Essays
on
CONTEMPORARY ISSUES IN INTERNATIONAL LAW

CENTRE FOR RESEARCH AND TRAINING
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PREFACE

Publications of an organization are its face to the outside world. Therefore, since its inception, AALCO's publications have constituted an integral part of the Organization's activities. Apart from the regular publications, namely AALCO's Newsletter, the Quarterly Bulletin and the Yearbook, the Secretariat has also from time to time special studies on topics of contemporary relevance for its Member States.

The present book entitled '*Essays on Contemporary Issues in International Law*' is an attempt by the Secretariat to reflect upon some of the issues of importance in the present day realm of international law. These essays have been written by a team of dedicated researchers who have given their general observations, commentaries and views on the contemporary development of international law with particular reference to AALCO's work on the chosen theme. The views expressed in these essays are of the authors and do not in any way reflect the views of the Organization or its Member States.

The continuous effort by the Secretariat to publish and conduct research in relevant areas that are of concern to the Member States of AALCO are a step in the direction to make AALCO the reference point for its membership on matters relating to the progressive development and codification of international law. Further, it is an effort to ensure that the Organization is and continues to remain of relevance to its Member States.

For their efforts and valuable contributions to this volume, I would like to express my sincere gratitude to all the contributors of the essays. I would like to particularly thank Mr. Shikhar Ranjan, Senior Legal Officer and Mr. Senthil Kumar, Legal Officer, for their sincere efforts in bringing out this publication.

It is a matter of great satisfaction and pride that this publication will be released during the Forty-Eighth Annual Session to be held at Putrajaya, Malaysia.

5 August 2009

Prof. Dr. Rahmat Bin Mohamad
Secretary-General

1

INTRODUCTION

Rahmat Bin Mohamad*

The Secretariat of the Asian-African Legal Consultative Organization (AALCO) has from time to time brought out publications on issues of relevance in International Law and such publications have been found to be quite useful by the discerning reader. In continuance of this practice, the present publication entitled "*Essays on Contemporary Issues in International Law*" is a modest attempt by the AALCO Secretariat that brings forth the views on topics of current significance in international law. Each of the contributors have worked on their selected area of interest and their respective contributions have been made with the objective of in-depth academic research on the theme and contextualize AALCO's work in that regard.

The first essay by Rahmat Bin Mohamad traces the genesis of Asian-African cooperation to the historic Bandung Conference of 1955, and then moves onto the newer challenges posed for Asian-African solidarity, fifty years after Bandung. Thereafter, it examines the salient features of the Westphalian Legal Order, established by the Peace of Westphalia of 1648. It also seeks to explore the impact of those features in the light of the developments that have taken place in some critical areas of international law, namely, human rights, humanitarian intervention, terrorism, globalization and the World Trade Organization. The essay also focuses upon the role of the AALCO, since its establishment, in 1956, in harmonizing the different perspectives amongst the Asian-African countries in relation to International Law. The essay builds up the case for

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strengthening AALCO for ensuring greater participation by the Asian-African States in the international law-making process.

Anuradha Bakshi in her article highlights the critical concerns of the growing number of internally displaced persons (IDPs). The estimated number of IDPs crossed 26 million in 2007. With an increase in armed conflict in many areas of the world over the past few years this number has definitely increased. In view of the current situation, this article addresses many vital issues pertinent towards solving this rapidly aggravating problem. Keeping the 1998 Guiding Principles on Internal Displacement presented to the United Nations High Commissioner for Refugees (UNHCR) as the core concern, this article analyses the developments in the legal framework that exists to protect IDPs and the role of Sovereignty in curbing this crisis. The efficiency of the Guiding Principles in addressing this problem as well as their legal significance and shortcomings are reviewed in some detail. The Asian-African perspective of this issue is given special mention. The role of regional government bodies in finding a solution to this issue is also highlighted. The pioneering role of AALCO, in its proposal to establish safety zones in accordance with Article 23 of the First Geneva Convention has been pointed out clearly. The article concludes with a summing up of the current progress in the protection of IDPs and further action required in the coming years.

The transboundary movements of hazardous wastes from the developed to developing countries had become a very contentious issue in the decade of eighties. To address this issue, under the auspices of the United Nations Environment Programme, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted in 1989. This Convention establishes an international regulatory system to protect developing countries from the menace posed by such transfer of pollution. Shikhar Ranjan's article seeks to provide an overview of some of the important developments that have taken place in the two decade journey of the implementation of this landmark environmental treaty. In doing so, he briefly traces the evolutionary history of the Basel Convention; contextualizes AALCO's work on

the subject; provides a bird's eye-view of the main provisions of the Convention; and then proceeds to elaborate upon what he perceives to be the significant achievements in the twenty year journey of the Convention, namely, the Basel Ban Amendment, the Basel Protocol on Liability and Compensation, and the issues of electronic-waste and ship dismantling. Although, the author considers that the Basel Convention has become firmly rooted in the international environmental governance structure, its full objectives will not be realized until the generation of hazardous wastes is minimized.

R. Rajesh Babu's paper seeks to understand the implication of the WTO Appellate Body ruling in US - Shrimp/Turtle cases from the perspective of developing countries. The paper focuses on the defence available under the GATT Article XX 'General Exceptions', which is the most important provision governing the operations of the WTO affecting environment, and has been the subject of elaborate scrutiny by the Panel/Appellate Body. The paper also undertakes an analysis of the jurisprudential evolution of the GATT Article XX, in the context of environment measures. More importantly, the paper focuses on the decisions and interpretation delivered by the Appellate Body in the Shrimp/Turtle cases which is alleged to have permitted back door entry of those issues which are not settled in the World Trade Organization (WTO), in favour of the United States and the European Community.

Mohammed Hussain K. S. in his article analyses the Palestinian issue from an international law perspective. He traces the history of the crisis right from the Balfour Declaration. The article addresses the issues of legality of the Balfour Declaration, Palestine mandate, United Nations Resolutions 181 (II) of 1948 and 242 of 1967. It highlights the violations of international law committed by Israel, including the war crimes committed in Gaza and the issue of accountability and examines the right to resistance of the Palestinian people under international law. It also examines the legal consequences of the ICJ Advisory Opinion on the Wall Case and the peace accords. AALCO's role in the consolidation of the Asian-African views is highlighted. The author concludes the article by stating that an independent, Sovereign and viable State of Palestine,

free of all occupation is an international legal obligation of the United Nations and its member States and the cornerstone of the durable peace in the Middle East. He further emphasizes that the peace the international community envisages for Middle-East should be based on justice and principles of international law. Peace with justice is achieved only when the aggressors and perpetuators of the war crimes are tried and punished. The author also points out that Israel has a legal obligation to pay compensation to the Palestinian people for the decades of occupation, war crimes and wanton destruction that it has committed on them.

Senthil Kumar in his article considers the concept of unilateral sanctions and its compatibility with general international law from the developing countries point of view. It testifies unilateral sanctions with the principles of non-intervention, sovereign equality of States and self-determination as enshrined in the Charter of the United Nations, other relevant international instruments along with the judicial decisions etc. The Article suggests that the imposition of unilateral sanctions stands in an uneasy relationship with existing international and regional legal regimes. It also argues that as an instrument of foreign policy, the imposition of unilateral sanctions has never been successful. It analyses the United States hegemonic actions against the developing countries on the pretext of being a global protector of universal norms. In this connection, the article points out the negative implications of the unilateral sanctions from the developing countries perspective. The article also examines in detail, the two important extraterritorial legislations enacted by the US, viz., the Helms Burton and D-Amato Acts. The article further elaborates AALCO's position on the extraterritorial application of national legislation and the effects of sanctions imposed against third parties. It explains the negative impact of unilateral sanctions against the Member States of AALCO and calls for a cessation of all kinds of unilateral measures exerted on their population which basically undermines the UN Charter and other provisions of international law.

Shannu Narayan succinctly brings out that the Convention on Suppression of Financing Terrorism, 1999 gained more importance

after the 9/11 attack through the adoption of the United Nations Security Council Resolution 1373 of 2001. The provisions in the Convention were selectively implemented after the 9/11 attack in pursuance of the 'War on Terror' agenda, by powerful States, against some developing countries, described by them as 'rogue' States. While enforcing the agenda by certain States, one could witness the changing structure of international law like inclusion of non-state actors, private militarization and the concept of 'use of force' etc,. The need to establish democracy in such States, as insisted by the powerful States, in the author's opinion turns out to be a case of the selective application of norms against targeted countries that have different political structure.

S. Pandiaraj examines the implications of the policies of the International Monetary Fund and the World Bank (the IFIs) on the poor and vulnerable people of the developing countries from the human rights view point. He opines that, as the IFIs have (in recent times) come to play an extraordinarily intrusive role in shaping the national economic polices, there should be a corresponding expansion in their responsibilities. The importance of holding IFIs accountable, he suggests, has become all the more important with the recent adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural rights, which considers the violation of economic and social rights as grave as civil and political rights.

While trying to ascertain the sources of these obligations, he argues that, the IMF and the WB- as international organizations with international legal personality, whose member states are legally bound by treaty law and general international law to respect, protect and fulfill human rights- are required by general international law to respect the human rights obligations of their member states and the human rights of individuals affected by the operational activities of IFIs. He further argues that, though the IFIs have, of late, started paying attention to human rights issues, it remains inadequate since the ideological underpinnings of their macro economic policies themselves are still tied to neo liberal development agenda which is incompatible with human rights law.

2

BRINGING TOGETHER ASIAN-AFRICAN STATES IN HARMONIZING THE INTERNATIONAL LEGAL ORDER IN THE POST WESTPHALIAN ERA

Rahmat Bin Mohamad*

I. Introduction

Every age has its challenges. Fifty-four years ago, in 1955, leaders of 29[1] nations representing over half of the world's population gathered in Bandung, Indonesia to deliberate and determine a new vision and path for the people of Asia and Africa. These newly independent States shared the common past, of subjection to colonial rule or foreign domination that had manifested itself in problems of emancipation from backwardness, oppression, and economic and

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This is an abridged version of the lecture delivered at the Xiamen Academy of International Law, on 6 July 2009, at Xiamen, Fujian Province, the People's Republic of China.

1 The Asian-African Conference was convened upon the invitation of the Prime Ministers of Burma, Ceylon, India, Indonesia and Pakistan met in Bandung from the 18th to 24th April 1955. In addition to the sponsoring countries the following 24 countries participated in the Conference: Afghanistan, Cambodia, People's Republic of China, Egypt, Ethiopia, Gold Coast, Iran, Iraq, Japan, Jordan, Laos, Lebanon, Liberia, Libya, Nepal, Philippines, Saudi Arabia, Sudan, Syria, Thailand, Turkey, Democratic Republic of Vietnam, State of Vietnam, and Yemen. For details see the website of the Museum of the Asian-African Conference at: http://www.asian african-museum.org/. For an account of the Conference and excerpts of address made by the Asian-African leaders and the Final Communique of the Asian-African Conference see George McTurnan Kahin, *Asian-African Conference* (New York: Cornell University Press, Ithaca, 1956).

social inequities. It was at this first ever Asian-African Conference that President Soekarno of Indonesia proclaimed:

> For long years we Asian and African people have tolerated decisions made in our stead by those countries which placed their own interests above all else. We lived in poverty and humiliation. But tremendous changes have taken place in the past years. Many peoples and countries have awakened from centuries of slumber. Tranquility has given way to struggle and action. This irresistible force is sweeping the two continents.

The determination of the Asian-African leaders to work together, with a keen sense of kinship came to be known as "Bandung spirit". The Conference gave a unique message to the world - whatever may be the differences in political, economic or legal systems, the states of Asian-African region were inextricably linked together as an Asian-African identity. Their common concern was not limited to political and economic questions but also included a desire to effect the progressive development of international law with a view to adapting traditional international law and existing treaties to the requirements of newly independent States. Moreover, it was felt that African and Asian States should have an adequate say in the formulation of the new law of nations.[2]

Based upon the core principles of solidarity, friendship and cooperation the first generation of Asian-African leaders, building upon the *Panchsheel*[3] or the Five Principles of Peaceful Coexistence, earlier enunciated by the Governments of the People's Republic of China, India and Burma (now Myanmar),[4] laid down as code of

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2 Eberhard Jahn, "Asian-African Legal Consultative Committee", *Encyclopedia of Public International Law*, vol. 1 (North-Holland: Amsterdam, 1992), p. 272.

3 "Panchsheel" in Sanskrit means "Panch" meaning five and "sheel" meaning principles and virtues, in other words, "convincing people by virtues." See generally, Chen Meidi, "Panchasheel and International Law", *AALCO Quarterly Bulletin,* vol. 1 (2005), pp. 28-49; Edward McWhinney, "The Renewed Vitality of the International Law Principles of Peaceful Coexistence in the Post-Iraq Invasion Era: The 50th Anniversary of the India/China Panch Shila Agreement of 1954" *Chinese Journal of International Law*, vol. 3 (2004), pp. 379-84.

4 The five principles of peaceful co-existence are mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's

ethics for international relations the 'Ten Principles of International Peace and Cooperation' – the Ten Principles of Bandung, or *Dasa Sila Bandung*.[5] This political statement containing the basic principles in the efforts to promote peace and cooperation in the world became the underlying inspiration for these nations to continue to strive towards the attainment of a just, peaceful, progressive and prosperous world order.

Bandung spirit gave rise to the new wave of Third World consciousness that led the basis for collective mobilizations by the Third World at the UN, through the Group of 77 and the Non-Aligned Movement (NAM). In addition, Bandung underlined two cardinal principles that would organize third world politics in the

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internal affairs, equality and mutual benefit, and peaceful coexistence. During the Chinese Premier Zhou Enlai's visit to India, he and his counterpart, Indian Prime Minister Jawaharlal Nehru issued a Joint Communiqué based on the Five Principles on June 28, 1954. The Five Principles were again reiterated in a Joint Communiqué by the Chinese Premier and Burmese Prime Minister on June 29, 1954.

5 The Final Communique of the Asian-African Conference, inter alia proclaims that "Free from mistrust and fear, and with confidence and goodwill towards each other, nations should practice tolerance and live together in peace with one another as good neighbours and develop friendly cooperation on the basis of: 1. Respect for fundamental human rights and for the purposes and the principles of the Charter of the United Nations. 2. Respect for the sovereignty and territorial integrity of all nations. 3. Recognition of the equality of all races and of the equality of all nations large and small. 4. Abstention from intervention or interference in the internal affairs of another country. 5. Respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations. 6. (a) Abstention from the use of arrangements of collective defence to serve the particular interests of any of the big powers. (b) Abstention by any country from exerting pressures on other countries. 7. Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country. 8. Settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice, in conformity with the Charter of the United Nations. 9. Promotion of mutual interests and co-operation. 10. Respect for justice and international obligations.

coming decades: decolonization and economic development.[6] Another concrete outcome of the Bandung Conference was the foundation of the Asian-African Legal Consultative Organization (AALCO), one year later on November 15, 1956, by seven Asian States to serve as an advisory body of legal experts for consultation and cooperation between member governments in the fields of international law and economic relations, and more particularly in matters under consideration by the United Nations and its various organs and agencies.[7] Thus, the name Bandung had a magical effect in bringing together the countries of the region in various multilateral foras. For all these reasons Bandung Conference is considered to have no parallel in history.

Since the time of Bandung Conference, the Asian and African countries have attained significant political and economic advancement, and today, 106 countries grace the continents of Asia[8] and Africa,[9] comprising more than half of the membership of the

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6 Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance,* (New Delhi: Cambridge University Press, 2005), p. 74.

7 The Asian-African Legal Consultative Organization (AALCO), originally known as the Asian Legal Consultative Committee (ALCC) was constituted on 15 November 1956. Later, in April 1958, in order to include participation of countries of the continent of Africa its name was changed to Asian-African Legal Consultative Committee (AALCC). At the Fortieth Session, held at the Headquarters of AALCC in New Delhi, in 2000, the name of the Committee was changed to Asian-African Legal Consultative Organization.

8 The Full Participants at the 2005 Summit from the continent of Asia were: Afghanistan, Azerbaijan, Bahrain, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, Democratic People's Republic of Korea, , Fiji Islands, India, Islamic Republic of Iran, Iraq, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Lebanon, Malaysia, Maldives, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, Nepal, Oman, Pakistan, Palestine, Papua New Guinea, People's of Republic China, Philippines, Republic of Korea, Qatar, Saudi Arabia, Samoa, Singapore, Solomon Islands, Sri Lanka, Syria, Tajikistan, Thailand, Timor-Leste, Tonga, Turkey, Turkmenistan, Tuvalu, United Arab Emirates, Uzbekistan, Vanuatu, Vietnam, and Yemen.

9 The Full Participants at the 2005 Summit from the continent of Africa were: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cote d' Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabonese Republic,

United Nations, encompassing an area that is almost half of the world in which 4.6 billion people or 73% of the world's population lives. The combined Gross Domestic Product of this region amounts to US $ 9.3 trillion.[10] Together, the Asian-African countries had successfully combated the scourge of colonialism and consistently fought racism. In particular, the abolishment of apartheid represents a milestone in Asian-African cooperation. Presently, all independent, sovereign and equal nations striving for the promotion of human rights, democracy, and the rule of law grace the continents of Asia and Africa. However, having made these political gains, the countries of Asia and Africa have not yet attained commensurate progress in the social and economic spheres.

If in the decade of fifties, the challenges for these countries were the war against colonialism, apartheid, economic oppression, the challenges in the new millennium are multiple and different. Although, the urgency to promote economic development in the two regions remains, some of the common issues that call for closer cooperation and collective action by the States of Asia and Africa are: poverty and underdevelopment, gender mainstreaming, environmental degradation, natural disasters, drought and desertification, digital divide, inequitable market access, and foreign debt.

To reinvigorate the Bandung spirit, and chart the future cooperation between the continents of Asia and Africa, the leaders of Asian and African countries assembled for "The Asian-African Summit 2005 and the Commemoration for the Golden Jubilee of the Asian-African Conference 1955" in Indonesia from 22 to 23 April 2005. They adopted the Declaration on the New Asian-African

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Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe.

10 Statement by His Excellency Dr. Susilo Bambang Yudhoyono, President, Republic of Indonesia at the opening of the Asia-Africa Summit 2005.

Strategic Partnership.[11] The Declaration recognizes that the people of Asia and Africa aspire for an affluent Asian-African region characterized by equitable growth, sustainable development as well as common determination to enhance the quality of life and well being of its people. The leaders called for the establishment of a caring Asian-African society where the people live in stability, prosperity, dignity and free from the fear of violence, oppression and injustice is essential for the peace and prosperity of world at large.

Guided by the imperative of increasing the collective powers of the two continents in world affairs, the leaders envision an Asian-African region at peace with itself and with the world at large, working together as a concert of nations in harmony, non-exclusive, bonded in dynamic partnership and conscious of the historical ties and cultural heritage. The nations of Asia and Africa emphasize the importance of multilateral approaches to international relations and the need for countries to strictly abide by the principles of international law, in particular the Charter of the United Nations.

This essay revisits as to whether the factors that prompted the Bandung Conference have changed or remained relevant. It seeks to address the relevance of Westphalian principles of sovereignty, non-intervention and territorial integrity in the context of changing nature of international legal system and international relations from the perspective of Asian and African States. It emphasizes upon the importance of Ten Principles of Bandung in bringing together Asian-African States in harmonizing the international legal order in the post Westphalian era and in doing so briefly touches upon more than five-decades work of the AALCO in fostering cooperation amongst Asian-African States in international law matters and prevalence of the rule of law in international relations.

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[11] The Text of the Declaration is available on the website of the Museum of The Asian-African Conference, note1. It has also been reproduced in the *AALCO Quarterly Bulletin*, vol. 1 (2005), pp. 140-45.

II. Westphalia Legal Order: Tracing the History of Sovereignty

The existence of state sovereignty is typically traced to the 1648 Treaty of Westphalia, which brought an end to the Thirty Years' War in Europe and replaced the ruling religious hierarchical structure dominated by the Pope and Holy Roman Emperor with a horizontal structure of independent sovereign states that notionally possessed equal legal legitimacy and authority.[12] It laid the juridical foundations of sovereign independence for the European nation-States. The basic tenets of sovereignty according to this scheme included:

First, the king or the central/national government is the sole holder of sovereignty which is considered absolute. Over a period of time, however, sovereignty slowly evolved from absolute power to, at least in some countries, as the reflection of the undisputed will of the people, sometimes referred to as the "doctrine of popular sovereignty". John Locke in the 17th century and Jean-Jacques Rousseau in the 18th century, linked sovereignty to democracy, via the doctrine of the social contract according to which the "People" are the ultimate owners of sovereignty. They may delegate to government's strong powers to be exercised in their name but they are the ultimate masters and may withdraw that delegation by voting governments out of office.[13]

Second, the State had the absolute control over its territory. The sovereignty of nations was expressed through the control of geographical territory.

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12 R.R. Palmer and Joel Colton, *A History of the Modern World* (1992) arguing that in international law the Peace of Westphalia initiated the current European state system or system of Sovereign States. *See generally* Richard Falk, *A New Paradigm for International Legal Studies: Prospects and Proposal*, *Yale Law Journal*, vol. 84, (1975), pp. 980-87.

13 Kimon Valaskakis, "Westphalia II: The Real Millemmium Challenge", *Pari Centre for New Learning,* available at: http://www.paricenter.com/library/papers/valaskakis01.php (accessed on 25 July 2009).

Third, Central or National governments became the most powerful players of the world system. There was subordination of economic interests to national goals, which remained a dominant feature of international relations for most of the countries of Western Europe till the twentieth century.

Fourth, the only truly enforceable international law was the body of agreements resulting from treaties between sovereign countries. International Law was a form of delegated authority which could be taken back by repealing the treaty which transferred that authority. While "natural law" based on assumed universal values was occasionally acknowledged, this type of international law merely reaffirmed the primacy of sovereignty since no sovereign country could be forced to accept what it had not consented to.

Finally, a by-product of the Westphalian World Order was the explicit retention of war between sovereign states as a legitimate instrument of national policy. The use of force to settle conflicts has always existed but the innovation brought by Westphalia was the introduction of the concept of war with rules. Although not explicitly present in the Treaty itself, the legitimate possibility of war between states was a logical extension of the primacy of sovereignty.[14]

The Westphalian model, however, was an embodiment of a paradox: it combined the logic of equality with the logic of inequality. In other words, the problem of 'order among sovereign states' arose only in the context of sovereign European states since sovereignty was formulated in such a way as to exclude the non-European States. This was sought to be done through the distinction between the civilized and the uncivilized States which was crucial to the formation of sovereignty doctrine. Once this was achieved, Europe could manipulate the state system for as long as possible to serve its imperial ambitions which led to the colonizing of much of the non-European world. The process of transforming the non-European world was completed through decolonization, which

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14 *Ibid.*

enabled the non-European States to emerge as sovereign and equal members of the international community.

The new states of Asia and Africa after their independence from colonial rule, accepted international law as the normative framework with which to conduct their international relations. Though Eurocentric in nature, none of the newly independent countries rejected international law on the ground that it was European in origin and bias. They mostly accepted the treaties concluded by European powers on their behalf and before their independence. They had no problems in accepting those fundamental principles of international law which they thought would reflect their interest and which stood codified in the UN Charter such as sovereign equality, non-intervention, democracy and self-determination[15]. International law, through these principles, entitled them to maintain political independence and territorial integrity, and empowered them to establish the political system of their own choice, which were of fundamental importance to these new nations.

III. Post 1945 Westphalian Era

The post World War era has posed serious challenges to the Westphalian legal order. The two world wars, the establishment of the UN and acceleration of "Globalisation" since 1945 have tested the Westphalian System. The first *de facto* challenge to the Westphalian system was the first and second world wars. The system which had guaranteed peace and security failed catastrophically. The sovereign states could no more resort to war, even legitimate war (a logical extension of the primacy of sovereignty). The illegality of aggressive war is reaffirmed in the United Nations Charter. War, except in self-defense or collective self-defense, is now illegal either under customary international law or under the U.N. Charter. In addition, the idea of national self determination challenged the system of nation-states and national empires. In a first wave of national liberation following the First

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15 R. P. Anand, *Development of Modern International Law and India* (New Delhi: Indian Society of International Law, 2006), p. 108.

World War, Europe's multinational empires were disbanded and re-aggregated into nation-states with a rough congruence of borders and ethnos.

In a second wave following the Second World War national liberation movements sprang up throughout the third world leading ultimately to decolonisation. National liberation and decolonization doubled the number of states in the international system, which included several new micro-states. The post war era has seen a number of developments which have an immense implication for the Westphalian world order. Here in an attempt is made to reflect upon the themes of human rights, humanitarian intervention, terrorism, globalization and the World Trade Organization that have an important bearing on the development of international legal order in this era.

A. Human Rights

The emergence of human rights as an international issue has played a significant role in bringing the conventional norms and principles of inter-state relations into debate. Under the doctrine of absolute sovereignty as emanating from the Westphalian world order, how a State treated its own citizens was not the concern of international community. The doctrine of absolute sovereignty was the ruling canon of the day. But after World War II, especially after Hitler's heinous crimes committed against his own population, international human rights law came into being which has pierced the veil of sovereignty by conferring on individuals a number of rights which are codified in the human rights treaties.[16]

Richard Falk argues that the statist nature of the current international system comprises a significant obstacle to the institutionalization of international human rights objectives. He is of

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[16] These include universal instruments, such as the Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; and International Covenant on Economic, Social and Cultural Rights, 1966 (together referred to as International Bill of Human Rights.) In addition, a huge corpus of human rights treaties and declarations has been adopted under the aegis of Regional Organizations.

the view that a "breakthrough in the internationalization of the protection of human rights is conceptually irreconcilable with the Westphalian logic of world order."[17] In nutshell, elements of contemporary international society entail a loosening of the absolutist conception of State sovereignty so that human rights are included in the discourse of international relations.

B. Humanitarian Intervention

In the 1990s, there was a definite trend toward accepting a more interventionary role for the United Nations with respect to the prevention of ethnic cleansing and genocide. The Security Council, reflecting a greater prominence for the international protection of human rights and less anxiety about risks of escalation that were operative during the cold war, narrowed the degree of deference owed to the territorial supremacy of sovereign governments. As such, the domestic jurisdiction exclusion of UN intervention expressed in Article 2(7) was definitely under challenge from the widespread grassroots and governmental advocacy of humanitarian intervention in the years following the cold war.

