India will make them absolutely liable or like other countries there will be ceiling on the liability and make liability based on fault basis. The legal vacuum in India is a major drawback for India's space commerce.

India's recent push for commercial activities will definitely boost to the Indian economy. Presently India has a Remote Sensing Data Policy of 2011, the Satellite Communication policy 1997, the Norms, Guidelines and Procedures for Implementation of the Policy Framework for Satellite Communications in India (hereinafter 'SATCOM Policy'), National Telecom Policy 2012 and Mapping Policy 2005 to deal with commercial activities. Very recently India also opened its market for private players in space market mainly in the telecommunication sector. India is consistently continuing to emerge as a serious contender in the international space market. India has not yet formulated any national space policy, with the only policy dealing with space activities being the SATCOM Policy.

The SATCOM Policy 2000 exclusively deals with the satellite telecommunication. SATCOM Policy sets procedures and guidelines for commercial space exploration in the telecommunication sector, though this policy applies only for the application for licenses in telecommunication. There are almost no provisions on commercial launches, insurance, indemnification or dispute settlement. Government of India has not yet initiated any process for enacting Domestic Space Legislation or amending any relevant existing legislation to give effect to its international space treaty obligations. In spite of this India is increasingly opening its market for commercial space activities. The commercial space activity in India continue to

[32] The Commercial Space Launch Act 1984, art 19 PubL No 98-575, 98 Stat 3055 (1984).

be the subject matter of the Department of Space in the Government of India. There are also however, guidelines and procedures that have been occasionally issued for outer space activities in India like the Remote Sensing Data Policy 2011, Satellite Communication policy 1997, SATCOM Policy 2000, National Telecom Policy 2012 and Mapping Policy 2005. The legal issues relating to private space activities are largely dealt by other normative laws of India like Contract Act 1972, Sales of Goods Act 1930, Transfer of Property Act 1972, and all intellectual property rights laws, which are largely not modified or amended for commercial space explorations.

8. CONCLUSION AND RECOMMENDATIONS

The requirement of the present hour is to harmonize the international treaty and national laws at the domestic level. From the above analysis, the lack of international law to deal with commercial space activities in the present date is clear. All the present international agreements are not sufficient to deal with the present space commercialisation move. In light of the same the recommendations are:

1. There is a serious need for the revision of the present space slaw agreements.
2. It is important to formulate new international space law concerning the commercial space activities.
3. Not only this, there is an urgent need for enacting national law for India, following other countries who are increasingly engaging in space commerce successfully.
4. There is an urgent need for enacting corresponding national law in compliance with international law.

There remains a need for important issues like safety and control, contracts, dispute resolutions and space liability, etc., to be addressed. Apart from this, the laws of contract, transfer of property, stamps duty, registration, copyright, patent, insurance law and last but not the least arbitration law needs to be revised to cover space related activities within the ambit of domestic laws. No provisions exist now for participation of private parties in space activities in India, and there is also no legal regime to protect or to curb the operator and the government for any damage or in fixing liability. The domestic laws remain unrevised, especially the IPR laws, to include space related activities. Internationally it was agreed that any space related disputes will be handled by arbitration, but our arbitration laws are not updated according to present space agreements. Another important issue is insurance law. Risk coverage is one of the

important things in business and therefore domestic laws relating to third party risk in space activities need a clear legal regime.

INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA: A QUICK OVERVIEW

- Hardik Singh [*]

1. INTRODUCTION

The origin of conflicts coincides with the very inception of human society, which in turn led to the evolution of various rules of engagements between the belligerents. These belligerents may be state or non-state actors. It was through continuous application and improvisation of these procedures that the modern-day humanitarian law was chiselled out. The definitional development of 'humanitarian' focussed on the principle that, being a human precedes all other considerations and affiliations.[1] In other terms, humanitarian law attempts to strike equilibrium between humanitarian concerns and the military necessities of the State.[2] The present essay tries to demystify the various dimensions of international humanitarian law in the context of South Asian nations.

