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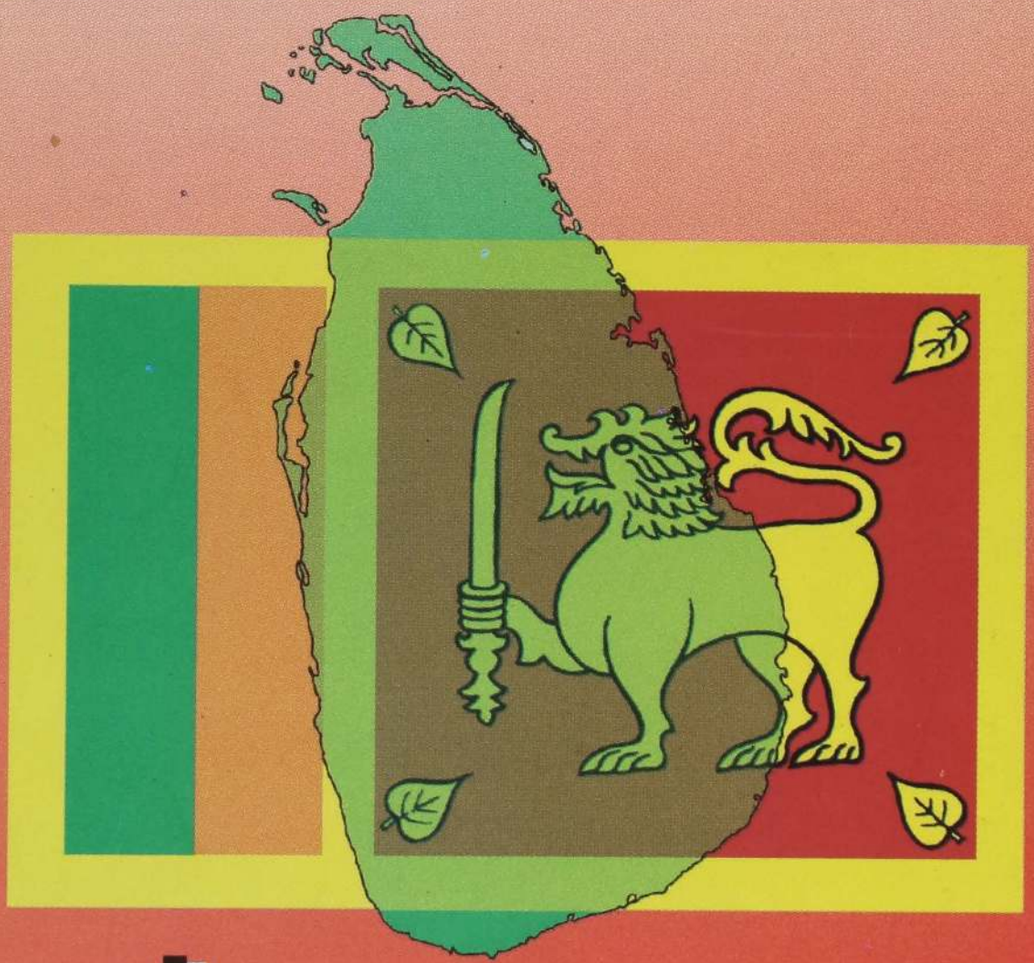

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INFORMATION

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EDITORIAL

The release of volume 21 (2009, No.1) almost coincides with the Presidential election in Sri Lanka, where the incumbent President, Hon Mahinda Rajapakse was reelected with a comfortable majority. The Presidential election was held within a space of few months following the end of the three decade old war that pitted the government against the Tamil militant movements.

Sri Lankan people had great expectations that Sri Lanka would be able to reach reconciliation and healing that would pave the way for rapid economic progress. But unexpectedly the country appears to be getting more divided and polarized than ever before. The lines of ethnic division that existed are now being supplemented by lines of political division even as political conflict escalates. A situation that is reminiscent of the decade of the 1980s and early 1990s is now threatening to re-emerge. The crisis may not leave any institution unscarred, with not even the Buddhist clergy being untouched.

The National Peace Council stated:[1] "Conflicts are inevitable in any society. This is because people have varied interests and requirements that often clash with one another. One important method of conflict resolution in a functioning democracy is elections. Well established democracies, such as the United States, have conventions of their own to deal with divisive political issues, and to heal the wounds of the election campaign thereafter. The victorious side at the elections is generally entitled to have their views prevail. Those who lose accept the verdict of the polls. One of the most bitterly divisive elections in recent US history was the one that saw President Barrack Obama win. Both his victory speech and the concession speech of his defeated opponent Senator John McCain were designed to heal the wounds of the election campaign".

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[1] http://www.peace-srilanka.org/~peace/index.php?option=com_content&view=article&id=228:missed-opportunities-for-reconciliation-and-healing&catid=1:latest&Itemid=121[last visited, March 1, 2009]

The editorial board of the journal calls upon the leaders of all sections of the Sri Lankan political scene to heed the examples set by President Obama and his rival Mc.Cain. In the post independent Sri Lanka there is an urgent need: the contenders in elections must learn to respect democratic values, promote and protect human rights of everyone including those of their opponents.

The present issue of the journal carries the following articles. Carlo Tiribelli and Konstantinos have written on conflict situations in the world. Carlo discusses the issue on the duty to extradite or prosecute (*tradire aut judicare*) those suspected of offences under the Statute of Rome, such as war crimes and crimes against humanity. Konstantinos discussing a phenomenon rampant in the contemporary world, namely military conflicts, suggest that: "Besides the issue of external legitimacy, self- determination through elections or a referendum can boost the end of occupation. The ideal situation would be the combination of internal legitimacy with external approbation by the international community".

There are two articles very close to the heart of Sri Lanka Journal, namely the social and distributive justice dimensions in international relations. Both articles are connected with intellectual property rights. The first article is from Halouse. He discusses the importance of morality and that in the context of new age where technology is a dominant feature. He concludes: "Internationalizing moral rights is found to be an effective solution to ensure that moral rights are progressing on the same pace along with economic rights. Countries shall proceed in their negotiations to achieve harmonization among them. This process should be approached after careful analysis of the consequences". The second from Towdihul is titled, "Problems and Politics of IPRs Protection from WIPO to WTO:The Case Study of Bangladesh". His contention is that intellectual property Rights (IPR) owners follow the power-based-bargaining strategies to coerce developing and LDC members into agreeing to the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs). The article also argues that in the bargaining, developing and least developed countries possess little understanding about

TRIPs and hence they fail to provide meaningful input in support of their developmental needs as regards agriculture, public health, economic development, and so on.

Two other articles are dealing with certain issues in the African continent. The first is from Ndifon, who takes us into the field of private international law. He questions in matter of marriage and family, whether the courts could move away from the established practice of deriving customary law from one's ancestors? He sees in the decision *Olowu v Olowu* the courts attempt to create a flexible connecting factor in the matter of choosing the applicable law. Such a device help in establishing a legal relationship with the country, which presents the strongest ties with the territory and/or with the citizen. This decision might pave the way for the legislature to introduce flexibility in the connecting factors by using connections such as the most significant relationship, the closest link and similar ones. The second article fromYemioke is about 'sustainable utilization of mineral resources in Sub – Sahara. He contends: "Beyond integrating sustainability into the mineral laws, a number of contextual underpinnings would also need to be taken into consideration by countries in the quest for practical sustainability in mining, as they shape not only the manifestation of local peculiarities but also the sustainability of the mineral sectors in Sub-Saharan Africa".

Zia Akhtar takes us into constitutional law and the doctrine of necessity. His contention is that Art 58(2) of the first Pakistani constitution (prior to its secession), Government of India Act 1935 paved easy access to unconstitutional governments to legitimise themselves. This section provided for a Head of State with *de facto* powers to augment his *de jure* powers as the head of the government. This has been an instrument for arbitrary rule. He also faults the judicial interpretation which justified such action by an over-formal approach. The author maintains that such a precedent can be rebutted by rejecting Kelsen's approach that has emphasised an abstract definition of law depriving the rule of law of its true spirit.

Gamble and Dias co-authoring the article on equality of arms under Art. 6 of the European Convention on Human Rights and Art. 14 of the (UN) International Covenant on Civil and Political Rights contend that both confer absolute rights: the 'interests of justice' test is the yardstick in both, although the precise circumstances and expression is slightly different. Under the ICCPR, an accused has a right to have legal counsel assigned to him 'in any case where the interests of justice so require' and his entitlement to have the state pay for his legal assistance arises only where he does not have 'sufficient means to pay for it'. Under the ECHR an accused has a right to have legal assistance of his own choosing and 'where he has insufficient means to pay for legal assistance, to be given it free when the interests of justice so require.'

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PROBLEMS AND POLITICS OF IPRS PROTECTION FROM WIPO TO WTO: THE CASE STUDY OF BANGLADESH

Mohammad Towhidul *

ABSTRACT

The protection of intellectual property rights (IPRs) from World Intellectual Property Organization (WIPO) to World Trade Organization (WTO) faces the question of suitability for IPRs-owning developed countries and IPRs-using developing and least developed countries (LDC). This article accumulates arguments put forward by IPRs owners and users in different negotiations that give births to different regimes from WIPO to WTO. It shows that all of the arguments are raised from the countries' individualistic viewpoints which protect their own interests. While doing so, this article examines the relevance of these arguments on the basis of indisputable suitability to the circumstances. The article shows that the IPRs owners follow the power-based-bargaining strategies to coerce developing and LDC members into agreeing to the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs). The article also argues that in the bargaining, developing and least developed countries possess little understanding about TRIPs and hence they fail to provide meaningful input in support of their developmental needs as regards agriculture, public health, economic development, and so on. To exemplify such situations, this article scrutinises international treaties from WIPO to WTO in relation to developmental needs of developing and LDC members like Bangladesh and finds out the treaty-intricacies in fitting in local legislations.

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1. INTRODUCTION

The protection of intellectual property rights (IPRs) in developing and least developed countries (LDCs) has been problematic and contentious since the beginning of international system for such protection in the 19th century. The challenge arises mainly of ownership and use of IPRs. The developed countries of the North hold the ownership of most of the IPRs goods.[1] They tend to secure their investment through restrictive IPRs protection whereas the IPRs-using South developing countries insist on the flexibility in IPRs appropriation in consideration of their developmental needs. In formulating a way-out in such differing situations, there arise diverse bargains between the stakeholders under different regimes but the IPRs owners' power-based-bargaining strategies always seem to coerce developing countries in agreeing to the way-out.

The European colonial powers first conclude the *Paris Convention for the Protection of Industrial Property 1883 (Paris Convention)*[2] to start protection for their own industrial property covering technology-based subject areas like patents, designs, trade marks, and so on. The apparatus of colonial rule spreads such protection to IPRs-appropriating colonial societies, largely in Asia and Africa under the auspices of the international intellectual property system.[3] After a short while, such western groups secure protection for copyrights as intellectual property by adopting the *Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention)*.[4] The colonies are again made parties to this

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[1] United Nations Development Programme, 'New technologies and global race for knowledge' in *Human Development Report* (1999) 68 [hereinafter UNDP]. It states that ninety-seven per cent of patents in the world are held in developed countries, whilst eighty per cent of patents in developing countries also belong to owners based in developed countries – which leaves developing countries with less than 1 per cent of the patents in the world.

[2] *International Convention for the Protection of Industrial Property 1883*, signed 20 March 1883, *828 U.N.T.S. 305* [hereinafter the *Paris Convention*].

[3] Ruth L Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (2003) 7 *Singapore Journal of International and Comparative Law* 315.

[4] *Berne Convention for the Protection of Literary and Artistic Works 1886, signed* 9 September 1886, *828 U.N.T.S. 221*[hereinafter the *Berne Convention*].

multilateral agreement through colonial outfit or on the basis of the defunct rule of continuity even after decolonisation.[5]

These two treaties make efforts to firmly build the comprehensive framework for the World Intellectual Property organisation (WIPO)-led international system ensuring industrial property and copyright protection respectively. However, developed countries hold the flexibility and inadequacy of the WIPO regime responsible for resulting in piracy and counterfeiting of goods and causing considerable loss to their trade revenues. On the other hand, the regime's restrictive attitude towards IPRs protection seems to collide with the colonial societies' welfare needs based upon the appropriating use of IPRs products.[6] In order to ease the conflicting situations, standard-setting of the IPRs-protection system and assisting the process of technology-transfer from one country to another, especially from developed countries to developing or least developed countries become necessary. Consequently it results in creation of a new regime, which subsumes the WIPO regime in 1994. This new regime moves on the wheels of the World Trade Organisation's (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)*[7] and the WIPO treaties.

At the very beginning of the twin institutions of *Paris and Berne Conventions*, the term 'intellectual property' (IP) does not cover 'industrial property' since they are incorporated in two different treaties giving protections to two different products. Commentators distinguish these two terms on the basis of commercial use.[8] Because the latter are typically created and used for industrial or commercial purposes but the former does not often require them.[9] However, this point of

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[5] Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (1987) 797-807.

[6] See Sol Picciotto, 'Private Rights vs. Public Interests in the TRIPs Agreement' (2003) 97 *American Society of International Law* 167.

[7] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *1869 U.N.T.S. 299; 33 I.L.M. 1197* [hereinafter the *TRIPs Agreement*].

[8] M Rafiqul Islam, *International Trade Law of the WTO* (2006) 380.

[9] Michael Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (1996) 10-11; see also Shahid Alikhan, *Socio Economic Benefits of Intellectual Property Protection in Developing Countries* (2000) 10-11.

distinction does not bring any purposive difference to most of the developing and least developed countries that merely copy knowledge products regardless of the classification of IPRs and satisfy their developmental needs. Nevertheless, developing and least developed countries find the WIPO treaties taxing for them since the treaties create a patchwork system of disparate norms, rules, levels of protection and overlapping membership of a variety of multilateral and bilateral instruments.[10]

With the passage of time, the international IPRs protection system leaves the conceptual difference between 'intellectual property' and 'industrial property'. It uses 'intellectual property' for copyrights, patents, designs, trademarks, and technology-based inventions, such as computer software, integrated circuits, and others.[11] And the term becomes popular when industrialized countries fall behind developing countries in the trade of manufactured goods and they concentrate merely on IPRs goods.

In the *General Agreement on Tariffs and Trade* (*GATT*),[12] the North countries protect their trading superiority in manufactured goods. In course of time, some NICs of Far-East Asia become formidable competitors in the global market of manufactured goods through reverse engineering[13] and other techniques. This leads to diminish the market share of industrialized countries in the manufactured goods sector. To overcome this diminished market share in manufactured goods, the North countries look for an alternative sector to revive their trading superiority. They find intellectual property through transfer of technology as a handy sector for this quest of regaining the trade superiority. Initially they sought protection of IPRs under the GATT but got disappointed due to the dissents of the South. The

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[10] Jerome H Reichman, 'Universal Minimum Standards of Intellectual Property Protection under the TRIPs Component of the WTO Agreement in Carlos M Correa and Abdulqawi A Yusuf (eds) *Intellectual Property and International Trade* (1998) 21-88.

[11] M Rafiqul Islam, above n. 8, 379-80.

[12] *General Agreement on Tariffs and Trade*, signed 30 October 1947 and entered into force 1 January 1948, 58 R.T.N.U. 187 [hereinafter *GATT*].

[13] 'Reverse engineering' is taken to mean adding value and shaping the existing the product. See for details Pamela Samuelson and Suzanne Scotchmer, 'The Law and Economics of Reverse Engineering' (2002) 111 *Yale Law Journal* 1575.

North countries capitalize their trading superiority in the GATT and make further proposal to initiate negotiations on IPRs in the Uruguay Round of GATT Negotiations.

With the successful completion of the Uruguay Round trade negotiations, the *TRIPs Agreement* emerges with the formulation that IPRs qualify as trade-related intellectual property rights (TRIPs) when they hold market value and involve trade implications quite independent of the product and its bits and pieces.[14] The Agreement also establishes a similar protection standard for all types of IPRs qualifying as TRIPs and ignores developing countries' IPRs-appropriating nature of developmental needs that give birth to manufactured goods and make developed countries lag behind developing countries in trade competition of such goods.[15] As a result of such trade-IPRs linkage, tensions come up between IPRs-using developing countries and IPRs-owning developed countries.

The *TRIPs Agreement* also launches a new regime with extensive membership, unprecedented level of international protection with the extended reach of protectable items, a relatively detailed and specific enforcement obligations and mechanisms on applying the WTO's dispute settlement system to IPRs related disputes.[16] It also initiates a major move to a substantive harmonisation in various aspects of IPRs protection on making it mandatory for all current and intending members of the WTO irrespective of their developmental standing.[17]

In order to determine the problems and politics of IPRs protection from WIPO to WTO, this article accumulates arguments put forward by IPRs owners and users in the negotiations taken place from the WIPO regime to the WTO. It examines

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[14] M Rafiqul Islam, above n. 8, 380; Keith E Maskus and Mohan Penubarti 'How Trade-related Are Intellectual Property Rights?' (1995) 39(3/4) *Journal of International Economics* 227.

[15] *Ibid.*

[16] World Trade Organisation, 'Overview: the TRIPs Agreement' <http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> at 20 May 2008 [hereinafter WTO].

[17] Jerome H Reichman, 'From Free Riders to Fair Followers: Global Competition under the TRIPs Agreement' (1996-1997) 29 *New York University Journal of International Law & Politics* 11.

the suitability of these arguments to the individual circumstances of member countries. The article shows how the IPRs owners follow the power-based-bargaining strategies to coerce developing and LDC members into agreeing to the WTO-TRIPs Agreement. The article also argues that developing and least developed countries possess little understanding about TRIPs at the time of bargaining, and hence they fail to provide meaningful input in support of their developmental needs as regards agriculture, public health, economic development, and so on. To exemplify such situations, this article scrutinises international treaties from WIPO to WTO in relation to developmental needs of developing and LDC members like Bangladesh and finds out the treaty-intricacies in fitting in local legislations.

2. WIPO-REGULATED INTELLECTUAL PROPERTY CONVENTIONS: PROBLEMS AND PROSPECTS

The WIPO-driven international intellectual property protection regime commences its mission with the aim of 'developing a balanced and accessible international intellectual property system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest.'[18] To this end, the regime carries out the global promotion and protection of IPRs. While doing so, the administration of the Paris and Berne Unions[19] created by the *Paris* and the *Berne Conventions* respectively is required to secure economic development and safeguard public interests. However, the aims of securing owners' interests and safeguarding public interests appear contradictory to each other and hence, create conflicts between IPRs-owning developed countries and IPRs-using developing and least developed countries.[20]

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[18] 'What is WIPO?' <http://www.wipo.int/about-wipo/en/what_is_wipo.html> at 2 April 2008.

[19] *Paris Convention* Article 1 and *Berne Convention* Preamble.

[20] 'World Intellectual Property Organization: An Overview'<http://www.wipo.int/export/sites/www/freepublications/en/general/1007/wipo_pub_1007.pdf> at 20 May 2008.

2. 1. The Paris Convention

The *Paris Convention* is the first international convention that comprises the international protection regime for IPRs. Article 2 of the *Paris Convention* speaks of the 'national treatment principle' with regard to industrial property, currently known as intellectual property. It says that a member of the Convention must grant the same industrial property protection to nationals of other member countries as it provides to its own nationals.[21] This provision is considered to serve the trade interests of developing and least developed countries in spite of the fact that these countries have a little involvement with producing and trading of IPRs goods. On the other hand, this provision creates an immediate concern for IPRs-owning developed countries since a country offering no intellectual property protection to its nationals, does have no obligation to provide any protection for the nationals of other countries.[22]

The Convention also guarantees the 'right of priority' to foreign nationals of member countries, who have applied for a registration of their rights in another member country.[23] To put it another way the 'right of priority' offers protection to 'the first to invent or create, rather than the first to file or reproduce.'[24] This provision goes in favour of IPRs-owning nationals of developed countries since they are given the priority right of IPRs protection for a longer period of time. However, this provision goes against the interests of developing and least developed countries since the prioritised right of protection tends to monopolise the owners' IPRs regardless of places and takes away earlier the users' comparative advantage of reverse engineering.

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[21] *Paris Convention* Article 2.

[22] Monique L Cordray, 'GATT v. WIPO' (1994) 76 *Journal of Patent and Trademarks Office Society* 121, 123; For instance, nations like Brazil and India did not provide for product patents for pharmaceuticals either for nationals of or for foreigners; see for details, Gary Gereffi, *The Pharmaceutical Industry and Dependency in the Third World* (1983) 145-9.

[23] *Paris Convention* Article 4.

[24] Christopher May, 'The World Intellectual Property Organisation' (2006) 11(3) *New Political Economy* 435, 436.

Additionally, the *Paris Convention* does not require member countries to provide patents for inventions such as pharmaceuticals and chemical substances. On taking this flexibility of the Convention, member countries use discretionary powers to reject inventions from being patentable. As a result, the unauthorised copying of unpatentable inventions, which are patented in another country, becomes legitimate in countries exercising this discretion.[25] Again, the *Paris Convention* does not fix any minimum term for patents. Hence, a shorter-term patent encourages earlier access to legitimate copying. In addition, the *Paris Convention* also creates the possibility of granting compulsory licenses in relation to patents in order to prevent the abuses in exercising exclusive rights.[26] However, this provision gets heavily restricted to certain cases of national emergency or other circumstances of extreme urgency.[27] This restrictive approach on compulsory licensing undermines the protection of public interests in developing and least developed countries in dire necessities.

2. 2. The Berne Convention

'[T]o protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works' through copyright as 'intellectual property', comes the *Berne Convention*. [28] Like the *Paris Convention*, the *Berne Convention* provides for 'national treatment principle' requiring member countries to give the same rights to works originating from other member countries as they give to works of their nationals.[29] This is considered to be more efficient than the *Paris Convention* since the protection of author's rights in each member country under the *Berne Convention* should be unconditional and independent of the existence of such protection in the country of origin.[30] In addition, the *Berne Convention* does not offer satisfactory recognition and protection mechanism for

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[25] Stephen P Ladas, *The International Protection of Industrial Property* (1930) 54.

[26] *Paris Convention* Article 5A(2).

[27] *Ibid*, Article 5A(4).

[28] *Berne Convention* Preamble.

[29] *Ibid*, Articles 3-5.

[30] *Ibid*, Article 5.

neighbouring rights. As a result, it encourages breach of these rights in computer software, video movies, motion pictures and so on.[31]

2. 3. The WIPO Convention and Formation of the WIPO

The Paris and Berne Unions facilitating the protection of IPRs hold considerable commonalities and hence they integrate in 1893 to form an international organization called the United International Bureaux for the Protection of Intellectual Property (best known by its French acronym BIRPI).[32] This new institution feels the need for proper execution of the *Paris Convention* and the *Berne Convention* by making them more answerable to member countries and treating them on the same footing. In 1967, the *Convention Establishing the World Intellectual Property Organization* (the *WIPO Convention*)[33] creates the WIPO on replacing the BIRPI. By an agreement[34] signed with the United Nations Organization (UNO) on 17 December 1974, the WIPO becomes a specialised agency of the UN and gets the exclusive mandate of accumulating specialised knowledge and expertise in intellectual property.[35] It requires explicitly to work with the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP) and the United Nations Industrial Development Organization (UNIDO) to promote and facilitate 'the transfer of technology to developing countries in such a manner as to assist these countries in attaining their objectives in the fields of science and technology, and trade and development.'[36] Commentators find this shifting to the UN forum as making it

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[31] Michael Blakeney, Above n. 18, 76-81.

[32] WIPO- An Overview,<http://www.wipo.int/about-wipo/en/what_is_wipo.html> at 06 November 2007.

[33] *Convention Establishing the World Intellectual Property Organization*, signed at Stockholm on 14 July 1967 and as amended 28 September 1979, *828 U.N.T.S. 3* [hereinafter the *WIPO Convention*].

[34] *Agreement between the United Nations and the World Intellectual Property Organization,* entered into force 17 December 1974, *GA Resolution No. 3346(XXIX).*

[35] Michael Blakeney, above n. 9, 24-5.

[36] *Agreement between the United Nations and the World Intellectual Property Organization,* above n. 36, Article 10; see also Christopher May, above n. 26, 437.

sympathetic to developing and least developed countries. This is because, most of the UN forums are perceived as neutral without the 'vested interests' and hence, they appear with an impartial role so that developing and least developed countries do not feel helpless in protecting their developmental interests; while the other world bodies best-serve the interests mainly of dominating powers i.e. developed countries.[37] Nevertheless, developed countries tend to pressurise the associate organisations of WIPO in forming policies and implementing them in developing and least developed countries in order to ensure their rents through the trade of IPRs goods.[38]

With the increased volume of trade and reliance significantly on intellectual goods, the role of the WIPO becomes highly crucial to the international community harbouring and recognising creations of the mind as properties for trade.[39] Its mission becomes sceptical when developed countries principally the US contend that the gradual huge loss sustained in trade revenues has link with piracy and counterfeiting of goods and the WIPO-administered *Paris* and *Berne Conventions* fail to make a significant drive to prevent them.[40]

In addition, the lack of effective enforcement mechanisms under the WIPO Unions makes worries particularly for developed countries.[41] Because, none of the Conventions governed by the WIPO contains penal provisions for countries, which fail to set up or implement the required standards for counterfeit and pirated goods

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[37] Wendell Berge, *Cartels: Challenge to a Free World* (1944) 3; Christopher May, above n. 23, 435.

[38] UNCTAD, *The TRIPS Agreement and developing countries* (1996); see also Mywish K Maredia, 'Application of Intellectual Property Rights in Developing Countries: Implications for Public Policy and Agricultural Research Institutes' (Final Draft Submitted to the World Intellectual Property Organization,December, 2001)<http://www.wipo.int/about-ip/en/studies/pdf/study_k_maredia.pdf> at 17 November 2008.

[39] World Intellectual Property Organization (ed), *Introduction to Intellectual Property: theory and Practice* (1997) 28 [hereinafter WIPO].

[40] Kenneth W Dam, 'The Growing Importance of International Protection of Intellectual Property' (1987) 21 *Intentional Lawyer* 627.

[41] Monique L Cordray, above n. 24, 131.

crossing national borders.[42] Hence, the United States General Accounting Office Report describes WIPO's enforcement mechanisms as 'unsuccessful' in ensuring strong worldwide IPRs protection.[43]

Again, none of the WIPO Conventions contains effective dispute resolution system among member countries. Hence, this system is under constant criticism for its being as 'effectively worthless.'[44] The only option left for them is to lodge complaints to the International Court of Justice (ICJ).[45] However, the contesting member can declare that it does not consider itself bound by the ICJ's jurisdiction. As a consequence, the ICJ's jurisdiction to dispose of the IPRs-related dispute becomes dependent on consent.[46] On invoking this opportunity, twenty-six members of the Paris Union refuse to accept and only sixty members of the Berne Union accept the ICJ's jurisdiction.[47] Nevertheless, the member challenging countries that do not meet their treaty obligations can seek the ICJ's non-binding advisory jurisdiction.[48]

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[42] Christopher Arup, 'TRIPS Forum: A Matter of Interpretation' (Conference Paper, Victoria University, Melbourne, 2004), <http://www.business.vu.edu.au/lsja/documents/conference_papers/conf_tripsforum20> at 20 August 2008.

[43] United States General Accounting Office, 'Iinternational Trade: Strengthening Worldwide Protection of Intellectual Property Rights' (Report to Selected Congressional Subcommittees, Washington, DC, April 1987) <http://archive.gao.gov/d2t4/132699.pdf> at 20 May 2008.

[44] *Ibid,* 25; Emmerrt, 'Intellectual Property in the Uruguay Round – Negotiating Strategies of the Western Industrialized Countries' (1989) 11 *Michigan Journal of Intetnational Law* 1317, 1343.

[45] See *Paris Convention* Article 28(1) and *Berne Convention* Article 33(1)..

[46]. See *Paris Convention* Article 28(2) and *Berne Convention* Article 33(2); see also Article 36 of the *Statute of the International Court of Justice*, entered into force 24 October 1945, 145 *BFSP* 805. It notes that the consent may be demonstrated in one of three ways: (1) by special agreement or *compris,* in the context of a particular case; (2) by treaty, such as a multilateral agreement that specifies reference of disputes arising under it to the court; or (3) by advance consent to the so-called 'compulsory' jurisdiction court on terms specified by the state concerned.

[47] Monique L Cordray, above n. 24, 131; Kunz-Hallstein, 'The U.S. Prposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property' (1989) 22 *Vanderbilt Journal of Transnational Law* 265, 278-9.

[48] Article 65 of the *Statute of the International Court of Justice*, above n. 48..

In addition, at the time of referring a dispute to the ICJ it also requires taking into account the political and diplomatic considerations to back up a resolution of the dispute.[49] In consideration of such constraints on its application, no such referral has ever been made.[50] Therefore, the affected country finds the WIPO-administered Conventions as an unfriendly and cumbersome mechanism since the length and complexity of the procedure itself turns the enforcement engine into a *de facto* impractical one.[51]

Therefore, the weak or almost non-existent enforcement and dispute settlement mechanisms as found in the WIPO-administered Conventions tend to help a country sticking to certain political, economic, and social systems in consideration of their usefulness or interests-serving.[52] Furthermore, the weak or almost non-existent enforcement system or selection option empowers the sovereign state to retain a right to decide which level of IPRs protection requires within its own territory.[53] Given this, it can be argued that such flexible option arising out of the huge debate over suitable multilateral level of IPRs protection among member countries tempts developing countries to join developed countries in adopting the WIPO-directed Conventions..[54]

3. STRATEGY OF FORUM SHIFTING: PROBLEMS AND PROSPECTS

The US and its allies' accusation against the WIPO-managed Conventions was based on their inadequate treatment in relation to product piracy and counterfeiting

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[49] Monique L Cordray, above n. 24, 131.

[50] International Bureau of WIPO, Committee of Experts on the Settlement of Intellectual Property Disputes between States, 7th Sess., 29 May –2 June 1995, WIPO Doc. SD/CE/VII/8, Para. 50, 13.

[51] Frederick M Abbott, 'The Future of the Multilateral Trading Systems in the Context of TRIPs' (1996-1997) 20 *Hastings International and Comparative Law Review* 661, 664.

[52] Rajan Dhanjee and Laurence Boison de Chazournes, 'Trade Related Aspects of Intellectual Property Rights (TRIPs): Objectives, Approaches and Basic Principles of the GATT and of Intellectual Property Conventions' (1990) 24(5) *Journal of World Trade* 5, 6.

[53] *Ibid.*

[54] *Ibid*, 7.

and causing impediments to trade.[55] This led the US and its allies to push for revisions of the Conventions. As a part of the campaign, developed countries led by the US placed revision proposals for strengthening intellectual property during 1980s in forums like WIPO, UNCTAD and United Nations Educational, Scientific and Cultural Organization (UNESCO).[56]

The US held revision proposals as regards IPRs protection in mind, but it could not approach the WIPO straight away since it was not a member of the *Berne Convention*. It first moved towards the UNCTAD which spearheads the New International Economic Order (NIEO) through the economic activities related to economic development goals. These activities included cutting tariffs to trade or freeing the trade from state regulations, protecting IPRs to encourage investments etc. However, the US always remained critical for UNCTAD's support in favour of developing countries' interests.[57] In addition, the US approached the UNESCO since the UNESCO suited to advocate policies and principles related to copyright and information policies and for such objectives, it adopted the *Universal Copyright Convention*.[58] Nevertheless, the US left the UNESCO citing its 'hostility toward the basic institutions of a free society, especially a free market and free press'[59] and its compassion towards the interests and needs of developing countries.[60]

To carry out the purpose of strengthening IPRs protection, the Diplomatic Conference for Revision of the Paris Convention for the Protection of Industrial Property (Paris Conference) was held in 1980-1984 under the patronage of

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[55] Christopher May and Susan K Sell, *Intellectual Property Rights: A Critical History* (2006) 4-5.

[56] Peter Drahos, 'Developing Countries and International Intellectual Property Standard-setting' (2005) 5(5) *Journal of World Intellectual Property* 765, 769.

[57] Ruth L Okediji, above n. 3, 332-5.

[58] *Universal Copyright Convention* adopted 6 September 1952 and entered into force 16 September 1955, 216 UNTS 133 [hereinafter *UCC*].

[59] See Michael J Farley, 'Conflicts over Government Control of Information: The United States and UNESCO' (1980) 59 *Tulane Law Review* 1071.

[60] Ruth L Okediji, above n. 3, 332-5.

WIPO.[61] During the Conference, developing countries contended that the international standards of patent protection under the *Paris Convention* are too high to allow a proper balance between the protection of patent holders' rights and public interests with economic development requirements.[62] They also argued that they needed to discriminate against foreign investors, and to receive preferential treatment for levelling the vast inequities in power and wealth.[63] Hence, they proposed revision of the existing IPRs system to achieve preferential treatment with regard to IPRs protection and exclusive compulsory licensing of patented technology where the IPRs owners failed to supply a reasonably-priced, adequate volume of products to satisfy local needs.[64] The US opposed this proposal fiercely on taking this as an expropriation of its IPRs.[65] Along its coalition, the US also termed the revision proposal as an attempt by developing countries to weaken the level of international IPRs protection.[66] On the other hand, the US attempted to create a global system of IPRs protection to prevent trade in counterfeit goods. The US argument was based on the report of the International Trade Commission, which showed approximately $43-61 billion losses to the US companies caused by foreign infringements of IPRs.[67] The United Kingdom also joined the US to claim the increased level of IPRs protection and vigorously protested the weakening proposal of IPRs protection.[68] However, the forums approached therewith seemed

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[61] Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (2002) 111.

[62] The attempts to prevent trade in counterfeit goods started at the Tokyo Round of Trade Negotiations of GATT (1973-1979), but failed due to developing countries' opposition. See for details, Daniel Gervais, *The TRIPs Agreement: Drafting History and Analysis* (2003) 10.

[63] Susan K Sell, 'Intellectual Property as a Trade Issue: From the Paris Convention to GATT' (1989) 13(4) *Legal Studies Forum* 407, 409-10.<http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006_1/endeshaw/endeshaw.pdf> at 20 August 2008.

[64] *Ibid*; see also Assafa Endeshaw, 'Intellectual Property and the WIPO Development Agenda' (2006) 1 *Journal of Information, Law and Technology*

[65] D M Mills, 'Patent and the Exploitation of Technology Transferred to Developing Countries (in Particular, those of Africa)' (1985) 24 *Industrial Property* 120.

[66] United States General Accounting Office, above n. 45.

[67] Richard A Morford, 'Intellectual Property Protection: A United States Priority' (1989) 19(2) *Georgia Journal of International and Comparative Law* 336, 336-7; see also Kristen Riemenschneider, 'Philosophy, Trade, and Aids: Current Failures to Obtain a Substantive Patent Law Treaty' (2006) 11(5) *Virginia Journal of Law and Technology* 1.

[68] Susan K Sell, above n. 65, 410-11.

to be soft and sympathetic for developing countries' proposal insofar as some developmental needs of these countries got redressed through compulsory licensing.[69] As a result, developing country alliance could easily defeat the developed countries' proposals for strengthening the IPRs protection.[70]

Thus, developing countries made all out efforts to neutralise IPRs protection through various forums so that their developmental interests were best served and developed countries' revision proposals for the WIPO-led Conventions were not carried into. All of these efforts appeared disappointing for developed countries and made them adopt a strategy of forum shifting i.e. looking beyond the framework of the Conventions.[71] The strategy of forum shifting started on taking IPRs as trade-related intellectual property, and the shifting took place in two ways: (a) bilateral strategy and (b) the strategy of placing IPRs in the GATT.

3. 1. Bilateral Strategy Adopted by the US, and Its Allies' Domestic Efforts for IPRs Protection: Problems and Prospects

The bilateral strategy was first seen in 1970s, when the US adopted an *ad hoc* bilateral approach, using the intellectual property system as a trade issue.[72] To do this, the US faced pressures from some of its giant pharmaceutical, media, entertainment, and information technology industries. The industries alliance convinced the US that they encountered product imitation, counterfeiting, and piracy mostly in developing countries.[73] They insisted that an internationally uniform level of IPRs protection required to be adopted so that full profits of their intellectual properties are ensured and further research and development (R&D) is encouraged.[74]

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[69] Christopher May, above n. 26, 437.

[70] Peter Drahos, above n. 58, 769.

[71] Bankole Sodipo, *Piracy and Counterfeiting: GATT, TRIPS, and Developing Countries* (1997) 22-25.

[72] Peter Drahos and John Braithwaite, 'Hegemony Based Knowledge: The Role of Intellectual Property' in J Chen and G Walker (eds), *Balancing Act: Law Policy and Politics in Globalisation and Global Trade* (2004) 206-12.

[73] *Ibid.*

[74] M Rafiqul Islam, above n. 8, 381.

To pay heed to its industries' concerns, the US initially persuaded its allies to raise the issue of strengthening IPRs protection in the WIPO. Accordingly, the WIPO patronised the Paris Conference. However, the Conference failed due to the fundamental disagreements among the parties as to the determination of scope and application of IPRs.[75]

The failure in the Paris Conference made the US realise further the increasing impact of foreign piracy on the US economy.[76] The US also realised that better protection of IPRs was necessary both within the US and abroad in order to save its huge investments in R&D and the largest production of copyrighted works from piracy and counterfeiting.[77] In April 1987, the US General Accounting Office Report made such realisation officially recognised when it said that piracy and counterfeiting of IPRs products

(1) restricted companies and individuals to get returns on their investments of time and resources in making patented innovations, trademarked products, and copyrighted works,

(2) took away lawful trade of sales, profits, and the ability to provide employment,

(3) threatened public health and safety by producing less qualitative products,

(4) undermined the patent and copyright systems as mechanisms for encouraging innovation and creativity, and

(5) struck at the foundations of the trademark system as an indicator to consumers of quality products and services.[78]

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[75] Susan K Sell, above n. 65, 418.

[76] *Ibid*, 411.

[77] Richard A Morford, above n. 69, 336-7.

[78] United States General Accounting Office, above n. 45. (presenting compelling data which shows that combined losses of 82 firms that suffered from foreign piracy, and especially from unauthorized use of patents, accounted for $ 50 million in lost sales during 1982. According to the International Intellectual Property Alliance (IIPA), piracy of copyrighted works in ten different countries amounted to $ 1 billion in losses as compared to 1985. The Pharmaceutical Research and Manufacturers Association of America (PhRMA) found the same statistics in 1985, stating that one of its member-companies lost $ 27 million in potential sales on one patented product because unlicensed copies were sold in five developing countries.)

With the aim of saving investments in R&D and production of copyrighted works, the US initiated bilateral consultations with countries like Hungary, Taiwan, and Singapore because the USTR recorded unsatisfying levels of IPRs protection in these countries.[79] In addition, it amended its Trade and Tariff Act 1984[80] by extending the Generalised System of Preferences (GSP)[81] for developing countries that complied with the existing IPRs agreements and conventions.[82] On 23 August 1988, the US President Ronald Reagan signed the Omnibus Trade and Competitiveness Act 1988,[83] which amended Sections 301 and 182 of the *Trade and Tariff Act* 1974. The amendments are known as 'Super 301' and 'Special 301' respectively. The 'Super 301' grants the United States Trade Representative (USTR) the power to identify 'priority foreign countries'[84] that have 'the most onerous or egregious'[85] IPRs policies. It also empowers the USTR to deny adequate IPRs protection to the US IPRs-owning companies trading with such

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[79] The piracy and the unauthorized use of patented inventions in these countries raised concerns of American manufacturers; therefore, the US made these countries revise heir IPRs policies. See for details, Susan K Sell, above n. 65, 414-5.

[80] *Trade and Tariff Act* 1984, Pub. L. 98-573, 98 Stat. 2948.

[81] The Generalized System of Preferences (GSP) is a programme, under which developed countries can grant reduced or zero tariff to selected imports from developing and least developed countries. This programme does not extend the same concessions to other members and does not want the beneficiaries to reciprocate unless the WTO rules would otherwise require; see for details, Christopher Arup, *The New WTO Agreement: Globalising Law Through Services and Intellectual Property* (2000) 183.

[82] Under the new provisions, the US President can choose a country as a beneficiary developing country whose IPRs laws tend to provide effective IPRs protection to foreign nationals. As a result, such a beneficiary developing country can enjoy various benefits in tariffs and trade transactions with the US. See for details, *Trade and Tariff Act 1984*, Pub. L. 98-573, 98 Stat. 2948 and also, Susan K Sell, above n. 65, 418.

[83] *Omnibus Trade and Competitiveness Act 1988*, Pub. L. No. 100-418. *[Omnibus Act 1998]*. Paragraphs 1301 and 1303 of *Omnibus Act 1998* amended sections 301 and 182 of the *Trade and Tariff Act 1974* respectively (amendments known as 'Super 301' and 'Special 301,' 19 U.S.C. § 2420 (a)-(b) and 19 U.S.C. § 2242 (respectively); see also Dylan A MacLeod, 'U.S. Trade Pressure and the Developing Intellectual Property Law of Thailand, Malaysia and Indonesia' (1992) 26(2) *University of British Columbia Law Review* 343, 346-48.

[84] 19 U.S.C. § 2242 (a)(2)

[85] *Ibid.*, § 2242 (b)(1)(A)

offending countries.[86] The 'Special 301' authorises the USTR to retaliate against these countries through various trade sanctions like withdrawal of benefits and imposition of higher tariffs.[87]

The US threat of sanctions for their goods proved to be effective in cases of some Latin American and Far-East Asian countries.[88] This was because these countries amended their IPRs laws with the stronger enforcement mechanism in order to protect the US goods[89] and in return, they looked forward to access the US market for exporting their textile and software products.[90] The European Community (EC) also enacted regulations similar to Section 301.[91] Japan did not practice such bilateral approach but it faced some difficulties when the US wanted it to drop its proposal for an effective *sui generis*[92] form of protection for computer software.[93]

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[86] Joshua J Simmons, 'Co-operation and Coercion: The Protection of Intellectual Property in Developing Countries' (1999) 11(1) *Bond Law Review* 59, 67.

[87] *Omnibus Trade and Competitiveness Act* § 2242 (b)(1); see also Judith H Bello and Alan H Holmer, 'Update: Special 301' (1990-1991) 14 *Fordham International Law Journal* 874, 874-5; Susan K Sell, 'Post- *TRIPs* Developments: The Tension Between Commercial and Social Agendas in the Context of Intellectual Property' (2001-2002) 14 *Florida Journal of International Law193*, 197.

[88] Joshua J Simmons, above n. 88, 59; see also Susan K Sell, 'Intellectual Property Protection and Anti-trust in Developing World: Crisis, Coercion, and Choice' (1995) 49(2) *International Organisation* 315.

[89] Tohru Nakajima, 'Legal Protection of Computer Programme in Japan: The Conflict between Economic and Artistic Goals' (1988-1989) 27 *Columbia Journal of Transnational Law* 143.

[90] Bankole Sodipo, above n. 73, 22-5.

[91] Council Regulation (EEC) No. 2641/84, 17 September 1984.

[92] The Latin term 'sui generis' means unique, or of its own kind. Sui generis rights are taken to be legal rights tailored for things, which by their own nature do not fit into classic IPRs schemes. Integrated computer circuits, electronic data bases, folklore or plant varieties are some of the instances. In that sense, sui generis rights are simply deviations from traditional IPRs. The TRIPs Agreement obliges member countries to establish monopoly rights on plant varieties, either by patent or some sui generis system. The monopoly rights established by way of sui generis system are known as plant breeders' rights (PBRs). See for details, Biswajit Dhar, '*Sui Generis* Systems for Plant Variety Protection: Options under TRIPs' (A Discussion Paper, Commissioned by the Quaker United Nations Office, Geneva, April 2002); UPOV, *Welcome* <http://www.upov.int/index_en.html> at 22 March 2008.

[93] Peter Drahos, above n. 58, 773.

Therefore, it appears that strengthening the level of IPRs protection was the prime target for the US and its allies and hence, they took all out bullying steps to link IPRs with trade issues through the bilateral strategy. For this, they incorporated various provisions on trade sanctions in their domestic laws and amended trade laws to increase the level of enforcement for new IPRs policies.[94] However, the inequitable strategy exercised by the US and its allies seemed to be unfair to developing countries. Hence, it made Brazil and other developing countries lodge complaints before the GATT panel for breaching the GATT.[95] Notwithstanding such incidences, the US and its allies got buoyed by the success of trade-IPRs linkage strategy and hence they preferred to move towards a multilateral and stringent approach prevailing in the GATT.[96]

3. 2. Intellectual Property Protection under GATT 1947: Problems and Prospects

The US and its allies took the GATT 1947 for protecting trade in IPRs goods since it was in place mainly for providing a multilateral trading system with minimum barriers to trade.[97] In addition, the US and its allies were the dominant players in the GATT. They could enjoy significant negotiating influence there. With their largest domestic markets, they could exercise the most influential power to shape trade bargains in conformity with their interests. For this, they could either promise to open or threat to close their markets to foreign goods.[98] They could also

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[94] Solomon F Balraj, 'General Agreement on Tariffs and Trade: The effect of the Uruguay Round multilateral trade negotiations on US intellectual property rights' (1992) 24(1) *Case Western Reserve Journal of International Law* 63.

[95] Joshua J Simmons, above n. 88, 59.

[96] Editorial, (December 1986) 4 *Trademark World* 45.

[97] Rajan Dhanjee and Laurence Boison de Chazournes, above n. 54, 6; see also 'Legal Texts: GATT 1947' <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm> at 20 May 2008. (noting '... Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce...')

[98] Richard H Steinberg, 'In the Shadow of Law or Power: Consensus-Based Bargaining and Outcomes in the GATT/WTO' (2002) 56 *International Organisation* 339, 341

strategically compel disclosure of weaker countries' preferences, block the progress of these countries' proposals, and advance their own initiatives with the help of the GATT-operating principle of consensus.[99] Besides, they considered the GATT's dispute settlement system to be far more effective than the mechanisms set in WIPO-based conventions because these WIPO-procedures were clumsy in theory and never utilised in practice.[100] Such points of privileges led the US and its allies to believe that placing IPRs in the GATT would serve their interests.[101]

To justify their claim, the US and its allies argued that the GATT was the right forum for IPRs protection since the GATT under 'General Exceptions' in Article XX(d) ensured members' right to protect patents, trademarks, and copyright and it introduced a dispute resolution mechanism under Articles XXII and XXIII.[102] They also argued for the GATT on taking the essential principles of this old GATT

(noting that 'the EC and the United States have dominated bargaining and outcomes at the GATT/WTO from its early years'); Richard H Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, (1997) 91 *American Journal of International Law* 231, 232. (noting that 'richer countries tend to be more powerful in trade negotiations than poorer countries since, in the international trade context, 'power' may be seen as a function of relative market size.')

[99] John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 570 (noting that 'one reason why the US has been prepared to shift its agenda into WTO is that consensus offers it a tool of domination.'); Richard H Steinberg, above n. 100, 350-67 (arguing that a consensus to launch new trade rounds of trade talks is achieved by including all states' initiatives in negotiating mandates, but that rounds are closed through power based bargaining in which the proposals of the United States and the EC are ultimately adopted.)

[100] Frank Emmert, 'Intellectual Property in the Uruguay Round—Negotiating Strategies of the Western Industrialized Countries' (1989) 11 *Michigan Journal of International Law* 1317, 1343 (describing dispute settlement provisions in Berne and Paris Conventions as "effectively worthless"); *see also* Monique L Cordray, above n. 24, 131-32 (critiquing dispute settlement provisions of WIPO-based intellectual property conventions).

[101] *See, e.g.*, Susan K Sell, *Power and Ideas: North-South Politics Of Intellectual Property And Antitrust* (1998) 132; see also Ulrich Joos and Rainer Moufang, 'Report on the Second Ringberg- Symposium' in Friedrich-Karl Beier and Gerhard Schricker (eds) *GATT Or WIPO?: New Ways in The International Protection of Intellectual Property* (1989) 25 (discussing advantages of negotiating intellectual property issues in GATT).

[102] Frederick M Abbott, 'Protecting First World Assets in the Third Word: Intellectual Property in the GATT Multilateral Framework' (1989) 22(4) *Vanderbilt Journal of Transnational Law* 689.

as trade-friendly. Given this they argued that its most favoured nation (MFN) principle provided equal advantage to all nationals irrespective of membership[103] and its national treatment clause provided no less favoured treatment to a foreigner than the one provided to a national.[104] They also argued in favour of the GATT since it provided for trade liberalisation and transparency of trade rules although the liberalisation was made applicable only for manufactured tangible goods[105]

However, developing and least developed countries vehemently opposed the US position by saying that the GATT principles and disciplines were designed for trade in tangible goods and did not enjoy the legal capacity to deal with intangible properties like IPRs.[106] They made counter-proposal for taking UNCTAD and WIPO as more appropriate forum with a view to setting up an international system of IPRs protection.[107] Furthermore, they preferred less stringent standards to assist their economic developments since they were mostly dependent on importation of technology, and adding value to and shaping the existing technology.[108]

Thus it appears that through the *GATT 1947*, developed country alliance intended clearly to protect trade of IPRs goods. However, the lone mention of IPRs protection in the GATT can be taken as a mere suggestion since it gives discretion to a Member country to adopt measures for the protection of patents, trademarks and copyrights, as well as measures against trade in counterfeit goods, only if such measures are 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement...'[109] To put it another way, the GATT provides measures for IPRs protection only when these

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[103] *GATT 1947*, Article I(1).

[104] *Ibid*, Article III(1).

[105] Adrian Otten, 'The Trade-Related Intellectual Property Rights Agreement (TRIPS)' (Video presentation WTO Webcasting), <http://www.wto.org/english/res_e/webcas_e/webcas_e.htm#TRIPS> 20 May 2008.

[106] Rajan Dhanjee and Laurence Boison de Chazournes, above n. 54, 6-7.

[107] Michael Blakeney, above n. 9, 4.

[108] M Rafiqul Islam, above n. 8, 382.

[109] *GATT 1947*, Article XX(d).

measures do not pose any barrier to free trade. Therefore, the GATT is deemed to have treated IPRs protection as an obstacle to trade and, consequently, IPRs issues are believed to be addressed as a secondary matter, while its primary to-do was trade in tangibles, not intangible IPRs goods.[110] However, in the end the efforts made by the US and its allies to place IPRs in the GATT did not succeed on the face of developing countries' dissents.[111]

4. GATT NEGOTIATIONS AND EMERGENCE OF THE WTO-*TRIPS AGREEMENT*: PROBLEMS AND PROSPECTS

The proposal for negotiations on IPRs in the GATT was raised as a response to the increase of counterfeiting of trademarked goods, product piracy, and due to the frustration of the IPRs owning developed countries as regards enforcement of the existing IPRs protection regime in the international level during the 1970s and 1980s.[112] The negotiations started with the Tokyo Round talks and ended with the Uruguay Round giving birth to the *TRIPs Agreement* within the WTO.

4. 1. IPRs in the Tokyo Round of GATT Negotiations

The Tokyo Round of GATT negotiation launched in 1978 for resisting counterfeiting of trademarked goods and resolving the dissatisfaction of the creators of such IPRs goods.[113] The US and the EC, the proponents of the negotiation of this issue moved forward to adopt an anti-counterfeiting code within the GATT. Before launching such negotiation i.e. in 1977, an International Anti-Counterfeiting Coalition of Multi-national Corporations (MNCs) was also formed to lobby for establishing

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[110] Rajan Dhanjee and Laurence Boison de Chazournes, above n. 54, 6-7.

[111] Susan K Sell, above n. 65, 418.

[112] Edward Slavko Yambrusic, *Trade-Based Approaches to the Protection of Intellectual Property* (1992) 85; Julie-Chasen Ross and Jessica A Wasserman. *Trade-Related Aspects of Intellectual Property Rights and the GATT Uruguay Round: A Negotiating History 1986–1992)* (1993) 15.

[113] *Ibid*; Julie-Chasen Ross and Jessica A Wasserman, *Trade-Related Aspects of Intellectual Property Rights and the GATT Uruguay Round: A Negotiating History (1986–1992)* (1993) 15.

a link between trade and IPRs and to assist in drafting an anti-counterfeiting code during the Tokyo Round.[114] The US and its allies' argument was that the weak IPRs protection would lower trade volume, distort trade patterns and deter firms from transferring technology abroad.[115] They also argued that trade in trademarked counterfeit goods was a serious concern and in the absence of satisfactory protection regime it would amount to a barrier to trade under the GATT.[116] Hence, they proposed a draft agreement on the regulation in relation to anti-counterfeiting policy. Later on, Japan and Canada supported them.[117] The draft agreement intended mainly to look for legal means in an international forum for anti-counterfeiting measures. However, the efforts failed to reach an agreement among the contracting parties of the GATT since these efforts did not effectively allow developing countries to maintain their own policies to protect or direct trade having dependent on their comparatively advantageous manufacturing.[118]

Therefore, it appears that there were no important developing country interests to be addressed in the Tokyo Round. The negotiations in the Tokyo Round were very much based on EU-US leadership and concentrated on preventing counterfeiting in developing countries. The negotiations never took into account that developing countries' fulfilment of developmental needs were dependent on their manufacturing, and that an anti-counterfeiting code would stop their comparatively advantageous reverse engineering efforts for existence. This led them show their trade strength in resisting developed countries' interest-serving measures.[119]

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[114] *Ibid.*

[115] Alireza Naghavi, 'Strategic Intellectual Property Rights Policy and North-South Technology Transfer' (2007) 143 *Review of World Economy* 55.

[116] Christopher Wadlow, 'Including Trade in Counterfeit Goods: The Origin of TRIPs as GATT Anti-counterfeiting Code; (2007) 3 *Intellectual Property Quarterly* 351, 357-60.

[117] Agreement on Measures to Discourage the Importation of Counterfeit Goods, GATT Document L/4817, July 1979.

[118] UNCTAD, *The Outcome of the Uruguay Round: An Initial Assessment* (1994) 186; Carlos A Primo Braga, 'Trade-Related Intellectual Property Issue: The Uruguay Round Agreement and Its Economic Implications' in Will Martin and L Alan Winters (eds) *The Uruguay Round and Developing Economies* (1995) 382.

[119] Sheila Page, 'Developing Countries in GATT/WTO Negotiations' (Working Paper, Overseas Development Institute, London, February 2002)<http://www.odi.org.uk/iedg/participation_in_negotiations/gatt_wtonegotiationsfeb2002.pdf> 14 November 2008.

4. 2. IPRs in the Uruguay Round of GATT Negotiations

The losses of trade revenue arising out of IPRs infringement caused the IPRs owners to rethink about the reasons for breakdown of the Tokyo Round. They felt the necessity to discuss a new round of multilateral negotiations to save their investment in R&D for inventions. As a result, IPRs owning contracting parties of the GATT established a Preparatory Committee in November 1985 for further negotiation of IPRs under the GATT.[120] The GATT with its better off position in regulating the global trade re-appeared to its developed members as a very convenient and 'more fluid mechanism for adopting new measures...'[121] and hence led them to give the Preparatory Committee a broad mandate in examining any possible agenda in the new round including the issue of IPRs.[122]

On 11April 1986, the US and its allies placed an extensive proposal to the Preparatory Committee.[123] The proposals included IPRs protection linking IPRs with trade, enforcement and dispute settlement mechanisms, and so on. The Committee was also asked to recommend the general programme of negotiations and effectively establish the basis of discussions at the Ministerial Conference.[124]

4. 2. 1. IPRS as a Trade Issue in the Uruguay Round of GATT Negotiations

The US and its allies raised IPRs issues as texts to the Preparatory Committee with the intention of linking IPRs with trade and securing their protection through the mechanism of the GATT. This proposal was based on numerous developments taken place during 1970s and 1980s as regards trade-IPRs connection and protection therein at the international level and within the US, and within multilateral

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[120] See Monique L Cordray, above n. 24, 139.

[121] *Ibid.*

[122] Carlos A Primo Braga, above n. 120, 384.

[123] Daniel J Gervais, above n. 64, 10.

[124] WTO, *Decision on the Establishment of the Preparatory Committee for the World Trade Organization* at para. 8(c), <http://www.wto.org/English/docs_e/legal_e/58-dpcwto_e.htm> 20 August 2008.

and bilateral levels.[125] Commentators note that these developments made the US and its allies take on the protectionist GATT regime as the perfect forum for linking IPRs with trade, and protecting them with the increased level of IPRs protection.[126]

In their texts, the US and its allies insisted on the inclusion of IPRs issues in the GATT agenda and setting it as the leading condition for participation in the negotiations.[127] However, developing and least developed countries made opposition to linking IPRs protection with trade issues.[128] Their disagreement was based on the claim that by virtue of State Sovereignty they are entitled to the right to decide the appropriate level of IPRs protection required for them.[129] In addition, they raised questions with regard to the economic profitability of stronger IPRs protection since there were not many intellectual property holders in their countries. They also contended that the GATT forum was not the proper forum for the discussion of IPRs issues since it related to trade in intangible goods.[130]

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[125] As a coalition of 12 major U.S. companies from various IP-oriented industries including Brystol-Myers, DuPont, FMC Corporation, General Electric, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International, Warner Communication, the IPC's first and foremost goal was to act towards an enclosure of the IP protection issues in the Uruguay Round. After the Uruguay Round launched, the IPC along with European and Japanese business groups worked closely on convincing the international community of the necessity of the multilateral IP agreement in GATT framework. See Carol J Bizli, 'Towards an Intellectual Property Agreement in the GATT: View from the Private Sector' (1989) 19(2) *Georgia Journal International & Comparative Law* 343; Monique L Cordray, above n. 24, 137-38.

[126] Joshua J Simmons, above n. 88, 59; see also Susan K Sell, 'Intellectual Property Protection and Anti-trust in Developing World: Crisis, Coercion, and Choice' (1995) 49(2) *International Organisation* 315.

[127] The group of developed countries expanded later to the 'Group of Forty,' including industrialized as well as 20 developing countries, chaired by Colombia and Switzerland. See T. N. Srinivasan, *Developing Countries and the Multilateral Trading System - from GATT to the Uruguay Round and the Future* (1998) 30-31.

[128] See Azza El Shinnawy, 'A Reading into the *TRIPS* Track Road' (2003) 10(3) *Newsletter of the Economic Research Forum, for the Arab Countries, Iran & Turkey,* <http://www.erf.org.eg/nletter/Newsletter_VollO_Autumn03/PI 6-17.pdf> at 20 August 2008; see also Chakravarthi Raghavan, 'New Efforts of Consensus over Ministerial Meeting?' *International Foundation for Development Alternatives* (News Release, 26 August 1986), <http://www.sunsonline.org/trade/process/during/86/08280086.htm> at 20 August 2008.

[129] Frank Emmert, above 102, 1353-354.

[130] *Ibid*, 1358-359.