The key criterion of humanitarian intervention is that the intervening State acts strictly and purely out of genuine humanitarian motives, rather than out of any element of self-interest. Unilateral military intervention outside the auspices of collective security arrangements reflects power politics at the expense of the international rule of law and sovereign State equality. It is perfectly clear in such cases as the US-UK invasion and occupation of Iraq. The UN Charter Article 2(4) does not support supposed legality of unilateral (or joint) military intervention on humanitarian grounds, however it has become a political reality of power relations.[18] These

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17 See Richard Falk, "A Half Century of Human Rights", *Australian Journal of International Affairs*, vol.52 (1998), pp. 255-272.

18 For useful overviews of this trend, see V. S. Mani, " "Humanitarian" Intervention Today", *Recueil des cours,* vol. 313 (2005). Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* (1996); Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention In International Society* (2000).

developments have come to its zenith in the debates after 2001 on the 'Responsibility to Protect'- the initiative to redefine sovereignty as responsibility to the population. Accordingly, if the Security Council does not mandate the intervention, and a coalition of the willing proceeds, the undertaking could still be substantially vindicated, as in Kosovo, if some sort of collective process was involved and the facts confirmed the imminence of a humanitarian emergency.

There are a number of critical issues raised by humanitarian intervention. The choice of the places where humanitarian intervention takes place is decided by a coalition of States in their own geopolitical interest. For instance, it took place in Kosovo, but not in Rwanda. Moreover, the loose nature of the concept has allowed the big powers to enlarge the scope of it so as to include controversial concepts such as 'regime change' and 'pre-emptive war' into it. This simply is incompatible with well-established principles of international law. For example, the events leading to the invasion of Iraq in 2003 saw a number of justifications being offered on the part of big powers. Hence, the reasoning of humanitarian intervention results in certain forms of violence being condemned while simultaneously legitimizing violence conducted by others in the name of human rights.[19]

C. Terrorism

Terrorism is one of the grave problems that has been plaguing the international community for long.[20] Since the United States has

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[19] See Antony Anghie, "Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations", *New York University Journal of International Law and Politics,* vol. 34 (2002), p. 513, 622.

[20] See generally, *A Preliminary Study on the Concept of International Terrorism* (CRT, AALCO: New Delhi, 2006); V.S. Mani, "International Terrorism and the Quest for Legal Controls", *International Studies,* vol. 40 (2003), pp. 41-67; Alex Schmid, "Terrorism-Definitional Problem", *Case Western Reserve Journal of International Law,* vol. 36 (2004), pp. 359-374; Reuven Young, "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation", *Boston College International and Comparative Law Review,* vol. 29 (2006), pp. 44-46; Noelle Quenivet, "The World after September 11: Has it Really Changed?", *European Journal of*

embarked upon the "global war on terror," following the events of September 11, 2001, a new geo-strategic situation has begun to evolve. As the only superpower, the United States claims supreme authority for all measures related to the ongoing anti-terrorist campaign; it does not accept any arbiter – such as the United Nations – in regard to the determination of an actual terrorist threat. As part of the ongoing anti-terrorist struggle, the United States – termed by some analysts as "hyper power" – has asserted its global hegemonial position in a way not seen since the end of history's great empires.

By acting unilaterally in the name of the "international community," the United States circumvents the procedural safeguards for multilateral enforcement action as they are set out in the United Nations Charter, specifically in Chapter VII. In real terms, the United States acts on behalf of the group of Western states, indeed only on behalf of just a few Western states, when it comes to practicing the new doctrine of "preventive war" (or "pre-emptive strikes") as part of the global "war on terror." The concept of "preventive war," as advanced in the new strategic doctrine of the United States, is not in any way compatible with the United Nations Charter. The Charter explicitly and unequivocally bans all uses of force in international relations except in self-defense or by way of a Chapter VII resolution of the Security Council.

The US declaration of a "war on terrorism" poses a threat to those international law principles designed to protect against overt return to imperial practices, like the principles of sovereign equality, non-intervention and the prohibition of use of force. The controversy inspired by the US government's doctrine of pre-emptive self-defence[21] has similarly brought consideration of US unilateral

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International Law, vol. 16 (2005), pp. 561-577; Thomas M. Franck, "Criminals, Combatants or What? An Examination of the Role of Law in Responding to the Threat of Terror", *American Journal of International Law,* vol. 98 (2004), p. 688.

21 See US National Security Council, *The National Security Strategy of the United States of America* (Sept 2002) Part V <http://www.white house.gov/nsc/nss.html> at 20 November 2004. The US National Security Council recently released an updated National Security Strategy which declared that 'the place

tendencies to the fore, as pre-emption also threatens many of the foundational principles of the discipline. Invasion, regime change, lengthy occupation and nation-building in Afghanistan and Iraq have led to allegations that the US is ignoring the restraints of international law and pursuing its interests through untrammeled use of force in an imperial manner.

D. Globalization

Another issue that has assumed monumental importance in the current context for the welfare of third world States is the neo liberal globalization engineered by the International Financial Institutions, particularly the International Monetary Fund and the World Bank. The IFIs which follow neo liberal economic policies have come to acquire tremendous power to shape the economic course of the third world States. This has been sought to be done by their imposition of policy prescriptions in the name of conditionalities on the third world States. This has immense impact on the decision making capacity of these countries to have their own economic and social policies. In other words, the power of States has been moved 'upwards' to be exercised by the IFIs and a number of private actors. Hence the issues of globalization have immense implication for the meaning of democracy.[22]

Further, the rapid change in the post-Cold War era international relations have given rise to complex problems which not one state could handle alone. There is proliferation of international actors and special legal regimes which have directly challenged the traditional structure of international legal order. There is a global rise of multinational corporations bringing with them globalisation of trade and production. There is high transnational mobility of productive factors, mass migrations of skilled and unskilled labour, capital and technology, particularly internet. This has lead to asymmetrical and

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of preemption in our national security strategy remains the same': US National Security Council, *The National Security Strategy of the United States of America* (March 2006) Part V.

22 Robert Cox, "Global Restructuring: Making Sense of the Changing International Political Economy", in R.Stuubs and G.Underhill, *Political Economy and Changing Global Order* (Basingstoke: Macmillan, 1994) p. 50.

uneven globalization. On the one hand globalisation proceeded at breakneck speed in some sectors (finance, technology transfer, spread of epidemics, organised crime, international terrorism) and very slowly in others (government policies, social attitudes, international regulation, the fight against crime, terrorism or disease). These asymmetries have created winners and losers and have threatened the social fabric of many countries undergoing rapid and often unwanted social and economic change.

The sovereignty of the contemporary National governments has been challenged by the above factors. The national governments responded to globalisation by shifting power upwards to supranational institutions, downwards to sub-national governments and sideways to market forces. The establishment of the European Union as a super state is the best example of the upward shift of power/sovereignty. At the global level the United Nations, although established and based on Westphalian principles, exercise more power than envisaged.

More specifically, the State's control over its physical territory is much less meaningful today both as a source and domain of power. Improvements in transportation, telecommunication and internet have made the world a 'Global Village". The international crimes such as terrorism, money-laundering, corruption etc, and state action or inaction in terms of transboundary implication of environmental and exhaustible natural resources transient national borders and sovereign jurisdictions. Yet the structure of government legislation and regulation is still territorially based. This discrepancy severely reduces the ability of national governments to deal with global challenges.

There is considerable increase in the role of non-state actors in the global order. The large multinational corporations wielding considerable economic (and therefore political) clout and they could exert, through their economic size and their transnational mobility, considerable influence in world affairs including on national governance itself - both via financing the elections in democratic countries and in influencing the agenda of international

negotiations. The Non-Governmental Organisations seek to represent Civil Society by lobbying and protests have shown considerable ability to influence the national and international policies. Further, there is proliferation of Intergovernmental Organizations created by sovereign governments and now imbued with increasing power. For example, the United Nations resolutions are binding on its members even if they have not accepted them. Second, some UN Security Council resolutions are supposed to be enforceable even against non-members, a clear breach of the sovereignty principle. The WTO, an international organization established for the regulation of international trade exercises considerable power and influence, which may involve a transfer of sovereignty. The control of IMF and World Bank over the national governments is immense. This is specifically true for countries which are dependent on these institutions for funds. Finally, there is also a lateral shift of power from the public to the private sector, through disinvestment and decentralization. The functions of national governments are changing from 'regulation' to 'management' and the scope of the sovereign functions has been considerably reduced.

While it is true that traditional structure of international legal order has been challenged by several factors, however, the problems for the developing countries as far as international law and international relations are concerned remains the same. As Xue Hanqin notes, "the Wesphalian system by now is over 360 years old, but for non-European countries, particularly for the Asian and African countries, it is only 60 years old. In the past 60 years, Europe has undergone a profound process of integration, and more and more competences are being transferred from national jurisdiction to the regional domain, the concept of sovereignty is undeniably changing, but not diminishing.[23] From the developing countries' view point, "more often than not, international law provides the last resort for the developing countries to defend their political system, economic policy or social stability."

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[23] Xue Hanqin, "Chinese Observations on International Law", *Chinese Journal of International Law,* vol. 6 (2007), pp. 83-93.

Hanqin notes that:

> If we understand that such political life is built upon the diversity of autonomous political communities, the concept of sovereignty is not only meaningful but also essential. If, however, we come to understand that such political life should exist only in one single social model, the notion then becomes pointless and irrelevant.

While it is true that we are in now in a different legal landscape and the individual rights and duties under international law are increasingly important, the role of the state still remains at the centre for any success of economic development and social progress.

E. World Trade Organization

Ever since the WTO was established, the issues regarding traditional Sovereignty has been argued as outdated and obsolete.[24] In the developing countries view, Sovereignty spurned nations to compete and in that manner pushed the limits of mankind's progress. Equally, sovereignty can facilitate development, self-help and self-determination amongst developing nations. Such sovereignty may be coined as 'development sovereignty'. The development dimension in the dispute settlement process of the WTO calls for both sensitivity to 'development sovereignty', and the need for a certain degree of relinquishment of sovereignty on the part of developed nations.[25]

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[24] See, John Jackson, "Sovereignty: Outdated Concept or New Approaches" in Wenhua Shan, Penelope Simons and Dalvinder Singh (ed.,), *Redefining Sovereignty in International Economic Law* (Oxford and Portland, Oregon: Hart Publishing, 2008), pp. 1-25. He argues that the traditional, Westphalian concept of sovereignty no longer represents an adequate understanding of sovereignty in today's globalised world and he identifies a new notion of sovereignty which he refers to as 'Sovereignty-Modern'. The essence of this new approach is that the concept of sovereignty should not be completely discarded or eliminated without establishing a valid substitute, but should be disaggregated and redefined by employing analytical tools such as 'power allocation analysis'.

[25] Asif Qureshi, "Sovereignty Issues in the Dispute Settlement – A Development Sovereignty Perspective", in Wenhua Shan et al, note 24, p. 160.

The WTO Panel and Appellate deliberations acknowledge that the WTO Agreements were negotiated against the background of State sovereignty, and that the WTO is set within the framework of sovereign Members. Indeed, it has even been claimed that 'a Member's regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services'.[26] Thus, the principle of sovereignty is acknowledged as an 'additional argument'. The judicial organs of the WTO have acknowledged that they have no business to determine the scope and content of sovereignty outside their function of interpreting and applying the WTO agreements.

The WTO, which was established primarily to further liberalization of international trade, has become one of the most important international Organizations. Nearly 153 States, developed and developing, small and big, powerful and weak, are the members of WTO. Until the onset of the recent international financial crisis, the world witnessed a rapid growth in international economic activity and a massive increase in the volume of international trade after the conclusion of the Uruguay Round of multilateral trade negotiations. In the midst of the economic growth and competition for international trade, the main efforts the WTO were supposed to create a level-playing field in order to enable nations, small and big, to compete on an equal footing for their share of international trade. New impetus was added to this objective of the WTO when the Doha Declaration[27] was issued by the trade Ministers from the Member States of the WTO in November 2001 in Doha, Qatar, commencing a new round of multilateral trade negotiations supposedly to promote economic growth through international

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26 *United States – Import Prohibition of Certain Shrimp and Shrimp Products.* Recourse to Article 21.5 of the DSU by Malaysia, Report of the Panel, (WT/DS58/RW) Adopted Nov 2001: 'we nonetheless consider that the "sovereignty" question raised by Malaysia is an additional argument in favour of the conclusion of an international agreement to protect and conserve sea turtles which would take into account the situation of all interested parties.

27 WT/MIN (01)/DEC/W/2 of 14 November 2001.

trade and thereby increase economic development in the developing world.[28]

However, the Doha Round of international trade negotiations collapsed in 2006. The Doha Declaration of the WTO sought to inject elements of justice and fairness into international trade and the notion of economic development of developing countries. Due to the impasse in the further trade negotiations, the crucial issues of developing countries especially the trade in Agriculture are not progressed. It appears that the whole international trade regime and multilateralism are at the crossroads at this point of time.

The Preamble to WTO gives the impression that it is there to create a fair and more just world. Given the manner in which the agenda of the WTO has been expanded by its Member States in the recent years this Organization is becoming close to an international economic Organization encompassing so many different areas of economic activity such as the protection of trade related aspects of intellectual property, liberalization of trade in services, relationship between trade and environment etc.

However, the question remains as to whether the WTO has been successful in making the level playing field more level, uplifting the standards of living of the people in the developing world or in promoting international economic justice, an objective of the international community, or in protecting the environment from the harmful effects of the expansion of international trade. The irony is that the world is still witnessing a match played between unequal players on an uneven playing field and the international trade regime designed to address this anomaly is going nowhere.

The dispute settlement provisions of the WTO may not fulfil the promise that a rule-based system of international trade has been created with enforceable provisions. This may not be the fault of the existing system but are due to the inherent defects that flow from the

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[28] Surya P. Subedi, "What Next for the WTO after the Collapse of the Doha Round?", Paper presented at the *Sixth International Conference on International Law in the Contemporary World*, ISIL, New Delhi, 1-4 February 2009, pp. 307-314.

very structure of power within the international economic system.[29] The system may well have created another weapon in the armoury of developed states than created equality of access to developing countries to an impartial tribunal. The problem of unilateralism still remains to be solved. The eventual enforcement of decisions through retaliation emphasizes a technique that involves power and is far removed from the notion of equality.

In terms of Intellectual Property issues, the developing countries viewed that the decision of the Uruguay Round to bring into the WTO through the TRIPS agreement seems to have been an error. Since the World Intellectual Property Organization (WIPO) already existed for dealing with IP issues, there was no need to bring them into the WTO by calling them trade related, rather than deal with any problems of enforcement of IP rights and create any new disciplines needed in the WIPO. The only reason for bringing them into WTO seems to be the availability of the WTO's dispute settlement and trade sanctions mechanism for enforcing IP rights. The very same motive lies behind the persistent demand by some developed countries for inclusion of labour and environmental standards in the WTO.

Essential reforms to promote fairness and protect the interests of developing countries are needed at the WTO negotiations. The WTO forum should not be used as an institution of inequality.[30]

III. The Role of AALCO

The Asian-African Legal Consultative Organization (AALCO) has now traversed through fifty three years. Its establishment in the year 1956 marks one of the assertive steps of the peoples who were under the yoke of colonialism for long periods of time and were seeking to

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29 M. Sornarajah, "The New World Economic Order and Equity", Paper presented at the *International Conference on International Law in the New Millennium: Problems and Challenges Ahead*, Indian Society of International Law, New Delhi, India 4-7 October 2001, p. 249.

30 Carmen G. Gonzalez, "Institutionalizing Inequality: The WTO, Agriculture and Developing Countries", *Columbia Journal of Environmental Law,* vol. 27, no.2 (2002), pp. 431-487.

redefine international relations towards more even and democratic participation. The broader political and economic backdrop of international relations constituted the important driving force in establishing the Organization. Therefore, the establishment of AALCO was an historic event in the long saga of post-colonial assertion of those states whose lived experiences as states and as peoples have certain commonalities. Commonalities in their histories and lived experiences have been the result of the forced interaction of these states and peoples with colonizers. States under colonialism were subjected to exploitative policies, which many a time were justified in the language of law. Post World War II developments led to the establishment of the United Nations in 1945, which immediately became an important platform at the international level. Development of international treaty law making under the UN system, in parallel to the process of decolonization has led to the participation of newly independent states in the international law making process. Relations between states thus, are sought to be defined in accordance with international law rules as enshrined mainly in the form of customary law or the treaty law as it was emerging. However many countries from Africa, Asia and Latin America were of the view that conceptual premises on which international law was being negotiated upon were either alien to them or were detrimental to their economic and political development. Thus it was observed that "classic intentional law thus consisted of a set of rules with a geographical basis (it was a European law), a religio-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)".[31] Therefore they sought to redefine the conceptual framework and redraw the contours of international legal structure whose language plays an instrumental role in defining international relations. As Jawaharlal Nehru, in his speech at the first session of the Asian Legal Consultative Committee (Predecessor to AALCO) aptly said, "it is desirable that the various

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[31] Mohammed Bedjaoui, "*Towards a New International Economic Order*", (New York-London: Holmes & Meier Publishers, 1979), p. 50.

aspects of international law should be considered objectively and in a scholarly manner by the eminent lawyers and jurists of Asia Africa."[32] Therefore the establishment of AALCO has to be seen in the larger backdrop of assertive agenda of the under developed South vis-à-vis the developed north. The fact that AALCO was one of the tangible outcomes of the historic Bandung conference underlines the fact that newly independent States were aware of the significance of international legal structures and also the necessity of subjecting it to thorough appraisal from the perspective, alternative to the dominant view i.e., views from the North.

History of international law in the last century largely has been the history of confrontation. Though the combination of groups that have involved in this confrontation has not been static, even if it is not fluid, the primary concerns that decided and guided the rules of this confrontation are colonialism, underdevelopment, sovereign equality, non-discrimination etc. Thus the confrontation is strongly premised on certain ideological and material bases which may broadly be called developing and the developed countries' perspectives. The taxonomy of 'developing and developed countries' is not intended merely to denote economic deprivation but also encompasses differences involving political, social and cultural spheres. This confrontation took place both on the content of the international legal regimes and also on the form of these legal structures. In other words, the confrontation is not merely confined to the biased nature of international law but also on the form in which these legal norms are articulated i.e. customary law, treaty law and resolutions of international bodies. Customary rules were critiqued as they emerged largely from the practice of European States. Therefore in comparison to customary law, treaty law was found to be more democratic as newly independent States at least had nominal participation. Similarly it was also argued by the developing countries that resolutions of the UN General Assembly

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[32] Speech delivered on April 18, 1957. See, "*Jawaharlal Nehru's Speeches*", vol. 3. The Publications Division, Ministry of Information and Broadcasting, Government of India.

do have legal validity which was opposed by the developed countries.

Last fifty years have also seen a phenomenal growth of international law attempting to cover as many aspects of international relations as possible. During this period international law also broke opened itself from the traditional shell of 'instrument to regulate inter-state relations' and today individual constitutes an important subject of international law by way of international human rights law and also because of the recent developments in the field of international criminal law. Many important conventions covering areas like law of treaties, law of the sea, human rights law, environmental law and trade law came into existence along with a parallel growth of adjudicatory bodies of varied nature. States from South and North have taken part in most of these developments. However, the negotiating process of almost all these instruments has not been smooth and they have all along reflected the uneven economic development and political, social and cultural dissimilarities between various groups of states.

While taking active part in the international treaty law making process, the developing countries from South have also attempted to bring radical transformative measures on to the agenda of the international community. Some of the most conspicuous and controversial issues of this nature were the concept of permanent sovereignty over natural resources and the new international economic order. These concepts as they emerged in the backdrop of right to self-determination of peoples were the attempts of the newly independent states from the developing south to assert their economic sovereignty over their natural resources. As international law played an important instrumental role in the furtherance of colonial policies, the newly independent countries attempted to convert the mere political slogans into legal language with a view to debunking the content of international law that was predisposed to colonial expansionism.

AALCO as one of the earliest outcomes of developing countries solidarity provided an active platform for many of the discussions

on issues of intentional law which led to the emergence and concretization of alternative views on many issues of intentional law. For example the concept of Exclusive Economic Zone which constitutes an important aspect of he law of t4h sea today emerged form the deliberations at the AALCO. Similarly Bangkok principles adopted by AALCO on refugees are a valuable reference in the field of refugee studies. Along with these, on many issues AALCO is considered as a forum for eliciting views from African and Asian countries which largely constitute the developing countries perspectives.

IV. Conclusion

It may be noted that while sovereignty has been the organizing principle of the Westphalian World Order, the concept of absolute sovereignty as it was traditionally understood does not exist today. To the Asian-African States, sovereignty has always held an important place in international relations. However, on account of a number of developments that have taken place in the last half-a-century, the sovereignty of developing States, has at times become vulnerable. This is clearly demonstrable in the case of globalization wherein the policy space that was traditionally available to the Third World countries is being significantly curtailed to a considerable extent.

The reality of the present-day international legal order is that States continue to remain the primary actors in international relations. The system of international relations and international law continues to be state centric. A large number of other actors, namely, International Organizations and non-governmental organizations today contribute to and influence the international law-making process, thereby to an extent diluting the traditional role of the State.

In the New Asian-African Strategic Partnership Declaration adopted at the Asia-Africa Summit 2005, it was proposed that regional and sub-regional organizations should be enhanced and reinforced so as to promote sustainable partnership. AALCO, a tangible outcome of the Asian-African Conference, the only such organization, needs to strategize its future development and expand

its activities. The AALCO was established with the objective of democratizing the international law making process by ensuring the wider participation of countries of Asia and Africa in multilateral law-making forums. In fifty-three years of its journey, the Organization has amply demonstrated its capacity and resolves to address legal issues of concern to its membership. It would continue to tread that path by reinventing and remoulding itself to meet the challenges posed in the rapidly changing world. AALCO is uniquely positioned to play a significant role for the international community in the international law field.

3

TEN YEARS OF THE ADOPTION OF THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: HAVE THEY MADE A SIGNIFICANT DIFFERENCE TO THE LIVES OF THE INTERNALLY DISPLACED PERSONS?

Anuradha Bakshi*

"Statistics are only reference points for reality. We can summarize a million lives in a short paper, but eventually we must deal with human problems".
Yul Brynner, 1960

I. Introduction

People have been uprooted by persecution, conflict and famine in all ages. What is unique at the present time is the massive scale of such movements. We live in a period of challenge as well as transition in international and domestic affairs - it is a troubled time in a troubled world, with far reaching implications for millions of persons forced to leave their homes and displaced within their own country. The plight of the "Internally Displaced Persons" (IDPs), particularly those who are victims of internal tensions, civil war or international conflict" merits the most serious concern of providing immediate material assistance to those in need and ensuring protection and respect for their human rights. In other words it requires a response that would alleviate their immediate suffering and provide a durable solution.

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Despite the magnitude of the numbers of IDPs and the problems encountered by them, unfortunately even in the 21st Century there is no agency that has been exclusively designated to comprehensively look into all matters relating to IDPs. It is pertinent to mention here that the year 2008 marked the 10th anniversary of the adoption of the "1998 Guiding Principles for the Internally Displaced Persons". That event gave an opportunity to revisit those principles, their application and utility in the 21st century. In this backdrop the current article seeks to look into the problem of internal displacement, and raise few issues pertaining to it. Who are IDPs? What is the legal framework for their protection? Is there any need for a separate legal framework to meet the protection and assistance needs of IDPs? Guiding Principles on Internal Displacement – how effective are they 10 years after being adopted? The Asian-African Perspective to internal displacement: Regional Approaches to incorporating the Guiding Principles, Establishment of Safety Zones for the Internally Displaced: An AALCO Initiative and The road ahead.

II. What is Internal Displacement?

Recognition of internal displacement emerged gradually through the late 1980s and became prominent on the international agenda in the 1990s. The chief reasons for this attention were the growing number of conflicts causing internal displacement after the end of the Cold War and an increasingly strict international migration regime. The phenomenon of internal displacement, however, is not new. According to United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (2003) the Greek government argued to the United Nations (UN) General Assembly in 1949 that people displaced internally by war should have the same access to international aid as refugees, even if they did not need international protection.

III. What do Statistics Reveal?

In 2007, the estimated number of internally displaced persons as a result of armed conflicts and violence passed the 26 million mark. This is the highest figure since the early 1990s, and marks a six per

cent increase from the 2006 figure of 24.5 million. The increase resulted from a combination of continued high level of new displacements (3.7 million) and a lower level of return movements (2.7 million) in 2007. Three countries had significantly larger internally displaced populations than any others: Colombia, Iraq and Sudan. Together they accounted for nearly 50 per cent of the world's internally displaced people (IDPs). At the end of 2007, Africa hosted almost half of the global IDP population (12.7 million) and generated nearly half of the world's newly displaced (1.6 million). Somalia and the Democratic Republic of the Congo were the African countries worst affected by new internal displacement in 2007. The region with the largest relative increase in the IDP population during 2007 was the Middle East, where a rise of nearly 30 per cent was mainly caused by a continuing deterioration of security conditions in Iraq.[1]

IV. Causes for Internal Displacement

Poverty, environmental degradation, human rights violations and war affect more people than ever before, leading to increased pressure for migration and to the mounting flow of refugees and displaced persons worldwide. A negative cycle is produced by dangerous forms of nationalism, associated with claims of ethnic exclusivity or cultural superiority and by religious intolerance, which together or separately are rising up and spreading unchecked in various places. Communal divisions and antagonisms are created or augmented by victimization and discrimination, and maybe accompanied or followed by conflict and flight. Intolerance may result in hostility to neighbours, or be the cause of indifference towards the fate of refugees or displaced persons. In several armed conflicts during the 1990s and some in the current times, the savage expulsion of a whole population was the very objective of the fighting, and not a by-product. Whatever the reasons for the flight, the flow of refugees across international borders and the coerced displacement of persons within States now pose an almost

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1 "Internal Displacement – Global Overview of Trends and Developments in 2007", *Norwegian Refugee Council*, Internal Displacement Monitoring Centre, p. 7, 8.

insurmountable challenge to States as well as Organizations to respond to and to uphold human dignity.[2]

Most forced internal displacement in the last decade was caused by internal rather than international armed conflicts. This trend continued in 2007. Some existing internal conflicts intensified during the year, partially accounting for the increase in the world's IDP population. Many of the worst new displacement crises took place in countries where long-standing armed conflicts deteriorated during 2007. People were mainly displaced by government forces and allied groups, as well as by rebel groups fighting them. Governments were responsible for forced displacement in 21 of 28 countries with new displacement, and rebel groups in 18 of those countries.[3]

Often the most vulnerable as a result of conflict, internally displaced people frequently fell victim to the gravest human rights abuses. They were exposed to attacks, arbitrary arrest and detention, and had limited access to food, water, health care and shelter. Displaced women and girls were at increased risk of sexual violence, including rape and exploitation. Perpetrators often enjoyed impunity for these violations. IDP women and girls were also exposed to significant health risks due to their lack of access to reproductive and maternal health care in areas of displacement. A specific threat facing displaced children was forced recruitment by armed groups. Family separation and other risk factors deriving from displacement aggravated this problem. In the majority of countries affected by internal displacement, children lost access to education and were forced to work in order to survive. The majority

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2 Pertinent studies with the UN system include the following: Comprehensive study on the Human Rights Issues related to Internal Displaced Persons. Report of the Representative of the Secretary-General to the Commission of Human Rights, by Francis M. Deng, UN Doc. E/CN.4/1993/35 (1993): Co-ordination of Activities Related to Early Warning of Possible Refugee Flows, Report of the Joint Action Unit, UN Doc. JIU/REP/90/2 = A/45/649 (1990); International Cooperation to Avert new Flows of Refugees, Report of the Group of Governmental Experts, UN Doc A/41/324 (1986); and Study on Human Rights and Massive Exoduses, Report of the Special Rapporteur to the Commission on Human Rights, by Sadruddin Aga Khan, UN Doc E/CN.41503 (1981).