2. SUBJECT-MATTER OF INTERNATIONAL HUMANITARIAN LAW

The genesis of International Humanitarian Law (hereinafter 'IHL') can be traced to the rules of ancient civilisations and religions with respect to warfare. Although universal codification began in the nineteenth century, proper framework could only be evolved by 1949; perhaps the two world wars were the requisite catalyst.[3] IHL or 'Geneva law' has kept pace with the political developments around the world, especially the changing dimension of armed conflicts. It is for the aforesaid reason that it has expanded from mere 10 Articles in 1864 to the present complex amalgamation of 600 Articles.[4]

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[1] A S Hornby (ed), *Oxford's Advanced Learner's Dictionary of Current English* (8th edn, OUP 2010) 760; Jean S Pictet (ed), *Commentary on Geneva Convention I* (Geneva International Committee of the Red Cross 1952) 46.

[2] International Committee of the Red Cross, 'What is International Humanitarian Law?' (Advisory Service on International Humanitarian Law, 31 July 2004) <http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf> accessed 29 November 2014.

[3] ibid.

[4] VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) xiv.

The central body of humanitarian law consists of four Geneva conventions of 1949 and two supplements in the form of additions protocols of 1977. Apart from these there are hundreds of other conventions, which are operational in specific subject-matters like the conventions on Cultural Property, anti-mines convention, convention on cluster munitions etc. Moreover, there is a parallel customary humanitarian law jurisprudence which assists in giving a comprehensive and integrated coverage to the application of IHL.

The subject-matter of IHL can be broadly distinguished into international armed conflict and non-international armed conflict. While the former involves two state parties and might take place in international theatre[5], the latter conflict is restricted to the territory of a single state and involves parties from within the state itself.[6] Internal disturbances and tensions are not included within the ambit of non-international armed conflict.[7]

Humanitarian law serves a dual purpose, on one hand, it protects the participants (by regulating the procedure and protocols of warfare) and on the other hand, it protects those who are not taking part. If treaties are segregated into the above-mentioned categories, one will find disproportionate number of Conventions dealing with the international armed conflicts when compared to non-international armed conflicts. However, due to interpretation of the common Article 3, minimum core contents of humanitarian rules have been made applicable to both categories of conflicts.[8]

The concept of 'grave breaches' was technically not applicable to non-international conflicts and even other IHL treaties could not fill these lacunae.[9] This in-turn led to failure of imposition of criminal sanctions in situations of an internal armed conflict. However, in the last two decades, there has been a tremendous expansion of the international law jurisprudence regarding armed conflicts and humanitarian violations incidental to it.[10]

One of the most common mix-ups has been about IHL and International Human Rights. Although both share the same roots and objective, but operate in different directions. While

[5] Protocol I additional to the Geneva Conventions 1977, art 1(4).
[6] Protocol II additional to the Geneva Conventions 1977, art 1.
[7] Additional Protocol II, art 1(2).
[8] *Nicaragua v United States of America (Military and Paramilitary Activities in and against Nicaragua)* 1986 ICJ 14 [254] – [256].
[9] John Dugard, 'Bridging the gap between human rights and humanitarian law: The punishment of offenders', (1998) No 324 International Review of the Red Cross 447.
[10] *Prosecutor v Dusko Tadic* IT-94-1-A; *The Public Committee against Torture in Israel v The Government of Israel*; Use of Force Committee, 'Final Report on the meaning of armed conflict in international law' (*International Law Association,* 2010) <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87> accessed 29 November 2014.

IHL tends to regulate conduct in time of conflict only, International Human Rights impose only general obligations on nation states in both peacetime and conflict.[11] Another major difference is that, IHL is binding on both state and non-state actors, but human rights law is primary designed to check state-initiated abuse and hence is only binding upon state actors.[12] However, over time, this barrier between the two has been penetrated to allow for the introduction of Human Rights principles in the efficient delivery and allocation of humanitarian assistance.[13] This inter-mix between the two fields has received criticism from certain IHL experts.[14]

3. INTERACTION OF IHL IN SOUTH ASIA

The importance of IHL in South Asia is evident from the fact that, this is a region which has witnessed many full-scale inter-state conflicts and nuclear-armed adversaries are ready to defy the goal of nuclear deterrence at any time. Furthermore, this region is the hub of global terrorism and almost every country was infested with insurgency or separatist movements at some point in the past.[15] To this, the hostile political relations act like a garnish.