Thus it appears that the debate on the inclusion of IPRs in the GATT gave rise to huge differences between developed countries and developing countries led by Brazil and India. The differences were in fact based on the evidence that developed countries lagged behind developing countries in trade of manufactured goods. This led developed countries concentrate on knowledge goods and made them take stern efforts in protect these goods through a different forum like GATT where developing countries are often dominated. These differences were somewhat fundamental in nature concerning both developed and developing countries' economic interests. However, such differences were not resolved during the Preparatory Committee's meetings prior to the launching of the Uruguay Round.[131]

On the other hand, the texts of Colombia and Switzerland appeared as synchronised ones in some extent among developed countries' texts since these texts presented a uniform IPRs protection standard obligatory for all countries. Consequently, these texts were adopted as a starting point for a future Ministerial Declaration conferring the mandate for the Uruguay Round negotiations.[132] This text proposal expanded the scope of issues in the GATT negotiations to 'trade-related aspects of intellectual property rights, including trade in counterfeit goods' (TRIPs). However, it was restricted only to such IPRs enforcing measures, which 'do not themselves become barriers to legitimate trade.'[133]

Therefore, it seems that the issue of TRIPs was included in the GATT agenda on the face of sharp differences between developed and developing countries. For its inclusion, there was no consensus required as regards the scope of the issues to be included in the mandate of the future Ministerial Conference. Besides, no significant understanding took place between developed and developing countries

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[131] The group of developed countries expanded later to the 'Group of Forty,' including industrialized as well as 20 developing countries, chaired by Colombia and Switzerland. See T.N. Srinivasan, above n. 129, 30-31.

[132] Daniel J Gervais, above n. 64, 10-11.

[133] General Agreement on Tariff and Trade, *Ministerial Declaration on the Uruguay Round,* MIN.DEC of 20 September 1986, <http://gatt.stanford.edu/bin/object.pdf?91240152> at 20 August 2008 *[Ministerial Declaration on the Uruguay Round]*; see also Daniel J Gervais, above n. 64, 10-11.

to influence the outcome of the Preparatory Committee's meetings in its favour. However, the Preparatory Committee's report made TRIPs as an agenda in the GATT negotiations.

In addition, at the very beginning of its discussions, the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (NG) was constituted by the Ministerial Declaration of Punta Del Este that launched the Uruguay Round.[134] The NG examined the question of an appropriate scope of IPRs that should be included in the GATT framework.[135] At the discussion, several countries recommended the NG to look for a proper balance between adequate IPRs protection and its effective enforcement. They also suggested the NG to calculate the risk or barrier that such TRIPs protection would create to international trade.[136] Nevertheless, the NG considered 'the whole range of intellectual property rights protection,' in stead of only specific aspects.[137] A number of participating developing countries made the view that the authorisation given to the NG did not allow the discussion to evolve beyond trade in goods. For that reason, such countries contended that the NG did not have the legal capacity to deal with such issues as linking IPRs with trade, setting a higher level for its protection or strengthening the enforcement procedures. They also maintained that the only aspects of IPRs that the NG was authorised to discuss were the consequences of IPRs protection on the trade in goods where they caused barriers to legitimate trade.[138] Some developing country participants asserted that linking GATT's mandate with the relevant provisions of WIPO treaties on IPRs protection would be absolutely useless. They stated that such linking strategy would lead to

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[134] Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPs Agreement* (2002) 29.

[135] World Trade Organization, Meeting of the Negotiating Group (held on 23 September 1987), WTO Doc. MTN.GNG/NG11/3 (8 October 1987); see also WTO <http://docsonline.wto.org> at 20 August 2008.

[136] *Ibid.*

[137] World Trade Organization, *Meeting of the Negotiating Group* (held on 25 March 1987), WTO Doc.MTN.GNG/NG11/1 (10 April 1987); see WTO <http://docsonline.wto.org> at 20 August 2008.

[138] *Ibid.*

the wide range 'regulation approach' to the GATT bringing quite undesired result as opposed to trade liberalisation philosophy of deregulation.[139]

Thus, the negotiations in the NG's examination process progressed very slowly. The negotiations could not arrive at a significant understanding as to the text linking IPRs with trade. Because, the long-standing differences between developed countries and developing countries over the usefulness of TRIPs protection in the GATT remained unresolved.[140] The developed countries led by the US, Switzerland, the EU, and Japan argued that since IPRs possess commercial value, IPRs issues should get connected to the GATT forum, and, hence, to trade. This argument was based on the fact that the GATT negotiations had a wide-scale agenda that sheltered various trade topics. In addition, the wide spectrum of trade topics discussed during the Uruguay Round negotiations offered numerous opportunities to retaliate and to be compensated for different concessions and renunciations.[141] Therefore, such developed countries expected extensive IPRs protection linking with the trade machinery of the GATT. They also expected that bargains among developing and developed countries could have been made in various fields where developing countries were able to compete, such as textiles or agriculture.[142] On the other hand, developing countries led by Thailand, Mexico, and Brazil feared that inclusion of IPRs in the trading regime of the GATT would make IPRs protection very monopolistic in favour of IPRs-owning developed countries. Therefore, they apprehended that such initiative would prevent technology transfer and increase prices of goods.[143] Even at the later conference in Montreal, the parties made no substantial agreement on the TRIPs text.[144]

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[139] *Ibid;* Being the only multinational agreement that set up international trade rules, *GATT* not only served as a code of rules but also allowed parties to negotiate on adding and improving such rules in order to reduce barriers to international trade. *GATT* also provided a broad exposure of various trade-related aspects, therefore offering a possibility for package deals, *i.e.,* making concessions in more developed areas of trade. See Frank Emmert, above n. 102, 1344-345.

[140] Daniel J Gervais, above n. 64, 13-14.

[141] Robert E Hudec, 'GATT and the Developing Countries' (1992) 1(67) *Columbia Business Law Review* 67, 75.

[142] *Ibid.*

[143] Daniel J Gervais, above n. 64, 13-14.

[144] T. N. Srinivasan, above n. 129, 33.

However, in the end developing countries had no real choice but to give way to developed countries' pressure in the form of imposition of trade sanctions and arm-twisting.[145] In some cases they were unduly influenced by the developed countries in the way of concessions known as GSP.[146] Therefore, the question whether the GATT forum was in fact the right forum to strengthen international IPRs protection standards linking IPRs with trade remained as a matter of debate. And after the Uruguay Round, IPRs issues became related to trade and turned into a 'trade-related' topic in the preparation of the wide-ranging GATT agenda.

4. 2. 2. Dispute Settlement and Enforcement Mechanisms in the Uruguay Round of GATT Negotiations

The US and the EC insisted on incorporating IPRs protection in the Uruguay Round of trade negotiations because they were influenced by the GATT for its relatively effective dispute settlement and enforcement mechanisms. The GATT dispute settlement mechanisms that were in existence at the opening of the 1986 Uruguay Round developed gradually on the basis of Articles XXII – XXIII of the *GATT 1947*.[147] The remedy in the form of suspension of concession or obligation

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[145] The 'Special 301' provisions of the [US] *Trade Act*, 1974 enables the US Trade Representative (USTR) to identify countries, which do not protect the US goods and put them on a watch list to face trade retaliatory measures considered by the presidential power unless they amend their existing IP laws with stronger level of protection and enforce them. For details, see, Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (1998) 85; Solomon F Balraj, above n. 96, 63-68.

[146] *See, e.g.*, Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, (1996-97) 17 *North-Western Journal of International Law and Business* 398, 442.

[147] While article XX(d) establishes a mechanism for consultations between the contracting parties if a 'satisfactory solution' to a dispute is found prior that, article XXIII provides a mechanism that allows contracting parties to settle disputes arising between other contracting parties. The contracting parties that participate in a dispute settlement procedure of other parties' dispute produce a report that is to be adopted consensually. This dispute settlement regime evolves to another version of dispute resolution procedure where, instead of contracting parties, a panel of independent experts prepares reports including their recommendations that are submitted the GATT Council. See WTO, 'Historic Development of the WTO Dispute Settlement System,' <http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm> 20 May 2008.

that the offending country was entitled to under the Agreement, seems to be an effective measure available under Article XXIII (2) of the *GATT 1947*.[148]

The question whether the GATT was the proper forum for strengthening the global level of IPRs protection with adequate dispute settlement and enforcement mechanisms remained unsettled at the Uruguay Round launching. This was because IPRs-owning developed countries and IPRs-using least developed countries did not reach a consensus on this issue at the Preparatory Committee.

At the Preparatory Committee, developed countries stated that the WIPO Conventions did not go for establishing multilateral trade rules and setting up a strong enforcement and dispute settlement mechanism for IPRs protection. They maintained that the Conventions rather looked for lessening possible conflicts between the member countries that followed different national IPRs regimes. They also maintained that the WIPO Conventions gave discretion for member countries to implement IPRs laws in the way they saw convenient, and having based on national treatment and non-discrimination clauses.[149] However, this flexibility, as they maintained, encouraged less protection for IPRs, causing less returns for innovators, and less rents for IPRs-owning countries. For that reason, developed countries argued for strict enforcement and dispute settlement mechanism for IPRs protection so that the economic interests of developed countries that host most of the IPRs-owners were served. On the other hand, developing and least developed countries chose not to adopt stringent protection regime that bears the risk of hampering their comparatively advantageous reverse engineering of IPRs protected products and thereby causing concerns on their developmental needs in relation to agriculture, health, economic development and so on.[150]

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[148] *GATT 1947* Article XXIII(2); Monique L Cordray, above n. 24, 133.

[149] Rajan Dhanjee and Laurence Boison de Chazournes, above n. 54, 6.

[150] See Robert J Gutowski 'The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven' (1999) 47 *Buffalo Law Review* 713.

Therefore, to get rid of the conflict of interests between developed and developing countries, the Group of Experts was employed for a solution.[151] The Group of Experts opined that the existing provisions of WIPO treaties were not adequate to protect IPRs-owning parties from the growing impact of trade in counterfeit goods.[152] Hence, it asked for creating an effective regime of IPRs protection not posing a barrier to legitimate trade.[153] In addition, many developing countries agreed to sign TRIPs enforcement mechanism as adopted in the GATT with the hope that this would ultimately satisfy the US particularly its MNCs' plans for reaching a high level of international IPRs protection.[154] Finally, the IPRs issue became connected to the GATT's enforcement and dispute resolution mechanisms and obliged member countries of the newly created WTO to follow its procedure.[155]

Thus it appears that the negotiations of GATT preferred trade interests and the strengthening dispute settlement and enforcement mechanism adopted therein ultimately favoured developing countries. This is because IPRs belong mostly to developed countries and toughening the dispute settlement and enforcement mechanism for IPRs protection outweighs owners' interests at the costs of hampering users' developmental needs-fulfilling reverse engineering in IPRs products.

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[151] The group of experts was created in 1984 following a Ministerial Declaration adopted in the 38th Session at Ministerial Level in November 1982 in Geneva. See GATT, Ministerial Declaration, Quantitative restrictions and other non-tariff measures (29 November 1982), 38th Sess., <http://www.jus.uio.no/lm/wto.gatt.thirty.eighth.session.ministerial.declaration.1982/non.tariff> at 20 August 2008; see also Solomon F Balraj, above n. 96, 63.

[152] Daniel J Gervais, above n. 64, 8-9.

[153] Ministerial Declaration on the Uruguay Round, above n. 145; Daniel J Gervais, above n. 64, 8-9. <http://www.bilaterals.org/IMG/doc/Expanding_IP_Empire_-_Role_of_FTAs.doc> at 20 August 2008.

[154] Peter Drahos, 'Expanding Intellectual Property's Empire: the Role of FTAs' (November 2003), online: Bilaterals.org

[155] Fanni Weitsman, 'TRIPs, Access to Medicines and the North-South Conflict after Doha: The End or the Beginning' (2006) 6 *Asper Review of International Business and Trade Law* 67.

4. 3. Shifting from GATT to WTO and Emergence of the TRIPs Agreement

In the 1986 Ministerial Declaration launching the Uruguay Round of GATT negotiations, IPRs-owning developed countries made a proposal to extend GATT to TRIPs as one of the negotiating agendas.[156] They also tended to develop a multilateral framework of principles, rules, and disciplines on TRIPs. In addition, the certain members of the Organization for Economic Cooperation and Development (OECD) held the WIPO-led international IPRs system responsible for not establishing sufficiently substantive rules to promote trade in IPRs and the maintenance of mechanisms for the enforcement of those rules.[157] All of these issues are taken on board with the view to reducing all distortions and impediments to trade, promoting adequate and effective TRIPs protection, and to ensure that measures and procedures to enforce IPRs, did not become a barrier to legitimate trade.[158] This issue which went ahead for several years made developed countries of the North and developing countries of the South concerned.[159] The main concerns raised by developing counties were two folds: (a) the proposed protection of TRIPs would make them pay high cost for accessing to modern technology and (b) the protection of their socio-economic conditions would be in peril if the protection of TRIPs was prioritised.[160]

With the huge opposition, the South could not make any difference to the proposal extending GATT to TRIPs protection in the final phases of the Uruguay Round of GATT. The lengthy and technical discussions and in some cases imposition of 'Special 301' and arm-twisting made developing and least developed countries unstable, disunited and confused.[161] As a result, several developing countries joined the Group of Forty led by Switzerland and Colombia instead of sticking to the

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[156] Ministerial Declaration on the Uruguay Round, above n. 153.

[157] Frederick M Abbott, above n. 53, 664.

[158] Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPs Agreement* (2007) 2-4.

[159] M Rafiqul Islam, above n. 8, 382-383.

[160] *Ibid.*

[161] See Vandana Shiva, above n. 147, 85; Solomon S Balraj, above n. 96. 63-68.

opposition of the Group of Ten led by India and Brazil.[162] In addition, developing and least developed countries were given the hope of greater market access through GSP facilities in other sectors of the WTO including textile and agriculture as a trade-off for 'swallowing TRIPs'.[163] In spite of these undue influences and threats, the democratic bargain[164] between developed and developing countries was claimed to have taken place for formulating a TRIPs code.[165] In addition, in presenting the final draft of TRIPs in December 1991, the Chairman of the NG along with the Secretariat, and Arthur Dunkel, the then Director General of GATT actively spoke of trade-IPRs linkage in promoting international trade and hinted the effects of its non-existence risking economic isolation.[166] Therefore, it is said that the way final draft of TRIPs was presented was nothing but a 'take-it-or-leave-it' offer by the GATT Director General.[167] It is also said that the final text did not contain much an outcome of the consensus reached in the negotiations on the TRIPs debate. However, it contained much of an effort by the Director General and the Secretariat to meet a deadline and prevent the failure of the Uruguay Round due to unsettled IPRs issues.[168]

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[162] T. N. Srinivasan, above n. 129, 35.

[163] *Ibid.*

[164] The theory of 'democratic bargain' is based on three conditions: a) condition of representation i.e. all relevant interests have to be represented in the negotiating process b) condition of full information i.e. all those involved in the negotiating process must have full knowledge about the consequences of various possible outcomes and c) condition of non-domination i.e. one party must not coerce the others. See for details, Peter Drahos and John Braithwaite, above n. 65, 188-92.

[165] *Ibid.*

[166] Daniel J Gervais, above n. 64, 24; see also Robert J Gutowski, above n. 152, 713.

[167] William O Hennessy, 'Holy Spirits: Part II' (22 February 2005); see <http://www.ipfrontline.com/depts/article.asp?id=2160> at 20 August 2008.

[168] Fanni Weitsman, above n. 157, 80; Daniel J Gervais, above n. 64, 24; Sergio Escudero, 'International Protection of Geographical Indications and Developing Countries',<http://www.southcentre.org/publications/geoindication/toc.htm#TopOfPage> at 20 August 2008; see also Chakravarthi Raghavan, '*TRIPS* – Dunkel's New Text Seen As More Partial to US' <http://www.sunsonline.org/trade/areas/intellec/04070189.htm> at 20 August 2008.

On 15 December 1993, the Uruguay Round of GATT negotiations resulted in establishing the WTO and adopting three principal agreements including the *TRIPs Agreement*.[169]

Thus, it appears that the *TRIPs Agreement* encountered huge controversy, novelty, and uncertainty in its journey. However, the finishing came up with comprehensive and legally binding coverage on following the IPRs protection standard already set by developed countries in their national jurisdiction. It exceeds sometimes its original mandate given in the 1986 Ministerial Declaration when it provides patents in all forms of technology or when it incorporates limitations on compulsory licensing.[170] For this reason it is said that that *TRIPs Agreement* was designed and shaped by a group of developed countries led by the US. And the final draft of TRIPs was mostly taken from the US proposal based on its domestic laws.[171] This made developing and least developed countries concerned since for their compliance they require a lot of doings. However, in order to reduce tensions an *Agreement between the World Intellectual Property Organization and the World Trade Organization*.[172] Article 4 of the Agreement makes the WIPO provide legal and technical assistance to developing country WTO members on TRIPs. This provision of making the defaulter upright by providing necessary support presents the opportunity to bring them together so as to pacify the North-South debate.

4.3.1. IPRs Protection in the TRIPs Agreement

The *TRIPs Agreement* fits in with the WTO's free trade agenda when it incorporates trade liberalising principles of MFN and national treatment, and shares the WTO's

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[169] The *General Agreement on Tariffs and Trade* (GATT) for goods, the *General Agreement on Trade in Services* (GATS) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS).

[170] T Stewart, *The GATT Uruguay Round: A Negotiating History* (Vol. II, 1986-1992) 2259-2313.

[171] Fanni Weitsman, above n. 157, 67.

[172] Signed 22 December 1995 and entered in to force 1 January 1996, *35 I L M 754*.

strong dispute settlement mechanism.[173] Being included in the trade-related Uruguay Round package, the *TRIPs Agreement* makes all IPRs as trade related rights and adopts extensive provisions for IPRs protection and anti-counterfeiting.[174] Its protected areas include copyright and related rights, trademarks, geographical indications, industrial designs, patents including plant variety protection, layout designs (topographies) of integrated circuits, and protection of undisclosed information known as trade secrets.[175] The Agreement requires the member countries to maintain minimum standard for such IPRs protection. It gives the Members liberty to decide on the appropriate method of IPRs protection within their own legal system and practice, and to provide more extensive protection if they so wish.[176]

The following sections will outline briefly how the *TRIPs Agreement* treats IPRs in terms of scope and protection and some of this treatment will be examined in later sections to assess the TRIPs impacts on developing and least developed countries' welfare needs.

4. 3. 1. 1. Patents in the TRIPs Agreement

The *TRIPs Agreement* re-conceptualises IPRs protection for patent by extending its protection to all inventions irrespective of areas of technology, whether products or processes including microorganisms, non-biological and microbiological processes.[177] As a result, patenting of use of knowledge, living organisms like genes and other biological substances, and plant varieties is allowed.[178] It addresses

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[173] *TRIPs Agreement*, Articles 3 -4 and PART III.

[174] Daniel J Gervais, 'The *TRIPs Agreement* and the Changing Landscape of International Intellectual Property' in Paul Torremans et al (eds), *Intellectual Property and TRIPs Compliance in China: Chinese and European Perspectives* (2007) 67-69; Bankole Sodipo, above n. 73, 24-25.

[175] *TRIPs Agreement* Article 1.2.

[176] *Ibid*, Article 1.

[177] *Ibid*, Articles 27-34.

[178] Megan Bowman, 'Intellectual Property Rights, Plant Genetic Resources and International Law: Potential Conflicts and Options for Reconciliation' (2007) 1(4) *International Journal of Intellectual Property Management* 277.

the exclusion clause in regard to patenting of chemical and pharmaceutical inventions as laid down in the *Paris Convention*.[179] It fixes a minimum term of 20 years for patents synchronising the difference in the terms allowed by the *Paris Convention*.[180] It adopts the principle of national treatment as incorporated in the earlier IPRs conventions[181] and adds here the MFN principle.[182] It makes provisions ensuring payment of reasonable fees for compulsory licenses.[183]

4. 3. 1. 2. Copyright in the TRIPs Agreement

The *TRIPs Agreement* redefines copyright with the help of the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)*[184] and enlarges protection to computer programmes, films, sound recordings, live performances and so on.[185] By doing so, it ensures protection of neighbouring rights and makes it possible to exempt moral rights from the scope of copyright.[186] It also accords additional protection to an already popular works.[187]

4. 3. 1. 3. Trademarks and Geographical Indications in the TRIPs Agreement

The *TRIPs Agreement* provides protection to trademarks and service marks.[188] It also extends the protection of registered well-known marks to goods or services, which are not similar to those in respect of which the trademark has been

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[179] *TRIPs Agreement* Articles 10, 27-34.

[180] *Ibid*, Article 33.

[181] *Ibid*, Article 3.

[182] *Ibid,* Article 4.

[183] *Ibid*, Article 31.

[184] Signed at Rome 26 October 1961, *496 UNTS 43.*

[185] *TRIPs Agreement* Articles 9-14.

[186] *Ibid*, Articles 9-14.

[187] *Ibid.*

[188] *Ibid*, Articles 15-20.

registered.[189] It depends on a connection between those goods or services and the owner of the registered trademark.[190] It terms geographical indications[191] capable of using as trademark and prohibited use of misleading geographical indications (GI) as trademark or any use amounting to an act of unfair competition.[192]

4. 3. 1. 4. Designs in the TRIPs Agreement

The *TRIPs Agreement* empowers owners of protected designs to prevent the manufacture, sale or importation of articles bearing or embodying a design, which is a copy of the protected design.[193] It extends protection to layout designs (topographies)[194] of integrated circuits[195] in accordance with the provisions of the *Treaty on Intellectual Property in Respect of Integrated Circuits* (*Washington Treaty*),[196] negotiated under the auspices of WIPO in 1989.[197] It allows innocent infringers to use, sell stock in hand or order before learning of the infringement against a suitable royalty.[198]

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[189] *Ibid*, Article 16.

[190] *Ibid.*

[191] *Ibid*, Article 22.1. It states, 'Geographical indications are defined, for the purposes of the Agreement, as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.'

[192] *Ibid*, Articles 22-24.

[193] *Ibid*, Articles 25-26.

[194] A 'layout-design (topography)' is defined as the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture; see <http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> at 12 November 2007.

[195] An 'integrated circuit' means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function; see<http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> at 12 November 2007.

[196] Signed at Washington 26 May 1989, *28 ILM 1477.*

[197] *TRIPs Agreement* Article 35.

[198] *Ibid*, Articles 36-37.

4. 3. 1. 5. Undisclosed Information in the TRIPs Agreement

The *TRIPs Agreement* accords protection to 'undisclosed information' covering trade secrets, know how, data submitted to the government, and so on.[199] It authorises both natural and legal persons to prevent information lawfully within their control from being 'disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices' if such information is secret and not generally known among or easily accessible to persons who normally deal with this kind of information. The Agreement also accords protection to such information having commercial value for its secrecy and which are placed under statutory departmental steps by the person who legally manages the information, to keep it secret.[200]

4. 3. 2. TRIPs Compliance and Effects of Non-compliance

In compliance with the *TRIPs Agreement*, the member countries require to implement the provisions of the *TRIPs Agreement* either by amending their existing laws on IPRs, or enacting new IPRs laws if they are non-existent. The phase-in rules for developed and developing countries have already ended.[201] In accordance with the Article 66 of the *TRIPs Agreement*, the TRIPs Council extends the transitional period for an LDC member to 1 July 2013 in its meeting taken place on 29 November 2005 unless it graduates from being LDC.[202] To address possible adverse effects on public health in LDCs, the patenting of pharmaceuticals is

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[199] *Ibid*, Article 39.

[200] Peggy E Chaudhry and Michael G Walsh, 'Intellectual Property Rights: Changing Levels of Protection under GATT, NAFTA and the EU' [Summer 1995] *Columbia Journal of World Business* 80.

[201] *TRIPs Agreement* Article 65. It allows the member states a general transitional period of one year from 1 January 1995 of entry into force of the WTO for implementing the TRIPs Agreement.201 Developing countries and countries in the process of moving to market economies were entitled to another four years for implementing it on consideration of their special problems. To extend product patent protection to technology an additional period of five years was provided to developing countries.

[202] WTO, Press Release, Press/424, 29 November 2005, (05-5683).

delayed till 1 January 2016.[203] However, provisions in regard to national treatment and MFN become obligatory for all WTO members- developed and developing countries alike on 1 January 1996.[204]

The *TRIPs Agreement* provides for a better dispute settlement and enforcement mechanism.[205] It restructures the dispute settlement rules to make decisions binding on all members and to authorise the use of retaliatory sanctions by complying countries if their opponents do not alter WTO-incompatible national laws or provide compensation.[206] Given such compliance procedures and provisions for sanctions on non-compliance, the member countries in particular with developing and transitional economies are facing the reality of TRIPs.[207]

4. 3. 3. Position of Developing and Least Developed Country Members under the TRIPs Regime

The comprehensive and stringent TRIPs standard-setting for the international protection regime prescribes the paradigm domestically enforceable for IPRs-protection as a condition of membership of the WTO.[208] It aims to support socio-

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[203] WT/MIN(01)/DEC/2, 20 November 2001, (01-5860).

[204] *TRIPs Agreement* Articles 65(2), (3) and 66(1).

[205] *Ibid*, Articles 63-64.

[206] *Ibid*, Article 61. See also *See* Laurence R Helfer, 'Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy' (1998) 39 *Harvard International Law Journal* 357, 383-85 (collecting authorities discussing the importance to the WTO dispute settlement system of the prevailing state's ability to impose trade sanctions on the losing state).; Ruth Okediji, *Rules of Power in an Age of Law: Process Opportunism and TRIPs Dispute Settlement*, in Kwan Choi and James Hartigan (eds) *Handbook Of International Trade Law* (2003/2004) 42-72 (asserting that WTO dispute settlement system is structured as a signalling game that encourage the parties to 'opt out of the formal process and settle the dispute informally.')

[207] See Jerome H Reichman, 'The TRIPs Agreement Comes of Age: Conflict or Cooperation with the Developing Countries' (2000) 32 *Case Western Reserve Journal of International Law* 441, 450.

[208] Michael Blakeney, 'International Intellectual Property Jurisprudence after TRIPs' in David Vaver and Lionel Bently (eds), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (2004) 3.

economic development ensuring a balance of rights and obligations of IPRs owners and their users.[209]

However, the standard set by the *TRIPs Agreement* seems to prioritise the interests of IPRs-owning developed countries over those of IPRs-using developing and least developed in several respects:[210]

1. Developed countries are ahead in technological knowledge, investment and risk-taking required for new inventions. With the gradually increasing demand for new inventions, they manufacture information and technology-based products and marketise them in the world market. The appearance of the *TRIPs Agreement* expedites the commercialisation of knowledge-based products and makes developed countries sole manufacturers and exporters of technologies from the very beginning of the TRIPs protection regime. For developing and least developed countries that are reluctant in TRIPs protection, the *TRIPs Agreement* is expected to prepare a level playing field enabling them upright by providing necessary support.[211] However, the undefined way of such support leaves them volatile in the technology-trade competition. The rise of knowledge-based industries with the help of the *TRIPs Agreement* undermines their comparative advantage in reverse engineering and demoralises their capacity to manufacture industrial goods at a comparatively cheaper cost. As a result, developing and least developed countries become merely users rather than owners of TRIPs.[212]

2. The TRIPs protection regime comes up with its stringency for all IPRs. This stringency in protection seems to block free trade principle of the WTO and create monopolisation in the IPRs owners' hand. Such goings-on are alleged

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[209] *TRIPs Agreement* Article 7.

[210] Derek E Bambauer, 'Why Intellectual Property Rights Matter to Less Developed Countries' (2004) 1(3/4) *Information Technologies and International Development* 63, 64-71.

[211] *Agreement between the World Intellectual Property Organization and the World Trade Organization* Article 4.

[212] M Rafiqul Islam, above n. 8, 380.

to make the poor peoples of these countries pay soaring price for food security, livelihood of farmers, public health and technology transfer.[213] As regards health, the World Health Organization (WHO) states, '... where most consumers of health are poor, as are great majority in developing countries, the monopoly costs associated with patents can limit the affordability of patented health care products required by poor people in the absence of other measures to reduce prices or increase funding.'[214]

3. As a part of fulfilling such TRIPs commitment, the government departments in Member countries require submission of secret test or other data to approve the marketing of pharmaceutical products using new chemical entities. While doing so, the government departments are under obligation to protect such data from unfair commercial use. However, the submission requirement concerns the pharmaceutical industry and the developing and least developed countries. This is because the data or secret test submitted to the government departments are sometimes stolen and used for producing fake medicines. This causes loss to pharmaceutical industry for their investments. This also causes tensions to developing and least developed countries in deteriorating health with substandard or fake medicines.[215] Harvey and Ronkainen note this concern for the disclosure of company information in this way:

> The U.S. Freedom of Information Act (FOIA) of 1966 is often mentioned as a source of problems, aiding and abetting the piracy of products and technologies. Pfizer Inc., for example, estimated that more than four-fifths of the 3 4,000 FOIA requests for the release of information were commercially motivated.[216]

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[213] Laurence R Helfer, 'Regime Shifting: The *TRIPs Agreement* and New Dynamics of International Intellectual Property Lawmaking' (2004) 29(1) *Yale Journal of International Law* 1.

[214] World Health Organisation, 'Public Health: Innovation and Intellectual Property Rights' (Report of the Commission on Intellectual Property Rights, Innovation and Public Health, 2006) [hereinafter WHO].

[215] 'U.K.: Billion-Pound Drugs Fraud Hits U.K.', *Observer,* (March 14, 1993).

[216] M Harvey and I A Ronkainen 'International Counterfeiters: Marketing Success without the Cost and the Risk' (1985) *Columbia Journal of World Business* 37-45.

4. The *TRIPs Agreement* recognises GI especially in regard to wines and spirits, and it includes a provision that negotiations on the establishment of a multilateral registration system for wines should be undertaken. A number of developing and least developed countries show grievances to this provision and seek similar specific attention extended to other products such as India/Pakistan's *Basmati* rice or *Darjeeling* tea and so on.[217]

5. At the time of protection-standard-setting, the *TRIPs Agreement* takes into account of the trade-oriented IPRs-protection rules prevailing in developed countries.[218] These rules are often considered to be less sensitive of bio-diversity and traditional knowledge (TK) since developed countries are poor in bio-diversity and TK. They currently account for only ten per cent of the world's biodiversity and hence they take least care of them.[219] As a result, while providing for patents in technology products or processes made of biodiversity and TK, the *TRIPs Agreement* does not make any reference to bio-diversity or TK or their time immemorial nurturers developing and least developed countries.[220] It hardly looks into benefit sharing for using these resources, and above all, the existing socio-economic conditions of these countries dependent on them.[221] For this reason, the standard set up by the *TRIPs Agreement* results in a huge conflict between developed and developing countries on TRIPs-protection.

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[217] See Adrian Otten, 'Implementation of the TRIPs Agreement and Prospects for Its further Development' (1998) 1 *Journal of International Economic Law* 523, 532.

[218] Carlos A Primo Braga, C Fink and C Paz Sepulveda, 'Intellectual Property Rights and Economic Development' (Discussion Paper No. 412. World Bank, Washington DC, 2000).

[219] J George and Van Staden, 'Intellectual Property Rights: Plants and Photo-medicines – Past History, Present Scenerio and Future Prospects in South Africa' (2000) 96(8) *South African Journal of Science* 1; N. Harvey, 'Globalisation and Resistance in Post-Cold War Mexico: Difference, Citizenship and Biodiversity Conflicts in Chiapas' (2001) 22(6) *Third World Quarterly* 1045; N. Zerbe, 'Contested Ownership: TRIPs, CBD and Implications for Southern African Biodiversity' (2002) 1 *Perspectives on Global Development and Technology* 294; Vandana Shiva, above n. 147, 65.

[220] Frederick M Abbott, 'TRIPs in Seattle: The Not-So-Surprising Failure and the Future of the TRIPs Agenda' (2000) 18 *Berkeley Journal of International Law* 165, 171.

[221] Vandana Shiva, *Protect or Plunder: Understanding Intellectual Property Rights* (2001) 64.

6. Because of weak economic conditions, developing and least developed countries struggle with the cost of implementation and enforcement of the *TRIPs Agreement*. At the time of reviewing the World Bank Project, Finger and Schuler notes that restructuring of TRIPs and other related fields would cost each developing and least developed country some 150 million dollars, almost larger than a full year's budget in many of the least developed countries.[222] The restructuring of TRIPs through implementation and enforcement requires developing and least developed countries to adopt appropriate legislation to bring judicial and administrative procedures in line with the Agreement.[223] It also requires personnel trained with the knowledge in TRIPs.[224] The costs of such compliance are promised to be borne by developed countries.[225] However, the way how the costs will be borne is not mentioned in the Agreement.[226]

7. To enable the LDCs in founding a technological base, the *TRIPs Agreement* contains a number of flexibilities comprising compulsory licensing[227], parallel imports[228] and fair use or fair dealing[229]. The LDC Members can utilise these

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[222] J M Finger and Philip Schuler, 'Implementation of Uruguay Round Commitments' (2000) 23(4) *World Economy* 511-25.

[223] *Ibid.*

[224] Jerome H Reichman, above n. 209, 450.

[225] *TRIPs Agreement* Articles 67-68.

[226] Huala Adolf, 'Trade-Related Aspects of Intellectual Property Rights and Developing Countries' (2001) 39(1) *Developing Economies* 49, 80; see also Carlos A Primo Braga and Carsten Fink, 'Reforming Intellectual Property Rights Regimes: Challenges for Developing Countries' (1998) 1 *Journal of International Economic Law* 537.

[227] Compulsory licensing occurs when a government allows someone else to produce the patented product or process without the consent of the patent owner. WTO rules on compulsory licensing are outlined in Article 31 of the *TRIPs Agreement* and are reaffirmed in the Doha Declaration, adopted in 2001; <http://www.wto.org> at 2 April 2008.

[228] Article 6 of the *TRIPs Agreement* recognises the possibility of legally permitting parallel imports based on the principle of 'exhaustion of rights'. The principle is used to avoid the fragmentation of markets and the exercise of discriminatory pricing of intellectual property (IP) title holders through parallel imports of the product from another country where the product is found cheaper. This principle applies to patents, trademarks and copyrights.

[229] 'Fair use' or 'fair dealing' provisions are treated as exceptions to copyright. They authorise third parties to use protected works on certain conditions. Such exception

options in order to make possible use of TRIPs-compatible norms in a manner to pursue their own regulatory policies. However, these provisions are vaguely worded and often need further explanation for their use in developing countries' developmental causes. In addition, these flexibilities get circumvented in LDCs if necessary laws are not framed to incorporate them or if the Members sign regional or bilateral agreements curtailing the flexibilities.[230]

8. There are other flexibilities including exceptions to patent rights such as Bolar exception[231], government use and experimental use exceptions. Developing countries can use these flexibilities interpreting them in the widest possible way. On invoking the exception rules in relation to patents as laid down in Article 30 of the Agreement, the LDCs can enjoy the flexibility to promote transfer of technology, prevention of abuse of IPRs and protect public health.

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mirrors the public objectives of copyright, i.e. to make creations and information widely available to the public. Fair use is permitted in international copyright instruments such as the Berne Convention and the WIPO Copyright Treaties of 1996. However, States remain free to decide on whether to implement fair-use provisions in their domestic legislation. The scope and flexibility of these exceptions are variable widely depending on countries. Nonetheless, they have to meet the following requirements in general when applied to the right of reproduction, namely,

(a) Copying may only be done for *private, non-commercial* purposes, and only a *small amount* of copies may be made.

(b) Hard copy works may typically only be copied by reprographic processes. Possibilities exist with respect to the copying of electronic works (e.g. time-shifting of TV programmes or archiving of computer software).

(c) In case of exemptions to the benefit of archives or libraries, such institutions must be open to the public and their copies used for non-commercial purposes only. See for details, ICTSD/UNCTAD, 'Intellectual Property Rights: Implications for Development' (Policy Discussion Paper, 2003) 130-31.

[230] Daniel W Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (2007) 182.

[231] 'Bolar exception' deals with the use of an invention relating to a pharmaceutical product to conduct tests and obtain the approval from the health authority, before the expiration of the patent, for commercialisation of a generic version, just after the expiration of the patent. The USA, Canada, Australia and Israel, among other countries, have admitted this exception by law or through case law. In exchange for this permission, the term of a patent may be extended for an additional period in some of those countries; see for details, Carlos M Correa, 'Pro-competitive Measures under TRIPs to Promote Technology Diffusion in Developing Countries' in Peter Drahos and Ruth Mayne (eds) *Global Intellectual Property Rights: Knowledge and Development* (2002) 47.

Nevertheless, the TRIPs plus regulations which are currently in operation in many LDCs limit these flexibilities and can cause adverse impacts on access to technological knowledge necessary for economic development.[232]

9. Through its standard setting, the *TRIPs Agreement* imposes developed countries' protection standard of IPRs, their culture and day to day practice of IPRs norms on developing and least developed countries. Since the standards are culturally different from and new in developing and least developed countries, their application and interpretation often depend on borrowing case law and jurisprudence from western developed country culture. This trend does not suit with developing country needs and interests and causes crucial concerns for developing and least developed countries.[233] Some of its impacts are beyond any debate crystal clear and are promised to be compensated (e.g. infrastructure build up), some requiring immediate attention for their grave consequences are placed for amendment (e.g. public health) and some are still impending.[234]

10. The TRIPs' inclusion in the WTO is taken to promote economic development through trade of IPRs goods. In fact, in fulfilment of the Agreement's aim a considerable transfer of resources from developing country consumers and firms to industrialised country firms takes place. This transfer of technology example is often set to show that some Latin American and Far-East Asian countries are shining.[235] However, a great body of works concludes that this is the short-term impact of stronger intellectual property protection for both owners and users and in the long run, this benefit will continue for owners

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[232] Carlos M Correa, *Ibid.*

[233] M Rafiqul Islam, above n. 8, 410.

[234] Huala Adolf, above n. 228, 75-84.

[235] Joseph Straus, 'The Impact of the New World Order on Economic Development: The Role of Intellectual Property Rights System' (2006) 6 *John Marshall Law Review of Intellectual Property Law* 1; see also D Rodrik, 'Comments on Maskus and Eby-Konan' in A Deardroff and R Stern (eds) *Analytic and Negotiating Issues in the Global Trading System* (1994) 449.

only.[236] This is because, the US and other industrialised country firms' comparative advantage lies in innovation and intellectual property and they will receive 'significant benefits from the *TRIPs Agreement*'. On the other hand, developing and least developed countries are not so sanguine since they will have to compete with industry giants after the end of GSP era or after the transitional period, and their comparative advantage of reverse engineering will be handicapped due to the TRIPs protective rules on technology transfer and compulsory licensing.[237]

4. 3. 4. IPRs in Bangladesh under WIPO, GATT and WTO: Problems and Prospects

The currently enforceable IPRs laws in Bangladesh are in place for its compliance with the international IPRs protection regimes. Most of them are older than its membership[238] in international IPRs regimes. The laws are the *Patents and Designs Act, 1911 (Patents and Designs Act)*[239], the *Trade Marks Act, 1940*

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[236] M Doane, 'TRIPs and International Intellectual Property Protection in an Age of Advancing Technology' (1994) 9(2) *American University Journal of International Law and Policy* 464, 494.

[237] Susan K Sell, *Private Power, Public Law: The Globalisation of Intellectual Property Rights* (2003) 9-10; Jerome H Reichman, 'The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market' (1993) 4 *Fordham Intellectual Property, Media and Entertainment Journal* 171-266; see also D Foray, 'Knowledge Distribution and the Institutional Infrastructure: The Role of Intellectual Property Rights' in Horst Albach and Stephaine Rosenkranz (eds) *Intellectual Property Rights and Global Competition: Towards a New Synthesis* (1995) 77-117; see also Ana Maria Pacon, 'What Will TRIPs Do for Developing Countries?' in Friederich-Karl Beier and Gehard Schricker (eds) *From GATT to TRIPs: The Agreement on Trade-Related Aspects of Intellectual Property Rights* 352-6.

[238] *WIPO Convention*, since 11 May 1985; *Paris Convention*, since 3 March 1991; *Berne Convention*, since 4 May 1999; *TRIPs Agreement*, since 1 January 1995, and *UCC* since 5 May 1975. See for details, < http://www.wipo.int/treaties/en/SearchForm.jsp?search_what=C> at 31 March 2008; <http://www.unesco.org/culture/copyright/html_eng/ucc52ms.pdf> at 31 March 2008.

[239] *The Patents and Designs Act*, 1911 (ACT NO. II of 1911) *Bengal Code Vol. VII; Pakistan Code Vol. 6,* enacted 1 March 1911 (hereinafter *Patents and Designs Act*).

(Trademarks Act)[240], and the *Copyright Act, 2000 (Copyright Act)*[241] as amended in 2005[242]. These IPRs law are the succession from colonial IPRs laws enacted in British India. They are said to have followed the [British] *Patents and Designs Act 1907*,[243] the [British] *Copyright Act 1911*[244] and the [British] *Trademarks Act 1938*[245] suiting the British interests reflecting the British empire building and colonisation.[246]

The British laws have changed several times[247] in order to cater for the needs and developmental objectives and to keep pace with the revision[248] of the *Paris Convention* and the *Berne Convention*.[249] However the newly independent countries were bound by the conventions on the basis of the defunct rule of continuity even after decolonisation.[250] This is because when the British colonial

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[240] *The Trade Marks Act, 1940* (ACT NO. V of 1940) *Pakistan Code, Vol. 10,* enacted 11 March 1940 (hereinafter *Trademarks Act)*.

[241] *The Copyright Act, 2000* (ACT NO. XXVIII of 2000) *Bangladesh Gazette Extra 18 July 2000* (hereinafter *Copyright Act*).

[242] *The Copyright (Amendment) Act, 2005* (ACT NO. XIV of 2005) *Bangladesh Gazette Extra 18 May 2005.*

[243] 1907 CHAPTER 29 7_Edw_7.

[244] 1911 CHAPTER 46 1_and_2_Geo_5.

[245] 1938 CHAPTER 22 1_and_2_Geo_6.

[246] Hedwig Anuar and Richard Krzys 'Asia, Libraries in' in Allen Kent et al (eds), (1987) 42 *Encyclopaedia of Library and Information Science* 24, 38; Keith Hodkinson, *Protecting and Exploiting New Technology and Designs* (1987) 101-2.

[247] See for details, *The Patents Act 1977 (Amendment) Bill*, Bill 9 of 2001-02, Research Paper 01/84, 31 October 2001, <http://www.parliament.uk/commons/lib/research/rp2001/rp01-084.pdf> at 12 November 2007.

[248] WIPO (ed), *Introduction to Intellectual Property: Theory and Practice* (1997) 388-91. The revisions enabled the Conventions to shift from soft coordination to hard institutional organisation or to provide for compulsory licensing for translation and reproduction of copyrighted educational materials in developing countries; See for details of the revisions, <http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf> 31 March 2008; see lso< http://www.wipo.int/article6ter/en/general_info.htm> at 31 March 2008.

[249] Ruth L Okediji, 'Sustainable Access to Copyrighted Digital Information Works in Developing Countries' in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology: Under a Globalized Intellectual Property Regime* (2005) 142, 159-60.

[250] Sam Ricketson, above n. 5, 797-807.

master acceded to international IPRs regimes, the operation of such accession extended to 'His Majesty's Dominions'.[251]

In spite of the continuity of obligations, some countries conducted reviews in order to assess whether the colonial IPRs laws still suited the socio-economic conditions prevailing in those countries. India is one of them, which carried out an extensive review of its IPRs laws and found some of the IPRs rules ineffective to 'stimulate inventions among Indians and to encourage the development and exploitation of new inventions'.[252] It redesigned them to go well with its own national circumstances comprising low R&D, huge population of poor people and some of the highest drug prices in the world.[253] Having started its journey from similar position and having the same circumstances, Bangladesh has not yet made it possible to review its IPRs laws.

4. 3. 4. 1. IPRs Protection in Bangladesh under the WIPO Regime

Most of the IPRs laws in Bangladesh seem to be very age-old in terms of defining and protecting IPRs, covering emerging issues in IPRs, providing adequate benefits to the IPRs owners, identifying causes of infringement of IPRs in a globalised world and remedying them or keeping pace with the trends of liberalising trade and promoting sustainable economic development.[254]

The *Patents and Designs Act 1911* was enacted in line with the *Paris Convention* originally adopted on 20 March 1883. Between the date of enactment of the *Patents and Designs Act* and the adoption of the *TRIPs Agreement 1994*, the concepts of patents and designs have come across massive development

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[251] Peter Drahos, above n. 58, 766-9.

[252] S Vederaman, 'The Indian Patents Law' (1972) 3 *International Review of Industrial Property and Copyright Law* 39-43.

[253] *Ibid.*

[254] Denis Borges Barbosa, Margaret Chon and Andres Moncayo von Hase, 'Slouching Towards Development in International Intellectual Property' [2007] *Michigan State Law Review* 71, 77.

through adoption of a large number of international conventions[255] and decisions of courts throughout the world. They recommended enactment of uniform laws on intellectual property including patents and designs. For Bangladesh as a member of the *Paris Convention,*[256] the current Act requires to be updated in order to validate certain revisions and amendments made to the *Paris Convention* as regards independence of patents obtained for the same invention in different countries,[257] mention of the inventor in the patent,[258] protection of industrial designs in all the member countries[259] or prevention of unfair competition through effective use of compulsory licensing or parallel importation.[260]

The *Trademarks Act 1940* was enacted as an instrument of protection of the industrial property as formulated in the *Paris Convention.* Over the years, the definition and scope of trademarks have undergone gradual international development and application[261] and the *Convention* has also contained some revisions. However, these revised or amended provisions of the *Convention* are not covered in the present Act. Some of them include refusal or cancellation of registration or use of well-known marks in another member country[262] or protection of marks registered in one member country in the other member countries.[263]

The *Copyright Act 2000* as amended in 2005 and substituted the *Copyright Ordinance 1962*[264] is updated in many respects as required by the *Berne*

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[255] Amongst them are several revisions for *Paris Convention for the Protection of Industrial Property*, *Convention on the Grant of European Patents* (adopted in Munich, 5 October 1973 *BGB1. 1976 II, 649*, 826), *Convention for the European Patent for the Common Market* (adopted in Luxembourg, 15 December, 1975, *76/76/EEC*), and *Patent Co-operation Treaty* (adopted in Washington, 19 June 1970, *1970 TIAS 8733*).

[256] *Ibid.*

[257] *Paris Convention* Article 4*bis.*

[258] *Ibid,* Article 4*ter.*

[259] *Ibid*, Article 5*quinquies.*

[260] *Ibid*, Article 10*bis.*

[261] e.g. Currently geographical indications are getting registered as trademarks.

[262] *Paris Convention* Article 6*bis.*

[263] *Ibid*, Article 6*quinquies.*

[264] Ordinance No. XXXIV of 1962 (now stands repealed), *Gazette of Pakistan* 2 June 1962.

Convention. In accordance with the Convention, the old statute required to incorporate compulsory licensing as regards translation and reproduction of copyrighted materials keeping in consideration of the educational needs of Bangladesh and its developing country status.[265] The old ordinance also lacked provision in relation to protection of broadcasting and related rights.[266]

4. 3. 4. 2. IPRs Protection in Bangladesh under the GATT Regime

As a part of fulfilling trade liberalising agenda launched in the GATT forum after the World War II, Bangladesh was given the hope of accessing the developed countries' market for its ready-made garments (RMGs), frozen foods, generic drugs, and leather products.[267] To have the market access for these import items, developing and least developed countries like Bangladesh were urged to comply with the GATT provisions on IPRs ensuring protection for developed countries' knowledge products imported in Bangladesh.[268]

4. 3. 4. 3. IPRs Protection in Bangladesh under the TRIPs Regime

Bangladesh enters the age of trade liberalisation by signing all of the WTO Agreements including the TRIPs on 1 January 1995.[269] Like other LDCs, Bangladesh aspires to attract foreign direct investment (FDI), technology transfer and innovation enabling it to promote economic development through its compliance.[270] However, in the context of TRIPs obligations, the existing IPRs

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[265] *Berne Convention* Articles 2*bis*, 9.2, 10.2, 10*bis* and the ten year rule, Article 30.2(b).

[266] *Ibid*, Article 11*bis*.

[267] 'Trade Policy Reviews: Bangladesh' (May 2000) <http://www.wto.org/english/tratop_e/tpr_e/tp132_e.htm> at 20 August 2008.

[268] See Harold K Jacobson, 'Beyond Economic Disarmament' (1983) 16(1) *PS: Political Science & Politics* 10-16.

[269] <http://www.wto.org/english/thewto_e/countries_e/bangladesh_e.htm> at 12 November 2007.

[270] Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and the Policy Options* (2007) 23-24.

laws appear to face a daunting task for inspiring inventions among the Bangladeshis, encouraging development and exploitation of new inventions, and ensuring rights and obligations of parties therein through appropriate protection in legal and institutional means. As a consequence, the TRIPs protection regime requires Bangladesh to build up its legal and institutional framework for IPRs protection covering agriculture, health, traditional knowledge and geographical indications, information technology, economic development, and human rights.

4. 3. 4. 3. 1. TRIPs in Protecting Patent in Bangladesh

The *TRIPs Agreement* requires Bangladesh to provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. On using the flexibility Bangladesh is not bound to provide a stringent protection for plant varieties by way of patent; rather it is allowed to adopt a less harsh approach of '*sui generis*'.[271] This approach is not so lenient as is expected since the developed countries contend that the expression 'by an effective *sui generis* system' is meant to be the UPOV style protection.[272] In addition, for Bangladesh UPOV style is a must because it executes the *United States-Bangladesh Bilateral Investment Treaty1986*[273] or the *European Union-Bangladesh Cooperation Agreement on Partnership and Development 1999*.[274] Both of the treaties contain the TRIPs Plus requirements of acceding to the *Budapest Convention* (micro-organism) and adopting of the *UPOV*

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[271] Megan Bowman, above n. 180, 287 (noting that the plant variety protection by *sui generis* system of IPR creates a greater degree of flexibility for TRIPs members.)

[272] Anitha Ramanna, 'IPRs and Agriculture: South Asian Concerns' (2003) 4(1) *South Asia Economic Journal* 55, 63.

[273] Signed 12 March 1986; entered into force 25 July 1989 *Treaty Doc.99-23 Congress.* Article 1c) states: 'Investment' means every kind of investment owned or controlled directly or indirectly, including equity, debt; and service and investment contracts; and includes…(iv) [i]ntellectual property, including rights with respect copyrights and related patents, marks and trade names, industrial designs, trade secrets and know-how and goodwill.'

[274] Signed 22 May 2000, LEX-FAOC036142 <http://faolex.fao.org/docs/pdf/bi-36142.pdf> 2 April 2008. Article 4.5.(c) states: '… Bangladesh shall endeavour to accede to the relevant international conventions on intellectual, industrial and commercial property referred to in Paragraph 2 of Annex II.

Convention respectively to secure plant varieties protection (PVP) through protection of plant breeders' rights (PBRs) as IPRs.[275]

Again, in order to protect PBRs Bangladesh necessitates patenting of agricultural biotechnology and its use. Such initiatives are needed for agriculture-dependent Bangladesh to grow much food in a limited area of 147,570 square kilometres and to feed its 140 million people.[276] However, as of today Bangladesh does have no legislation either to ensure plant breeders rights or secure farmers' rights and save its agriculture-prone economy.

Furthermore, the PVP involves with biotechnology which play the most role in making fertilisers, herbicides, and insecticides used in agricultural farming. And all sorts of biotechnology products are ordained from biodiversity. However, Bangladesh is yet to finalise its biodiversity legislation to assess the impacts of agricultural biotechnology on the soil or to provide for prior informed consent and access of benefit sharing in regard to natural products or traditional knowledge.

Bangladesh does have the *Bangladesh Standard and Testing Institute Ordinance 1984*[277] to test the quality and standard of fertilisers, herbicides, and insecticides and assess their suitability in the soil. However, the shortage of advanced technology and expert manpower fetters the functions of the Bangladesh Standard and Testing Institute.

In addition, patenting of PVP or medicines creates monopolisation in the hand of MNCs and risks price hike. However, Bangladesh does not have any competition law to regulate the price of patented seeds, agrochemicals, foodstuffs, medicines and other daily necessities protected by patents.

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[275] See UNCTAD, *The Least Developed Countries Report 2007 Report: Knowledge, Technological Learning and Innovation for Development* (2007) 99-100.

[276] Bangladesh Bureau of Statistics <http://www.bbs.gov.bd/dataindex/pb_wb_page.pdf> at 17 August 2008.

[277] The *Bangladesh Standards and Testing Institution Ordinance*, 1985 (Ordinance No. XXXVII of 1985), *Bangladesh Gazette* 25 July 1985.

The current *Patent and Designs Act* does not provide patent for pharmaceutical products. It concerns the MNCs that export patented medicines to Bangladesh. The present legislation also frets the local manufacturers of traditional *Ayurvedic* medicines since it does not protect such medicines either in product or process.

The current *Patent and Designs Act* does not also contain any provision to offer legal coverage for using the clinical test data in areas of pharmaceutical products and related processes in producing generics of the patented life saving drugs by adopting the comparative advantage of reverse engineering which Bangladesh possesses and for which it does not need licensing under paragraph 6 of the *Doha Declaration on the TRIPs Agreement and Public Health.*[278]

4. 3. 4. 3. 2. TRIPs in Protecting Trademarks and Geographical Indications in Bangladesh

Bangladesh produces some region-specific handicrafts, tea, spice, sweets, fruits, rice, and so on.[279] However, the differential treatment as regards GI provided in the *TRIPs Agreement* does not influence Bangladesh effectively to frame laws in regard to GI protection. As a result, the absence of laws ensuring effective GI protection in Bangladesh causes marketing of similar products with false indications, misleading the public and encouraging unfair competition.[280]

4. 3. 4. 3. 3. TRIPs in Protecting Copyright and Layout Designs in Bangladesh

Education in Bangladesh is mostly dependent on text books, journals, periodicals, electronic resources and other educational materials copyrighted in a foreign country. In compliance with the TRIPs Agreement, Bangladesh can accommodate the TRIPs 'fair use' provision in its *Copyright Act* in order to promote the right to

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[278] <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htM> at 2 April 2008.

[279] Donald McClatchy, 'The Ongoing WTO Negotiations on Agriculture: Issues and Options for Bangladesh' (Paper 15, Centre for Policy Dialogue, Dhaka, February 2002).

[280] Mahfuz Ullah, *Intellectual Property Rights and Bangladesh* (2002) 61-2.

education. It can also produce these materials locally on simplifying compulsory licence as provided in Section 50 of the *Copyright Act* or import them from countries producing generic versions under compulsory licence and sell them at a cheaper rate. The absence of such provisions cause Bangladesh to face multidimensional constrains in education. It affects the right to education by limiting students and researchers often with least financial capability in accessing these materials. It leads to copyright piracy as is recently reported by the International Intellectual Property Alliance.[281]

In addition, Bangladesh holds a bright prospect for its growing software and semiconductor industry and the *TRIPs Agreement* covers them by providing *sui generis* protection under the *Washington Treaty*. However, the *Copyright Act* or the *Patents and Designs Act* in Bangladesh does not incorporate appropriate provisions in regard to protection for such gradually growing industry.[282]

4. 3. 4. 3. 4. TRIPs in Protecting Undisclosed Information in Bangladesh

Various government departments, financial and commercial institutions in Bangladesh control data, trade secrets, know how, internet data and so on. In compliance with the *TRIPs Agreement*, Bangladesh requires protecting them. However, neither the IPRs laws in Bangladesh accord protection for them nor is there any data protection legislation in consideration. As a consequence banking and pharmaceutical industries feel gravely unsecured. The banking industry is currently introducing internet banking in Bangladesh keeping pace with the globalisation. They are constantly under threat from intruders and feel helpless in bringing the intruders to justice in absence of suitable IPRs and penal laws.[283] The pharmaceutical industry is also concerned with their data, know and trade secrets

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[281] International Intellectual Property Alliance, '2008 Special 301 Report' (11 February 2008). (recommending the USTR to place Bangladesh atop the Watch List for copyright piracy and other IPRs violations) [hereinafter IIPA].

[282] UNCTAD, above n. 277, 100.

[283] Syed Shah Alam et al, 'Development and Prospects of Internet Banking in Bangladesh' (2007) 17(1/2) *Competitiveness Review* 56-66.

submitted to the government departments since some of the data are being used for manufacturing fake medicines in Bangladesh. It results in losses of pharmaceutical companies' investments and deaths of lives. The World Health Organization in its report published in 1995 estimates that counterfeit drugs currently account for about five per cent of world pharmaceutical trade and that seventy per cent of drugs used in developing countries are fake and produced with stolen and unreliable data. The report finds more than 400 deaths during the past three years (1992-4) in Argentina, Bangladesh, India, and Nigeria and shows the deaths' relation with the consumption of medicines containing diethylene glycol anti-freeze, wrongly labelled as propylene glycol.[284]

4. 3. 4. 3. 5. TRIPs in Technology Transfer and Economic Development of Bangladesh

The *TRIPs Agreement* speaks of its compliance for fostering technology transfer in developing and least developed countries and mentions technology transfer as contributing to economic development. In fulfilment of its obligations, Bangladesh enacts IPRs legislations like the *Patents and Designs Act*, the *Copyright Act*, the *Trademarks Act*, and the *Investment Board Act 1989* to facilitate technology transfer through FDI.[285] However, the received FDI confines only in few sectors consisting of ready-made garments (RMG), processed food products and generic drugs. This FDI hardly owes to IPRs controlled technology transfer.[286]

4. 3. 4. 3. 6. TRIPs in Protection and Promotion of Human Rights in Bangladesh

The TRIPs Agreement ensures the human right to intellectual creations. However, while doing so, it never mentions its link with other human rights. On following

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[284] Peggy E Chaudhry and Michael G Walsh, above n. 194, 80.

[285] *Investment Board Act 1989,* Act No. XVII OF 1989, adopted March 1989, *Bangladesh Code* Vol. 27(2).

[286] See UNCTAD, above n. 277, 109-110.

this, the Bangladesh laws ensure the rights of IPRs owners, but not users' rights to health or life or education and so on.[287] Section 22 of the *Patent and Designs Act* and Section 53 of the *Copyright Act* provide for compulsory licensing in certain cases like encouraging competition but never mention anything in the compulsory licensing clauses as regards protection and promotion of the right to health or life, or the right to education.

4. 3. 4. 3. 7. Legal and Institutional Framework Required for TRIPs Compliance in Bangladesh

The signing of the *TRIPs Agreement* entitles Bangladesh to enjoy the WTO membership. This entitlement asks Bangladesh to prevent IPRs-misappropriation but provides its access to developed countries' markets. To this end, Bangladesh needs to update its the long-standing colonial laws. The *Agreement* requires Bangladesh to have an extended and modern legal framework, sufficient and equipped administrative offices manned with efficient and trained personnel, capable state mechanism to monitor transfer of technology arrangements. Since all of these involve huge budget and expertise for now and future, a least developed country like Bangladesh may not easily afford them.[288] A study of World Bank and UNCTAD estimates that Bangladesh may need approximately US$ 250,000 one time plus US$ 1.1 million per annum for reform and capacity building on intellectual property law in the context of the *TRIPs Agreement*.[289]

While doing a similar review on Vietnam, Michael Smith notes that copying the laws or legal structures of the developed countries is a simple matter but maintaining an effective structure of laws and enforcement procedures compatible with those of developed countries and encouraging domestic innovations is a multidimensional

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[287] Peggy E Chaudhry and Michael G Walsh, above n. 202, 80.

[288] UNCTAD, *The TRIPs Agreement and the Developing Countries* (1996) 2-3.