3 *Ibid*.

of the world's IDPs were trapped in protracted displacement situations in which they faced obstacles accessing essential services and securing livelihoods. Whether they were living in camps or collective centres, or seeking safety in the bush or in urban slums, their living conditions were generally poor. Displaced people relied mainly on themselves and on already strained host communities to improve their situation.

V. Definition of IDP – Is it a Special Category?

For more than 50 years, the international community has acknowledged its responsibility to protect people fleeing their countries in search of safety. In 1921 the League of Nations created a high commissioner for refugees to assist refugees in Europe, mainly from the USSR and Eastern Europe. In the aftermath of World War II and the massive needs of some 30 million displaced Europeans, the fledgling United Nations developed an international system to respond to refugees. The system included: a clear definition of who is a refugee, a convention prescribing the way in which refugees should be treated and an international agency, the United Nations High Commissioner for Refugees (UNHCR) with a mandate to protect and assist refugees.

In the beginning in the 1980s, there was increasing concern about another group of people forced to leave their communities – but who were not able to cross an international border. These people, who came to be known as internally displaced persons (IDPs), were not entitled to the same legal protections as refugees, although they were often fleeing the same conflicts and even though they were often more vulnerable to violence because of their proximity to the conflicts. Following a period of intense diplomatic and lobbying activity, the then UN Human Rights Commission appointed a Special Representative to the UN Secretary-General on IDPs (RSG) in 1992, Francis Deng. According to him:

Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of, or in order to avoid the effects of armed conflict, situations of human rights or

natural or human-made disasters, and who have not crossed an internationally recognized state border

Over the past decade the plight of the internally displaced has been well documented but, for humanitarian Purposes, there is still a debate over whether they should be recognized as a special category of persons. The International Committee of the Red Cross (ICRC), for example, provides assistance and protection to all civilian victims of armed conflict and prefers to target assistance on the basis of vulnerability, not category. The fear is that singling out one group could lead to discrimination against others, fostering inequity and conflict. Making a distinct category of displaced could lead to their becoming 'privileged'.[4]

Nonetheless, the displaced do have special needs. Displacement breaks up families and severs community ties. It leads to unemployment and limits access to land, education, food and shelter. The displaced are particularly vulnerable to violence. As an ICRC official observed "It goes without saying that, deprived of shelter and their habitual sources of food, water, medicine and money, internally displaced persons 'have different and often more urgent material needs'."[5]

These special needs have often been ignored in 'situational approaches'. As a result, the internally displaced frequently suffer the highest mortality rates in humanitarian emergencies. The purpose of formally identifying internally displaced persons as a category for humanitarian action is not to confer privileged status on them, but to ensure that their unique needs are addressed.

Internal displacement disrupts the lives not only of the individuals and families concerned but of whole communities and societies. Both the areas left behind by the displaced and the areas to which they flee can suffer extensive damage. Socio-economic

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4 J. Borton, M. Buchanan-Smith and R. Otto, *Support to Internally Displaced Persons – Learning from Evaluations*, Swedish International Development Cooperation Agency, 2005, pp. 14-15.

5 J. D. Tauxe, "We should have Humanitarian Access to Displaced Civilians", *International Herald Tribune*, 1 March 2000.

systems and community structures often break down, impeding reconstruction and development for decades. Conflict and displacement can also spill over into neighbouring countries. Thus, both humanitarian and geo-political reasons had prompted former UN Secretary-General Kofi Annan's call to the international community to strengthen support for national efforts to assist and protect internally displaced persons.

VI. Sovereignty: Barrier or Responsibility

As internally displaced persons reside within the borders of their own countries and in most cases under the jurisdiction of their own governments, primary responsibility for them rests with their national authorities. As pointed out by Francis Deng and Roberta Cohen in their study "Masses in Flight", 'since there is no adequate replacement in sight for the system of state sovereignty, primary responsibility for promoting the security, welfare, and liberty of populations must remain with the state'.[6] Yet, when asked why the United Nations had not been able to do more for the internally displaced persons, former High Commissioner for Refugees Ms. Sadako Ogata replied: 'The problem is sovereignty".[7]

Nonetheless, over the past 15 years a predictable shift has occurred in international thinking about the internally displaced. It is now widely recognized that people in need of aid and protection in their own countries have claims on the international community when their Governments do not fulfill their responsibilities, or where there is a disintegration of the nation-state. While reaffirming respect for sovereignty, United Nations resolutions have authorized the establishment of relief corridors and cross-border operations to reach people in need. UN Security Council resolutions have demanded access for the delivery of relief in Bosnia and Herzegovina, Darfur (Sudan), northern Iraq, Mozambique, Somalia and Timor Leste, among other places. In exceptional places the United Nations has authorized the use of force to ensure the delivery

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6 R. Cohen and F. M. Deng, Masses in Flight, p. 275

7 D. A. Korn, *Exodus within Borders* (Brookings Institution, 1999), p. 49.

of relief and to provide protection. Today, many governments allow some form of access to their displaced populations.

The former Representative of the Secretary-General on Internally Displaced Persons, Francis Deng, believes that while governments have the primary responsibility to care for their displaced populations, when they are unable to do so they must request and accept outside help. If they refuse, the international community has a right, even a responsibility to become involved. While no government has explicitly challenged this concept, some states have expressed fears that international humanitarian action could be a pretext for interference by powerful states in the affairs of weaker ones. Nonetheless, the concept of 'a collective responsibility to protect' the displaced when their national authorities are unable or unwilling to do so has gained ground. Indeed, it was upheld in the World Summit document adopted by heads of governments in September 2005.[8]

The Brookings-Bern Project on Internal Displacement identified the following as main indicators of national responsibility:[9]

To begin with, governments are expected to prevent or mitigate displacement. When displacement is unavoidable, they are expected to raise national awareness of the problem, collect data on the numbers, locations and conditions of the displaced and facilitate access to populations at risk, including those under insurgent control.

Governments are expected to adopt laws and policies to protect displaced populations; train their officials, military and police in the rights of the displaced; and designate an institutional focal point for coordination within the government and with local and international partners.

Allocating resources in the national budget for the displaced, or creating special funds from oil and other revenues, is another

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8 United Nations General Assembly, 2005 World Summit Outcome Resolution A/RES/60/1, 15 September 2005, p 68, 69.

9 Addressing Internal Displacement: A Framework for National Responsibility, Brookings Institution-University of Bern Project on Internal Displacement, April 2005.

indicator of national responsibility. So too is finding solutions to the plight of the displaced, for instance by giving them the choice to return voluntarily to their homes or to resettle in another part of the country. The displaced should also be assisted to reintegrate and recover, or receive compensation for, lost property.

Finally, governments are expected to cooperate with international and regional organizations when national capacity is insufficient.

Mr. Walter Kalin, the current Representative of the Secretary-General on Human Rights of Internally Displaced Persons, has been using the framework of national responsibility with governments. The Commonwealth too has emphasized national responsibility and drawn up 'best practice guidelines' for its Member States.[10] The efforts of the donor governments, regional bodies and the United Nations to encourage states to assume their responsibilities need to be strengthened. So too do initiatives to get rebel armed groups to adhere to international standards in their treatment of those under their control.[11]

VII. The Legal Framework for IDP Protection

From the above it follows that the internally displaced, as all persons under the jurisdiction of a State, are entitled to the full protection of national laws. Additionally, under international human rights law, States have the obligation to respect, protect and fulfill the human rights of their citizens and other persons on their territory or under their jurisdiction. Furthermore, in situations of armed conflict, international humanitarian law applies. Thus, national law, together with international human rights law and international humanitarian law, forms the basic legal framework for the protection of IDPs.

Among the international human rights instruments that merit mention as especially pertinent to the protection of IDPs, the

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10 Report of the Expert Group Meeting on Internal Displacement in the Commonwealth: Common Themes and Best Practice Guidelines, Commonwealth Secretariat, 12-21 May 2003.

11 Office for the Coordination of Humanitarian Affairs, No Refuge: The Challenge of Internal Displacement, pp. 64-67.

Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) stand out. The ICCPR in particular declares certain fundamental rights as not derogable, including the right to life; freedom from torture or cruel, inhuman and degrading treatment or punishment; freedom from slavery or to be held in servitude; recognition as a person before the law; and non-discriminatory treatment. Where derogation may not be precluded, the ICCPR requires that the "public emergency which threatens the life of the nation" should be officially proclaimed and the derogation must be strictly required by the exigencies of the situation. These universally applicable instruments[12] are buttressed by many others, universal as well as regional, concerning more specific fields of rights or which relate to specific groups.

Turning to international humanitarian law, the principal instruments are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. The four Geneva Conventions and Additional Protocol I form a normative framework for the overall protection of civilians during international armed conflict. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) is of particular relevance to the protection of IDPs. Both treaty-based and customary international humanitarian law obliges States Parties to distinguish at all times, in a conflict, between the civilian population and combatants, and to direct operations only against military objectives.

Non-international armed conflicts are covered by Article 3 common to the Four Geneva Conventions and Additional Protocol II. Together, they provide for the protection of civilian populations against, *inter alia,* being objects of attacks; displacement unless for safety or imperative military reasons; violence to life and person, in particular murder of all kinds, mutilations and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of

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12 See, Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993, A/Conf.157/24 (Part 1) Chapter III, Article 5.

indecent assault; corporal punishment; taking of hostages; and collective punishment. International humanitarian law is binding on both States and organized armed groups.

Various Security Council resolutions have directed the international community to address IDP situations, and have explicitly placed expectations upon UNHCR in this regard. [13] Security Council resolutions relating to women, children and the protection of civilians more generally are also of relevance to the protection of IDPs. As seen before, there are several United Nations declarations and General Assembly Resolutions which have addressed a range of issues and aspects relating to internal displacement, thereby providing, together with similar instruments of other international or regional bodies, an important body of "soft law" of direct relevance to IDP protection.

VIII. The Guiding Principles on Internal Displacement

The 1951 Refugee Convention did not apply to internally displaced persons. Principal responsibility for providing for the well-being and security of IDP's rested with their governments but most were unable or unwilling to assume this obligation. Nor did international organizations and NGO's have clear rules of engagement with the rapidly growing numbers of IDP's in need of assistance. Many thus began appealing for an international document that would define the rights of the IDP's and the obligations of governments towards them.

Development of a legal framework for IDP's undertaken by the Representative of the Secretary-General for Internally Displaced Persons; Francis Deng was an assignment fraught with many challenges:

Dealing with the sensitivities of governments wary of potential intrusions into their sovereignty;

Ensuring that international standards were based on a concept that would promote consensus;

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[13] See for example, operative paragraph 11(K) of Security Council Resolution 1244 (1999) on Kosovo, 10 June 1999.

Reassuring states that while IDPs came under their sovereign responsibility they had to agree that sovereignty carried with it the obligation to protect and assist these vulnerable populations; and

The concept of sovereignty as a form of responsibility became the basis for the normative framework that would be created.[14]

As mentioned above in April 1998, the Representative of the Secretary-General on IDPs presented to the UNHCR a set of The Guiding Principles on Internal Displacement. [15] The Guiding Principles consolidate into one document all the international norms relevant to IDPs, otherwise dispersed in many different instruments. Although not a legally binding document, the principles reflect and are consistent with existing international human rights and humanitarian law and analogous refugee law.[16] They were also meant to develop the law, rather than merely reflect existing law, but this emphasis has been dropped over recent years. In re-stating existing norms, they also sought to address grey areas and gaps. An earlier study had found seventeen areas of insufficient protection for IDPs and eight areas of clear gaps in the law[17]. No norm, for example could be found explicitly prohibiting the forcible return of internally displaced persons to places of danger. Nor was there a right to restitution of property lost as a consequence of displacement during armed conflicts or to compensation for its loss. The law, moreover, was silent about internment of IDPs in camps. Special guarantees for women and children were needed.[18] The principles

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14 Ten Years of the Guiding Principles: The Genesis and Challenges by Roberta Cohen and Francis M. Deng FMR – GP10, p. 4.

15 See the Guiding Principles on Internal Displacement.

16 Guiding Principles on Internal Displacement, Introductory Note by the Representative of the Secretary-General on Human Rights of Internally Displaced Persons; paragraph 3, states that: "These principles are consistent with international human rights law and international humanitarian law.

17 See Compilation and Analysis of Legal Norms, Report of the Representative of the Secretary-General on Internally Displaced Persons, E/CN/4/1996/52/Add.2, United Nations, December 1995.

18 Roberta Cohen, "The Guiding Principles on Internal Displacement: A New Instrument for International Organizations and NGO's" Forced Migration Review (no. 2, August 1998), pp 31-33 at p. 31.

are thus an "important tool" and authoritative framework for the identification of the rights, guarantees, and standards relevant to the protection of individuals in situations of internal displacement[19] .

A growing number of governments, regional bodies, UN agencies and NGO's have begun to use them. Resolutions of the Commission on Human Rights and General Assembly regularly refer to them as "an important tool" and "standard" for dealing with situations of internal displacement. [20] In the World Summit document of 2005, heads of government recognized the Guiding Principles as 'an important international framework for the protection of internally displaced persons.[21] Former United Nations Secretary-General Mr. Kofi Annan had called upon states to promote their adoption through national legislation. [22] They have also empowered internally displaced persons and their representatives. In some cases even armed rebel groups have acknowledged the value of the Guiding Principles.

IX. Developments in the Legal Protection of IDPs

Legal developments over the past decade have not only strengthened and consolidated the law supporting the Guiding Principles but have also been influenced by them.[23] An encouraging number of treaties have been ratified by an even greater number of states:

Both the International Covenant on Civil and Political Rights[24] and the International Covenant on Economic, Social and Cultural Rights[25] have been ratified by some 160 states.

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19 See, for example, Commission on Human Rights Resolution 2005/46, E/CN.4/RES/2005/46 (19 April) para. 7.

20 See UN Commission on Human Rights Resolution 2003/51, 23 April 2003, and General Assembly Resolution 58/177, 22 December 2003.

21 United Nations, 2005, World Summit Outcome Resolution, para. 132.

22 K. Annan, In Larger Freedom: Towards Development Security and Human Rights for All, United Nations, New York, 2005, para. 210.

23 Forced Migration Review GP 10 - Ten Years of the Guiding Principles on Internal Displacement: Developments in the Legal Protection of IDP's – Cordula Droege, p. 8

24 http://www.unhcr.ch/html/menu3/b/a_ccpr.htm

All the states in the world are now party to the Geneva Conventions – the international treaties that contain the most important rules limiting the effects of war.[26]

Adoption of the Rome Statute of the International Criminal Court[27] has led to recognition that unlawful deportation and transfer is a war crime in any armed conflict and a crime against humanity if committed as part of a widespread or systematic attack directed against any civilian population, even outside of an armed conflict.

The International Criminal Tribunal for the Former Yugoslavia[28] has recognized that displacements are crimes punishable under customary international law. It has also more precisely defined the term 'forced', stating that it is not limited to physical force but rather may include the 'threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment." The essential element is that it is "involuntary in nature, where the relevant person had no real choice."[29]

Clarification of customary law has helped consolidate the legal framework protecting individuals from, during and after displacement. The ICRC "Customary Law Study"[30] identifies a number of customary rules of international humanitarian law that must be applied by all parties in all types of armed conflict, international and non-international:

The prohibition of forced displacement;

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25 http://www.unhcr.ch/html/menu3/b/a_cescr.htm

26 http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions

27 http://www.un.org/icc/

28 http://www.un.org/icty

29 Prosecutor v Krnojelac, IT-97-25, Trial Chamber Judgment of 15 March 2002, para 475.

30 http://www.icrc.org/web/eng/siteeng0.nsf/html/customary-law-rules-291008, rules 129, 131, 132, 133.

The obligation to take all possible measures to receive civilians under satisfactory conditions of shelter, hygiene, health, safety and nutrition;

Non-separation of members of the same family unit;

The right to voluntary and safe return; and

The protection of the property of the civilians.

The importance of weapons treaties should not be underestimated. Explosive remnants of war are one of the main obstacles to safe return, causing immediate dangers to people's lives and access to their homes, disrupting infrastructure and agricultural production and imposing further burdens on weakened medical systems. The banning of anti-personnel landmines in the Ottawa Convention,[31] the obligation to clear explosive remnants of war in the fifth Protocol to the Convention on Certain Conventional Weapons[32] and the recently adopted Convention against Cluster Munitions[33] all help to reduce challenges for those rebuilding their lives.

At the Regional level, the African Union is in the process of drafting a Convention for the Protection and Assistance of the Internally Displaced Persons in Africa[34] which has the potential to contribute to a stronger legal framework across the continent.

X. Have the Guiding Principles Actually Improved Conditions?

While there have been enormous advances since the process of drafting the Principles began in 1996, some of the gaps or weaknesses – such as the fact that non-state actors are not, traditionally bound by human rights, and the option of derogation from human rights – that were identified then are still apparent. But much more importantly the real challenge remains respect for rather

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31 http://www.icrc.org/ihl.nsf/FULL/580?Open Document

32 http://www.icrc.org/ihl.nsf/FULL/610?Open Document

33 http://www.icrc.org/ihl.nsf/FULL/620?Open Document

34 http://www.unhcrrlo.org/Conference_Special_Events/2008AUSpecialSummit.html

than development of, the law. Francis Deng's finding that "the implementation of existing standards is more important than legal reform" is as true today as it was in 1998. There are more structures in place to deal with situations of displacement. States are less prone to deny the existence of displaced people. Displacement is sometimes taken into account in peace agreements and in national action plans. The international community is better organized to provide basic shelter and assistance, even if coordination can still improve.

However, the first cause for displacement in armed conflict is disrespect for the existing rules of war. People are obliged to flee because they are forced out by the parties to the conflict, because they are threatened, subject to extortion, forced recruitment, reprisals or other violations. Or they flee the consequences of fighting, because parties do not spare civilians but indiscriminately attack and destroy homes and infrastructure. Some people even flee when there is no specific violation or threat but most displacement is induced by the unlawful behaviour of belligerents.

While a lot has been done to raise awareness of the plight of IDPs, most displacement could be prevented in the first place if parties respected the existing laws.

The late Sergio Viera deMello had identified four ways in which the Principles might benefit IDPs: raising awareness of their needs; mobilizing support within the humanitarian community; helping field staff find solutions; and assisting governments to provide IDPs security and well-being.

No comprehensive study has been undertaken to evaluate the impact of the Guiding Principles. Data from comparative surveys of IDPs before and after the launch of the Principles in 1998 or on public, humanitarian and state awareness of internal displacement issues do not exist. As Francis Deng observed in 2002, "while the Guiding Principles have been well received at the rhetorical level, their implementation remains problematic, and often

rudimentary."[35] It is frequently asked whether compliance would be greater if there were a legally binding treaty on internal displacement. Countries such as Egypt, India and Sudan have pointed out that the Guiding Principles were not negotiated by Governments or formally adopted by the UN General Assembly. Those who favour a treaty argue that it would hold states accountable if they disregarded its provisions. However, others point out that the Guiding Principles do have "legal significance" and are being applied by a growing number of States[36]. In fact some of them have acquired the status of customary international law. It is a well known fact that human rights treaty-making at the international level can take decades, with no guarantee that states will ratify instruments and abide by the obligations. The process could also lead to watering down of the accepted provisions of international law on which the principles are based. Until the international community is ready to adopt a binding instrument that accords with the protection level set forth in the Guiding Principles, the majority opinion is that the best approach is to expand the application of the principles at the national level.[37] Nonetheless, as mentioned above, at the regional level the African Union is using the principles to develop a treaty on internal displacement for the continent.

No matter what the outcome of this debate, for the time being the Guiding Principles fill a major gap in the international protection system for internally displaced persons. They provide the displaced with a document to turn to when they are denied their rights. For their part, governments and other actors have guidelines to follow in

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35 United Nations, Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, F.M. Deng, UN Doc. E/CN.4/2002/95, 16 January 2002, para. 98.

36 See W. Kalin, "How Hard is Soft Law? In Recent Commentaries about the Nature and Application of the Guiding Principles on Internal Displacement, Brookings-CUNY Project on Internal Displacement, April 2002.

37 International Symposium on the Mandate of the Secretary-General on Internally Displaced Persons: Taking Stock and Charting the Future, hosted by the governments of Austria and Norway, Brookings Institution-SAIS Project on Internal Displacement, Vienna, Austria, 12-13 December, 2002, pg. 8-11, 21.

designing national policies and laws on behalf of the displaced. In fact, some experts are building upon the Guiding Principles to spell out issues related to restitution, compensation and land use for the displaced in more detail.[38]

Issues around internal displacement have steadily been incorporated into the international policy agenda. A growing body of UN resolutions and documents refer to the Principles. These range from reports on the protection of children affected by armed conflict,[39] to reports of the Secretary-General on the implementation of the UN Millennium Declaration,[40] to the Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.[41] Thus, the Principles have become the accepted international standards for IDPs.

The Guiding Principles were the driving force behind the reform of the humanitarian system which culminated in the launch of the cluster approach in December 2005.[42] Discussions about IDPs have dominated much of the humanitarian reform agenda from the need of better preparation and selection of Humanitarian Coordinators to financing.

There is some evidence that the Principles have an impact beyond that of humanitarian response. A review of 43 peace agreements between 1990 and 2008 found that while only ten of the 18 peace agreements signed before 1998 mentioned internal displacement, all but one of the post-1998 agreements have included a reference to IDPs.

Where there are active civil societies and somewhat receptive governments, the Principles can have a significant impact. When

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38 United Nations Sub-Commission on the Promotion and Protection of Human Rights, Principles on Housing and property Restitution for Refugees and Displaced People, E/CN.4/Sub.2/2005/17, 28 June 2005.

39 http://www.un.org/children/conflict/english/reports.html.

40 http://www.un.org/millenniumgoals/reports.html.

41 http://www.fmreview.org/humanitarianreform.htm.

42 http://www.fmreview.org/humanitarianreform.htm.

people are aware of their specific rights, they are able to exercise them and successfully advocate on their behalf.

However, lack of awareness of the Principles is still an issue in many contexts, mitigating their effectiveness as an advocacy tool for IDPs themselves, national NGO's and international agencies. As Roberta Cohen says: "Knowledge and dissemination of the principles, however, are not sufficiently widespread. Of the 528 IDPs interviewed in South Asia, the interviewers found that international principles, norms, and laws do not reach most IDPs; only one third had knowledge about the Principles".[43]

While it is difficult to access the direct impact of the Principles on the IDPs, it is fairly certain that they have encouraged governments to adopt laws and policies on internal displacement, have been used by some IDPs as a tool to advocate for their rights and have provided a legal framework for the UN agencies and human rights organizations to promote the rights of the IDPs. What is much less certain is the extent to which the Principles have prevented arbitrary displacement of persons or have contributed to the ability of IDPs to find sustainable solutions to their displacement. The challenge for the coming decade is to ensure that IDPs are aware of their basic human rights and that they see the Principles as a useful tool in promoting the exercise of these rights.[44]

XI. The Asian-African Perspective to Internal Displacement: Regional Approaches to Incorporating the Guiding Principles

Internal displacement has been experienced by many populations in different continents at different points of time. Mr. Walter Kalin, like his predecessor has sought to 'harden' soft law by encouraging states to develop national laws and policies based on the Guiding Principles. A parallel track has been to work with regional organizations to develop region-wide, binding conventions. While

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43 "Voices of the Internally Displaced in South Asia" Mahanirban Calcutta Research Group, 2006, p. 14, 24. http://www.mcrg.ac.in/Voices.pdf.

44 Assessing the impact of the Principles: An Unfinished Task, by Elizabeth Ferris, Ten Years of the Guiding Principles FMR-GP10 pg. 11.

the negotiations may be lengthy, involving as they do a number of states, the impact maybe greater, firstly because several states accede to regional conventions at the same time and secondly because being under scrutiny of a regional organization may place greater pressure on individual states to actually fulfill their commitments. The best examples to date of incorporating the Guiding Principles in regional approaches are in Africa.

At the regional level, organizations in the Americas, Europe, and Africa have acknowledged and disseminated the Principles, including the Organization of American States, Organization for Security and Cooperation in Europe, Council of Europe, African Union, as well as the three sub regional organizations of Africa—the Economic Community of West African States, Inter-Governmental Authority on Development, and the Southern African Development Community.

With as many IDPs in Africa – 12 million – as the rest of the world put together, African States have already shown leadership in the area of protection of IDPs. Signed in 2006, the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons[45] obliges signatory states to adopt and implement the Guiding Principles. The decision by African Union (AU) ministers in 2006 to initiate a process to develop a continent wide framework on the rights of IDPs raises the prospect of binding standards for Africa as a whole. The Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa was expected to be approved at a Special Summit of the AU in Uganda in April 2009; the meeting has been postponed to a later date. However, the draft of the Convention is broadly based on the Guiding Principles. Although IDP advocates welcome this development, they have a number of reservations when actually comparing the draft's provisions to the Principles.

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45 The Protocol, part of the Pact on Security, Stability and Development in the Great Lakes Region, was signed by 11 States, including **Sudan, Uganda**, and the Democratic Republic of Congo, between them home to nearly two-thirds of Africa's IDPs. http://www.brookings.edu/fp projects/idp/Great Lakes_IDP protocol.pdf

However, should these reservations be addressed, the Guiding Principles could be on the cusp of forming the core of the world's first international legal instrument for the protection of IDPs.[46] Whether in Somalia, Bosnia, Rwanda (after the genocide) or East Timor, internal conflict and displacement have figured heavily in international and regional involvement. The recent situations faced by the Governments of Kenya, Uganda and Sudan reinforced urgent need for officially endorsing the Guiding Principles along with the voices of the IDPs themselves, in order to reach solutions to the problem of internal displacement in these countries.