S.D. Muni, a noted IHL expert, categorises conflicts in South Asia into four broad categories. *Firstly*, those arising from the external role of global political powers and their strategies; *secondly*, those arising from inherent inter-state engagements and strategies; *thirdly*, those arising from internal political, economic or social turbulence and other distortions and *fourthly*, those arising from activities between state and non-state actors.[16] For the present discourse, second and third types of conflict are relevant, i.e. inter-state conflict (international armed conflict) and internal armed conflict (non-international armed conflict).

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[11] Inter-Agency Standing Committee Task Force on Humanitarian and Human Rights, 'Frequently asked questions on International Humanitarian, Human Rights and Refugee Law in the context of armed conflict' (IASC, 2004) 1 <http://www.unicef.org/emerg/files/FAQs_IHL.pdf> accessed 30 November 2014.

[12] ibid 23.

[13] Kate Mackintosh, 'The Principles of Humanitarian Action in International Humanitarian Law' (*Humanitarian Policy Group Report 5, Overseas Development Institute UK*, 2000) 14 <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf> accessed 30 November 2014.

[14] 'Improving Compliance with International Humanitarian Law ICRC Expert Seminars' (*International Committee of the Red Cross*, ICRC 2003) 14-15 <http://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf> accessed 30 November 2014; *See also*, Richard Burchill, 'Regional Approaches To International Humanitarian Law' (2010) 41(2) Victoria University of Wellington Law Review 213.

[15] SD Muni, 'Conflicts in South Asia: Causes, Consequences, Prospects' (2013) Institute of South Asian Studies Working Paper No 170, 2 <http://www.isas.nus.edu.sg/Attachments/PublisherAttachment/ISAS_Working_Paper_170_Conflicts_in_South_Asia_26032013170324.pdf.> accessed 30 November 2014.

[16] ibid.

For better understanding of the topic, each South Asian country would be dealt separately. At the risk of being rhetoric, some nations have been excluded. The countries are dealt in the following order, Pakistan, Bangladesh, Myanmar, Nepal, India and Sri Lanka. Before proceeding with individual nations, it would be helpful to dwell upon the legal status of IHL treaties in the region.[17] All of the above-mentioned countries have ratified the four Geneva Conventions of 1949. Except Bangladesh, there is no other nation in the region which is a party to Additional Protocol of Geneva Convention. Furthermore, India is the sole country, which has a domestic legislation on the lines of Geneva Convention.[18] Many countries have individually signed (or ratified) important IHL treaties like the "Protocol on Prohibition of the Use of Bacteriological Methods of Warfare", "Protocol on Prohibition on the use of Mines and other devices", "Protocol on the involvement of children in armed conflict" etc.

Islamic Republic of Pakistan, one of the countries born out of the partition of the Indian Sub-continent has witnessed many conflicts since its inception. With respect to international armed conflicts involving Pakistan, there have been three full-scale wars between India and Pakistan ranging from a period of 13 days to 85 days. The outcome of the conflict is not the subject-matter of the present discussion, only the humanitarian law issues (application, violation etc.) are being addressed. Pakistan's state practise has been consistent with the internationally recognized principle of proportionality. This principle has been proclaimed to be utilized by Pakistan armed forces against India in 1965 war.[19] No major humanitarian law violation was reported in that short war.

The 1971 Indo-Pak war was of immense importance because there were a lot of humanitarian law issues which arose due to the conflict. At the outset, there were allegations of 'indiscriminate killings' by the Pakistan army.[20] Another issue was related to the trial of Pakistani Prisoners of War (hereinafter 'PoW'). The dispute was regarding the charges of genocide against 195 Pakistani nationals, PoW etc. in Indian custody. The 195 Pakistani

[17] Divya Prasad, 'Factsheet on the status of International Humanitarian Law in South Asia' in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) [233]-[243].
[18] The Geneva Convention Act 1960.

[19] Ahmed Bilal Soofi, 'International Humanitarian Law - A Pakistani Perspective' in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 93.
[20] US Department of State Archive, 'Foreign Relations of The United States, 1969–1976, Volume XI, South Asia Crisis, 1971' (*Office of Historian*, 2005) <http://2001-2009.state.gov/r/pa/ho/frus/nixon/xi/45652.htm> accessed 1 December 2014; However, there are disputes regarding the exact number of people killed in the aforesaid carnage, see David Bergman, 'Questioning an iconic number', (*The Hindu*,24 April 2014) <http://www.thehindu.com/opinion/lead/questioning-an-iconic-number/article5940833.ece> accessed 1 December 2014.

prisoners were to be tried for the serious charges of genocides, crimes against humanity, breach of art 3 of the Geneva Conventions, murder, arson, rape etc. Pakistan approached The International Court of Justice regarding the same[21], but the matter was discontinued due to successful negotiations between the nations.[22] After the conclusion of 1971 war there was an agreement signed between the parties so as to work towards establishment of durable peace and respect for each other's territorial integrity[23], but this 'arrangement' could not stand for long as both the countries confronted each other, in 1984 and then again in 1999.