[289] Jayashree Watal, 'Implementing the *TRIPs Agreement*' in Bernard Hoekman, Aaditya Mattoo and Philip English (eds) .*A Hand Book on Development Trade and WTO* (2002) 1-10.

process causing impending pitfalls.[290]

The Least Developed Countries Report 2007 corroborates the apprehension when it says, '[T]he *TRIPs Agreement* is highly problematic for LDCs owing to the high transaction costs involved in complex and burdensome procedural requirements for implementing and enforcing appropriate national legal provisions. LDCs generally lack the relevant expertise and the administrative capacity to implement them.'[291]

5. CONCLUSION

In terms of theoretical and practical consequences, IPRs protection from WIPO to WTO faces the question of suitability for IPRs-owning developed countries and IPRs-using developing and least developed countries. Some IPRs owners question the WIPO regime for its toothlessness and insufficiency in IPRs protection. However, during its continuance a large number of countries make remarkable economic development through reverse engineering of IPRs products. Afterwards, IPRs owners insist on reformulation of IPRs as TRIPs strengthening the IPRs protection. The IPRs owners followed the power-based-bargaining strategies to coerce developing and least developed members into agreeing to TRIPs terms. In the bargaining, developing and least developed countries had little understanding about TRIPs and hence they fail to provide meaningful input in support of their developmental needs as regards agriculture, public health, human rights, biodiversity, and plant genetic resources.[292] As a result, the stringency of IPRs protection makes the relevance of TRIPs highly questionable for large parts

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[290] Michael W Smith, 'Bringing Developing Countries' Intellectual Property Laws to TRIPs Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalise an Intellectual Property Regime' (1999) 31(1) *Case Western Reserve Journal of International Law* 211.

[291] UNCTAD, above n. 277, 99.

[292] Peter Drahos, above n. 58, 769-70; see Susan K Sell, 'TRIPs and the Access to Medicines Campaign' (2002) 20(3) *Wisconsin International Law Journal* 481, 481; see also Susan K Sell, above n. 239, 108-120; see also Ruth L Okediji, 'A Cartography of WTO TRIPS Dispute Settlement and the Future of Intellectual Property Policy, (2001) 62-102 (unpublished manuscript, on file with the *Yale Journal of International Law*); see also Jerome H Reichman, 'Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection' (1989) 22(4) *Vanderbilt Journal of Transnational Law* 747.

of them.[293] Consequently, developing and least developed members, consortium of non-governmental organisations (NGOs) and officials of intergovernmental organisations challenge the 'moral, political and economic legitimacy'[294] of TRIPs in broad range of international forums. Given the situations, it seems essential to 'begin dialogues to replace TRIPs... with alternate intellectual property paradigms' and in the meantime to 'modif[y] the way the agreement is interpreted and implemented.'[295] To this end, a number of recent 'intellectual property law making' under the WTO and WIPO engages in the negotiation of new treaties (e.g. Substantive Patent Law Treaty[296]) and reinterpretation of existing agreements and the creation of new non-binding declarations (e.g. Declaration on the TRIPs Agreement and Public Health[297] and Geneva Declaration on the Future of the World Intellectual Property Organisation[298]), guidelines, recommendations/reports (e.g. UNDP Report on 'Making Global Trade Work for People'[299]), proposal

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[293] UNDP, 'Making Global Trade Work for People' (2003) 221, 222.

[294] Ceas Consultants (Wye) Ltd. et al., 'DG Trade European Commission, Study on the Relationship between the Agreement on TRIPs and Biodiversity Related Issues: Final Report 50-51' (2000) 125.

[295] UNDP, 'Making Global Trade Work For People' (2003) 221, 222; see also, Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights And Development Policy' (Report of the Commission on Intellectual Property Rights, London, September 2002) 5-6 [hereinafter UK Commission]; see also 'UNCTAD-ICTSD Capacity Building Project on Intellectual Property Rights' <http://www.iprsonline.org/unctadictsd/description.htm> 20 August 2008; see also *Resource Book on TRIPS and Development: An Authoritative and Practical Guide to the TRIPs Agreement*, <http://www.iprsonline.org/unctadictsd/ResourceBookIndex.htm> at 20 August 2008.

[296] The *Substantive Patent Law Treaty* (SPLT) is a proposed international patent law treaty under the WIPO. It aims at harmonizing substantive points of patent law requirements. The substantive requirements include novelty, inventive step and non-obviousness, industrial applicability and utility, as well as sufficient disclosure, unity of invention, or claim drafting and interpretation. In that sense, the proposed treaty contrasts with the *Patent Law Treaty* (PLT), signed in 2000 and now in force relating to formalities, since the SPLT aims at going far beyond the PLT formalities. See for details, WIPO, 'Substantive Patent Law Harmonization'<http://www.wipo.int/patent-law/en/harmonization.htm> at 20 August 2008.

[297] Ministerial Declaration, WTO Doha Ministerial Conference, 4th Sess., WTO Doc.WT/MIN (01)/DEC/W/1 (14 November 2001).

[298] *Geneva Declaration on the Future of the World Intellectual Property Organisation* (4 October 2004) < http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf > at 20 August 2008.

[299] UNDP, 'Making Global Trade Work for People' (2003) <http://www.undp.org/dpa/publications/globaltrade.pdf> at 20 August 2008.

(e.g. Proposal for the Establishment of a Development Agenda[300]) and other forms of soft law. All of these initiatives tend to promote optimum system of IPRs protection already initiated for serving both IPRs owners' and users' interests through extensive technology transfer, introducing anti-competitive practices to curb monopolisation, and recognising conservation of biodiversity and benefit sharing.[301] And it is interesting to note that the recent developments have resemblance with the past agendas raised by the developing world in various sessions of the WIPO, GATT and WTO debates.[302]

The joining of Bangladesh in IPRs treaties is relatively recent but it does not mean that its IPRs legislations are framed afresh with the gradual development of IPRs. Prior to its joining in the *TRIPs Agreement*, Bangladesh simply duplicates the British colonial master's IPRs legislations that safeguarding IPRs-owning interests. However, the compliance of these laws with international IPRs treaties is never closely monitored. As a result, its laws do not serve wholly either IPRs-owning interests or its using interests. Since the date of its coerced joining in the *TRIPs Agreement*, Bangladesh has been a slow coach in fulfilling its obligations in line with the *TRIPs Agreement* and the integration deadline. Its integration through legal and infrastructural means poses multifarious implications and challenges in the fields of agriculture, public health, economic development, and so on. These consequences arise out of the extended reach of IPRs protection that developed from WIPO to WTO. And the extended reach of IPRs protection results in restricting the local developmental needs-fulfilling efforts in reverse engineering of IPRs products that keep continuing at the expense of flexibility found in the WIPO Conventions.

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[300] See Press Release, WIPO, Member States Agree to Further Examine Proposal on Development (4 October 2004) <http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_396.html> at 20 August 2008.

[301] Laurence R Helfer, above n. 215, 6; see also Christopher May, *The World Intellectual Property Organisation: Resurgence and the Development Agenda* (2007) 101-5; Christopher May, 'The World Intellectual Property Organisation and the Development Agenda' (2008) 22(1) *Global Society* 97; see also Andre Koury Menescal, 'Changing WIPO's ways: The 2004 Development Agenda in Historical Perspective' (2005) 8(6) *Journal of World Intellectual Property* 761; see also Margaret Chon, 'Intellectual Property and Development Divide' (2005-2006) 27 *Cardozo Law Review* 2821; see also Silke von Lewinski, 'International Copyright over the Last 50 Years: A Foreign Perspective' (2003) 50 *Journal of Copyright Society USA* 581, 605-7.

[302] See Peter K Yu, 'Currents and Cross-currents in the International Intellectual Property Regime' (2004-2005) 38 *Los Angeles Law Review* 323.

PERSONAL LAW IN CRISIS: OLOWU V OLOWU REVISITED-A NEW TREND OR ALTERNATIVE APPROACH?

C. Osim Ndifon *

ABSTRACT

In Nigeria, the issue of personal law, in particular, the personal law of natives has always been thought to be fixed and settled in favour of the law of one's ancestor. The test of appropriateness was to get the individual closely connected to a country, culture or ethnic group. For instance the laws of marriage and family are intimately connected with the culture and the moral and religious standard of the community. However, even in this personal area of the law, the test of appropriateness has in recent times been turned on its head. Starting with the unsuccessful attempt by the court in Yinusa v. Adesubokan, the Nigerian Supreme Court in Olowu v. Olowu formulated the way-of- life test. Apparently this test and change must have been influenced by the realities of today's world, especially in the case of marriage which as all other institutions are also affected by economic and social circumstances. Is this a new trend or an alternative approach? Or is it instead a one off thing? It is our argument that this represents an important contribution by the Supreme Court to the Corpus Juris Nigeriana.

Customary laws were formulated time immemorial. As our society advances, they are removed from their pristine social ecology. They meet situations, which were inconceivable at the time they took root... when the customary law is confronted by a novel situation, the courts have to consider its applications under the existing social environment.[1]

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* Doctor of Philosophy, Nigeria.

1 Per Nwokedi JSC in *Agbai v. Okogbue* (1991)NWLR(pt.2000)atp. 391.

INTRODUCTION

There is no *consensus ad idem* when it comes to the choice of law rule dealing with intestate succession in Nigeria[2]. This subject has aroused so much attention and interest in all spheres of conflict of laws.[3] The Judgement of the Supreme Court of Nigeria in *Olowu v. Olowu*[4], may well have ignited a renewed interest in the subject thus provoking further discussion and enquiries as to its proper parameters.[5]

The significance of this decision extends beyond its immediate context.[6] It represents an important contribution by the Supreme Court to *Corpus Juris Nigeriana*.[7]

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2 The diverse views of jurists, academics and other commentators have been principally on whether the personal law of the deceased should govern the devolution of the estate, whether movable or immovable or that the *lex situs* only should govern devolution of immovable: K. Lipstein, (1972B) *Camp Law Journal* p. 67, I. O. Agbede, "Conflict of Laws in Federation: The Nigerian Experience" (1964) *Nigerian Law Journal*, p. 48, *Legal Pluralism* (Shaneson, 1991) C. O. Olawoye, *Title to Land in Nigeria* (Evans brother Limited, 1981) p. 85, R. W. James, *Modern Land Law of Nigeria* p.68, *Kuka v. Tapa* (1945) 18 NLR5. *In re Estate of Alayo Tunwase* (1984) 18 NLR88, section 24 (8) Land Use Act, Laws of the Federation of Nigeria,(LFN),2004

3 The identifiable conflict situations in Nigeria are international, interstate and intra (or internal conflict) Agbede (1964) *op cit*

4 (1985) 3NWLR (pt 13) 372

5 See generally O. U. Ndukwe, *Comparative Analysis of Nigerian Customary Land Law*, 1st ed. (University of Calabar press 1999); I. O. Agbede, (1991) *op. cit.* Compare with the peripheral treatment in A. A.Kolaje, *Customary Law in Nigeria through the Cases* (Spectrum Books 2000), Niki Tobi, *Cases and Materials on the Nigerian Land Law* (Mabochi Books, 1997) p. 81.

6 Although Olowu's case in the view of their Lordships primarily deals with the issue of change of personal law, it is the opinion of the present writer that the confused treatment of the subject by the court submerged albeit erroneously, the issues of the true connecting factor of the application.

7 This is the first acknowledgement by Nigeria courts that it is possible for one to change one's personal law. Bello J. (as he then was) had attempted though unsuccessfully, to raise the possibility of such a situation in *Yinusa v. Adesubokun* (1971) NBJ 69.

This paper seeks to undertake a critical analysis of the concept of personal law within the context of the case of *Olowu v Olowu*. It requires that we examine certain aspects associated with its evolution in Nigeria; make use of comparative methods to analyse and study the growth of the concept; and the finally to design a mechanism for the proper definition and application of personal law in Nigeria. Although the main thrust of personal law is predicated on the freedom of an individual to determine for himself the specific legal system which should constitute his personal law without the necessity of changing his political[8] allegiance, nonetheless, one area of confusion is the determination of the appropriate connecting factor(s). From the practical side most rules adopted are unrealistic and out of tune with social needs and convenience. This has become more apparent in the light of *Olowu v Olowu*.

BASIS OF PERSONAL LAW: THE UNDERLYING POLICY CONSIDERATIONS

The main object of the choice of law rule is that it is designed to lead to the application of the most appropriate law, a law that generally would be the one the parties might reasonably expect to apply. The problem is one of ascertaining the connecting factor or factors which best satisfy or satisfies the criterion of appropriateness.[9] The test of appropriateness and therefore the required link with a country varies in the different areas of law. For example, in the field of status, marriage and succession the traditional view is that a much closer connection between a person and a country is required than in commercial spheres. The laws of marriage and family are intimately connected with the culture and the moral and religious standard of the community. It is appropriate that, in the conflict of laws, a person's legal position in these fields should be wholly or partly determined by the courts of their own country in accordance with the law of that country. However, even in this personal area of the law, the test of appropriateness will vary depending on the purpose for which the connecting factor is sought to be

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[8] *Supra*

[9] Clarkson & Hill *Jaffrey on the Conflict of Law* (Butterworths, 1997) p. 2

employed.[10] For instance, in jurisdiction and divorce matters, there always seems to be a preference for the forum court. This is not unconnected with the notion that the forum has legitimate interest in ensuring that its procedures are not abused and in divorce cases in the financial and custody arrangements likely to be made because this will impact on the society. Accordingly the connecting factor(s) utilized, need to be flexible enough to encompass all such persons.[11]

Similar considerations as the ones stated above are employed for the recognition of foreign judgements such as divorce decrees. If the English courts deem certain connecting factors to be appropriate for founding English jurisdiction it should be prepared to recognize forum decrees in similar circumstances.[12] However, one could adopt an even broader range of connecting factors for the purposes of recognition of judgement than for jurisdiction so that recognition could be given in any case in which the parties have some legitimate connection with the forum in which the judgement is obtained.[13] In contrast, in the area of status, marriage and succession; the prevailing view is that the choice of law should be the law of the place, with which the parties have a reasonably substantial connection on the basis that people should be subject to the law of the country to which they primarily belong. This is known as personal law. This area of the law deals with the investigation by the court of the "minutiae" of a man's life, hopes, fears and aspirations.[14]

The main reason for an appropriate connecting factor in conflict of laws is to link the individual with the law, of some given territory in the world, to be able to ascribe to any given individual a legal "centre of gravity", as Wolff has aptly named it.[15]

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[10] Different Policy considerations guide the appropriateness of the Law in the areas of jurisdiction, choice of law and recognition rules, see Sauveplanne, J. G. (1982) 11 *Recueil Des Cours*, Anton and Beaumonth, *Private International Law,* (Edinburgh: Scottish University Institute 1990), Clarkson and Hill, *op. cit.*

[11] J. G. Sauveplanne, (1982) ii *Recueil Des Cours, op.cit*, pp.47 - 53

[12] Clarkson & Hill, *op. cit*

[13] *Ibid*

[14] E. I. Sykes and M. Pryles, *Casebook on Conflict of Laws:Commentary and Materials. See also the case of Winans v. Attorney-General* (1904) A.C. 287 at p. 291

[15] Anton and Beaumount, *op. cit.* p. 121

Some legal systems have chosen, out of nationalistic considerations, to favour *lex patriae*, that is the law of an individual's nation as offering that link. Yet in other countries like India or Cyprus, religion has been chosen. In Anglo-Nigerian conflict of laws the law of the individual's domicile or of one's ethnic group is recognized as the appropriate connecting factor.[16]

Traditional systems of private international law select the legal system appropriate to deal with a particular issue by identifying within the circumstances an element that seems to link those circumstances most strongly with a particular legal system. Lawyers use the term "connecting factor" to refer to the element on the facts of any case, which is selected as the signpost to the relevant legal system. This important connecting factor may be the domicile, in the traditional sense of the term, of the deceased in matters relating to devolution of or succession to property, or the place of the execution of a will or contract, in matters relating to their formal validity, or the place where a *delict* has been committed in matters relating to compensation for an injury.

The choice of a connecting factor appropriate to the circumstances is clearly a crucial policy decision in any system of private international law. In the presence of elements pointing in several directions the choice of one rather than the other is likely to be dictated by the desire to give effect not only to the policies of the conflict rules but also to the expectations of the parties.

The adoption and elaboration in conflict of laws of these connecting factors have their social justification in the view that;

> *At least in the matters which have enduring and socially important repercussions a man will expect and be expected to follow the customs of the people with whom he has permanent ties even when he is temporarily living elsewhere.*[17]

The idea of basing personal law on a flexible connecting factor is sound in the sense that it ensures the freedom of the parties to determine the law that would govern them.

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[16] *Ibid*

[17] *Ibid*

OLOWU V. OLOWU: FACTS AND DECISION

The deceased, Adeyinka Ayinde Olowu was a Yoruba man by birth, belonging to the Ijesha cultural group. He had lived most of his life in Benin City. He married a Benin woman who begot for him all his children who were plaintiffs and defendants in this case. In 1942, the deceased applied to the Omo N'Oba N'Edo ie the traditional ruler of Benin to be "naturalized" as a Benin citizen. His application was granted. As a result of his status as a Bini man he was able to acquire a lot of landed property both in Benin City and elsewhere in the old Bendel State. The deceased died in 1960 without making a will. The defendants, two of his children, were granted letters of administration to administer the deceased's estate. The first defendant distributed the estate in accordance with the Bini Customary Law but the other children-plaintiffs and the second defendant were dissatisfied and claimed that the estate ought to have been distributed according to the Ijesha Customary Law rather than Bini Customary Law. The plaintiffs brought an action against the defendant in the High Court to *inter alia*, set aside the distribution according to Bini Customary Law, and get a declaration that Ijesha Customary Law was the applicable law. They lost in the High Court, the Court being satisfied that Bini Customary Law was the applicable law. Upon appeal to the Court of Appeal, the decision of the High Court was affirmed and the appeal dismissed. Not being satisfied, the plaintiff further appealed to the Supreme Court wherein two issues were formulated by the Court for determination viz:

(1) Can a Nigerian Citizen, belonging to one cultural group, by choice, change his personal law, by adopting the culture of another and entirely different group?

(2) Can the children or successors-in-title of a deceased dispute or change the deceased's personal law and status after his death?

The Supreme Court unanimously dismissing the appeal, held on the first questioned, that the deceased, Adeyinka Olowu having by choice changed his status from an Ijesha man to a Bini man in 1942 when he applied to the traditional ruler of Benin for naturalization he had consequently changed his personal law. And, on the second question above, it further held that the children of the deceased could not,

after the death of their father, change the status of the deceased from what it was at the time of the deceased death. According to the Court;

> *If they must enjoy his property, it must be in accordance with the law regulating the affairs of the deceased at the time of his death.*[18]

OLOWU v. OLOWU: A CRITICAL ANALYSIS

In Olowu's case, as we have earlier noted, the Supreme Court addressed its mind to two main issues;

(i) Can a Nigerian citizen, belonging to one cultural group, by choice, change his personal law by adopting the culture of an entirely different cultural group?

(ii) Can the children or a successor-in-title of the deceased dispute or change the deceased personal law and status after his death?[19]

The issues in this case were not only fundamental and important but they marked a watershed in the development of our conflict of laws rules. For the first time, the notion of the inviolability of the laws of our ancestors were being challenged[20], as it was the very first time, the highest court of the land had to thread this forbidden path and hold that a person could change his personal law from one indigenous customary law to another.[21]

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[18] *Supra*

[19] The court answered (i) in the affirmative while (ii) was in the negative

[20] Bello J. (as he then was) had in *Rasaki Yinusa v. Adesubokun* (19688) NNLR 97 at p. 97 attempted albeit, obiter to address the issues of change of personal law: see Bello JSC in *Olowu v. Olowu supra* at p. 388

[21] All attempts to change personal law in Nigeria have always been from English law to native law or voice versa: see *Cole v. Cole* (1898) NLR 15 customary law to Christianity or English Law, *Yinusa v. Adesunbokun* (1968) *supra* (where Bello J. had suggested that Moslem of Yoruba, extraction could not make a will. In both *Tapa v. Kuka* 18NLR 5, *In Re the Estate of Aminatu AG v. Tunkwase* 18 NLR88 the courts here dealt with conflict between indigenous customary law and Moslem law

While this attempt is greeted as a welcome development, one is at a loss in putting one's finger on the real legal basis for the *volte face*. A cursory look at the decision shows lack of consensus by the justices of the Supreme Court on some fundamental issues. In fact as we shall see there exist inherent ambiguities, if not outright contradictions, in the statements of the law.[22]

BASIS FOR THE DECISION

From the issues formulated and/or submitted for determination by the parties[23], the full bench of the Supreme Court was *ad idem* with both the Trial Court and the Court of Appeal that the deceased person, had through his conduct changed his personal law[24] from Yoruba to Bini. In averting his mind to the status of the deceased person, the trial judge remarked;

> *I have no hesitation in holding that late A. A. Olowu is of Yoruba extraction- an Ijesha. I also hold that he resided in Benin City and acquired considerable properties in what is now known as Bendel State. Evidence was led to show that he "naturalised: as a Bini on his own volition and hence the distribution was made according to Bini Native law and custom.*[25]

The Court of Appeal and the Supreme Court supported the above finding of the trial judge. Justice Coker, who delivered the lead judgement of the apex court, was very succinct in stating the law. He said,

> *In effect, their father renounced his Yoruba cultural heritage and opted for Benin personal law by "naturalizing as an indigene of Benin City"*[26]

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[22] Agbede (1991) p. 261

[23] The issues are (i) and (ii) earlier stated

[24] He applied to the Oba of Benin to be naturalised and this was granted

[25] *Supra* at p.383

[26] *Supra* at p.383. Both the Court of Appeal(per Okagbue JCA) and the Supreme Court (per Obaseki and Uwais JJSC) adopted the term "naturalisation"

Bello JSC while agreeing that A. A. Olowu (deceased) did change his personal law, however opted for the term "culturalization" to explain this change of status.[27] He gives a reason for his preference of that term to naturalisation.

> *The word "Naturalization", which takes place when a person becomes the subject of a state to which he was before an alien, is a legal term with precise meaning. Its concept and content in domestic and international law have been well defined. To extend its scope so as to include a change of status, which takes place under native law and custom, when a person becomes a member of a community to which he was before a stranger, may create confusion. I would prefer to describe a change of status under customary law as "culturalization".*[28]

He continues:

> *I may add that culturalization with its resultant change or personal law may take place by assimilation by choice.*[29]

Other legal bases for the justification of the decision are the application of the *lex situs* and the issue of estoppel. On the issue of the *lex situs*, Coker JSC noted,

> *Rather the authorities seem to be in favour of the 1st defendant. The landed properties are in Bendel State, the larger parts of which are in Benin City. As a general principle of law, succession to immovables, is governed by the lex situs, that is, the law of the place where the land is situated. In this case, the customary law of Benin people*[30]

Oputa JSC also recognised the *lex situs* connection observed,

> *If A. A. Olowu's personal law, his lex patriae Yoruba customary law, is excluded as it ought to be on the facts and surrounding circumstances of this case, then the lex situs, the lex loci, lex domicile (sic) and lex fori all point to Bini customary law in the Bendel state of Nigeria*[31]

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[27] *Supra* at p. 389. See Oputa JSC where he adopted the term "acculturation" (p. 405).

[28] at p. 389

[29] *Ibid*

[30] at p. 387

[31] *Supra* at p. 405

And on the issue of estoppel, Oputa was alone in the adoption and application of this doctrine. As his Lordship puts it,

> *... I will go further and say that the appellants, the respondents and in fact all the eleven children of the late A. A Olowu who are now his successors in title in respect of the properties are also estopped from denying that their late father acquired the status of a Benin man, which status enabled him to acquire those properties. All the children of late A. A Olowu are estopped from denying that their father, though of Yoruba extraction, lived and died a Benin man. They are required to abide by that assumption because it formed the conventional basis upon which the late Adeyinka Ayinde Olowu acquired his property in Benin*[32]

ISSUES AND CONSTRAINTS

The decision in *Olowu v. Olowu* has come under severe criticisms and for our purpose; we shall dwell on those criticisms relevant to our discussion.

First, was the issue for determination properly defined? This question has in most cases been answered in the negative. We shall now attempt an analysis. The bone of contention from the facts and surrounding circumstances was "issue of inheritance to immovable property". This form of intestacy as a general rule is usually governed by the *lex situs*.[33] The personal law on the other hand, governs inheritance to movables property[34] Stephen Peter Thomas J., was quite graphic in his statement of the law,

> *Customary law is not constant but relative and varies sometimes within special localities, in land with the place where the land is situated, in*

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[32] at p. 504

[33] *Mojekwu v Mojekwu, Supra.* See S. 24 Land Use Act Cap. L.5 vol.8.LFN 2004 , *Adegoke v. Adesina (*2000) FWLR (pt. 29) 2427 at p. 24, 35.

[34] There is however disagreement as to whether the *lex situs* instead of the *lex domicilii* should governed in the estate inheritance, no matter what form It takes: See Agbede (1986) pp. 251 – 283.

> *other civil causes with the personal law of the parties and in other circumstances with the area of jurisdiction of the court*[35]

This issue has always been a problem in the court's determination of the question of proprietary or possessory interest. In the area of conflict of laws, the first task of the court should be to decide whether the *res litigiosa* is a moveable or an immoveable property.[36]

The *lex situs* rule has been adopted and applied in Nigeria. In *Zaidan v. Mohssen*[37] the Supreme Court reiterated the general rule thus:

> The *lex situs* governs immovable property of a deceased intestate, and the *lex situs* means the law of Nigeria which embraces customary law including the conflict rules between two systems of customary law.

The *lex situs* rule is however subject to the exception that,

> if a deceased dies leaving immovable property and is subject to a system of customary law which does not obtain in the place where the property is situated, the applicable law as regard succession to his estate is not English law, but the law which is binding within Nigeria between the parties subject to its sway.[38]

As would be seen therefore, in Olowu's case the Supreme Court did not only define the issue correctly initially; as one bordering on succession to immovable property, their Lordships further averting their minds to all the surrounding facts and circumstances accommodated the case within the exception. First, it was recognised that Mr. Olowu was an Ijesha man by birth and that the properties were situated in Benin. This would have meant application of Ijesha customary law i.e. the exception to the *lex situs* rule. But from the facts of the case, Mr. Olowu by conduct became a Bini man. In the process, due weight was given to

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[35] In *J. E. Edopkolor v. J. I. Idehen* (1961) WNLR (pt 1) 11.

[36] M. P. Okom, *Okom on Conflict* (Optimist Publishers 1999) p. 128

[37] (1973) 11 S.C.1

[38] *Zaidan v. Mohssen supra* .See also Tapa v. Kuka 15 N.L.R.5

the "naturalization" question identified by the trial court. With this, the personal law *(lex domicili)* coincides with the *lex situs*. For example, his Lordship Coker JSC observed in the course of his judgement that:

> *The real issue in the case centred on whether the estate should be distributed according to Bini or Yoruba native law and custom*[39]

Earlier in the judgement the learned Justice had noted that:

> *He lived apparently from childhood until his death in Benin City. He, like his late father, had considerable business interests in Benin City... It was pleaded by the first defendant and evidence was led that during his lifetime, he applied to the Oba of Benin to be naturalized as a Benin indigene (sic) which conferred on him the right to acquire absolute title to the considerable landed properties in Benin City as any native of that city*[40]

And nowhere did he so correctly and succinctly state the applicable rule of law than in this passage of the judgement where he noted that:

> *As a general principle of law, succession to immoveable is governed by the lex situs, that is, the law of the place where the land is situated. In this case, the customary law of the Benin people*[41]

Despite the above formulation of the issue, which we think was proper, the decision of the court raises two major problems, to wit; (1) the issue as to whether and how ones personal law may be altered and the conditions that need to be satisfied (2) the ethnicity issue : whether or not it is possible for one to alter his tribal or ethnic affiliation in law, i.e at both customary law and Nigeria common law. Another issue is that of intention. How do we locate the intention of the propositus. The Supreme Court unfortunately was evasive on this. This for me was a missed opportunity to clarify the state of the law.

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[39] *Supra*

[40] at p. 378

[41] *Ibid* at p. 387 (per Obaseki JSC)

In an earlier case, *Yinusa V Adesubokan*[42] Bello J. (as he then was) expressed the view (admittedly obiter) on the standard required for a change of one's custom any law of origin thus:

> *Mere settlement in a place, unless it, as has been for a long time that the settler and his descendants have merged with the native of the place of settlement and have adopted their ways of life and custom, would not render the settler or his descendants subject to the native law and custom of the place of settlement"* [43]

In Olowu's case, the Supreme Court failed to be clear about the test or standard required. The court speaking through Bello JSC noted that;
Culturalization with its resultant change of personal law may take place by assimilation or by choice. Strictly speaking, this case of appeal is not case of a change of personal law by assimilation.[44]

His lordship then went on to add:

> *The case in hand is concerned with culturalization by choice which axiomatically, led to a change of personal law by choice*[45]

The above statement, with respect, contains some inherent ambiguities, if not outright contradictions. For example, the requirement that culturalization could be acquired by "assimilation or choice", implies that the act of assimilation is involuntary and cannot be by choice. This cannot be true because personal law is implied, indeed; imposed by law and only a conscious act of the propositus followed by the requisite intent can change it. Furthermore, looking at Pa Olowu's actions and various steps taken by him in the entire transaction, one wonders under which sub-head the court can explain Pa Olowu's actions. Why, do we, for instance, need the consent of the Oba of Benin and/or of the District Officer to effect a change of ones personal law? And, what is the status of such an act? Understandably in the case of "naturalization" or "registration" as a Nigerian citizen consent of

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[42] (1968) NMLR 97

[43] *Supra, p.99*

[44] Agbede, (1991), p.262

[45] *Ibid* at p. 390

the authority is required, but it is doubtful if the same can be said of the choice of place of origin; after all our constitution encourages us to move and live freely in any part of the country without let or hindrance.[46] The court failed and missed the opportunity to set a standard required to change ones personal law.

The decision was also supported on other grounds, one of which was estoppel. This is outrightly inapplicable. Generally the issue of estoppel usually arises between parties to the transaction, but in the instance of Olowu's case, the children were never a party to the act of "naturalisation" to invoke the doctrine of estoppel. This, therefore, was in the first instance unnecessarily and secondly totally unrelated to the issue for determination.

THE LEGAL FRAMEWORK FOR INTESTATE INHERITANCE AND THE WAY OF LIFE TEST IN NIGERIA

The problems that arise in Nigeria on a death intestate are many and varied. The most important is to determine the law that will apply to the distribution of the estate.[47] The second important issue is to determine the categories of those entitled to claim from the deceased. The two issues posed above are related, and not mutually exclusive. For example, if we determine the law applicable to the intestate to be personal law, the next issue will be what is the personal law? Let us assume further that a particular system of law has been chosen, who by that system of law is entitled?

The traditional distribution schemes on intestate succession as evolved under Nigerian law assumed the following pattern:[48] Succession under statutes[49] or

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[46] S.15 CFRN 1999

[47] The choice has always been between customary (Islamic) law, English law as provided for by statute (section 36 (2) Marriage Act LFN (1990) or general English Law has espoused in the case of *Cole v. Cole* (1989) 1NLR 15: See generally Quansah E. K. "Testate and Intestate Succession in Nigeria: Presently Aliment and Future Prescription (1990) III Cal. L. J. 179; Ipaye, O. A. (1989) 16 Nig. J. *Contemp. Law*. 143

[48] Quansah, *op, cit*.

[49] Marriage Act; Cap. LFN 2004, S.36; Administration of Estate Laws, 1959. (applicable to the old Western and Mid western regions) Administration of Estate Law, cap. 2, Laws

succession under the general English law[50] or succession under customary law, including Islamic law. But these schemes failed us in many respects. They, for example, left unresolved the persistent conflict between people's "way of life" and their ethnic laws. It was always thought that an intestate remained a native of a particular community governed by such community laws not withstanding what must have transpired during his lifetime. This, in fact, became a veritable ground for conflicting judicial dicta; especially in respect of the choice between customary and English laws. We shall attempt to appraise the problems.[51]

The problem started with the application of section 36 of the Marriage Act,[52] which makes succession to property an incident of marriage. In the words of the full court reversing the Divisional Court in *Cole v. Cole*[53]

> *Marriage in a church according to Christian rites had changed the position of the intestate and hence English law should govern the distribution of his estate.*

In the court's view,

> *A Christian marriage "clothes the parties to such marriage and their offspring with a status unknown to native law... In such circumstances can it be contended that the question of inheritance to the deceased in the present case should be decided in accordance with the principles of native law and custom? I think not, such a contention would be contrary to natural justice, equity and good conscience"*[54]

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of Lagos State, 1973, Statute of Distribution 167 & 1675, Administration of Intestate Estate Act 1985, Intestate Estate Act 1890.

50 This is exemplified by the Rule in *Cole v. Cole, supra*

51 For an elaborate treatment see, Quansah *op. cit.* M. A. Yanou, "Intestate Succession in Anglophone Cameroon: A Critical Appraisal" (1999) *Cal. L. J.* (No. 1) p. 57

52 Similar Scenario exists in the Cameroon see Yanou, *Ibid*

53 (1898) 1NLR 15

54 Per Griffith J. for justification of the decision in *Cole v. Cole.* See also Zabel. "Legislative History of the Gold Coast and Lagos Marriage Ordinance III" (1979) JAL vo. 23 p. 23. Quansah, *op. cit.* p. 184

The interpretation and application of section 36 is more aligned to the way of life test. This is contrary to the position under the various customary laws where the yardstick for measuring who inherits and what is to be inherited is the law laid down by the custom and not from the fact of marriage *per se* [55]

The case of *Cole v. Cole* has attracted considerable comments and criticism[56] but has, however, been followed by the courts[57] up until the decision of Van Der Meulon J. *in Smith v. Smith.*[58] The court, in that case, held that marriage *per se* is not the only determinant of law governing the inheritance of a deceased's estate. In the learned judge's view, the fact that a native marries according to the rites of the Church raises a presumption that the marriage and the status it confers on the parties are regulated by English law and standard. This presumption , it would seem, is rebuttable, for the court should be guided by consideration of the position in life occupied by the parties and their conduct with reference to the property in dispute.[59] In the instant case, all the parties had treated the property as "Family property" after the intestate who contracted a monogamous marriage, had died. This interpretation given to the rule in *Smith v. Smith* was however doubted by the courts in *Coker V Coker* [60] and *Administrator-General v. Egbuna*[61] but was followed in *Ajayi v. White*[62] where Baker Ag C. J. said;

> *Whilst not unmindful that the fact that a woman has contracted a marriage in accordance with Christian rites is strong evidence that she desires that the succession to her property to be by English law, in my opinion, however, it is not conclusive and the question is a*

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[55] See section 24 (5) Land Use Act LFN 2004

[56] See A. Allot, *op, cit.* pp. 182 – 196, Kasunmu, "Intestate Sucession in Nigeria" (1964) NLJ 50, and Salacuse, "Birth, Death and the Marriage" NLJ 59

[57] *Admin General v. Egbuna, supra, Asiata v. Goncallo* (1990) INLR 4, *Re Adadevoh* (1961) 13 WACA 304, *Coker v. Coker* (1993) 17 NLR 55

[58] (1924) 2NLR 105

[59] See further Salacuse, "The Cole v. Cole Principle and the Manner of Life Theory" (1964) NLJ 59.

[60] *Supra*

[61] *Supra*

[62] (1946) 18 NLR 41

> *presumption that can be rebutted and the question of what law should be applied depends on the circumstance in each and every case.*[63]

There seems to be some confusion in judicial circles as to which of these two views is prevalent, that is ; whether the rule in *Cole v. Cole* raises rebuttable or irrebutable presumption. Quansah has argued that it raises a rebuttable presumption. Citing *Obiekwe v. Obiekwe,*[64] Quansah submitted that since Christian marriage *per se* is not always equivalent to marriage under the Marriage Act, the rigid application of the rule of *Cole v. Cole to* non-adherents of Christianity in the true and full sense of the word will be unfair. For the mere fact that one contracts a Christian marriage does not mean that one has completely opted out of the customary law system to which one was attached prior to one's marriage.[65] This view is further affirmed by the Resident of the Plateau Province in the colonial times thus:

> *Among the primitive tribes of this and other provinces, marriages*[66] *are not contracted because the parties have adopted or wish to adopt a western mode of life. One or both of the parties may have been converted to a belief in Christianity but their way of life, apart from religious observance, is little changed, if at all. They continue to live as members of the family the basic unit in tribal society and continue to share in the family's customary responsibility.*[67]

The "manner of life" test has also been criticised by Agbede thus:

> *The views expressed by the various judges is of all fours with the discredited "manner of life" test enunciated by the old Supreme Court*

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[63] *Ibid.* p. 44

[64] (1963) 7 ERLR 196 at 1999, See further the comments of Ainley C. J. in *Onwudinjoh v. Onwudinjoh* (1957) 2 ERLR NLR 1 at pp. 4

[65] Quansah *op. cit* 184

[66] Here the meaning of marriage is one contracted in accordance with Christian rites

[67] The Resident was responding to the then Attorney-General's proposal for applying English law to those who contact monogamous marriages and were domiciled outside to them colony of Lagos: as statutory extension of the rule of *Cole v. Cole.* See further Morris "Attitudes towards Succession Law in Nigeria During the Colonial Period" (1970) *J. A.L* vol. 14 p. 15, II; see also the comments of the Court of Appeal of Ghana in *Coleman v. Shang op. cit* II at p, 401.

> *in Smith v. Smith*[68] *And Ajayi v. White*[69] *... underlying these decisions is the assumption that by adopting a European style of life the deceased concerned had intended (or should be deemed to have intended) that English law should govern the devolution of their intestate estate*[70]

The learned author continues,

> *The point should be emphasized as earlier argued that it is because of the deceased failure to express and (sic) intention as to the distribution of his estate in a manner recognised by law that intestacy arises. That is, intestacy is a creature of law. The intention of the deceased has no place in intestate succession*[71]

With respect, we disagree with the learned author. Three reasons may be preferred, namely: (i) To hold that intestacy is a creation of law without more, is to concede that a change of personal law, which is based largely on a factual situation is impossible. (ii) It will be mistaken to imagine that the mere expression of intention without a corresponding conduct, *id est*, "way of life" will be sufficient to say a person who before now belonged to the ethnic group of his ancestors had by his conduct changed to another ethnic group. No doubt, "way of life" is a determinant of both words and deeds. (iii) It is wrong to assume that intention has no place in intestacy.

A NEW TREND OR AN ALTERNATIVE APPROACH

Marriage has in recent times undergone some changes for this reason the above view of Resident of the Plateau Province cannot therefore be said to adequately reflect the present trends in society. Lack of a historical perspective sometimes lulls people into thinking marriage is an unchanging institution. This, of course, is not true. Marriage like all other institutions is affected by economic and social

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[68] (1924) 5NLR 105

[69] (1946) 18NLR 41

[70] Agbede, op. cit

[71] *Ibid*

circumstances and change with time. These changes, naturally will affect the rights and obligations of the parties.

A brief look at the changes that have taken place in recent times show the following trend: Not only is marriage happening with more frequency between persons of different ethnic groups, in most cases, it is now common to find a majority of these people working and/or living in societies different from theirs.[72] As would be expected, these persons usually have children and bring them up in their new found homes. But if we stick faithfully to the concept of personal law, these children, obvious products of mixed-marriages and social dislocation, are nevertheless expected to abide (as their fathers did) by the customary law rules of their ancestors. The recourse to the personal law rather than the way of life approach is founded on the argument that it is of no consequence that the person by the life he led never intended such laws to govern his intestacy. There are times when it is clear that by the way he conducted his affairs while alive, he could not have reasonably been expected to know his personal law.

Another notable trend is that the distribution schemes in our customary law rules were designed for societies different from the present. For example, under the customary law system, the man was the sole breadwinner- the owner of all the properties he left behind. Wives were simply chattels-inheritable items or objects of inheritance, not subjects of inheritance. Polygamy was rife, and the extended family system reigned supreme. Lands were usually held by the family or community and not by individuals. But today, in most families, the wife is a joint breadwinner. There is now the prevalence of monogamy especially among the young men and women in the south, a fact attributable to the combined effects of Christian Pentecostalism which has led to the present wave of "born again" syndrome. For this group, their faith-the Christian doctrine- is a way of life. Also economic factors seem to have further connived in making the option of taking

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[72] Section 15 of the 1999 Constitution encourages the promotion of national integration through inter-marriage among people of different places of origin,. See also S. C. Ekong, "Continuity and Change in Nigerian Family Pattern" in Afonja and Pearce (eds) *Social Change in Nigeria* (Longman group Ltd 1984) who noted that "the Nigerian family is undergoing a dynamic process of social change" p. 65

more than one wife un-lucrative. The cost of taking care of the family, even the extended family (where such exists), is now prohibitive. There is general insecurity engendered by the poor state of the nation's economy. In fact, ours is fast becoming a society where the surviving spouse and children have replaced the brothers; uncles and other relations as the primary beneficiaries of the intestate. Indeed, matter of factly, the extended family system exists only for limited purposes such as landholdings and chieftaincy matters.

The changes depicted by the way of life test above seem to be taking root in many traditional indigenous communities.[73] In Ikom Local Government Area of Cross River State, for example, the Mgbagatiti village of Nkome Town now recognise; for the very first time in their history the inheritance rights of the "wedded wife". In stating its "Land Policy', clause 8 of Appendix II of the Constitution of Mgbabatiti Community Welfare Association provides that

> *Only direct children and/or wedded wife*[74] *may inherit the estate (farmhouse) of a non-indigene.*[75]

The Mgbagatiti constitution further provides in the last paragraph of clause 9 to appendix II that'

> *Any indigene or non-indigene wishing to make a will to bequeath his estate (land farm/house) in Mgbagatiti to a relation after death should consult our policy contained in this schedule and keep strictly to it*[76]

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[73] Section 15 (3) of the 1999 Omusoy Abbey Youths Associations, Tombia, Rivers State: Art 4 (d) and (e), (ii) of the Constitution of the Association.

[74] "Wedding Wife" is not defined but it could arguable be said to cover "church marriage" and Marriage in accordance with the "Marriage Act" and possibly a marriage according to the customs of the people.

[75] This Law (hereinafter refered to as Mgbagatiti Constitution) came into force in 1995.

[76] *Ibid*

CONCLUSION

The decision in *Olowu v Olowu*[77] no doubt has opened a pandora's box and marks a watershed in the development of the rules of intestacy in Nigeria in three respects. First, it has departed from the established practice of deriving customary law from one's ancestors. Second, it seems to have settled and placed in proper perspective the role and importance of "way of life" in the determination of personal law. And thirdly, the decision has moved closely to unifying the choice of law rules under the customary and general laws, *id est*, willy-nilly making domicile the connecting factor.[78]

The decision in Olowu's case could further be rationalised as being in line with a desire by the courts to create a flexible connecting factor. This usually leaves the judge with ample room to take into consideration without, however, openly admitting it, legal policies and the contents of the law involved.[79] The notion of a flexible connecting factor is informed by the general tendency to connect the legal relationship with the country, which presents the strongest ties with the territory and/or with the citizen. It is therefore, not uncommon for the legislature to introduce flexibility in the connecting factors by using loose connection such as the most significant relationship, the closest link and similar ones.[80] In Olowu's case the tests used include "assimilation" or "merging into a community" and the "nature of life". In fact, for all intents and purposes these tests are the same, as those demanded in the English concept of domicile.

There is, however, the problem of the standard required for "merging" or "assimilation" in a community.[81] Some have argued that usually in practice it is too fluid or unpredictable for one to say at any point that such a change has taken

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[77] *Supra*

[78] See Agbede (1991) pp. 266 – 267

[79] Before now inheritance was material usually by the deceased brother of the same mother. The present law applies to both indigenes and non indigenes alike: see clause 5, Appendix II Mgbagatiti Constitution.

[80] (1982) II *Recueil Des Cours* 47

[81] *Ibid*

place. For example, one may be tempted to hold with regard to domicile (were this to be the standard) that an individual, say an Ibo man, has subjected himself to customary law of the Yorubas because he has decided to live in Lagos state when, in fact, he has shown not the slightest sign of imbibing Yoruba way of life. Professor Agbede suggests a way out of this conundrum.[82] He argues that the received English rule of domicile of origin would take care of this situation and cites the dictum of Lord Mcnaughten in *Winans v. Attorney-General* to support this. In the words of the learned Justice:

> *... So heavy is the burden cast upon those who seek to show that the domicile of origin has been superceded by a domicile of choice. This is a serious matter- serious enough when the competition is between two domiciles both within the ambit of one and in the same kingdom or country-more serious still will when one of the two is altogether foreign. The change may involve far reaching consequences in regard to succession or distribution and other things, which depend on domicile.*[83]

From the available authorities,[84] the legal requirement is that there must be a fixed intention /determination to strip himself of his nationality or in other words "to renounce his birth in the place of his original domicile".[85]

What is more, the domicile of origin revives as soon as there is no operative domicile. It is clear therefore that the rule of domicile of origin will ensure that nobody will be arbitrarily or unwarrantedly subjected to the customary law of a particular community where he is settled. The position of the law will be that the customary law is a constituent part of propositus law of domicile of origin and, therefore, can be changed accordingly.[86] By extension it could be argued that the same rule will apply where the propositus has as his personal law a religious law

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[82] Agbede (1989) *op. cit.*

[83] (1904) A.C. 287 at p. 291

[84] See C. O.Ndifon, *Issues in Conflict of Laws.* Vol. 1 (Calabar V. C. Digital publishers 2001) pp. 315 - 344

[85] Huntly v. Gaskell (1985) 3 WLR 373 (per Earl of Haisbury LC)

[86] Agbede (1989), *op. cit.*

whether acquired by virtue of marriage[87] or as a variant of customary law. It simply stands to reason that the thrust of the above contention is that nobody (whether a foreigner or a Nigerian) should be subjected to the customary law of the country they have abandoned.

The nexus between law and ethnic origin is a relic of the colonial past.[88] During the colonial period the question of which law to apply to a person of a given ethnic origin and that of which court might exercise jurisdiction over which people were often confused. The basic principle was that customary law was the primary law of the African, presumptively, not applying to non-Africans except in exceptional cases.[89] Jurisdiction, for example, was defined in terms of whether the party was African or not. The same with the choice of law rules as these were geared towards ethnic description. But this is out of touch with modernity and today's reality and it is for this reason that the decision in Olowu's case is a welcome breathe of fresh air. While we see the said decision as a recognition that in recent times more people see themselves less bound by custom and more open to new ideas it is a victory to the present generation who not only seek to rewrite the law but also contribute to its upkeep. Why not? If the custom is "a mirror of the culture of the people"[90] we submit; that, it is proper that every generation have a say in what must be its constituents. It is for this reason that the intestate law must be reconfigured to serve modern society.

There is also the suggestion that there should be a move towards the unification of the *lex domicili* and *lex situs* rules so as to make the personal law or *lex domicili* govern devolution or inheritance of movable and immovable property of the deceased. This has two advantages among many others. It is just and meets

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[87] When Catholic marriages are contracted it is usually governed by canon law. *Quaere:* Would this not protect a Roman Catholic who has gone through a form of marriage which however fell below the statutory requirement of "marriage under the Act", but lived and died a professed Catholic: see Anyaegunam v. Anyagaebuna (1973) 4 SC 121, See also Nwogugu, E. I. "The Validity of Church Marriages in Nigeria: Anyaegbunam v. Anyaegunam" NLJ (1974) 142.

[88] Allot, *A New Essays in African Law* (London :Butterworths 1970) p. 182.

[89] See High Court Laws of the Various States of the federation of Nigeria.

[90] *Princess Onyewunmi & Anor v. Amos Owode* (1990) 3 NWLR (pt 182) at 204.

the expectations of the parties (which is the essence of conflict of law rules) and secondly, it is convenient in that it saves one the trouble of applying too many and at times conflicting rules to the distribution of the estate of the deceased where such properties are situated in different and at times more than one ethnic group. In conclusion, the way of life test adopted by the Supreme Court is progressive and reflective of the twin principles of (a) meeting the wishes of the intestate as measured by the reasonable expectations of the community and (b) The evolving social policy.[91] This approach, needless to say, is both a new trend and an alternative approach to the solving of the intractable problem of intestacy. It is therefore time for the Judges of other courts to follow suit.

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[91] The intestacy laws are new generally designed to serve the following purpose: the wishes of the intestate, the needs of the survivor, the contribution of the survivors to the accumulation of the intestate estate and some combination of these. See Reform of the Intestate Succession Act, Alberta (1996).

PUBLIC INTERNATIONAL LAW AND SUSTAINABLE UTILIZATION OF MINERAL RESOURCES: THE CASE OF SUB-SAHARAN AFRICA

Yemi Oke *

ABSTRACT

The mineral producing countries in Africa like Ghana, South Africa and new entrant like Nigeria have demonstrated through their mining regimes that mining is not incompatible with sustainable development. Ghana's regime anchors on strong community-based land tenureship, which gives prominence to protection of the rights and interests of local owners of the mineral-rich lands. The Nigerian regime aims purely at a liberalized mining sector with equal opportunities. Sustainable utilization of mineral resources is a matter of constitutional imperative in South Africa.

However, attempts by countries to integrate the principle into their mining regimes are not without challenges. For example, social circumstances have continued to impede legal provisions even when such is meant to achieve sustainable and equitable distribution of wealth and benefits among the stakeholders in the mining sector. The complexities of the overarching issues involved in mining sustainability for developing countries in Sub-Saharan Africa are multifaceted. In the region, repositioning the legal frameworks of minerals for maximum efficiency and socially responsible utilization is beyond law, though the imperative of a good legal regime cannot be over-emphasized. Beyond integrating sustainability into the mineral laws, a number of contextual underpinnings would also need to be taken into consideration by countries in the quest for practical sustainability in mining, as they shape not only the manifestation of local peculiarities but also the sustainability of the mineral sectors in Sub-Saharan Africa.

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INTRODUCTION

Going by the debates in academic circle, the question as to whether or not mining or mineral exploitation especially in mineral-rich African countries could bring about sustainable economic development or diversification remains uncertain. The use of vague consensus terms such as "unsustainable" and "non-renewable but sustainable"[1] and other terminologies employed by scholars in the debates reveal the conceptual quandaries generated by attempts to reconcile opposing views of scholars on this issue. The underlying reasons for these conflicts reveal that it is rather due to both the mining sector's apparent heterogeneity and the definitional difficulties of the concept of sustainability that make the debates seemingly difficult to reconcile.[2]

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[1] Saleem H. Ali, "Nonrenewable but Sustainable? Environmental Planning For Mining Ventures", (paper presented to the Mining and Sustainable Development Conference, Implementing Sustainable Development in Mining: From Talk To Action, November 2003), at 7A1-10, 1. online: The Chamber of Mines < http://www.bullion.org.za/UpcomingEvents/SustainableDevConf.htm >

[2] The on-going debates on sustainability of mining remain divided. Opposing academics hold divergent views as to the economic effects of mining, mineral exploitation and processing in developing countries, which can be described roughly as 'pro-mining' and 'anti-mining' camps. To the pro-mining sustainability group, mining and mineral processing have the potential to become important sources of income, and can serve as driving forces for broader economic development. While mining itself might not be 'sustainable', in that it can be exhausted over time, it provides income that can be re-invested in more sustainable national development projects. However, to the anti-mining group, the economic potentials of mining are unlikely to be realised. These writers observe that mining industry dependent nations include some of the poorest and worst performing economies in the world, and recommend that such nations avoid export-oriented extractive industries altogether, instead working to 'sustainably' develop direct benefits for the poor, and more balanced forms of growth. For detailed arguments on the opposing views on mining and sustainable development see David Humphreys, "Mining as a Sustainable Economic Activity," (April 2000) 6-11 Centre for Energy, Petroleum and Mineral Law and Policy *(CEPMLP) The Journal* online: CEPMLP < http://www.dundee.ac.uk/cepmlp/journal/html/volume6.html>. See also Graham A. Davis and John E. Tilton, *"Should Developing Countries Renounce Mining? A Perspective on the Debate*" (commissioned by the ICMM as a submission to the World Bank Extractive Industries Review (EIR) December 2002). See also Jeremy P. Richards, "Sustainable Development and the Mineral Industry" (January 2002) *Society of Economic Geologists Newsletter*; Michael L. Ross, "The Political Economy of The Resource Curse" (1999) 51 World Politics, 301. ; Paul Stevens, "Resource Impact-Curse

Despite divergent academic debates, mineral producing countries in Africa like Ghana, South Africa and new entrant like Nigeria have demonstrated through their mining regimes that mining is not incompatible with sustainable development. For example, the underlining aim of the Nigerian mining regime[3] is to achieve economic development and diversification as resort to mining is seen as an indispensable alternative to douse increasing tension in the oil sector as well as to diversify the economic base of the country. In South Africa[4] and Ghana,[5] increasing and sustaining mining investment underlie their mining sectors. An important aspect of the regulatory frameworks of the mineral sectors of the countries under focus is the inclusion of statutory provisions to accelerate systematic state withdrawal in order to increase foreign investment and to achieve developmental and other objectives.[6]

This article accounts for the ways countries have taken advantage of the public international law principle of sustainable development in repositioning their mineral regimes for maximum efficiency and socially responsible utilization of natural resources. This paper adopts South Africa, Ghana and Nigeria's mineral regimes as analytical bases for its arguments due to the fact that South Africa's regime is based on constitutionally derived sustainability. Ghana's regime is anchors on strong community-based land tenureship, which gives prominence to the protection of the rights and interests of local owners of the mineral-rich lands while the Nigerian regime aims purely at a liberalized mining sector with equal opportunities. Sustainability is an implied phenomenon under the Nigerian mining regime. It is both the rule and norm in South Africa and an unwritten persuasive normative code having both the force and effect of a law in Ghana.

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or Blessing? A Literature Survey" (March 2003) Centre for Energy, Petroleum and Mineral Law and Policy, 1. Jeremy P. Richards "Sustainable Development and the Minerals Industry" (January 2002) No. 48, Society of Economic Geologists Newsletter 1.

[3] Nigerian *Minerals and Mining Act*, 2007.

[4] *Mineral and Petroleum Development Act of South Africa,* 2002. [MPRDA].

[5] *Mining and Mineral Law of Ghana* (PNDCL 153) of 1986 (MML)

[6] *B. Campbell, "Factoring in Governance is Not Enough: Mining Codes In Africa, Policy Reform and Corporate Reasonability" (2003) Mineral & Energy, Raw Material Report Taylor and Francis Ltd 18: 3 at 2.*

MINING AND INTERNATIONAL LAW OF SUSTAINABLE DEVELOPMENT

According to Prince and Nelson, for many years, the basic discipline of the minerals industry have been separated along four basic lines of geology, mining, mineral processing, and metallurgy but now a major new field has emerged: environment.[7] Omission of mining in the Agenda 21[8] further corroborates the duo's assertions on the hitherto lackadaisical attitude to the environmental effects of mineral exploitation especially in developing countries.[9] Notwithstanding, several private sector initiatives have been put in place to ensure environmental stewardship of the extractive industries, particularly the multinational corporations. One of such is the global spread of environmental management systems (EMSs) and EMS standards such as the *International Organization for Standardization's* ISO 14000.[10] In addition to the EMSs, there are other industry standards like environmental auditing, labeling, and others[11] to complement the above and the lacuna in international regime.

Before attempts were made at the Johannesburg Summit to remedy the lacuna in international environmental regime on mining sustainability, concerted efforts had been made to regulate mining activities at the international level. For example, the *International Council on Metals and the Environment* (ICME) was founded in 1991 and later renamed *International Council on Mining and Metals* (ICMM)

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[7] See William Prince and David Nelson, "Developing an Environmental Model: Piecing Together the Growing Diversity of International Environmental Standards and Agendas Affecting Mining Companies" (1996) 7:2 *Colorado Journal of International Environmental Law and Policy*, 247 (citing Roderick G. Eggert, "Mining and the Environment: An Introduction and Overview") at 1.

[8] See Agenda 21, A/CONF.151/26 [vols. I, II, III (1992)].

[9] Third World Network, TWN "Mining Activities (Excluded in agenda 21) Causing Social and Ecological Problems" Earth Summit Plus 5 Briefing No. 5.

[10] See Stepan Wood, "Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance" (2002-3) 10 *Buffalo Environmental Law Journal*, 127 for detailed discussions on the Environmental Management Standards [Hereinafter the EMSs].

[11] See Prince and Nelson, *supra* note 7, at 292-296.

in 2001. ICMM was found primarily to promote sound environmental practices in production, use, recycling and disposal of metals.[12] Similarly, the *German Foundation for International Development* and the UN convened a roundtable meeting of experts on mining and environment in Berlin in 1991 at which a *Mining and Environmental Guidelines* was agreed upon.[13] Of particular relevance is the *World Mining Environment Congress* (WOMEC) Guidelines issued in New Delhi, India in December 1995. The guidelines provides for best practices in environmental management in mining.[14]

Just before the Johannesburg Summit, nine of the world largest mining companies, through the *World Business Council for Sustainable Development* (WBCSD), and *International Institute for Environment and Development* (IIED) led a private sector initiative leading to the commissioning of a two-year project tagged "*Mining, Minerals and Sustainable Development* (MMSD)". The project was aimed at examining the role of the mineral sector in contributing to sustainable development.[15] In its 16-Chapter Report titled *"Breaking New Ground"*, the project finds and concludes that sustainable development could provide a useful framework to guide the mineral sector.[16]

The aim of the report was further strengthened at the Johannesburg Summit where a 150-section document tagged "*Plan of Implementation*" (the JPOI) on sustainable development was adopted.[17]Section 44 of the document specifically provides for mining, mineral and metals. It recognizes the importance of the sector to modern living, and economic and social development of any country in the world.[18] To achieve sustainability in mining, the *JPOI* suggests taking steps to

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[12] *Ibid.* at 296.

[13] *Ibid,* at 297.

[14] *Ibid,* at 298.

[15] See "MMSD, Breaking New Ground", Report of the Mining, Minerals and Sustainable Development Project (MMSD, 2002), Executive Summary, at xiv.

[16] *Ibid.* c. 16 at 386.

[17] See World Summit on Sustainable Development, Plan of Implementation, online: Johannesburg Summit <http://wwww.johannesburgsummit.org/html/document/summit_docs/2309_planfinal.htm>, last visited on 13 January 2009.

[18] *Ibid.* s. 44 (a-c).

address the environmental, economic, health and social impacts and benefits of mining.[19] It also targets active participation of the stakeholders[20] and fostering sustainable mining practices through the provision of financial, technical and capacity building support to the developing countries.[21]

A major development at the summit, which appears to be fast gaining recognition in the post-Johannesburg era, is the *"Extractive Industries Transparency Initiative* (EITI)" announced by the former British Prime Minister, Tony Blair at the Summit. The initiative aims at increasing transparency in payments by companies to governments by imposing a duty on the oil, gas and mining companies to make public all taxes, royalties and other payments made to governments.[22]Nigeria was among the nations that agreed to the *Statement of Principles* of this initiative at the *Multistakeholder Conference* and first to domesticate the principle through the enactment of local legislation.[23]

Notwithstanding the *JPOI* and other stakeholders' initiatives in mining sustainability and the pervading environmentally depleting nature of mining at the expense of the mining communities, the entire world is unable to boast of a single mining instrument or convention. Though the *Antarctic Mineral Convention of 1988*[24] replaced the voluntary moratorium on mining that had been in place since 1977 upon its approval in 1988 after facing a two-year ratification battle, its existence was however transient. Similarly, the *International Seabed Authority Regulations on Prospecting and Exploration for Polymetallic Nodules in the Seabed*[25] is

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[19] Ibid. s. 44 (a).