A great deal of interest has developed on the part of Asian NGOs, academics, journalists, and members of national human rights commissions in addressing the issue of internal displacement in Asia. Their interests and concerns, however, are not yet shared by their governments or by the existing regional intergovernmental bodies, ASEAN and SAARC. Indeed, there is a sharp disconnect between the concerns of civil society and those of their Governments when it comes to the issue of forced displacement. However, the Governments of Sri Lanka and Philippines have incorporated these Principles into their national legislations.

There is also a gap between the approach of Asian regional government bodies and those in other parts of the world with regard to displacement. In other regions, attitudes have begun to change with regard to traditional notions of sovereignty and nonintervention in member states. Although respect for the sovereignty and integrity of member states remains critical to regional systems, the importance of heading off conflicts, reaching people in need, and holding governments accountable when they violate regional and international standards have gained increasing recognition. Within Asia, forced displacement is a serious issue. With regard to displacement caused by conflict and human rights violations, the cases of Afghanistan, East Timor, India, Indonesia, Pakistan, Sri Lanka, Myanmar (Burma), Tajikistan, and the

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[46] Africa: from voluntary principles to binding standards by Brigittaq Jaska and Jeremy Smith: 10 Years of the Guiding Principles FMR – GP10 p. 18.

Philippines feature significantly. Development-induced displacement would add many more to the total - not only from the countries listed above but from some other countries as well. Moreover, displacement caused by natural disasters affects many countries, and may be compounded by human rights violations, such as is the case in North Korea. The return and reintegration of the displaced in particular affect Cambodia, East Timor, Laos and the Philippines.[47]

The former United Nations Secretary-General Mr. Kofi Annan called upon the international community to "strengthen its efforts to assist and protect displaced populations" even while acknowledging that the issue creates "an unprecedented challenge for the international community: to find ways to respond to what is essentially an internal crisis." [48]

XII. Safety Zones for the Internally Displaced Persons: An AALCO Initiative

The Guiding Principles do not directly refer to the creation of safety zones for the internally displaced; access to safety is often the primary concern of the IDPs. One obvious way of providing physical protection during armed conflict is to move them away from dangerous areas[49]. The creation of safe areas represents one of the most controversial strategies used so far to afford protection to the internally displaced population in war zones. Safe areas have also been referred to as "UN Protected Area" (1992, Cambodia), "Safe Area" (Bosnia and Herzegovina, 1992), "Protected Zone" (Rwanda, 1994), "Safe Havens", "Safety Zones", "Security Zones" or the latest "No-fire Zones" (Sri Lanka, 2009).

In 1985, it was Thailand which proposed to the Asian-African Legal Consultative Organization (AALCO) then (AALCC), a unique

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47 Addressing Internal Displacement in Asia: A Role for Regional Organizations by Roberta Cohen.

48 Annan, Preface, Cohen and Deng, Masses in Flight, p. xix.

49 The International Protection of Internally Displaced Persons by Catherine Phuong, published by Cambridge Studies in International and Comparative Law. Introduction.

inter-regional organization in the Asian-African region mandated to study legal issues, that it studies the possibility of "Establishing Safety Zones for Refugees and Displaced Persons in the Country of Origin". The Proposal emanated out of the experience of a developing country faced with massive refugee flows, who felt that this would lessen the burden imposed upon the international community under the broader principle of "Burden Sharing".[50] In 1995 the AALCO Secretariat formulated a "Framework for the Establishment of a Safety Zone for Displaced Persons in their Country of Origin". It incorporated basic principles enshrined in international humanitarian law and decisions of International Organizations. It adopted a simple uncomplicated structure to outline a solution to a complex issue and comprised of 20 provisions arranged under seven broad headings. The framework stipulated (i) the aim of the establishment of the safety zone; (ii) conditions in accordance with which a safety zone may be established; (iii) the supervision and management of the proposed zone; (iv) duties of the Government and the Conflicting Parties concerned; (v) the rights and duties of the displaced persons in the safety zone; (vi) protection of the officials of the International Organizations; and (vii) the closure of the safety zone[51]. After presenting the framework to its Member States in 1995, the Secretariat had sought comments from them on the future course of action on the subject. Pending those comments the work is kept in abeyance.

The idea is not new as it finds its origins in international humanitarian law. Article 23 of the First Geneva Convention[52] envisages the creation of hospital zones and localities for the sick and wounded in armed forces. This provision is extended to the civilian sick and wounded by Article 14 of the Fourth Geneva

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50 Burden Sharing principles were adopted in 1987 by the AALCC, they were an addition and improvement on the Bangkok Principles of 1966.

51 Establishment of Safety Zones for the Displaced Persons in Their Country of Origin, Asian-African Legal Consultative Committee, Doc. AALCC/XXXIV/ Doha/95/3, pg. 2

52 Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 53.

Convention[53]. Article 15 of the same Convention allows for the creation of neutralized zones which would be open to all civilians, whether wounded or not. Additional Protocol I[54] also contained provisions of non-defended localities (Article 59) and demilitarized zones (Article 60). These provisions have been rarely used in practice[55], and safe areas created in Iraq in 1991, Bosnia and Herzegovina in 1993 or Rwanda in 1994, although inspired by the provisions of international humanitarian law, was different from those envisaged by the Geneva Conventions. Prof. Chimni defines safety zones as a "clearly demarcated space in which individuals fleeing danger can seek safety within their own country".[56]

The creation of safe areas thus seeks to protect the civilians who are already living in these areas, but also to provide a destination for those in search of temporary refuge in a location where protection is supposedly granted. Although the stated objective of the establishment of the safety zones is the protection of internally displaced persons, actual practice raises the question of whether such measure is protecting states' interests rather than the physical safety of the internally displaced.

The safe areas established so far differed from those envisaged by international humanitarian law. The main difference is that safe areas were often established without the consent of warring parties. Moreover, they were not properly demilitarized, as envisaged in Articles 59 and 60 of Additional Protocol I. They lacked the legitimacy that they would have enjoyed if established under international humanitarian law. The experience of the 1990s raised a number of questions to which answers would determine whether

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53 Geneva Convention relative to the Protection of the Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

54 Protocol Additional to Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3.

55 See Y. Sandoz "The Establishment of Safety Zones for Persons Displaced within their Country of Origin", in N. Al-Naumi and R. Meese (eds).

56 B.S. Chimni "The Incarceration of Victims: Deconstructing Safety Zones", in Al-Naumi and Meese (eds), *International Legal Issues*, pp. 823-54 at p. 825.

the practice of establishing safe areas in war zones is to be confirmed in the future.

The Open Relief Centres (ORC's) established in Sri Lanka in 1990 are closer to the model envisaged by international humanitarian law and were relatively successful in providing both assistance and protection to the internally displaced. They benefited from the implicit, and later explicit, consent of the parties to the conflict and retained a civilian character: no weapons or any military presence (including peace keeping forces) were allowed on the site.[57]

The consent of parties, the exclusive civilian character of the safe areas, and the safeguarding of the right of asylum appear to be the main principles to be followed when establishing safe areas in war zones. Other principles have been identified, such as clear delimitation of the area (as in Article 59(5) and 60(2) of the Additional Protocol I, and the definition of a more precise mandate of the force in charge of the defense of such areas. In addition Hyndman argues that the establishment of safe areas is most likely to work when they have 'local connotations of sanctuary or safety', i.e. where the designated area has traditionally been considered as a place of refuge. Not only in areas of conflict but these zones are also being created in instances of natural disasters.

XIII. The Road Ahead

A High-Level Conference on "Ten Years of the Guiding Principles on Internal Displacement – Achievements and Future Challenges" was held in Oslo in October 2008. The purpose of the conference was to assess the accomplishments and shortcomings of the Guiding Principles on Internal Displacement since 1998, and to chart a way forward for national and international decision-makers, including relevant States, United Nations bodies, regional organizations and civil society actors.

At that Conference Mr. Walter Kalin stated that "it is fair to say that over the last ten years the Guiding Principles have demonstrated their utility and impact but also their limitations".

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57 See, Hyndman "Preventive, Palliative or Punitive?", p. 179.

While assessing the future of the Guiding Principles, he assessed the situation in some countries where these Principles had been applied[58]. In Burma they have been used to raise awareness about displacement and mobilize humanitarian assistance but have offered little diplomatic or political leverage to influence national authorities. During elections in Bosnia and Herzegovina and in Kosovo, the Principle's focused attention on IDPs political rights but across the world IDP political participation remains inconsistent. They had inspired the peace process in Nepal but the country still lacked an effective IDP strategy. They have informed the ongoing process of drafting the African Union Convention for the Prevention of Internal Displacement and the Protection and Assistance to the Internally Displaced Persons in Africa but – assuming it is approved by the African Union at a special summit[59] its effectiveness will depend on the degree of compliance and monitoring. The Principles were issued to Georgian civil servants designated to provide assistance to those displaced by recent conflict but the response of the government to Georgia's latest displacement has been criticized. They form the basis for Uganda's National Policy for Internally Displaced Persons but there is still a very significant gap in implementation. One of the reasons for this change has been the evolving notions of sovereignty. Although the World Summit in September 2005 did not go so far as to affirm *automatic international protection* of populations at risk, it did put forward the notion of a collective 'responsibility to protect' when civilians are subject to ethnic cleansing, crimes against humanity, genocide or natural disasters. This can be built upon to reinforce both national and international responsibility for internally displaced persons.

On the other hand in many parts of the world internal displacement is essentially seen as an "internal affair" which in turn is an impediment to their application. As consensus is the very foundation of international law its important to build up the consensus from the "bottom up". Such an approach is dependent

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58 The future of the Guiding Principles, FMR GP-10, p. 38.

59 http://www.unhcrrlo.org/Conference_Special_Events/2008AUSpecial Summit. html

upon convincing states affected by internal displacement to incorporate the principles into domestic law, implement then and to encourage regional organizations to develop locally applicable normative frameworks.

More efforts need to be made to prevent displacement, through effective disaster-risk reduction and emergency preparedness, and through conflict prevention. In parallel, sustained efforts need to be made to end displacement and find durable solutions to displacement.

In conclusion it can be said that the law of internal displacement can only grow if states, international organizations and other actors continue to insist that specific guarantees exist for the internally displaced. Even if some of these claims would be rejected, others, as the history of the Principles show, would be accepted. As United Nations High Commissioner for Refugees, Mr. Antonio Guterres put it; the international community has finally awakened to its 'biggest failure in terms of humanitarian action' and decided to act in defence of those who 'have not crossed a frontier'.[60]

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[60] 'UN Refugee Boss says World tackling Past Failures', News 1, New Brisbane, Australia, 27 September 2005.

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TWO DECADES OF BASEL CONVENTION: A REVIEW

Shikhar Ranjan*

I. Introduction

The year 2009 marks the completion of twenty years of adoption of the international treaty addressing the transboundary movements of hazardous wastes and their disposal, namely the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989.[1] In two decade of its existence, the Basel Convention has proved to be one of the most focussed and effective environmental conventions and has directly led to the decrease in transboundary movements of hazardous wastes from developed to developing countries. Its control system, legal framework, and operation through improved classification of wastes and refined hazard classification has been firmly consolidated. The Convention has proved to be a dynamic instrument and its achievements include, the adoption of the Basel Ban Amendment, a Liability and Compensation Protocol, tackling the growing problem of e-waste and engaging in efforts to craft an international legal instrument on the safe and environmentally sound ship recycling. It has also contributed to the strengthening of capacities in developing

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1 The official text of the Convention is contained in *United Nations Treaty Series (UNTS)*, vol. 1673 (1992), pp. 126-61. Also reproduced in AALCC & UNEP, *Asian-African Handbook on Environmental Law* (AALCC, New Delhi,1999), pp. 686-712; *Indian Journal of International Law (IJIL)*, vol. 29 (1989), pp. 165-97 and *International Legal Materials (ILM)*, vol. 28 (1989), p. 657-86. Also available on website: http://www.basel.int/text/documents.html, (last accessed on 10 July 2009). Hereinafter referred to as the "Basel Convention" or "Convention".

countries for ensuring environmentally sound management of hazardous wastes. However, some of the clandestine incidents of transboundary movements of hazardous wastes, that have taken place in recent times, particularly, the toxic waste dumping incident in Abidjan, Côte d' Ivoire in 2006,[2] highlight the imperative for developing countries to remain vigilant against the continuance of such illegal practices.[3] Furthermore, to strengthen the Basel regime

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2 In August 2006, several citizens in Abidjan, the capital of Côte d' Ivoire, began flocking to health centres with symptoms including nausea, severe headaches, vomiting, skin reactions and nose bleeds. Following which the national civil defence and protection authorities visited affected areas. They identified various sites in Abidjan where toxic waste originating from a ship chartered by a Western Company Trafigura had been stored and dumped. Consequentially people had been displaced, schools in affected areas had to be closed and there had been outbreaks of anger and protest among the population. Environmental consequences included air pollution, contamination of water sources, closure of the city's household waste treatment centre for two months and contamination of the food chain. Industries had been closed and hundreds of workers laid off; fishing activities, vegetable and small livestock farming had halted; and a number of businesses such as bakeries had been closed down due to contaminated products. The human cost of the disaster was at least 10 deaths, 69 people hospitalized and more than 100,000 medical consultations to date. Initial estimates had put the quantity of waste at 2,500 tons but it was later estimated to be closer to 10,000 tons. The Government by November 2006 had already spent 22 million euros on clean-up operations and the total cost of the soil pollution alone was estimated at 30 million euros. Further assistance was needed for health, agriculture, animal resources, rehabilitation of the water table, help for industries, including the informal sector, the information network and for bereaved families. Details are drawn from Statement by Ms. Safiatou Ba-N'daw, Deputy Director of the Office of the Prime Minister of Côte d' Ivoire and coordinator of the national plan to combat toxic waste, at the Eighth Conference of Parties to the Basel Convention (COP VIII). For details see: "Dumping of toxic wastes in Abidjan, Côte d' Ivoire", in UNEP, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its eighth meeting*, Nairobi, Kenya, 27 November-1December 2006, UNEP/CHW.8/16, p. 6-10.

3 COP VIII vide decision VIII/1, entitled "Côte d'Ivoire", *inter alia*, strongly condemned the dumping of hazardous wastes in Abidjan, Côte d'Ivoire, in August 2006, and called for carrying out the following actions: (a) Immediate action on clean-up of the toxic wastes and contaminated soils and materials; (b) Comprehensive assessment of the levels of contamination in various ecosystems and humans and the related impacts of such contamination; (c) Full investigation to establish responsibilities; and (d) Follow-up activities, especially monitoring of long-term effects of the toxic wastes. *Ibid*., p. 24.

the continuing deadlock over the entry into force of the Ban Amendment and the Liability and Compensation Protocol also needs to be resolved.

Increased acceptance of the fundamental concepts of the Basel Convention in the international community is reflected from the fact that that out of 192 Members States of the United Nations Organization (UNO), as of July 2009, the Convention has been ratified by 172 States.[4] Thus, approximately 90% of the UN members have legally consented to abide by the obligations they have assumed under the Basel Convention. It may be inferred from the large number of state parties to the Basel Convention that in two decades the Convention has achieved near universal acceptance. However, it is pertinent to mention herein that the largest generator of hazardous wastes, the United States of America has still not ratified the Convention, although it is a signatory to the Convention.

The purpose of this article is to review some of the significant achievements of the Convention in its twenty years of journey. In doing so, it first, briefly touches upon the evolution of the Convention, highlights the work of Asian-African Legal Consultative Organization (AALCO) in this context and in the early phase of the Convention; second, it sets out the main provisions of the Basel Convention, and thirdly, describes some of the significant achievements that have come about in two decades of the Basel Convention, with a particular focus upon the Basel Ban Amendment as that is described by many as the "real heart" of the Convention.

II. Evolution of the Basel Convention

A. International Developments

In the late 1980s, shipments of hazardous waste from industrialized countries to developing countries and Eastern European nations

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[4] The Convention was adopted by the Conference of Plenipotentiaries convened in Basel, Switzerland on 22 March 1989. It entered into force on 5 May 1992. For the status of ratification see list of state Parties available on the website of the Basel Convention: http://www.basel.int/ratif/convention.htm (last accessed on 10 July 2009).

were brought to light by the media.[5] Awareness and concern regarding international transport of toxic and dangerous products and wastes were reflected in the discussions of the General Assembly of the United Nations at its Forty-Second Session in 1987. This issue was the subject of a resolution on "Traffic in toxic and dangerous products and wastes" adopted by the General Assembly in 1987.[6]

The ensuing international outrage led the international community to act and the "environmental conscience" of the United Nations Environment Programme (UNEP) convened a Working Group of legal and technical experts to prepare a global convention on the control of transboundary movements of hazardous wastes. A

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5 Among the notorious cases were: five shipments of toxic and radioactive waste that were illegally imported into Nigeria by an Italian national. Within several months, an additional 2100 tons of Italian waste carried abroad a German ship was dumped in Nigeria; 15, 000 tons of municipal fly ash, contaminated with dioxin, heavy metals and other chemicals, which were shipped from Philadelphia, USA to the Caribbean in 1986. When several Caribbean nations turned away the ship, the *Khian Sea,* the crew attempted (over a two year period) to off load its toxic cargo as far away as Guinea. It eventually returned to the Caribbean to dump some of the ash in Haiti. The rest is presumed to have been dumped into the Indian Ocean; 41 missing drums containing topsoil contaminated with highly toxic dioxin from the 1976 Seveso chemical plant explosion turned up in a barn in northern France; and in 1983, a shipment of carcinogenic PCBs was sent from Austria to Hungary. It represented a small fraction of the 2.2 million metric tonnes that were being moved across European borders in the form of 100, 000 shipments, which represented a transboundary movement of hazardous wastes every five minutes. Approximately, 10 per cent went from Western Europe to the Eastern Europe. These cases were widely reported in international media. The information stated herein is drawn from: UN, *Illegal traffic in toxic and dangerous products and wastes, Report of the Secretary-General, United Nations General Assembly, 18 July 1989*. UN Doc. A/44/362.

6 UNGA Res. 42/183, adopted on 11 December 1987. The text of the resolution is available on the website: http://www.un.org/Depts/dhl/res/resa42.htm. (last visited on 10 April 2009). The Assembly, convinced that this problem required the attention and cooperation of the international community, requested the Secretary-General to prepare a comprehensive report on the subject. The Report considered by the General Assembly in 1989 dealt with illegal traffic in toxic and dangerous products and wastes, that is, transports which were carried out in contravention of national legislation and relevant international treaties, guidelines and principles.

soft-law instrument in the form of Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes, popularly called the Cairo Guidelines, adopted by the UNEP in 1985, provided a facilitative basis for the Working Group for its work. This Group met from October 1987 to March 1989 in six negotiating Sessions and after intense negotiations was finally able to present a draft Convention for adoption by the Conference of Plenipotentiaries, held at Basel, Switzerland from 20 to 22 March 1989 at the Ministerial level.[7] On 22 March 1989, the Convention was adopted by consensus of the 116 States present; 105 of these and the European Community (EEC) signed the Final Act, including the decision to adopt the Convention. 35 States and the EEC signed the Convention immediately after its adoption.[8] However, at the opening of the adoption ceremony, a statement was made on behalf of the President of Mali, the Chairman of the Organization of the African Unity, to the effect that the African States were not prepared to sign the Convention, as they considered it too weak, and they had agreed to decided on their final position after further discussions within the framework of OAU.

B. Developments in AALCO

The issue of "Transboundary Movement of Hazardous Wastes" was considered as part of the AALCO's work programme on environmental law matters, during the period 1989-91. It may be recalled that during this period the Basel Convention and the African Union's Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa, 1991 were adopted.

At the Twenty-Eighth Session of the AALCO held in Nairobi in February 1989; a new item entitled "Transboundary Movement of Hazardous Wastes and Their Disposal" was inscribed in the environmental law programme of the AALCO. The Secretary-

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7 For a detailed account of the negotiation process see, Iwona Rummel-Bulska, "The Basel Convention on Hazardous Wastes - Problems, Negotiations and Solutions", in Tuula Kolari and Ed Couzens (eds.), *International Environmental Law-making and Diplomacy Review 2007* (University of Joensuu, Finland, 2008), pp. 91-117.

8 *Ibid*., p. 107.

General was mandated by the Nairobi Session to participate in the plenipotentiary conference being held in Basel in March 1989 to adopt the Basel Convention. Expressing his dissatisfaction, on the lack of prohibition on transboundary movements of hazardous wastes, the then Secretary-General Frank X. Njenga, at the Basel Conference stated: [9]

> It is my onerous duty, today, to place before this august body the grave concern of States members of the Asian-African Legal Consultative Committee on the issue of transboundary movement and disposal of hazardous wastes- particularly the disposal and dumping of toxic and hazardous wastes in the territories of the developing countries. The member states of AALCC consider it imperative to work towards the prohibition rather than prescription of rules on transboundary movements and disposal of hazardous wastes. However, careful the disposal processes are, they may easily eventually spread across international borders thereby causing untold environmental damage to third parties.

In December 1989 and April 1990, the Secretary-General was invited by the Organization of African Unity (OAU, now African Union – AU) to participate in the work of legal and technical experts of the Member States of the OAU on the subject of transboundary movement of hazardous wastes in Africa. The Secretary-General actively participated in the preparatory process of the African Convention on the subject. Subsequently, the Bamako meeting in February 1991 adopted the OAU Convention on the Ban of the Import into Africa and Control of Transboundary Movement of Hazardous Wastes within Africa based on the proposals of the Legal and Technical Experts Group.[10] The Secretariat Studies prepared during this period on "Control of Transboundary Movement of

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9 Statement of the Secretary-General of the Asian-African Legal Consultative Committee at the Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes, held at Basel, Switzerland, 20th March – 22nd March 1989. (On file with the author).

10 AALCC, *Combined Report of Twenty-Sixth to Thirtieth Session held in Bangkok (1987), Singapore (1988), Nairobi (1989), Beijing (1990) and Cairo (1991)* (AALCC, New Delhi, 1992), p. 51-2.

Hazardous Wastes and Their Disposal", contained an overview of the Basel and Bamako Conventions, as well a note on "Elements which might be considered for Inclusion in a Protocol on Liability and Compensation for Damage resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes."[11]

At the Thirtieth Session held in Cairo in 1991, vide the decision adopted on the agenda item "Environment including the Transboundary Movement of Hazardous Wastes and Their Disposal", the Annual Session, *inter alia* congratulated the "Organization of African Unity on the conclusion of "The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa, 1991" and urged "Member States concerned to consider, ratifying the Bamako Convention on "The Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa" and the Basel Convention on "The Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989", so that they can enter into force as soon as possible".[12]

Perhaps in view of the successful adoption of the Basel and Bamako Conventions and the high importance accorded to the United Nations Conference on Environment and Development (UNCED), 1992 and subsequent to that the follow-up, of the mandate of UNECD, particularly in relation to the three Rio Conventions, namely, the United Nations Framework Convention on Climate Change, 1992; the Convention on Biological Diversity, 1992; and the United Nations Convention to Combat Desertification, 1994, the further consideration of the item pertaining to the "Transboundary Movements of Hazardous Wastes and Their Disposal" by the AALCO was discontinued.

III. The Basel Convention: Main Provisions

The Basel Convention was adopted in 1989 to address concerns over the management, disposal and transboundary movement of the estimated 400 million tonnes of hazardous wastes that are produced

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11 *Ibid.,* pp. 99-121.

12 *Ibid*., p. 61-2.

worldwide each year. The guiding principles of the Convention are that transboundary movements of hazardous wastes should be reduced to a minimum, hazardous wastes be managed in an environmentally sound manner, treated and disposed of as close as possible to their source of generation, and be minimized at the source.[13]

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[13] A significant number of academic writings exist on the Basel Convention, amongst which a notable work is: Katharina Kummer, *International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules* (Clarendon Press, Oxford, First Edition, 1995). Also see Katharina Kummer, *Transboundary Movement of Hazardous Wastes at the Interface of Environment and Trade* (UNEP: Environment and Trade Monograph No. 7, Nairobi, 1994). Some of the important writings on the topic appearing in academic journals are: Ved P. Nanda and Bruce C. Bailey, "Export of Hazardous Wastes and Hazardous Technology: Challenge for International Environmental Law", *Denver Journal of International Law and Policy,* vol. 17 (1988), pp.155-206.; Barbara D. Huntoon, "Emerging Control on Transfers of Hazardous Wastes to Developing Countries", *Law and Policy in International Business,* vol. 21 (1989), pp. 247-71; David J. Abrams, "Regulating the International Hazardous Waste Trade: A Proposed Global Solution", *Colombia Journal of Transnational Law*, vol. 28 (1990), pp. 801-45; Kathleen Howard, "The Basel Convention: Control of Transboundary Movements of Hazardous Wastes and their Disposal", *Hastings International and Comparative Law Review*, vol. 14 (1990), pp. 223-46; Alexandre Kiss, "The International Control of Transboundary Movement of Hazardous Wastes", *Texas International Law Journal*, vol. 26 (1991), pp. 521-39; Katharina Kummer, "The International Regulation of Transboundary Traffic in Hazardous Wastes : The 1989 Basel Convention", *International Comparative Law Quarterly (ICLQ)* , vol. 41 (1992), pp. 530-62; T. R. Subramanya, "Legal Control of Transboundary Movement of Hazardous Substances: North South Issues and a Model for Reform", *IJIL,* vol. 33 (1993), pp. 41-57; Hugh J. Marbury, "Hazardous Waste Exportation: The Global Manifestation of Environmental Racism", *Vanderbilt Journal of Transnational Law*, vol. 28 (1995), pp. 251-94; Bharat Desai, "Regulating Transboundary Movement of Hazardous Waste", *IJIL*, vol. 37 (1997), pp. 43-61; Jonathan Krueger, "What's to Become of Trade in Hazardous Wastes?: The Basel Convention One Decade later", *Environment*, vol. 41 (1999), pp. 14-21; B. C. Nirmal, "Regulating Transboundary Movement of Hazardous Wastes", in S. Bhatt and Akhtar Majeed (ed.), *Environmental Management and Federalism: The Indian Experience* (Uppal Publishing House, New Delhi, 2002), pp. 135-79; and T.R. Subramanya, "The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 1989 and Related Developments: An Overview", *IJIL*, vol. 46 (2006), pp. 406-428.