The 1984 conflict, also known as the 'Siachen Glacier Conflict' was not a full-scale war but skirmishes which took place at the highest battleground on the Earth. Fortunately, this did not escalate into a full-fledged war but both the countries have been at loggerheads on this barren land since then.[24] 1999 Indo-Pak war, also known as the Kargil war was different from previous engagements, as now the adversaries were nuclear-armed.[25]One of the IHL violations from the Indian side was the strategy employed by the Indian Navy to blockade supplies to Pakistan from north Arabian Sea.[26]However, there also were 'allegations' of war crime against Pakistan armed forces for torturing prisoners of war.[27]

Now, considering the internal conflicts prevalent in Pakistan, there has been on-going conflict between Pakistan Army and anti-government armed groups in Federally Administered Tribal Areas (hereinafter 'FATA'), Balouchistan and North West Frontier Province (hereinafter

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[21] *Pakistan v India (Trial of Pakistani Prisoners of War)*, Order of 15 December 1973, ICJ Reports 1973 <http://www.icj-cij.org/docket/files/60/6185.pdf> accessed 1 December 2014.
[22] Ministry of External Affairs, Government of India, 'India's Neighbour' (*Annual Report 1973-74, MEA Library 20*) <http://mealib.nic.in/?2500?000> accessed 1 December 2014.
[23] Ministry of External Affairs, Government of India 'Simla Agreement' (MEA Library 6, 2 July 1972) <http://mea.gov.in/in-focus-article.htm?19005/Simla+Agreement+July+2+1972> accessed 1 December 2014.
[24] Edward W Desmond, 'The Himalayas War at the Top of the World: Fighting at breath-taking altitudes, Indians and Pakistanis are locked in an icy stalemate' (*Time*, 31 July 1989) <http://content.time.com/time/magazine/article/0,9171,958254-2,00.html> accessed 1 December 2014; Tim McGirk & Aravind Adiga, 'War at the top of the world' (*Time*, 04 July 2005) <http://content.time.com/time/magazine/article/0,9171,1079528-1,00.html> accessed 1 December 2014.
[25] *Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy* (Chatham House Report, Chatham House – The Royal Institute of International Affairs, 2014) vi <http://www.chathamhouse.org/publications/papers/view/199200> accessed 1 December 2014.
[26] AK Chakraborty, 'Kargil War Brings Into Sharp Focus India's Commitment to Peace' (Press Information Bureau, Government of India) <http://pib.nic.in/feature/feyr2000/fjul2000/f210720001.html> accessed 1 December 2014; Indian Navy, 'President's Fleet Review 2011' (20 December 2011) <http://indiannavy.nic.in/PFR2011/navaloperations.html> accessed on 1 December 2014;) Carolin Alvermann, *Customary International Humanitarian Law,* (vol 1,CUP 2009) 247.
[27] Harish V Nair, 'Government gives up on tortured Kargil hero: Delhi gets cold feet on taking Islamabad to International Court of Justice' (*Daily Mail*,19 November 2013) <http://www.dailymail.co.uk/indiahome/indianews/article-2510153/Captain-Saurabh-Kalia-Government-gives-tortured-Kargil-hero-Delhi-gets-cold-feet-taking-Islamabad-International-Court-Justice.html> accessed 1 December 2014.