[20] *Ibid.* s. 44 (b).

[21] *Ibid.* s. 44 (c).

[22] See "Extractive Industries Transparency Initiative", online: Department for International development < http://www.dfid.gov.uk/News/files/eiti_core_script.htm last visited on 7 December 2008.

[23] See *Nigerian Extractive Industry Transparency Initiative Act* (NEITI Act), 2007.

[24] See the text of the Convention at < http://www.vias.studies.aq/antdocs/CRAMRA.pdf>, last visited on 17 February 2004.

[25] See International seabed Authority, online: ISA <http://www.isa.org.jm/en/documents/PRESS/PRESS_2000/SB_6_10.pdf>, last visited on 17 February 2003. See also Michael W. Longe, "The International Seabed Authority's Regulations on Prospecting and

also restrictive. Aside from governing specific minerals in the *Area*, it restricts application to government state parties, state enterprise, natural or juridical person of state parties[26] and has little or no relevance to domestic mining operations.

The impact of the lacuna in the regulation of environmental impacts of mining is obvious on regional instruments in Africa. As at today, aside from allusion to mining in the *New Economic Partnership for Africa's Development* (NEPAD)[27] and general provisions in the *African Convention on Conservation of Nature and Natural Resources*[28] on sustainable utilization of resources, no mining-specific instrument exists in the region to regulate the environmental effects of minerals exploitation despite being the major source of foreign exchange earnings to several countries in Africa.

The *African Convention* merely provides for general environmental sustainability, conservation and usage of natural resources without specific mention of mining.[29] However, NEPAD goes a bit further in making specific provisions for mining and mining objectives and actions.[30]The objective of the instrument towards mining sustainability in the region includes improving mineral information, creating conducive regulatory frameworks, and establishment of best practice in mineral

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Exploration for Polymetallic Nodles in the Area" (2002) 20:3 *Journal of Energy & Natural Resources Law*, 1-29 (See also the electronic copy at *CEPMLP Website Journal*, Volume 10: 2, 1-19).

[26] *Ibid*. See article 153 which provides that:Activities in the Area may be carried out by the Enterprise, State Parties, state enterprises, natural or juridical persons which possess the nationality of States parties or are effectively controlled by them or their nationals, when such sponsored by such States, or by any group of the foregoing; provided in each case that the entity concerned meets the requirements of Part XI, Annex II and the 1994 Agreement.

[27] NEPAD is a merger of the Millennium Partnership for Africa's Recovery Programme (MAP) and the Omega Plan. The framework document was concluded at Abuja, Nigeria in October 2001.

[28] See the *African Convention on Conservation and of Nature and Natural Resources*, Doc. EX/CL/50 (III), 2003.

[29] *Ibid*, objectives of the Convention, article II (1-3). See also article XIV on sustainable development and Natural Resources.

[30] See NEPAD, *supra* note 27, paragraphs 159-160, at 41-42.

extraction.[31] To advance sustainability of mining in Africa, the instrument urges harmonization of policies to eradicate perceived investment risk as well as centralization of information sources on business opportunities in the region.

A noble initiative in the instrument is provision for the establishment of an *African School of Mining System* for development and production of education, skills and training at all levels. It should be recalled that the importance of manpower training and development to mineral sustainability has been emphasized in the literature.[32] The laudable provisions of the instrument would no doubt enhance mineral sustainability by training the required manpower for the region. Aside from environmental and social problems, inadequacy of skilled mining professionals and technological know-how are other problems of sustainable minerals exploitation in Africa, which the mineral-producing countries in the region have had to grapple with in their mining regimes.

SUSTAINABLE DEVELOPMENT AND MINERAL RESOURCES

Despite noticeable gaps in the global regimes of sustainable development due to inability to reflect mining and minerals in specific terms; the mineral rich countries in sub-Saharan Africa like South Africa, Ghana and Nigeria have taken cues from industry practices and sector guidelines in applying the principle in their mining sectors. The mining regime of South Africa stands out as constitution forms the basis of the application of sustainability in its minerals regime. However in Nigeria, this is a matter of statutory imperative due to the bitter experiences of the oil and gas sectors, while in Ghana the application of the sustainability principle is due to the constitution and socio-cultural imperatives of its mineral regime being a traditional sector.

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[31] *Ibid*. paragraph 159.

[32] See MMSD report, *supra* note 15, chapter 16 at 391-392. See also Silvana Costa and Malcolm Scoble, "An Interdisciplinary Approach to Integrating Sustainability into Mining Engineering Education and Research", (Paper Submitted for Publication in the Journal of Clean Production, Elsevier Science, 2003), at 1-16.

Cognizant of the problems associated with South African mining under the old apartheid regime, the provisions of the *Mineral and Petroleum Development Act of South Africa 2002 (MPRDA)* provide a clear signal of the importance accorded to the principle of sustainable development and equitable resources utilization. The *White Paper on Mineral and Mining Policy of the Republic of South Africa* (the White Paper) provides detailed background facts as to the enactment of the *MPRDA*.[33] The MPRDA of South Africa brings to the fore the interplay of political, economic, social, cultural and other factors underpinning its mining sector in line with section 24 of South Africa's Constitution which provides for ecologically sound use of mineral resources.[34] State custodianship, equitable access to mineral resources, expanding opportunities for historically disadvantaged persons, are among the provisions of the new regime meant to compensate for decades of unsustainable exploitation of mineral resources.[35] The long title impresses the purpose of the law: "[t]o make provisions for equitable access to and sustainable development of the nation's mineral and petroleum resources..."[36] The Nigerian Constitution on the other hand lacks such explicit and expansive provisions with respect to sustainable mining. Instead, it merely enjoins the state to protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.[37] In contrast to unambiguous references contained in the title,[38] objectives[39] and specific provisions of MPRDA of South Africa, the Nigerian Minerals and Mining Act is replete with vague principles of sustainability

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[33] *White Paper on Mineral and Mining Policy of the Republic of South Africa,* released in October 1998, Pretoria, South Africa. See generally paragraph 1:2:2, which provides that the "intent" of the regime is to maintain and promote a stable legal and fiscal climate for the country's mining industry. See also the "intent" of the government for introducing state ownership of minerals, which is to prevent hoarding of mineral rights and sterilization of mineral resources of South Africa, *ibid* at 1:3:2 (i-vii).

[34] See 24(b) (iii) of the *South African Constitution* 1996 which states that, "Everyone has the right... to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that...secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[35] *Supra* note 4, section 2 (b), (c), and (d).

[36] *Supra* note 4, see the long title to the MPRDA.

[37] *Constitution of the Federal Republic of Nigeria*, (CFRN) 1999, at section 20.

[38] *Supra* note 4.

[39] *Ibid.*.

leaving the issues of applicability to interpretation and inference. Unlike both South Africa and Nigeria, Ghana's regime pre-dates the sustainability regime brought about by the Rio Declaration[40] which deals with environmental and human development activities, including mining.[41] Nevertheless, the MAA of Ghana contains provisions indicating the importance of moving towards environmentally friendly and socially responsible utilization of mineral resources in the country.

While the three regimes all systematically apply the principle of sustainability and equitable sharing of benefits from the utilization of mineral resources, their provisions and mode of application expectedly differ. Past experience demonstrates that in sub-Saharan Africa, many challenges exist which often impede applicability of the provisions of the law. Social circumstances, for example, often impede legal provisions meant to achieve equitable distribution of wealth and benefits among stakeholders in the extractive sectors like mining. Agitations against unequal distribution of profits derived from natural resources, particularly on the part of local owners of mineral-rich lands[42] is part of the history of the mineral regimes of the region.[43] Both regional[44] and some national instruments[45] acknowledge the

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[40] *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I), 8;31 I.L.M 874 (1992). [Rio Declaration].

[41] *Ibid,* at preamble (generally).

[42] Roderick G. Eggert, "Mining and Economic Sustainability: National Economies and Local Communities" (2001) 19 Report of the Mining, Minerals and Sustainable Development Project, at 60.

[43] See for example, Ayesha K. Dias, "International Standard-Setting on The Rights of Indigenous Peoples: Implications For Mineral Development In Africa" (1999) 6 *South African Journal of Environmental Law & Policy*, 67 at 94 on the agitation of the Ogoni communities of Nigeria.

[44] For example the preamble to the *New Partnership for Africa's Development* (NEPAD), recognizes that the continent is impoverished by slavery, corruption and economic mismanagement and that only judicious use of enormous natural and human resources in the region could lead to equitable and sustainable growth. NEPAD is a merger of the Millennium Partnership for Africa's Recovery Programme (MAP) and the Omega Plan. The framework document was concluded at Abuja, Nigeria in October 2001.

[45] See for example the *Corrupt Practices and Other Related Offences Act of Nigeria*, 2000. This Act intends to put an end to corruption and related offences in Nigeria. Such vices, according to the Act, are already threatening the basis of the country's unity and development. See the long title of the Act.

difficulties associated with effective distribution as well as sustainable utilization of the benefits from natural resources.

There exists a plethora of literature referring to developing countries as "cursed" rather than blessed with the presence of natural resources.[46] Many critics point to empirical research to justify the link between natural resources and civil war in many part of Sub-Saharan Africa.[47] The Rio Declaration's statement that "peace, development and environmental protection are interdependent and indivisible" proves relevant in light of instability experienced in the mining sectors of countries in the region.[48] Apparent inherent volatility of the mining sector makes it is indispensable for countries under focus to give force and effect to the principle of socially friendly and environmentally sustainable exploitation of mineral resources as illustrated below.

COMPARATIVE APPRAISAL OF THE MINING REGIMES

The principal goal of Nigeria, Ghana and South Africa's mining regimes is, as noted above, to sustainable and socially competitive mineral development. To attract foreign investment, each country has undertaken efforts to restructure the pre-existing regime or create new regulatory frameworks.[49] South Africa, for example, portrays the image of a liberalized mining sector in a bid to attract investment. However, technically, it could not be said to be a radically liberalized regime. In its attempt to remedy decades of historical and political inequities in mining, the historically disadvantaged group receives comparative advantages against the

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[46] See for example Auty Richard, *Sustaining Development in Mineral Economies: The Resource Curse Thesis*, (London: Routledge, 1993), Gelb A.H. *et al.*, *Windfall Gains: Blessing or Curse,* (New York: Oxford Unviersity Press, 1988).

[47] See Michael L. Ross, "Oil Drugs, and Diamonds: How Do Natural Resources Vary in Their Impact on Civil War" (Los Angeles: UCLA University Press, 2002) Working Paper, at 1-5. See also Noah Novogrodsky "Redressing Human Rights Violations in Sierra Leone" Spring/Summer 2003, *Nexus*, University of Toronto, at 27 for diamond-fuelled civil war in Sierra Leone.

[48] *Ibid.* principle 25.

[49] *See B. Campbell, supra note 6.*

previously favoured group.[50] Though the history of the country makes this inevitable and justifiable, it sits uncomfortably with the "level playing field" approach normally associated with liberalization.

Similarly, Ghana's regime also encourages both local and foreign private sector investment in mining. However, the state maintains its dominance in the sector through compulsory acquisition of interests ranging from ten, twenty-five or forty-five percent, depending on the nature and quantity of the minerals.[51] The Nigerian regime, on the other hand, qualifies on paper as a purely liberalized mining sector with no state interest or ownership.[52]The Nigerian law makes no discrimination or distinction between foreign or indigenous interests in mineral adventures.[53] The general rule as to foreign investment in any sector -including mining- is that foreigners may freely invest and participate in any enterprise in Nigeria except those on the "negative list subject to the provision of the Nigerian Investment Promotion Act."[54]

Principles of sustainability are also invoked and applied differently in each of the countries under review. The Nigerian mining law emphasizes achieving sustainability and environmental friendly utilization of mineral resources as primary objectives.[55] South Africa clearly qualifies as a regime with a strong focus on sustainable development.[56] While Ghana's regime pre-dates the Rio Convention, some of its provisions nonetheless accord with sustainability. For example, without

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[50] MPRDA, *Supra* note 4 at section 12 (1). See also the preamble, which expresses an intention to make provisions for the equitable access to, and sustainable development of, the country's mineral resources.

[51] MML of Ghana, *supra* note 5, at section 8 (1-2).

[52] See Section 20 and 27 of the *Nigerian Investment Promotion Commission* Act, Cap N117 LFN 2004.

[53] *Ibid.* section 2 (e).

[54] *Supra,* note 26.

[55] *Ibid.* See generally Part II of the Act, which vests several sustainability duties on the Minister. See also Chapter 4 of the Act which provides for detailed environmental considerations and tights of host communities in mineral exploitation in Nigeria.

[56] MPRDA, the long title s*upra* note 4, and section 24 on objectives of the law.

prejudice to public lands, ownership of lands in Ghana is vested in the various communities and held in trust by the communal leaders such as the "stool", the "skin", or the family.[57] It is an acceptable norm for mining companies in Ghana to engage with these groups in the interest of their mining projects.[58] Though Ghana's regime is not without community frictions, high level of community concerns under the regime makes it possible for many mining companies to co-habitate with small-scale, artisanal mining activities and practices of the local communities.[59] Consequently, a form of partnership is forged between large-scale miners and small-scale (artisanal) miners. Thus, where land concessions granted to mining companies contain alluvial gold deposits suitable for small-scale mining, such areas are awarded to resident small-scale miners. Purchasing services and other forms of agreements are entered into where the mined products are sold to the company at prevailing market prices.[60]

The sustainability benefits derived from this kind of collaboration with local stakeholders and resource-communities are yet to be realized in Nigeria and South Africa this is because their mining regimes encourage absolute ownership of mining rights or titles. Ghana's mining regime also differs from the other two in terms of state ownership of minerals as it reflects and recognizes the need to take into account traditional land tenure systems.[61] In Nigeria, mineral resources vest exclusively in the government of the Federation for and on behalf of the people of Nigeria.[62] The vesting of proprietary ownership of mineral resources in South Africa is similar to Nigeria since the MPRDA also confers ownership in the state while declaring minerals the "common heritage" of all the people of the country.[63]

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[57] K. Grubaugh, "Profile of Ghana's Mining Industry Mining Engineering," (2003) 55, Issue 1, Society For Mining Metallurgy and Exploration at 39-44. [Grubaugh]. In Ghana, the local or traditional governments are known as "stool" or "skin". Stool is the term used in the south while skin is used in the north.

[58] *Ibid.*

[59] Gavin Hilson, "A Contextual Review of the Ghanaian Small-scale Mining Industry" Report of the Mining, Minerals and Sustainable Development Project, Vol. 76, September 2001 at 18-21.

[60] *Ibid,* at 19-20.

[61] *Ibid.*

[62] Nigerian Mineral and Mining Act, *supra* note 3, at section 1.

[63] MPRDA, *supra* note 4, section 3 (1).

Regime weaknesses are also common to mining codes of the countries under consideration but these manifests differently. For instance, the MPRDA of South Africa stands the risk of being rendered ineffective regardless of its sustainability branding and embellishment. While small-scale mining is synonymous with the presence of mineral resources, surprisingly, this sub-sector is technically unregulated under the present regime of South Africa.[64] This portends serious danger to mining sustainability in the country unlike its Nigerian counterpart which devotes a whole chapter to the regulation of small-scale mining operations.[65]

In Ghana, excessive state dominance leading to weak or inadequate environmental regulations or monitoring is the greatest undoing of its mining regime.[66] Apparently, state dominance of mining in Ghana makes it difficult for the government to insist on strict environmental compliance. By virtue of acquisition, the government statutorily holds itself bound as acquiring percentage interests in the forms of both the rights and obligations with attendant, implied environmental responsibilities or implications.[67]As a result, the government seems to be lacking the resolve to enforce serious environmental compliance to avoid clogging its stake in the sector. Regime peculiarities in mining regulations are also noticeable in the above mineral regimes. Briefly put, while the South Africa's regime is based on constitutionally derived sustainability,[68] Ghana's regime is anchored in strong community-based land tenureship, which gives prominence to the protection of the rights and interests of local owners of the mineral-rich lands.[69] However, quite remarkably, the Nigerian regime targets sustainable and purely liberalized mining sector with equal opportunities.[70]

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[64] The MPRDA has omitted to properly consider the notorious environmental problems of mercury pollution, land degradation and the disproportionately large percentage of environmental degradation associated with small-scale or artisanal mining. See Gavin Hilson, "The Environmental Impact of Small Scale Gold Mining in Ghana: Identifying Problems and Possible Solutions" (2002) 168:1, *The Geographical Journal*, at 59. See also Hilson, *supra* note 59 at 15-17.

[65] *Supra* note 3, at Chapter 2, sections 90-91.

[66] *Supra* note 64.

[67] *Ibid.*

[68] MPRDA, *supra* note 4, at section 2 (h). The section specifically provides for sustainable development in mining in accordance with section 24 of the constitution.

[69] See Grubaugh, *supra* note 57, at 3.

[70] See generally Part III of the *Nigerian Minerals and Mining Act* on "Mining Incentives".

The minerals and mining laws of Nigeria, South Africa and Ghana are similar but different as far as approach to sustainable utilization and environmentally friendly exploitation of mineral resources is concerned. While sustainability is an implied phenomenon under the Nigerian mining regime, it is both the rule and norm in South Africa. However, in Ghana, it is an unwritten persuasive normative code having both the force and effect of a law. Scholars have argued that the concept of sustainability is a new way of looking at issues.[71] As a new way of looking at issues in mining and mineral utilization, it suggests a coherent across-the-board approach to environmental matters.[72] These facts permeate the mining regimes of the countries under focus. Therefore, from whichever way it is perceived, the above countries have attempted making their respective mineral sectors sustainable for achieving the objective either to remedy historical wrongs or injustices, increase investment in the solid minerals sector, diversity the economic base or revenue.

THE UNDERPINNING OF SUSTAINABLE MINERAL REGIMES

Over the years, mere passage or enactment of laws has never proved to be the magic wand for automatic sustainability of the minerals and other extractive sectors in Sub-Saharan Africa and elsewhere. In most extractive sectors in the region, the design and implementation of laws and policies so far appears not easily divestible from what a scholar describes as "neo-capitalist" in that they are products of metropolitan thinking in the capital city as determined by the needs of the ruling elites.[73] The political configurations of resource-rich countries in sub-Saharan Africa make it possible for a few to influence policy directions.[74] Ironically, the nature of resources management in the region is such that the natural wealth which fuelled development elsewhere would most likely have little effects on the peasants of the resources-rich communities.[75]

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[71] See John Dernbach, "Sustainable Development as a Framework for National Governance" (198) 45 *Case W. Law Review*, at 1.

[72] John C. Dernbach, "Towards a National Sustainable Development" (2002-2003) 10 *Buffalo Environmental Law Journal*, at 70.

[73] Allot, Anthony, "The Unification of Laws in Africa" (1968) 16 *American Journal of Contemporary Law* pages 51, at 52-53.

[74] *Id*, 32.

[75] *Id*, at 57.

Apparent inadequacy of the legal codes or frameworks of some mineral-producing countries in the region often appears to justify the assertion of scholars who describe some of these laws as "*law made by a leader-in-a hurry*":

> "Africa is full of leaders-in-a hurry. They may be hurried because they are fired up with zeal to improve the harsh lot of their countrymen. Or they may be hurried because they are fired up with the zeal to line their own pockets. But everywhere the sense of overwhelming urgency pervades the political atmosphere. Leaders-in-a-hurry, restrained mainly by their own respect for the forms of law, can usually achieve their objectives within the form of law but outside its real content. To a depressingly great extent, Africa has become a continent of legalisms rather than legality".[76]

The complexities of the overarching issues involved in mining sustainability for developing countries in Sub-Saharan Africa are multifaceted and all inclusive.[77] Mining is characterized by special features which when collectively considered have no parallel in other sectors.[78] Inherent risk and sector unpredictability makes issues of stability and peaceful polity relevant considerations in mining investment. A reference case is a Canadian mining company and other consortia in the bitumen project where insecurity of the mining area is reported to have threatened or scuttled commencement of operations.[79]

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[76] See Robert B. Sheidman, "Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa" *Wisconsin Law Review,* 1966, at 1023.

[77] For example, the peculiar nature of mining, divergent and sometime conflicting nature of interests of the stakeholders and other factors make realization of the full potentials and contributions of minerals to national economies of most mineral-rich sub-Saharan African countries elusive. See "MMSD, Breaking New Ground", Report of the Mining, Minerals and Sustainable Development Project (MMSD, 2002), Executive Summary, at XIV. See also Chapter 16, *id* 386-410, at 388. See also Yemi Oke, *"Notes on Sustainable Utilization of Mineral Resources in Ghana*", Africa Files, Africa InfoServ, 16 September 2004, online: Africa Files <http://www.africafiles.org/article.asp?ID=6603&ThisURL=./western.asp&URLName=WESTERN%20REGION>.

[78] See "Finance, Mining and Sustainability" Report by United Nations Environment Programme for UNEP, World Bank and Mining Mineral & Sustainable Development (MMSD) Initiative, 2001-2002, at 7.

[79] See James Sowole, "Insecurity Scares Investors From Bitumen Project", at http://www.dailytimesofnigeria.com/DailtTimes/2004/July/21/Insecurity.asp >, dated 27 July 2004.

Peculiar inadequacy of the developing counties in Africa vis-à-vis mining technology may also determine the extent of sustainability of their minerals sector. Technology undoubtedly reduces the environmental impact of mining, costs of extraction and of recovering mineral raw materials.[80] It is imperative to also point out the impact of technology in mining for reducing environmental harm, effective exploitation among others. The relevance of technology to recycling of minerals and reduction of threat of exhaustion is incredibly phenomenal. Beyond doubts, the technology and manpower development needs bold steps by way improvement for overall mining sustainability in the region. While collaborative effort of African countries under NEPAD is laudable,[81] local manpower of the member nations would require an urgent overhaul to cope with the rapidity of the technology need of vibrant minerals and mining regimes.

Placing reliance on foreign technology and manpower in the face of local inadequacies goes into costing of the minerals and profitability of mining adventure. Importation of required technology or machinery including spares due to lack of local capacity could make the mining sectors of countries in the region less efficient due to high costs of procuring required foreign exchange among other logistics like shipping. Where eventually procured, factoring in costs and profits makes the output expensive and uncompetitive at the international market. This makes importation of mining products for local consumption sometime preferable due to their relative cheapness and presumed "high value" based on perceived high technology with which they are produced.

It needs to be borne in mind that the pursuit of sustainable mining in Sub-Saharan Africa is not unconnected with the quest for economic development. To some scholars, economic development and sustainability are antonymous.[82] It has also

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[80] See David Humphreys, "Mining as a Sustainable Activity" Vol. 6-11 Article Centre for Energy, Petroleum and Mineral Law and Policy *(CEPMLP) Website Journal*, 1-9 at 1.

[81] See *NEPAD* text at <http://www.allafrica.com>, paragraphs 159-160, at 41-42.

[82] See for example Richard Stewart, "Environmental Regulation and International Competitiveness" 102 *YALE L.J.* 2039, at 2052-3; Edith Brown Weiss, "Environmentally Sustainable Competitiveness: A Comment" 102, *YALE L. J.*, 2123 at 2127; Robert Lucas, et al, *Economic Development Regulation and the International Migration of Toxic Industrial Pollution*, 1960-88, 159 WORLD BANK PAPERS: INTERNATIONAL TRADE

been argued that environmental sustainability would ordinarily need to be mortgaged for development until enough wealth has been generated to repair the damage done to the environment.[83] Daly, for example, argues in support of this position and posits that a country could not grow its way into environmentally sustainable world.[84] The attitude of many developing countries seems to support the above views and corroborates the assumption that being coerced into meeting higher standards of the "North" does not constitute a legitimate means of achieving sustainability in the developing world.[85] The realties on ground show that countries are wary of environmental standards that fail to take into account their peculiar economic development needs or situations.[86] Therefore, in actual sense, 'development now', 'environment later' seems to permeate countries' attitude in attaining their developmental aspirations through the utilization of mineral resources. The above is evident in the antecedents of countries like Nigeria, Ghana and other mineral-rich countries, as their colonial past to a large extent shape the structural and institutional peculiarities of their mining regimes. According to Sheidman, the colonial-power-imposed subsistence economy an enclave of modern technology based in the main upon extractive industries of mining, forestry and others.[87] The physical structures that were developed by the colonialists were to meet their extractive resources needs as those structures eventually became the funnels through which raw materials were moved to the metropolis for shipment to the land of the colonialists.[88] According to a scholar, the mining regime being part of the English law received in Africa was not the English law of the home country,

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AND THE ENVIRONMNT 67, at 72; Georgia Carvalho, "Sustainable Development: Is It Achievable within the Existing International Political Economy Context?" (2001) 9 *Sustainable Development*, at 61.

[83] *Ibid*. Edith Brown Weiss and Richard Stewart.

[84] See Herman Daly, "Debates at Environmentally and Socially Sustainable Development Week (ESSD)", March 2, 2004 at http://info.worldbank.org/etools/bspan/PresentationPrint.asp?PID=1054&EID=543 > last visited on 16 July 2004.

[85] See Scott Vaughan, "Trade and Environment: Some North-South Considerations" (1994) 27 *Cornell Law Journal*, 591-606 at 597.

[86] *Id,* at 596.

[87] Robert B. Sheidman, *supra* note 76 at 1002.

[88] *Id,* at 1003.

as they embodied norms that eventually aided the enterprise of the colonialists.[89] The extractive laws and regulations introduced in the post-colonial societies succeeded in making persons and institutions mere colonial enclaves thereby creating a legal environment inherently favorable to foreign dominated private enterprises especially in mining and other extractive industries in Sub-Saharan Africa.[90]

With the above background, it is appropriate to argue that contemporary mining regimes in post-colonial countries in Sub-Saharan Africa have their roots in the colonialist enclave, as they not only fixed the frontiers within which these territorial systems were to operate but also imported and imposed western legal system on these countries as the general law.[91] This factor is termed "legal balkanization"[92] and also manifests in the law making process of post-colonial African countries.[93]

TRANSNATIONAL BUREAUCRACIES AND SUSTAINABLE MINING

Further to contextual underpinnings of the minerals sector, it needs to be emphasized that a number of extraneous factors also shape not only the manifestation of local peculiarities but overall sustainability of the mineral sector in Sub-Saharan Africa. For example, Nigeria and other developing African countries are in a precarious situation in terms of economic development, responsible resources use and the struggle to support their poor masses. As a result, both natural resources and environment are leveraged to a deplorable situation at the mercy of global economic trends dominated by the developed nations.[94] In several mineral-exporting sub-

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[89] *Id*, at 1008.

[90] *Id,* at 1014.

[91] See Allot, Anthony, "The Unification of Laws in Africa" (1968) 16 *American Journal of Contemporary Law*, 51-87 at 54.

[92] This is the term in which Allot describes the colonialist legal enclave of Africa, *id* at 85.

[93] *Id.*

[94] See Todd Johnston, "The Role of Intergenerational Equity in a Sustainable Future: The Continuing Problem of Third world Debt and Development" (1998) 6 *Buffalo Environmental Law Journal*, at 39.

Saharan African countries, ability to attract mining investment especially multinational mining companies far exceeds the willingness to subject corporations to environmental accountability.[95] The external causes of their vulnerability is traceable to the "ladder theory of development", coerced free trade and free markets which results in the race-to-the-bottom phenomenon, short-term foreign investment and overbearing of corporate influence and externalization.[96] David Wheeler, using China, Mexico and Brazil as case studies argues that the "race-to-the-bottom" assumptions is flawed since its predictions are inconsistent with urban air pollution trends in the above mentioned countries.[97] Though the scholar's assertion sounds plausible, it is doubtful whether this viewpoint would hold using developing African countries as case studies. This is because, according to a scholar, the international financial institutions and other advocates of globalization and liberalized extractive sector that tell African leaders to open up their economies in solving their problems did not go to the bottom of the continent's problems in testing the suitability of the suggested panacea.[98]

Global bureaucratic exigencies foisted certain development concepts upon these countries without considering the impact of the externalized factors involved. By nature, the "one-world" economic alliance called globalization would appear to merely advocate "global neighborhood" but devoid of "global neighborliness." The chagrin realities of globalization as practiced by the mineral-rich countries justify the argument that environmentally sustainable development might be impossible in mining without a realistic and sincere paradigm shift leading to changes in the

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[95] See Madeline Cohen, "A Menu for the hard-Rock Café: International Mining Ventures and Environmental Cooperation in Developing Countries" (1996) 15 *Stanford Environmental Law Journal*, 130 at 132.

[96] *Id,* at 37.

[97] David Wheeler, "Racing to the Bottom? Foreign Investment and Air Pollution in Developing Countries", Paper Written for *Development Research Group*, World bank, 2001, at 5.

[98] See Fredrick Cooper, "What is the Concept of Globalization Good For? An African Historian's Perspective" (2001) *African Affairs*, 189-213 at 211-2. Cooper based his argument on the African perspectives, which finds relevance in the manner in which Nigeria subscribes to the concept as an unavoidable evil in opening up it solid mineral resources for investment with little regard to environment.

structure of international political economy for an equitable and stable international economic order.[99] It is appreciable that, based on the mineral regimes of countries adopted as representative examples in this paper, some of the countries in the region have positioned their mineral regimes for sustainability advantages. But in reality, the global playing field is lopsided against these countries. This is because when these countries struggle economically, invariably, their environments bear much of the strain.[100] By implication, these countries are continually enmeshed in a game of development they cannot win.[101]

Global inconsistencies have its greatest manifestations in the reluctance of countries to extend the application of their environmental laws to their extractive corporate citizens operating in developing countries of Africa. This approach was suggested towards sustainability in mining especially in countries where environmental regulations of mining are extremely feeble and wobbly.[102] Extraterritorial control of multinational mining companies in Sub-Saharan Africa deserves global concerns for various reasons. First, minerals exploitation whether small, medium or large scale inevitably leaves its negative impact on the environment. Second, trade liberalization, globalization, and other global economic pressures appear to have culminated in the race-to-the-bottom syndrome.[103] This conundrum makes it possible for foreign-dominated extractive industries in sub-Saharan Africa. As a consequence, the environments, natural resources as well as social and political structures in these countries have been put under intense external pressures. Environmental concerns are global in nature; but issues bordering on environmental protection have become a matter of economic interests of the developed countries.

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[99] See Georgia Carvalho, Georgia Carvalho, "Sustainable Development: Is It Achievable within the Existing International Political Economy Context?" (2001) 9 *Sustainable Development*, at 61.

[100] See Todd Johnston, *supra* note 94, at 37.

[101] *Ibid*, at 38.

[102] See George Sampson, "Environmental and Human Rights Problems in Natural Resources Development: Implications for Investment in Petroleum and Mineral Resources Sector" Vol. 6-5 (b), Centre for Energy, Petroleum and Mineral Law and Policy *(CEPMLP) Website Journal*, 1-29 at 6. See also B. Campbell, "Factoring in Governance is Not Enough: Mining Codes In Africa, Policy Reform and Corporate Reasonability" (2003) Mineral & Energy, Raw Material Report Taylor and Francis Ltd 18: 3 at 19.

[103] See Todd Johnston, *supra* note 94.

Regrettably, these developed economies are apathetic in subjecting their local companies operating in the extractive sectors of Sub-Saharan African countries to extraterritorial controls in respect of environmental regulations,[104] though some Western scholars have argued with strong emphasis that this as a matter of imperative.[105]

Discreet discriminatory trade barriers and imposition of other forms of restrictions might also make achieving mining sustainability difficult for the mineral-dependent countries in Sub-Saharan Africa. Johnston captures it thus:

> While free trade sounds like a cooperative, sharing process, the reality is that developing countries are in greater need of trade restrictions and regulatory freedom than developed countries. The submission to free trade and the competitive global economy compels developing countries to focus exclusively on industries in which they have comparative advantage. These industries are typically labor intensive and focus on the harvest of natural resources, the only marketable commodities many countries posses.[106]

In actual fact, the developed countries dictate the tune in terms of goods that could be imported into their countries, which are, in most cases, natural resources, minerals, petroleum and allied resources. Paradoxically, developing countries in sub-Saharan Africa have continued to be dumping grounds for *dis*-used automobiles and other (*Tokunboh)*[107]products at the risk of development of local industry, environmental sustainability and safety of lives and properties. The domestic markets for similar products have also been rendered unattractive, as people prefer the so-called "*tokunboh*" products, with attendant unsustainable consequences.

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[104] See George Sampson, *supra* note 102 at 29.

[105] For example, Campbell argues that given the present lack of financial and technical resources resulting in inability of developing countries to monitor and enforce (environmental) norms, it should be the responsibility of the countries of origin of the companies operating internationally to ensure respect for (environmental) norms and standards, *ibid* at 20.

[106] Todd Johnston, *supra* note 94 at 45.

[107] "Tokunboh" is the generic term for second hand materials and it denotes importation across the sea.

CONCLUSION

This article has mirrored attempts by some mineral-rich countries in sub-Saharan Africa to reposition their mining regimes in line with the global trends of sustainable development. Mining is a global economic activity involving the interplay of nations and regimes. However, this article has shown by using South Africa, Ghana and Nigeria as representative examples of the new trends in sustainable mining in sub-Saharan Africa that repositioning the legal frameworks of minerals and mining for maximum efficiency and socially responsible utilization of mineral resources is beyond law, though the imperative of a good legal regime cannot be over-emphasized. Beyond the mineral laws, the paper argues that a number of contextual underpinnings and related extraneous factors would also need to be taken into consideration by countries in the quest for sustainable mining. This is because they shape not only the manifestation of local peculiarities but also overall sustainability of the mineral sectors in Sub-Saharan Africa.

HOW AND WHEN DO MILITARY OCCUPATIONS END?

Konstantinos Mastorodimos *

ABSTRACT

The present article is an attempt to approach the issue of when and how a military occupation ends. Effective control over foreign territory appears to be the most important criterion for the existence and the end of military occupation. The article proceeds as follows: firstly it explains what a military occupation is and discusses the basic features of this legal regime. Then it examines the effect of the absence of each feature for the termination of military occupation before making some concluding remarks. In his concluding remarks, he maintains that the issue of external legitimacy, self- determination through elections or a referendum can boost the end of occupation. The ideal situation would be the combination of internal legitimacy with external approbation by the international community. With regard to the (almost) necessary mix of ius ad bellum and ius in bello: inescapably the end of occupation might deal with matters such as who used force first and if it was unlawful. Provided that the international community interferes, in the interest of peace and justice, this mixture might prove to be less detrimental for the law of occupation (and the individual who gains from its application) than one would expect. However there are many steps to be taken towards that direction: the regulation of international life is satisfactory, but the implementation of international norms is still not so self-evident.

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1. INTRODUCTION

Military occupations occur for several centuries. However the issue of the termination of an occupation has attained only scant attention. The present article is an attempt to approach the issue of when and how a military occupation ends with reference to the basic features of military occupation. In this regard, the exercise of effective control over foreign territory appears to be the most important criterion for the existence and the end of military occupation. Nevertheless it is impossible to isolate each feature, without necessarily taking the others into consideration.

The article proceeds as follows: firstly it explains what a military occupation is and discusses the basic features of this legal regime. Then it examines the effect of the absence of each feature for the termination of military occupation before making some concluding remarks.

2. MILITARY OCCUPATION- SOME BASIC HISTORY

Occupation in legal terms means the assumption or holding of possession.[1] In international law, the term is used in the sense of acquisition of *terra nullius* with a view to establishing a sovereign title. *Terra nullius* didn't belong to or was abandoned by a state. This concept of occupation, based on a notion of European hegemony over the 'uncivilized world', was discredited in the *Western Sahara* Advisory Opinion[2] and nowadays plays no practical role, especially since there is almost no place of land which does not belong to a state, while self-determination would bar any claim on territory based on this justification.

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[1] Bothe M., 'Occupation Belligerent', *in* Berndhart R. (ed.), *Encyclopaedia of Public International Law*, Vol. 3, Amsterdam, Elsevier, 1997, p. 763.

[2] *Western Sahara,* Advisory Opinion, I.C.J. Reports 1975, p. 39, 'Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius'*. Nevertheless, occupation is still considered as a way to acquire territory in doctrine, see Jennings R. & Watts A. (ed.), *Oppenheim's international law*, Vol. 1, Peace, Parts 2 to 4, London, Longman, p. 687, and Malanzuk P., *Akerhurst's Modern Introduction to International Law*, 7th ed., London/New York, Routledge, 1997, p. 148

Military occupation, which is also based on effectiveness,[3] is distinguished from occupation because it does not lead to acquisition of territory or any change of sovereignty. The notion dates somewhere in the first half of 19th century[4] and developed (in the more narrow sense of *occupatio bellica*) as a legal status defined in contraposition to *debellatio*.[5] The latter equals to the destruction of a state's government through war and the subsequent acquisition of territory by the victorious state, after the end of the war.[6] In contrast to *debellatio, occupatio bellica* is an intermediate status between invasion and conquest, during which the continuity of the state is maintained.[7]

The legal framework of military occupation developed in the area of customary law (with the exception of military manuals such as the Lieber Code[8]), until the conclusion of the Hague treaties in 1899.[9] Later the regulation of military occupation was basically refined by the Hague Regulations of 1907,[10] the Geneva Convention

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[3] Debbasch O., *L'occupation militaire: pouvoirs reconnus aux forces armées hors de leur territoire national*, Paris, Pichon et Durand-Auzias, 1962, p. 3, claims that 'on ne trouve pas de différence majeure entre les effets de l'occupation militaire et ceux des de l'occupation de territoire sans maître'.

[4] For its traces before this century, see Haggenmacher P., 'L'occupation militaire en droit international: genèse et profil d'une institution juridique', *Relations internationales*, N. 79, 1994, p. 291-4.

[5] Bhuta N., The Antinomies of Transformative Occupation, *The European Journal of International Law,* Vol. 16, 2005, p. 725.

[6] Korman S., *The Right of Conquest: the acquisition of territory by force in international law and practice*, Oxford, Clarendon Press, 1996, óåë. 109.

[7] Bhuta N., *op. cit.*, p. 726.

[8] Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863.

[9] Regulations Respecting the Laws and Customs of War on Land annexed to the Convention with Respect to the Laws and Customs of War on Land, 29 July 1899. For Haggenmacher P., *op. cit.*, p. 297, 'la réflexion doctrinale a jouè un rôle considérable dans l'émergence de l'occupation de guerre'.

[10] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. For the customary nature of this Convention see among others Von Glahn G., *Law among nations: an introduction to public international law*, New York/ Toronto, Macmillan Publishing Company, 1992, óåë. 769 êáé Kaikobad K.H., 'Problem of Belligerent Occupation: the Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004', *The International and Comparative Law Quarterly*, Vol. 54, 2005, p. 263.

IV in 1949,[11] and Additional Protocol I, in 1977.[12] The application of these rules, after the 2nd World War, is rather infrequent, because almost all Occupying Powers denied this characterization.[13] The only express exception was the recent occupation of Iraq,[14] while Israel maintained a fuzzy position with regard to 'the Administered Territories'.[15]

3. MILITARY OCCUPATION- THE NOTION

Military occupation is the transient and effective administration of foreign territory, primarily through the presence of armed forces.[16] If this presence is without the consent of the sovereign, then occupation is belligerent.[17] The nexus between

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[11] Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. For Bothe, Collegium, p. 26, articles 47-68 are customary. It is interesting that the ICRC customary law study, Henckaerts J. M. & Doswald-Beck L., *Customary International Humanitarian Law*, Vol. 1-2, Cambridge, Cambridge University Press, 2005, has generally refrained from examining and acknowledging the customary status of occupation law, with the exceptions of Rules 41,51,129 and 130.

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977. Some relevant provisions can also be found in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, the Hague, 14 May 1954, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 10 October 1980 and the Rome Statute for the International Criminal Court, 17 July 1998.

[13] Benvenisti E., *The international law of occupation*, Princeton, Princeton University Press, 2004, p. 149-150.

[14] Kelly M.J., 'Iraq and the Law of Occupation: New Tests for an Old Law', *Yearbook of International Humanitarian Law*, Vol. 6, 2003, p. 130: 'the 4th Geneva Convention was for the first time in its 60 year history accepted to have general application as a matter of law without contest'.

[15] As Dinstein Y., 'The international legal status of the West Bank and the Gaza Strip', *Israel Yearbook on Human Rights*, Vol. 28, 1998, p. 39, wrote, 'since the adoption of the Geneva Conventions, Israel is the only contracting party to have actually implemented its stipulations governing occupied territories'. However it implements only those norms which it considers as customary in nature.

[16] The simultaneous presence of civilians also should not be excluded in advance.

[17] For Benvenisti E., *op. cit.*, preface, p. xvi, it is the 'effective control of a power over a territory to which that power has not a sovereign title, without the volition of the sovereign of the territory'

sovereignty and effective control is severed[18]. The former stays within the state whose territory is occupied, in a condition of suspension,[19] while the latter passes to the Occupying Power[20]. International society has, especially after the creation of the United Nations, favoured certain principles such as the peaceful co-existence of states and the prohibition of use of force, respect for territorial integrity and prohibition of annexation as well as respect for human rights (including the right to self-determination). A situation of military occupation usually derives from some form of using force, violates potentially the territorial integrity of states and creates an irregularity in international affairs. Assuming that the international community in its majority desires a return to world order, a military occupation cannot but constitute a temporary situation.[21] In the words of Ben Naftali[22] 'this principle of

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[18] Ben-NaftaliO., '"A la recherche du temps perdu": rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion', *Israel Law Review*, Vol. 38, 2005, p. 220.

[19] Haggenmacher P., *op. cit.*, p. 285.

[20] In the words of Von Glahn G., *op. cit.*, note 10, p. 774: 'belligerent occupation transfers to the occupant the authority to exercise some of the rights of sovereignty. The exercise of these rights result from the established power of the occupant and from the necessity of maintaining law and order indispensable for both to the inhabitants and to the occupying force'. Note also that the title of Section III of the Hague Regulations is 'Military Authority' (not sovereignty).

[21] The temporary nature of military occupation is also acknowledged by Judge Elaraby in his Separate Opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, p. 9, par. 3.1. Also *Beit Sourik Village Council v. 1) Government of Israel, 2) IDF Commander in the West Bank* (excerpts), High Court of Justice 2056/04, 30 June 2004, *Israel Yearbook on Human Rights,* Vol. 35, 2005, p. 347. For Alonzo-Maizlish D., 'When does it end?: problems in the law of occupation', *in* Arnold R. & Hildbrand P.A.(ed.), *International humanitarian law and the 21st century's conflicts: changes and challenges*, Lausanne/ Berne/ Lugano, Ed. interuniversitaires suisses-Edis, 2005, p. 107 and 110, 'this is more of a normative aspiration than an obligation towards states. Moreover the law does not define what temporary is'. Look in Benvenisti E., *op. cit.*, p. 145-6 for an opposite opinion, although not particularly convincing. According to Gasser H.P., 'Protection of the civilian population', *in* Fleck D.(ed.), *The handbook of Humanitarian law in Armed Conflicts*, Oxford, Oxford University Press, 1995, p. 246, the Occupying Power'should declare a prospective date for the termination of occupation'. This is actually what happened in the occupation of Iraq, but it doubtful whether the Occupying Power acted according to a legal duty; rather it was a policy aim to formulate an exit-strategy.

[22] Ben-Naftali O., *op. cit.*, p. 220.

provisional status is the most fundamental of the whole regime[23] and, indeed, explains why an occupation cannot confer title[24] and why the occupation is a form of trust.[25] In short, it explains why the occupant has only limited powers and why it is not permitted to act in a manner that generates permanent results'.

Nevertheless occupation law does not explicitly reveal its temporary nature and state practice tends to the opposite conclusion. Israel has overcome 40 years of occupation, Turkey's armed forces are 'stationed' in Cyprus for more than 35 years and the occupations of Namibia and East Timor lasted for more than 20 years. On the other hand the law of military occupation offers many hints for its temporary nature, such as the limited functions of an Occupying Power, the one-year application of the whole Geneva Convention IV (art. 6) and the character of administrator and usufructuary of public property for the Occupying Power (art. 55 of the Hague Regulations).

4. THE ELEMENTS OF MILITARY OCCUPATION

The essentials of a military occupation are actually provided by the law of occupation and more specifically from article 42 of the Hague Regulations: I) an army should be present; II) actually placing the territory under its authority; III) the army is hostile.

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[23] The definitions of occupation by the ICTY in *Prosecutor v. Naletilic and Martinovic,* IT-98-34, Trial Chamber Judgement, 31 March 2003, par. 214 and doctrinal writings (Gasser H.P., *op. cit.*, p. 243, Kaikobad K.H., *op. cit.*, p. 255, Kolb R., 'Etude sur l'occupation et sur l'article 47 de la IVème Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre : le degré d'intangibilité des droits en territoire occupé', *African Yearbook of International Law*, Vol. 10, 2002, p. 278, Lauterpacht H. (ed.), *Oppenheim's international law*, Vol. II, 7th edition, London/ New York, Longmans Green, 1952, p. 434 and Edelstein D.M., 'Occupational hazards: why military occupations succeed or fail', *International Security,* Vol. 29, 2004, p. 52), contain this point.

[24] As article 4 of Additional Protocol 1 stipulates, 'the occupation of a territory shall [not] affect the legal status of the territory in question'.

[25] See also Von Glahn G., *The occupation of enemy territory: a commentary on the law and practice of belligerent occupation*, Minneapolis, The University of Minnesota Press, 1957, p. 31.

I. Presence of an army

This is a relatively straightforward criterion. It does not really matter if the number of armed forces is substantial or not;[26] and neither is the fate of the enemy's forces important (surrender, defeat or withdrawal).[27] But it is important for the armed force of the Occupying Power to cross their internationally recognized frontier and displace the local armed forces (provided that there are any and there is fighting), to that degree of effectiveness that also the national government cannot function in the said territory (pointing therefore to the second criterion).[28] It is possible though that no invasion had preceded, when foreign armed forces were stationed lawfully in the territory and subsequently engaged in occupational acts, with or without the volition of the sovereign.[29] Battle areas are not considered occupied and only a specific spectrum of occupation law will apply.[30] Sporadic

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[26] However the number of troops is a strong indication about the existence and continuance of occupation and whether these troops can objectively exercise effective control over the occupied territory. See, European Court of Human Rights, *Loizidou v. Turkey,* Judgment (Merits), 18 December 1996, *International Legal Materials*, Vol. 36, 1997, p. 454, par. 56. The English High Court of Justice, Queen's Bench Division, Divisional Court, in *The Queen - on the Application of – Mazin Jumaa Gatteh Al Skeini and others and The Secretary of State for Defence and The Redress Trust*, 30 November 2004, par. 41-2 has also referred to the ratio of the number of Occupying Power's troops deployed in relation with the population in the occupied territory (comparing also the situation between occupied Iraq and Northern Cyprus); however in the end it declined to assess the argument of the government whether the British occupying forces in Iraq exercised effective control of the provinces where the alleged violations of human rights took place.

[27] 'Occupation does not take effect merely because the main forces of the country have been defeated', Office of the Judge Advocate General of Canada, *Law of Armed Conflict at the Operational and Tactical Levels*, 2001, par. 1203.2, 'but depends on whether authority is actually being exercised over the civilian population', UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, Oxford University Press, 2004, p. 276, par. 11.3.2.

[28] For Kolb R., *op. cit.*, p. 279 the presence of the army is the most important criterion, since the others are sort of consequences of it.

[29] See Stone J., *Legal Controls of International Conflict*, 2nd ed., Sydney, Maitland Publication PTY Ltd., 1959, p. 696.

[30] See Feilchenfeld E.H., *The international economic law of belligerent occupation*, Washington, Carnegie Endowment for International Peace, 1942, p. 6 and Pictet, Jean S. (ed.), *The Geneva Conventions of 12 August1949: commentary,* Geneva, International Committee of the Red Cross, 1952, p. 60, 'So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of

local resistance, even temporarily successful, does not affect the reality of occupation, as long as it cannot remove the hostile army totally and no local administration has been set up (or resumed its functions). That applies also to the situation of a defended zone; it makes no difference as long as it is surrounded and effectively cut-off[31]. Nevertheless time is critical in this regard, if the army cannot actually acquire control of this zone and resistance is permanently successful.[32]

The presence of the army must be relatively continuing. Military units, which move on or withdraw after carrying out their mission, do not occupy territory since they are not there long enough to set up an administration. On the other hand, to occupy a district it is not necessary to keep troops permanently stationed in every isolated village or town,[33] as long as the Occupying Power possesses the capacity to send troops within a reasonable time to make the authority of the occupying power felt.[34]

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a state of occupation within the meaning of the Article 42 [of the 1907 Hague Regulations]. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the [fourth Geneva] Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets'. This view is supported by an ICTY judgement, *Prosecutor v. Naletilic and Martinovic, op.cit.,* par. 221, the ICRC (Lavoyer J.- P., 'Jus in Bello: Occupation Law and the War in Iraq', *ASIL Proceedings*, 2004, Vol. 98, pp. 122) and academic circles (Roberts A., 'What is a military occupation?', *The British Yearbook of International Law*, Vol. 55, 1984, p. 253 and Kolb R., *op. cit.*, p. 292)

[31] UK Ministry of Defence, *op. cit.*, p. 276, par. 11.3.2

[32] Other factors would also be relevant, such as the total collapse or not of the national government, the possibility of external help, the space of the defended zone, the existence of civilian population within this area and so on. Obviously there is a considerable degree of subjectivity on deciding whether occupation exists or not.

[33] Office of the Judge Advocate General of Canada, *op.cit.*, par. 1203.2.

[34] *Prosecutor v. Naletilic and Martinovic, op.cit.*, par. 217. Or according to the UK Ministry of Defence, *op. cit.*, p. 276, par. 11.3.2 'for occupation of an area....it is sufficient that the national forces have withdrawn, that the inhabitants have been disarmed, that measures have been taken to protect life and property and to secure order, and that troops are available, if necessary to enforce authority in the area.'

While the reference to armed forces equals primarily to ground forces, it is possible that air or naval forces might satisfy this criterion, as long as there is a representative of the Occupying Power in place and the forces have the ability to exercise effective control indirectly. The past presence of ground armed forces for the purpose of disarming the locals and set-up the administration would of course be decisive.[35] The UK Manual foresees the possibility of exercising indirect control through a local government, on the absence of ground forces (but not the possibility of exercising control through air/ naval forces) and it opines that 'in such cases, despite certain differences from the classic form of military occupation, the law relating to military occupation is likely to be applicable. Legal obligations, policy considerations, and external diplomatic pressures may all point to this conclusion'.[36]

As already noted, the effectiveness of naval/air forces would depend on various circumstances: geography, ability of a state to resist, clear technological supremacy are some of them. This is a remote possibility (and certainly not foreseen by the drafters of the relevant law); nevertheless, as long as the local government is actually the long arm of these forces or it acts under duress because of their visible presence, then this situation might be labeled as occupation.[37]

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[35] See Bruderlein C., 'Legal Aspects of Israel's Disengagement Plan under Humanitarian Law, Legal and Policy Brief', November 2004, Program on Humanitarian Policy and Conflict Research, Harvard University, p. 10, http://www.ihlresearch.org/opt/pdfs/briefing3466.pdf, 'A key aspect of the Nuremberg jurisprudence…is the recognition that the occupier's military evacuation from a given area within the territory it occupies does not necessarily signify the end of occupation for that area. Such evacuation does not relieve the occupier from its responsibility for the welfare of the occupied population living in the evacuated area, especially when this withdrawal is implemented solely as to limit the occupier's responsibility toward the occupied population while maintaining its security control over the evacuated territory by other means (i.e., encirclement, military control of airspace, etc.)'.

[36] UK Ministry of Defence, *op. cit.*, p. 276, par. 11.3.1.

[37] For Gasser H.P., *op.cit.*, p. 243, 'supremacy in the air does not fulfil the requirements of actual occupation'. See also Bruderlein C., *op.cit.*, p. 9: 'some form of military presence on land remains a necessary condition for an occupation, i.e. a military occupation cannot be solely imposed by the control of the national airspace by a foreign air force (e.g. no fly zone over Southern Iraq), or of the national seashore by a foreign navy. The law of occupation belongs historically to the law of land warfare which requires, at its core, a land-based security presence.' Nevertheless Scobbie I., 'Is Gaza still occupied territory?', *Forced Migration Review,* Vol. 26, 2006, p. 18, http://www.soas.ac.uk/research/our_research/projects/ lawpeacemideast/publications/, rightly comments that 'these Regulations were adopted before the first flight of the Wright brothers. Today, air power and aerial surveillance are paramount'.

II. Installation of authority over the territory

This is the second (and more important) element of military occupation, which is a matter of fact, first of all.[38] No official proclamation is needed to this extent; however such a proclamation will serve as a notification for the inhabitants of the territory. On the other hand a mere declaration or proclamation that possession has been taken, or that there is the intention to take possession does not suffice:[39] the occupation must be effective, therefore 'the legitimate authority must be unable to exercise its functions publicly in the occupying territory and the occupying power is in position to substitute its own authority for that of the former government'[40] (even if it actually avoids doing so[41]). Occupation does not cease if belligerent armed forces continue their advance, leaving only a few troops behind, so long as they have disarmed the inhabitants and made arrangements for the administration of the territory. However the authority of the Occupying Power should be represented by the presence of a commissioner or official.[42] The presence of isolated areas in which the sovereign's authority still functions does not affect the reality of occupation if those areas are effectively cut off from the rest of the occupied territory.

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[38] Also article 43 of the Hague Regulations '...the authority of the legitimate power having in fact passed into the hands of the occupant....'.

[39] Stone J., *op. cit.*, p. 696 and Office of the Judge Advocate General of Canada, *op. cit.*, par. 1203.2.

[40] *Prosecutor v. Naletilic and Martinovic, op.cit.*, par. 217.

[41] If the Occupying Power stays totally inactive, while remaining on the territory, it might be liable for breaches of occupation law. On the potential effective control test, which stresses the capability of belligerent forces to exercise effective powers of government (while the sovereign cannot), even if they actually do not, see Shavy Y., 'Faraway, so close: the legal status of Gaza after Israel's disengagement.' *Yearbook of International Humanitarian Law,* Vol. 8, 2005, pp. 369-383. The test should be read as a means to overcome the legalistic approach of a state that is actually present in an area for a certain time and avoids establishing its authority in order to evade the applicability of occupation law. It is not an implication of a 'duty' for the belligerent state to occupy once the lawful sovereign's administration is displaced or collapses, because the belligerent state could also simply withdraw from the area by continuing the invasion or retreating., Mastorodimos K., 'The current legal status of Gaza Strip: has the occupation ended?', *in* Frenkel D.A. & Gerner-Beuerle C. (ed.), *Challenges of the Law in a Permeable World*, Athens, Atiner, 2009, p. 229.

[42] UK Ministry of Defence, *op. cit.*, p. 277, par. 11.6.

The character of the authority as civil or military also does not differentiate the existence of occupation or not. The fact that the civilian authority depends on the presence of the armed forces for the exercise of its powers should be enough for the establishment of a military occupation and the subsequent application of occupation law.

The authority exercised by an occupying power is, as far as international law is concerned, a *de facto*, not a *de jure* authority. The law does not grant rights to the Occupying Power, but actually limits the occupant's exercise of its *de facto* powers.[43] In essence the Occupying Power undertakes the exercise of all the sovereign's functions, albeit in a limited manner. This could be inferred also by the basic assumption of the temporary character of military occupation. Nevertheless the recent experience with the occupation of Iraq is an evidence on the contrary, since the Occupying Powers have gone one step further from what is permitted by occupation law, breaching if not the letter at least the spirit of the relevant stipulations.

III. The army is hostile/ foreign

This element presupposes, in essence, the absence of any consent or acquiescence by the sovereign. However, consent is not a crucial point for the existence of an occupation, but rather for the character of the occupation (belligerent or not) and the extent of the applicability of occupation law. Simultaneously it implies the difference of nationality between the army and the inhabitants of the occupied territory, thus triggering the application of Geneva Convention IV. In the age of self-determination, sovereignty lies with the peoples and not the government and the state-centered approach of the Hague Regulations should be read under modern-day international humanitarian law, whose object and purpose is to protect the civilian population. The interpretation of hostile as foreign would trigger the direct applicability of the Hague Regulations in much the same conditions with the Geneva Conventions (and actually more, since co-belligerents, belligerents and neutral states will be treated alike). It will also offer an objective criterion on what

[43] Bothe M., *op. cit.*, p. 764.

hostile means. It would moreover render the division between wartime and peace occupations useful only for academic purposes. It would finally preclude imposed governments from giving their coerced consent to third states to occupy their national territory, while the latter would be barred from claiming a lawful intervention by invitation.

On the other hand this interpretation goes against the recent trend towards allegiance as a substitute for nationality. The consequences of the *Tadic* judgement[44] and its re- interpretation of the nationality criterion are not yet visible; in case that this standard prevails, although it seems that it doesn't, then a foreign army might not be considered to be hostile, at least for a part of the population. This has already happened in the past (Cyprus being one relevant example). Would that mean that the occupation is not belligerent, therefore the Hague Regulations do not apply as such and that the Geneva Conventions apply only to a limited number of persons whose allegiance lies with the sovereign?[45] What are the minimum rules to protect those who profess allegiance to the Occupying Power? The extra-territorial application of human rights treaties might offer a context for their protection (although states are generally reluctant to accept it).[46] otherwise, from a humanitarian point of view, this is an unacceptable consequence of an interpretation that sought to offer more protection instead of less. In light of this fact it is preferable to keep the condition of nationality, which is objective, instead of the subjective and difficult to discern element of allegiance. Nevertheless the occupation of a part of a state whose inhabitants share common ties and interests with the Occupying Power raises complex problems which probably cannot be solved in the long run solely by the withdrawal of the Occupying Power or the prolonged application of occupation law.

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[44] *Prosecutor v. Dusko Tadic*, IT-94-1-A, Appeals Chamber Judgement, 15 July 1999, par. 163-9.

[45] See also Kolb R., *op. cit.*, p. 313.

[46] For some of these reactions see Mastorodimos K., 'The utility and limits of human rights law and international humanitarian law's parallel applicability', *Review of International Law and Politics*, Vol. 5, No20, 2009, p. 135-6.

5. THE LEGAL FRAMEWORK FOR THE END OF OCCUPATION

The law of occupation does not provide for the temporal aspect or the way of terminating a military occupation. Therefore the assumption, which will be examined in length *infra*, is that a military occupation ends when the abovementioned essentials of a military occupation cease to exist. On the contrary the law of occupation contains a relevant provision regarding its applicability, thus creating a dichotomy between the actual end of occupation and the applicability of occupation law.

According to article 6 of Geneva Convention IV '[i]n the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations'. After that period, a limited list of provisions applies, to the extent that the Occupying Power exercises the functions of the government. The next paragraph of the same article is devoted to protected persons who continue to be covered by the Convention until their repatriation, release or re-establishment.