A. The Scope of the Convention

Article 1 provides for the scope of the Convention. As the scope of the Convention pertains to hazardous wastes, the same article instead of defining hazardous wastes, prescribes for its applicability to forty-five categories of wastes that are presumed to be hazardous. Eighteen of these are waste streams (i.e. clinical wastes, mineral oils, and others) and twenty-seven others are wastes with clearly identified constituents (i.e. mercury, lead, asbestos, cyanides etc.).[14] However, in order to be classified as hazardous, these categories of wastes need to exhibit one or more hazardous characteristics, viz, flammability, corrosiveness, toxicity or eco-toxicty.[15] Further, if a waste is considered hazardous by the national legislation of the Party of export, import or transit, it will be considered hazardous for the purpose of transboundary movement by all States involved.[16]

Radioactive waste and wastes deriving from the normal operations of a ship are excluded from the scope of the Convention on the ground that these wastes are subject to other international regulations on the subject.[17]

B. Main Provisions of the Basel Convention

The corpus of the Basel Convention presently, consists of a preamble, containing twenty-five preambulatory paragraphs, twenty-nine articles and nine annexes. The overall goal of the Basel Convention is to protect human health and the environment against the adverse effects which may result from the generation, transboundary movements and management of hazardous and other wastes. To attain these, the Basel Convention seeks to:

- minimize the generation of hazardous wastes in terms of quantity and/or hazard potential to a minimum (principle of waste minimization);[18]

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14 Basel Convention, note 1, Annex1-Categories of Wastes to be Controlled.
15 *Ibid.,* Annex III-List of Hazardous Characteristics.
16 *Ibid.*, Article 1(b).
17 *Ibid.,* Article 1 (3).
18 *Ibid*, Preamble, paragraph 3.

- promote disposal of hazardous wastes and other wastes, as close as possible to their source of generation (the "proximity principle");[19]
- encourage adoption of the "precautionary approach" to control pollution;
- reduce transboundary movements[20] of hazardous wastes and other wastes subject to the Basel Convention to a minimum consistent with principle of environmentally sound management of hazardous wastes ;[21]
- ensure strict control over the movements of hazardous wastes across borders as well as the prevention of illegal traffic;[22]
- establish a prior-inform consent mechanism for any transboundary movement of hazardous wastes; [23]
- transfer the responsibility upon the exporting country to re-import the hazardous wastes if the transboundary movement fails to meet the requirement of the Convention;[24]
- consider illegal traffic in hazardous wastes or other wastes as criminal;[25]
- prohibit shipments of hazardous wastes to countries lacking the legal, administrative and technical capacity to manage and dispose them in an environmentally sound manner;

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19 *Ibid*., paragraph 8.

20 *Ibid*. Transboundary movement is defined under Article 2 (3) to mean "any movement of hazardous wastes or other waste from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement."

21 *Ibid*., Preamble, paragraph 23 and Article 4 (2)(d).

22 *Ibid*., paragraphs 19 & 24.

23 *Ibid*. Article 6.

24 *Ibid*., Articles. 8 and 9 (2).

25 *Ibid*. Article 4 (3). Article 9 stipulates that: Any transboundary movements of hazardous wastes is deemed to be illegal if it is (a)without notification to all states concerned; or (b) without the consent of a State concerned; or (c) consent obtained from states concerned through falsification, misrepresentation or fraud; or (d) that does not conform in a material way with the documents; or (e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law.

- assist developing countries with economies in transition in environmentally sound management of hazardous wastes and their disposal.

1. Prior Informed Consent Mechanism

The foundation for the control of transboundary movement of hazardous wastes is based on the very strict control system, based on the prior written consent procedure. The procedure for the notification of trasboundary movement of hazardous wastes or other wastes forms the basis of the control system of the Basel Convention. One important condition under the Basel Convention is that the transboundary movement of hazardous wastes or other wastes can take place only upon prior written notification to the competent authorities of the States of export, import and transit (if appropriate), and upon consent from these authorities permitting the transboundary movement of waste. Furthermore, each shipment of hazardous waste or other waste shall be accompanied by a movement document from the point at which a transboundary movement begins to the point of disposal.

In accordance with Article 6, paragraph 1 of the Basel Convention, the State of export shall notify, or shall require the generator or exporter to notify in writing, using appropriate documentation of the competent authority of the State of export, the competent authorities of the state concerned of any transboundary movement of hazardous wastes or other wastes.

Specific documents are to be used to notify the competent authorities in the countries concerned of all transboundary movements of hazardous wastes and other wastes and subsequently, to accompany the movement of waste. Competent authorities will issue these documents, which consist of two forms: the notification and the movement document.[26]

The notification and its annexes are designed to provide detailed, accurate and complete information about the Parties involved with the movement, on the waste itself, on the type of disposal operation for which the waste is destined, and on other details relating to the

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26 *Ibid*., Annex VA and Annex VB.

proposed movement. This information will allow the competent authorities concerned to be sufficiently informed to make a judgment on whether to object or consent to the movement, in accordance with the Basel Convention and relevant national legislation.

The movement document is intended to accompany the consignment at all times from the time of departure from the waste generator to the arrival of the consignment at the disposal facility in another country. The movement document provides relevant information on a particular consignment, for example, on the carriers of the consignment, passage through customs offices, and the receipt and disposal of waste by the disposer.

2. Environmentally Sound Management of Hazardous and other Wastes

Article 2 (8) of the Basel Convention defines the "environmentally sound management of hazardous wastes or other wastes" as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes." To realize this objective, the Basel Convention calls for international cooperation between Parties. It also calls for building national capabilities to manage hazardous wastes in an environmentally sound manner and for developing a technical and legal infrastructure, including the necessary legislation and regulations. Prevention and minimizing the generation of hazardous wastes is the first step in this regard. However, for wastes which are generated the goal of environmentally sound management is addressed through the "integrated lifecycle approach", which involves controls from the generation of waste to its storage, transport, treatment, reuse, recycling, recovery and final disposal.

At the tenth anniversary of the adoption of Basel Convention, in 1999, a Ministerial Declaration entitled "Basel Declaration on Environmentally Sound Management"[27] was adopted by the Fifth Meeting of the Conference of Parties to the Basel Convention (COP

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[27] UNEP, *Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989*, Fifth Meeting, Basel, 6-20 December 1999, UNEP/CHW.5/29, pp. 96-98.

V) to build on the achievements of the first decade and set the focus for the next decade. The Declaration laid down the framework to promote the implementation of the Basel Convention and its amendments, worldwide, and to achieve environmentally sound management, called for strengthening of efforts and cooperation in the following fields:

- Prevention, minimization, recycling, recovery and disposal of hazardous and other wastes subject to the Basel Convention, taking into account social, technological and economic concerns;
- Active promotion and use of cleaner technologies and production, with the aim of prevention and minimization of hazardous and other wastes subject to the Basel Convention;
- Further reduction of transboundary movements of hazardous and other wastes subject to the Basel Convention, taking into account the need for efficient management, the principles of self-sufficiency and proximity and the priority requirement of recovery and recycling;
- Prevention and monitoring of illegal traffic;
- Improvement and promotion of institutional and technical capacity-building, as well as the development and transfer of environmentally sound technologies, especially for developing countries and countries with economies in transition;
- Further development of regional and sub-regional centres for training and technology transfer;
- Enhancement of information exchange, education and awareness raising in all sectors of society;
- Cooperation and partnerships at all levels between countries, public authorities, international organizations, the industry sector, non-governmental organizations and academic institutions; and
- Development of mechanisms for compliance with and for the monitoring and effective implementation of the Convention and its amendments.

3. *Inter-related Principles applicable for development of waste and hazardous waste strategies*

As ensuring "environmentally sound management of hazardous wastes or other wastes" is one of the key objectives of the Basel Convention, therefore, in this regard, the Secretariat of Basel Convention (SBC) has identified the following interrelated principles to be considered by Governments in the development of waste and hazardous waste strategies.[28] These are:

(a) ***The Source Reduction Principle*** – by which the generation of waste should be minimized in terms of its quantity and its potential to cause pollution. This may be achieved by using appropriate plan and process designs;

(b) ***The Integrated Life-cycle Principle*** – by which substances and products should be designed and managed such that minimum environmental impact is caused during their generation, use, recovery and disposal;

(c) ***The Precautionary Principle*** – whereby preventive measures are taken, considering the costs and benefits of action and inaction, when there is a scientific basis, even if limited, to believe that release into the environment of substances, waste or energy is likely to cause harm to human health or the environment;

(d) ***The Integrated Pollution Control Principle*** – which requires that the management of hazardous wastes should be based on a strategy which takes into account the potential for cross media and multimedia synergistic effects;

(e) ***The Standardization Principle –*** which requires the provision of standards for the environmentally sound management of hazardous wastes at all stages of their processing, treatment, disposal and recovery;

(f) ***The Self-sufficiency Principle*** – (to be considered with (g) and (h))-by which countries should ensure that the disposal of the waste generated within their territory is undertaken there by means which are compatible with environmentally sound management,

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[28] Secretariat of Basel Convention (SBC) and UNEP, *The Basel Convention: A Global Solution for Controlling Hazardous Wastes* (UN, New York, 1997), p. 12. Principles (f), (g) and (h) should be considered in relationship and balance. This publication emphasizes that it "should also be recognized that considerations for disposal may be different from those for recovery, which, if soundly managed, can provide environmental and economic benefits and should be encouraged".

recognizing that economically sound management of some wastes outside national territories may also be environmentally sound;

(g) ***The Proximity Principle*** – (to be considered with (f) and (h))- by which the disposal of hazardous wastes must take place as close as possible to their point of generation, recognizing that economically and environmentally sound management of some wastes will be achieved at specialized facilities located at greater distances from the point of generation;

(h) ***The Least Transboundary Movement Principle*** – (to be considered with (f) and (g)) – by which transboundary movements of hazardous wastes should be reduced to a minimum consistent with efficient and environmentally sound management;

(i) ***The Polluter Pays Principle*** – by which the potential polluter must act to prevent pollution and those who cause pollution pay for remedying the consequences of that pollution;

(j) ***The Principle of Sovereignty*** – under which every country shall take into account political, social and economic conditions in establishing a national waste mangament structure. A country may, for example, ban the importation of hazardous wastes into its territory in accord with its national environmental legislation;

(k) ***The Principle of Public Participation*** – under which States should ensure that in all stages, waste management options are considered in consultation with the public as appropriate, and that the public has access to information concerning the management of hazardous wastes.

C. Mechanisms of Implementation

1. Conference of Parties

Article 15 of the Convention establishes the Conference of Parties with overall policy making powers.[29] It is composed of all

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[29] Conference of Parties (COP) has met nine times till date. COP I met at Piriapolis in Uruguay (3-4 December 1992); while COPs II (21-25 March 1994), III (18-22 September, 1995) V (6-10 December 1999) VI (May 2002) VII (25-29 October 2004) met at Geneva in Switzerland. While COP IV met at Kuching, Malaysia (23-27 February 1998); COP VIII at Nairobi, Kenya (27 November - 1December 2006), and COP IX in Bali, Indonesia (23-27 June 2008). The Reports of these meetings and the important decisions arrived at these meetings is available on the website of the Basel Convention at: http://www.basel.int/meetings/

governments that have ratified or acceded to the Basel Convention. The meetings of the Conference of Parties (COP) periodically reviews the Convention's effectiveness and adopts amendments to the Convention, and establishes such subsidiary bodies,[30] as it deems necessary for the implementation of the Convention.

2. The Secretariat

In order to facilitate the implementation of the Convention, a Secretariat was also established by the Convention.[31] The main task of the Secretariat, in the light of the provisions and principles contained in the Basel Convention, and the decisions adopted by the Conference of Parties, consists of:

- Carrying out the implementation of the Convention as guided and decided by COP and its subsidiary bodies;

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frsetmain.php (last accessed on 21 July 2009). An insightful summary of these COP meetings, from COP V to IX is contained in the *Earth Negotiations Bulletin,* available on the website at http://www.iisd.ca/basel/ (last accessed on 10 July 2009).

30 The Subsidiary Bodies, established by the Conference of Parties, include the Technical Working Group (TWG) and the Legal Working Group (LWG). The TWG is entrusted with the task of preparing technical guidance for the environmentally sound management of hazardous wastes, to develop criteria on which wastes are suitable for recovery and recycling operations and to provide guidance on technical matters to the Conference of the Parties. Taking into account the development within the Basel Convention, the TWG is actively involved in better defining, identifying and clarifying what hazardous waste is under the Convention. The work programme for the Legal Working Group includes: Mechanism for promoting implementation of and compliance with the obligations set out by the Basel Convention; Emergency fund/financial mechanism; Analysis of the dispute settlements mechanism under article 20 of the Basel Convention; Protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal; Prevention and monitoring of illegal traffic in hazardous and other wastes; Bilateral, multilateral or regional agreements or arrangements. An Ad Hoc Working Group of Legal and Technical Experts was established to consider and develop a draft protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal. Its work was accomplished with the adoption of the Basel Protocol in 1999.

31 The Secretariat is established under Article 16. The Secretariat of the Basel Convention (SBC) is located at Geneva, Switzerland.

- Arranging for and servicing meetings of the COP and its subsidiary bodies;
- Ensuring the necessary coordination with relevant international bodies;
- Communicating with Focal Points and Competent Authorities established by the Parties;
- Providing information to Parties on: sources of technical assistance and training; scientific know-how; and environmentally sound technologies; and availability of resources.
- Assisting Parties in: Controlling movements of hazardous wastes; handling of the notification system of the Convention; Managing and minimizing of hazardous wastes; assessing disposal capabilities and sites; monitoring of hazardous wastes and emergency responses; and identifying cases of illegal traffic;
- Reducing transboundary movement of hazardous wastes to a minimum consistent with their environmentally sound management;
- Collecting and disseminating data on the generation of hazardous wastes, their movements and disposal; and
- Providing assistance to Parties, in particular developing countries, in the technical and legal fields covered by the Convention with a view to facilitating the implementation of the Convention.

3. Competent Authority and Focal Point

At the national level, each party is required to establish two pertinent agencies; a 'focal point' responsible for the exchange of information with other parties and the Secretariat, and a 'competent authority' for handling the Prior Informed Consent procedure.[32]

4. Compliance Committee

The Mechanism for Promoting Implementation and Compliance was established by Decision VI/12 of the Conference of the Parties

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32 Article 5.

adopted in 2002.[33] It decided to establish a Committee dedicated to help Parties to implement the provisions of the Convention. The Committee is comprised of 15 members: three from each of the five regional groups of the United Nations (the African group, the Asian group, the Central and Eastern European group, the Latin America and Caribbean group, and the Western Europe and others group). Although the members are nominated by Governments, they serve objectively and in the best interest of the Basel Convention. The members have expertise relating to the Basel Convention in areas including scientific, technical, socio-economic and/or legal fields.

The Committee, in its work, follows a procedure that is non-confrontational, transparent, cost-effective, preventive and non-binding in nature. It is mandated to pay particular attention to the special needs of developing countries and countries with economies in transition. It assists in the resolution of difficulties faced by Parties in compliance with their obligations under the Convention by providing them with advice, non-binding recommendations and information. The Committee is empowered to recommend to the Conference of the Parties further additional measures to address difficulties faced by the Parties in complying with their Convention obligations. It reviews, as directed by the Conference of the Parties, general issues of compliance and implementation under the Convention.

IV. Significant Achievements of the Basel Convention

A. Basel Ban Amendment

The use of the word "control" in the Convention's title—rather than prevention or prohibition—is seen by many as weakening the Convention. During the negotiations of the Convention vast majority

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33 UNEP, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Sixth Meeting, Geneva, Switzerland, 9-13 December 2002, UNEP/CHW.6/40, p.45. The Committee meets on an annual basis and until June 2009, has met in six annual sessions. Also see the Information Brochure entitled *The Basel Convention Mechanism for Promoting Implementation and Compliance*, at: http://www.basel.int/legalmatters/compcommitee/index.html (last accessed on 10 July 2009).

of states wanted a "total ban" instead of "limited ban"[34] on hazardous wastes trade, particularly from developed to developing countries. However, under intense pressure from industrialised countries a compromise formula was achieved by inserting Article 4 (9) (b) in the Convention. It permitted a party to the Convention after giving prior written consent to import hazardous wastes if it was required by the state of import for use as raw material for recycling or recovery industries. Thus, the Convention primarily became an instrument to monitor the transboundary movements of hazardous wastes rather than preventing it.[35] Insertion of this provision led it to be described as "providing license to an activity which should have been considered criminal".[36] It also led to the refusal by the African group to sign the Convention and adopt in 1991 the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa.[37] Environmentalists argue that the danger with permitting export of hazardous wastes was that it would lead to "sham recycling". This means that the waste forming the subject for transboundary movement for recycling is in reality meant to be dumped in the recipient country.

Perhaps, in the light of this, M. K. Tolba, the then Executive Director of UNEP at COP I (December 1992) vehemently pleaded for

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34 The term "total ban" and "limited ban" were devised by UNEP while negotiating for the Basel Convention. A total ban forbids the importation and exportation of hazardous wastes into or out of a signatory state for any reason; the ban on transfrontier movement is absolute whereas a limited ban will permit the importation and exportation of wastes between contracting parties in limited circumstances, such as where waste transfers will ensure the environmentally sound management of hazardous wastes. Such transfer are subject to the Convention as well as the municipal law of the state of import and export, and other bilateral, multilateral, regional and economic and political integration treaties. Cf. C. Russell H. Shearer, "A Comparative Analysis of the Basel and Bamoko Convention on Hazardous Wastes", *Environmental Law*, vol. 23 (1993), pp. 141-83 at p.147.

35 Jim Puckett, "The Basel Ban: A Triumph Over Business as Usual", *The Ecologist Asia,* vol. 5 (1997), pp 5-19 at p. 9.

36 *Ibid*.

37 For text see *ILM*, vol. 30 (1991), pp. 773-99.

a ban on the movement of hazardous wastes from North to South.[38] He stressed that most developing countries did not possess, and were unlikely to possess in the near future, environmentally sound disposal facilities, with the result that import of hazardous wastes into their territory represented an imminent danger for their populations and environment. It was particularly important to consider that aspect because traffic in poisons was a lucrative business and there would be an increasing number of "waste brokers" willing to make profits out of that unscrupulous and immoral commerce.[39]

The divide between North and South was quite evident at COP I. While, on the one hand, the Group of 77 and China at COP I called for adoption of a total ban on all exports of wastes from developed to developing countries,[40] on the other hand, some developed countries made out a case for the continuance of waste movements for recycling purposes. [41] Finally, vide the untitled decision I/22, COP I requested the "industrialized countries to prohibit transboundary movements of hazardous wastes and other wastes for disposal to developing countries."[42] Further, vide Decision I/16, on "Transboundary Movements of Hazardous Wastes Destined for Recovery Operations", the COP, requested the Technical Working Group to review the issue and determine the criteria whether such wastes were suitable for recovery operations.[43]

Amongst the most important issues to be considered by COP II (March 1994) was the ban of exports of hazardous wastes, not only for their final disposal, but also for recovery and recycling

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38 UNEP, *Report of the First Meeting of the Conference of Parties to the Basel Convention*, Piriapolis, Uruguay, 3-4 December 1992, UNEP/CHW.1/24, p. 3.

39 *Ibid*., p. 2.

40 *Ibid*., p. 57.

41 The representative of the United States of America, a non-Party to the Basel Convention drew attention to the contribution made by recycling to environmentally sound management. *Ibid*.

42 *Ibid*., p. 37-8.

43 *Ibid*., p. 32.

operations.[44] Many representatives strongly supported a total ban on export of hazardous wastes from countries members of the Organization for Economic Cooperation and Development (OECD) to non-OECD countries, not only for final disposal but also for recovery and recycling operations. Some representatives were, however, of the opinion that under the strict control of the Basel Convention and when the importing country possessed the technological capability to recover raw materials from hazardous wastes, the transboundary movement of such wastes should be allowed.[45] The untitled decision II/12 adopted by COP II inter alia recognises that "transboundary movements of hazardous wastes from OECD to non-OECD States have a high risk of not constituting an environmentally sound management of hazardous wastes as required by the Convention" and therefore, by the same decision, the Parties attending the COP meeting by consensus decided to prohibit immediately all transboundary movements of hazardous wastes which were destined for final disposal from OECD to non-OECD States; and phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes which were destined for recycling or recovery operations from OECD to non-OECD States. The Parties were also requested to cooperate and work actively to ensure the effective implementation of the decision.[46] This decision is popularly known as the "Basel Ban". The President emphasized that the adoption without a vote of this decision was a great success of COP II.[47] Welcoming the historic decision, Group of 77 and China, stated that this decision should be qualified as one of the greatest advance in global environmental protection.[48]

Thus, the decision to implement ban seeks to create a "total ban" on any movement of hazardous wastes from industrialised countries to the developing countries. A commentator argues that the "total ban selectively applies to transboundary movement of hazardous

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44 UNEP, *Report of the Second Meeting of the Conference of Parties to the Basel Convention*, Geneva, Switzerland, 21-25 March 1994, UNEP/CHW.2/30, p. 2. Opening Statement by Elizabeth Dowdeswell, Executive Director, UNEP.

45 *Ibid*., p. 7.

46 *Ibid*., pp. 19-20.

47 *Ibid*., p. 9.

48 *Ibid*.

wastes from developed countries to developing countries. The total ban essentially a North/South ban does not affect the movement between the developing countries themselves."[49] Thus, theoretically, after December 1997, no hazardous wastes cargo can cross the boundaries of any developed country if that "cargo" was destined for a developing country regardless of whether the cargo was for permanent disposal or for recovery of valuable products from it.

The issues arising from the discussions surrounding the decision II/12 was the subject of intense debate at COP III (September, 1995), with several proposals for the amendment of the Convention, itself under consideration. The Executive Director of UNEP Elizabeth Dowdeswell stated that since the adoption of decision II/12 on the prohibition of all transboundary movements of hazardous wastes from OECD to non-OECD countries by the COP II, the international community has gone through a very intense process in the analysis of implications. She stressed that the decision on ban without proper monitoring of its implementation, would not meet the real requirements of the Parties.[50] At the Conference many representatives strongly supported the adoption of an amendment to the Convention which would ban all exports of hazardous wastes from OECD to non-OECD countries, not only for final disposal but also for recovery and recycling operations. Some representatives were however, of the opinion that the amendment to the Convention should only refer to the part on the export of hazardous wastes from OECD to non-OECD countries for final disposal. In this context, the need for further work to be done by the Convention on the hazard characteristics of wastes was emphasized by all speakers as a very crucial one. A few delegations were of the opinion that the amendment of the Convention, in particular related to hazardous wastes destined for recovery operations was somehow premature.

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49 Muthu S. Sundram, "Basel Convention on Transboundary Movement of Hazardous Wastes: Total Ban Amendment", *Pace International Law Review*, vol. IX, no. 1 (1997), pp. 1-56, at p. 2-3.

50 UNEP, *Decisions and Report Adopted by the Third Meeting of the Conference of Parties*, Geneva, Switzerland, 18-22 September 1995, Basel Convention Series/SBC No. 95/003, p. 78.

Delegations emphasized that it was crucial to ensure the effective implementation of the Convention and possible amendment(s).[51]

Finally, in order to give legally binding effect to decision II/12, COP III by decision III/1 titled as "Amendment to the Basel Convention" decided to insert a new preambular paragraph that reads: "Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention;". A new Article 4A that prohibited the transboundary movements of all hazardous wastes from OECD, European Community and Liechtenstein (Annex VII countries) to developing countries for final disposal and gave time till 31 December 1997 to Annex VII countries to phase it out from recycling and recovery operations to the developing (or non Annex VII) countries. Annex VII composing "Parties and other States which are members of OECD, EC, Liechtenstein" was also added.[52]

At the Fourth Conference of Parties (February, 1998) several representatives emphasized the need for enforcement of the ban on the transboundary movement of hazardous wastes from developed to developing countries and appealed for the prompt ratification of the Amendment to the Convention adopted by COP III. They commended the work completed by the Technical Working Group in the development of Lists A and B, which would facilitate the implementation of the Amendment, and called for the inclusion of those lists in the Convention as annexes with the understanding that the reviewing system of the lists would also be adopted. Many representatives called for the maintaining of Annex VII in its current structure. Others, however, proposed undertaking of work within the TWG for reviewing composition of Annex VII.[53]

COP IV strongly appealed to Parties to ratify the Amendment adopted by decision III/1 as soon as possible to enable the early entry into force of the Amendment.[54] It decided to leave Annex VII

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51 *Ibid*., p.89.

52 *Ibid*., Decision III/1, p. 1-2.

53 UNEP, *Report and Decisions of the Fourth Meeting of the Conference of Parties*, Kuching, Malaysia, 23-27 February 1998, UNEP/CHW.4/35, p.15.

54 Decision IV/7: Implementation of decision III/1, *Ibid*., p. 24.

unchanged until the amendment contained in decision III/1 enters into force.[55] The Conference made an amendment to Annex I of the Basel Convention and added two new Annexes VIII and IX to the Convention. Annex VIII contains List A (hazardous wastes) that may not be sent by Annex VII countries to other States. Annex IX contains List B, that includes materials that are not subject to the shipment ban unless they contain constituents at a level that causes them exhibit hazardous characteristics, such as flammability or toxicity.[56]

At COP V (December, 1999), several delegations stressed upon the importance of the entry into force the Basel Ban Amendment. Many felt that one possible reason for the small number of ratifications was that the criteria used to assign States Parties to Annex VII were based on economic rather than technical considerations, and thus needed to be reviewed. Some representatives expressed reservations concerning Annex VII, and said that the criteria used to assign States Parties to Annex VII should be based on the extent to which Parties had the necessary technological expertise to ensure environmentally sound industry. Parties which met those strict standards should be permitted to maintain their waste recycling industry.[57] Many representatives drew attention to the importance of the ban amendment in ensuring the full implementation of the Convention, and urged all States Parties which had not yet ratified the amendment to do so. A number of representatives suggested that reluctance to ratify the Amendment did not necessarily reflect a lack of political will but, rather, a need for capacity-building, which should be a priority in the coming years.

Vide decision V/3, the Conference took note of the progress made by Parties in effectively implementing decision III/1. It welcomed the ratification or acceptance by several Parties of the amendment contained in that decision and strongly appealed to

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55 Decision IV/8: Decision regarding Annex VII, *Ibid*.

56 Decision IV/9: Amendment and adoption of annexes to the Convention, *Ibid*., pp. 25-40.

57 UNEP, *Report of the Fifth Meeting of the Conference of the Parties to the Basel Convention*, Basel, Switzerland, 6-10 December 1999, UNEP/CHW.5/29, p. 10.