'NWFP') which falls into the category of non-international armed conflict, which is bound by IHL. However, there have been blatant violations reported from both the sides.[28]

Pakistan Army Act, 1952 is the sole domestic legal provision which brushes with issues of armed conflict. Although, there is no express distinction between 'civilian' and 'combatant', but the definition of 'enemy' given in the aforesaid Act resembles to that of 'combatant' given in Protocol I.[29]

People's Republic of Bangladesh was conceived as an aftermath of 1971 civil war and was at the receiving end of the humanitarian law violations.[30] Unlike India, there is no express provision in Bangladesh's Constitution which deals with application of international law in the domestic arena.[31] Bangladesh in its very infancy had to utilize the IHL in the form of the tri-partite agreement between Bangladesh-India-Pakistan regarding the treatment of PoWs of Pakistan.[32] Further, there was a war tribunal established by the government to prosecute the crimes committed during the liberation war of 1971, but it was inclined towards awarding punishments rather than comprehensive application of the IHL principles.[33] Although, Bangladesh was amongst the first countries to ratify the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (hereinafter 'OPCRC'), but there are reports that, children below the age of 18are still active in various wings of government forces.[34]

Burma or the Republic of the Union of Myanmar is another South Asian nation, which has witnessed some violent phases of an armed conflict. In June 2010, the Myanmar army violated a 17-year ceasefire with the Kachin Independence Army (hereinafter 'KIA') in the Kachin state and before that there was fighting between the government forces and ethnic armed group forces in the Shan state.[35] In the aforesaid instances, there were various IHL issues involved,

[28] Amnesty International USA, 'Search for Human Rights – Pakistan' <http://www.amnestyusa.org/research/science-for-human-rights/pakistan> accessed 1 December 2014.
[29] Ahmed Bilal Soofi (n 19) 92.
[30] *Foreign Relations of the United States* (n 20).
[31] Borhan Uddin Khan, 'International Humanitarian Law – Bangladesh's Attitude and Practice' in V.S Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 57-59.
[344] Ministry of External Affairs, Government of India, 'India's Neighbour' (*Annual Report 1974-75, MEA Library 6*) <http://mealib.nic.in/?pdf2502?000> accessed 1 December 2014.
[33] The International Crimes (Tribunals) Act 1973.
[34] Child Soldiers International, 'Child Soldiers Global Report 2001 - Bangladesh, 2001' <http://www.refworld.org/docid/4988061228.html> accessed 1 December 2014.
[35] Amnesty International, 'Archive on Myanmar, Annual Report 2012: The state of the world's human rights' <http://www.amnesty.org/en/region/myanmar/report-2012> accessed 1 December 2014.

which ranged from indiscriminate attack on civilians to extra-judicial executions. There have been allegations that soldiers sexually assaulted many Kachin and Shan civilians.[36]

From the view-point of IHL, common Article 3 is applicable to all non-international armed conflicts, regardless of the state ratification. It is so because it has been interpreted into customary international humanitarian law. However, Additional Protocol II is yet to be accepted as part of the same.[37]Another phenomenon closely related to IHL violation is the high number of internally displaced persons (hereinafter 'IDPs') across Myanmar.[38] There are worrisome developments in the form of government forces resorting to air strikes in the region which not only endanger civilians but at the same time amount to a blatant violation of IHL principles. This warfare methodology has led to many nations condemning the acts and asking for inquiry into the ongoing armed conflict in Burma.[39]

Nepal or Federal Democratic Republic of Nepal has been a hot-spot for armed Maoist insurgency which has dented the image of the country in the international sphere. Nepal has not signed or ratified many key IHL treaties, moreover, there is no domestic legislation enacted to incorporate provisions of Geneva Conventions. However, there are certain enabling provisions available in the Nepalese legal system, which provide for application of international treaties and conventions as a part of domestic law.[40]

The violent insurgency in Nepal dates back to 1996 and was concluded in 2006, when a Comprehensive Peace Accord was signed between the belligerents, viz., government of Nepal and Communist Party of Nepal (Maoists).[41] There have been allegations against government security forces for violation of IHL, which include extra-judicial killings by virtue of failing to