Apart from this discord, the duration of the occupation and the application of occupation law coincide. The Hague Regulations do not contain any comparable *clausula*. The provision of article 6 does not cover the no-hostilities situation of article 2.2[47]. Primarily, Additional Protocol I has corrected this situation through art. 3 (b) and the obvious statement that the Conventions cease to apply when the occupation is terminated, thus overriding the stipulation of article 6....., at least for its 169, so far, state-parties.

The provision of article 6 still creates a lively debate: Kolb calls it a legal anachronism[48] and Gasser refers to the need of its removal[49]. It has been

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[47] According to Pictet J.S., *op. cit.*, p. 63, '[it] does not say when the Convention will cease to apply in cases of occupation where there has been no military resistance, no state of war and no armed conflict. This omission appears to be deliberate and must be taken to mean that the Convention will be fully applicable in such cases, so long as the occupation lasts'.

[48] *Op. cit.*, p. 295.

[49] *Op. cit.*, p. 252.

advanced[50] that article 6.3 has been wholly superseded by the provision of the Protocol. The functional interpretation forwarded by Naftali is certainly interesting in this regard: 'It is unreasonable to assume that the drafters of the Convention intended for children to be deprived of proper schooling or for the population to be deprived of medical supplies and food in long-term occupations, as such as intention would defy the Convention's main impetus. The only reasonable conclusion, therefore, is that the working assumption behind Article 6 was that the situation of an occupation is bound to be relatively short and that responsibilities of this kind would be transferred to local authorities in a process leading to the end of the exceptional situation of occupation. The *travaux preparatoires* and the Commentary confirm this assumption. Once the assumption is challenged by reality, however, the rationale informing Article 6 disappears, and with it its applicability'.[51] Nevertheless the International Court of Justice in the *Palestinian Wall* did not endorse this interpretation.[52] Consequently this temporal restriction is still relevant for those states not parties to Additional Protocol I. Nevertheless the inapplicability of various articles after one year of the close of hostilities might not in itself mean much, in light of the continued application of human rights in times of armed conflict.[53]

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[50] Orna Ben-Naftali, *op. cit.*, p. 217, refers only to Israel's behaviour, a state that has all the right reasons to be interested in objecting to the extinction of art. 6.3, writing that 'while Israel indeed remains a persistent objector to some of the Protocol's provisions, this objection does not seem to extend to Article 3(b): The argument that Article 6 of the Fourth Geneva Convention limits the Convention's scope of applicability was never raised before Israeli Courts, and indeed the Israeli High Court of Justice had applied provisions that would have otherwise become inapplicable in light of the language of Article 6. This practice characterizes other prolonged occupations, thereby lending support to the proposition that Article 3(b) of Protocol I enjoys customary status'. Robert Kolb, *op. cit.*, p. 295, accepts that Israel has acquiesced in the inapplicability of this article, but he's generally reluctant to accept the universal inapplicability of it.

[51] *Idem*, p. 215.

[52] International Court of Justice, *op. cit.*, I.C.J. Reports 2004, p. 185. Also Dinstein Y., *op. cit.*, p. 43 and Wolfrum R., 'Iraq: from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference', *Max Planck Yearbook of United Nations Law*, Vol. 9, 2005, p. 7, deny that art. 3 (b) has become customary

[53] For some views on this subject see Mastorodimos K, *op. cit.*, note 46, p. 129-130.

Another important provision of occupation law, relevant to the termination of the law's applicability is article 47 of Geneva Convention IV. Thereby any change introduced, as the result of the occupation of a territory, into the institutions or government[54] of the said territory,[55] by any agreement concluded between the authorities of the occupied territories and the Occupying Power or by annexation of the whole or part of the occupied territory by the Occupying Power, shall not deprive protected persons from their benefits under the Convention.[56] In itself the article does not rule out the possibility of changes in the institutions etc. but it also does not recognize even implicitly the legality of such political changes.[57] Therefore, it is not possible to end the applicability of the law of occupation through the abovementioned means, even though it is accepted that generally States can deviate from the Hague Regulations and the Geneva Conventions.[58]

6. HOW (AND WHEN) DOES MILITARY OCCUPATION END?

A situation of military occupation is an anomaly to the system of international affairs. Sovereignty and territorial integrity of a state is disrupted, usually in the course of an armed conflict. At least one of the ingredients of a state, government is lacking. But the occupied Power is deprived neither of its statehood nor its sovereignty.[59] The re-instalment or the emergence of a sovereign, deemed to be

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[54] For relevant examples during the Second World War, see Mcdougal M. & Feliciano P., *The international law of war: transnational coercion and world public order*, New Haven, New Haven Press, 1994, p. 748 ff.

[55] Marek K., *Identity and continuity of states in public international law*, Geneva, Librairie Droz, 1968, p. 111-3, referred to a presumption of a puppet character in the case of governments and States which came into being under belligerent occupation.

[56] The provision is 'droit imperatif' according to Kolb R., *op. cit.*, p. 299.

[57] Benvenisti E., *op. cit.*, p. 100.

[58] See among others Feilchenfeld E.H., *op. cit.*, p. 108 and Ando N., *Surrender, Occupation, and Private Property in International Law: An Evaluation of US Practice in Japan,* Oxford, Clarendon Press, 1991, p. 80.

[59] Military occupation seems to be one exception when one of the criteria of statehood is lacking and the state still exists. As Harris D.J., *Cases and Materials on International Law,* London, Sweet & Maxwell, 1991, p.101, notes 'state practice suggests that the requirement of a stable political organization [government] in control of the territory does not apply during a civil war or where there is a collapse of law and order in a state that already exists'.

the lawful 'owner' of the territory and a representative of the people in the said territory, accepted or recognised by the international community, marks the end of military occupation.[60] The way and the time of the termination of occupation should coincide with the deficiency of the essentials of a military occupation, namely the presence of an army, actually placing the territory under its authority and the character of the army as hostile vis-à-vis the inhabitants and/ or the government of the occupied state. The importance of each element for the end of military occupation will be assessed successively.[61]

I. Absence of the army

A. Withdrawal of the army and loss of effective control mark the end of occupation

The classic manner for the termination of an occupation is 'when an occupant withdraws from a territory, or is driven out of it'.[62] In this case the presence of the army ends, voluntarily (unilateral withdrawal) or involuntarily (through the use of force by enemy forces or the inhabitants of the territory), and subsequently the army cannot (and does not) exercise authority over the territory.

In 2000 Israel unilaterally withdrew from southern Lebanon and its allies inside Lebanon dismantled. The territory that was abandoned by the Israel Defence Forces was taken over by paramilitary groups. This is a relevant paradigm of unilateral withdrawal and total loss of effective control over the (formerly) occupied

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[60] Alonzo-Maizlish D., *op. cit.*, p. 98, rightly asserts that the existence of the legitimate sovereign and the political approval by the international community is a process well beyond the scope of international humanitarian law, but remains an essential component on when humanitarian law ceases to apply. Also Lavoyer J.- P., *op. cit.*, p. 123, refers to international recognition by states of the United Nations which is likely to play an important role. See also Benvenisti E., *op. cit.*, p. 171, for cases that the law of occupation was superseded by arrangements receiving the endorsement of the indigenous population.

[61] However, it is impossible at large to isolate each of the ingredients of military occupation without taking each other into consideration.

[62] Lauterpacht H. (ed.), *op. cit.*, p. 436.

territory. The carrier of effective control is not an issue, as long as the occupying state is not in this position any more.

In the cases of involuntary withdrawal, the structures of authority instituted by the former Occupying Power will be substituted by the armed forces which take over, leading to the termination of military occupation. An example of involuntary withdrawal of the Occupying Power's forces is the ousting of Egypt from the Gaza Strip in 1967 by Israel, although this actually meant the substitution of an Occupying Power by another Occupying Power. On the other hand it is more difficult for the inhabitants of the occupied territory alone to drive away the regular army of the Occupying Power. Usually the involuntary withdrawal of the latter will be a combination of factors one of which is the uprising of the inhabitants of the occupied territory.

B. Withdrawal of the army while effective control continues (necessarily through a local government) does not end occupation

Despite the fact that the absence of the army is the most visible sign of an ending occupation, it is necessary, especially (if not exclusively) in cases of consenting withdrawal, to examine simultaneously whether the carrier of authority in the territory is free from the influence of the withdrawing army and its government in order to affirm that the occupation has ended. After all article 47 of Geneva Convention IV envisages a situation where the authority is not exercised by the Occupying Power itself, although the drafters of the Convention probably did not have in mind an occupation without the presence of a foreign army. In this regard it is easier to argue in favour of the continuity of occupation when the local government was appointed and acts according to the instructions and the wishes of the Occupying Power; conversely it is difficult to prove the link when there is no obvious connection between the local government and the withdrawing Occupying Power.

There are several examples where the Occupying Power has imposed miscellaneous measures on how the territory should be governed after the

withdrawal of its armed forces. Provided that control of the indigenous government is effective,[63] then the military occupation continues, despite the absence of the army.

The occupation of Grenada[64] by US and other Caribbean countries is relatively illustrative, although the facts available are, as usual, not many in order to reach safe conclusions. As Benvenisti wrote 'in three days the force gained control over the island. Subsequently, a new government was appointed to replace the existing institutions. By mid-December, after the appointment of that government, the bulk of the U.S. forces left Grenada, leaving behind about 240 U.S. military personnel, as well as Jamaican and Barbadian forces, to serve as the interim police force of the country'[65].

This military force is probably insufficient in itself to exercise the degree of effective control that is needed for the existence of a military occupation. But the Grenadan governor- general re-instated the Constitution only in November 1984 and elections were held on December of the same year. These elections were premeditated since 'some factors that helped one of the parties to gain "tremendous advantage" during the campaign, and consequently led to its clear victory (these factors included massive foreign financing of the campaign and the detention of the leaders of the leftist party)'.[66] In this case the minimum existence of armed forces of the Occupying Power in the territory might not be the decisive factor for the end of occupation, if other measures were taken (financial aid, agreements, the existence

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[63] Whether the effective control test of the ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, par. 115, or the overall control test of ICTY, *Prosecutor* v. *Tadic*, *op. cit.*, par. 84, is the right standard is debatable. Considering that the end of occupation is mostly an international humanitarian law issue, it might be argued that the overall control test is more appropriate.

[64] It is of course contested by American writers that there was a period of occupation in the island, with little exceptions such as Franck T., 'When, if Ever, May States Deploy Military Force without Prior Security Council Authorisation', *Singapore Journal of International & Comparative Law*, Vol. 4, 2000, p. 372.

[65] *Op. cit.*, p. 168.

[66] *Idem*, p. 169. See also Hardt B., 'Grenada Reconsidered', *Fletcher Forum of World Affairs*, Vol. 11, 1987, 304-5 about the financial aid to the Grenada indigenous government.

of a liaison who instructs the indigenous government etc.) which evidence the firm and effective control of government in the territory.[67]

C. *Can the occupation continue despite the withdrawal of the army and the existence of an unfriendly indigenous government?*

It is difficult to assert that in such a situation the occupation continues. However there might be a situation when due to several internal and external factors the local government acts under duress and is unable (or unwilling) to take decisions which are not favourable to the Occupying Power, especially if the latter governs the territory through ultimatums and has (or has shown) the physical ability at any time and with the least resistance to make its will felt upon the country. Occupation by air or naval forces would also fall under this heading, since it is not occupation proper. As already mentioned these are borderline cases and they rarely represent realities on the ground.

The withdrawal of Israel from Gaza Strip constitutes a relevant case study. The disengagement plan was not based on any agreement between Israel and Palestine (unlike the Oslo accords); rather it was a unilateral act of Israel. Among several points of this plan[68] one could read: a) Israel will .....redeploy outside the Strip, with the exception of the area of the border between the Gaza Strip and Egypt ("the Philadelphi Road"),[69] . b) Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces or Israeli civilians, c) Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to

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[67] Other examples when the Occupying Power continued to have major influence towards the indigenous government despite the absence of armed forces are the cases of Czechoslovakia (by the then U.S.S.R.) and Panama (by the U.S.A.), see Benvenisti E., *op. cit.*, p. 160-3 and 171-3, Korman S., *op. cit.*, p. 233 and Roberts A., *op. cit.*, p. 276, 284 and 288.

[68] Over-All Concept of the Disengagement Plan, 15 April 2004, http://www.pmo.gov.il/PMOEng/Communication/DisengagemePlan/DisengagementPlan.htm.

[69] This point of the disengagement plan was abrogated by the subsequent Agreement on Movement and Access, 15 November 2005.

exercise security activity in the sea off the coast of the Gaza Strip, d) The Gaza Strip shall be demilitarized and shall be devoid of weaponry, the presence of which does not accord with the Israeli-Palestinian agreements, e) No foreign security presence may enter the Gaza Strip or the West Bank without being coordinated with and approved by Israel.

According to these selected elements of the disengagement plan, the degree of control continues to be firm. While Israel has certainly the right to monitor the external perimeter of the Strip, where the borders of Israel are, it is difficult to reconcile the end of occupation with the exclusive authority over Gaza's air space,[70] the exercise of security activity in the sea which is not its own territorial waters, the demilitarization of the Strip[71] (even for self-defence purposes?) and the previous accord of Israel to a foreign military presence in an area which is neither its own nor occupied (according to the Israelis). Israel has also retained the right to enter at will into the same area (which has happened in numerous times). The military superiority of the Israeli armed forces over any armed elements of the Palestinians secures the easy re-deployment of the former in the territory.[72] The control of basic infrastructure and generally the heavy dependence of the economy of the said area from Israel points towards the continuity of effective control over the area regardless of the evacuation by the armed forces.[73] Nevertheless there are several points that negate the applicability of occupation law. Firstly, Israel seems unable to control, actually or potentially, or even influence the regime governing the Strip. Secondly, some points of the disengagement plan only repeat stipulations

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[70] In light of the fact that the Palestinians do not have any air power combined with the overwhelming technological supremacy of Israel, this control gives a definite advantage into monitoring and potentially controlling actions on the ground, Mastorodimos K., *op. cit*, note 41, p. 225.

[71] It is not obvious, unlike the Oslo Accords, whether Israel retains the responsibility for the external security of the Strip. If not, then the capacity of the Palestinian Authority to exercise a defensive function is denied, see *idem*.

[72] *Ibidem.*

[73] Human Rights Watch Press Release, 'Israel: 'Disengagement' Will Not End Gaza Occupation', New York, 29 October 2004, http://hrw.org/english/docs/2004/10/29/isrlpa9577.htm. See also Stephanopoulos N., 'Israel's legal obligations to Gaza after the pullout', *Yale Journal of International Law*, Vol. 31, 2006, p. 524. Bruderlein C., *op. cit.*, is reluctant to accept either the end or the continuance of the occupation.

of the Oslo Accords or subsequent agreements.[74] Lastly the applicability of occupation law would lead to some absurd results, such as the 'obligation' to retain public order in the territory. In fact it seems that responsibility of Israel should lie in other provisions of humanitarian law (and/or human rights), rather than the stipulations of military occupation law.

II. Loss of authority over the occupied territory

Although the withdrawal of foreign armed forces is a *prima facie* proof and the most obvious indication that the occupation ends, it is also necessary to assess whether, simultaneously, effective control over the territory is waved away. While the army is almost exclusively the means for the realization of control over a territory (at least in the initial stages), the loss of effective control is the decisive factor for the termination of occupation. This is a question of fact, but international recognition of the termination of occupation, in particular by the UN Security Council, may be an indicator.[75]

A. The occupied territory becomes a combat zone and the Occupying Power cannot exercise effective control

This is the (factual) case when another army enters into the occupied territory or local resistance is widespread and the Occupying Power is unable to exercise effective control over the territory. In the words of the UK Manual 'whether or not a rebel movement has successfully terminated an occupation is a question of fact and degree depending on, for example, the extent of the area controlled by the movement and the length of time involved, the intensity of the operations and the extent to which the movement is internationally recognized'.[76]

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[74] See Mastorodimos K., *op. cit*, note 41, p. 229.

[75] Zwanenburg M., 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', *International Review of the Red Cross*, Vol. 86, 2004, p. 753.

[76] UK Ministry of Defence, *op. cit.*, p. 277, par. 11.7.1.

More or less the same criteria (but not on the same degree) are important when fighting between two armies take place. In this situation and despite the presence of foreign armed forces the law of occupation does not apply, but for its provisions that should be respected at all times (respect for family honour, prohibition of ill-treatment etc.),[77] along with the rules on the conduct of hostilities.

The combat situation, however, cannot last indefinitely. Either the Occupying Power will prevail and restore its authority or it will be defeated and the sovereign, another state or an armed group will take over. In the area of the former Yugoslavia there were constant changes and sometimes effective control over territory would change overnight.

B. The conclusion of a peace treaty (or other agreement) ends the occupation as long as effective control is transferred away from the Occupying Power

It is widely considered that the conclusion of a peace treaty between the sovereign and the Occupying Power is the safest formal means for the termination of occupation.[78] A peace treaty does not fall within the ambit of an 'agreement',[79] as in articles 7 and 47 of Geneva Convention IV (whereas armistice/ disengagement agreements do). The application of the Geneva Convention would be predicated through article 6 and not article 47.[80]

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[77] See above, note 30.

[78] Von Glahn G., *op. cit.*, note 10, p. 804.

[79] Pictet J.S., *op. cit.*, p. 67-8 and 274. He also comments, on p. 68, that 'special agreements would not appear to be subject to formal requirements, such as signature and ratification, which are essential in the case of international treaties. They clearly fall into the category of conventions in simplified form'.

[80] In this regard it is awkward to acknowledge that on the one hand a 'treaty' on the temporary stationing of troops between the Occupying Power and the authorities of the occupied state would be covered from art. 47 (therefore the Convention continues to operate and occupation continues); on the other hand if the same provisions are included in the peace treaty or the stationing of troops treaty is concluded immediately after the peace treaty, then the application of occupation law (and the existence of occupation) has already ceased, therefore the same regulation is not covered at all by art. 47. According to Roberts A., *op. cit.*, p. 288, 'it may well be the case in particular instances that such agreements limit the role of foreign forces so stringently that many

However it is necessary to examine several points related to a peace treaty in order to affirm that the occupation has ended: I) is it valid under the Vienna Convention on the Law of Treaties[81] (and especially art. 52), II) does the text of the treaty fulfil the criteria for the termination of occupation and does the reality on the ground reflect its text?

I) Article 52 of the Vienna Convention provides for the nullity of a treaty if 'threat or use of force in violation of the principles of the Charter of the United Nations' had been used in order to extract the consent of one of the parties[82]. The commentary of the International Law Commission[83] makes it quite clear that peace treaties are one category which is prone to be void.[84] This provision forces us to examine the legality of used force (a *ius ad bellum* issue) and the lawfulness of occupation in order to rule over the termination of occupation.[85] Since there is no central organ which would make at all

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of the potential points of friction between the inhabitants and the occupant, which are addressed in the law of occupation, are unlikely to arise in practice'. Still, the differentiation of the regulation of the same subject in such variant manner is a further reason why the validity of the peace treaty should be examined carefully.

81 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations, Treaty Series, Vol. 1155, p. 331

82 This provision is an expression of the principle '*ex injuria jus non oritur*'.

83 U.N. Doc. A/6309/Rev.1 (F), Draft Articles on the Law of Treaties with commentaries, Report of the International Law Commission to the General Assembly, p. 247.

84 Peace treaties are also not open to denunciation, *idem,* p. 250. See also the concern of the U.S. government that 'the validity of a large number of treaties, notably peace treaties, might be thrown into question' if this principle would apply retroactively, U.N. Doc. A/CN.4/177 and Add.1-4, Fifth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, p. 16. See also the comment of the Swedish Government, U.N. Doc.A/CN.4/182 and Corr.1&2 and Add.1, 2/Rev.1 & 3 Law of Treaties: Comments by Governments on the draft articles on the law of treaties drawn up by the Commission at its fourteenth, fifteenth and sixteenth session, p. 340, admitting that 'as the international community is not equipped with an organization capable of ensuring peaceful change and effectively implementing its decisions, treaties may continue to be made—armistices, peace settlements and others—in contravention of legal principles, and yet continue to be upheld and gradually—like past peace treaties—even become an element of stability'.

85 This contravenes the basic rule that the law on the use of force and humanitarian law function independently of each other. See Stone J., *op. cit.*, p. 695.

times such a distinction, the position of the international community through the U.N. or regional organizations acquires particular significance.[86] To the extent that occupation is a flaw in peaceful co-existence of states, it is probable that any treaty which terminates an occupation would attract the approbation of states, if not the endorsement of the U.N., provided that its content does not breach in itself any international law rules.

As a matter of law, any treaty which was concluded as a result of an illegal use of force would be void *ab initio*. However a peace treaty which terminates occupation would represent a return to the *status quo ante*, and therefore, it would hardly be a treaty that furthers the results of the illegal use of force. On the contrary it would constitute a form of restitution (article 35 of the Draft Articles on State Responsibility[87]), which is an obligation of the state which has committed an internationally wrongful act. Consequently, the peace treaty would be valid, unless it contains some kind of a concession to the occupying power (eg. cession of a part of the occupied territory), in which case the whole treaty would be void, since separability of its provisions is impossible (art. 44.5 of Vienna Convention on the Law of Treaties).

In the event of a void peace treaty envisaging the withdrawal of the occupying power, which, subsequently, is followed by its application in practice, occupation will cease. The reason, of course, would not be the treaty itself but the fact that the former occupying state does not exercise authority anymore. In the event of a cession of territory to the occupying power, this territory will continue to be considered as occupied, since the treaty cannot validate the fact. The only exception would be if there is widespread acceptance and recognition of the cession by the international community (eg. for reasons of self-determination), in which case the law of occupation might be considered as irrelevant.

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[86] For several such pronouncements see Ronen Y., 'Illegal Occupation and its Consequences', *Israel Law Review*, Vol. 41, 2008, p. 213 ff.

[87] Annex to General Assembly resolution 56/83 of 12 December 2001, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

On the other hand a treaty of peace after a lawful use of force (and a lawful occupation) does not have to pass through the gates of article 52, as long as 'a treaty provision imposed upon an aggressor State [is] in conformity with the [UN] Charter'.[88] Consequently what matters is the content of the treaty and whether this is in conformity with the Charter. (i.e. territorial acquisition is not[89]). This could change though if during the occupation, the Occupying Power resorts to some kind of threat or use of force which is not in conformity with the U.N. Charter.

In the light of the above, a peace treaty which is concluded with the genuine consent of the authorities of the occupied territory, in case of an unlawful occupation, and for the purpose of terminating the occupation is not subject to article 52 of the Vienna Convention. However it is necessary to examine the whole text of the peace treaty in the light of the provisions of the Vienna Convention and the principles of the UN Charter.

II) After reviewing the validity of the peace treaty (including the validity of consent and the ability of the representative to conclude a treaty), the text of the treaty should be read in order to examine the fulfilment of the criteria for the termination of occupation (at least loss of effective control and secondarily

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[88] In the words of the International Law Commission, Draft Articles on the Law of Treaties with commentaries, *op. cit.*, p. 227, 'A treaty provision imposed upon an aggressor State in conformity with the Charter would not run counter to the principle in article [52]..... The Commission decided by a majority vote to include in the draft a separate article containing a general reservation in regard to any obligation in relation to a treaty which arises for an aggressor State in consequence of measures taken in conformity with the Charter. The text of this reservation is in article [75]'.

[89] For Gerson A., 'War, Conquered Territory, and Military Occupation in the Contemporary International Legal System', *Harvard International Law Journal*, Vol. 18, 1977, p. 556, territorial acquisitions by the aggressed state are within the limits of legality. However Korman S., *op. cit.*, p. 232-3 is right in asserting that an imposed peace treaty leading to territorial changes would infringe article 75, because it is not a measure taken in conformity with the Charter of the United Nations (notably article 2.4). One can come to the same conclusion directly from art. 52 (threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.) by the disproportional effect between the acquisition of the territory and the limited purpose of self-defence, which is to repeal the attack.

withdrawal of the army). It should be recalled that a peace treaty terminates the state of war; and that occupation does not necessarily follow the same fate. Moreover, review of the treaty's implementation is equally necessary in order to come to a conclusion that military occupation has ended.

Peace treaties, however, are mostly a practice of the past than present. The treaties signed with the past Axis Powers (such as the San Francisco peace treaty of the 8th of September 1951 with Japan)[90] were extremely harsh and they might have been considered unacceptable and null under international law nowadays. However at the time of their conclusion the norm of article 52 was not a treaty rule, while its customary law status is debatable. Taking into account that the doctrine of *debellatio*[91] was considered back then as a norm of international law- even though the victors of World War II did not follow this path- the validity of the peace treaties should be weighted accordingly and subsequent practice shows a more balanced approach leading to less leonine treaties.

With the US-brokered peace treaty between Egypt and Israel in 1979,[92] the state of war was terminated, Israel undertook to withdraw (in phases) all its armed forces and civilians from Sinai and Egypt's full sovereignty in the area would resume (art. I). Annex I (and its Appendix) provided for the details of the withdrawal as well as security arrangements about the armed forces of each state party allowed to be in the four zones provided for in the treaty (only one in the territory of Israel). In the zone next to the boundary only Egyptian civil police was allowed to remain and overflight of combat and reconnaissance planes was prohibited but in one zone for each respective party. An international lightly armed force carried out certain of the verification functions provided for in the treaty. By 1982 and within schedule, the Israelis

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[90] For the text of the treaty see http://www.taiwandocuments.org/sanfrancisco01.htm. For a Soviet view of this treaty see Kulski W.W., 'Soviet Comments on International Law and Relation', *American Journal of International Law,* Vol. 48, 1954, p. 642.

[91] See below, part 6.III.B.

[92] Treaty of Peace between the Arab Republic of Egypt and the State of Israel, Washington, 26 March 1979, *International Legal Materials*, Vol. 18, 1979, pp. 363- 393.

evacuated the Sinai Peninsula and effective control of Egypt resumed. Between the conclusion of the treaty and its practical full implementation, Israel continued to be the occupying power. This peace treaty did not contain any stipulations with regard to the Gaza Strip (which was under Egyptian military administration before the 1967 war[93]). And since Israel retained effective control over the territory, the occupation did not (and could not) end, regardless of the repudiation of the state of war between the parties.[94]

In the light of the above, the relevance and value of peace treaties with regard to the termination of occupation should not be overestimated. What matters mostly is not the text of treaty but the factual situation on the ground. If the implementation of the treaty is not immediate, but on phases, the occupation continues, although the applicability of occupation law might be limited to the extent that the occupation is considered as a peaceful one. The possibility of armed forces of the former Occupying Power remaining on the spot as visiting forces (through the peace treaty or a subsequent agreement) does not resume occupation, provided that the tasks of these visiting forces are limited and confined and as long as they do not interfere with the functions of the sovereign. It is not inconceivable however that such a treaty might be considered as null and void.

C. Does a Security Council resolution end the occupation?

The organ with the primary responsibility for the maintenance of international peace and security, the Security Council of the UN, takes up several decisions in this regard. Provided that its decisions fall under chapter VII of the UN Charter, they are binding on member states, as well as on every state of the international

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[93] For more information see Dinstein Y., *op. cit.*, p. 40 and Glahn G., *op. cit.*, note 10, p. 771.

[94] See also Benvenisti E., *op. cit.*, p. 111. It is also not possible to claim that the occupation was turned into a peaceful in the place of belligerent, because Egypt was not the sovereign. But even if it was, it would be difficult to reconcile the powers and functions of the sovereign (which is not a failed state) with its agreement on the continuation of an occupation/ suspension of its sovereignty. For an opposite view see Kelly M.J., 'Non-belligerent occupation', *Israel Yearbook on Human Rights*, Vol. 28, 1998, p. 33-4.

community. The examination of the minimal international practice will clarify the Security Council powers with regard to occupation.

In the Iraqi case the Security Council, acting under chapter VII, adopted resolution 1546/ 2005. In its operative par. 2 the Council welcomed that 'by 30 June 2004, the occupation will end'. This resolution caused a great deal of controversy, whether it reflected the reality on the ground or not.

In the case at hand, the governmental authority was actually undertaken by the Iraqi Interim Government and the Coalition Provisional Authority stopped exercising its functions. However the formation of Iraqi Interim Government seemed to be the outcome 'of the combined work of the Coalition Provisional Authority and the CPA-appointed Iraqi Governing Council'.[95] This fact represents exactly the rationale behind art. 47 of Geneva Convention IV: the occupying power cannot appoint a new government in order to relieve itself from its duties under the relevant Convention.

Despite the (potential) applicability of article 47, it seems that none of the members of the Security Council opposed the formation of the Iraqi Interim Government on grounds of legality or legitimacy. While the General Assembly is the representative forum of the world community, the endorsement by the Security Council (par. 1 of the resolution) is an act of major importance and represents a sort of massive

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[95] Carcano A., 'End of the Occupation in 2004? The status of the multinational force in Iraq after the transfer of sovereignty to the Interim Iraqi Government', *Journal of Conflict & Security Law,* Vol. 11, 2006, p. 50. The preamble of the resolution refers to the efforts of assistance of the Special Adviser to the Secretary General to this end. However, according to Roberts A., 'The end of occupation: Iraq 2004', *The International and Comparative Law Quarterly,* Vol. 54, 2005, p. 37, the Special Adviser was effectively sidelined by the Coalition- appointed Iraqi Governing Council. And Sassòli M., 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', *The European Journal of International Law,* Vol. 16, 2005, p. 683-4: the US had an important word to say on its composition, the new Prime Minister has a long record of US connections, before the elections held in January 2005 the Government could not yet possibly be considered as democratically legitimated, and, finally, it is very doubtful whether it has greater control over the reality in Iraq than the US and its coalition partners have.

recognition of a fact/situation.[96] Subsequent events also reveal that several governments followed the example of the Security Council,[97] detracting article 47 of its normative content and actually bypassing the provisions of occupation law.

It is more doubtful whether the Iraqi Interim Government bore any internal legitimacy.[98] At first it was not elected but appointed. It didn't have the support of the Sunni community; the majority Shiite community was moderately tolerant and only the Kurds clearly embraced the new government. Violence against this government (and even the elected governments that followed) was particularly fierce.

With regard to the functions of a sovereign government, the Iraqi Interim Government could not: a) Exercise its policing and external security (army) functions. This is evident from par. 8 of the resolution, which 'w*elcomes* ongoing efforts by the incoming Interim Government of Iraq to develop Iraqi security forces including the Iraqi armed forces'.[99] After all the mandate of the Multi-National Force (par. 10) is to 'contribute to the maintenance of security and stability', which is actually one of the main duties of an Occupying Power according to article 43 of the Hague Regulations. b) regulate its export sales of petroleum, petroleum products, and natural gas; the International Advisory and Monitoring Board retained responsibility (par. 24 of 1546/2004 and par. 20 of 1483/2003 resolution). Moreover the Oil-for-Food Programme (which represents another lacuna in the sovereignty of Iraq) would continue to function (par. 25 of 1546/2004), c) legislate freely, since all Coalition Provisional Authority norms would remain in force[100] and it would be able to control the normative order of Iraq after

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[96] 'When the Security Council—*the* institutional epitome of *jus ad bellum*—qualifies territory as occupied or views the law of occupation as applicable thereto, such determinations are not challenged', GILADI R., 'The Jus Ad Bellum/Jus In Bello Distinction and the Law of Occupation', *Israel Law Review*, Vol. 41, 2008, p. 286.

[97] See Carcano A., *op. cit.*, p. 48-9, for subsequent to the resolution acts which equal to recognition of the government.

[98] As could be shown by the results of the elections in the beginning of 2005, it didn't.

[99] See also the letter by the Iraqi Prime Minister, in the annex of the resolution.

[100] It is notable also that the lasts days of the Coalition Provisional Authority, the latter passed several legislative acts specifically addressed to the post-occupation period, see Fox G. H., 'The occupation of Iraq', *Georgetown Journal of International Law,* Vol. 36, 2005, p. 227-8.

the elaboration and adoption of the Iraqi Constitution.[101] Moreover par. 1 of the resolution contained a general clause on the powers of the Iraqi Interim Government, which should refrain from taking any actions affecting Iraq's destiny beyond the limited interim period.

Concerning the question of withdrawal of the Occupying Power's army, in the 30th of June the army was renamed into a Multi-National Force, whose presence was authorized by the Security Council and consented by the Iraqi Interim Government.[102] Manned with 140.000 troops the Multi-National Force exercised the same functions as before (when it was an army of occupation[103]), *by taking all necessary measures*. Although in the past occupation forces remained on the spot after the termination of an occupation (Japan and Germany), their functions were strictly confined to external security purposes, unlike the Multi-National Force which exercised a double role. In these previous examples security treaties were concluded between the Occupying Power and the authorities of the occupied territory. In Iraq there was no Status of Forces Agreement; only an edict from the head of the Coalition Provisional Authority granting immunity to all foreign troops in Iraq.[104]

As to the degree of control exercised by the Iraqi Interim Government to the Multi-National Force, there was none. Par. 11 of the resolution refers to '... a security partnership between the sovereign Government of Iraq and the multinational force ... the Government of Iraq has authority to commit Iraqi security

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[101] *Idem,* p. 212 and Wolfrum R., *op. cit,* p. 41-2.

[102] It has been argued that the consent was invalid since it was given prior to the Iraqi Interim Government coming into office. But even if invalid, it is the Security Council resolution that matters (in par. 9 the Council 'reaffirmed the authorization for the multinational force...'). And it is the Security Council who decides at the mandate of the Multi-National Force (par. 12)

[103] Note that according to US Secretary's of State letter annexed to 1564/2004 the activities of the Multi-National Force would include '....internment for imperative reasons of security...', a task belonging to an Occupying Power!

[104] The status of forces agreement ('Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq) between Iraq and the United States became applicable in late 2008.

forces to the multinational force to engage in operations with it' - and not vice versa. It is even more doubtful whether this paragraph (as well as all those who refer to the Government of Iraq and not explicitly the Iraqi Interim Government) is pertinent for Iraqi Interim Government at all or whether it refers to the future elected government; if this assumption holds true, then the Iraqi Interim Government does not have the power to ask neither for review of the mandate nor for its withdrawal.[105] And even at that time (2004) it was obvious that it would be suicidal for the Iraqi Interim Government to ask for the withdrawal of the Multi-National Force.

In light of the above it is almost obvious that the Iraqi Government could not exercise much of the governmental functions of a sovereign barred either by the prevailing insurgency or by the resolution. Moreover it could not exercise any degree of control (or review) over the Multi-National Force, which was mandated by the Security Council to use all necessary means for fulfilling its tasks.[106] And while the second flaw in the Iraqi sovereignty can be reconciled with the powers of the Security Council under chapter VII of the Charter, it is difficult to accept that the Iraqi Interim Government represents something more than an appointed government, which was, nevertheless, internationally endorsed and recognized. The government could only legislate, albeit in a limited manner, and exercise some administrative powers, subject to the limitations of the security situation. Otherwise it was heavily dependent on the Multi-National Force and other states and institutions which contributed to the reconstruction efforts. Is it possible to overcome these flaws only on the ground that the Security Council has endorsed, under chapter VII, the end of occupation and the re-emergence of the sovereign?

The answer offered by state practice and the majority of doctrinal writing is positive.[107] The Security Council, when acting under chapter VII, does not have

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[105] Sassòli M., *op. cit.*, p. 683: 'All Resolution 1546 foresees is that the 'mandate for the multinational force shall be reviewed at the request of the Government of Iraq'.

[106] If consent by the Iraqi Interim Government was undeniably valid, then there would not be a need for an express authorization to use all necessary means.

[107] It seems that the majority of American commentators take as granted that a Security Council resolution will prevail over occupation law (which is above all a treaty obligation for state parties) without even offering the slightest explanation. Sassòli M., *op. cit.*, p.

to abide by all rules and principles of international law.[108] Article 103 of the UN Charter places member states under an obligation to implement their Charter obligations, including Security Council resolutions, to the detriment of their treaty obligations; therefore a resolution creates a sort of *erga omnes* obligations. Customary obligations of states are also subordinated to Charter obligations through the general clause of article 25 of the UN Charter.[109] On the other hand *jus cogens* rules, which constitute the top of the pyramid in the hierarchy of international sources, would probably bar any opposing Security Council resolution.[110] But two serious problems are raised: one has to do with who could make a binding determination that a resolution violates *ius cogens*. The second with the determination of which rules (not only of international humanitarian law but specifically of occupation law) are *ius cogens*:[111] many sources refer to

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684 accepts the end of occupation, although he contends that the factual situation does not support the position of the Security Council. Doermann K. & Colassis L., 'International Humanitarian Law in the Iraq Conflict', *German Yearbook of International Law*, Vol. 47, 2004, p. 311, are reluctant to accept the end of occupation on the ground of art. 103, but they concur that the situation on the ground might actually indicate that effective control by the Occupying Power is non-existent.

[108] The *travaux preparatoires* confirm this position, Zwanenburg M., *op. cit.*, p. 760. That however does not mean that the Security Council is unbound by any law, as an Appeals Chamber in ICTY explains, *Prosecutor v. Dusko Tadic*, IT-94-1-A, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 28.

[109] Zwanenburg M., *idem.*, p. 761, with further references.

[110] See Separate Opinion of Judge Lauterpacht in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, Order of 13 September 1993*, International Court of Justice, par. 100–104.

[111] Bassiouni M.C., 'International Crimes: jus cogens and obligation erga omnes', *Law& Contemporary Problems*, Vol. 59, 1996, p. 67, discusses this problem, although in a limited context: 'Scholars, however, disagree as to what constitutes a peremptory norm and how a given norm rises to that level. The basic reasons for this disagreement are the significant differences in philosophical premises and methodologies of the views of scholarly protagonists. These differences apply to sources, content (the positive or norm-creating elements), evidentiary elements (such as whether universality is appropriate or less will suffice), and value-oriented goals (for example, preservation of world order and safeguarding of fundamental human rights). Furthermore, there is no scholarly consensus on the methods by which to ascertain the existence of a peremptory norm, nor to assess its significance or determine its content. Scholars also disagree as to the means to identify the elements of a peremptory norm, to determine its priority over other competing or conflicting norms or principles, to assess the significance and

humanitarian rules of a peremptory character,[112] but only rarely do they refer to specific rules.[113] It is doubtful whether the law of military occupation (apart from some substantive rules, such as the prohibition of torture) has acquired that status. However the abrogation of occupation law by the Security Council does not relieve all relevant actors on the ground from their responsibilities under human rights or international criminal law.

The end of occupation with this resolution seems, also, to blur the distinction between *jus ad bellum* and *jus in bello*, insofar as the focus of the analysis does not lay on whether effective control exists, but if the resolution legitimizes the end of the applicability of occupation law, leading thus to the discriminatory (in)application of humanitarian law.[114] The situation which was created by the resolution represents a mixture of an authorized by the Security Council mission (short of a transitional administration) and a national government with diminished powers (short of sovereign), creating thus a temporary vacuum of responsibility.

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outcomes of prior application, and to gauge its future applicability in light of the value-oriented goals sought to be achieved'.

[112] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, International Court of Justice, par. 157, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 284, Sassòli M., *op. cit.*, p. 681 and Doermann K. & Colassis L., op. *cit.*, p. 311. Note also that treaties of a humanitarian character are not subject to termination or suspension of their operation as a consequence of its breach (article 60.5 of the Vienna Convention on the Law of Treaties).

[113] ICTY has referred in *Prosecutor v Kupreskic*, IT-95–16-T, Trial Chamber Judgment, 14 January 2000, par. 520, to 'most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character". See also *Prosecutor v. Anto Furudzija*, IT-95-17/1-T, Trial Chamber Decision, 10 December 1998, par. 144 and *Prosecutor v. Z. Delalic, IT*-96-21-T, Trial Chamber Judgement, 16 November 1998, par. 454, referring to the *jus cogens* character of the prohibition of torture.

[114] To the words of Sassòli M., *op. cit.*, p. 684: It is nevertheless regrettable and a dangerous precedent to make thus the (end of) the application of IHL dependent on criteria which are at best related to the desired legitimacy of the new government and at worst to the needs of a US administration in an election year, as both considerations blur the fundamental separation between *jus ad bellum* (the rules on the legitimacy of the use of force) and *jus in bello* (the rules on how force may be used, which comprise IHL).

An attractive perspective was offered by M.J. Kelly[115] who suggested that 'the presence of the troops was in effect, an occupation *pacifica* or an occupation regulated by the terms of the Security Council resolution and the consent and agreement of the sovereign'. This would provide a meaning on the functions of the Multinational Force who could undertake 'all necessary measures', which are to be in accordance with the rules and principles contained in occupation law; as Kelly continues 'the commander could apply a Geneva Convention IV type framework to security operations as matter of policy..'. However it is difficult to reconcile this assertion with the text of the resolution, which foresees the end of occupation.

In sum, although a Security Council resolution might be the most authoritative expression of the position of the international community on a subject and the most formal means to terminate the occupation, if it does not reflect the facts, it adds to already existing problems. Since states are ultimately under an obligation to abide by a Security Council resolution, it is probably the only legal act which prevails over factual situations.

III. The (foreign) army ceases to be hostile

The lack of the third element of military occupation would mean that either the sovereign consents or acquiesces to the presence of the foreign army or that the foreign army shares some ties with the population of the territory (even if hostile to the government).

A. The role of consent by the sovereign

In the current international world order the state still remains the basic actor; therefore its consent is an important factor in international law processes. Consent of the occupied state is crucial in the treaty- process (with regard to peace treaties),

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[115] *Op. cit.*, note 14, p. 163.

but it does not necessarily imply that the occupation ceases,[116] although it might transform the legal grounds of it. Especially the applicability of Geneva Convention IV is likely to be severely restricted since under article 4.2 nationals of co-belligerents would not qualify as protected persons. However if there is no existing agreement or treaty on how this kind of occupation should be handled or the treaty is silent, then the law on military occupation (notably the Hague Regulations) takes over, by analogy.[117] The powers of the Occupying Power are prone to be restricted, since the 'the occupant was always operating under the imperative of facilitating the restoration of...lawful sovereignty'.[118] In sum the consent of the sovereign is an important factor to determine the end of occupation but it is by no means the crucial one.

Policy reasons might also favour our reasoning that governmental consent is not necessarily the decisive factor. In those cases that the consent for occupation comes from an imposed government, it would be a mockery of the law to evade responsibility on the pretext of a lawful invitation. Article 47 of Geneva Convention IV would not be applicable in principle, because intervention by invitation precludes its applicability. In order to avoid the formal inapplicability of occupation law, it will be necessary to interpret 'hostile' as synonymous to 'foreign' army. Otherwise, technically there will never be a military occupation in the first place.[119] The situation in Afghanistan in the 1980s is telling of such an example; fortunately the international community of states overwhelmingly condemned the presence of the then USSR

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[116] Opposite Bothe M., 'Beginning and End of Occupation', Proceedings of the Bruges Colloquium on Current Challenges to the Law of Occupation, *Collegium*, 2005, p. 26. The professor gives a paramount importance to consent, such as to determine the beginning and the end of an occupation.

[117] Von Glahn G., *op. cit.*, note 25, p. 27, Debbasch O., *op. cit.*, p. 8 and UK Ministry of Defense, *op. cit.*, p. 275, par. 11.1.2. Kolb R., *op. cit.*, p. 280, suggests another route for the direct applicability of the Hague regulations: to argue that the Regulations developed in customary law without the conventional specificities regarding its field of application only in situations of armed conflict-war (but also in the situations covered by art. 2.2 of GCIV).

[118] Kelly M.J., *op. cit.*, note 94, p. 30. He further contends that the occupant did not have the power to legislate and to assume the administration of justice.

B. *Annexation does not terminate the state of occupation*

In past times a state defeated in a war used to cede territory to the victor by a treaty. This constituted a relatively classic scheme of acquisition of territory, visible in the various peace treaties concluded after World War I. The Charter of the United Nations clearly outlawed 'the threat or use of force against the territorial integrity... of any state' (art. 2.4). Geneva Convention IV seems to be rather indifferent towards annexation (art. 47),[120] but the prohibition on the use of force and acquisition of territory through forceful measures gained tremendous acceptance in international law. The Charter of the Organization of American States[121] and resolutions by the Security Council[122] and the General Assembly[123] are only some evidence of the validity of this rule. Moreover, the Vienna Convention prohibits coercion of a state by the threat or use of force (art. 52).[124]

The international community has reacted several times, individually or collectively, to the efforts of states to annex territories (especially when the right of self-determination was at stake). Relevant cases are Namibia, Western Sahara, East

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[119] Reisman M. & Silk J., 'Which Law Applies to the Afghan Conflict?', *The American Journal of International Law*, Vol. 82, 1988, p. 484. 'it is appalling to realize that the *lex lata* seems to view an invitation by a government to occupy its territory against the wishes of the inhabitants as not triggering the plenary application of the Geneva Conventions, no matter what the resistance or deprivation of rights suffered. *De lege ferenda*, that factual situation should lead to the opposite legal conclusion'.

[120] However the fact that this article provides for the continuing application of the Convention despite annexation is an indirect way of not recognizing the annexation (even if the latter was legal) and another sign of the dichotomy between *ius in bello* and *ius ad bellum*. Art. 49 of GC IV can also be read as another indication of respect for sovereignty, Korman S., *op. cit.*, p. 219.

[121] Article 20 of the Charter of the Organization of American States, *International Legal Materials*, Vol. 33, 1994, p. 991.

[122] Resolution 242/1967, 22 November 1967.

[123] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (resolution 2625 (XXV)), 24 October 1970, *International Legal Materials*, Vol. 9, 1970, pp. 1292- 1297.

[124] If a bilateral or multilateral act as a treaty cannot cure the illegality of annexation, then one can expect that unilateral annexation would *a fortiori* be illegal.

Timor and Kuwait. Israel's annexation of the Golan Heights[125] and East Jerusalem[126] has also received widespread condemnation,[127] which however didn't succeed in bringing out any tangible results. A well-known exception to the principle of non-acquisition of territory through the use of force was the annexation of Goa by India. However this case should be seen under the prism of the era of de-colonization and self-determination; on the other hand it evidences that acceptance by the international community will be a crucial factor for processes with legal effects.[128]

The doctrine of *debellatio* is a sub-case of conquest of territory by the victorious state. When the victorious state acquired effective control over territory and the apparatus of the defeated state has collapsed, the former could formally annex the territory, provided that the war has ended and nobody was fighting to recover the sovereignty of the defeated state. It is needless to say that in the era of the

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[125] For more informationsee Elagab O.Y., 'The law of belligerent occupation versus the law of annexation of territories: a case study for the Golan Heights', *Development and Peace*, Vol. 6, 1985, pp. 118-128 and Korman S., *op. cit.*, p. 260-7. The General Assembly has qualified 'the imposition of laws, jurisdiction and administration on the occupied Golan Heights' as an act of aggression, see resolution ES-9/1 on the situation in the occupied Arab Territories, 5th February 1982.

[126] See among others Quigley J., 'Jerusalem: the illegality of Israel's encroachment', *The Palestine Yearbook of International Law*, Vol. IX, 1996/7, p. 29-31 and Korman S., *op. cit.*, p. 250-260.

[127] The condemnation by states which accepted Israel's grounds that it acted in self-defence shows clearly that any use of force (whether lawful or not) cannot result in the unilateral acquisition of territory. After all the purpose of self-defence is limited and acquisition of territory would be at least disproportional to this purpose. For Schwarzenberger G., *International Law as applied by International Courts and Tribunals, Vol. II, The law of the armed conflict*, London, Stevens, 1968, p. 167, 'a rule of international customary law prohibits the unilateral annexation of territories under belligerent occupation'. Likewise Von Glahn G., *op. cit.*, note 10, p. 768. On the other hand Gerson A., *op. cit.*, p. 544, contends that 'moreover there is some agreement that an aggressor-occupant may acquire title to annexed territory, provided there is an express act of recognition by other states who treat as valid the new title or situation, notwithstanding the initial illegality of the act on which it is based'.

[128] For a contemporary legal appraisal of the situation see Wright Q., 'The Goa incident', *American Journal of International Law*, Vol. 56, 1962, pp. 617-632, who predicted rightly that 'no action is likely to be taken by the United Nations, in which case the states of the world will, doubtless, recognize or acquiesce in the Indian annexation of Goa'. See also Korman S., *op. cit.*, p. 267-275.

United Nations, where the use of force is outlawed, it is not possible to accept that this doctrine has survived. The latest occupation of Iraq showed vividly that the collapse of the regime did not affect sovereignty.[129] Nevertheless it is surprising to find out that several (even contemporary) sources still refer to this doctrine as if nothing has changed during the previous century. According to the Canadian Manual, one of the ways of terminating the occupation is when 'the sovereign of the occupied territory may be totally defeated and part or all of the occupied territory may be annexed by the occupying power'.[130]

C. *Does self-determination end an occupation?*

Self determination was recognized in the Charter of the UN as a principle (articles 1.2 and 55)[131] and in subsequent General Assembly resolutions as a right (such as 637 (VII), 1514 (XV) and 2625 (XXV)[132]). The two Covenants of 1966 recognized also a (human) right of peoples, under common article 1. The International Court of Justice was more reluctant to refer to a right,[133] although it eventually confirmed

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[129] Even the regime of occupation in Germany and Japan, falling short of annexation and transfer of sovereignty, could be regarded as evidence of the redundancy of *debellatio.*

[130] Office of the Judge Advocate General of Canada, *op.cit.*, par. 1204.1. See also Gasser H.P., *op. cit.*, p. 524, 'the legal situation of the territory can be altered only through a peace treaty or debellatio. Also Green L., *The contemporary law of armed conflict*, Manchester, Manchester University Press, 1998, p. 258, Von Glahn G., *op. cit.*, note 10, p. 804, Marek K., *op.cit.*, p. 103 and Schwarzenberger G., *op. cit.*, p. 167, who refers to *debellatio* as a freedom of state under customary law. Also Mcdougal M. & Feliciano P., *op.cit.*, p. 735.

[131] For earlier treatment of self-determination see Chadwick E., *Self-determination, terrorism and the international humanitarian law of armed conflict*, The Hague, Nijhoff, 1996 p. 22 ff.

[132] '[Resolution 2625] represents a significant step in the progressive development of international law when compared with the positions taken in 1964. many states had never before accepted self-determination as a right', Rosenstock R, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', *The American Journal of International Law*, Vol. 65, 1971, p. 731.

[133] See the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 31.

its *erga omnes* character.[134] 'The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law'[135]. Consequently all peoples have a lawful self-determination claim, although there is still 'controversy over the exact meaning, content, extent and beneficiaries of, as well as the means and methods utilized to enforce the right to self-determination'.[136]

A generic definition of self-determination points to the collective right of a people to determine their political status and to pursue freely their economic, social and cultural development.[137] In line with this definition, the peoples of a state have the right to choose a government through elections or to opt for an autocracy rule. A choice between a market-oriented economy and a socialist one is again one aspect of self-determination. This has been termed as 'internal self-determination', which in essence is a partial expression of the political independence of a state. International law (excluding human rights) has a really marginal direct role on this aspect of self-determination. On the other hand, external self-determination (if leading to independent statehood) could clash with the rule of territorial integrity of states. In many cases, such as the dissolution of Czechoslovakia or the unification of East and West Germany, it was relatively easy to observe and implement this right, since the relevant actors agreed on all the modalities. But, in general, self-determination does not lead to an unqualified right to secede.[138] The only relevant

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[134] *East Timor (Portugal v. Australia),* Judgment, I.C.J. Reports 1995, p. 102. See also Frowein J.A., 'Self-determination as a limit to obligations under international law?', *in* Tomuschat C. (ed.), *Modern law of self-determination,* Dordrecht, Nijhoff, 1993, p. 215.

[135] *Reference re Secession of Quebec*, 1998 CanLII 793 (S.C.C.), par. 114.

[136] Final report of the Special Rapporteur, Kalliopi K. Koufa, Terrorism and human rights, UN Doc. E/CN.4/Sub.2/2004/40, 25 June 2004, par. 28.

[137] See article 1.1 of the 1966 Covenants. These are actually only some aspects of self-determination, which further includes the right to dispose of natural and wealth resources (article 1.2).

[138] See in this regard the General Assembly resolution 2625(XXV): 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent Slates conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and

claims, acknowledged by the international community, are the many cases of former colonies (or non-self-governing territories), which are rather obsolete in the present context. Furthermore the world community supported the expression of this right for the several peoples in disintegrating federal states, such as the former U.S.S.R. and Yugoslavia. The creation of the state of Bangladesh was also a unique situation, which was quickly recognized by other states, due to facts such as the repression, geographic separation and ethnic distinction from the 'parent' state, Pakistan.

There is also a western-propounded view[139] according to which a repressive and non-representative government towards a certain group cannot expect this group to remain loyal to it and therefore the gates of secession could open up,[140] as a last viable resort of self-determination. The validity, however, of this view is contested as 'this savings clause as such, figuring only in a non-binding General Assembly resolution is not in itself hard law [and i]t has so far not become customary law.[141]

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thus possessed of a government representing the "whole people belonging to the territory without distinction as to race, creed or colour'. Even the Declaration on Decolonization (General Assembly resolution 1514 (XV)), stated that 'any attempt aimed at the partial or total disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.

[139] For another current of scholars, 'secession is basically a fact of life not regulated by international law. The doctrinal argument for this proposition is that, systematically speaking, the principle of territorial integrity does not apply within a state, and is thus not directed against groups within states', Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Vol. II, September 2009, p. 136.

[140] See *Reference re Secession of Quebec*, *op. cit.*, par. 134-8. Also Eide A., 'The peaceful and constructive solution of problems involving minorities', E/CN.4/Sub.2/1993/34, p. 18, Tomuschat C., 'Modern law of self-determination', *op. cit.*, p. 9-11 and the rather careful analysis of Murswiek D., 'The issue of a right of secession – reconsidered', *in* Tomuschat C. (ed.), *Modern law of self-determination*, *op. cit.*, p. 37. The opposing opinion by Frowein J., *op. cit.*, p. 213.

[141] Independent International Fact-Finding Mission on the Conflict in Georgia, *op. cit.*, p. 138.

As regards what 'peoples' means, it is quite clear that minorities (and probably communities) are excluded and individuals cannot claim this right.[142] Cristescu,[143] after noting the various definitions available and the difficulty to have a clear-cut case suggests two elements in order 'to decide whether or not an entity constitutes a people fit to enjoy and exercise the right of self-determination : *(a)* The term "people" denotes a social entity possessing a clear identity and its own characteristics; *(b)* It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population'. For Koufa[144] 'what distinguishes people having the right to self-determination from groups that do not include, generally, a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capacity to regain self-governance'. This however would necessarily qualify as people only those groups who lived under colonial regimes or possessed some kind of self-rule which was subsequently denied. Then, depending on the circumstances, even minorities could claim for self-determination. Even the definitions on minority (controversial as well) do not distinguish persuasively from peoples.[145] In sum, even if there is some common core on the notion of self-determination (despite the difficulties that arise from its external aspect), the notion of peoples is yet to be defined.

Can the right to self-determination terminate the occupation? In many past or present occupations, self-determination is one important driving force behind the

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[142] Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27), CCPR/C/21/Rev.1/Add.5, 8 April 1994, par. 3.1. For a more comprehensive discussion see Hannum H., 'The right of self-determination on the 21st century', *Washington & Lee Law Review,* Vol. 55, 1998, pp. 773-780 and Hill M.A., 'What the principle of self-determination means today', *ILSA Journal of International & Comparative Law,* Vol. 1, 1995, pp. 119-134.

[143] Cristescu A., 'The right to self determination, Historical and current development on the basis of the United Nations Instruments', E/CN.4/Sub. 2/404/ Rev. 1, 1981, par. 270-9.

[144] *Op. cit.*, par. 12. See also the Independent International Fact-Finding Mission on the Conflict in Georgia, *op. cit.*, p. 144: 'A group is a "people" in the sense of international law if it has objective common characteristics such as a common language, culture, and religion, and if the group moreover has expressed the intention to form a political community of its own'.

[145] Eide A., *op. cit.*, p. 7.

end of occupation. But its realization would probably go through some other kind of act, as a treaty, or simply by the changing facts on the ground, such as the Occupying Power abandoning the territory.

What if the peoples who reside in the occupied territory share common ties and interests with the Occupying Power? Theoretically if they constitute a minority, then self-determination is not their right. Secession is hardly considered as a right available in international law. International practice shows that the Bangladeshi independence after the intervention of India was widely recognized, while the intervention of Turkey to Cyprus is still regarded as an occupation and Kosovo has been recognized, so far, by only a minority of the international community of states.

The exercise of local democratic elections can constitute an important factor for terminating an occupation. Elections are probably the most genuine way to ascertain the will of peoples and accomplish self-determination. A democratic election (preferably supervised by the international community) cannot be considered as a change 'introduced' by the occupying power, therefore article 47 of Geneva Convention IV would not apply. However it would be safer to examine both the external and the internal legitimacy of the government in order to conclude that effective control lies with the sovereign. The general election held in 2005 in Iraq has provided an unqualified right to ask for the withdrawal of the Multinational Force as well as control over the natural resources. A democratically- elected government should be presumed to be and act as the sovereign of the territory. On the other hand an election is not a panacea,[146] but it is only one (strong) indication that the Occupying Power has relinquished control.

7. CONCLUSION

Military occupation ends when effective control is abolished and the absence of the foreign army (or its factual confinement to certain and limited responsibilities)

[146] See Green L.C., *op. cit.*, p. 54.

is the most obvious indication. This can be achieved with four ways: 1. involuntarily, 2. unilaterally, through the volition of the Occupying Power, 3. by a consensual bond between states (Occupying Power included), 4. with a binding 'order' by the Security Council. The Security Council resolution offers the advantage of interference by the international community as well as the maximum legitimacy for the state involved. However it is still unclear what are the limits of the Security Council powers and most importantly what would happen in case of violation of *erga omnes* obligations (eg. self- determination). The interference of Security Council in Iraq was a rather unfortunate moment; since the U.N. didn't have the control on the ground, it should have endorsed the end of occupation as soon as this took place and not before its realization. On the other hand it was exactly this resolution that prevented any more friction with regard to this subject, as several states, tacitly or expressly, accepted the U.N.'s position.

Besides the issue of external legitimacy, self- determination through elections or a referendum can boost the end of occupation. The ideal situation would be the combination of internal legitimacy with external approbation by the international community.

A last remark with regard to the (almost) necessary mix of *ius ad bellum* and *ius in bello:* inescapably the end of occupation might deal with matters such as who used force first and if it was unlawful. Provided that the international community interferes, in the interest of peace and justice, this mixture might prove to be less detrimental for the law of occupation (and the individual who gains from its application) than one would expect. However there are many steps to be taken towards that direction: the regulation of international life is satisfactory, but the implementation of international norms is still not so self-evident.