Parties to ratify the amendment as soon as possible to facilitate the early entry into force of the amendment.[58]

Several delegations at the Sixth Conference of Parties (COP-VI, December 2002) urged countries to ratify the Ban Amendment so that its entry into force could be achieved before COP VII. [59] In this context, it needs to be noted that there are a few developed countries that quietly but steadfastly oppose the Ban, arguing that it does not promote environmentally sound management but merely prohibits hazardous waste exports. They maintain that OECD countries should be permitted to export hazardous waste to non-OECD countries that have adequate and environmentally sound hazardous waste management practices. In contrast, supporters of the Ban underscore that implementation of the Convention was critical to the success of the Basel Convention, as closing off the possibility of cheap hazardous waste disposal in developing countries creates an incentive for OECD countries to minimize hazardous waste generation, which is the root of the problem, and pursue cleaner production.[60]

COP VI vide decision V1/33 reiterated this strong appeal, and in addition, it strongly appealed to States that were not Parties to the Basel Convention to expedite the process of ratification, acceptance and approval of, or accession to the Basel Convention and its amendments.[61] The Conference also reaffirmed its decision to leave Annex VII unchanged until the amendment contained in its decision III/1 entered into force.[62]

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58 *Ibid.,* p. 33.

59 "Summary of the Sixth Conference of the Parties to the Basel Convention: 9-14 December 2002", *Earth Negotiations Bulletin*, vol. 20, no.12, available online at http://www.iisd.ca/linkages/basel/cop6/ (last accessed on 12 July 2009), p. 10.

60 *Ibid.,* p.12.

61 Decision VI/33: Implementation of decision III/1 on Amendment of the Basel Convention, UNEP, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Sixth Meeting, Geneva, Switzerland, 9-13 December 2002, UNEP/CHW.6/40, p.153.

62 Decision VI/34: Analysis of Issues related to Annex VII, *Ibid*., p. 153-4.

Efforts were made to revive the Basel Ban Amendment at COP VII (October, 2004). It was noted that while the Ban Amendment (Decision III/1) symbolized an unprecedented victory of developing countries in the international environmental arena and an uncommon triumph of environmental over economic considerations, its entrance into force is proving to be more time consuming than many had expected. The handful of developed countries who have opposed the idea of a ban since its inception, continued to argue that a ban may prevent the growth of "legitimate" and potentially profitable recycling industries in developing countries. In response, some participants reminded Parties of their obligations under the Convention, including those of reducing transboundary movement of hazardous wastes to a minimum, becoming self-sufficient in managing domestic waste, and reducing hazardous waste generation. These principles would suggest that even if countries have the capacity to ensure the environmentally sound management of hazardous wastes, they should use this capacity to process domestic, rather than imported, wastes. In addition, some argue that the danger exists that strengthening the market for wastes through a growth in recycling industries will provide further incentive to increase their generation, thereby undermining the Convention's objective of minimizing hazardous waste.[63]

Some argue that the ban is *de facto* in operation, since it has been ratified and integrated into the domestic legislation of the majority of Annex VII countries. However, a key hazardous waste generating country remained outside the framework of the Basel Convention and/or the Ban Amendment, which implied that developing countries that have not yet ratified the Ban Amendment will still be able to import hazardous wastes.[64]

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63 "Summary of the Seventh Conference of the Parties to the Basel Convention: 25-29 October 2004", *Earth Negotiations Bulletin,* vol. 20, no. 18, available online at http://www.iisd.ca/basel/cop7/ (last accessed on 10 July 2009), p. 11.

64 *Ibid.*

The Conference reiterated its decisions as regards the Ban Amendment[65] and leaving Annex VII unchanged till the Basel Ban decision entered into force.

B. Basel Ban Amendment: The Number Puzzle

It may be noted that till March 2009, 65 Parties have ratified the Ban amendment.[66] The question concerning the number of ratifications required for the entry into force of the Ban Amendment surfaced at the COP VIII (November-December 2006) and presently dominate the agenda of the Basel Convention, with the interpretation of its Article 17 (5) being at the heart of the controversy.[67] In essence, delegates were divided into two camps. The first supports the "current time" approach, according to which the number of ratifications required for the Ban Amendment to enter into force should be based on the current number of parties to the Basel Convention. The second camp defends the "fixed time" approach, according to which the number of ratifications required should be calculated on the basis of the number of parties to the Convention when the Ban Amendment was adopted, namely 82. To complicate matters, two different views are held within the second camp. One

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65 Decision VII/23: Implementation of decision III/1 and Decision VII/24: Analysis of issues related to Annex VII, UNEP, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Seventh Meeting, Geneva, Switzerland, 25-29 October 2004, UNEP/CHW.7/33.

66 The list of Parties that have ratified the Basel ban Amendment and the Parties that were present at the time of its adoption at COP-3 is available on the website: http://www.basel.int/ratif/ban-alpha.htm (last accessed on 14 April 2009).

67 Article 17 provides for Amendment of the Convention. Its sub-clause (5) reads: "Instruments of ratification, approval, formal confirmation or acceptance of amendments shall be deposited with the Depositary. Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted them or by at least two thirds of the Parties to the protocol concerned who accepted them, except as may otherwise be provided in such protocol. The amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval, formal confirmation or acceptance of the amendments."

claims that the number of ratifications required for the Ban to enter into force has been met, as 63 parties, more than three-quarters of 82, have ratified the Amendment. The other argues that the magic number has not yet been met, as it is only the ratifications of those parties "who accepted" the amendment in 1995 that count, and not the ratifications of those who joined the Convention later on.[68] The Office of Legal Affairs of the United Nations, in its opinion to the Secretariat of Basel Convention has advocated for the "current time" approach.[69]

The COP meeting was unable to resolve the issue of interpretation of Article 17(5) of the Basel Convention, which will determine how much ratification, are required for the Ban Amendment to enter into force. The Conference adopted decision VIII/30 entitled: "Addressing the Interpretation of paragraph 5 of Article 17 of the Basel Convention". Vide this decision the COP, acknowledged the difference of views regarding the interpretation of "who accepted them" in Article 17 (5) and recognized that many parties consider that expression ambiguous. It urged all Parties to make every effort to facilitate the early resolution of the interpretation of "who accepted the" in Article17 (5) and in this regard requested the Open-ended Working Group (OEWG) to: further address the issue of interpretation taking into account the perception of ambiguity held by many parties, with a view to resolving it at the earliest opportunity, and develop a draft decision to reach an agreed interpretation of Article 17 (5) by the Parties in accordance with international law for consideration at COP 9.[70]

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68 "Summary of the Ninth Conference of Parties to the Basel Convention: 23-27 June 2008", *Earth Negotiations Bulletin*, vol. 20, no. 31, available online at http://www.iisd.ca/basel/cop9/, p. 14.

69 For details see: Letter dated 5 May 2004 from the Assistant Secretary-General, Incharge of the UN Office of Legal Affairs to the Executive Secretary of the Basel Convention, available on the website of the Convention at http://www.basel.int.

70 For details see: UNEP, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its eighth meeting*, Nairobi, Kenya, 27 November – 1 December 2006, UNEP/CHW.8/16, p. 47-8.

At COP-9 (June 2008), a number of participants urged the COP to forget about the legal technicalities surrounding Article 17(5) and focus on the substance and objectives of the Ban. These delegates stressed the need to find concrete solutions to protect vulnerable countries and their populations from the environmental and health threats posed by hazardous wastes. In that context, many welcomed the COP-9 President's proposal to start exploring means through which the Ban's objectives could be met, as well as the offer by Switzerland and Indonesia to lead an informal, brainstorming session to that effect. Others were sceptical and preferred a stronger resolution to ensure the prompt entry into force of the Ban Amendment, which they said would put pressure on all countries to ratify it and enforce it. Furthermore, because parties have been reluctant to modify the Amendment before its entry into force, they said that only this development would open the possibility of revising it in light of technological and economic developments. Among these, they said, were the trading of products not traditionally considered "wastes," such as old computers, and the possibility that, with the industrialization of many non-Annex VII countries, growth in South-South trade in hazardous wastes would increase.

To resolve the controversial issue, the President made a statement on the possible way forward on the Ban Amendment. In his statement, the President, inter alia stated that he strongly believed that it was important to have a mechanism that would safeguard vulnerable countries and ensure the environmentally sound management of wastes, that took into account recent trends in technologies for recovery and recycling. He noted that there was no consensus among Parties as to the interpretation of the provision regulating the number of ratifications required for entry into force of an amendment under the Convention. He called upon parties to: expedite ratification of the Ban Amendment, facilitate its entry into force; and create enabling conditions, through country-led initiatives conducive to the goal of the amendment, as these contribute to gathering momentum to encourage ratification. The President stressed that for the objectives of the Ban Amendment to be achieved, capacity building and global partnerships were vital; and

invited all parties to join the initiative, which sought to launch a process by which parties work together to bring the Convention closer to achieving the objectives of the Ban Amendment.

In the decision on the President's statement on the Ban Amendment, the COP acknowledged the President's Statement on the way forward on the Ban Amendment; and invited parties to take into consideration, wherever possible, the Statement annexed to the decision.[71] Another decision requests the Open-ended Working Group to continue at its seventh session the development of a draft decision to reach an agreed interpretation of paragraph 5 of Article 17 of the Basel Convention in accordance with international law, taking into account the work of the Conference of the Parties on the matter at its ninth meeting and the non-exhaustive list of possible elements for consideration by the OEWG.[72]

Following this a Indonesian-Swiss country led initiative (CLI) to develop recommendations for the tenth meeting of the Conference of the Parties to the Basel Convention (COP 10) for a way forward to protect vulnerable countries without adequate capacity to manage hazardous wastes in an environmentally sound manner from unwanted import of hazardous waste and to ensure that transboundary movement of hazardous wastes, especially to developing countries, constitute an environmentally sound management of hazardous wastes as required by the Basel Convention has commenced its work. The CLI is intended to be an informal process in which three rounds of informal talks are proposed to take place before COP-10.[73]

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71 Decision IX/26: President's statement on the possible way forward on the Ban Amendment, UNEP, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its ninth meeting*, Bali, Indonesia, 23-27 June 2008, UNEP/CHW.9/39, p. 51-2.

72 Decision IX/25: Addressing the interpretation of paragraph 5 of the article 17 of the Basel Convention, Ibid., p. 50-1.

73 For details see: Concept Note: Indonesian-Swiss Country led Initiative to improve the effectiveness of the Basel Convention, and other information available on the website of the Basel Convention: http://www.basel.int/ convention/ cli/ index.html (last accessed on 20 July 2009).

C. Basel Protocol on Liability and Compensation

The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal was adopted at the Fifth Conference of Parties (COP-5) on10 December 1999.[74] The negotiations for the Protocol began in 1993 in response to the concerns of developing countries about their lack of funds and technologies for coping with illegal dumping or accidental spills. The objective of the Protocol is to provide for a comprehensive regime for liability as well as adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes, including incidents occurring because of illegal traffic in those wastes. The Protocol addresses who is financially responsible in the event of an incident. Each phase of a transboundary movement, from the point at which the wastes are loaded on the means of transport to their export, international transit, import, and final disposal, is considered. The adoption of Protocol represents a significant advancement in the regime of civil liability for environmental damage. However, nearly ten years after its adoption the Protocol has not yet entered into force. Till date, it has been ratified only by 9 States and 20 Parties are required for its entry into force.[75]

It may be noted that following the adoption of the Protocol, efforts have been made to facilitate its early entry into force by the successive meetings of the Conference of Parties to the Basel Convention. In this regard, COP VI called upon the Parties to the Basel Convention to expedite the process of ratification, acceptance, approval of or accession to Basel Protocol.[76] COP VII and VIII called upon all Parties and organizations that were in a position to do so to make financial or in-kind contributions for the organization of

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74 The Protocol was adopted vide Decision V/29 of COP V. For text see, UNEP, Report of the Fifth Meeting, note 58, pp. 99-121. The text is also reproduced in *IJIL*, vol. 41 (2001), pp. 167-84; and is also available on the website: http://www.basel.int/text/documents.html (last accessed on 14 July 2009).

75 For the list of signatories and parties to the Protocol is available on the website: http://www.basel.int/ratif/protocol.htm (last accessed on 14 July 2009).

76 For details see Decision VI/15: Basel Protocol on Liability and Compensation, COP VI Report, note 61, p. 76;

workshops for addressing various aspects of and obstacles to the process of ratification of or accession to the Basel Protocol.[77] COP IX appealed to Parties to the Convention to expedite the process of ratifying the Protocol to facilitate its entry into force at the earliest opportunity.[78]

D. Electronic Waste

It is estimated that some 20 to 50 million metric tonnes of e-waste – which includes lead, cadmium, mercury and other hazardous substances – are generated worldwide every year as a result of the growing demand for computers, mobile phones, TVs, radios and other consumer electronics. The Eighth Conference of the Parties to the Basel Convention in 2006 adopted the Nairobi Declaration on the Environmentally Sound Management of Electrical and Electronic Waste.[79] The Parties agreed to accelerate efforts to reduce the risks posed to human health and the environment by the dramatic worldwide growth in electronic wastes. Priorities would include launching pilot projects to establish take-back systems for used electronic products, strengthening global collaboration on fighting illegal traffickers and promoting best practices through new technical guidelines.

The Declaration calls for an urgent action to address the illegal trade in e-wastes. It recognizes the need to improve national policies, controls and enforcement efforts, and urges industry to pursue "green design" by phasing out the need for hazardous components and managing the entire life cycle of its products. It urges the Governments to develop effective regulatory regimes that empower the market to respond positively to the challenge of e-wastes. It encourages Governments to promote by partnering with the private

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77 For details see Decision VII/28: Basel Protocol on Liability and Compensation, COP VII Report, note 66, p. 64; Decision VIII/25: Protocol on Liability and Compensation , COP VIII Report, note 65, p. 52.

78 Decision IX/24: Protocol on liability and compensation, COP IX Report, note 70, p. 49.

79 UNEP, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on its eighth meeting,* Nairobi, 27 November -1 December 2006, UNEP/CHW.8/16 dated 5 January 2007, p. 108.

sector and with civil society, collection chains that channel obsolete goods back to their original manufacturers for recovery and recycling.

E. Ship Dismantling

The benefits and risks currently presented by the ship dismantling industry are heatedly debated. The issue has become a priority on the international agenda. Much work is being carried out in many international and regional fora to come to a sustainable ship dismantling industry that safeguards those employed in it and protects the environment, while recognizing the vital role the industry plays in the economies of certain States.[80]

The issue of "Dismantling of Ships" came up on the agenda of Conference of Parties in 1999. [81] Following the mandate from the COP, a Joint Working Group of the Basel Convention, the International Maritime Organization and International Labour Organization was established. A decade of work by this Joint Working Group paved the way for adoption by the International Conference on the Safe and Environmentally Sound Recycling of Ships, held in Hong Kong, People's Republic of China, from 11 to 15 May 2009, of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009. This new Convention, is aimed at ensuring that ships, when being recycled after reaching the end of their operational lives, do not pose any unnecessary risk to human health and safety or to the environment. It is considered to be an important milestone for the sustainable development of the shipping industry.[82]

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80 For details see section on the "Dismantling of Ships", on the website of the Basel Convention, Available online at http://www.basel.int/ships/index.html (last accessed on 11 April 2009).

81 Decision V/28 on *Dismantling of Ships,* note 57, p. 56.

82 For details see Press Briefing 21 of International Maritime Organization, "New international convention adopted to ensure safe and environmentally sound ship recycling", 18 May 2009, available on IMO's website: at: http://www.imo.org/. Detailed information may be accessed by under the head "Recycling of Ships" in the section on Marine Environment. (last accessed on 23 June 2009).

It may be recalled that the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) approved the text of the draft ship recycling convention for adoption at a conference in 2009, when it met for its 58th session in July 2008. The new convention provides regulations for the design, construction, operation and preparation of ships so as to facilitate safe and environmentally sound recycling, without compromising the safety and operational efficiency of ships; the operation of ship recycling facilities in a safe and environmentally sound manner; and the establishment of an appropriate enforcement mechanism for ship recycling, incorporating certification and reporting requirements. Ships to be sent for recycling will be required to carry an inventory of hazardous materials, specific to each ship, while an appendix to the convention provides a list of hazardous materials whose installation or use in ships is prohibited or restricted in shipyards, ship repair yards, and ships of parties to the future convention. Ship recycling yards will be required to provide a "Ship Recycling Plan", to specify the manner in which each ship will be recycled, depending on its particulars and its inventory. Parties would be required to take effective measures to ensure that ship recycling facilities under their jurisdiction comply with the convention.

V. Conclusion

The Basel Convention is a significant step forward in efforts to alleviate the problems posed by transboundary movement of hazardous wastes. International cooperation to solve the problem having consequences beyond national borders forms the underlying basis of this Convention. The Convention's fundamental principles of waste minimization, proximity of disposal, environmentally sound management of waste, and 'cradle to grave' monitoring of waste by means of an international control system laid down the basis on which, in the last twenty years, an international hazardous waste management regime has been developed, implemented and has become firmly rooted in the international environmental governance structure. The adoption of the Basel Ban Amendment, Basel Protocol on Liability and Compensation, Basel Declaration on Environmentally Sound Management of Hazardous Wastes, the on-going consideration of e-waste issues reflect the dynamism of the

Convention, as well as the capacity of its various decision-making bodies to effectively address newer challenges. The establishment of Compliance Committee to promote the implementation of the Convention and the recent adoption of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships in May 2009 can also be considered to be significant achievements. Despite these significant accomplishments, the full objectives of the Basel Convention will not be realized until the generation of hazardous waste is minimized.

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TRADE AND ENVIRONMENT INTERFACE: IMPLICATIONS ON DEVELOPING COUNTRY'S TRADE

R. Rajesh Babu*

I. Introduction

The recent years have seen an increase in tension over the interface between trade and environmental regulations, particularly because of the use of environmental measures to gain trade advantage. This debate centres to a large extent around the concerns of the developing countries, whose products and services could be the subject of protectionist measures on the pretext of protection of environment. There is at the same time a genuine and growing concern among the community of states that the negative effects of globalization and liberalization of international trade could have on the environment. Equally genuine are the concerns of the developing countries that they could be the easy target of "green protectionism."[1] Another fact of this debate is the growing fear among the developed countries that they would lose business to the products originating from developing countries where environmental standards are lower, the cost of production cheaper and the possibility of pollution-intensive industries moving to

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1 Green protectionism is described as the deliberated use of an environmental disguise for regulations that are in fact aimed at protecting domestic industry. Aaron Cosbery, "The Trade, Investment and Environment Interface", in Shahrukh Rafi Khan (ed), *Trade and Environment: Difficult Policy Choices at the Interface* (London: Zen Books), at p. 13.

countries with lower standards, taking with it jobs and revenue. In addition, the thrust of this debate, to a large extent, is due to the pressure and lobbying of Western environmentalists and civil society organizations, urging for stronger and better environmental standards.

While the developing countries are conscious of their role and the need for the protection of the global environment, the preferred approach has been to develop international environment standards through conclusion of multilateral environment agreements. Indeed, serious efforts are made in this direction at multilateral fora and most developing countries are active parties to the negotiations. However, there exist among many, particularly the Western civil society organizations, that these multilateral approaches are slow, insufficient and ultimately lack strong implementation power. This has made the World Trade Organization (WTO) and its Dispute Settlement Body (DSB)[2] to be looked upon as the perfect medium for enforcement of environmental standards. Armed with a strong enforcement mechanism and the ability to enforce its decisions, the WTO DSB has become the battle ground in the trade and environment debate. Thus, environmental measures are introduced through the exception provided under Article XX of the General Agreement on Trade and Tariffs.

From the developed countries perspective, the enactment of unilateral measures for the protection of environment[3] could serve many purposes and also present opportunities: firstly, adoption of environment friendly measures would mean catering to the lobbying of the environment groups within their country, and secondly, such measures could provide disguised protection for the domestic industry by denying market access for developing country's 'like

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2 The Dispute Settlement Body was established under the *Understanding on the Rules and Procedure governing the Settlement of Disputes* (DSU), 1994.

3 There is also a possibility that regulations that are in fact aimed at environment protection, because of the ambiguity in implementation, could be the subject of lobbying to interpret the regulation for their own benefit. Aaron Cosbery, "The Trade, Investment and Environment Interface", in Shahrukh Rafi Khan (ed), *Trade and Environment: Difficult Policy Choices at the Interface* (London: Zen Books), at p. 13.

products'.[4] In other words, by adopting a unilateral measure, the onus of protection of environment is transferred from the national government to that of the WTO DSB and it falls on the Panel/Appellate Body to adjudicate on the appropriateness of such unilateral measures taken by a Member. This in turn makes the WTO DSB the centre of trade and environment debate, turning the attention of the Western environmentalist from their national government to that of the WTO. The political pressures brought by these groups have considerably influenced the interpretation of the WTO Appellate Body and Panel, and essentially made law that affected the developing countries adversely.[5]

The WTO and its predecessor the GATT 1947, though are member driven organizations, have been the target of environmental groups in challenging the WTO decision making on trade and environment issues as antidemocratic and thus lack legitimacy.[6] The fundamental premise was that while the GATT/WTO Agreement provides sufficient leeway for the protection of the environment, the GATT/WTO adjudication bodies have repeatedly struck down environment friendly measures and taken a pro-trade stand.[7] However, this traditional argument/view changed with the ruling of

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4 See Grether, Jean-Marie and Jaime de Melo, "Globalization and Dirty Industries: Do Pollution Haven Matter?", *NBER Working Paper Series* , 2003, 9776.

5 Jagdish Bhagwati, "After Seattle: Free Trade and the WTO", in Roger B. Porter, Pierre Sauvé, Arvind Subramanian, and Americo Beviglia Zampetti, eds., *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (CBG/Brookings Institution 2001), pp. 60-61.

6 Gregory C. Shaffer, "The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters" Harvard *Environmental Law Review*, vol. 25, 2001, 1-93, at p.1.

7 At the November 1971 meeting of the GATT Council of Representatives, it was agreed that a *Group on Environmental Measures and International Trade* (EMIT Group) be established. This group would only convene at the request of Contracting Parties, with participation being open to all. Up until 1991, no request had been put forward for its activation. Between 1971 and 1991, environmental policies began to have an increasing impact on trade, and with increasing trade flows, the effect of trade on the environment had also become more evident. WTO, Trade and Environment at the WTO, Trade and Environment Division,(WTO Secretariat, Geneva)

the Appellate Body in the *US -Shrimp/Turtle I and II* cases,[8] which is considered as a turning point in the trade and environment interface. This decision marked a paradigm shift in the approach of the Appellate Body in dealing with unilateral environmental measures having trade implications. By sanctioning the legitimacy and broadening the scope of such measures within the WTO framework, the jurisprudential evolution of trade and environment interface has tilted the balance towards environment protection, particularly in areas were no international standardization or agreement is concluded. This development has been seen with great concern by the developing countries, particularly because, with the relaxed criteria sanctioned by the Appellate Body for unilateral environment measures, the developed countries could distort the flow of goods from the developing countries to their markets (market access commitments).

The Asian-African Legal Consultative Organization (AALCO), since the inception of the WTO and the initiation of the Doha Development Round of Negotiations in 2001, has been consistently following and reporting with much interest the developments in the Committee on Trade and Environment and the discussions and deliberations in the negotiations. AALCO has always felt the seriousness of the issues in terms of the implications that the environmental measures might have on the market access of exports of the developing countries.

It is in this context that this paper seeks to understand the implication of the Appellate Body ruling in *US - Shrimp/Turtle* cases from the perspective of developing countries. The paper would focus on the defence available under the GATT Article XX 'General Exceptions', which provides the Member States the leeway necessary for the protection of environment. Article XX of GATT is the most important provision governing the operations of the WTO affecting environment and has been the subject of elaborate scrutiny by the Panel/Appellate Body. The paper also undertakes an analysis of the jurisprudential evolution of the GATT Article XX, in the context of

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[8] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998) and *United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5*, WT/DS58/AB/RW (2001)

environment measures. More importantly, the Paper will focus on the decisions and interpretation delivered by the Appellate Body in the *Shrimp/Turtle* cases which is alleged to have permitted back door entry of those issues which are not settled in the WTO, in favour of the United States of America (US) and the European Communities (EC). This has considerably diluted the position of the developing countries and has become a disguised restriction against their exports.[9]

II. The GATT/WTO Legal Framework for the Protection of Environment: The General Exceptions

The WTO was established with the objective of promotion and regulation of international trade. The WTO rules at the same time provide sufficient scope for Members to pursue national environment policies and goals. For instance, the preamble of the Marrakesh Agreement Establishing the WTO enshrines the objectives of sustainable development and seeks to protect and preserve the environment. The WTO Members recognized that "their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living ... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".[10] The Ministerial Decision on Trade and Environment adopted during the Uruguay Round in 1994 established a Committee on Trade and Environment (CTE) with the aim of making "international trade and environmental policies mutually supportive".[11]

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9 "Not only does it evidence the Appellate Body's continued accretion of power, it opens procedural doors not negotiated by the WTO Members." Arthur E. Appleton, "Shrimp/Turtle: Untangling the Nets", *Journal of International Economic Law* (1999) 477-496, at 478.

10 Preamble, *Marrakesh Agreement Establishing the WTO* 1995.

11 The WTO CTE's competence in the field of trade and environment is limited to trade policies and to the trade-related aspects of environmental policies which have a significant effect on trade.

The WTO Agreement and its Annex form part of a "single undertaking", and all Members shall accept all the obligations envisaged in the Agreements without any reservations.[12] The WTO Agreement also provides for instances or exceptional circumstances were the WTO Members could deviate from its obligations to pursue national policies concerning protection of human, animal or plant life or health, however, within certain parameters. The most prominent provision is found in GATT Article XX.[13] Though applicable only in exceptional circumstance, GATT Article XX has been used as a defence for environment protection measures and has been the source of contention in the WTO and the GATT. Not surprisingly, the defence under this provision is most often resorted to by the developed countries, in particular the US, to justify unilateral extraterritorial environment protection measures having serious implication on their trade obligations undertaken within the GATT/WTO regime, and is constantly used to advance their trade agenda in the guise of environment protection. Very often the

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12 *Marrakesh Agreement Establishing the WTO* 1995 (The Final Act). The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", was signed by ministers in Marrakesh on 15 April 1994 is 550 pages long. In addition to the texts of the agreements, the Final Act also contains texts of Ministerial Decisions and Declarations which further clarify certain provisions of some of the agreements.