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[36] ibid.
[37] Kate Mackintosh (n 13) 8.
[38] Tasneem Jamal, 'Burma – Myanmar (1988 – First combat deaths)' (*Project Ploughshares, Institute of Peace and Conflict Studies, Conrad Grebel University College, University of Waterloo*, 2013) <http://ploughshares.ca/pl_armedconflict/burma-myanmar-1988-first-combat-deaths/> accessed 1 December 2014.
[39] Amnesty International, 'Myanmar: Protect civilians caught in the Kachin state conflict, investigate attacks' (*Press Release, Media Centre*, 15 January 2013) <http://www.amnesty.org/en/for-media/press-releases/myanmar-protect-civilians-caught-kachin-state-conflict-investigate-attacks-> accessed 27 May 2014; Human Rights Watch, 'Burma' (2012 World Report) <http://www.hrw.org/world-report-2012/world-report-2012-burma> accessed 1 Decemeber 2014.
[40] Nepal Treaty Act 1990, s 9(1).
[41] 'Peace Agreement signed between Government of Nepal and the Communist Party of Nepal (Maoist)' (21 November 2006) <http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/nepal_cpa_20061121_en.pdf> accessed 2 December 2014.

discriminate among targets, torture and ill-treatment during detention etc.[42] While Maoists have regularly claimed to be entitled for the protection under Geneva Convention, they themselves at the same time have refrained from acting in consonance with Geneva principles. At times, insurgents have resorted to practices like child labour, human shields, taking hostages, killing unarmed security forces etc. which constitute a breach of IHL.[43] Even though Protocol II might not be applicable, but obligations under common Article 3 are still binding upon the parties to such conflict.

Republic of India has been juggling internal and external threats from its inception in 1947. These include a concoction of security challenges ranging from wars with Pakistan and China to internal disturbances in form of Naxalite armed rebellion and insurgency in north-east.[44]India has been a party to international armed conflicts with Pakistan (already dealt in the previous section) and China (1962-Sino Indian war).[45] One of the peculiar factors in above-mentioned facts is the initial denial of formal participation by other parties, which made it problematic for the both sides to utilize IHL principles and provisions.

With respect to India, emphasis is placed on three things, *firstly*, the internal armed conflicts in various region of country, *secondly*, the special focus on 'landmines' and *thirdly*, judicial application of IHL.

For long, Indian government has resisted the application of Additional Protocol II to various national liberation movements and have argued for utilizing Additional Protocol I to cover such conflicts.[46] Consider the example of Naxalite armed rebellion and north-east insurgency as non-international armed conflict, in which there have been IHL violations from both the sides. Some examples of state-sponsored violations are the 1966 bombing of Aizwal by Indian Air

[42] United Nations Office of the High Commissioner for Human Rights, (*Nepal Conflict Report 2012*, October 2012) <http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf> accessed 2 December 2014.
[43] TR Onta, 'International Humanitarian Law and Internal Armed Conflict in Nepal' in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 125.
[44] Rule of Law in Armed Conflicts Project RULAC, 'India' (*Geneva Academy of international humanitarian law and human rights, Switzerland*, 13 April 2012) <http://www.geneva-academy.ch/RULAC/state.php?id_state=107> accessed 2 December2014.
[45] VS Mani, 'International Humanitarian Law – India's experience since 1962' in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 116.
[46] Ravindra Pratap, 'International Humanitarian Law – India's Attitude' in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 74-77.

Force[47] and raising the civilian vigilante group to retaliate against Naxals.[48] On the other hand, de-railing the passenger train and mutilation of body of security personals are instances of IHL violations by the Naxalite militia.[49]

Next, dealing with mines and IHL, India has utilized mines in various conflicts with Pakistan and China but has claimed to refrain from using them in internal conflicts.[50] India has not acceded to the Mine Ban Treaty, in spite of having the sixth-largest stockpile of mines.[51] The irony in this attitude of the government is that, there are various non-state actors which have declared a ban on mine-use.[52] In 2001-02, Indian government undertook one of the biggest mine-laying operations in the world in years, whereby a large chunk of western border was mined. Such mining has affected civilians living in the villages adjoining the border[53], which to a great extent violates humanitarian law.

Lastly, considering the role of judicial bodies in India, courts have been approached many times to adjudicate upon IHL matters. The first case in this list was that of *Rev Monterio v State of Goa*[54] which arose in the background of India's annexation of Goa and the Court was faced with the issue of deportation under Geneva Convention Act, 1960. There is another bunch of cases which dealt with status and condition of PoW(s).[55] Insurgency has been legally covered

[47]'Silent rally echoes Mizo pain of '66 IAF attacks' (*The Times Of India*, 5 March 2011) <http://timesofindia.indiatimes.com/city/guwahati/Silent-rally-echoes-Mizo-pain-of-66-IAF-attacks/articleshow/7636603.cms> accessed 2 December 2014.