A LEGAL PARADOX : PAKISTAN'S CONSTITUTION, MARTIAL LAW AND STATE NECESSITY

Zia Akhtar *

ABSTRACT

There have been a sequence of governments in Pakistan that have suspended the due process and restricted judicial review of administrative action. The operational device is the Article 58 (2) adopted from the Government of India Act 1935 which was the country first constitution at its inception in 1947. It created a Head of State with de facto powers that augmented his de jure powers as the head of the government. This has been an instrument for arbitrary rule that has been challenged in the courts repeatedly. In the latest such episode General Musharaff's government ruled by decree on two separate occasions declaring an emergency when it tried to justify taking extra constitutional measures. Its authority was proclaimed by Provisional Constitutional Orders which allowed the enforcement of Legal Framework Orders that sanctioned the emergency regulations. In 2007 the military government was rocked by the lawyers movement that came in the aftermath of the suspension of the Chief Justice of the country. The Supreme Court restored him, but when he was dismissed again along with the upper echelons of the judiciary to pave the way for the General's election as a civilian President the momentum was for the restoration of civilian rule in the country. Empirical investigation reveals that the doctrine of State Necessity which the military has prayed in aid to justify its intervention is a consequence of an over-formal approach of judges who have set this as precedence. It can be rebutted by rejecting Kelsen's approach that has emphasised an abstract definition of law depriving the rule of law of its true spirit.

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INTRODUCTION

The judiciary and the military have always been involved in a tussle for power in Pakistan. The judicial branch views itself as the custodian of a liberal tradition while the armed forces consider themselves as the guarantor of the nation's security. It often puts them on a collision course because of the perception that threats emanating to the state require the soldiers to step into the corridors of power which leaves the justices to grapple with the erosion of the rights of the masses and the fetters it places on civil society.

The conflict is between a military ethic operating under a code of absolute loyalty and a judicial oath taken is sworn to have regard for the presumption of innocence. In the past ten years this has been manifested by a period of emergency rule that General Musharaff has imposed firstly in October 1999, when he acceded to power and then in November 2007, when he promptly sacked the Supreme Court and most of the High Court judiciary[1]. After the later purge he orchestrated an election that gave him a mandate as a civilian President to rule the country for another five years. In the interim he introduced an Emergency, the 1973 Constitution was suspended enabling him to pack the Supreme Court with complaint judges and to enact laws that gave the military authority over running the country.

The issue for the jurist's attention is the legal sanction that the military draws on and its basis in constitutional jurisprudence. This is because upon assuming office the army abrogates the constitution and promulgates Legal Framework Orders to govern through an emergency. It falls back on a legal authority that has been proclaimed in its four periods of military rule over 62 years of Pakistan's existence. The recourse is to Hans Kelsen's theory of 'revolutionary' legality by the advocates of the regime that raises the question whether the efficacy of change can be a basis for legitimacy when it tramples on fundamental rights.

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[1] There were 60 judges of the High courts and 10 of the 12 judges of the Supreme Court who were removed.

The friction between the executive and the judicial branches has been the subject of a study for the Carnegie Institute for Peace by Paula Newberg. She describes the functions of the judges as follows:[2]

> Pakistan's courts and judges are cast as protectors of the constitution in a separation of powers system. But in circumstances such as those just described they have usually found it expedient or necessary to accommodate wrenching alterations of the constitution or grossly un- or anti-constitutional actions by the rulers of the day. They have done so because they thought such deeds or misdeeds essential to the survival of the state or, more likely and more often, to their own survival as at least partly independent governmental actors or, at the extreme, as living, imprisoned human beings.

COLONIAL INHERITANCE

The civilian Constitution of Pakistan guarantees security of tenure for superior court judges and, yet the facts point otherwise leading to the assumption that the judiciary exists on the altar of the executive's discretion and is not as an independent branch that conforms to the separation of powers doctrine.[3] The reason for that is the unwieldy constitutional instrument left behind by the Raj in the form of Article 58 (1) that Pakistan has inherited.[4] This has caused the machinery of justice to be performed by improvising the constitution when the executive has so desired as a requirement of his rule. It is a process begun when Pakistan was still a dominion and the Constitution of India Act 1935 was still applicable.

The genesis of the power of President to dissolve the Parliament first originated at this moment and it can be traced back to the speech delivered by the Governor General of Pakistan, Mr Ghulam Mohammad prior to the dissolution of the first Constituent Assembly of Pakistan in 1954.

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[2] Paula R Newberg *Judging the State: Courts and Constitutional Politics in Pakistan.* (Cambridge University Press, 2002 p 9).

[3] Articles 179 and 195 that respect independence of the judiciary guaranteed under the Constitution

[4] The Indian Independence Act 1947 empowered the governors-general of Pakistan and India to adapt the Act of 1935 as an interim constitution

He emphasised in his speech as follows:

> *With deep regret I have come to the conclusion that the constitutional machinery has broken down...the constituent assembly as at present constituted has lost the confidence of the people and can no longer function. The ultimate authority vests in the people who will decide all issues through their representatives to be elected afresh.*[5]

In 1955, the then Chief Justice of the Supreme Court Mohammad Munir facilitated Governor- General Ghulam Mohammad's action to dissolve the first Constitutional Assembly of Pakistan. He helped give it a legal premise by setting out the constitutional grounds as prescriptive of this power to dissolve the Assembly. This was set out in his judgement in *Tamizuddin Khan*).[6] Chief Justice Munir ruled that the Assembly was not a sovereign body and that the Constituent Assembly had 'lived in a fool's paradise if it was ever seized with the notion that it was the sovereign body of the state.'

Furthermore, he dismissed it as a lacuna the omission of any empowering provision to the Governor General in the constitution, which allowed his dissolution of the Constitutional Assembly. He held that to understand the role of Pakistan's Governor-General it was necessary to go 'far back in the history and to trace the origin and development of the British Empire itself'. In his opinion, the statehood Jinnah gained for his country in 1947 was restricted by the prerogative rights of the English Crown. The Chief Justice agreed with the argument made to the Court by Lord Diplock, who was representing the Pakistan government, who stated to the Court that Pakistan did not become independent in 1947, but that it had attained a status like the senior dominions, 'virtually indistinguishable from independence'.

The conclusion reached by C-J Munir's colleague Justice Cornelius, however, in his dissenting opinion was entirely different. He ruled that the Chief Justice's interpretation of Commonwealth history differed with his own understanding of the meaning of a dominion. He maintained that the historical fact was that Pakistan

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[5] Ghulam Mohammad declared an emergency on October 24th.

[6] *Molvi Tamizuddin Khan v State of Pakistan* (1955) 2 PLD, FC 240.

had been created as a 'sovereign entity' with complete independence, and he pointed to what he believed to be clear variance in the status of the senior dominions and the new dominion of Pakistan. He wrote in his judgment that 'Pakistan was not just a dominion but an independent dominion.'

A study of this case by Syed Sami Ahmed focused on the surrounding circumstances of the case concluded that Justice Munir viewed the judicial role as a tool of the government. He writes : *The former Chief Justice was the chief architect of the Federal Court judgment in the case of Tamizuddin Khan, speaker of the constituent assembly. An ailing, half-witted governor-general (GG) Ghulam Mohammad by a sort of a Papal Bull or a fiat ex cathedra dismissed the assembly in October 1954 to pave the way to future martial laws.*[7]

He describes the Chief Justice's verdict as a total negation of the judgment of the provincial High Court of Sindh province which had supported Tamizuddin's complaint against the G-G's order. Justice Constantine, chief justice of the Sindh Court, and his colleagues had unanimously upheld Movlvi Tamizuddin's petition regarding the sovereignty of the assembly, and established the G-G's *malafides* in dismissing it with a stroke of the pen. At the Supreme Court Justice A.R. Cornelius (later the chief justice of Pakistan) appended his note of dissent to the ruling of C-J Munir and expressed his 'sincere regret' for being 'unable' to agree with 'My Lord the Chief Justice and my learned brothers'. Sami Ahmad states further:

The chief justice's invocation of the doctrine of necessity, together with the views expressed by the British member of the team Mr Diplock QC, in upholding the G-G's action on the ground of public welfare, made 'a mockery of the whole case'. In his critical assessment, Syed Ahmed cites the submission of Lord Diplock's in using the following Latin legalism in support of the dissolution of the assembly by the GG. '*Salus populi est suprema lax*'— the welfare of the

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[7] Syed Sami Ahmed *History of Pakistan and the Role of the Army* (Royal Book Company, 2005, http:/www.dukandar.com/historypakarmy.html)

people is the supreme law. This amounted to a reaffirmation of the doctrine of state necessity in a popular, almost poetic language.

Chief Justice Munir developed the doctrine of necessity as a ground for a political sovereign to seize power in an emergency and furnished extra constitutional powers upon the executive. He then elucidated it still further by way of a Special Reference- 1 1956, an advisory opinion sought by the Governor General Ghulam Mohammad on his prerogative powers. It came about by the request of the GG to the C-J, to settle a legal premise for the use of non-constitutional emergency powers. In his opinion C-J Munir found it necessary to move beyond the constitution to what he claimed was the Common Law and to general legal maxims under English historical precedent.

The reference dealt with the principle of state necessity by stating as follows:

> *Subject to the condition of absoluteness, extremeness, and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under stress of necessity, the necessity being referable to an intention to preserve the Constitution, the state, or the society, and to prevent it from dissolution, and affirms...that necessity knows no law...necessity makes lawful which otherwise is not lawful.*[8]

This had the effect of conferring on the executive a *de facto* power of the state, and because the legislature was denied a judicial remedy in these circumstances the new Constituent Assembly, which the court required him to call, was no longer a sovereign body. It vested the Governor General with near veto power over all its proposed laws, and there followed from the court's decision on sovereignty that the Assembly could be dissolved by the Governor General for political purposes based on expediency.

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[8] To support the use of non-constitutional emergency powers, Munir moved to Common Law general legal maxims such as Bracton's maxim 'that which is otherwise not lawful is made lawful by necessity'.

AN INDIGENOUS FRAMEWORK

The successor to the office of Prime Minister was M. Ali Chowdhary, who governed under the first home grown constitution formulated for Pakistan. This was framed on March 23, 1956 and had the effect of ending the country's status as a dominion. It allowed the Constituent Assembly of Pakistan to take over as the interim National Assembly, and the Governor- General Iskander Mirza was sworn in as the first President of Pakistan. The new constitution came with the augmented powers that went with the executive office vested in the President of the Federation, and the authority to appoint the Prime Minister from amongst the members of the Assembly.

The Constitution provided for a federal form of government in the country. The relationship between central and provincial governments was the same as it was in the Government of India Act 1935. In 1958 Chief Justice Munir was the presiding judge again in a climate of political turmoil, when he gave judicial approval to President Iskandar Mirza's decision to dissolve the parliament, and abrogate the 1956 constitution. This was followed in February 1959, by a proclamation on the night of 7th October, 1958 of martial law by the Commander-in-Chief of the Pakistan Army, General Ayub Khan, who was also appointed as the Chief Martial Law Administrator. Following the proclamation of martial law the Law (Continuance in Force) Order was promulgated. This was challenged in the Supreme Court by way of a petition.

In *Dosso* decided in 1958, Munir C-J ruled [9]

> *I*t sometimes happens, however, that the Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order...For the purpose of the doctrine here explained, a change is, in law, a revolution if it annuls the constitution and the annulment is effective...Thus the essential condition to determine whether a constitution has been

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[9] *Dosso v Federation of Pakistan (1958) 4 PLD, 5L 353, 000.*

> annulled is the efficacy of the change...Thus a victorious revolution, or a successful coup d'etat is an internally recognized legal method of changing a constitution.
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> ... If what I have already stated is correct, then the revolution having been successful, it satisfies the test of efficacy and becomes a basic law-creating factor.

The Chief Justice based his doctrine contingent upon Hans Kelsen's theory of efficacy. He borrowed from Kelsen the notion that logically sets out the elements of a successful legal government when it is first constituted. The General Theory of Law states that the new order begins to be 'efficacious' because the individuals whose behaviour it regulates actually behave, by and large, in conformity with the new order.[10] If these two facts are associated with the new order, then the order is considered as valid and 'a law creating fact '. This in sum means that the success of a revolution or, in the legal jargon, the efficacy of the change would establish its legality. The efficacy of the change becomes a basic law-creating fact that could be justified as the new binding constitution.

The *Dosso* judgment had a tremendous impact upon other Commonwealth jurisdictions who took cognisance of it in dealing with the proclamations of martial law in their own country. As the imposition of military rule precluded protests among the people, after the coup was successfully completed the argument deemed as legally sustainable. The positivist theory of Kelsen became a pattern of 'change' in the Commonwealth countries and this decision was refereed to with approval in courts of many countries such as Nigeria, Rhodesia, Ghana, Uganda etc. This case has had an application subsequently in the jurisprudence of other countries.

In *Matuvo*,[11] the Ugandan High Court held that precedence established under Dosso's case was valid for application in Uganda. The Court held that the

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[10] Hans Kelsen, *General Theory of Law and State,* (Translation by Andres Wedbery Cambridge, Massachusetts. pp 110-20

[11] *Uganda* v *Commissioner of Prisoners Ex parte Matuvo* (1996) EA 514

constitution of 1966 was the Supreme law, that had been imposed by a military government, which had come to power by a *coup de etat*. It was a product of a revolution and established a quid pro quo by its successful outcome earning it recognition by the courts.

This principle was followed in another well known case of *Lardner- Burke,*[12] in 1968 that arose out of a scenario in Rhodesia. This concerned the Ian Smith's government declaring UDI. The High Court had the choice of following a British Order in Council, which nullified the declaration on account of the Constitution of 1961 or, relying upon the notion that the *grundnorm* had changed, a central tenet of Kelsen's philosophy that the order was legal because it had reached efficacy. The Court held that the UDI was a result of a revolutionary constitution as it was proclaimed immediately when independence was declared.

The Court pronounced on the status of law both of the pre revolutionary sovereign and of the revolutionary authorities, finally admitting the latter as legitimate source of law. This determination that the 1965 constitution was lawful, was based on the fact that the new government could disregard the decision of the Privy Council which was adverse to the revolutionary regime.

Likewise in *Sallah,*[13] the Supreme Court of Ghana held that after the Constitution of 1969 came into effect, the suspension of the constitution of 1960 by military coup had no effect of destroying the legal order. Therefore, the law promulgated by the previous constitution was still valid and the military coup d'etat had not changed the existing order. In this manner the Supreme Court restored the status quo ante.

MILITARY IN THE CORRIDORS OF POWER

The saga of military dictators in Pakistan kick started in 1959 with General Ayub Khan, as President. He nevertheless had the tact to provide a representative fig

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[12] *Madzimbamuto* v *Lardner-Burke* (1968) 2 SA 284.

[13] *E.K. Sallah* v *the Attorney General* (1970) 493 SC

leaf to his rule by introducing a hierarchy of elected councils authorised by his constitutional commission. This ushered in a new political system, known as 'Basic Democracy,' which Ayub called within the particular 'genius' of Pakistan.

In 1962, a new Constitution was promulgated that led to an executive presidency, but twenty judicial safeguards were removed that had been in the previous model.[14] The Ayub regime dismantled them by abolishing the right to challenge their abuse by the writs of certiorari, mandamus, prohibition, quo warranto and habeas corpus. It undermined the freedom of the judiciary, and facilitated the declaration of emergency government whose logic was another military government.

As he approached his twilight hour General Ayub conveyed his baton to another Field Marshall, General Yahya Khan, and this was also on the basis that the country was facing a malign threat to its existence. The political unrest was deemed best solved by acting on state necessity. The Chief Martial Law Administrator as General Yahya styled himself proceeded to dissolve the state based on One- unit and recreated the federation with separate provincial assemblies. While in power the General continued to rule under Martial law making the political parties defunct before allowing a general election in 1970. In order to strengthen his power he issued the President's Jurisdiction of Courts (Removal of Doubts) Order, 1969 by which the courts were barred from questioning the exercise of Martial Law regulations.

However, his leadership led to cataclysmic events in Pakistan including its break up, and after his regime ended the Supreme Court gave a retrospective judgment that declared his authority to govern illegal, after a case brought by the noted Pakistani human rights lawyer. In Asma Jilani,[15] the Supreme Court declared that General Yahya had usurped power, and that his action was not justified by the 'revolutionary legality doctrine' that was grounded on state necessity, and

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[14] These had been set out in Chapter 1 Section 8 as follows: "that laws inconsistent with or in derogation of Fundamental rights are to be void', and in Section 10 there were safeguards for those in detention and the arrested person to be brought before magistrates within twenty-four hours ".

[15] *Asma Jilani v Government of Pakistan PLD 1972 SC 139*

consequently his Martial law was illegal. Chief Justice Anwarul Haq gave his opinion as follows:

> With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice (Mohammad Munir CJ) not only misapplied the doctrine of Hans Kelsen, but also fell into error that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone...I am unable to resist the conclusion that Mohammad Munir erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is wholly unsustainable.

This judgment overruled the concept of Kelsen on the assumption that the status quo had been validated by revolutionary legality. It requires an examination of the Pure Theory, because a revolution or coup has been regarded in international law as leading to a 'legitimate' government on the principle that a newly established order is valid on account of state necessity.

However, this was an interregnum that was short lived between the successful introduction of a civilian constitution in 1973 and the military intervention by General Zia- ul Haq in 1977 . His premise was to act in the context of a national emergency, and he immediately suspended the Constitution by issuing his Affirmation of President's Orders, etc (1)[16] He introduced a form of civilian mandate, like Ayub before him, by describing his government a legal 'hot- potch' a mixture bag of common law and sharia codes that he felt were demanded by the national consensus.

However, he did not change from the old pattern and promulgated a law that harked back to Article 58 2(b) in the 1935 constitution, giving him dejure powers in addition to the de facto he possessed by way of being the military commander in chief who was also the new President. His authority has been given a lucid appraisal by Zain Sheikh, who writes:[17]

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[16] Affirmation of President's Orders, etc.-(1) The Proclamation of the fifth day of July, 1977, all President's Orders, Ordinances, Martial Law Regulations,

[17] Zain Sheikh, 'Forget the Constitution: Play Musical Chairs' (8/8/04) - Daily Jang http://www.pakistanconstitution-law.com/forgetconstitutionplaymusicachair.asp

The Constitution Eighth Amendment Act 1985, introduced a quasi-presidential form of government in Pakistan and armed the President, General Zia-ul-Haq, with two distinct powers to change the duly elected parliamentary government of the day. Such extra-parliamentary powers of the President were super imposed on the quintessential parliamentary form of government adopted by the Framers of the Pakistan Constitution in 1973.

The two Presidential Powers were grafted on to Articles 58 and 91 of the Constitution in 1985. The power granted by virtue of Article 58 was the more drastic of the two and pursuant thereto, the President, in his discretion, can dissolve the National Assembly if, in his opinion, there is a constitutional breakdown in government and an appeal to the electorate has become necessary.

Almost a quarter of a century later, in 1977, the Supreme Court, in the case of Bhutto (Begum Nusrat)[18] stated that:

The court justified the extra-constitutional step, taken by General Mohammad Zia-ul-Haq, in imposing martial law and dissolving the National Assembly on the basis of the doctrine of state necessity. Eight years thereafter, in 1985, General Zia-ul-Haq manipulated the passage of the Constitution Eighth Amendment Act, 1985 and Article 58(2)(b) there under provided, in relevant part, '... that the President can dissolve the National Assembly where, in his opinion,...the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and appeal to the electorate is necessary'.[19]

In 1999 more than ten years after Ziaul Haq's demise Pakistan was again in a period of civilian government and the 1985 Amendment was excised by virtue of the passage of the Thirteenth Amendment Act. Then General Pervaiz Musharaff stepped into power on the pretext of saving the country from threats to its security.

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[18] *Begum Nusrat Bhutto v Chief of Army Staff* (1977) PLD SC 657

[19] The 8th Constitutional Amendment was adopted which added the significant Article 58(2)(b) by which the President acquired discretionary powers to dissolve the National Assembly. On 29th May 1988 the Assembly was dissolved by the President by using the power acquired under Article 58(2)(b)

There was no existing device through which he could re- establish emergency rule, but he came up with his trump card when he issued a Provisional Constitutional Order 1999, that froze the legal safeguards against military rule.

The Legal Framework Order 1 that came the following year resuscitated the spirit of the old Article 58(2)(b) by postulating that any orders made by the military authority, in the person of the General cannot be challenged by any source, in any court of law, on any ground whatsoever. This was a throwback to the stance taken by Ayub, Yahya and Zia and confirmed that he too would set his political agenda by removing the powers of redress for citizens in challenging abuse of power by the executive.

If there is any necessity for any further amendment of the Constitution or any difficulty arises in giving effect to any of the provisions of this Order, the Chief Executive may make such provisions and pass or promulgate such orders for amending the Constitution or for removing any difficulty as he may deem fit.

In 1999 more than ten years after Ziaul Haq's demise Pakistan was in a period of civilian rule and the 1985 Amendment was excised by virtue of the passage of the Thirteenth Amendment Act.[20] Then General Pervaiz Musharaff stepped into power on the pretext of saving the country from threats to its security. There was no existing device through which he could re- establish emergency rule, but he came up with his trump card when he issued a Provisional Constitutional Order 1999, that froze the legal safeguards against military rule.

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[20] This was when Prime Minister Nawaz Sharif took oath as Prime Minister of Pakistan on 17th February 1997 and article was omitted from the Constitution vide 13th Amendment in the Constitution in April 1997.

The LFO 1 stated :

> If there is any necessity for any further amendment of the Constitution or any difficulty arises in giving effect to any of the provisions of this Order, the Chief Executive may make such provisions and pass or promulgate such orders for amending the Constitution or for removing any difficulty as he may deem fit.

However, Gen Musharaff's suspension of the Constitution and the assumption of emergency powers under the PCO were challenged in the Supreme Court as in all previous instances when the military has held the reins of government. In *Zafar Ai Shah*,[21] the Court dismissed a petition by granting " compulsion " as sufficient grounds for the military to intervene on the grounds of state necessity. The judgment was based on the Article 3 (2) of the LFO 2000 states :

> A situation arose for which the Constitution provided no solution and intervention by the Armed Forces through an extra-Constitutional measure became inevitable and the said act was validated on the basis of the doctrine of state necessity and the principle salus populi suprema lex as embodied in Begum Nusrat Bhutto's case.

The outcome of this case was that the Parliament approved the LFO in 2002, and an Article was appended that made the judicial organ virtually impotent in the face of the executive action. The ordinance in Article 270AA states:

> The Proclamation of Emergency of the fourteenth day of October, 1999, all President's Orders, Ordinances, Chief Executive's Orders, including the Provisional Constitution Order No.1 of 1999, the Oath of Office (Judges) Order, 2000 (No.l of 2000), the Referendum Order, 2002 (Chief Executive's Order No. 12 of 2002) and all other laws made between the 12 th October, 1999 and the date on which this Article comes into force, are hereby affirmed, adopted and declared notwithstanding any judgment of any court, to have been validly made by competent authority and notwithstanding anything contained in the constitution shall not be called in question in any court on any ground whatsoever.

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[21] *Zafar Ali Shah* v *Pervaiz Musharaff* (2000) PLD, SC 869

The declaration of the emergency and the PCO, made 29 amendments to the 1973 Constitution and, intensified the severity of contempt laws in Pakistan. The Contempt of Courts Ordinance 2004 repealed the old law under the 1998 Act and created a third category besides the familiar classifications of civil and criminal contempt. These go on to stipulate a definition of judicial contempt, which covers the notions of 'scandalising the court' and personalised criticisms of the judge, that is now obsolete in other common law jurisdictions. The new law sets down in Article 3 that the Supreme Court and the High courts will have powers to punish for their contempt which can lead to imprisonment, of up to six months or fine, that can be up to Rs 100,000 (US$1,600) or both.

However, the bubble burst in March 2007, when the then General Musharaff as the head of the executive branch decided to unseat the Chief Justice Iftikhar Chowdhary, and the news resonated all over the world. It arose when the Article 209 of the country's Constitution was invoked against the Chief Justice that provides the highest authority in the land to dismiss the most senior judge of the country.[22] Although he was reinstated after a hearing he was sacked again in November with the bench of the Supreme Court was summarily removed and sent into domestic exile in the country.

The Pakistan Think Tank, a lobby group consisting mostly of lawyers in the country's capital released an article written by Babar Sattar. He compared the process of a referral of a judge to an impeachment of a head of state by stating that:[23]

> Neither Article 209 or any other article of the Constitution authorizes the President or any other institution or individual to suspend any judge or declare his judicial office dysfunctional pending the Supreme Judicial Council's inquiry. If a president subject to impeachment proceedings can continue to hold office, there is no reason why the

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[22] Clause five of article 209 of Pakistan Constitution states that if the president is of the opinion that a judge of the Supreme Court or of a High Court (a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or (b) may have been guilty of mis conduct, The president shall direct the Council to inquire into the matter.

[23] The Intrigue of Justice' (11/7/07) Pakistan Think Tank (http://www.pakistanthinktank.org/default.php/p/articles/pk/72)

chief justice cannot, so long as he is not found guilty of misconduct by his peers and removed by the president.

However, the issue was a red herring because Musharaff had decided on a second term as President and he dismissed 14 judges of the Supreme Court including Justice Chowdhary.[24] who refused to take the oath on the PCO declaring the emergency. It paved the way for his re election as a civilian head of state. The puppet bench approved his candidature and he rode into power in February 2008.[25]

COMMONWEALTH - DEROGATIONS OF POWER

1) Malaysia

In South East Asia, there are comparable examples with Pakistan in the case of other countries which are common law based and where there is an entrenched colonial military power nexus. The case of Malaysia where the British authorities extricated themselves from a communally divided land, beset by a Communist-led guerrilla war, the government has imposed an emergency and enforced it though the 1960 Internal Security Act.

The ISA has silenced the Malaysian government's opponents within the ruling United Malay National Organization. Section 72 of the ISA allows the police to detain any person for up to sixty days, without warrant or trial and without access to legal counsel. The example of a measure that is used by those at the lower rungs of the hierarchy is the Emergency Ordinance, which the government's law and order agencies can call on when there is a perceived threat to public order. The EO was first proclaimed in May 16, 1969 when the ruling United Malay National Organization lost its parliamentary majority and riots erupted in Kuala Lumpur between ethnic Chinese and Malays causing the deaths of over 190 persons. It led to a state of emergency and the Parliament and Constitution were suspended. The preamble to this ordinance states:

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[24] Acting Chief Justice Dogar dismissed the final challenge against Musharraf's candidacy.

> By reason of the existence of a grave emergency threatening the security of Malaysia, a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong the Malaysian King under Article 150 of the Constitution.[26]

The EO permits the police officer to make a subjective judgment to arrest anyone when he suspects that a person has 'acted' or is 'about to act' in a 'manner prejudicial to public order,' or if he has 'reason to believe' that a person should be detained if 'necessary for the suppression of violence' or for 'the prevention of crimes'. The district police officer then approves the arrest which may be without any prima facie evidence whatsoever. It precludes obtaining a detention order from a magistrate, and thus, the appropriateness of detention cannot be reviewed by a judge. The Federal Court viewed the security provisions when it gave the judgment in the *Timbalan* case in 2005.[27]

It concerned an EO detainee's argument that the government had not considered whether he should be charged and prosecuted instead of being detained under the EO. The Court ruled that there is no obligation for the government to bring criminal actions after a detention order is imposed against a suspect, reasoning that the law specifically authorises the minister to detain persons who are a threat to public order, whereas it entrusts the attorney general with prosecutions.

The Court held that should the minister have referred the case for criminal prosecution, "*it would not be surprising to hear arguments that the minister has exceeded his jurisdiction, or that he has taken into consideration matters which he should not have*". The Malaysian state can act under emergency regulations by the emasculation of the judiciary behind a civilian order in which there is an elected civilian government in power. The multi ethnic composition of Malaysia has enabled the security branches to steer away from declaring any

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[25] Chief Justice Chowdhary was dismissed without retirement privileges and later the New York Bar gave him an Honourary Life Membership and the Harvard Law School has bestowed a 'Medal of Freedom' upon him in November 2008

[26] The Emergency Proclamations have been in place since independence and none have been revoked.

[27] *Lee Kew Sang v Timbalan Menteri Dalam Neger (2005) 4 AMR 725, 740 28*

martial law and it has survived turmoil that Pakistan has not as a state under the armed forces shadow.

2) Bangladesh

This former eastern wing of Pakistan severed its links from the western component in 1971, partly because the military dictatorship emasculated political expression. The country has been under martial law by a reference to Article 46 in the 1972 constitution, That provision has empowered Parliament to pass an Act of Indemnity in 2003 in respect of any act done in connection with the war that led to the country's creation, or the maintenance or restoration of order in any area in Bangladesh. It means that prima facie the constitution does not include any provision for the military to take power. However, martial law has been imposed in Bangladesh twice, firstly, in 1975 by means of a bloody coup and, secondly, by a peaceful takeover by the army in 1982.

In the first instance the leaders of the new regime Khondoker Mostaque Ahmed, and Major General Zia ur Rahman fell back on the support of Justice Abu Sadat Mohammad Sayem, who at the time was the Supreme Court Chief Justice. There was the issue of Martial law Proclamations on 15/8/75 but there was no recourse to the doctrine of state necessity owing to lack of challenges and because the constitution was not suspended as in Pakistan.[28] There were amendments to the constitution including the 5th amendment, which came by way of MR 7 that confiscated property deemed as abandoned by the previous regime.

This expropriation came up for consideration by the courts in *Halima Khatun v Bangladesh*[29]. Here the courts declared that martial law proclamation regulation

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[28] Army Chief of Staff Gen. Ziaur Rahman (Zia) pledged the army's support to the civilian government headed by the president, Chief Justice Sayem. Acting at Zia's behest, Sayem then promulgated martial law, naming himself Chief Martial Law Administrator (CMLA).

[29] *Halima Khatun* v *Bangladesh* (1978) 4 AMR 725, 740

etc. were supreme law and the Constitution lost its character as the supreme law. The observations of Justice Fazle Munim are pertinent.

He held:

> What it appears from the Proclamation of August 20, 1975 is that, with the declaration of Martial Law .... the constitution of Bangladesh ... (has been made) subordinate to the Proclamation and any regulation or order as may be made by the president in pursuance thereof .... Under the Proclamation ... the constitution has lost its character as the supreme law of the country. There is no doubt, an express declaration in Article 7(2) of the constitution to the following effect, 'This constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this constitution that other law to the extent of such inconsistency be void'. Ironically enough, this Article, though it still exists must be taken to have lost some of its importance and efficacy. In view of .... the Proclamation the supremacy of the constitution .... is no longer unqualified

The effect was to cancel the independence of the judicial branch and this connivance between the two organs added another layer of legitimacy to the executive branch when it exercised martial law regulations. In his column NM Harun a Bangladeshi political scientist writes in *The New Age* as follows:[30]

> In the 36 years of independence, Bangladesh has faced four cataclysmic constitutional-political crises — martial laws in 1975 and 1982, the collapse of Lt General HM Ershad's civilianised regime in 1990, and the current emergency rule since January 11, 2007. The Supreme Court, as an institution, is not known to have played any role during the past three crises. And in the midst of the current emergency, there is no sign yet of judicial activism by the court to help remove the governmental mess through an imaginative and creative application of constitutionalism.

Unlike the challenges in Pakistan, the legality of the declaration of martial law was not discussed by the Supreme Court in Bangladesh in any case either during the continuance or, even after the withdrawal of martial law. However, on 29th

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[30] 'South Asian Perspectives' *New Age* 30/9/07

August 2005, a Division Bench of the High Court Division comprising Mr. Justice ABM Khairul Hoq and Justice ATM Fazley Kabir gave a verdict declaring that the 5th amendment was illegal and that all actions done under Martial law between August 1975 and April 1979 are void.

3) Sri Lanka

In Sri Lanka the government has been involved in suppressing an insurgency in the north and the country has been under successive emergency rule since 1983. While the civilian paraphernalia has exited the executive has been strengthened by former Execurive President JR Jayewardene's raising the bar of his powers. He amended the 1972 constitution during his term by concentrating all powers in an Executive Presidency, on par with the French model. This inaugurated the 1978 constitution that fused the role the Head of State and Government. The office created led to the President being elected for a term of 6 years, who also had at his disposal emergency regulations by way of him being the appointed head of the armed forces.

The Sri Lankan agencies of government operate the Public Security Ordinance of 1947 and the Prevention of Terrorism Act 1979 for which redress through judicial review is not available.[31] The President has discretion to set the criteria of an Emergency regulation (ER) under Rule 5(2) of the PSO to list the authoritative options available to a President during a self-declared state of emergency ie the detention of persons; acquisition of private property, including land, on behalf of the government; search and seizure of any property; amendment, suspension and/ or application of 'any law', granting supreme legal authority to emergency regulations issued by the President over all other laws of the land.

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[31] The PSO Part 1 provides any necessary 'measures in the interests of the public security and the preservation of public order.' and empowers the executive to declare a state of emergency, thereby making Part II of the ordinance, which governs the nature of emergency regulations (ER) effective

The impact of these extraordinary restrictions was last seen when the Sri Lanka's former President Chandrika Kumaratunga responded to the December 26th 2005 tsunami by secretly promulgating ERs in 14 of the island's 25 districts at the same time as ordering relief operations. These measures, which included powers for the police, army and officials to suppress political criticism or opposition were enforced on January 4th, but were only made public on January 25, at the instigation of the Civil Rights Movement of Sri Lanka, which in a statement on January 13, declared that it was "imperative" that the people knew under what laws they were governed.

However, the acid test of Sri Lankan judiciaries complaint position in relation to the executive came to the surface in the case of *Singarassa*[32] in which the defendant Singarassa had been convicted of attacking army bases in the early 1990s and imprisoned. He appealed to the UN Human Rights Committee, which called for his release, retrial and compensation. The Supreme Court concluded that such remedies were not available under Sri Lankan law, except where there had been prosecution in bad faith. In addition the Supreme Court decided that it could not set aside or vary its judgment on the basis of the findings of the UN HR Committee since this body had no judicial power under the Constitution.

The Supreme Court judgment according to the Asian Human Rights Commission report inferred that the sovereignty of the country as enshrined in the Constitution is compromised by Sri Lanka's accession to the Covenant on Civil and Political Rights in 1980.[33] This follows it being a signatory to the Optional Protocol in 1997 that the ruling implies was done merely as the head of the executive and that as Sri Lanka has violated Article 2 of the ICCPR on that basis the obligations to the Convention by the Sri Lankan state can be waived.

This approach has been severely criticized by the International Crises Watch Asia Report no 165 that sets out the basic criteria that Sri Lanka needs to follow to balance the separation of powers.[34] It requires the overruling of the Singarasa

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[32] *Singarassa v Attorney General 30 S.C Spl (CA) no 182/99 (September 2006)*

[33] Asian Human Rights Commission Report AS- 217 -2006

[34] International Crises Group Asia Report No.172, 30 June 2009

case, respect of the amendment 17 that calls for the constitutional council to meet in the appointment of judges. It also states that the process has been infringed by the last two Presidents who have sought to make appointments by the Attorney General's office.

There has been further criticism leveled by the ICG into the judicial selection practices in Sri Lanka. It cites the example of the recently retired chief justice, Sarath N. Silva who it states eroded the independence of the lower courts and the Supreme Court. Through the Judicial Service Commission (JSC) it alleges that he controlled appointments, transfers and removals of lower court judges and, further, he used those administrative powers to punish judges out of step with his wishes and to reward those who toed the line. Moreover the police and other politically influential constituencies used their close ties to the chief justice to influence judicial decisions

PART B

REBUTTING KELSENS' ARGUMENT

i) Jurisprudential definition of efficacy

In order to turn Kelsen's logic on its head and reject the ground of state necessity as a rational basis for arbitrary rule his pure theory must be explored in terms of validating constitutional change. This has been the bone of contention in several countries as the cases show and their justification by the judiciary has been quite lucid. However, the usurpation of power by the military and the threat it poses to the civilian framework must be set against the notion that the basic norm has been changed.

The test of efficacy in Kelsen's *Pure Theory of Law*[35] is based upon what the law 'is' and not what it 'ought to be'. His approach eschews idealistic notions

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[35] Hans Kelsen, *Pure Theory of Law and State*, (trans. By M Knight California University Press 1957 pp 117)

of how law is formulated and instead concentrates on a theoretical deduction that extracts all political ideology and natural-scientific elements. It focuses on law's function and the objective purpose is clear from Kelsen's Pure Theory, where he writes that, " *Right from the start, therefore, my aim was to raise jurisprudence, which openly or covertly was almost completely wrapped up in legal-political argumentation [Raisonnement], to the level of a genuine science, a science of mind [Geistes-Wissenschaft].* "

The crux lies in when the Basic Norm is changed. This occurs when the old order ceases and the new order begins to be efficacious. The individuals whose behaviour the incoming constitution regulates actually behave, by and large, in conformity with the new order. Its litmus test is the actual behaviour of individuals that interprets the legality or illegality of the order, and by this means a new basic norm is presupposed endowing the revolutionary government with legal authority.

Therefore, if the revolutionaries fail, and the order they have tried to establish remains inefficacious, then, their undertaking is interpreted, not as a legal, or a law-creating act of establishing a constitution, but as an illegal act, a crime of treason, according to the old constitution.[36] However, in the words of de Smith, a '*successful revolution begets its own legality*'. This is a 'de facto' or 'effective control' test of governmental legitimacy and it was given its most famous formulation in the US Supreme Court in a 1928 case[37] concerning an international arbitration involving a concession allotted to a local company Tinoco, under the previous regime in the South American country.

Chief Justice Taff ruled :

> There is no exception to the principle that it is only by reference to an international legal obligation binding on a State that an act of that State can be characterized as internationally wrongful. The rule that the characterization given by international law cannot be affected by the characterization of the same act in internal law makes no exception for

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[36] S A De Smith, *Constitutional lawyers in Revolutionary Situations* (Western Ontario Law Review (1968) pp 100

[37] *Great Britain v Costa Rica* 1928 (Vol. 3, 1923)

> cases where rules of international law require the State to conform to the provisions of internal law, for instance by applying to aliens the same treatment as to nationals. It is true that in such a case once the State has applied the provisions of internal law, there can be no internationally wrongful act; but even then, it is not the fact of keeping conduct in conformity with internal law that precludes its international wrongfulness, but the fact that conduct which thus conforms to internal law constitutes, by the very fact of its conformity, the performance of the international obligation. Conversely, if a State has, by its act or omission, contravened provisions of internal law, there will be an internationally wrongful act inasmuch as the violation of internal law constitutes at the same time a breach of the international legal obligation.

This begs the question whether the *grundnorm* really has changed or if the old constitution is still valid if a coup occurs. It seems to be a moot point if the old provision is being employed to produce the same effect of arbitrary government then clearly the constitution has not been changed and its transition cannot be described as efficacious. The retention of the status quo is simply the enforcement of arms and rests on a superior exercise of power and by a lid placed on civil strife by the suspension or abrogation of the constitution.

In a recent article by Constitutional Transformations v "Juridical" coup d' etat *Gianluigi* Polombella compares the constitutional theory of Kelsen to prove that the basic norm does not change in a circumstances of a coup.[38] He writes:

> From the juridical perspective, Kelsen writes, it makes no difference whether the coup originates in a violent action by the people, or in a usurpation of power by the government or anything else. What counts, juridically speaking, is that the constitution is changed partially or totally, and a new constitution thus generated becomes the valid foundation of the legal order.

Polombella then goes on to enquire if this makes it possible for the Supreme Court to invalidate the decision of such a constituted authority:

> Therefore, the question arises as to whether and how the juridical coup changes the system for the future, introducing a discontinuity which

[38] German Law Journal Vol 8, No 10, October

> not only threatens the previous existing separation of powers, but subverts and undermines it to the extent that it would take another transformation of the same import to return to the previous system.

The concept of the *Grund norm* having changed when the military acceded to power in Pakistan is expunged by this analysis of efficacy of change because no change in the constitution took place by the juridical coup. The judiciary is simply the agent of the change and is not an independent organ of the constitution. It casts aside the notion that martial law government can act under an emergency by the specious argument that the country is threatened and that they have acted to safeguard the national interest by taking the extra constitutional action and abrogating the constitution.

It is clear that Kelsen's pure theory of the law is fairly abstract and the objective is to deduce a model of efficiency and it does not deal with justice. The legal norm is based on a hierarchy of norms, and each norm is derived from its superior norm. The ultimate norm from which every legal norm deduces its validity is the *Grundnorm,* the highest basic norm. As the *Grundnorm* is not deduced from anything else, but is assumed as an initial hypothesis, this has been criticised by those who have developed an alternative positivist view of law.

In a diametrically opposed view Professor H LA Hart rejects Kelsen's view on two premises firstly, the idea that law necessarily requires a sanctions regime, and secondly, a normative social phenomenon could not be explained purely in terms of social facts that regulate behaviour. In rejecting the "pure theory of law," Hart developed the notion that every legal system had a rule of recognition that takes account of circumstances in which the law exists.

Hart states that a constitution is legal by " *passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition*".[39]

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[39] HLA Hart, *The Concept of Law* 1961, Clarendon Press

It is the common denominator of all rules and provides a test for validity that arises out of a convention among officials whereby they accept the rule's criteria as a standard governing their behavior. These can be deduced from the social practices of officials acknowledging the rule as a legitimate rule of conduct, and capable of being obeyed as a valid law; by conferring validity to all else and in unifying the laws in the applicable legal system.

However, this notion of a master law is rejected by Dworkin who states that there is no central driving force for all subsequent laws.[40] He responds by stating that the rule of recognition cannot provide an ultimate test, but he also rejects Kelsen's separation of law and morality and his concept suggests that the two are related in anepistemic rather than in any ontological way. Dworkin's underlying principles are not provided by an authority acting under an obligation and legal rights even in cases where the correct legal outcome is open to reasonable dispute there is link between law and morality, but his concept suggests that the two are related in an epistemic rather than ontological sense. His resolution is to aim for social justice as set out in his definition of law based on the flexibility and creativity of judges and its validity in the public interest. He poses the question:

> One example is the ethical problem that is presented when a lawyer asks, not whether a particular law is effective, but whether it is fair. Another example is the conceptual puzzles that arise when lawyers try to describe the law in concepts that are unclear.

ii) Creation of a new judicial model

There is clearly a dragnet of laws in those countries that have a supervening security statute or state necessity set in stone as their legal doctrine. These can be enforced by an executive who is exercising de facto powers who has also de jure powers under his command. It can lead to an abuse of power as is manifest in the breaches of the rule of law in the south Asian countries. In a recent study by Imtaiz Omar's that has focused on constitutional and comparative legal theory

[40] R Dworkin, *Taking Rights Seriously* 1977, Cambridge: Harvard University

there is a strong argument for a change in the reasoning of judges who are compelled to act for the executive under the doctrine of necessity.[41]

In Chapter one, Omar deals with the derogations of these fundamental rights and conducts a general overview of the constitutions, the process of their adoption, and a brief discussion of provisions of rights and their general interpretation by the courts. He states that while there are guarantees in these constitutions of a 'right to life and liberty', however, there are also provisions relating to 'preventive detention' or 'administrative detention' without charge, for anticipated offences or for preventative reasons, are also included in these same documents.[42]

In his view the concept of 'preventive detention', is a post colonial construct of a prevailing power during the period of foreign rule, which was a 'a potent and effective mechanism to contain political dissent in the colonial period, has been expressly recognised and legitimised in the constitutions of independent Malaysia, Sri Lanka and Bangladesh; and that these powers are available both during states of emergency and in normal times.' He calls them a power of administrative detention that has been enhanced in the national frameworks. Omar next addresses the doctrinal basis of a 'state of emergency' by comparing the insurgencies in Malaysia, Sri Lanka and Bangladesh and the prescription of an emergency' by statute as defined in the anti terrorism legislation in the UK, Northern Ireland, Canada, and some States in Australia.[43]

He gives the definition of martial law in Pakistan as a process of an 'extra-constitutional emergency' which empowers the executive and legislature with extraordinary power that encroaches on individual rights. In expressing his concern for the predicament of individual citizens when constitutions are abrogated or suspended, by such spurious doctrines as state necessity, Omar questions the direct and indirect effects of the suspension of constitutional rights of citizens as a result of the proclamation of an emergency, and the removal of the framework for the protection of individual rights.

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[41] Imtaiz Omar, "Rights, Emergencies and Judicial Review" (1996) *Kluwer Law International,* Hague, Netherlands

[42] *Ibid* pp 301

[43] *Ibid* pp 323

These he argues that detention powers are based on the inherited powers of the post-colonial constitutions of these countries which he argues as the statutory instruments which structured the system of government in British colonial territories regularly linked the establishment of representative institutions with the reservation of special 'emergency' powers to the Representative of the people. Omar identifies three separate strands of jurisprudence arising from the courts in Malaysia, Sri Lanka and Bangladesh that lead to an advance of a substantive critique of prevailing legal interpretive theories in these countries. He identifies the fundamental problem and the solution follows:[44]

> The permeating influence of conventional ideas of law and justice, the familiarity with common law rules of interpretation and the self-denial of the Court of its status as constitutional court have all contributed to the failure of the Malaysian and Sri Lankan Courts to render justice on vital questions concerning constitutional liberty. Adherence to the formal style of interpretation in relation to constitutional questions overlooks the fact of post- Independence statehood and the principles, priorities and values of the post- Independence constitutional order.

Therefore, the constitutionally entrenched emergency powers predefine the legal consequences of a challenge in the courts and preclude judicial independence in decision making. This he points out meets with little success when an challenge comes by way of judicial review when it has no prospect for success because the executive competence is expressly in line with meeting with the emergency and in meeting the nature of the crisis. The judicial power in these circumstances is seconded to the executive branch of the government as has happened in Pakistan, Malaysia, Sri Lanka and Bangladesh.

In order to arrive at this new judicial model the reasoning of such accomplished modern jurists as Giovanni Sartori[45], must be evaluated. He states that "*the existence of the Rechtsstaat (constitutional guarantees) appears to eliminate the very possibility of the unjust law and thereby allows the problem of law to be reduced to a problem of form, not of content*". This he mentions is not

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[44] *Ibid* pp 328

[45] G Sartori , *The Theory of Democracy Revisited* (Chatham House) New Jersey 1987 pp 31

just the juridical form but along with the form of law and the formal nature of its contents constitutes what defines "the characteristics by virtue of which a law is a law".

Sartori elucidates his theory by stating that specific procedures have to be either written into statutes by legislators or articulated by independent judges in case law. The distinction, he argues is between the rule of law and rule of a person. In a representative democracy, the rule of person means the rule of legislators, but the rule of person, left unchecked, presents the danger of tyranny.

This is because the law is the product of judges' "legal reasoning", but the rule of law can be inadequate for three reasons. First, the rule of law can be too static; secondly, the rule of law can result in the tyranny of (unelected) judges; and finally, the rule of law, by itself, may not address the problem of political freedom As such, Sartori states, the ideal representative democracy needs to strike a proper balance between the rule of legislators and the rule of law. This is done through liberal constitutionalism.

This can be illuminated by an example from his book:[46]

> "Even though our constitutions are becoming more and more unbalanced on the side of statutory lawmaking, as long as [constitutions] are considered a higher law, as long as we have judicial review, independent judges dedicated to legal reasoning, and, possibly, the due process of law, and as long as a binding procedure establishing the method of lawmaking remains an effective brake on the bare-will conception of law — as long as these conditions prevail, we are still depending on the liberal-constitutional solution of the problem of political power"

This methodology provides legal sanctions through the constitutional process and it rules out the arbitrary form of law making that Omar states arise by compliance with the executive in a 'formal' style of interpretation. It may be the cause of the judiciaries close identification with "a rigid precedent-oriented approach to legal issues and the isolation of legal questions from any consideration of values".

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[46] *Ibid* pp 35

iii) *Operative devices in a Constitution*

In support of a more flexible interpretation of constitutional rules an argument can be advanced that it can be interpreted according to more historically sensitive categories. This is the existence in its fabric that Ackerman differentiates between an official constitutional canon and the operational constitutional canon. The former is the body of texts that conventional legal theory places at the very centre of the legal culture's self-understanding while the ad hoc canon is developed by the judges. He gives the example of the contemporary USA where the official canon is composed of the 1787 Constitution and its subsequent formal amendments and states that there is " a yawning gap between this official canon and the nation-centred self-understanding of the American people".[47]

The legal profession contends Ackerman has been trying to fill this gap with an *operational* canon that promotes "landmark statutes and super precedents to a central role in constitutional argument". However, these attempts have proceeded in an ad hoc fashion, and it is past time for us to reflect on these efforts at adaptation and build an official constitutional canon that is adequate for use by lawyers and judges of the twenty-first century.

He mentions these developments as "haphazard and under theorized fashion". He cites the notion of a "super precedent" that is gaining ground, and for the adoption of landmark statutes that also deserve a central place in the modern constitutional canon, such as " Abraham Lincoln repeatedly claimed that the Missouri Compromise should be accorded a "sacred" status comparable to the Constitution itself ". These he states could move beyond " the common law's sceptical treatment of legislation and to treat major statutes, in Justice Stone's words, as "a source of law, and as a premise for legal reasoning" (The Common Law in the US, 50 HLR 4,13 1930).[48]

If these super statutes can be brought to bear on legal reasoning then it could be less formalistic and may find a source for moderation for judges. This will need

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[47] Bruce Ackerman, "The Living Constitution", 120 *Harv. Law Rev* 1737 (2007) pp 14

[48] *Ibid* pp 17

the judges to override state necessity where it clearly an exercise of arbitrary power that goes against the canon of reasonable and good governance. In the case of the countries that have over weaning security apparatuses in place this will be their strong ethical and moral underpinning that will need to be stressed.

CONCLUSION

In bringing about the end of the last military government the lawyers movement in Pakistan has shown for the first time since the Third Estate in France that framed the Declaration of Rights of Man and the Citizen in 1789 that a professional class can successfully challenge the arbitrary power that relies on ill founded principle to sustain itself. However, it cannot be stated that it has consigned the role of the military to the history in future cases of a perceived threat to the country.

This is a role of the jurist to override the compliant role of the judiciary in Pakistan, that has been in evidence by the approaches that go as far back as the *Moulvi Tamizuddin* case when Munir C-J obediently served judgment in favour of Governor General Ghullam's dismissal of the legislature. The same reasoning was espoused in the *Zafar Shah* case when the legality of the military rule of General Musharaff was raised in the Supreme Court.

The origin of the article 58 (I) b lies in the colonial military axis that owes its derives from the blueprint of the Government of India Act 1835.[49] It is clear that the link in the chain of common law concepts such as the doctrine of state necessity

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[49] Section 93 conferred powers on governors of the provinces to decide when the government of the federation cannot be carried in accordance with the GIA. The joint parliamentary committee of the British parliament on the Government of India Bill observed: 'It is proposed to give the governor power at his discretion, if at any time he is satisfied that a situation has arisen which for the time being renders it impossible for the government of the province to be carried on in accordance with the provisions of the constitution act.' The secretary of state for India, Sir Samuel Hoare, told the House of Commons on March 13, 1935 that he was 'contemplating the last emergency, when the whole machinery or government has broken down,' a weapon of last resort not first.

that has granted the Generals a license to rule the country. There are initiatives besides the purely theoretical one of debunking Kelsen's theory of the efficacy that has been relied upon the advocates of the junta. It can be done by the interpretation of the rule of law that is more in accordance with the development of morality of law. The doctrine of state necessity will no longer be the papal bull that has enabled it to survive as precedent.

It will invest the judges with authority not to suspend the legal safeguards for individuals on the basis that the regime has achieved efficacy. This must not be allowed to operate as an ouster to exclude judicial review of administrative action and the judges should be encouraged by the momentum of the lawyers sacrifices in Pakistan to not abide by any fixed rigid precedent-oriented approach to legal issues and the isolation of legal questions from any consideration of values.

These are programmes that can be launched for preventing the excesses of the martial law regimes and the simple measures by which they can suspend the Constitution in Pakistan. In that regard there have been recommendations by the International Crises Group that has been monitoring the erosion of civil liberties in Pakistan by successive military regimes. It castigates the inability of the judiciary to check "extra-constitutional regime change, that has endorsed and abetted the consolidation of illegally gained power".[50]

The ICG has identified several key areas to amend the machinery of justice in Pakistan to carry out institutional change from top down. The report calls for substantial changes in the system for appointments, promotions and removals of judges, as well in the jurisdiction of the ordinary courts. The report makes the assertion that " the judicial independence from political influence and financial corruption cannot be restored by mere technical, legislative corrections" and that "reform depends upon a credible commitment by the government to respect the rule of law as much as upon legislated change".

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[50] International Crises Group Building Judicial Independence in Pakistan (Asia Report No 86, 9/11/04)

It outlines the changes that it wants the government to make for an independent branch of the judiciary to function that can be summarised as follows:

1. Public discussions with members of the bar and parliamentarians before filling the candidates for posts on the High Courts and then adoption of a constitutional amendment, to bring about a transparent system of judicial appointments to the High Courts that expands accountability beyond the executive and Chief Justices.

2. To promote on the basis of seniority the promotion of High Court judges to the posts of Chief Justice; establish by statute a seniority rule for promotions from the High Courts to the Supreme Court; and when filling vacancies on the High Courts and Supreme Court.

3. To terminate the practices of not confirming additional judges and of awarding government positions to retired judges; establish public audits of all members of the superior judiciary and near family members to ensure that only statutory benefits are awarded and corrupt practices are avoided.

4. End the practice of selectively offering new oaths to judges, and renounce publicly the use of the judicial oath as a mechanism for purging the judiciary.

5. Absorb the anti-terrorism and accountability courts into the ordinary judiciary, jettisoning procedural variations in bail, plea-bargaining, and the physical circumstances of trials that presently characterise those proceedings.

This reform to the infrastructure will enable the Pakistan and the Commonwealth judiciary to be more flexible in their legal interpretation. The Supreme Courts should apply less formalistic methodology, than the maxim *Salus populi est suprema la.* It must not be set in an absolute terms and it has to accord with the rights of the people that go towards preserving their fundamental freedoms and not to emasculate them by a regime that monopolises power.

There must be no way back for the Generals and the people should express their inalienable rights that make them stakeholders in power in a democracy where the magistrates are elected. There can be no real separation of powers in Pakistan, until there are land reforms that guarantee a portion of real estate as a right than a privilege and bring the genuine representatives of the people into power. With the development of a clear doctrine of rights based on civil liberty, that emanates from the people and serves their benefits can the judges carry out their role as interpreters of legislation, rather than as interlocutors on behalf of a military regime.

'EQUALITY OF ARMS IS A BLESSED PHRASE':[1] ITS MEANING UNDER INTERNATIONAL LAW

Roger Gamble *
Noel Dias **

ABSTRACT

This paper discusses the meaning of the 'equality of arms' principle in relation to fair trial protections under Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") and Art 14 of the International Covenant on Civil and Political Rights ("the ICCPR"). We discuss the particular rights to which the equality of arms principle extend - the right to be tried in one's presence; to defend oneself in person; to choose one's own counsel; to be informed of the right to counsel; and the right to receive free legal aid.

In essence, the equality of arms principle speaks to the virtues of procedural equality: the idea that both parties should be treated in a manner ensuring that they have an approximately equal opportunity to make their case during the course of a trial. Such protections are guaranteed in most domestic legal systems, are enshrined in relevant international instruments (such as the two we examine in this paper) and are the procedural bedrock of all major international courts and tribunals.

The authors conclude that everyone charged with a criminal offense has a primary, and generally, unrestricted right to defend himself. This right can be forgone and counsel can be chosen by the accused (subject to the usual constraints such as availability of counsel and the defendant's capacity to pay). Where the defendant is unable to afford counsel, he or she has a right to legal aid but only where the interests of justice so requires.

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[1] *RTA v Dederer* [2007] HCA 42, Callinan J at para298

1. INTRODUCTION

Under international law there has been no attempt to list exhaustively the attributes of a fair trial; rather the approach has been to enshrine certain basic minimum rights of an accused in a criminal trial or a party in certain civil disputes in various international instruments. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR")[2] and Article 14 of the International Covenant on Civil and Political Rights ("the ICCPR")[3] enshrine such basic minimum rights and it is these two instruments that we examine in this paper.[4]

Put simply Articles 6(1) and 14(1) provide that a person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The remainder of Article 14[5] and Article 6[6] catalogue the *minimum* procedural guarantees that must be provided to a person in the determination of any *criminal* charges brought against him or her. One of those guarantees is the principle of equality of arms, a right that is fundamental to the adversarial nature of modern criminal proceedings. Both the ECHR and the ICCPR are exemplars of the decisive move away from the inquisitorial processes towards the adversarial.[7]

The specific equality principle provision in the ECHR and the ICCPR are virtually identical. Article 14(3) of the ICCPR states that:

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[2] European Convention for the Protection of Human Rights and Fundamental Freedoms Art 6(1)-(3)

[3] International Covenant on Civil and Political Rights Art 14(1)-(3)

[4] For an overview of the fair trial guarantees in the ECHR and the ICCPR see Dias and Gamble 'Dias N & Gamble R, 'International Fair Trial Protections in Criminal Trials' (2008) 20(1) *Sri Lanka JIL* 25

[5] See the ICCPR Article 14 (3) (a)-(g), 14 (5) and (7)

[6] See the ECHR Article 6(3) (a)-(e)

[7] In earlier inquisitorial systems defence counsel were often denied the right to participate (and rights of confrontation and compulsory process were less important than in adversarial systems: see M C Bassouni 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' 3 *Duke J Comp and Int'l L* 235 at 277.

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality...'(d) to be tried in his presence, and to defend himself in person or through legal assistance of his choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if does not have sufficient means to pay for it".

Article 6(3) of the ECHR says:

> 'Everyone charged with a criminal offence has the following minimum rights... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

Thus the relevant parts of Art 6(3)(c) and 14(3)(d) are substantially the same and include the following rights:

- to be tried in his presence (Art 14, not Art 6)
- to defend oneself in person
- to choose one's own counsel
- to be informed of the right to counsel and
- to receive free legal assistance

We will examine each of these rights.

2. THE EQUALITY PRINCIPLE EXPLAINED

In 2007, the Human Rights Committee of the United Nations issued General Comment No. 32 on the right of equality before courts and tribunals specified in Art 14 of the ICCPR. The Committee explained the operation of this right:

> 'The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant'.[8]

[8] Human Rights Committee of the United Nations, General Comment No 32, 21 August 2007, Geneva, p13

The equality of arms principle is primarily concerned with *procedural* equality rather than *substantive* equality, in the sense of ensuring that the material and practical circumstances of the two parties are the same. It is concerned with ensuring parties have access to facilities on equal terms and have a reasonable opportunity of presenting their case under conditions which do not place them at substantial disadvantage *vis-à-vis* their opponent.[9] The application of the equality of arms principle in the criminal law context takes account of the fact that the prosecution enters the trial with two advantages: having superior resources and having conducted the investigation that led to the charges being brought.

Stefania Negri in the International Criminal Law Review has defined the principle more fully and emphasised it is a principle with comprehensive application in criminal matters where the prosecution enters the trial with two advantages: having superior resources and having conducted the investigation that led to the charges being brought:

> 'The right to a fair trial entails protecting the 'equality of arms' principle, an inherent element of the due process of law in both civil and criminal proceedings. Strict compliance with this principle is required at all stages of the proceedings in order to afford both parties (especially the weaker litigant) a reasonable opportunity to present their case under conditions of equality. Indeed, at the core of the concept of 'equality of arms', as elaborated in domestic and international case law, is the idea that both parties should be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial. Fundamental procedural safe-guards aimed at securing such equality are guaranteed in most domestic legal orders, enshrined in human rights treaties and other relevant international instruments, and set out in the Statutes and Rules of the major international courts and tribunals.'[10]

Elsewhere he says,

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[9] Harris, D., O'Boyle, M., and Warbrick, C., *Law of the European Convention on Human Rights*, (Butterworths, London, 1995) 218.