13 Any tendency to use the provisions as a means of securing economic advantages rather than environmental or health benefits is protected through two subsidiary agreements - The Agreement on Sanitary and Phytosanitary (SPS) Measures and the Agreement on Technical Barriers to Trade (TBT). The SPS provides that when restrictions on trade are applied they must be consistent with recognized international standards. Any other standards applied (i.e. standards for which there may be no international standard) must be based on solid scientific evidence and supported by a risk assessment process and provisions created for affected parties to require presentation of the supporting justification. The TBT is intended to reduce the potential for countries to use technical standards as hidden barriers to trade. Technical standards which are restrictive of trade may only be applied, subject to some caveats, for certain legitimate purposes—protecting the environment; national security; prevention of deceptive practices; and protecting human health and safety and animal and plant health and life. Kristalina Georgieva and Muthukumara Mani "Trade and the Environment Debate: WTO, Kyoto and Beyond", available at URL: http://www.siteresources.world bank.org/INTRA NETTRADE /.../TradeEnvironment.doc

developing countries have found themselves at the receiving end of these actions initiated under Article XX exception.

The excerpt of GATT 1994 Article XX which offers defense for environment measures is given below:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> *(b)* necessary to protect human, animal or plant life or health;
>
> *(d)* necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
>
> *(g)* relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;".[14]

According to this Article, a Member State could undertake measures for the protection of human, animal or plant life or health and for the conservation of exhaustible natural resources. The chapeau (preamble) of the Article provides the guideline as to how this measure has to be applied, that is, the measure shall not be applied in a manner which is "arbitrary or unjustifiable or a disguised restriction on international trade". In other words, the WTO Members are "free to adopt national environmental protection policies provided that they do not discriminate between imported and domestically produced like products (national treatment

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14 Article XX, GATT 1994.

principle), or between like products imported from different trading partners (most-favoured-nation clause)".[15]

The Appellate Body in *US – Shrimp* case described the nature and purpose of Article XX as a balance of rights and duties:

> [A] balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.
>
> The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[16]

In *US – Gasoline*, the Appellate Body concluded its analysis by emphasizing the function of Article XX with respect to national measures taken for environmental protection:

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15 Non-discrimination is one of the main principles on which the multilateral trading system is founded. It secures predictable access to markets, protects the economically weak from the more powerful, and guarantees consumer choice. WTO, "Trade and Environment at the WTO", *WTO Secretariat Working Paper*, Geneva 2004, p. 7. The Appellate Body in *US – Gasoline*, while in discussing the preambular language (the "chapeau") of GATT Article XX, stated "[T]he chapeau says that '*nothing in this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures …'The exceptions listed in Article XX thus relate to all of the obligations under the *General Agreement*: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well." See *US – Gasoline*, Appellate Body Report p. 24.

16 *US – Shrimp*, Appellate Body Report, paras. 156 and 159.

> It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests — including the protection of human health, as well as the conservation of exhaustible natural resources — to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as it concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.[17]

The defence offered under Article XX is two-tiered: the challenged measure must meet the criteria of one of the Article XX exceptions and the measure must pass the requirements of the chapeau.[18] In the *US – Gasoline* case, the Appellate Body presented the two-tiered test under Article XX, as follows:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the

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17 *US – Gasoline*, Appellate Body Report, pp. 30–31.

18 *US – Gasoline*, Appellate Body Report, p. 22. See also WTO, GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, paragraphs (b), (d) and (g), *Note by the Secretariat*, WT/CTE/W/203 of 8 March 2002, p. 5.

> measure under [one of the exceptions]; second, further appraisal of the same measure under the introductory clauses of Article XX.[19]

In other words, to qualify under Article XX, the defending party must demonstrate that the measure (i) falls under at least one of the ten exceptions - paragraphs (a) to (j) - listed under Article XX, and (ii) satisfies the requirements of the preamble, i.e. is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and is not "a disguised restriction on international trade".

As regards the individual exception under Article XX paragraph (b), the panel, in *US – Gasoline*, determined that this demonstration includes the following steps:

> "(1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
>
> (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and
>
> (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX".[20]

Similarly, the exception under Article XX paragraph (d), the Appellate Body in *Korea – Various Measures on Beef* case, noted that the party invoking paragraph (d) had to demonstrate the following steps:

> For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a

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19 *US – Gasoline*, Appellate Body Report, pp. 20-21.

20 *US – Gasoline*, Panel Report, para. 6.20. See also *US – Tuna (EEC)*, para. 5.29.

justification has the burden of demonstrating that these two requirements are met.[21]

Finally, under Article XX paragraph (g), the Appellate Body in *US – Shrimp* followed a three-step analysis:

"(1) The measure at issue is "a measure concerned with the conservation of 'exhaustible natural resources' within the meaning of Article XX(g)"; [22]

(2) "Article XX(g) requires that the measure sought to be justified be one which 'relat[es] to' the conservation of exhaustible natural resources"; [23] and

(3) The measure at issue is "a measure made effective in conjunction with restrictions on domestic production or consumption".[24]

If the measures falls under any one of the exceptions in Article XX, paragraphs mentioned above, the second step would then be to satisfy the requirements of the chapeau, ie, the measures are not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and is not "a disguised restriction on international trade".

The Appellate Body in *US - Shrimp* noted that "in order for a measure to be applied in a manner which would constitute 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', three elements must exist. First, the application of the measure must result in *discrimination*. … Second, the discrimination must be *arbitrary* or *unjustifiable* in character. … Third, this discrimination must occur *between countries where the same conditions prevail*. In *US - Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not

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21 *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, 10 January 2001, para. 157.

22 *US – Shrimp,* Appellate Body Report, para. 127.

23 *Ibid.*, para. 135.

24 *Ibid.*, paras. 143-145.

only between different exporting Members, but also between exporting Members and the importing Member concerned.[25]"[26]

III. The GATT/WTO 'Environment' Jurisprudence

The protection of environment through trade measures has been a subject of serious debate and constant tension for the last 15 years.[27] Most often, these differences have ended up in litigation before the panel for adjudication. These disputes have challenged the compatibility of measures taken by the US and the European Union (EU) in the name of protection of environment and/or the consumer with the GATT/WTO Agreement. Because of the highly controversial and sensitive nature of the disputes, most panel Reports/findings during the GATT period was never adopted.[28] Under the GATT, six panel proceedings involving an examination of environmental measures or human health-related measures under Article XX have been completed. They are: *US – Canadian Tuna,*[29] *Canada – Salmon and Herring,*[30] *Thailand – Cigarettes,*[31] *US – Tuna (Mexico),*[32] *US – Tuna (EEC)* [33] and *US – Automobiles* [34]. Out of the six decisions, only three were adopted and three remained unadopted,[35]

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25 *(footnote original)* Appellate Body Report on *US – Gasoline*, pp. 23–24.

26 *US – Shrimp*, Appellate Body Report para. 150.

27 Reinhard Quik and Christian Lau, "Environmentally Motivated Tax Distinctions and WTO Law: The European Communities Green Paper on Integrated Product Policy in Light of the 'Like Product' and 'PPM-' Debates", *Journal of International Economic Law*, vol. 6, no. 2, 2003, 419-458, at p. 419.

28 The GATT 1947 requirement of 'positive consensus' of the GATT Contracting parties for adoption of reports of the GATT Panel was the major impediment in the adoption of the report. Most often, the losing contracting party would block the adoption of the report.

29 *US – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91.

30 *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* adopted on 22 March 1988, BISD 35S/98.

31 *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* adopted on 7 November 1990, BISD 37S/200.

32 *US – Restrictions on Imports of Tuna*, circulated on 3 September 1991, not adopted, DS21/R.

33 *US – Restrictions on Imports of Tuna*, circulated on 16 June 1994, not adopted, DS29/R.

34 *US – Taxes on Automobiles*, circulated on 11 October 1994, not adopted, DS31/R.

35 *US – Tuna (Mexico), US – Tuna (EEC)* and *US – Automobiles.*

owing to positive consensus requirement. All these findings were against the US unilateral measures.

However, in the WTO, the change from 'positive' consensus requirement to 'reverse' or 'negative consensus' has brought the trade-environment debate to the fore.[36] The reason being that, any finding of the panel or Appellate Body would now be automatically adopted by the DSB, thereby giving legal effect. So far, under the WTO, there have been several disputes[37] that led to the adoption of panel and Appellate Body reports, however the most important among them was the *US – Gasoline,*[38] and *US – Shrimp* [39] including one case of *US – Shrimp*, *Recourse to Article 21.5 of the DSU*. Some of the interpretations handed down by the panel and the Appellate Body in these cases is said to have far reaching implications on the developing countries.

In the GATT period, the most prominent/controversial was the *US - Tuna/Dolphin* cases because of the anti-environment stand taken by the panel. In the WTO, the *US - Shrimp/Turtle* cases bought before the DSB changed the course of environmental jurisprudence in WTO legal system. These decisions, together, offer a best understanding

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36 In the GATT 1947, because of the 'positive' consensus requirement, any Contracting Party, including the respondent itself, could block the adoption of the Report. However, in the WTO DSU, this has been changed to 'negative' consensus. Now a Report of the Penal/Appellate Body will not be adopted only if all the Members decides so (consensus). In other words, the Report would almost always be adoption automatically.

37 Some of the disputes that panel and Appellate Body reports were adopted: *US – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R of 20 May 1996 (*US – Gasoline*); *EC – Measures concerning Meat and Meat Products*, AB Report, WT/DS26/AB/R and WT/DS48/AB/R of 16 January 1998 (*EC – Hormone*); *US - Import Prohibition of Certain Shrimp and Shrimp Products, AB* Report WT/DS58/AB/R of 6 November 1998 *(US – Shrimp*); *EC – Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R of 5 April 2001 (*EC – Asbestos); US - Import Prohibition of Certain Shrimp and Shrimp Products, AB Report* WT/DS58/AB/RW of 21 November 2001 *(US – Shrimp – 21.5)* .

38 *US – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report and Panel Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

39 *US – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report and Panel Report adopted on 6 November 1998, WT/DS58.

on the evolution of Article XX general exception in the context of environment considerations in trade matters. Together with these cases, a brief outlines of some of the pertinent decisions in other cases are also analysed below.

A. GATT Cases

The first case brought before the GATT panel was the *US - Canadian Tuna*,[40] case. The measure at issue was the import prohibition by the US as retaliation for the seizure of 19 fishing vessels and arrest of US fishermen by Canada. The US argues that the prohibition was intended to ensure that certain stocks of fish were properly conserved and managed and to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species. The panel found that the prohibition was not discriminatory under the chapeau of Article XX, because the US had taken similar actions against imports from other countries and for similar reasons,[41] however, came to the conclusion that the US had provided no evidence that domestic consumption of tuna and tuna products had been restricted in the US, which was required under the second part of Article XX(g).[42] Accordingly, the Panel found that the import prohibition was contrary to Article XI:1, and not justified under either Article XI:2 or Article XX(g) of the GATT.

In a similar case *Canada - Salmon*,[43] the Canadian prohibition[44] on exportation or sale for export of certain unprocessed herring and salmon was challenged by the US. Canada argued that these export restrictions were part of a system of fishery resource management destined at preserving fish stocks, and therefore were justified under Article XX(g). The panel agreed that salmon and herring stocks were 'exhaustible natural resources' and that the harvest limitations were 'restrictions on domestic production' within the meaning of Article

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40 *US – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91. adopted on 22 February 1982, BISD 29S/91.

41 *Ibid.*, para. 4.8.

42 *Ibid.*, para. 4.11.

43 *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted on 22 March 1988, BISD 35S/98.

44 Canadian Fisheries Act 1976.

XX(g).[45] However, Canada limited purchases of unprocessed fish only by foreign processors and consumers and not by domestic processors and consumers. The Panel, in light of all these factors, found that the "prohibitions could not be deemed to be *primarily aimed at* the conservation of salmon and herring stocks and at *rendering effective the restrictions* on the harvesting of these fish",[46] and concluded that the export prohibitions were not justified by Article XX(g).

In the third case, *Thailand - Cigarettes* case[47], Thailand prohibited importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes. The US challenged the measure, complained that the import restrictions were inconsistent with GATT Article XI:1, not justified by Article XI:2(c), nor by Article XX(b). Thailand argued, *inter alia*, that the import restrictions were justified under Article XX(b) because the government had adopted measures which could only be effective if cigarettes imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than domestically produced cigarettes. The World Health Organisation (WHO), in its expert advice, indicated that there were sharp differences between cigarettes manufactured in developing countries such as Thailand and those available in developed countries, which used additives and flavourings.[48] These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and created the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting.[49] However, the panel concluded that import restrictions imposed by Thailand could not be considered "necessary" within the meaning of Article XX(b) because there were alternative measures consistent

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45 *Canada – Salmon*, BISD 35S/98, para. 4.4.

46 *Ibid.*

47 *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990, BISD 37S/200.

48 *Ibid.*, para. 52. On the basis of a memorandum of understanding between the parties, the panel asked the WHO to present its conclusions on technical aspects of the case, such as the health effects of cigarette use and consumption.

49 *Ibid.*

with the GATT, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.[50] Accordingly, the measure was found inconsistent.

The next two GATT disputes that ignited the trade-environment debate were: the *US - Tuna-Dolphin* cases (*Tuna-Dolphin* I (1991) and *Tuna-Dolphin* II (1994)). These cases for the first time tested the legitimacy of using environmentally-unfavourable foreign process and production methods (PPMs) as justification for trade restrictions.[51] In both these cases, the adverse Panel Reports were blocked by the US from adoption. *US - Tuna-Dolphin I* revolved around a US primary embargo on Mexican tuna caught using purse-seine nets that incidentally trapped dolphins. *US - Tuna-Dolphin II* centered on a secondary US embargo against countries who re-exported tuna from nations under the US primary embargo. These rulings contributed towards reactivating the dormant GATT Working Group on Environmental Measures established in 1971.[52]

In the *US – Tuna/Dolphin I (Mexico)*,[53] the US Marine Mammal Protection Act (MMPA) required a general prohibition of "taking"[54] and importation into the US of marine mammals, without explicit authorization. Under this Act, the importation of commercial fish or fish products which have been caught with commercial fishing technology which results in the incidental killing or incidental serious injury of ocean mammals (dolphins) in excess of US standards were prohibited. In particular, the importation of yellowfin tuna harvested with purse-seine was prohibited (*primary nation embargo*), unless the competent US authorities establish that (i) the government of the harvesting country has a programme regulating taking of marine mammals that is comparable to that of the US, and (ii) the average rate of incidental taking of marine

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50 *Ibid.*, para. 75. For instance, the panel suggested that a ban on cigarette advertising could curb the demand while meeting the requirements of Article III:4.

51 ICTSD, "GATTS Tuna - Dolphin Disputes", Available at http://ictsd.net/i/publications/3470.

52 *Ibid*.

53 *US – Restrictions on Imports of Tuna*, unadopted, DS 21/R, BISD 39S/155, 3 September 1991.

54 "Taking" includes harassment, hunting, capture, killing or attempt thereof.

mammals by vessels of the harvesting nation is comparable to the average rate of such taking by US vessels.[55] Imports of tuna from countries purchasing tuna from a country subject to the primary nation embargo are also prohibited (*intermediary nation embargo*).[56]

On Mexico's claime that the import prohibition on tuna and tuna products was inconsistent with Articles XI, XIII and III of GATT, the US argued that the *embargo* was consistent with Article III and, in the alternative, was justified by Article XX, paragraphs (b), (d) and (g). The Panel found that the import prohibition under the *direct* and the *intermediary* embargoes did not constitute internal regulations within the meaning of Article III, was inconsistent with Article XI:1 and was not justified by Article XX paragraphs (b) and (g).[57]

The most important finding of the panel in this case is that, based on the drafting history, Article XX(b) did not extend to measures protecting human, animal or plant life *outside of the jurisdiction of the country* taking the measure,[58] meaning the extraterritorial application of national legislations. The panel observed that if the broad interpretation of Article XX(b) suggested by the US were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the GATT.[59] The panel also rejected an extrajurisdictional application of Article XX(g).[60] Further, the panel viewed that the US measure could not be considered to be 'necessary' within the meaning of Article XX(b) as the US had failed to demonstrate that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the GATT, in particular through the

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55 The average incidental taking rate (in terms of dolphins killed each time the purse-seine nets are set) for that country's tuna fleet must not exceed 1.25 times the average taking rate of US vessels in the same period.

56 See WTO, "GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, paras (b), (d) and (g)", *Note by the Secretariat*, WT/CTE/W/203 of 8 March 2002.

57 The panel also found that the *intermediary* embargo was not justified under Article XX(d).

58 *Ibid.*, para. 5.26.

59 *Ibid.*, para. 5.27.

60 *Ibid.*, para. 5.32.

"*negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas*."[61] Concerning Article XX(g), the panel recalled that the US linked the maximum incidental dolphin-taking rate which Mexico had to meet to the taking rate actually recorded for US fishermen. The panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins in terms of Article XX(g).[62] Though this decision was considered as anti-environmental, from Mexico's perspective, the decision was extremely threatening to its fishing industry because the decision found that the US "dolphin safe" private labeling regime complied with GATT rules.[63]

In *US – Tuna/Dolphin II*[64], a complaint by the EC and Netherlands, the panel reaching a similar conclusion as in the case of *Tuna/Dolphin I*, that neither the *primary* nor the *intermediary* nation embargo was covered under Article III, that both were contrary to Article XI:1 and not covered by the exceptions in Article XX (b), (g) or (d) of the GATT. The panel found that measures taken so as to *force other countries to change their policies could not be considered "necessary"* for the protection of animal life or health in the sense of Article XX(b),[65] or primarily aimed at the conservation of exhaustible natural resources, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g).[66] However, the panel departed from the earlier panel and found that there was no basis for the contention that Article XX applied only to policies related to the protection of human, animal or plant life and

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61 *Ibid.*, para. 5.28 (Emphasis added).

62 *Ibid.*, para. 5.33.

63 Shaffer 2001, n. 7, p. 29. On 24 October 2008, Mexico requested consultation with US regarding the legality of "dolphin-safe" labels for tuna products in the US. Mexico claims the "Dolphin Safe" label is a trade barrier and construed in a way that effectively and unfairly keeps Mexican producers out of the US market. If a panel is established, it would examine the requirements for a label that is entirely voluntary, even if it is granted by a government agency. See ICTSD, "Tuna-Dolphin Update", *News and Analysis*, vol. 13, no. 1, March 2009

64 *US - Restrictions on Imports of Tuna,* unadopted, circulated on 16 June 1994, DS29/R.

65 *Ibid.*, para. 5.39 (emphasis added).

66 *Ibid.*, para. 5.27.

health or to the conservation of natural resources located within the territory of the contracting party.[67]

B. WTO cases

The first case brought before the WTO DSB where the Appellate Body had the opportunity to consider Article XX of GATT was in *US – Gasoline*.[68] The US Environmental Protection Agency (EPA) promulgated the Gasoline Rule to reduce air pollution in the US. According to this rule, reformulated gasoline only could be sold in most polluted areas of the country.[69] The Gasoline Rule applied to all US refiners, blenders and importers of gasoline.[70] Venezuela and Brazil challenged the consistency of the Gasoline Rule. The US argued that the Gasoline Rule was consistent with Article III, and, in the alternative, was justified under the exceptions contained in GATT Article XX, paragraphs (b), (g) and (d).

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67 *Ibid.*, paras. 5.16-5.17, 5.32. For discussion on GATT Tuna I and II see generally, Matthew Hurlock, "The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the *Tuna/Dolphin* Decision", *Columbia Law Review*, vol. 92, no. 8, 1992, pp. 2098-2161; Benedict Kingsbury, "The Tuna-Dolphin Controversy, The World Trade Organization, and the Liberal Project to Reconceptualize International Law", *Yearbook of International Environmental Law*, vol. 5, 1994, pp.1-40; Stephen J. Porte, "The Tuna/Dolphin Controversy: Can the GATT Become Environment-Friendly?", *Georgetown International Environmental Law Review*, vol. V, 1992, pp. 91-116; Paul J. Yechout, "In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards", *Minnesota Journal of Global Trade*, vol. 5, 1996, pp. 247 – 275; Thomas E. Skilton, "GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy", *Cornell International Law Journal*, vol. 26, 1993, pp. 455 - 494.

68 *US – Standards for Reformulated and Conventional Gasoline*, Panel Report and Appellate Body Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R adopted on 20 May 1996.

69 In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 (conventional gasoline) could be sold.

70 The Gasoline Rule requires any domestic refiner which was in operation for at least 6 months in 1990, to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990. EPA also established a statutory baseline, intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. Compliance with the baselines was measured on an average annual basis.

The Appellate Body found that the baseline establishment rules contained in the Gasoline Rule was covered within the terms of Article XX(g), it failed to meet the requirements of the chapeau of Article XX.[71] It noted that the chapeau addressed not so much the questioned measure or its specific contents as such, but rather *the manner in which that measure is applied*. Accordingly, the chapeau is animated by the principle that while Members have a *legal right* to invoke the exceptions of Article XX, they should not be so *applied* as to lead to an abuse or misuse.[72]

This decision was followed by the *US – Shrimp/Turtle* case.[73] In this case, the US barred import of shrimp from all countries that did not use Turtle Excluder Devices (TED), which permits turtles to escape from shrimp nets. The US law[74] provides, *inter alia*, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US, unless the harvesting nation is certified to have a regulatory programme and an incidental 'take rate' comparable to that of the US, or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles. In other words, all Members must impose on their fishermen the use of TEDs at all times if they want to be certified and export shrimp products to the US. The measure was adopted in the name of protection of turtles, an endangered species and 'exhaustible natural resource' and to save environment.[75] India, Malaysia, Pakistan and Thailand challenged the US measure and claimed that it violated WTO law (Articles I, III, and XI of the GATT) by barring the importation of their shrimp and shrimp products.

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71 The Panel found that the Gasoline Rule was inconsistent with Article III, and could not be justified under paragraphs (b), (d) or (g).

72 *US – Gasoline*, Appellate Body Report, 1996, p. 21

73 *US - Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body and the Panel, WT/DS58/AB/R and WT/DS58/R adopted on 6 November 1998.

74 Section 609 of Public law 101-102, enacted in 1989.

75 Sea turtles have been adversely affected by human activity, either directly (exploitation of their meat, shells and eggs), or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans). The US Endangered Species Act of 1973 lists as endangered or threatened the five species of sea turtles occurring in US waters and prohibits their take within the US, within the US territorial sea and the high seas.

The Appellate Body found that the sea turtles constituted "exhaustible natural resources" for purposes of Article XX(g),[76] and that Section 609 was a measure "relating to" the conservation of an exhaustible natural resource.[77] The Appellate Body, however, added that although the US import ban was related to the conservation of exhaustible natural resources and, thus, covered by GATT Article XX(g) exception, it could not be justified under Article XX because the ban constituted "arbitrary and unjustifiable" discrimination under the chapeau of Article XX.[78] It ruled, with regard to the chapeau, that discrimination resulted not only when countries in which the same conditions prevail were treated differently, but also when the application of the measure at issue did not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting countries.[79] In arriving at this conclusion, the Appellate Body also took into account the failure of the US to engage the appellees, as well as other Members exporting shrimp to the US, *in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before unilaterally enforcing the import prohibition against the shrimp exports of those Members.*[80]

The Appellate Body also ruled that there is no rule, *per se,* of impermissibility in the text of Article XX. The Appellate Body observed that the panel had made an error of law, "namely to assume that unilateral measures that conditioned market access on the policies of the exporting countries are, as a matter of general principle, not justifiable under Article XX. This was an assumption common to the panel ruling in *Shrimp/Turtle* and to the older

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76 *US – Shrimp*, Appellate Body Report, para. 134.

77 *Ibid.*, para. 142.

78 *US –Shrimp,* Appellate body Report, WT/DS58/AB, 12 October 1998, para 121. However, the Appellate Body ruled that there is no per se rule of impermissibility in the text of Article XX. Rather, the article imposes two requirements on trade measures that condition market access on other countries' policies. First, such measures must fit within one of Article XX's specific exceptions. Second, such measures must be applied in a manner consistent with Article XX's chapeau (preamble).

79 *Ibid,* para. 165.

80 *Ibid*, para. 166 (Emphasis added).

Tuna/Dolphin rulings".[81] In other words, the Appellate Body 'overruled' all previous GATT/WTO rulings and paved way for unilateral environment measures in WTO. The Appellate Body also ruled that the original words in Article XX, "crafted more than 50 years ago,... [are] by definition, evolutionary... [and] must be read... in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."[82]

The Appellate Body report was adopted by the DSB on 6 November 1998 and the US was given reasonable period of time to being the measure in to conformity with the WTO Agreement. By then, the USA reported to the DSB that it had amended the measure (Revised Guidelines) in question and had complied with the recommendations of the Appellate Body.[83] Malaysia, one of the parties to the original dispute, challenged the US claim of compliance and requested establishment of the compliance review panel under Article 21.5 of the DSU, to determine whether the US had complied with the recommendations and rulings of the DSB in *US – Shrimp*. This lead to the establishment of the panel in the *US – Shrimp (Article 21.5),*[84] which ultimately gave the Appellate Body an opportunity to further clarify and elaborate on its original holding delivered three years earlier.[85]

Malaysia maintained that Section 609 continues to violate Article XI: 1 and that the US was not entitled to impose any prohibition in the absence of an international agreement or international standards allowing it to do so. Malaysia first asserted that the US should have

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81 Robert Howse, "The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate", *Columbia Journal of Environmental Law*, vol. 27, 2002, p. 491. URL: http://www.worldtradelaw.net/articles/howseshrimp.pdf, at p.6.

82 *See* WT/DS58/AB/R, paras. 129-131.

83 In order to implement the recommendations and rulings of the DSB, the US issued the Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the "Revised Guidelines"). *US – Shrimp (Article 21.5)*, Panel Report, para. 2.22.

84 *US – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to article 21.5 by Malaysia*, Appellate Body Report and Panel Report, adopted on 21 November 2001, WT/DS58/AB/RW.

85 *Ibid.*

negotiated and *concluded* an international agreement on the protection and conservation of sea turtles before imposing an import prohibition. The US argued that the Revised Guidelines responded to the obligation to remedy all inconsistencies identified by the Appellate Body under the chapeau of Article XX.[86]

The original panel recalled the Appellate Body's finding in *US – Shrimp* concerning the nature of the chapeau of Article XX:

> the task of interpreting and applying the chapeau is (…) essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (…) of the GATT 1994.[87]

The panel added that the recognition that the protection of migratory species was "best achieved through international cooperation significantly moved the line of equilibrium towards a bilaterally or multilaterally negotiated solution, thus rendering recourse to unilateral measures less acceptable".[88] However, on the question whether the obligation is to *conclude* an international agreement or *only efforts to negotiate*, it concluded that the obligation of the US was an *obligation to negotiate*, as opposed to an obligation to conclude an international agreement.[89] The panel also concluded that in this case the US had made 'serious good faith efforts' to negotiate an international agreement. In other words, according to the Panel, it was because of the failure of the negotiating process that the US was constrained to undertake unilateral measure which is justified under Article XX.