[48] *Nandini Sundar v State of Chhattisgarh* 2011 (7) SCC 547.

[49] K Balchand, 'Sabotage caused Jnaneswari Express derailment: *CRS' The Hindu* (New Delhi, 21 October 2010) <http://www.thehindu.com/news/sabotage-caused-jnaneswari-express-derailment-crs/article840980.ece> accessed 2 Dec. 2014; Bharti Jain, 'Latehar operation mastermind tipped for Maoist politbureau berth?' (*The Times of* India, 5 February 2013) <http://timesofindia.indiatimes.com/india/Latehar-operation-mastermind-tipped-for-Maoist-politbureau-berth/articleshow/18341449.cms> accessed 2 December 2014; 'Police refuse report of Naxals mutilating CRPF jawans' bodies' (*Hindustan Times* 02 July 2010) <http://www.hindustantimes.com/india-news/police-refuse-report-of-naxals-mutilating-crpf-jawans-bodies/article1-566271.aspx> accessed 2 December 2014.

[50] Human Rights Watch, 'Human Rights Watch Backgrounder: Recent Landmine Use by India and Pakistan', (May 2002) 3 <http://www.hrw.org/sites/default/files/reports/ind-pak-landmines.pdf> accessed 2 December 2014.

[51] 'Statement by Sujata Mehta' (*Permanent Representative of India to the Conference on Disarmament*, 14 November 2012) <http://meaindia.nic.in/pmicd.geneva/?50031194> accessed 2 December 2014.

[364] (*GenevaCall*) <http://www.genevacall.org/country-page/india/> accessed 2 December 2014.

[53] Sonia Sarkar, 'Killing Fields' (*The Telegraph*, 15 February 2012) <http://www.telegraphindia.com/1120215/jsp/opinion/story_15136116.jsp#.U4WtGfmSzh4> accessed 2 Dec. 2014.

[54] *Rev Monterio v State of Goa* AIR 1970 SC 329; Chintan Chandrachud, 'International Humanitarian Law in Indian Courts: Application, Non-application, Misapplication' in D Jinks, J Maogoto, S Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International And Domestic Aspects* (TMC Asser Press forthcoming 2014).

[55] *Angrej Kaur v Union of India* 2005 (4) SCC 446; *Jagjit Singh Arrora v Union of India*, 2012 GLH (1) 362; Dhananjay Mahapatra, 'SC stays Gujarat HC fiat to Centre to move ICJ on 1971 POWs in Pakistan' (*The Times*

under the category of 'wagering war against the country'. Sri Lanka or Democratic Socialist Republic of Sri Lanka is still trying to recover from the recently concluded armed conflict between government forces and Liberation Tigers of Tamil Eelam (hereinafter LTTE). Since Sri Lanka is not a party to the Additional Protocol II, the belligerents were left to rely upon the customary international humanitarian law to regulate the conduct of conflict. The warfare strategy adopted by LTTE was a *prima facie* violation of IHL and its principles. These included, forced eviction of civilians (which also involved execution of several settlers), exploding bombs in public, religious and historical places, use of human shields, use of children as soldiers etc.[56]

This situation becomes even more problematic when the state tries to retaliate against such militancy with equal, if not greater ruthlessness. There have been grave allegations of rape committed by the police, army and navy personals and forced disappearances or extra-judicial killings. IHL and other human rights violations during the final phases of the conflict (when the violence had escalated from both the sides) are well documented.[57]

Sri Lankan government has for long denied any IHL violation from its side, however the evidence tells a different story. Utilising the modern-technology of satellite imagery, there is enough evidence to show that, there was a systemised bombing/shelling of the regions. Even though the humanitarian establishments were clearly marked with medical insignia, still they were subjected to army's mortars and shells.[58]

4. CONCLUSION AND THE WAY FORWARD

The primary issue involved with the IHL is never about the legitimatising violence, but protection of the parties affected (directly or indirectly) by a conflict. The importance of IHL cannot be undermined in a region where proximity actually breeds conflict instead of cooperation, viz. South Asia. There is a clear apprehension among the members regarding the

of India, 3 May 2012) <http://timesofindia.indiatimes.com/india/SC-stays-Gujarat-HC-fiat-to-Centre-to-move-ICJ-on-1971-POWs-in-Pakistan/articleshow/12973094.cms> accessed 2 Dec. 2014.