[10] Stefania Negri, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' (2005) 5 *International Criminal Law Review* 513 (footnotes omitted).

> 'In order to grant effective protection to the rights of the parties – with major concern for the rights of weaker litigants – the principle of procedural equality has to be understood as a basic rule of law and not merely as a guiding principle that inspires judicial proceedings with limited or relative binding force. It is also evident that strict compliance with the principle....is an ever compelling need in proceedings where individuals appear as parties'.[11]

Although the phrase 'equality of arms' is familiar to civil rather than common law legal systems, where it is better understood as the requirement of 'due process', its meaning resonates in any functional legal system and, as the assumption about the equality of advocates has weakened in common law adversarial systems, the potential for the principle of equality to be invoked has increased.[12] In an adversarial system the principle of equality of arms requires that that 'the resolution of conflicts of evidence or opinion between two people generally requires that both sides be given equal opportunities to put their side of the story and to challenge evidence put by the other side. There is an obligation to conduct a proper examination of the submissions, arguments and evidence. A court cannot comply with Art 6 if it merely defers to a decision of an administrative body on a fact which is crucial for the determination of the case'[13]

This paper focuses on one aspect of the equality principle - the right of a defendant to defend himself or receive/be assigned legal assistance. However it is worth remembering that the principle is but one feature of the wider concept of fair trial and due process of law within the meaning of Article 6(1) and Article 14(1) of the ICCPR and the ECHR respectively.[14] Furthermore it is but one part of the procedural guarantees listed in Article 14(3) of the ICCPR and Article 6(3) of the ECHR.

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[11] See Stefani Negri, 'Equality of Arms – Guiding Light or Empty Shell' in *International Criminal Justice: A Critical Analysis of Institutions and Procedures,* ed Michael Bohlander (2007) Cameron May, at p27

[12] See Jacob 'Civil Justice in the Age of Human Rights' Ashgate (2007) p109

[13] See fn 11above, at p107 (citing *ID v Bulgaria* 28 July 2005)

[14] See *Neumeister* v *Austria* 8 Eur Ct HR (ser A) para 22 (1968)

3. ESSENTIAL ELEMENTS OF 'EQUALITY OF ARMS' PRINCIPLE – THE RIGHT TO DEFEND ONESELF OR HAVE LEGAL ASSISTANCE.

The Art.6(3)(c) of the ECHR guarantees the accused the right to legal assistance, which has three subsidiary rights: to defend himself; or to defend through legal assistance of his choosing; or to be given free legal aid.[15]

3.1 The right to be tried in one's presence

Although not specifically referred to in Articles 14(1) or 6(1), the object and purpose of the Articles, taken as a whole, indicates that a person 'charged with a criminal offence' is entitled to take part in the hearing. In the interests of a fair and just criminal process it is crucial that a defendant appear at his or her trial and the duty to guarantee the right of a defendant to be present in the courtroom ranks as one of the core requirements of Article 6 and Article 14.[16]

On the question of whether the accused must be personally present, the earlier interpretation of the Convention organs has been rather restrictive. However, in *Colozza & Rubinat v Italy,*[17] the European Court maintained that "the object and purpose of (the) Article 6 as a whole was to show that a person charged with a criminal offense is entitled to take part in the hearing". This was confirmed in *Ensslin, Baader & Raspe v FRG,* [18] which rejected the contention proposed by Norway in a previous case,[19] where the decision to allow the accused to be present at trial depended on the determination of a Court of Appeal whether his presence was needed to examine a particular witness.

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[15] In *Pakelli v FRG,* Series A, no.64 (1983); *Goddi v Italy,* Series A, no.76 (1984), it was said that Art.6(3)(b) is intimately connected with Art.6(3)(c)

[16] See *Stoichkov v Bulgaria* no. 9808/02 March 2006.

[17] *Colozza & Rubinat v Italy*, Series A, no.89, para.25 (1985): Commission Report, para.116 (1983) identified the importance of the 'personality of the accused' to the court's decision as a further reason for his presence.

[18] *Ensslin, Baader& Raspe v FRG,* App.Nos.7572, 7586 & 7587/76, 14 DR 64 (1978).

[19] *App.No.5923/72 v Norway*

In *Hermi v Italy*[20] a majority of the Court decided that there was no automatic right for a defendant to appear in person, particularly at the appellate stage that followed a trial at which the defendant appeared:

> '...even where the court of appeal has jurisdiction to review the case both as to the facts and the law Article 6 does not *always* require a right to a public hearing, still less a right to appear in person. ..In order to decide the question regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in light of the nature of the issues to be decided by it...and of their importance to the appellant..Where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused'[21]

Recently in *Dedko v Australia*[22] In regard to the author's claim of a right to be present at the High Court (Australia's highest court) proceedings, the Committee confirmed its previous jurisprudence that the disposition of an appeal does not necessarily require an oral hearing and noted that the defendant had the opportunity to submit written papers to the High Court, acting *pro se*, and that she failed to appeal her denial of legal aid before the Legal Aid Review Committee.

However, the Committee said that the High Court *did* choose to conduct an oral hearing in its consideration of the author's application for leave to appeal. Further, A question of fact was put by the court to the solicitor for the Director of Public Prosecutions, and the author had no opportunity, either in person or through counsel, to comment on that question. One member of the High Court (Kirby J) noted that there was no apparent reason why a defendant held in custody could not, at a minimum, be enabled to take part in the hearing by means of a telecommunications

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[20] (2008) 46 EHRR 46

[21] See *Dondarini* v *San Marino* App no. 50545/99, July 2004. Compare the decision in Ekbatani v Sweden (1991) 13 EHRR 504 (a breach of Article 6(3)) with that in *Kamasinski* v *Austria* (1991) 13 EHRR 36 (no breach of Article 6(3)).

[22] CCPR/C/90/D/1347/2005 29 August 2007

link, at least where he or she did not otherwise enjoy any representation. The same judge noted that a right to attend appellate hearings is already the practice in several jurisdictions of the State party. The State party offered no explanation, other than to say it was not the practice in New South Wales. The Committee decided,

> '...that when a defendant is not given an opportunity equal to that of the State party in the adjudication of a hearing bearing on the determination of a criminal charge, the principles of fairness and equality are engaged. It is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the author. In the present case, the State party has offered no reason...why it would be permissible to have counsel for the State take part in the hearing in the absence of the unrepresented defendant, or why an unrepresented defendant in detention should be treated more unfavourably than unrepresented defendant *not* in detention who can participate in the proceedings. Accordingly, the Committee concludes that a violation of the guarantee of equality before the courts in article 14, paragraph 1, occurred in the circumstances of the case'.[23]

3.2 The right to defend oneself in person

The right to self-representation is not an absolute right; it complements the right to have legal assistance and is not intended to be an alternative to it. The public interest in ensuring equality of arms and due process more generally means that a court must ensure that the defendant can represent himself adequately. This is despite the fact that Article 6(3)(c) of the ECHR and Article 14(3)(d) of the ICCPR provides for the right of the accused "to defend himself in person *or* through his legal counsel of his choosing".[24] There is an argument that the use of the disjunctive 'or' gives the defendant a choice – a right to defend oneself 'or' defend oneself through a lawyer. It is now accepted that, in particular

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[23] See fn 22 above at para 7.4

[24] Emphasis added. See generally Mahoney P., 'Right to a Fair Trial in Criminal Matters under Art 6 ECHR' [2004] 4 *JSIJ* 107, 125

circumstances, a defendant *must* be legally represented, thus overriding his or her right to defend himself or herself.[25] Where there is the possibility of capital punishment, the HRC has said that the accused must be effectively assisted by a lawyer at all stages of the proceedings.[26]

On the question of whether the accused must be personally present, the interpretation of the Convention organs has been rather restrictive. In the earlier jurisprudence,[27] the Strasbourg institutions gave the discretion to the States' authorities to decide whether the accused should be personally present or to allow only his legal representative to be present at the trial. However, in *Colozza & Rubinat v Italy,*[28] the European Court maintained that "the object and purpose of (the) Article 6 as a whole was to show that a person charged with a criminal offense is entitled to take part in the hearing". This was confirmed in *Ensslin, Baader& Raspe v FRG,* [29] which rejected the contention proposed by Norway in a previous case,[30] where the decision to allow the accused to be present at trial depended on the determination of a Court of Appeal whether his presence was needed to examine a particular witness.

In *Hermi v Italy*[31] a majority of the Court decided that there was no automatic right for a defendant to be tried in his presence, particularly at the appellate stage. The applicant was charged with drug trafficking. He had two lawyers of his own choosing. At first instance the applicant and his lawyers were present at a private hearing but this was because he requested that the charge be heard summarily (a procedure with inherent and significant benefits to a defendant, particularly in

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[25] But otherwise the accused is entitled to defend himself: *Hill and Hill v Spain* (HRC 526/93). Also see *Pham Hoang v France* (1992)

[26] *Aliboev v Tajikistan,* Communication no.985/2001

[27] HRC.172/56, 1YB211:

[28] *Colozza & Rubinat v Italy*, Series A, no.89, para.25 (1985): Commission Report, para.116 (1983) identified the importance of the 'personality of the accused' to the court's decision as a further reason for his presence.

[29] *Ensslin, Baader& Raspe v FRG,* App.Nos.7572, 7586 & 7587/76, 14 DR 64 (1978).

[30] *App.No.5923/72 v Norway*

[31] (2008) 46 *EHRR* 46

relation to any sentence that can be imposed in the event that the defendant is convicted). No interpreter was present but the applicant, who spoke Arabic, said he could speak some Italian and understood the content of the charge. He was convicted, sentenced to 6 years jail and fined 20,000 euros. He appealed and was notified on September 1 that the appeal was to take place on November 3. He had no contact with his lawyers between those two dates. The applicant did not attend the appellate court which denied his appeal. The applicant then appealed to the Court of Cassation on points of law, arguing that he had been denied a fair trial because the documents at the trial had not been translated into Arabic and he had not been in attendance at the appeal. The Court of Cassation denied the appeal observing that the Convention did not require procedural documents to be translated into the language of a foreign defendant in Italy. Furthermore the presence of the defendant was not required under the summary procedure.

The defendant appealed to the European Court on a number of grounds. On the question of the right to be present at the hearing the Court decided that there was no automatic right, particularly at an appellate hearing that followed a trial at which the defendant appeared.

The decision of the majority followed the earlier decision of the Court in *Meftah and ors v France* where the Court said

> Provided that there has been a public hearing at first instance, the absence of public hearings at second or third instance may be justified by the special features of the proceedings at issue. Thus proceedings for leave to appeal or proceedings only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even where the appellant was not given an opportunity of being heard in person.[32]

In *Goddi v Italy,*[33] neither the accused nor his lawyer was present at the trial proceedings. Hence, the Criminal Appeal Court appointed a legal aid lawyer and proceeded to impose a heavier prison sentence. The reason for holding proceedings

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[32] IHRL 2612 (ECHR 2002) at para 41

[33] *Goddi v Italy,* Series A, no.76 (1984)

in the absence of the accused was that he was trying to delay justice. But, in fact, the accused was detained by the prison authorities in connection with another offence. In this instance, the Commission recognized a positive obligation on the part of the State to ensure the presence of the accused at the hearing or at least to offer him the opportunity of appearing by informing him of his right.

In *Zana v Turkey,*[34] the applicant was not requested to attend the hearing before the court that sentenced him. Pursuant to national law, the assize court had taken evidence from him under the powers delegated by the court trying the case. The applicant raised procedural objections and insisted on the use of the Kurdish language during the proceedings. The European Court found that his objections to the court language (other than Kurdish) was not a waiver of his right to defend himself and to appear before the court. As such, the Turkish government violated Art. 6 (3)(b) of the Convention. Given the seriousness of the offence (carrying 12 months imprisonment), the issue of 'indirect hearing' and the presence of the applicant's lawyer appearing in the case did not compensate for the applicant's absence.

3.3 The right to legal assistance

3.3.1 Introduction

The advantages of representation by counsel are clearly recognised in national and international law. It is in the best interests not only of the accused but also of the administration of justice that an accused be represented, particularly when the offence is serious. An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as the prosecutor and in this sense there is no equality of arms. As Justice Michael Kirby of The Australian High Court has put it

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[34] *Zana v Turkey,* 69*British YBIL* 394 (1998)

> '...the notion that judges should preside over serious criminal trials where accused persons, otherwise than by their choice, are not properly represented by a trained lawyer, involves a concept of law as a charade and mere formality: not as an enterprise of substantive justice.'[35]

Although Article 6(3) of the Convention and Article 14(3) of the Covenant provide few specific guidelines on the parameters of the right to counsel, they do establish the right as a norm of international law.

3.3.2 The right to legal assistance under the ECHR

The question of legal assistance arises normally at the trial stage but in *Imbrioscia v Switzerland*, the question was whether the defendant is entitled to legal representation at the *pre-trial stage.*[36] The observation of Harris and others on this case is that:

> "Art 6(3)(c) does not require (the majority of the European Court did not advert their minds to this aspect) the State to take the initiative to invite the lawyer of an accused to be present during the questioning in the course of investigation...However ...it would appear that if the accused or his lawyer requests the latter's attendance, then this must be allowed".[37]

The right to legal assistance under Art 6(3)(c) was not generally acknowledged by the Strasbourg institutions in the case of extradition proceedings. However, in *Soering v UK,* the European Court left it open in case the accused would run the risk of 'flagrant denial of a fair trial'.[38] A fugitive offender in a foreign land is often deeply marginalised, and as such, he is a good candidate for legal assistance.

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[35] Kirby M 'Law and Justice in Australia: Room for Improvement' [2004] QUTLJJ 19.

[36] *Imbrioscia v Switzerland,* (1993) 17 EHRR 441

[37] Harris, D., O'Boyle, M., Warbrick, C., *Law of the European Convention on Human Rights*, Butterworth, London, 1995, p.257

[38] *Soering v UK,* Series A, no.161 (1989): the fugitive offender ran the risk of a death penalty in the State of Virginia (USA)

In *Murray v UK*, the European Court on Human Rights found that the UK had violated ECHR Art 6(3)(c) on the ground that the petitioner was denied access to lawyers during the first 48 hours after his arrest. This restriction combined with a threat to draw adverse inferences from the silence of the accused violated the right to a fair trial under Art.6(1).[39]

3.3.3 The right to legal assistance under the ICCPR

The HRC has found grave breaches of this right in a number of situations. In *J. Campbell v Jamaica*, when the accused was notified of his court-appointed lawyer's name only after the rejection of his appeal, which rendered him unable him to meet the lawyer for an effective defence.[40] In *L. Simmonds v Jamaica,*[41] when the accused was not informed of the scheduling of his appeal, jeopardizing the opportunities to meet his lawyer and prepare his defence: the applicant had neither been allowed to instruct his legal representative nor allowed to be present in person for his appeal.[42] As stated in *Simpson v Jamaica* and a series of other decisions: "Legal assistance [must] be available at all stages of criminal proceedings, particularly in capital cases".[43] The signatory State was not faulted for the inadequacies of the lawyer. In *Ashby v Trinidad and Tobago,*[44] the Committee

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[39] *Murray v UK* , (1996) *British YBIL*

[40] *J. Campbell v Jamaica,* Communication No.307/1988: Doc.A/48/40, p.44 (mimeographed version).

[41] *L. Simmond v Jamaica,* Communication No.338/1988: Doc./ Doc.A/48/40, p.82 (mimeographed version)

[42] *G. Campbell v Jamaica,* Communication No.248/1987: Doc.A/47/40, p.239

[43] *Simpson v Jamaica*, Communication No. 695/1996: UN Doc.A/57/40, p/67. In this case the author of communication was convicted of murder and his death sentence was commuted for life. He claimed that the lawyer assigned by the State was absent for the hearing of two of the four witnesses during the preliminary hearing. Previous decisions of the Committee which held the same view were as follows: *Brown v Jamaica,* Communication No.775/1997 adopted on 23 March 1999; *Clarence Marshall v Jamaica,* Communication No.730/1996 adopted on 3 November 1998; *Osbourne Wright and Eric Harvey v Jamaica*, Communication No.459/1991 adopted on 27 October 1995; and *Frank Robinson v Jamaica*, Communication No.223/1987 adopted on 30 March 1989.

[44] *Ashby v Trinidad and Tobago* Communication No.580/1994: A/57/40. In this case the applicant was a NGO representing the victim, Ashby, who was executed prior to the determination of his case by the HRC. For this action HRC found the State liable.

stated: "In the instant case, there is no reason for the Committee to believe that the trial attorney was not using other than his best judgment. It is apparent from the trial transcript that the lawyer cross-examined all witnesses. It is apparent from the appeals decision that the grounds of appeal submitted by the lawyer were argued and fully taken into account". In short, it is important that the legal representation is effective and thus enable the accused to mount an adequate defence.

3.3.4 The right to choose a lawyer

The accused does not have an unfettered right to choose his lawyer. The right of the accused may be circumscribed by State regulation. For example, the accused cannot ask a solicitor who has not obtained the necessary advocacy practising certificate to appear in the higher English courts nor a disbarred lawyer to appear for him. On the other hand, a State party could not rely on its right to regulate the legal profession so as to prevent ethnic minorities or political dissidents from being represented by lawyers sympathetic to their cause. The UN Human Rights Committee has questioned Japan and Iran on the requirement of prior government authorisation for becoming lawyers.[45] Poland was also required to furnish information on the grounds on which the Ministry of Justice could oppose the admission of lawyers to the Bar.[46]

The European Commission found the exclusion of lawyers suspected of having criminal association with the accused as justified.[47] Exclusion of lawyers from particular trials should be resorted to only in cases of extreme necessity and should be non-discriminatory. In a trial concerned with terrorism, the Commission, whilst it recognised that the exclusion of a lawyer will affect the continuity of the defence, nonetheless allowed the State 'a margin of appreciation'.[48]

However there was no violation of Art 14 (3)(d). The victim of violation (Ashby) was charged in the domestic court for murder. The only evidence against him was an alleged accomplice and his own confession.

[45] *Human Rights Committee Reports A/37/40*

[46] *Human Rights Committee Rep. A/42/40.*

[47] *App.No.7572/76*

[48] *App.Nos.7572/76, 7586/76 and 7587/76*

In *S v Switzerland* both the European Commission and the Court of Human Rights found that the right of the applicant under Art 6(3)(c) was violated when he was held in pre-trial detention preventing confidential communication with his lawyer.[49] In *Poitrimol v France*, legal representation was used as a ploy to coerce the absconding convict to appear before the courts. Once he appeared, he was refused legal representation on his appeal. This was found to be a violation.[50]

The right to choose a lawyer, then, is not absolute but has legitimate constraints. By the same token the accused can choose to defend himself, provided he also accepts the reasonable consequences of his choice. In *Melin v France* the European Court found that the applicant, the accused in this case who was also a lawyer, in opting to defend himself was barred from complaining about the miscalculations he made by not requesting the original court record in time to prepare his appeal.[51] Also, in *Morris v UK* the European Court held that once the applicant chose the defending officer of the Army in preference to the solicitor provided by the Legal Aid authority, he is disentitled to complain that the defending officer is unable to act in his best interests.[52]

In the context of prison disciplinary proceedings in England, after the enactment of the Human Rights Act 1998, in one case the court was content to concede that a prisoner did not require legal representation, since legal advice alone was sufficient, as there were no unusual difficulties in presenting his case.[53]

3.3.5 Legal Assistance at Pre-trial Stage

The ECHR does not guarantee the right to legal assistance at the pre-trial stages. In *Brenan v UK*,[54] the European Court of Human Rights said: "although Art 6

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[49] *S v Switzerland,* ECHR, judgement of Nov. 28, 1991: (1991) 14 EHRR 670: (1992) *British YBIL*, Case No.12

[50] In *Poitrimol v France,* Series A, no.208-B (1991)

[51] *Melin v France,* Series A, no.261, para.25 (1993): This case was decided under Article 6(1), (3)(b) & (c) together.

[52] *Morris v UK,* (2002) 34 EHRR 52, p.1253, paras.81 & 90

[53] *Greenfield v Home Secretary*

[54] *Brenan v UK* (2002) 34 EHRR 507

normally requires that the accused be allowed to benefit from assistance of a lawyer at the initial stages of police interrogation, this right is not explicitly set out in the Convention and may be subject to restriction for good cause". Whilst recordings of interviews and attendance of a lawyer provide "a safeguard against police misconduct, they are not an indispensable pre-condition of fairness under Art 6(1)". It held that the adversarial procedure conducted before the trial court was capable of bringing to light any oppressive conduct by police. As such it found that the presence of the police officer within hearing distance during the applicant's first consultation with his solicitor infringed his right to exercise of his defence rights under Art 6(3) read in conjunction with Art 6(1).

3.3.6 The adequacy of counsel test

The European court has emphasised that the right to a proper defence is not a theoretical right – on a number of occasions the Court has found violations where the legal aid lawyer has failed the 'adequacy of counsel' test. In *Sannino v Italy*[55] the domestic court had assigned counsel to represent the defendant. However the lawyer was absent from a number of hearings and was not 'across the brief' at all. Although the defendant did not complain at the time Court held that, given the obvious shortcomings of the assigned counsel, the authorities should have intervened. Similarly in *Artico v Italy*[56] the 'intersts of justice' demanded that the defendant receive legal assistance. However, the court-appointed legal aid lawyer provided no assistance at all and this was brought to the attention of the court. In *Pakelli v Germany* [57] the German court's refusal to provide legal assistance on an appeal constituted a breach of Article 6(3)(c) because the appellant was unable to put oral arguments on the various points of law which were being argued.

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[55] 30961/03

[56] (1981) 3 EHRR 1

[57] However the decisions do not only go in one direction: see *Campbell v Jamaica* (HRC 618/95); *Hussain v Mauritius* (HRC 980/01)

The HRC in *Kelly v Jamaica*[58] said,

> ...the Committee is of the opinion that while Art 14(3)(d) does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice.

If there is insufficient or ineffective legal representation that prevents the accused from mounting an adequate defence, it is possible that the conviction might be quashed. For example, in *R v Isleworth Crown Court*,[59] the Administrative Court quashed a conviction where an unrepresented disabled defendant had been kept waiting all day before the hearing began and had no opportunity to make a closing submission.

Another important aspect of Art 6(3)(c) is the requirement that the free legal aid must be effective and adequate. Of the many applications that come before the European organs on the lack of effective and adequate legal aid, the applicants manifest dissatisfactions with the services of the legal aid lawyers. The dissatisfactions stem from the lack of confidence in counsel since the accused does not have a control over either the choice or the quality of services which the free legal aid counsel provide.[60]

In *Engel v the Netherlands,* the majority of the European Court found that there was sufficient legal assistance, although it was limited to legal issues:

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[58] HRC 253/87

[59] *R v Isleworth Crown Court* [2001] ACD 51

[60] In a recently decided unreported case *Anurudde v Sri Lanka,Court of Appeal Application No. 52/98*: the Sri Lanka Court of Appeal commented of the counsel, assigned to the accused by the High Court: "It must be mentioned here that the counsel in this case failed to provide the necessary legal aid to the accused appellant. In fact the learned High Court Judge has observed that the assigned counsel remained silent at the stage when the accused appellant pleaded guilty to the (murder) charge in the indictment. In the circumstances it would appear that accused appellant, was virtually unrepresented and undefended, therefore doubt arises as to whether the accused appellant in fact had a *fair trial*". This is one of several cases, where the assigned counsel (the lawyer appointed at State expense), who are either inexperienced or due to meagre fees do not do justice to their clients.

> "the three applicants...have received legal assistance of their choosing in the form of a fellow conscript who was a lawyer in civil life...his services were, it is true, limited to dealing with legal issues. In the circumstances of the case, this restriction could nonetheless be reconciled with justice...since the applicants themselves were not incapable of providing explanations of the very simple facts".[61]

In *Goddi v Italy*[62] the European Court held that free legal aid was ineffective because counsel failed to ask for an adjournment so as to enable him to prepare the case and left all the crucial issues to the judge. In *Artico v Italy,* the European Court found a violation of Art.6(3)(c) on failure to appoint another lawyer since the former free legal aid counsel had withdrawn his services. However, the European Court observed that a State cannot be held responsible for every shortcoming on the part of the legal aid lawyer. A view similar to this was held in the case of *Daud v Portugal.*[63] The facts were that the applicant was officially assigned a lawyer, who requested to be relieved of her duty for health reasons. In her place another lawyer was assigned. The European Court unanimously found a violation of Art 6(1) read in conjunction with Art.6(3)(c): the mere allocation of counsel did not in itself ensure the effectiveness of legal assistance. Nonetheless, the State could not be held liable for the faults of the assigned counsel. Yet the domestic court ought to have given more time to the defence by adjourning the trial to afford the second counsel further opportunity to prepare his defence considering the complexity involved in leading heavy evidence. This the State failed to do.

In *Twalib v Greece*[64] too, the European Court unanimously found that Greece has violated Art 6(3)(c) because at both the original trial and in the appeal proceedings, the legal aid lawyer was absent. By way of contrast, the Court was not persuaded by the argument in *Morris v UK* that the 'defending officer' (under the legal aid scheme in the Army before the Court Martial) could not act in the

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[61] *Engel et al. v the Netherlands,* (1976)22E.Ct.HR5 at p.38, para.91

[62] *Goddi v Italy,* Series A, no.76 (1984).

[63] *Daud v Portugal* 69 *British YBIL* 403 (1998)

[64] In *Twalib v Greece,* 69 *British YBIL* 405(1998)

best interest of the accused, since he was subordinate to the officer who presented the applicant for trial.[65]

What appears from the above case law is that the European Convention organs will intervene only in extreme cases of complete neglect of duty by counsel or serious lapses on the part of the court.

3.3.7 The right to state funded legal assistance

3.3.7.2 Introduction

The right to have legal assistance and the right to have counsel provided at the expense of the State are not the same thing. The common law, whilst recognizing the disadvantages which an unrepresented accused may suffer because of his lack of representation, does not accept that those difficulties cannot be overcome and a fair trial held. Art 6 and 14 of the ECHR and the ICCPR respectively, on the other hand, presuppose that there are some cases in which justice will necessarily be denied if an accused is tried without representation at public expense.

At common law an accused does not have a right to be provided with counsel at public expense. In the Australian High Court there was agreement that

> "It is proper to observe that an accused does not have a right to be provided with counsel at public expense. He has, of course, a right to be represented by counsel at his own or someone else's expense."[66]

It is not that the lack of representation in such a case itself constituted a ground of appeal, but that the lack of representation may form part of a composite set of factors leading to the conclusion that there was an overall miscarriage of justice. In the High Court of Australia, in *Dietrich v R*[67] Deane J put the common law

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[65] *Morris v UK,* (2002) 34 EHRR 52, at p.53, para.90

[66] *McInnis v R* (1979) 143 CLR 575, 579.

[67] *Dietrich v R* (1992) CLR 57 per Deane J at paras 12-13

position in relation to the question of whether an accused must be legally represented:

> 'A criminal trial in this country is essentially an adversarial process. Where the charge is of a serious crime, the prosecution will ordinarily be in the hands of counsel with knowledge and experience of the criminal law and its administration. The substantive criminal law and the rules of procedure and evidence governing the conduct of a criminal trial are, from the viewpoint of an ordinary accused, complicated and obscure...An accused is brought involuntarily to the field in which he is required to answer a charge of serious crime. Against him, the prosecution has available all the resources of government. If an ordinary accused lacks the means to secure legal representation for himself and such legal representation is not available from any other source, he will, almost inevitably, be brought to face a trial process for which he will be insufficiently prepared and with which he will be unable effectively to cope. In such a case, the adversarial process is unbalanced and inappropriate and the likelihood is that, regardless of the efforts of the trial judge, the forms and formalities of legal procedures will conceal the substance of oppression.
>
> It follows from the foregoing that, as a general proposition and in the absence of exceptional circumstances, a trial of an indigent person accused of serious crime will be unfair if, by reason of lack of means and the unavailability of other assistance, he is denied legal representation.'[68]

However as to whether an indigent accused has a 'right' to be provided with legal representation at public expense Brennan J in *Dietrich* summed up the position as follows:

> 'The common law does not impose upon the government or any section or member of the community an enforceable duty to provide free legal advice or representation to anyone. What the common law requires is that, if the government sees fit to subject an accused person to a criminal trial, that trial must be a fair one'.[69]

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[68] *Dietrich v R* (1992) CLR 57 per Deane J at paras 12-13

[69] See fn 68 per Deane at para 6

3.3.7.3 Legal aid under the ECHR

Article 6(3)(c) guarantees three rights to a person charged with a criminal offence: to defend himself in person, to defend himself through legal assistance of his own choosing and, on certain conditions, to be given legal assistance free.

On this last point, the Strasbourg institutions are inclined not to allow unfettered freedom to choose a free legal aid lawyer.[70] They adopt two criteria to determine as to whether the interests of justice are met: the complexity of legal issues, and the personal circumstances of the accused.

1. Sufficient Means

Numerous cases give general guidance as to the meaning of sufficient means. In *Artico v Italy* free legal assistance had been granted to an applicant considered to be in a 'state of poverty' (*stato di poverta*).[71] In *Pakelli v FRG,* Pakelli was a Turkish national born in 1937. He was resident in the Federal Republic of Germany from 1964 to 1976. In 1972 he was found guilty of importing 16 kilograms of cannabis resin of Turkish origin. In 1976, he filed an appeal on points of law.

The applicant complained of the refusal of the German Federal Supreme Court to appoint an official defence counsel to represent the applicant in an appeal on a point of law. He alleged that this constituted a violation of his right to defend himself under Article 6(3)(c). The Court held that there had been a breach of Article 6(3)(c) because, first, he did not have sufficient means to pay for legal assistance and second, the interests of justice required it.

On the first point the government argued that there was nothing to substantiate the applicant's assertion that he did not have sufficient means to pay for legal assistance of his own choosing. However in practise it was impossible to prove

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[70] App.No.127/55, 1YB230; App.No.646/59, 3YB272

[71] *Artico v Italy,* Series A, no.37 (1980)

that at the relevant time Pakelli did not have the means to pay his lawyer and, in the absence of clear indications to the contrary, the Court held he had insufficient means.

In *App.4338/69*,[72] the authorities froze the applicant's assets at the beginning of the criminal proceedings against him in order to secure the cost of the proceedings, which he might have to pay eventually. Free legal aid was provided depriving him of the services of a lawyer of his choice. The Commission rejected his application on the basis that the freezing of assets was justified under Protocol No.1, Art.1(2) and had not been contrary to Art.6(3)(c) because the motive for freezing the assets had been not to deprive the applicant of the right to counsel of his choice.

In *Benham v UK*, the applicant was charged with a poll tax violation, which entailed a maximum of six months' imprisonment. Under the assistance by way of representation (ABWOR) scheme, magistrates could at their discretion appoint a solicitor to represent him at the committal proceedings, but this was not done in the instant case. The European Court found that there was a violation of Art.6(3) read to together with Art. 6(1) because the applicant did not have legal aid as of right free. The Court went on to say: "In view of the severity of the penalty risked by the applicant and the complexity of the applicable law...justice demands that, in order to receive a fair hearing, the applicant ought to have benefited from *free legal aid* at the Magistrate's Court.[73]

The European Court found that a person who was capable of making a partial contribution towards legal expenses is not denied his rights under Art 6(3)(c) of the European Convention.[74]

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[72] App.no.4338/69, 36 CD 79 (1970).

[73] *Benham v UK,* (1996) *British YBIL 93* In England, under the 'green form' scheme a person is entitled to advice and assistance prior to a trial hearing

[74] *Morris v UK,* (2002) 34 EHRR 52, p.1253, para.80

2. The interests of justice

In *Artico v Italy*[75], the applicant discontinued association with the first legal aid lawyer, with whom his relationships became strained. Thereafter no free legal aid counsel appeared and his appeal was unsuccessful. The Commission found that there was a violation of Art.6(3)(c) since the interests of justice were not met. A lawyer could have apprised the applicant of the legal issues on limitation of time and clarified the arguments.

In *Pakelli v FRG*[76] the Commission found that the 'interests of justice' test required that Pakelli be granted free legal aid because: (1) the case involved complex legal issues; (2) an oral hearing was denied; and (3) the applicant was allowed legal aid at the stage of drafting the appeal.

The Court said that this was one of the rare cases in which the Federal Court held an oral hearing. This shows that it could have been important for the decision to be given. It therefore became necessary, in order to ensure a fair trial, to comply with the rule that a person be represented at an oral hearing. Furthermore it could be expected that the judgment of the Federal Court was going to be important in a precedential sense. In these circumstances, the personal appearance of the appellant would not have been sufficient: without the services of a legal practitioner, Pakelli could not have made a useful contribution to the questions of law which were at the heart of the appeal.

Finally, and most importantly, the appeal proceedings were not conducted with the participation of both parties. By refusing to provide him with a defence counsel, the Federal Court deprived Pakelli, during the oral stage of the proceedings, of the opportunity of influencing the outcome of the case, a possibility that he would have retained had the proceedings been conducted entirely in writing.

The Commission found that interests of justice were not met in *Quarantas v Switzerland.* In this case the applicant was accused of drug-trafficking. He

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[75] *Artico v Italy,* Series A, no.37 (1980).

[76] *Pakelli v FRG,* Series A, no.64 (1983)

already had a suspended sentence with the possibility of reactivation of his sentence in the event of a successful conviction for a second offence. Hence, the gravity of threatened penalty justified *per se* the appointment of legal aid counsel. The Court held that Art 6(3)(c) required free legal aid to be provided for the defendant's appearances before an investigating judge in the civil law (or inquisitorial) system.[77]

In *Granger v UK* the Court held that the defendant should have received *free legal aid* 'in the interests of justice' . Here the defendant was denied legal aid during an appeal from a five-year sentence. Granger appeared for himself against a QC and a junior counsel for the Crown. The Court found a violation of Art 6(3)(c), citing an obvious lack of understanding regarding intricacies of the law in the face of professional prosecution.[78]

3.3.7.4. Legal Aid under the ICCPR

As with the Art 6(3)(c) of the ECHR, Article 14(3)(d) does not purport to confer an absolute right upon an accused to have legal counsel assigned to him; the right is expressed to arise 'in any case where the interests of justice so require'.

The difference is illustrated in *Robinson v. The Queen.*[79] In that case, which was an appeal to the Privy Council from the Court of Appeal of Jamaica, the accused had been refused an adjournment to obtain other counsel after counsel retained by him had failed to appear, at least partly, because of insufficient funds. The accused was tried for murder and convicted. Murder was a capital offence in Jamaica. The Jamaican Constitution provided that an accused was to be afforded a fair hearing and that he was to be permitted to defend himself in person or by a legal representative of his own choice. The majority in the Privy Council held that the accused had, in all the circumstances, notwithstanding the refusal of the adjournment, been permitted to exercise his right to counsel. They also held that

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[77] *Quaranta v Switzerland,* (1991) Series A, no. 205

[78] *Granger v UK,* (1990) 12 EHRR 670

[79] *Robinson v. The Queen* (1985) AC 956

there was no miscarriage of justice; that is to say, *they held that the accused's lack of representation did not prevent his trial being a fair trial*. The minority, on the other hand, held that the accused had not been permitted to defend himself by a legal representative of his own choice and that this denial of a constitutional right was sufficient to vitiate the trial even if it was in every other respect fair.

The matter was the subject of a communication under the First Optional Protocol to the ICCPR[80] The view taken by the Human Rights Committee was as follows:

> "The Committee, noting that article 14, paragraph 3(d) stipulates that everyone shall have 'legal assistance assigned to him, in any case where the interests of justice so require', believes that it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of private counsel is to some degree attributable to the (accused) himself, and even if the provision of legal assistance would entail an adjournment of proceedings. This requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the (accused) in handling his defence in the absence of counsel. In the view of the Committee, the absence of counsel constituted (an) unfair trial."

In a similar vein the HRC has decided that Art 14(3)(d) would be violated if the accused's counsel withdrew from the case for non-payment of fees and the court decided to proceed in the absence of counsel. In *Reid v Jamaica*,[81] the Committee found a violation of the same Article, where the counsel appointed for the accused by the State considered that there was no merit in the appeal. Bearing in mind that the case involved the death penalty, the Committee considered that the State Party should have appointed another lawyer or allowed him to represent himself. The Committee in the case of *T. Jones v Jamaica,*[82] stated that, where the penalty is death, it is the duty of counsel to inform the accused the prospects

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[80] *Robinson v. Jamaica* CCPR/C/35/D/223/1987).

[81] *Reid v Jamaica,* communication no.250/1987: Doc.A/45/40/p.91.

[82] *T.Jones v Jamaica,* communication no.585/1994: Doc.A/53/40, p.54; other cases of similar standing are, *Mc.Leod v Jamaica,* communication no.734/1997: Doc.A/53/40, p.216; *G.Graham & A.Morrison v Jamaica,* communication no.461/1991: Doc.A/53/40, p.48.

of the case. This would enable him to seek another lawyer to represent him. In several cases including *R. La Vende v Trinidad and Tobago,*[83] the HRC was of the view that free legal aid was indispensable at all stages of the proceedings where the death sentence was applicable.

In *Jones v Jamaica,*[84] on the question of legal aid to the author, the HRC found that Jamaica violated Art 14(3)(d). The attorney assigned by the State conceded that there was no merit in the appeal. While it was not for the HRC to question the counsel's professional judgment, HRC considers that in capital cases (punishable by death) when counsel conceded that there was no merit in the appeal, the Court should ascertain whether counsel had consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused was so informed and given an opportunity of having another counsel.

A.Currie Jamaica adds a new dimension to criminal legal aid.[85] The Committee held that legal aid must be granted in cases before the constitutional court, where it considered the fairness of a criminal trial, if the interests of justice so required.

The applicant's claim in *Bulmer v New Zealand,*[86] was that State legal aid program did not achieve the goals of free legal aid. The HRC found this application inadmissible for the reason that the authors had not exhausted domestic remedies. Furthermore the authors claim that all the judges in New Zealand were biased against them was not substantiated.

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[83] *R. La Vende v Trinidad and Tobago,* communication no.554/1993: Doc.A/53/40, p.12; other cases expressing the same view were, *V.P.Domukovsky et al. v Georgia,* communication no.623-7/1995: Doc.A/53/40, p.111; *A.S Yassen v Guyana,* communication no.676/1996: Doc.A/53/40, p.161; *E.Harvey v Jamaica,* communication no.459/1991: Doc.A/51/40, p.40.

[84] *Jones v Jamaic*, communication no. 585/1994, Doc. A/53/40, p.45, paras.3.1 & 9.5.

[85] *A.Currie v. Jamaica,* communication no.377/1989: Doc.A/49/40, p.77.

[86] Communication No.952/2000: CCPR/C/1/D/952/2000

4. WAIVER

As a general proposition, a defendant may waive the rights and protections contained in Article 14 and Article 6.[87] Clearly the waiver must be voluntary, unequivocal and not contrary to some over-riding public interest.[88] Furthermore, waiver will not be irrevocable if the defendant could not reasonably be said to have been able to forsee the consequences of a waiver.[89]

In the context of this discussion, a defendant may waive his or her right to appear at the hearing. However, because of the importance to a democratic and open society of the right to a fair trial, Articles 6 and 14 impose on domestic courts the heavy onus of ascertaining whether a defendant has been given due notice of the date and place of a hearing and the steps that must be taken by him or her in order to take part, particularly where the adequacy of notice is disputed for what appears to be a prima facie valid reason. In certain cases,[90] the Court has determined that the accused has waived his right to be present at the trial. In *Campbell & Fell v UK*,[91] the Commission stated that the fugitive applicants who absconded or feigned unfitness to attend the trial proceedings were barred from relief under Art 6(3)(c). Similarly in *Ensslin and others,* the applicants who absented themselves from trial as a result of a hunger strike were precluded from relief under Art 6(3)(c).[92] After the hunger strike, the medical certification was to the effect that they were in a fit condition for a trial lasting two to three hours a day.

In *Hermi v Italy* the Court decided that the applicant had waived his right to appear at the appeal hearing. Although the Court said that it was regrettable that the State had not indicated on the notice of appeal that it was for the applicant to

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87 *Kwiatkowska v Italy* no 52868/99 (2000)

88 See *Hermi v Italy* (2008) 46 EHRR 46; Sejdovic v Italy (2006) 42 EHRR 17

89 *Jones v UK* no 30900/02 September 2003

90 In the *Vagrancy case (De Wilde, Ooms and Versyp v Belgium),* Series A, no.12 (1970), the Court held that there were certain rights under the Convention, which were precluded from waiver.

91 *Campbell & Fell v UK,* Series A, 80 (1984)

92 *Ensslin, Baader& Raspe v FRG,* App.Nos.7572, 7586 & 7587/76, 14 DR 64 (1978)

request, at least 5 days before the date of the hearing, that he be brought to the appellate court, it said that this did not constitute a breach of Article 6(3). The onus was firmly placed on the applicant's lawyers:

> 'the State cannot be made responsible for spelling out in detail...the defendant's rights and entitlements, it is for the legal counsel of the accused to inform his client as to the progress of the proceedings against him and the steps to be taken in order to assert his rights'[93]

5. CONCLUSION

The right to equality of arms is fundamental to the adversarial nature of modern criminal proceedings and must be accorded appropriate weight in national legal systems and in international courts and tribunals. At its heart, the equality of principle is concerned with procedural equality[94] and embraces the idea that both parties (but obviously, in a criminal trial, primarily the defendant) must be accorded equal treatment throughout the trial. If not the judicial process cannot be considered fair. As Negri puts it,

> Adherence to procedural fairness, as a means to the achievement of substantive equality, thus becomes the critical test of international courts' legitimacy and credibility.'[95]

This paper has examined one of the most important aspects of the equality of arms principle guarantee in the ECHR and the ICCPR – the principle that defendant is entitled to defend himself personally or receive legal assistance –

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[93] (2008) 46 EHRR 46

[94] Some argue that international procedural law has emerged as an autonomous discipline of international law: see Stefani Negri, 'Equality of Arms – Guiding Light or Empty Shell' in International Criminal Justice: A Critical Analysis of Institutions and Procedures ed Michael Bohlander (2007) Cameron May, 15-16. Negri says, 'A tendency is clearly discernible in the practice of international courts towards a coherent recourse to a set of basic general principles of procedural law...Amongst such fundamental rules, the principle of equality between the parties is one of the most important general principles of law governing international judicial procedure.

[95] See fn 94 above at p14

with a view to determining the nature and extent of the guarantee. It is clear that representation by counsel at each stage of the process is a fundamental right and is paramount to the concept of equality of arms because it is assumed that the presence of 'adequate' counsel will deter or prevent abuses against the defendant at each stage of the process.

However it is clear that neither Art 14(3)(d) nor Art 6(3)(c) confer absolute rights: the 'interests of justice' test is the yardstick in both, although the precise circumstances and expression is slightly different. Under the ICCPR, an accused has a right to have legal counsel assigned to him 'in any case where the interests of justice so require' and his entitlement to have the state pay for his legal assistance arises only where he does not have 'sufficient means to pay for it'. Under the ECHR an accused has a right to have legal assistance of his own choosing and 'where he has insufficient means to pay for legal assistance, to be given it free when the interests of justice so require.'

After assessing the cases decided by the ECtHR and the Committee it is clear that the procedural guarantees mean that a trial of an indigent person accused of a serious crime will *necessarily* be unfair if, because of lack of insufficient means and the unavailability of other assistance, the accused does not have legal representation.[96]

Thus it can be said that everyone charged with a criminal offense has a primary, and generally, unrestricted right to defend himself. This right can be forgone and counsel can be chosen by the accused (so long as he can afford him or her). Should he be unable to afford to pay he has a right to legal aid at no cost, where the interests of justice so requires (and the factors that determine whether the interests of justice do so require include a consideration of the seriousness of the offense, particularly whether it is a capital offense).

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[96] See *Robinson v The Queen* (163) 1985 AC 956.

MORAL RIGHTS IN THE DIGITAL ENVIRONMENT: DIAGNOSIS AND REHABILITATION

Haitham Haloush *

ABSTRACT

The Digital environment has provided authors with new creative possibilities. However, it has posed threats to their personal interests and increased the possibility for breaches of their moral rights. Digital technology has shed a cloud of uncertainty on fundamental concepts of authorship, creative expression and the nature of creative work. Moral rights are faced, in the digital environment, with challenges such as concerns over the scope of such rights and questions relating to the moral right doctrine. This paper examines the impact of digital technology on an aspect of copyright known as the moral rights of the author. Moral rights are concerned with the legal protection of the personal and cultural interests of the authors. As such, the importance of moral rights for authors and artists transcends the issue of commercial gain through their work, to the protection of their work from abuse.

The challenges posed by digital technological developments to authors' rights are not limited to the issue of moral rights alone. Rather, these challenges have introduced extensive debate on the general nature and objectives of copyright. Legal scholars have speculated the potential collapse of the copyright framework under technological pressures. However, the copyright law has evolved to extend copyright principles to the protection of software and other new technologies. The law of copyright recognized these products as similar to works of creative authorship allowing technological creativity to attain a new status in the world of information technology.

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In the present legal environment, two difficulties challenge the moral rights of the authors. The first is the practical problem of enforcing moral rights now that there are legal and practical limitations on the author's ability to control the use of his work. The second problem involves challenges to the conceptual integrity for moral rights doctrine. The future of moral rights lies in the ability to understand these rights in the digital age in order to find new methods to evolve and adapt the current system to the benefit of both the author and the public.

The paper assesses the state of moral rights in the present copyright practice, clarifies the implications of new technologies for authors' moral interests. The paper also seeks to provide adequate solutions to the questions raised by new economic and technological developments. Further, the paper identifies the reasons why it has proven difficult to achieve an international standard of protection for moral rights and suggests an approach to reconcile the fundamental social change in this important area of the law while studying the prospects of having an international moral right.

I. INTRODUCTION

Copyright has developed in response to technological innovation in the means of storing, reproducing, and disseminating works. Copyright laws emerged following the beginning of the printing press and have evolved to encompass other methods of mechanically storing and reproducing works of authorship, such as photography, motion pictures, and sound recordings.[1] The development of broadcasting technology—enabling the performance of works at distant points—led to a second wave of adjustments and expansions to copyright[2]. The digital revolution represents a third distinct wave of technological innovation which reshaped copyright law.

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[2] See Robert P. Merges, , Peter S. Menell, and Mark A. Lemley, Intellectual Property in the New Technological Age 125-132 (2003).

The digital technology represents possibly the greatest set of challenges to the copyright law[3]. The third wave presents new modes of expression, such as computer programming, synthesized music, video games, and interactive multimedia works. Additionally, it empowers anyone with a computer and internet connection to reproduce at a reasonably cheap price the exact copy of the work and distribute works of authorship instantly. Therefore, specific legislation aimed at each aspect in the digital technology is needed. The focus of my paper will be on the regulation of one aspect which is the protection of moral rights in the digital age.

Copyright laws grant economic rights (rights of reproduction, distribution, adaptation, public performance, broadcasting, and rental) as well as a series of non-economic privileges known as "moral rights." Moral rights are separate from economic rights, and when authors assign their economic rights, they still maintain their moral rights. Although the copyright laws of different nations may vary significantly regarding this issue, most recognize two moral rights: the right of paternity and the right of integrity. The right of paternity is the right of the author of a work to be identified as such. For example, an author has the right to have his name on the cover of his book. The right of integrity is the right to oppose any changes in the work that might distort it or alter it in detriment to the honor or reputation of the author. This harm would be a question of fact that would have to be determined in court through the testimony of witnesses or evidence. The example of Marcel Duchamp's famous re-interpretation of Leonardo DaVinci's Mona Lisa is a good reference. If both artists were alive in a jurisdiction that recognized moral right doctrine, DaVinci might have an actionable claim for the degradation of his original work's integrity because Duchamp painted a mustache on the subject of his famous portrait.[4] Additionally, manipulating a scanned photograph may also be a violation of moral rights, if prejudicial to the honor or reputation of the photographer.

There are two main tendencies in the area of copyright and specifically on how copyright has absorbed the new developments in the digital world. One view

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[3] *Id.*

[4] See Lesley Ellen Harris, Beyond Economic Rights, 10.4 Information Outlook. (April 2006).

holds that nothing has changed in essence. The issues arising and the problems posed are the same as they were in the analog world. It is only the medium, and perhaps the frequency of the occurrence of these problems, that have changed. Therefore no major legislation is required. It is only the interpretation of the current legislative structures that needs to be adapted to the new reality. The other view holds, to the contrary, that digitization reshapes copyright and generates the need for general development in order for it to work effectively, become more social oriented and respond to the challenges of the new era.[5] The second view is the starting point of the paper.

The conflicts between technology and author's rights have extended to copyrights and were not limited to moral rights. Leading scholars have paid attention to the possible collapse of copyright and ultimately copyright obtained a new status and managed to integrate itself by protecting computer software and other technologies. In contrast, issues of moral rights have been largely neglected and unfortunately research on moral rights has not still provided a comprehensive analysis of the impact of digital age on moral rights.[6] Thus, moral rights are viewed as irrelevant to new technologies and are viewed as an antagonist of technological progress which led for requests to restrict the scope of moral rights protection.

The main objective of this paper is, therefore, to make a statement about the necessity of providing solutions for the challenges of moral rights in the digital age and achieving international harmonization in this regard. In order to achieve this objective, the paper assesses the state of moral rights in present copyright practice, clarifies the implications of new technologies for authors' moral interests, and suggests an approach to reconcile the fundamental social change in this important area of the law while studying the prospects of having an international moral right.

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[5] See William W. Fisher, Promises To Keep. Technology, Law, and the Future of Entertainment 65 (2004).

[6] See Smita Kheria, Moral Rights in the Digital Environment: Authors Absence from Authors' Rights Debate (2007), available at <http://www.bileta2007.co.uk/papers/images/stream_6/KheriaS.pdf> (last visited July 13, 2009).

The paper will be divided in the following sections. Section two illustrates the divergence in moral rights by drawing upon the statutory moral rights in various regimes. Further, the legal framework in this area is discussed in the context of international agreements. Then, section three examines the difficulties that fundamentally challenge the moral rights of the author in the digital era and seeks to present recommendations to achieve a balance between the authors and the public. Finally, section four provides conclusions and suggestions for future research.

II. THE LEGAL FRAMEWORK FOR MORAL RIGHTS

There are two basic conceptions in moral rights. First, there is the "dualist" school, which grants perpetual protection to moral rights regardless of the term of protection for economic rights. Also, there is the "monist" school, providing an equal term of protection for both.

A. Moral Rights in Various Legislations

The Jordanian Copyright Law of 2001 recognizes moral rights. The Copyright Law grants the author the right of attribution to have his name listed on all produced copies every time the work is put forward to the public.[7] Moreover, the Copyright Law protects the right of integrity by prohibiting any distortion, misrepresentation, or any other amendments to the work of an author which may harm his reputation and honor.[8] The author is the only party that can make any amendments to his work whether by change, revision or deletion. Further, the author can withdraw his work from circulation in case serious and legitimate reasons existed for the withdrawal.[9] In such case, the author must compensate the holder of the financial exploitation rights. Moral rights are, therefore, protected in Jordan along with the

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[7] See Copyright Law No. 22 of 1992 as amended by Provisional Law No. 52 of 2001, Official Gazette No. 4508, art. 8 (Oct. 1, 2001).

[8] *Id.*

[9] *Id.*

financial rights. Moral rights are central and inalienable.[10] They cannot be transferred or waived regardless of any reason. Exercise of moral rights is subject to a test of reasonableness.

In the UK, the Copyright, Designs and Patents Act 1988 grants authors the right of identification.[11] The right of identification applies where it has been asserted in writing in the work or in an assignment or license covering the work.[12] The fact that the identification right applies only when asserted in writing is a surprising aspect of the UK law that stands out. The UK Copyright, Designs and Patents Act, however, excludes the right of identification in the case of computer-generated work, work created in the course of employment of the author or director, and work made for the purpose of reporting current events.[13] The right of integrity is expressed as the author's right not to have his work subjected to derogatory treatment.[14] The Copyright, Designs and Patents Act then removes the right of integrity from any work made for the purpose of reporting current events; published in a newspaper, magazine or similar periodical; work published in an encyclopedia, dictionary, yearbook or other collective work of reference.

In the UK, moral rights are not perpetual; they can be exercised only as long as the economic rights subsist in the work.[15] Additionally, any moral right may be waived by instrument in writing signed by the person giving up the right.[16] The drafters viewed the waiver provision as a technical one saving to give effect to the principle that UK law does not admit inalienable rights. It is not and should not have been surprising, however, that this provision was taken up by publishers.[17]

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[10] *Id.*

[11] See Copyright, Designs and Patents Act, S. 77 1988.

[12] *Id.* S.78.2.

[13] *Id.*

[14] *Id.* art. 80.

[15] *Id.* art. 86.

[16] A waiver may relate to a specific work, to works of a specified description or to works generally, and may relate to existing or future works, and may be conditional or unconditional. *Id.* art. 87.

[17] Mike Holderness, Moral Rights and Authors' Rights: The Keys to the Information Age, 1 Journal of Information, Law and Technology, 10, 18 (1998)

The exceptions and qualifications to moral rights were attempts by the UK government to modify, or even to emasculate, moral rights in the light of business reality.[18]

The U.S. does not recognize moral rights. However, the U.S. protects moral rights for the work of visual art.[19] The U.S. would not join the Berne Convention for almost a century. In 1988, however, the U.S. became a signatory of the Berne Convention on a conditional basis through the Berne Implementation Act.[20] Congress did not include new provisions recognizing moral rights in the Berne Implementation Act. Rather, Congress asserted that U.S. law already protected authors' moral rights adequately through the areas of unfair competition, defamation, and privacy or the Lanham Act. In addition, federal courts refuse to allow the copyright law to provide a cause of action for moral rights violations.

Until recently, then, U.S. copyright sought solely to maximize economic incentives for production. More specifically, U.S. copyright law sought market efficiency not protection of authors' rights. Moral rights are not being explicitly protected for the author; rather moral rights are being protected for the benefit of the market. In light of this tradition, it seems relatively obvious why moral rights conflict with the market-dominated culture of U.S. law.

B. Moral Rights at the International Level

Moral rights are probably the one area in which national legislations show greatest divergence, which makes it necessary to reassess the main international agreements in this area. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) remains the single-most important international legal instrument in the field of copyright. Under the Berne Convention, copyright

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[18] See G Dworkin, The Moral Right of the Author: Moral Rights the Common Law Countries, Columbia VLA Journal of Law and the Arts (1995).

[19] A work of visual art is defined as a painting, drawing, print, sculpture or photograph made only for exhibition, produced in a signed and numbered edition of 200 copies or fewer. See The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. §106A.

[20] The U.S. joined the Berne Convention to "ease international criticism, while bowing to domestic pressure by avoiding direct protection of Moral Rights through a recycled argument of indirect protection.

was recognized to include both economic and moral rights. The Berne Convention recognizes moral rights as the right of attribution, ensuring that the author is acknowledged as the creator of his own work, and the right of integrity, which allows an author to protest mistreatment or abuse of his work.[21] However, the right of divulgation, which entitled the author to determine the circumstances in which his work is first presented to the public, is not codified in the Berne Convention.

The Berne Convention regulates the duration and application of moral rights. According to the Berne Convention, countries may limit the rights of identification and integrity to the lifetime of the author.[22] The Berne Convention also leaves it to each country to determine the means of redress for safeguarding moral rights.

The Berne Convention sets minimum standards. Thus, each member state must provide for moral rights of paternity and integrity. Countries are, of course, free to go beyond these minimum standards and provide further rights, such as the right of association or to withdraw permission to use a work. Despite the attempt of unification by the Berne Convention, there is still a lack of agreement across national borders.

The TRIPs Agreement has replaced the Berne Convention as the primary instrument of international copyright law. While the TRIPs Agreement has superseded the Berne Convention in importance, it has not replaced the latter's copyright provisions. Article 9.1 in the TRIPs Agreement incorporates the substantive provisions of the Berne Convention, *inter alia,* the provision on moral rights protection of Article 6*bis* of the Berne Convention. However, moral rights are excluded from the general dispute settlement mechanism of the TRIPs Agreement.[23] Therefore, the WTO Dispute Settlement Understanding cannot be resorted to in order to protect moral rights. Additionally, any procedures relating

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[21] 6bis.

[22] *Id.*

[23] The U.S. has consistently protested the inclusion of moral rights in TRIPs. The drafters of TRIPs agreed to the U.S. desires and excluded moral rights from the minimum protections required.

to the enforcement and the implementation of intellectual property rights will not apply to moral rights. Member countries cannot expect to report violations of the moral rights of their authors within the TRIPs system. Thus, although moral rights have been recognized in the TRIPs Agreement in a soft manner, the recognition does not seem to be strong enough to generate a sense of obligation towards these rights internationally especially with the absence of any enforcement procedures.

The WIPO Copyright Treaty (WCT) in 1996 makes no reference to author's moral rights. However, WCT introduces new means of legal protection for technological measures which are useful at the same time for the protection of moral rights. The WCT obliges signing countries to provide legal protection and remedies against the circumvention of technological measures designed to protect works in digital formats.[24]

Article 12 of the WCT protects against the unauthorized removal or alteration of electronic rights management information and the distribution or communication of works where this information has been removed or altered without authorization.

C. Moral Rights and Copyright: An Uneasy Alliance

After examining the legal frameworks in various countries, an answer to whether moral rights are enforced to push for the optimum interests of the author seems to be far-stretched. As portrayed previously, in the UK and other countries whose copyright law derives from the common law tradition, the emphasis is traditionally on the protection of commercial interests of the author. In contrast, the civil law traditions approach authors' rights in a holistic manner. In other words, the author and his work are viewed as one system; they recognize that true artists are involved in their works which reflects on them and the public and transcend the realm of purely commercial concerns. Accordingly, their laws provide protection for both the personal and commercial interests of the author.

It seems substantial to have a unified set of rules for the protection of moral rights. The question that can be posed then is why there has not been active

[24] Ibid. Article 11

development in the WTO, WIPO and other international agreements. Three reasons may be able to answer this question. First, tension between copyright and moral right norms still exist despite the adoption of moral rights provisions in most common-law countries. The conceptual differences in moral rights are apparent which resulted in the stipulation of the related provisions in an incomplete way. For example, moral rights provisions in the UK are deemed ineffective by major exceptions on waivers. Second, concerns over the effect of moral rights on economic rights have been widely acknowledged as a reason for de-emphasizing moral rights in systems that push for economic rights. In the U.S., the powerful entertainment industry succeeded in persuading legislators not to enact moral rights protections that might lead to problems with the distribution of movies.[25]

Third, the fundamental incompatibility between the philosophy of moral rights and the commercial thrust of the international copyright regime is another reason which excludes moral rights from the international attention. The TRIPs Agreement explicitly brings copyright into the framework of international trade by emphasizing that high standards of copyright protection are a basic component of a successful international trade.

Moral rights present an uncomfortable contrast to strong commercial drive. The avowed goal of international processes is to accelerate the commodification of knowledge in order to improve the economic power of cultural industries. Moral Rights are concerned with protecting authors and their works. Moral rights protection aims to make a larger contribution to the preservation of cultural heritage and the encouragement of creativity. Moral rights attempt to provide shelter from the commercialization trend.

The failure to negotiate international standards for the protection of moral rights allows a cloud of uncertainty and vagueness to surf at the international level. Without international pressure to assert the protection of moral rights, these rights may be viewed as less important than economic rights.

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[25] D. Nimmer, Conventional Copyright: A Morality Play, 3 Ent. L. Rev. 94 (1992).

III. MORAL RIGHTS IN THE DIGITAL AGE

The revolution in information technology has changed access to information in fundamental ways. Increasing amounts of information are now available in digital form. Individuals are connected around the globe while sitting in front of their computers and websites provide access for a vast array of information from newspaper articles to music which is available at a click of a mouse. However, technologies that provide access simultaneously raise problems concerning intellectual property generally and moral rights and copyright specifically. Copying, legally and illegally, has become reasonably easy especially with the availability of various copying aids. As a result, many of the copyright rules and practices that were implemented in the realm of physical works of art do not necessarily work well in the current digital environment.

A. Challenges to Moral Rights in the Digital Environment

The issue of intervention with the content of works forms a major problem in the digital environment. The current environment equipped users with various means to adapt and transform content of works. When transferring works into a digital medium, the user has the ability to alter the work whether via editing the work, adding images, text or music, deleting parts of the work, removing or replacing the author's name and other endless changes. Furthermore, even in the creative process, technology has a role. New methods emerged and are used to create traditional works in new forms of expression such as multimedia works.[26] Computer-generated or digital art works are an extreme example where the author's creativity is the result of a computer program which produces images, music or words that eventually, combined together will form the work of art.[27]

The digitization of content, from print to video to audio and beyond, has major implications for corporations and consumers. The content is easily accessed and

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[26] Multimedia is the media that uses multiple forms of information content and information processing (e.g. text, audio, graphics, animation, video, interactivity) to inform or entertain the (user) audience.

[27] Digital art is art that uses digital technology as its medium or as a tool for its creation.

altered and never has the threat of misuse of copyright been greater. As such, the problem between the author and the creative freedom of the subsequent user occurred. The troubling aspect is that these changes may be integrated into the work in such a way that any other user will not be able to tell that the work was changed. Since the potential to alter works occurs at a large scale, the authors are left unaware of the modifications of the work. The link between the author and his work becomes blurred as a result of such situations. Moral rights are premised upon an unbreakable, continuous and enduring relationship between the creator and his creation. The amorphousness of the artist as a creative personality in a creative environment based on new technology brings doubt to the status of moral rights in these works. Clear lines need to be drawn to outline the protection of moral rights in the digital era and assert the link between the author and the work of art.

There are several challenges for moral rights in the digital era. One challenge concerns the definition and scope of moral rights. Fundamental legal concepts can be interpreted differently.[28] For example, a determination has to be made whether digitization of previous works amounts to infringement of moral rights.[29] In addition, it remains unclear if computer programs can be eligible for moral rights protection and how to draw a line for the right of identification in multimedia works and what sort of changes constitutes an infringement of the right of integrity.

Other challenges pertain to exercise, administration and enforcement of moral rights in the digital environment. Issues such as loss of the author's control over

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[28] Scholars disagree whether fair use is a defense against infringement or an affirmative right that allows copying in limited circumstances.

[29] Digitization is the process of converting information into a digital format. In this format, information is organized into discrete units of data (called bits) that can be separately addressed (usually in multiple-bit groups called bytes). This is the binary data that computers and many devices with computing capacity (such as digital cameras and digital hearing aids) can process. Text and images can be digitized similarly: a scanner captures an image (which may be an image of text) and converts it to an image file, such as a bitmap. An optical character recognition (OCR) program analyzes a text image for light and dark areas in order to identify each alphabetic letter or numeric digit, and converts each character into an ASCII code. Whatis.com Computer Encyclopedia. Multimedia & Graphics. 2007 <http://whatis.techtarget.com/definition/0,,sid9_gci896692,00.html>

the work, moral rights being vulnerable to infringement at a large scale, and difficulty in obtaining moral rights permissions in the digital environment are encountered at a practical level.

Regulations are not able to keep pace with technological developments. With regard to moral rights, it may be hard to decide which modifications fall within the acceptable range and who shall bear the burden of proof in a claim of the right of integrity. Additionally, the standards for authorship lack clarity with the intervention of technology in the creative process. Therefore, regulations of moral rights need to be adapted to accommodate this new environment by establishing guidelines for differentiating between permitted transformative works and infringing works.

Copyright has territorial application and international conventions are built based this idea. However, information networks have global reach and the borders between countries are blurred. Therefore, traditional copyright enforcement procedures are not adequate to deal with infringement in the digital environment. In this context, several issues arise including identifying infringers, determining jurisdictions, determining the applicable law, and enforcing judgment against infringers.

CONCLUSIONS

The digital environment provides both promise and peril: promise in providing endless creative opportunities for authors and vast array of information for the public and peril in the challenges facing moral rights in the digital era that threatens the author's personality. The digital environment also raises concerns over the scope of these rights and finding means to protect them. This article articulates the problems facing moral rights in the digital era, provides a framework for analyzing them and offers solutions to move towards resolving the issues. The article calls for the enforcement of moral rights and their integration in the current legal system where moral rights seem to have fallen out of notice and remain underrepresented. Moral rights play central role in the initiation, creation, developments and utilization of innovations in both the arts and sciences and protecting them is of paramount importance for both the authors and the general public.

Technological measures are useful in protecting moral rights regardless of their level of sophistication. These measures can deter the public from engaging in illegal actions and protects those who are not fully knowledgeable of the law. Technical protections measures are integrated at various degrees. For example, encryption is widely employed, while web monitoring, watermarking, and rights management languages are developed but not widely employed. Technological measures, especially encryption, are particularly important in the protection of moral rights. Authors are recommended to use technological measure to ensure the protection of their moral rights while keeping in mind the cost for authors and access for the public as well.

Business models can also serve as efficient means for protecting moral rights. Careful consideration should be given when assigning products for models since models can actually take the place of technological measures and therefore lower development and enforcement costs. There are many kinds of business models and technological measures available in the current environment that are being developed continuously and experimented. This process should be encouraged so that different parties can utilize the mechanisms that suit their needs.

The digital environment will continue to pose challenges to authors. In order for moral rights to survive the digital age, major amendments need to take place to ensure adequate protection of rights holders and creators and thereby ensuring the provision of information to the public. New copyright law should be drafted with simplicity, straightforwardness, and clarity. The law should also have room for flexibility to be able to absorb the new changes that might occur due to technological progress.

Internationalizing moral rights is found to be an effective solution to ensure that moral rights are progressing on the same pace along with economic rights. Countries shall proceed in their negotiations to achieve harmonization among them. This process should be approached after careful analysis of the consequences.

AUT DEDERE AUT JUDICARE: A RESPONSE TO IMPUNITY IN INTERNATIONAL CRIMINAL LAW?

Carlo Tiribelli *

ABSTRACT

This Article focuses on the analysis of the concept aut dedere aut judicare (to extradite or to prosecute), which may be seen as a pillar of the fight that international criminal law leads against impunity. The attempt is to demonstrate that this concept, due to its legal background casts a compulsory duty and not just a moral duty towards States.

This Article also analyzes the sometime abused concept of universal jurisdiction in parallel with that of aut dedere aut judicare. In fact, whether aut dedere aut judicare has long roots in the history of international criminal law, yet its aura has been often shadowed by that of universal jurisdiction seen as a more versatile and of general application instrument. The discussion will be focused on the jus cogens or at least customary relevance vested by aut dedere aut judicare.

Emphasis will be put on the fact that it is aut dedere aut judicare that imposes an alternative, yet compulsory choice, in the sense that a State subject to this obligation is bound to adopt one choice: it must extradite if it does not prosecute, and prosecute if it does not extradite. In addition, it will be attempted to demonstrate via the analysis of the international body of laws, via the case-law and via a consistent part of the doctrine that aut dedere aut judicare plays a paramount role to be always exploited.

In sum, this Article will try to depict the universality of the concept of aut dedere aut judicare.

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INTRODUCTION

Until the beginning of the twentieth century States could not easily extend the application of their laws and the jurisdiction of their courts to people, property and acts being outside their territory. Yet, some scholars envisaged the possibility to cope with the territoriality of criminal law and the principles of international law altogether, while respecting the former as an only exclusive domestic prerogative.

In fact, the specific territoriality of criminal jurisdiction collided at the eyes of the most either by the universal reprobation of the committed crimes or by the fact that the diverse characters involved in the said crime might come from different countries. At this proposal, with exemplar efficacy, an Italian academic of the eighteenth century, Cesare Beccaria, wrote:

> There are also those who think, that an act of cruelty committed, for example, at Constantinople may be punished at Paris, for this abstracted reason, that he who offends humanity should have enemies in all mankind, and be the object of universal execration, as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men.[1]

Analogously by what above imagined by the Italian academic, almost a couple of centuries later, in 1926 the collision between a French and a Turkish steamships produced before the International Court of Justice a leading decision, which gave birth to inter-State collaboration through the development of principles like universal competence of jurisdiction and *aut dedere aut judicare* (to extradite or to prosecute)[2]. Even though

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[1] Cesare Beccaria-Bonesana, *An Essay on Crimes and Punishments* 135 (2d Amer.ed.1819; Academic Reprints ed.1953). The phrase "Knights errant of human nature" is an inspired invention of the translator. The Italian original says literally "avengers of the sensibilities of mankind". In Italian, the full passage reads: "Alcuni credano parimente che un´ azione crudele fatta, per esempio, a Costantinopoli, possa essere punita a Parigi, per l´astratta ragione che chi offende l´umanitá merita di avere tutta l´umanitá inimica e l´esecuzione universale; quasiché i giudici vindici fossero della sensibilitá degli uomini e non piuttosto dei patti che gli legano tra di loro". Cesare Beccaria, Dei delitti e delle pene 71-72 (Franco Venturi ed. 1965). The first Italian edition dates from 1764. The translation quoted is based on an early Italian edition in which this passage appeared in chapter 35, on "sanctuaries" or asylum (asili); in the definitive Italian text of 1766, the passage appears in chapter 29, on "imprisonment" or arrest (cattura).

the facts happened on the high seas -outside the fixed range of a determined State's territorial jurisdiction but within the legitimate action of any State – Turkey tried the case against the master of the French vessel before Turkish jurisdictions. It was discussed over the territoriality of criminal law and the existence of a principle of international law restricting the discretion of States as regards criminal jurisdiction. To the contrary, French defence was based on the fact that in practice the action of the courts stays paralysed, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction. Eventually, the exceptions moved by France were rejected and Turkey was deemed legitimate to try the case before its domestic courts. The Turkish legal reasoning was supported by the dissenting opinion of Judge Moore who expressed that: "The substance of the jurisdictional claim is that Turkey has a right to try and punish foreigners for acts committed in foreign countries not only against Turkey herself, but also against Turks, should such foreigners afterwards be found in Turkish territory"[3]. Hence, the injunction of universal jurisdiction.

It is relevant to stress, however, when Judge Loder, in his dissenting opinion affirmed that: "The injured State may try the guilty persons according to its own law if they happen to be in its territory or, if necessary, it may ask for their extradition"[4] the first attempt to define the principle of *aut dedere aut judicare* was launched as well.

It is of this latter that it will be discussed in this Article. It will be imagined as a by treaties supported alternative to the principle of universal jurisdiction, which not always encounters the favour of scholars and case-law. *Aut dedere aut judicare* will even be depicted as a universal principle finding its roots in *jus cogens*, customary law and mere protection against heinous crimes. Finally, by this analysis it will be asked if the duties coming out from the application of this principle are simply morals or are somehow binding ones.

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[2] Permanent Court of International Justice, The case of the *S.S. Lotus* Judgment no. 9/22, September 7,1927. See publications of the PCIJ Series A-No. 10; collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927.

[3] See note at 2.

[4] See note at 2.

1. THE ALTERNATIVE OF ACTIONS OFFERED BY THE *AUT DEDERE AUT JUDICARE*

The principle *aut dedere aut judicare*, which was magisterially analyzed by scholars like Bassiouni and Wise[5], imposes on a State an obligation to do one of two things: either extradite or prosecute. Despite which of the two alternative courses of action should be entitled to preference, it might be asserted that the obligation to extradite or prosecute is "alternative" in the sense that a State subject to this obligation is bound to adopt one choice: it must extradite if it does not prosecute, and prosecute if it does not extradite. It is a matter of fact that States have an alternative course of action between extraditing and prosecuting, both accepted as a compulsory choice.

At this proposal Hugo Grotius, vividly expressed this concept in the seventeenth century[6]. According to Grotius the State in which the offender seeks refuge should not interfere with the exercise of this right and it ordinarily must deliver a guilty individual to the requesting State for punishment. Yet, Grotius adds that the State is not rigidly bound to do so[7]. It has an alternative: to punish the offender itself. But it is bound to do one or the other: either extradite or punish. Given the compulsory alternative between two defined actions it is necessary to identify the general duty of States towards this alternative. The question whether or not there is a general duty to extradite or prosecute international crimes is one which has been thought to provide an answer to the so-called "impunity gap" that affects international criminal law. In sum, the fear shared by the international community is to provide impunity for the perpetrators of heinous crimes.

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5 M. Cherif Bassiouni and Edward M. Wise: *Aut Dedere Aut Judicare; the Duty to Extradite or Prosecute in International Law* Martinus Nijhoff Publishers 1995 340.

6 Hugo Grotius (De Groot) 1625 *De Jure Belli ac Pacis*, Book II, Chapter XXI, paragraphs III and IV; English translation: The Law of War and Peace 526-529 (Classics of International Law, Francis W. Kelsey trans. 1925).

7 Grotius contended that a general obligation to extradite or punish exists with respect to all offences by which another State is particularly harmed and the harmed State has a natural right to exact punishment.

2. THE UNIVERSALITY OF *AUT DEDERE AUT JUDICARE*

The universality of the principle *aut dedere aut judicare* can be summed up by one main idea: the terminological confusion between this principle and that of universal jurisdiction which gave to the former character of *jus cogens* or at least of customary law. According to the 2007 Report of the Council of Europe that aptly summarises the contemporary law and practice of States with respect to universal jurisdiction: "There is sometimes no clear distinction between the principle of universality and other principles on which extraterritorial jurisdiction is based"[8]. Very often, in effect, the former is considered the corollary of the other. In effect, scholars, to express the Pavlovian reaction of the international community towards heinous crimes, use the two terms alternatively. Hawkins affirms that the debate on universal jurisdiction: "continues unabated, though it is marked by immense confusion and dramatically different interpretation".[9]

Another clear example of the confusion of the terms universal jurisdiction and *aut dedere aut judicare* might be found on the draft project on universal jurisdiction, developed by the International Commission of Jurists at Princeton University, where the purposes of advancing the continued evolution of international law and the application of international law in national legal systems, is stated at Principle 8 (Resolution of Competing National Jurisdictions):

> Where more than one State has or may assert jurisdiction over a person and where the State that has custody of the person has no basis for jurisdiction other than the principle of universality, that State or its judicial organs shall, in deciding whether to prosecute or extradite base their decision on an aggregate balance of the following criteria [..].[10]

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[8] Committee of Legal Advisers on Public International Law (CAHDI), 34th Meeting, Strasbourg 10-11 September 2007.

[9] D. Hawkins, "Universal Jurisdiction for Human Rights: From Legal principle to Limited Reality". *Global Governance,* vol. 9, 2003, pp.262-265.

[10] The Princeton Principles on Universal Jurisdiction obtainable upon request from Program in Law and Public Affairs, Wallace Hall, Princeton University, Princeton, New Jersey, NJ 08544.

The prelude is the same and the tasks are the same with the difference that the universality of jurisdiction is a pure speculative assumption while the universality of *aut dedere aut judicare* derives from the reception of international conventions such as the Geneva ones. By the loose use of language, the 'universal jurisdiction" to which a State can only refer due to the lack of other jurisdictions becomes the receptacle of the alternative obligation to prosecute or extradite. From this point a new formula might be used as universal *aut dedere aut judicare,* or universal principle of extradition. It means that *aut dedere aut judicare* is not just the corollary principle of universal jurisdiction, but an autonomous principle separated by that of universal jurisdiction. The affirmation of universality of extradition, when the prosecution results impossible, comes from this. A deeper analysis is hereto required and this will be further illustrated when describing the overlap of the two principles.

3. THE CONCEPT *AUT DEDERE AUT JUDICARE* IN TREATY LAW

There are many examples of conventions containing this principle standing alone or meshed with that of universal jurisdiction. Among others, the 1949 four Geneva Conventions are considered the depositaries of this principle[11]. These Conventions, in fact, maintain in common Articles that:

> Each High Contracting Party shall be under the obligation to search for person alleged to have committed, or to have ordered to be committed, such international crimes, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[12]

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[11] To name : Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War. All the four are of August, 12 1949.

[12] Convention I, Chapter IX, Repression of Abuses and Infractions, Article 49. Convention II, Chapter VIII, Repression of Abuses and Infractions, Article 50. Convention III, Part VI, Execution of the Convention, Section I General Provisions, Article 129. Convention IV, Part IV, Execution of the Convention, Section I General Provisions, Article 146. See also Additional Protocol I (8 June 1977) Article 85.

Even more explicitly, one year before in 1948, the International Committee submitted the following draft Article (Article 40) to the XVIIth International Red Cross Conference[13]:

> The Contracting Parties shall be under the obligation to search for persons charged with breaches of the present Convention, whatever their nationality. They shall further, in accordance with their national legislation or with the Conventions for the repression of acts considered as war crimes, refer them for trial to their own courts, or hand them over for judgment to another Contracting Party.

The proposed Article provided, therefore, that certain violations of the Convention were to be considered as war crimes, and laid down the manner in which those guilty were to be punished. The text was based on the principle, *aut dedere aut judicare* (*aut punire* in Pictet's Commentary) the validity of which is undoubtedly admitted in cases of extradition.

It is interesting to note that the 1948 draft explicitly mentioned that persons were to be pursued whatever their nationality. It meant that traces of active or passive personality jurisdiction were, in the mind of the lawmaker, adopted. It meant also that during the drafting States were almost prepared to accept the ineluctable fact that the nationality would have not been a barrier against extradition. The Geneva Conventions are not the only texts to contain this principle. The International Law Commission has incorporated the principle of *aut dedere aut judicare* in Article 9 of the 1996 Draft Code of Crimes.[14] This Article states:

> Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in [Articles 17, 18, 19, 20] is found shall extradite or prosecute that individual.[15]

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[13] Jean S. Pictet, *Commentary to the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* Geneva International Committee of the Red Cross, 1952, pp.362-365.

[14] See U.N. Doc. A/CN.4/L.532.

[15] The 1996 International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session, 51 U.N.G.A.O.R. Supp. (n.10) at 9, U.N. Doc. A/51/10 (1996). Draft Code of Crimes against the Peace and Security of Mankind, Art. 9.

The fundamental purpose reflected in the commentary of Article 9 of the Draft Code "is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction".[16] Conversely, no legal force is contained in this Draft Code. Article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft[17] reads as follows:

> The Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

The wording of Article 7 of The Hague Convention apparently, worked well because a year later the same concept appeared in Article 7 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[18] It provides:

> The Contacting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.[19]

Furthermore, Article 3 of the 1973 New York Convention on Crimes against Internationally Protected Persons[20] is very detailed on the matter and it establishes that:

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[16] See the Report (A/48/10), that contains commentaries on the draft Articles.

[17] UNODC, The Hague Convention on 16 December 1970.

[18] The Montreal Convention of 23 September 1971. In Article 5 the Convention deals with jurisdictional questions for the purpose of facilitating prosecution. In Article 8 the Convention makes extradition easier, but without creating any obligation in that regard.

[19] The principle of territoriality applied to civil aviation is strictly connected with the aircraft nationality. When the aircraft is airborne and during landing and taxing phases the applicable law is that of the territory where the aircraft is registered.

[20] The U.N. *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons* was opened for ratification the 14 December 1973 and it entered into force the 20 February 1977.

> Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in Article 2 in the following cases: when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State; when the alleged offender is a national of that State; when the crime is committed against an internationally protected person as defined in Article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article. This Convention does not exclude any criminal jurisdiction exercised in accordance with international law.

The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid[21], provides in Article V that:

> Persons charged with the acts enumerated in Article II of the present Convention (the list of behaviours deriving from the crime of apartheid) may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

It is interesting is to note that Article III of this Convention (international criminal responsibility for crimes of apartheid as crimes against humanity) applies qualified territorial jurisdiction together with passive personality jurisdiction to individuals, whether residing in the forum State or in some other States which are somehow involved. Additionally, Articles 6 and 7 of the 1977 European Convention against Terrorism[22] establish that:

> (Article 6): Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it

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[21] *This Convention was adopted and opened for ratification by General Assembly Resolution* 3068 (XXVIII) of 30 November 1973, entry into force on 18 July 1976.

[22] Council of Europe, ETS. No. 090, *European Convention on the Suppression of Terrorism,* Strasbourg 27 January 1977.

> does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.
>
> (Article 7): A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1, shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of the State.

Moreover, it seems that upon analysis of these two Articles the obligation to extradite has priority over the obligation to prosecute. It is, however, just a conceptual detail because the relevant alternative to prosecution or to extradition is not minimally infringed. Article 5(2) of the 1984 Convention against Torture[23] asserts that:

> Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.[24]

This Article reflects the binomial *aut dedere* (offender present in any territory under its jurisdiction) *aut judicare* (and it does not extradite him). Furthermore, this Article clearly indicates territoriality as a form of domestic applicability of universal jurisdiction.

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[23] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* U.N.G.A. A/RES/39/46. Adopted and opened for ratification, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984. Entered into force 26 June 1987, in accordance with Article 27 (1).

[24] Interesting is the second part Article 8 (1) which reads: "[S]tates Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them".

I Jus cogens in the aut dedere aut judicare principle

According to Bassiouni international crimes that rise to the level of *jus cogens* constitute legal obligations, which are stringent. It means, in his opinion that the legal obligations, which come from grave breaches, include, among others, the duty to prosecute or extradite[25]. Moreover, no matter what the subject treated, many Conventions, as well, focused on the *aut dedere aut judicare* principle. This statement is endorsed by the analysis given to the concept of *jus cogens* by Judge *ad hoc* Dugard[26] in his separate opinion on the case before the International Court of Justice (Democratic Republic of the Congo v. Rwanda)[27]. According to Judge Dugard norms of *jus cogens* are literally a:

> [B]lend of principle and policy. On the one hand, they affirm the high principles of international law, which recognize the most important rights of the international order such…[A]ggression, genocide, torture and slavery, while, on the other hand, they give legal form to the most fundamental policies or goals of the international community-the prohibitions on aggression, genocide and torture and slavery….. .

In the spirit of what was indicated by Judge Dugard, the above quoted Article 5 of the 1984 Convention against Torture recognizes the prohibition of torture as a fundamental right of the international order and it simultaneously provides a legal form for the most fundamental goals of the international community like the principle of *aut dedere aut judicare*. The same conclusions through a different reasoning can be reached for the concept of genocide. According to Article VI of the 1948 Genocide Convention, persons charged with genocide: "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal, if accepted by contracting Party to the Convention". Moreover under the following Article VII (1): "Genocide…shall not be considered as political crime(s) for the purpose

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[25] M. Cherif Bassiouni: "Accountability for International Crimes and Serious Violations of Fundamental Human Rights" in *Law and Contemporary Problems,* Vol. 59 no. 4 (Autumn 1996) pp.63-74.

[26] Judgment released on 3 February 2006 where the separate opinion of Judge John Dugard can be fully found on the Jurisdiction of the Court and Admissibility of the Application of the ICJ electronic case box.

[27] *Case Concerning the Armed Activities on the Territory of the Congo* (D.R.C. v. Rwanda). Press Release 2006/4.

of extradition" and (2): "The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force". From analysis of these Articles stems the fact that either the territorial State has the burden of prosecuting the crime (*aut judicare*) or an international penal tribunal will be mandated (*aut dedere*). All the elements are regrouped to affirm that the equation fundamental right of the international order, applicable to genocide and the most fundamental goals of the international community, applicable to the principle *aut dedere aut judicare* are respected.

II. The aut dedere aut judicare principle as customary law

The theory that the principle *aut dedere aut judicare* has *jus cogens* status seems not to be shared by the vast majority of the legal scholarship. On the contrary, the legal scholarship gives wide acceptance to the customary status of this principle. Wise alludes to the customary status of this principle affirming that: "The only post Hague treaty defining an international offence that does not include an obligation to extradite or prosecute is the Apartheid Convention of 1973"[28] Eventually, the assertion that the principle of *aut dedere aut judicare* is a customary norm when dealing with heinous crimes becomes reasonable for certain scholars[29] when a State has signed and ratified a significant number of treaties containing the *aut dedere aut judicare* formula. According to common thought, if a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalised provision, and that such practice should lead to the entrenchment of this principle in customary law. Thus, the State has demonstrated through this practice that *aut dedere aut judicare* principle is a customary norm. Danilenko adds that by agreeing to the formula of *aut dedere aut*

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[28] E.M. Wise, "The Obligation to Extradite or Prosecute", 27 *Israel Law Review,* 1993, pp. 268-270.

[29] See Colleen Enache-Brown and Ari Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere aut Judicare in International Law", 43 *McGill Law Journal* 613, 1998; M. Byers, "Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective", 17 *Michigan Journal of International Law* 1995 pp.109-118; T. Meron, *Human Rights and Humanitarian Norms of Customary Law*, Oxford, Clarendon, 1989, pp. 41-43.

judicare in multiple treaties concerned with international offences, a State has indicated that, with respect to international offences, it believes that the best way to ensure compliance is to impose such an obligation. Danilenko concludes saying that such an obligation is based on customary law. Partially irrespective of the general credo, Bassiouni affirms that, if one does accept that the obligation to extradite or prosecute international offenders is an obligation imposed by customary international law, it is "perhaps only a short step to regarding it as a rule of *jus cogens*, a rule of paramount importance for world public order which States are not free to contract out whenever they please". [30]

Independently of the foundation of the principle *aut dedere aut judicare* on *jus cogens* rather than customary law or *vice versa*, it is relevant to stress that in the absence of a treaty based on extradition or prosecution, there is no right under international law to insist that fugitives be surrendered or judged. Furthermore, Bassiouni stresses that the principle *aut dedere aut judicare,* as a customary norm, encounters its limits towards third States not bound by Treaties[31]. One can object, however, that the discussion over the applicability of *jus cogens* or customary law does not seem to be particularly relevant. Even though the Geneva Conventions should not confirm sort of customary norm for the *aut dedere aut judicare* principle, in the specific case of the 1949 four Geneva Conventions no States are third parties to these Conventions. In addition, as already stressed, the Geneva Conventions are the bedrock where rights under international law - in order to insist that fugitives be surrendered or judged - repose[32]. This lack of relevance is also due to the fact that international conventions or treaties cover heinous crimes (i.e. Geneva Convention for War Crimes; Genocide Convention for the homonym (the Genocide Convention is created around the crime of genocide) crime and International Convention on the Suppression and Punishment of the Crime of Apartheid for Crimes against Humanity)[33]. Moreover, consistent reaffirmation in these treaties of the duty to extradite or prosecute may be taken to confirm that,

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[30] G.M. Danilenko, "Law Making in the International Community", Dordrecht, Martinus Nijhoff, 1993 pp. 92-94.

[31] M. Cherif Bassiouni and Edward M. Wise in: "Aut Dedere Aut Judicare: the Duty to Extradite or Prosecute in International Law" 1995, 340.

[32] *Ibidem* at note no.11.

[33] UNGA doc. A/Res. 28/3068 (1973).

at least as far as international offences are concerned, the principle *aut dedere aut judicare* has been accepted as a positive norm of general international law.[34]

4. THE THIN LINE BETWEEN THE *AUT DEDERE AUT JUDICARE* PRINCIPLE AND THE UNIVERSAL JURISDICTION PRINCIPLE

One may be tempted to assert that in the Geneva Conventions is represented, not just the principle of *aut dedere aut judicare*: "[...] shall be under the obligation to search... and [i]t may also, if it prefers...hand such persons over for trial....."[35] but also that of universal jurisdiction: "enact any legislation necessary". Moreover, the presumed existence of the two principles together is even found in the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.[36]

Article 1 reads:

> War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

This Article expressly affirms the prosecution of crimes wherever they are committed, giving force to the principle of universal jurisdiction.

Article 5 reads:

> Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

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[34] M. Cherif Bassiouni, *International Extradition and World Public Order* Dobbs Ferry N.Y. A.W. Sijhoff-Leyden, Oceana Pub, 1974, 7.

[35] Michael Bothe, K.J. Partsch, W.A. Solf. ,*New Rules for Victims of Armed Conflicts*, Martinus Nijhoff eds.1982, pp. 273 and 489.

[36] Principles adopted by General Assembly, Resolution 3074 (XXVIII) of 3 December 1973.

This Article imposes on States a choice between prosecuting the accused and collaborating to hand over the accused, affirming the principle *aut dedere aut judicare*. Furthermore, Article 7 of the Hague Convention does not require that an offender who is not extradited be definitively put on trial. It requires submission of the case "without exception whatsoever" to the appropriate authorities "for the purpose of prosecution". Those authorities must "make their decision in the same manner as in the case of any ordinary offence of a serious nature" under the *lex loci deprehensionis* (the rules of the place where the offender is caught)[37]. This seems to be looser than the obligation to bring an offender before the courts contained in the 1949 Geneva Conventions and tighter than the obligation to submit the case to the "competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State" contained in the above reported 1973 New York Convention on Crimes Against Internationally Protected Persons. In the end, what is important to stress is that the universality principle establishes either a right or an obligation to bring offenders to justice, depending basically, on the crime committed. *Aut dedere aut judicare* constitutes the obligation of a State to bring legal proceedings, in the absence of extradition, when the offender is present on its territory. The obligation becomes the common point between the two principles.

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[37] According to the critical note of J. Verhoeven - Investigating Magistrate of the Brussels Tribunal of First Instance - on 6 November 1998, concerning the Case Pinochet: "The general principle of international law *aut dedere aut judicare* imports the necessity of combating impunity of crimes under international law and the responsibility of State authorities to ensure punishment of such crimes irrespective of the place of commission. Only one of the following two alternatives can hold: either crimes against humanity are ordinary crimes which do not transcend national boundaries and their punishments left to the discretion of the States or crimes against humanity are of an unspeakable and unacceptable nature and their punishment is a common responsibility of all States. In the latter case, all States and all humankind have a legal interest in the punishment of such crimes. Hence, it follows that even in the absence of a treaty, national authorities have the right –and in some circumstances the obligation-to prosecute the perpetrators independently of the place where they hide". A great terminological confusion between *aut dedere aut judicare* and the pure universal jurisdiction is made where this principle is aligned with affirmation such: "irrespective of the place of commission" or "independently of the place where they hide".

5. ITS APPLICATIONS IN DOMESTIC LAW

All the above analysed conventions require each State party alternatively to search for persons suspected of committing or ordering to be committed international crimes, to bring them to justice in their own courts, to extradite them to States which have made out a *prima facie* case against them or to surrender them to an international criminal court. Though the domestic realities are sometimes disrespectful of the commitments assigned, it is necessary to stress that, despite the general invitation by international law to enact and enforce jurisdiction over national legislations, there are a number of different types of legal, practical and political obstacles to the exercise of *aut dedere aut judicare* principle as well of universal jurisdiction one. A good example of this can be found in a Belgian Court's statement about the Pinochet Case[38]:

> National judicial authorities often give the impression that they are trying to evade prosecution of crimes against humanity instead of ascertaining whether they can prosecute them under international and national law... Concerning the enforcement of international humanitarian law, too, the risk is not that States may overstep their competences but rather that by looking for excuses to justify their alleged incompetence, they condone the impunity of the most serious crimes (which certainly goes against the *raison d'être* of international law).[39]

In this symptomatic example there has been little willingness to recognize the validity of foreign criminal judgments and to accept general duties of extradition even where the case, unambiguously, concern crimes bearing an international character. A number

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[38] D. Woodhouse: *The Pinochet Case: A Legal and Constitutional Analysis*, Hart Oxford, XI, 2000297.

[39] Pinochet Case, Decision of the Tribunal of First Instance of Brussels, 6 November 1998, para. 3.3.3. (English translation in Luc Reydams, Belgian Tribunal of First Instance (investigating magistrate), 8 November 1998, 93 American Journal of International Law, 702 July 1999. The original text reads: "Les autorités judiciaires dans les différents Etats ont souvent donné l'impression qu'en matière de crime contre l'humanité, elles recherchaient davantage les motifs ou les prétextes juridiques pour ne pas poursuivre de tells crimes plutôt que de vérifier dans quelle mesure le droit international et le droit interne leur permettaient d'exercer de telles poursuites.... Or, en droit humanitaire, le risqué ne semble pas tellement résider dans le fait que les autorités nationales outrepassent leur compétence pour justifier leur incompétence, laissant ainsi la porte ouverte a' l'impunité des crimes les plus graves (ce qui est assurément contraire a la raison d'être des règles de droit international)".

of observers have even suggested that States will use universal jurisdiction to achieve political ends. A leading contemporary critic of universal jurisdiction, former United States Secretary of State Henry Kissinger has stated, in response to supporters of the use of universal jurisdiction, that "[t] he danger lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch hunts".[40]

It is undisputable that *aut dedere aut judicare* (and universal jurisdiction) have a deep meaning for any scholar, politician, and advocate of human rights or even idealist dealing with international criminal law, but the great impact that these words exercise on people is not often shared by national observers and practitioners that often reduce these terms to a sterile exercise of political rhetoric. Mr. Kissinger also contended that the international system "must not allow legal principles to settle political scores", and suggested that extradition procedures to handle requests by States seeking to exercise universal jurisdiction "provide an opportunity for political harassment long before the accused is in a position to present any defence" that could turn "into a means to pursue political enemies rather than universal justice" and would allow partisans "to project their battles into the various national courts by pursuing adversaries with extradition requests".[41] Similarly to the above stated position, Lord Browne-Wilkinson, the presiding judge at the second hearing before the House of Lords in the Pinochet case, later expressed concern about the possible political use of universal jurisdiction over crimes under international law in the absence of treaty provisions expressly limiting such jurisdiction to the nationals of State parties. He said that:

> [I]f the law were to be so established, States antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such western powers and stage a show trial for alleged crimes. Conversely, zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national State of the accused would stand by and watch the trial proceed: resort to force would be more probable. In any event the fear of such legal activities would inhibit the use of peacekeeping forces

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[40] Henry A. Kissinger, "The Pitfalls of Universal Jurisdiction", *Foreign Affairs* 86 (July/August 2001).

[41] *Ibidem* at note no. 40.

when it is otherwise desirable and also the free interchange of diplomatic personnel.[42]

In general, States keep punishment of their citizens and the criminal prosecution of offences committed on their territory to themselves.

6. BRIEF ANALYSIS OF THE INTERNATIONAL CRIMES COVERED BY THIS AXIOM

As already affirmed, the principle *aut dedere aut judicare* and that of universal jurisdiction are often interchanged and some scholars maintain that the application of *jus cogens* or customary law to the former principle is extendible to the latter and *vice versa*[43]. Even the "famous" heinous crimes covered by these two axioms, that are the crime of genocide, crimes against humanity and war crimes, are concerned by this confusion. Furthermore, when one refers to these crimes, a connotation of universality is immediately attributed. In fact, because the referral to heinous crimes is automatically a referral to their universality and because these crimes are covered by international norms containing the axiom *aut dedere aut judicare,* it could be given strength to the thesis that the latter is of universal application. These crimes are at the centre of any debate around international criminal law. It is important, thus, to cast a brief look over them considering that they are represented separately or together in domestic legislations that find their inspiration in the above treated international treaties and conventions.

I. Genocide

The crime of genocide is defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[44] Genocide, under international law, is "contrary

[42] See for other critical positions Madeline H. Morris, "Jurisdiction in a Divided World: Conference Remarks", 35 *New England Law Review,* 2001, pp.337-338; Geoffrey Robertson, "Crimes against Humanity: The Struggle for Global Justice" (London: Allen Lane 1999), and Derek Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources", 53 *British Yearbook International Law*, 1982, pp. 1-12.

[43] R. Zimmermann: "La coopération judiciaire internationale in matière pénale", 2nd ed. Bruyland SA Bruxelles 2004, pp.677-802.

[44] Notably, Article VII of the First Draft Convention (Universal Enforcement of Municipal Criminal Law) and Article VII of the 1948 Convention (Jurisdiction).

to moral law and to the spirit and aims of the United Nations"[45], which entails individual criminal responsibility at the national and international levels, even though, as asserted in the foreword, the idea of the universal enforcement of domestic criminal law was lost well before the final version of the Genocide Convention. The very first draft of the Genocide Convention, submitted by Saudi Arabia during the 1946 session of the U.N. General Assembly, contemplated explicitly universal jurisdiction: "Acts of genocide shall be prosecuted and punished by any State regardless of the place of the commission of the offence or of the nationality of the offender, in conformity with the laws of the country prosecuting"[46]. Nevertheless, the adopted version of the Genocide Convention barred the Saudi Arabian proposal. Support for the universality of the *aut dedere aut judicare* principles comes from the legal scholarship approach of a pre-eminent contemporary expert on the crime of genocide: Prof. Schabas[47]. Regarding the 1948 Genocide Convention, Schabas stated that: "A norm tolerating impunity in cases where States refuse to extradite their own nationals is obviously incompatible with the object and purpose of the Convention". Schabas concludes his reasoning affirming that: "If States are unable or unwilling to bring their own nationals to trial for genocide, they should not be allowed to refuse extradition to States willing to assume their international duties". The alternative to prosecute or to extradite, seen as a duty, is clearly expressed for the crime of genocide. From this statement it may be inferred that genocide is considered as a source of *jus cogens* or at least customary international law because it implies the protection of domestic interests seen as an international duty. The crime of genocide is also defined in Article 4 of the ICTY Statute, Article 2 of the ICTR Statute and Article 6 of the Rome Statute,[48] which had basically the same structure as that of Article II of the 1948 Convention.

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45 UNGA Resolution 96 (1) of 11 December 1946.

46 See U.N. Doc E/621 (1947) for an overview of the history of this resolution.

47 William A. Schabas, *Genocide in International Law, The Crime of Crimes*, Cambridge University Press, pp.345-347, 2000.

48 William A. Schabas, "Article 6 (Genocide)" pp. 107-116 in Otto Triffeterer, "Commentary on The Rome Statute of the International Criminal Court", Observers Notes Article by Article, Nomos-Verlaggesellschaft ed. 1999.

II. Crimes against humanity

The most important developments in relation to the repression of crimes against humanity can be traced, as with war crimes, back to the Nuremberg Charter[49]. But, unlike international crimes of the Nuremberg Charter, no definition or recognition of the principle of universal jurisdiction over crimes against humanity has been embodied in a treaty and the definition "crimes against humanity", has developed inconsistently. National legislations often do not distinguish between the crime of genocide and that of crimes against humanity, or consider the crime of genocide as a particular form of crime against humanity. The Finnish Penal Code (1975)[50], for example, described it as "an international crime against humanity", thereby generating confusion between the two terms.[51]

Cassese affirms that, what many domestic legislations lack are specific norms tailored to crimes against humanity. Cassese concludes saying that by not recognising these international crimes in domestic legislations, countries thereby avoid the question of which domestic applicability to universal jurisdiction applies to these crimes[52]. Consequently, the absence of a comprehensive body of law defining crimes against humanity certainly explains the absence of extensive national legislation conferring universal jurisdiction on national courts for such crimes. Yet, the 2000 Canadian Crimes Against Humanity and War Crimes Act[53], that has integrally replaced Section 7

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[49] The text containing the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal was adopted by the International Law Commission at its second session in 1950, and afterwards submitted to the U.N.G.A. The report, which also contains commentaries on the principles, appeared in Yearbook of the International Law Commission, 1950, Vol. II. Principle VI letter (c) establishes crimes against humanity as: "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime".

[50] See Chapter 11, Section 6 (578/1995) of the Finnish Law 1 July 1975.

[51] See G.A. Res. 96 (1) U.N. Doc. A/Res/96 (1), 11 December 1996.

[52] Antonio Cassese and Mireille Delmas-Marty: "Juridictions Nationales et Crimes Internationaux". PUF, Eds. 2002. pp.555-587.

[53] An Act respecting genocide, crimes against humanity and war crimes to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts (Crimes Against Humanity and War Crimes Act), Bill C-19, 2nd Session, 36th Parl., 48-49 Elisabeth II, 1999-2000, assented to 29 June 2000.

(3.71)[54] of the Canadian Criminal Code, as amended by Bill C-71 (1987) and the Israeli Nazis and Nazi Collaborators (Punishment) Law 5710-1950 (1) (a)[55] provide precisely and exhaustively for such crimes.[56] However, a detailed analysis of the Belgian Act Concerning the Punishment of the Grave Breaches of International Humanitarian Law 1993[57] by a Belgian magistrate in the Pinochet Case[58] describes the absence of extensive national legislation conferring universal jurisdiction to national courts over crimes against humanity. Thus, the interpretation of crimes against humanity as customary international law or *jus cogens* permits their direct application into domestic

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[54] "Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,

(a) At the time of the act or omission,
  (i) That person is a Canadian citizen or is employed by Canada in a civilian or military capacity,
  (ii) That person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or
  (iii) The victim of the act or omission is a Canadian citize or a citizen of a state that is allied with Canada in an armed conflict; or

(b) At the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada".

[55] Passed by the Knesset on the 18th Av, 5710 (1August, 1950) and Published in Sefer Ha-Chukkim No. 57 of the 26th Av, 5711 (August 9, 1950) 281; the Bill and an Explanatory Note were published in Hatza'ot Chok No. 36 of the 11th Adar, 5710 (February 28, 1950) 119. It reads at Article 1 (a): A person who has committed one of the following offences - (1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people; -(2) Done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity.

[56] The text of the Canadian Crimes against Humanity and War Crimes and the text of Israeli Nazis and Nazi Collaborators (Punishment) Law are available at the websites of the respective departments of justice: www.edc.ca/pages/law/cc/cc.html and www.mta.gov.il.

[57] The text of the Belgian Act is published on the Moniteur Belge or Belgische Staatsblad of 23 March 1999.

[58] On November 1998 six Chilean exiles living in Belgium filed a criminal complaint with the Brussels Investigating Magistrate against Augusto Pinochet, who was then under arrest in Britain pending the outcome of a Spanish extradition request.

legislation[59]. Yet, this opinion encounters resistance in State practice for the Canadian Department of Justice affirms that there is no obligation on Canada to try or extradite with respect to crimes against humanity[60]. Concerning international tribunals, the recognition of crimes against humanity was inserted into Article 5 of the Statute for the International Criminal Tribunal for the former Yugoslavia and into Article 3 of the Statute of the International Criminal Tribunal for Rwanda. Finally, the Rome Statute, in Article 7, adopted and expanded the definition of this crime.

III. War crimes

War crimes were codified in the Nuremberg Charter[61] and a few years later in the "grave breaches" provisions of the four 1949 Geneva Conventions.[62] In the latter, as asserted above, the principle *aut dedere aut judicare* for persons suspected of having committed war crimes is explicitly contained.[63] Even more explicitly on the point, the 1973 United Nations Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity[64] declares in the Preamble:

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[59] The 1993 Belgian Act, as reported at note no.159, made no express mention of crimes against humanity. At the point the interpretation of the Investigating Magistrate Mr. J. Verhoeven: "[I]s the notion of crime against humanity, as defined by international law, directly applicable in our domestic legal order? . ....[T]he Belgian legislature has recognized the existence of the international *ad hoc* tribunals and has incorporated their statutes in our internal legal order.... Consequently, we find that before being codified in a treaty or statute, the prohibition on crimes against humanity was part of customary international law and of international *jus cogens*, and this norm imposes itself imperatively and *erga omnes* on our domestic legal order. Customary international law is equivalent to conventional international law and can be applied directly in the Belgian legal order".

[60] Audit Report July 2005, Dispute Resolutions Services.

[61] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, 1950.

[62] William A. Schabas, An Introduction to the International Criminal Court, 2nd Ed. Cambridge 2004 pp.73-74.

[63] See for example L.C.Green, "Political Offences, War Crimes and Extradition", 11 *International & Comparative Law Quarterly* 329 (1962).

[64] U.N. G.A. Res. 3074, 28 U.N. GAOR Supp. (No.30) at 78, U.N. Doc. A/9030 (1973).

> War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment....

In order to do that it stresses the State cooperation at Articles (3) (4) and (5), as follows:

> 3-States shall co-operate with each other on a bilateral and multi-lateral basis with a view to halting and preventing war crimes and crimes against humanity, and take the domestic and international measures necessary for that purpose.
>
> 4-States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them....
>
> 5-States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.

As above mentioned, even universal jurisdiction over war crimes is potentially recognised for international crimes of the 1949 four Geneva Conventions and the Additional Protocol I of 8 June 1977.[65]

a) Customary law rules war crimes

Besides the fact that the universally condemned etiquette for war crimes might be transformed either into the universal jurisdiction principle or into the *aut dedere aut judicare,* one is largely debated by scholars. According to Jean Marie Henckaerts and Louise Doswald-Beck: "States have the right to vest universal jurisdiction in their national courts over war crimes".[66]

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[65] Willard Cowles, "Universality of Jurisdiction over War Crimes", 33 *California Law Review* 177, 193 (1978).

[66] Jean-Marie Henckaerts, Louise Doswald Beck: *Customary International Humanitarian Law,* Vol 2, pp. 604-605 (ICHR) Cambridge 2005.

Article 8 of the Rome Statute (one of the longest provisions in that Statute) is amazingly detailed when compared with the "relatively laconic"[67] provisions contained in the Nuremberg Charter and the Geneva Conventions. The protection of the violations of the laws of war is the title contained in Article 3 of the ICTY concerning war crimes that becomes Article 4 of the ICTR (Violations of Article 3 common to the Geneva Conventions and Additional Protocol II). According to William J. Fenrick this is particularly significant as war crimes are generally regarded as international crimes, which any State has the right to prosecute under international law on the basis of the universality principle. [68] While, Hans-Heinrich Jeschek argued that:

> According to the Geneva Conventions of 1949, signatory States are not only empowered to punish war crimes, but also are obliged to do so, unless the accused is extradited to a signatory State. The duty to punish attaches not only to the States to which the accused owes his allegiance or to the injured State, but to all the signatory States; this duty even extends to neutrals in an armed conflict, and exists without regard to the nationality of the perpetrator or victim or to the place where the crime took place. Hence, the Geneva Conventions provide universal jurisdiction for the punishment of war crimes coupled with a duty to prosecute, since the goal is the protection of common and universal interests.[69]

Furthermore, according to John W. Baxter, war crimes constitute a traditional category of international crimes and the existence of universal jurisdiction over war crimes is

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[67] I. Clark: "Transnational Aspects of Criminal Procedure", *Michigan Yearbook of International Legal Studies*; 1983406.

[68] William J. Fenrick, "Article 8 (War Crimes)" pp.180-181 in Otto Triffeterer, "Commentary on The Rome Statute of the International Criminal Court", Observers' Notes Article by Article, Nomos-Verlaggesellschaft ed. 1999.

[69] Hans-Heinrich Jeschek, "War Crimes", 4 *Encyclopedia of Public International Law,* Bernhardt Eds. 1982, pp. 294-297.). The writing on this point is vast and it should be necessary only to cite a few examples. See Y. Dinstein: "War Aggression and Self-Defence", Cambridge University Press, June 7 2001 Menno T. Kamminga, "Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences", Committee on International Human Rights Law and Practice, International Law Association, London Conference 2000, 6 Nigel S. Rodley, "The Treatment of Prisoners Under International Law" 2nd eds, Oxford University Press, 1999, 510. See also Jean S. Pictet, "The Geneva Conventions" in the International Committee of the Red Cross, 1 Red Cross (1952-1960) (Jean S. Pictet Ed.) pp. 147-152.

generally recognised.[70] A number of scholars have concluded, in fact, that not only may States exercise universal jurisdiction over war crimes under customary international law during international armed conflict, but also that under the principle of *aut dedere aut judicare* they must exercise such jurisdiction or extradite persons suspected of such crimes to a State able and willing to do so, or surrender the suspect to an international criminal court. Following this line of reasoning, in 1995 the Argentinean Supreme Court decided to allow the extradition of Priebke to Italy on charges of war crimes and crimes against humanity perpetrated during the Second World War, though, at the precise time of that decision, Argentinean law still applied statutes of limitation to crimes against humanity and war crimes[71].

7. THE PRINCIPLE *AUT DEDERE AUT JUDICARE*: A MORAL DUTY OR A DUTY *TOUT COURT*?

The principle of *aut dedere aut judicare* encounters the favour of domestic jurisdictions because it is already part of almost all domestic legislations, either by those that have ratified conventions and treaties containing it, or by those that have directly adopted international principles into their domestic legislations or by those that have adapted international principles to domestic realities. Which duty for the principle *aut dedere aut judicare* is, thus, applicable? Having affirmed the universality of the *aut dedere aut judicare* principle, it is now necessary to establish if the duty at the base of this principle is a moral or compulsory one. The question whether or not there is a general duty to extradite or prosecute international crimes, is one, which has been thought to provide an answer to the so-called "impunity-gap"[72] that is alleged to affect international criminal law. It is generally agreed that, at least, for ordinary crimes, there is no obligation

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[70] John W. Baxter, "Multilateral Treaties as Evidence of Customary International Law", 41 *British Yearbook of International Law* 275, 1965-66.

[71] J.A. Consigli, "The Priebke Extradition Case before the Argentine Supreme Court", 1 Yearbook of International Humanitarian Law (1998), 341.

[72] Christopher Joyner, "Reining in Impunity for International Crimes and Serious Violations of Human Rights" *Nouvelles études pénales*, 14, 1998, 605.

to extradite in the absence of a treaty prescribing such an obligation.[73] The question is whether international offences constitute an exception[74]. Because certain offences are considered as universally condemnable, the answer is that whatever may be the case with respect to ordinary crimes, a duty to extradite or prosecute, therefore, follows from the common interest which all States have in the suppression of international offences.[75] In fact, this duty has been accepted as a legal obligation by an increasing number of multilateral treaties defining international offences. An example will be self-explanatory of which duty is contained in an international instrument and which message it contains. The U.N. General Assembly on this matter has promulgated Resolution 2840, which states that refusal to cooperate in the arrest, extradition, trial and punishment of persons accused of international crimes is contrary to the purposes of the UN Charter and international law[76]. In addition, Resolution 3074[77] affirms that perpetrators will be tried for: "War crimes and crimes against humanity, wherever they are committed.... and adds that: "Every State has the right to try its own nationals for war crimes and crimes against humanity", which shall be subject to trial as a general rule". As to its wording, Resolution 3074 is at some points framed in the imperative, i.e. "perpetrators shall be subject to trial". So it could be taken to imply a general duty to prosecute war crimes and crimes against humanity.[78] Some commentators consider

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[73] See Oppenheim's International Law 953, 971 (9th ed. R. Jenningsand A. Watts eds. 1992); I.A. Shearer, Extradition in International Law 116-117, 124-25 (1971); Hans Schultz, "The Classic Law of Extradition and Contemporary Needs", in 2 *Treatise on International Criminal Law* 309, 310 (M.C. Bassiouni & V. Nanda eds. 1973).

[74] W.E. Beckett, "The Exercise of Criminal Jurisdiction over Foreigners", *British Year Book of International Law*, 1925, 44-48.

[75] Ian Brownlie, *Principles of Public International Law* 315 (4th ed.1990).

[76] G.A. Res. 2840 (XXVI) of 31 October 1971.

[77] U.N. Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973. This resolution spells out an extensive list of obligations of States to cooperate in the investigation and prosecution of war crimes. In 1971, the General Assembly had urged all States "to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes".

[78] The general duty to prosecute might be found in the ICJ jurisprudence about the explanation of the significance of General Assembly Resolutions (2840 & 3074) in the Legality of the Threat or Use of Nuclear Weapons Opinion [1996] ICJ Rep. 4, pp.254-5.

this Resolution to be constitutive of a duty to extradite or prosecute.[79] One might infer that the expression "wherever they are committed" does lead to a universal jurisdiction interpretation, while the inclusion of "as a general rule" injects ambiguity as to the scope of the obligation. Yet, it is important to stress that these Resolutions in detail and the Conventions reported above are addressed to States. Now whether they contain the *aut dedere aut judicare* or universal jurisdiction principle, sometimes both, they are not just connected to the necessity of the protection of the national interests but are also aimed at the defence of internationally oriented values. The originality of *aut dedere aut judicare* is that the interests it represents are based on common values among States: to prosecute or to extradite in respect of national interests. Albeit, an interest dictated by factual convenience but it remains a valid reason. Moreover, when *aut dedere aut judicare* is seen as the principle acclaimed by all States, the interests it represents are, therefore, based on a universal value.

8. WHICH DUTY FOR THE PRINCIPLE *AUT DEDERE AUT JUDICARE* IS, THUS, APPLICABLE?

Delmas-Marty affirms that the Geneva Conventions have not received the attention they deserve and the magical idea of a universal jurisdiction, based on international customary law, has not been followed. If one admits that the fundamental rules contained in the Geneva Conventions are customary international law that it does not bind States to any obligation except for the custom contained in the four Geneva Conventions, this affirmation, though interesting, then denotes the subordination of the *aut dedere aut judicare* rule to the universal jurisdiction one. According to this theory, practitioners like Vandermeersch, practitioners and scholars like Cassese, or pure academics like Reydams 'reduce' *aut dedere aut judicare* to a mere corollary of universal jurisdiction.[80]

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[79] Jordan Paust, "International Law as Law of the United States" Durham N.C., Carolina Academic Press 1996, 405.

[80] Damien Vandermeersch (vice-president and instructing judge at the Brussels Court) "La competence universelle" pp.590-611 in Antonio Cassese & Mirielle Delmas-Marty: "Juridictions Nationales et Crimes Internationaux" Ed. PUF 2002, where he affirms: ". ...[C]ette compétence universelle procède du principe *aut dedere aut judicare*...". Antonio Cassese: "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Criminal Law" 9 European Journal of International Law 2, 1999, pp.5-6. Luc Reydams,"Universal Criminal Jurisdiction: The Belgian State of Affairs", 11 Criminal Law

To them, there is no unanimity to affirm that the fundamental rules of the Geneva Conventions are an integral part of customary international law. More specifically, according to Reydams it is far from established that *aut dedere aut judicare* is a general principle of international law or a rule of customary international law[81]. While Cassese, who affirms that the fundamental rules contained into the Geneva Conventions are very relevant part of customary international rules, is diametrically opposed[82]. In recent years, it has been argued by some scholars not only that the principle of *aut dedere aut judicare* has become a rule of customary international law but also that had war crimes, genocide, and other crimes against humanity been concerned it would have acquired the character of *jus cogens*[83]. Some other scholars have denied the existence of such a rule or declared their perplexities[84]. One may criticize the reductive position given to the *aut dedere aut judicare* principle affirming that the intimate connection with the principle of universal jurisdiction makes it difficult to define the competence of the former. Instead, exactly as for the reasoning with respect to universal jurisdiction, this universal value should be considered as international solidarity that finds its reason with the State's desire not to let people, allegedly having committed heinous crimes, remain free in a State unable or unwilling to prosecute them. It is

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Forum, no.2, June 2000, pp.183-216, where he affirms: "[T]o exercise universal jurisdiction over certain international crimes, that is, to prosecute or extradite persons responsible for such crimes".

[81] Reydams bases his considerations in the Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Lybian Arab Jamahirya v. United Kingdom) and Libyan Arab Jamahirya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, where judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley of the majority, voiced the opinion that *aut dedere aut judicare* is not a rule of customary international law.

[82] Cassese bases his considerations on the 1986 ICJ decision on the Case Nicaragua where at Paragraph 220 it affirmed that the first Article of the four Geneva Conventions: "[S]tates undertake to respect and to ensure respect to the present Convention in all circumstances" is considered as customary international law. .

[83] M.C. Bassiouni, "Crimes against Humanity in International Criminal Law", 2nd rev. edition 1999 pp.217-221 and J.J. Paust, "Universality and the Responsibility to Enforce International Criminal Law: No US Sanctuary for Alleged Nazi Criminals", 11 *Houston Journal of International Law*, 1999, 337.

[84] G. Gilbert, "Transnational Fugitive Offenders in International Law", 1998, L.S. Sunga, "The Emerging System of International Criminal Law", 1997, pp.250-256, and M.C. Bassiouni and E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht Martinus Nijhoff eds. XIV, 1995, 340.

relevant to recall that the traditional way of bringing perpetrators of international crimes to justice is for States to rely on one of two unquestionable principles: territoriality (the crime has been committed on the State's territory) and active nationality (the crime has been committed abroad, but the perpetrator is a national of the prosecuting State). In addition, extraterritorial jurisdiction over international crimes committed by non-nationals has been exercised and is generally accepted on the basis of passive personality (the victim is a national of the prosecuting State).

Now, the values shared by all members of a community are the same in application of the *aut dedere aut judicare* or the universal principle. The treaties and conventions (Geneva Conventions *en tête)* are interpreted as having alternatively one or the other or both principles[85], the legal scholarship employs the same meaning to define one and the other principle. Finally, the traditional way of bringing perpetrators to trial based on territoriality, active nationality or at least passive personality are at the base of the application of the axiom *aut dedere aut judicare* in domestic law.

9. CONCLUSION

Which duty for the principle *aut dedere aut judicare* is, thus, applicable? It must be clearly understood that no obligation to extradite exists apart from that imposed by treaty and none of the text discussed above creates an absolute obligation for State Parties to extradite persons suspected of having committed international crimes. Yet, there is reason to suppose that principles of international law have contributed to the emergence of a new rule of customary law entailing that an unconditional obligation to

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[85] A parallelism between some philosophical thoughts and the interpretation of applicability of the two principles aut dedere aut judicare and universal jurisdiction can be done. Aristotelian concepts of the opposites: non-contradiction and third excluded, as contained in the 4th book of the Metaphysics can be seen in parallel with these two principles. According to the Aristotelian approach, a proposition may be real or false not the two things together, otherwise it is a prejudice and the negation of its negation is contradictory. Now the two principles are often in terminological contradiction each other, and the dichotomy true or false is always confuted, but both are applicable. This contradiction, always applying a philosophical parallelism, is constructive when it deals with the Kantian imperatives. Any Kantian model is based on the contradiction of fundamental rules. They exist because they are contradictory, as the two principles. Because they are in contradiction they exist and their existence creates an antinomy, thus applicability.

extradite that does not depend on the existence of a treaty now exists where international crimes are concerned. By this reasoning it might be argued that, on one hand, the principle *aut dedere aut judicare* stands autonomously in an imperfect paradigm of subordination-coordination with that of universal jurisdiction. On the other hand, this imperfect paradigm leads to a continuing process of improvement within national legislations via harmonization with those of other States because face to international crimes the goal is not to restore privileges in a factual hierarchy of international principles regarding a world order that still do not exist, but to aid constituting a future world order still missing.

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