[56] Thushara Rajasinghe, 'International Humanitarian Law in Conflict Situations – A Sri Lankan Case study' in V.S Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2009) 139-40.

[57] *No Fire Zone*, directed by Callum Macrae (2013, Outsider Films). <http://nofirezone.org/> accessed 2 December 2014.

[58] Joshua Lyons, 'Documenting violations of international humanitarian law from space: a critical review of geospatial analysis of satellite imagery during armed conflicts in Gaza (2009), Georgia (2008), and Sri Lanka (2009)' 2012 Vol 94 No 886 International Review of the Red Cross 752-756.

utility of IHL vis-à-vis freedom of warfare tactics. Moreover, there have been practical problems with the mechanism of prosecution for breach of IHL.

Further, there are two modern challenges to IHL, *first*, the engagement with terrorism on international scale and *second*, the adoption of 'drone attacks' as a warfare methodology. Whether terrorist outfits or terrorists are covered by IHL is a matter of ongoing debate. Whether the acts of the state parties in counter-terrorism, especially when it involves military falls within the ambit of IHL is another burning sub-issue.[59] It gets even more problematic when loosely-organised terrorist organisations operate on a trans-national basis. Perhaps, it would be better to leave domestic and international human rights to deal with terrorism and matters incidental to it.[60]

Another contemporary debate relevant to IHL is the drone attacks, especially in the western parts of Pakistan. This debate revolves around two moot issues, *firstly*, whether drone attacks are within IHL and *secondly*, whether it is an effective method of warfare with respect to consequential collateral damage. While the institutive answer views such acts as a violation of IHL and Human Right, but there other views available, which answer otherwise.[61]

Although IHL Conventions and principles have withstood the test of time, but still there is a scope for improvement. In the same regard, there are following suggestions, *first*, expansion of International Criminal Court (hereinafter 'ICC') to incorporate formal IHL violations. However, this suggestion has a rider along with it, i.e., the overall sovereignty of nations must be ensured before such measure is adopted, so as not to repeat the present ICC debacle in African continent.[62] *Second*, National courts must adopt a positive view while adjudication on

[59] Hans Peter Gasser, 'Acts of Terror, Terrorism and International Humanitarian Law' (2002) International Review of the Red Cross No 847 2.
[60] International Committee of the Red Cross, 'International Humanitarian Law and Terrorism: Questions and Answers' (*International Committee of the Red Cross*, 01 January 2011). <http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm> accessed 3 December 2014.
[61] Robert Barnidge, 'A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law' 2011 Vol 30 Boston University International Law Journal 409446; Amnesty International, 'Will I be Next? US Drone Strikes in Pakistan' (2013) <https://www.amnestyusa.org/sites/default/files/asa330132013en.pdf> accessed 3 December 2014.
[62] Faith Karimi, 'African Union accuses ICC of bias, seeks delay of cases against sitting leaders' (*CNN* 12 October 2013) <http://edition.cnn.com/2013/10/12/world/africa/ethiopia-au-icc-summit/> accessed on 3 December 2014; Michael Birnbaum, 'African leaders complain of bias at ICC as Kenya trials get underway' (*The Washington Post*, 5 December 2013) <http://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b_story.html> accessed3 December 2014; Max du Plessis and Annie O'Reilly, 'Africa and the International Criminal Court' (*Chatam House International Law*, July 2013) <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf> accessed 3 December 2014.

IHL matters, especially when dealing with the grave breaches of the same. This suggestion takes into account the existing political inaction and attempts to by-pass it by empowering judiciary. *Third*, a vibrant and comprehensive definition of non-international armed conflict should be evolved. One of the methods for such labelling can be whether the regular police is required to counter it or a specialized armed force? Moreover, there is a need for certain provisions like Prisoner of War (PoW) to be incorporated into jurisprudence of internal armed conflict. *Fourth*; there should be encouragement of the application of modern technologies like satellite imagery which might help in prosecution of IHL violations. This suggestion keeps into account the violations which happen in the immediate aftermath, once the conflict has seized.

But, alas all of the above suggestions will remain quiescent unless they are internalized not as some rules of war but as pillars of human survival.

"The victims of the war are not the only one who are left with the scars of war, but it is the entire humanity which carries that scar for many years."

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