The Appellate Body upheld the panel's finding and rejected Malaysia's contention that avoiding "arbitrary and unjustifiable discrimination" under the chapeau of Article XX required the *conclusion* of an international agreement on the protection and conservation of sea turtles.[90] On the Malaysian argument that the

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86 *Ibid.*, para. 5.24.
87 *US – Shrimp*, Appellate Body Report, para.159.
88 *US – Shrimp (21.5)*, Panel Report, para. 5.59.
89 *Ibid.*, para. 5.67.
90 *US – Shrimp (Article 21.5)*, Appellate Body Report, para. 134.

measure at issue resulted in "arbitrary or unjustifiable discrimination" because of the lack of flexibility of the US measure, the Appellate Body once gain upheld the panel's finding and agreed with the reasoning of the panel that conditioning market access on the adoption of a programme *comparable in effectiveness*, allowed for sufficient flexibility in the application of the measure so as to avoid "arbitrary or unjustifiable discrimination".[91]

IV. The *Shrimp/Turtle* Decisions and its Implication on the Developing Countries Trade

The developing countries, since the beginning had opposed the inclusion of environment agenda because they feared that their autonomy and their economic growth would be limited if environmental obligations are imposed.[92] In the GATT they opposed the convening of the EMIT Working Group which was established in 1971. Later in the Uruguay Round of negotiations, which established the WTO, they opposed the establishment of the Committee on Trade and Environment (CTE). The precise reason was that "they feared the Working Group and Committee could serve to justify US and European unilateral trade measures against developing country imports, resulting in "green protectionism."[93] In the GATT Council meetings, the representative of Thailand, speaking on behalf of the ASEAN group, asserted that "for GATT to address environmental protection problems as a general trade policy issue was inappropriate,"[94] the Moroccan delegate questioned whether the GATT had the "competence to legislate on this subject" and the Egyptian delegate concurred that GATT "was not the forum to deal with this matter."[95] Despite the opposition, the environmental agenda, though in a limited way, found its way into the Uruguay

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91 *Ibid.*, para. 144.

92 David Kay and Eugene Skolnikoff, "International Institutions and the Environmental Crisis: A Look Ahead", *International Organization*, vol. 26, p. 474

93 Martin Khor, "South Concerned over New Issues at WTO", www.iatp.org/iatp; Cristina Hernandez, "Green Protectionism: Does the end justify the means?", in *Striking a Green Deal: Europe's Role in Environment & South-North Trade Relations*, EDRC and InterEdit S. A., pp. 9 - 16; Shaffer 2001, n. 6, p. 24.

94 GATT, *Minutes of Meeting of GATT Council: Held in the Centre William Rappard on 6 February 1991*, C/M/247, at 22.

95 Shaffer, 2001, n. 6, p. 24.

round of trade negotiations, and was imposed on the developing countries during the last phase with the argument that those who would oppose it would bear responsibility for the Round's failure.[96]

The analysis of the GATT/WTO jurisprudence reveals an attempt by the developed countries to bring in environmental criteria within the WTO through the panel/Appellate Body process. The analysis also reveals that the source of the trade conflicts has stemmed from US efforts to unilaterally employ trade restrictions to impose its domestic environmental policies on other countries. It is also clear that the GATT Article XX defense is primarily invoked by developed countries to restrict imports from the developing countries, and not vice-a-versa. In almost all the cases the US failed to justify retaining of its unilateral measures, however, they made sure that all adverse GATT reports are blocked. In the WTO, however, there seem to be change in scenario. While the US technically lost most cases, they seem to win the cases as far as interpretation was concerned. In other words, the interpretation of the Article XX of the GATT seem to relax considerably the criteria for invoking such defence, thereby increasing the scope of such measures in future which could be easily justified. In particular, the *US – Shrimp (Turtle)* case, was a watershed as far as the trade environment interface was concerned.

The interpretation of Article XX by the Appellate Body in *US – Shrimp/turtle* has far-reaching implications on the developing counties. The interpretation of Article XX in the *Shrimp/turtle* case was a contrast to the earlier dispute panel decisions in the *Tune/Dolphin* and other cases. By doing so, the WTO has effectively revised the international rules governing one of the persistent sources of trade conflict in favours of the economically advanced countries. One of the traditional understanding in the GATT/WTO, which has undergone a change was that the environmental provisions under the WTO are limited to the adoption of product-

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[96] Martin Khor, South Concerned over New Issues at WTO, www.iatp.org/iatp, in Shaffer 2001, n. 6, p. 24 (footnote). For a discussion on the different positions of the WTO membership on the subject: Sabrina Shaw and Risa Schwartz, "Trade and Environment in the WTO – State of Play", *Journal of World Trade* vol. 36, 2002, p. 129.

related measures "necessary to protect human, animal or plant life or health," or "relating to the conservation of exhaustible natural resources."[97] Members are within their rights under WTO rules to set criteria for the way products are produced, if their production method leaves a trace in the final product.[98] Unincorporated Process and Production Methods (PPMs)[99] or 'non-product related PPMs', ie, PPMs which leave no trace in the final product[100] was considered outside the scope of the WTO. Many developing countries argue that measures which discriminate between products based on unincorporated PPMs, should be considered WTO inconsistent.[101] The Appellate Body in *US – Shrimp/turtle* seems to have adopted a new approach, and ruled that measures addressed at a foreign PPM (i.e., how shrimp are produced) could be justified under GATT Article XX, thereby diluting the idea that PPMs could not be used to distinguish among products.[102] Thus, the 'shrimp-turtle' sanctioned that the US could limit/prohibit imports on the basis of how a product was produced to pursue 'legitimate' environmental objectives. An implication of this ruling is that non-trading concerns could find its way as new trade barriers.

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97 Article XX, GATT.

98 For example, vegetables/fruits grown using pesticides, with there being pesticide residue in the vegetables/fruits itself. The SPS Agreement encourages countries to base SPS measures on international standards, recommendations and guidelines. This process is called *harmonisation.* The organisations responsible for developing standards are: Codex Alimentarius Commission, for food safety; International Office of Epizootics (OIE), for animal health; International Plant Protection Convention (IPPO), for plant health.

99 A process or production method is the way in which a product is made. For example, traditional paper-making requires trees to be grown and harvested, the wood to be processed, the pulp often to be bleached, and so on. Other paper may be made from post-consumer waste, or without chlorine - processes arguably involving less environmental impact. See UNEP/IISD, *Trade and Environmental: A Handbook*, Second Edition, Geneva: International Institute for Sustainable Development (2005), p. 53.

100 For example, cotton grown using pesticides, with there being no trace of the pesticides in the cotton.

101 WTO, "Trade and Environment at the WTO", WTO Secretariat Working Paper, Geneva, (2004) p. 17.

102 In this, a distinction has been made between shrimps produced by killing turtles and without killing turtles.

Another criterion for justifying measures under article XX developed in this case was the justification of the Appellate Body of extraterritorial application of national legislations for the protection of environment policies, provided the country has made 'serious good faith efforts' to negotiate an international agreement. The Appellate Body found that the panel had made an *error of law* by assuming that "unilateral measures that conditioned market access on the policies of the exporting countries are, as a matter of general principle, not justifiable under Article XX".[103] The position was clarified further by the Appellate Body at the *Shrimp/Turtle* Article 21.5 compliance review stage. The Appellate Body made it clear that the above statement was not *dicta*, but was intended to give legal guidance to future panels.[104] The Appellate Body endorsed the panel ruling that there is no need for 'conclusion' of an international agreement. In fact the Appellate Body found that such a requirement would be unreasonable.[105] The requirement for justifying a measure under GATT Article XX is rather modest that is, "an ongoing serious, good faith effort to reach a multilateral agreement.[106] In other words, a demonstration of prior good faith negotiation would 'insulate' a unilateral measure from being characterized as 'unjustifiable discrimination'. This interpretation has sanctioned unilateral extraterritorial measures that could be placed by the any Member and simultaneously could engage in indefinite "good faith" negotiations for the purpose of concluding an international agreement.

This would mean that the US and other economically powerful blocs could practically arm twist rest of the WTO membership to comply with global environmental standards which it had set either through forced negotiations or unilateral actions. Both ways, the developed countries could be at an advantage. The reason being,

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103 Robert Howse, "The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate", *Columbia Journal of Environmental Law*, vol. 27, 2002, p. 491. URL: http://www.worldtradelaw.net/articles/howseshrimp.pdf, at p. 6. *US – Shrimp,* WT/DS58/AB, para 121.

104 *US – Shrimp,* Article 21.5 Appellate Body Report (Malaysia), WT/DS58/AB/RW of October 22, 2001.

105 *Ibid*, para. 123.

106 *US – Shrimp,* Article 21.5 Panel report, para. 6.1.

firstly, if the unilateral measures are in place, it could limit market access of its competitors and secondly, if an international agreement is imposed on other countries, this would be an additional burden on the competitors (increase in cost of production) and most environment friendly technologies and products are developed in the West and would come at a high price. More importantly, the Appellate Body ruling has ensured that international law making is unilateral, not by mutual consent of the member States. Any economically powerful Member could now, compel others to negotiate labour standards, human rights etc, or face unilateral action.

Not surprisingly, the Appellate Body failed to consider that there is a contradiction in the US eagerness to protect 'turtles' which seem to disappear in the Climate Change negotiations, the result of which could save most 'exhaustible natural resources" including turtles. Further, if the developed countries were serious about their global environment, they would not have opposed the two "environmental" items of primary interest to only developing counties, concerning "the export of domestically prohibited goods"[107] and "the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights" (TRIPs) in relation to sustainable development objectives.[108]

Australia, during the adoption by the DSB of the *US – Shrimp/Turtle (Article 21.5)* case,[109] expressed its concerns that the Panel had incorrectly relied on whether or not the US had engaged in ongoing serious good faith efforts to reach a multilateral agreement as a determining factor for the measure's consistency with the chapeau of Article XX of GATT 1994. The key issue should have

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107 See Shaffer 2001, n. 7, p. 38.

108 WTO CTE, *Report of the Meeting Held on 11-13 September 1996*, WT/CTE/M/12 of 21 Oct. 1996. India has also proposed that countries prohibit the granting of patents to inventions made with foreign genetic material obtained in contravention of the principles of "sovereign rights" over genetic resources and "fair and equitable" sharing of benefits set forth in Article 15 of the UN Convention on Biological Diversity. See India's remarks in WT/GC/W/147 and WT/GC/W/225. See Shaffer 2001, n.6, p. 38

109 WTO, *Minutes of DSB Meeting, held on 21 November 2001*, WT/DSB/M/113, 17 Dec. 2001.

been whether the measure itself was justified by the chapeau. This would have required an examination of the steps taken by the US to obviate or eliminate the unjustifiably discriminatory nature of the trade restriction – including in the design, extent and implementation of the measure. The progress of the Indian Ocean initiative on sea turtle conservation had demonstrated the existence of a viable, non-discriminatory alternative to the unilateral import restriction. The initiative provided for a wide and comprehensive range of actions to address turtle conservation, including the provision of technical expertise and genuine capacity building in the country. If the US believed that, in addition to these actions, trade restrictive measures were needed to promote sea turtle conservation, it could pursue these proposals through the Indian Ocean initiative – rather than through a unilaterally determined import restriction. This would reaffirm the importance of multilateral solutions to transboundary environmental problems.[110]

The case also marked a dangerous trend by the Appellate Body towards extending its powers beyond those that are permitted under the DSU.[111] By giving a new interpretation to certain DSU provisions, the Appellate Body has overstepped the bounds of its authority by undermining the balance of rights and obligations of Members. And this would also mean that the Appellate Body is bringing in rights and obligations that was never part of the Uruguay Round of Negotiations or agreement.

This ruling which has opened the gates for unilateral measures in the guise of environment protection is unacceptable and incompatible with the multilateral trading system. The cumulating effect is that with the traditional trade barriers such as tariffs and quotas steadily declined,[112] such US and EU environmental regulations would increase significantly. Reacting strongly to this ruling, Jagdish Bhagwati states:

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110 Ibid., p. 5.

111 WTO, *Minutes of the DSB Meeting held on 6 November 1998*, DSB Special Session, WTO Document WT/DSB/M/50 of 14 December 1998, at p. 5.

112 The Uruguay Round has reduced the amount of average *ad valorem* tariffs to under five percent, down from an average of 40 percent *ad valorem* at the end of World War II.

> I have some sympathy for [the] view that the dispute settlement panels and the appellate court must defer somewhat more to the political process instead of making law in controversial matters. I was astounded that the appellate court, in effect, reversed longstanding jurisprudence on process and production methods in the Shrimp/Turtle case. I have little doubt that the jurists were reflecting the political pressures brought by the rich-country environmental NGOs and essentially made law that affected the developing countries adversely.[113]

Chimni warns that

> …the implications of the Appellate Body report in *Shrimp Turtle II are grave, and perhaps of greater import than the explicit agenda included in the Doha Ministerial Declaration.* The significance of the Appellate Body report in *Shrimp Turtle II* goes far beyond the potential threat of non-tariff barriers to third world trade. It raises the issue of the place and function of the dispute settlement system in the WTO scheme of things. For *the Appellate Body Report highlights that WTO dispute settlement bodies can alter the balance of rights and obligations contained in adopted agreements by creating new obligations through the process of interpretation.* That is to say, the dispute settlement system is being used by the powerful states to bring in new rules through the backdoor.[114]

Chimni further notes that:

> When the Appellate Body Report in *Shrimp Turtle II* is read with the work programme on 'Trade and Environment' included in the Doha Ministerial Declaration it becomes clear that the third world countries have lost the battle of keeping environment regulation out of WTO. It also becomes clear from the Doha Ministerial Declaration that in due course third world countries will have to secede to the WTO other core aspects of sovereign economic decision-making, viz, in the area of investment, competition policy and government procurement.[115]

Thus, if the WTO adjudicating bodies interpreted agreements to "permit countries to take trade measures so as to force other

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113 Jagdish Bhagwati, "After Seattle: Free Trade and the WTO", in Roger B. Porter, Pierre Sauvé, Arvind Subramanian, and Americo Beviglia Zampetti, eds., *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (CBG/Brookings Institution 2001), pp. 60-61.

114 B.S. Chimni, "WTO and Environment: Legitimisation of Unilateral Trade Sanctions", *Economic and Political Weekly*, vol. 37, no. 2 (2002), 133-137, at p. 133.

115 *Ibid*., p. 137.

countries to change their policies within their jurisdiction, the balance of rights and obligations among member countries, in particular the right of access to markets would be seriously impaired. If this were carried forward to its logical conclusion, the GATT/WTO could no longer serve as a multilateral framework for trade among contracting parties".[116]

VI. Conclusion

"If the daunting challenges now facing the world are to be overcome, it must be through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order".[117] Environment protection is one such international challenge which needs to be seriously addressed multilaterally by the community of nations. Be it protection of marine mammals or ozone layer, unilateral actions with extraterritorial applications is not the solution, but would only increase the tension and further polarization. One must accept that there are genuine environment concerns and no country should shy away from their responsibilities towards the environment. At the same the international community, particularly the developed countries, must be cautious of the implications of some of their unilateral measures on the developing countries' economies and market access capabilities, whose priorities within their country are directed towards poverty eradication, food security and other developmental concerns.

It is a fact that trade is an important means for securing resources needed for environmental protection. Trade liberalization and market access opportunities in favour of products of export interest to developing countries are fundamental to help them achieve sustainable development. The WTO Agreement also recognizes and accepts the special situation of developing countries and the need to

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116 India, "Unilateral Trade Measures by States" Paper submitted to WTO by India, December 15, 1998, URL: http://www.indianembassy.org/policy/WTO/ wto_india/ unilateral_india_98.htm

117 Lord Bingham said in his Grotius Lecture of November 2008 at the Institute. Bingham Centre for the Rule of Law, Joshua Rozenberg, Member of the Bingham Centre Appeal Board, interviewed Lord Bingham.

assist them in their process of economic growth. The special and differential treatment provisions in the WTO Agreements calls on the Members to provide technical assistance and capacity building for the developing countries to assist them in the implementation of the WTO obligations. However, the promises of the financial and technology transfers to developing countries, made at the Uruguay Round and in the WTO Agreements to help them meet their economic development and environmental protection needs, have not been fulfilled. [118] It is in this context that one must understand and appreciate the interface between the trade and environment.

[118] WTO, "Trade and Environment at the WTO", WTO Secretariat Working Paper, Geneva 2004, p. 8.

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PALESTINE AND INTERNATIONAL LAW: AN OVERVIEW

Mohammed Hussain K. S.*

I. Introduction

The question of Palestine evokes diverse reactions among international lawyers and academicians. However, the fact remains that Palestine is under occupation for the past several decades. International law addresses the question of Palestine. However, its enforcement still remains a dream because of which one of the world's most deplored human tragedy continue unabated. This article analyses the Balfour Declaration, Palestine mandate, United Nations Resolutions 181 (II) of 1948 and 242 of 1967 from an international law perspective. It further analyses the right to resistance of the Palestinian people under international law. It also highlights the violations of international law committed by Israel, including the war crimes committed in Gaza and the issue of accountability under international law. It also examines the ICJ Advisory Opinion on the Wall Case; the peace process; and AALCO's role in the consolidation of the Asian-African views on this pertinent topic. The need to establish an independent and sovereign State of Palestine, which is an international legal obligation, is also emphasized

II. Balfour Declaration –Genesis of the Crisis

On 2 November 1917, Arthur James Balfour, British Foreign Minister, addressed the following communication to Lord

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Rothschild, a leader of the British Jewish community, for transmission to the Zionist Federation of Great Britain and Ireland:

> His Majesty's Government view with favour *the establishment in Palestine of a national home for the Jewish people,* and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country. (Emphasis Added)

This communication, which came to be known as the Balfour Declaration, is the key source of the crisis in the Palestine and the creation of the State of Israel. The developments that followed build up a major crisis which still engulfs the Middle East after nine decades.

Professor Henry Cattan[1] argues that the Balfour Declaration is legally null and void for either one of the following reasons. First, the British Government, as the author of the Balfour Declaration, possessed no sovereignty or dominion in Palestine enabling it to make a valid promise of any rights. On the date that the Balfour Declaration was made, Palestine formed part of Turkey, and neither its territory nor its people were under the jurisdiction of the British Government. The Declaration was void on the basis of the principle that a donor cannot give away what does not belong to him. For Great Britain had no sovereign rights over Palestine; it had no proprietary interest; it had no authority to dispose of the land. The Declaration was merely a statement of British intentions and no more.[2] The second reason, Professor Cattan points out that the

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1 See Henry Cattan, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* (Longman Group Ltd., London, 1973), pp. 18-21.

2 Sol M. Linowitz, "Analysis of a Tinderbox: The Legal Basis for the State of Israel", *American Bar Association Journal,* vol.43 (1957), pp. 522-523, cited in Note 1, p. 18; Jules Basdevant, formerly President of the International Court of Justice, has observed: No State has the right to extent at will its own competence at the expense of other States and other peoples. International law does not recognize the British State has having competence other than over its own territories and over its own subjects and nationals, cited in *The Palestine Question*, Seminar of Arab Jurist in Palestine (Institute for Palestine Studies, Beirut, 1968), p. 69. Also see Muhammad H.El-Farra, "The Role of the United

Balfour Declaration is also void on the ground that it violated the natural and legitimate rights of the people of Palestine. It was immaterial whether the Balfour Declaration sought to impose the establishment in Palestine of a Jewish State or simply of a national home for Jews; it was in either case invalid and could in no way affect or impair the rights of the Palestinians.[3] An attempt was made to validate the Declaration by seeking to secure its approval *ex post facto* by the former territorial sovereign in Palestine.[4]

Nations vis-à-vis the Palestine Question," *Law and Contemporary Problems*, vol.33 (1968), pp.68-77.

3 But the author of the Declaration was not concerned with the wishes or the feelings or the rights of the original inhabitants of Palestine. Arthur Balfour wrote in a memorandum to the British Government dated 11 August 1919: "In Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country…The four great powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in agelong traditions, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land.", *Documents on British Foreign Policy 1919-1939*, 1st series, Vol.IV, HMSO, See note 1, p. 19.

4 Article 95 of the Treat of Sevres, which was concluded between Turkey and the Allied Powers on 10 August 1920, provided that the administration of Palestine would be entrusted to a Mandatory who would be responsible for putting into effect the Declaration made on 2 November 1917 by the British Government in favour of the establishment in Palestine of a national home for the "Jewish people". The Treaty of Sevres, however, was not ratified by the Turkish National Assembly, which rejected some of its provisions, including its reference to the Balfour Declaration. Three years later, the allied powers, concluded with Turkey, the Treaty of Lausanne of 24 July 1923. Unlike the abortive Treaty of Serves, the new Treaty omitted any reference to the Balfour Declaration or to its acceptance by Turkey. This fact is significant because by excluding any reference in the Treaty of Lausanne to the Balfour Declaration, Turkey, as the previous sovereign over Palestine, did not, upon renunciation of its sovereignty, mortgage the future of Palestine with any obligation relating to the establishment of a Jewish national home. Thus, the attempt made in the treaty of Sevres to validate the Balfour Declaration by securing its acceptance by the previous territorial sovereign failed. Such an attempt would, in any event, have been futile and ineffectual, for the reason that, at the date of the Treat of Sevres, Turkey no longer possessed any sovereignty over Palestine. See note 1, p. 20.

There remains an argument which has been advanced to the effect that even though the Balfour Declaration initially lacked juridical value, it was validated by its inclusion in the Mandate for Palestine. Shabtai Rosenne, an Israeli spokesman at the UN, said with reference to the Balfour Declaration:

> Its precise legal status at the time it was made may be open to discussion but that problem is secondary in view of the fact that the Council of the League of the Nations incorporated its text into the Preamble to the Mandate for Palestine.[5]

Professor Cattan points out that argument of an *ex post facto* validation of the Balfour Declaration by the British Mandate has no legal basis. An accumulation of nullities cannot generate a valid juridical act. Therefore, the inclusion of the Balfour Declaration in an international instrument, such as the Mandate, did not and could not cure its invalidity. The inclusion of the Balfour Declaration in the Mandate, instead of validating it, had the effect of invalidating the Mandate itself.

Moreover, Balfour Declaration[6] was not in accordance with the spirit of the pledges of independence given to the Arabs both before and after it was issued. The disposition of Palestine was determined in close consultation with a political organization whose declared aim was to settle non-Palestinians in Palestine. Not only did this ignore the interests of the native Palestinians, but it was a deliberate violation of their rights.

III. The Palestine Mandate: Travesty of International Law?

The concept of the Mandate was accepted and its basic objectives were laid down in Article 22 of the Covenant of the League of Nations, which was adopted on 25 April 1919, was inspired on the principle, that war settlements at the end of the First World War

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5 See note 1, p. 21. Cited from J.W.Halderman (ed.), *The Middle East Crisis*, (Oceana, 1969), p.48. Rosenne argues that: "Ottoman sovereignty over the territory of Palestine, as over many other of its territories, was ceded to the Allied powers in the Peace Treaty".

6 *The Origins and Evolution of the Palestine Problem: 1917-1988,* Part-I, 1917-1947 (Division for Palestinian Rights, United Nations, 1990).

should not involve any annexations but should be based upon the principle of self–determination of peoples:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, *there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation* and that securities for the performance of this trust should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.
>
> The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
>
> *Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.* The wishes of these communities must be a principal consideration in the selection of the Mandatory…[7] (Emphasis added)

Palestine, as one of the territories detached from the Turkish Empire, was one of the countries whose independence was thus provisionally recognized "subject to the rendering of administrative advice and assistance by a Mandatory". Moreover, The Allied Forces promised Arab peoples sovereignty over their territory if they assisted them in defeating the Central Powers. These assurances appear in correspondence during 1915-1916 between Sir Henry McMahon, British High Commissioner in Egypt, and Sherif Husain, Emir of Mecca, who held the special status of the Keeper of Islam's most holy cities. He thus acted as a representative of the Arab

[7] Article 22, The Covenant of the League of Nations, 1919.

peoples, although not exercising formal political suzerainty over all of them. In the course of the protracted correspondence, the Sherif unequivocally demanded "independence of the Arab countries", specifying in detail the boundaries of the territories in question, which clearly included Palestine. McMahon confirmed that "Great Britain is prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca".[8] Professor Arnold J. Toynbee, who dealt with the Palestine question as a member of the British Foreign Office at the time of the Peace Conference, wrote in 1968:

> ... as I interpret the Hussein-McMahon correspondence, Palestine had not been excepted by the British Government from the area in which they had pledged themselves to King Hussein to recognize and support Arab independence. The Palestinian Arabs could therefore reasonably assume that Britain was pledged to prepare Palestine for becoming an independent Arab state.[9]

On 25 April 1920 at San Remo the Supreme Council of the Allied Powers decided to allocate the mandate over Palestine to Great Britain. Parties most concerned, the Arabs of Palestine, were not even consulted regarding the terms of the Mandate. On 24 July 1922, the Palestine Mandate was approved by the Council of the League of Nations.

A perusal of the preamble of the Palestine Mandate and Article 2 and 6 clearly gives the intentions of the mandate:

> Whereas the Principal Allied Powers have also agreed that the *Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favor of the establishment in Palestine of a national home for the Jewish people*, it being clearly understood that *nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country*; and

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[8] United Nations, note 6.

[9] Robert John and Sami Hadawi, *The Palestine Diary, vol. I (1914-1945)* (New World Press, New York, 1970), p. xiv., as cited in United Nations, note 6.

> Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country; and (Emphasis added)
>
> …
>
> Article 2: The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.
>
> …
>
> Article 6: The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

Professor Henry Cattan points out that the principal objectives of the Mandate were to put into effect the Balfour Declaration, and facilitate Jewish immigration.[10] The Palestinian Arabs rejected the mandate and took the position that it could not impair or prejudice their rights as the original inhabitants of Palestine. They never conceded its validity. Even during the mandate, the Palestinians protested against this denial of their fundamental rights. The report of the Royal Commission (of 1937) records these protests.[11] In fact,

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10 See Note 1, p. 26; Also see Michael J. Cohen, *The origins and Evolution of the Arab-Zionist Conflict,* (University of California Press, 1987); Mutaz Qafisheh, "Genesis of Citizenship in Palestine and Israel: Palestine Nationality During the period 1917-1925", *Journal of the History of International Law,* vol.11 (2009), pp.1-36.

11 "... though the Mandate was ostensibly based on Article 22 of the Covenant of the League of Nations, its positive injunctions were not directed to the 'well-being and development' of the existing Arab population but to the promotion of Jewish interests. Complete power over the legislation as well as administration was delegated to the Mandatory, who undertook to place the country under such political, administrative and economic conditions as would secure the establishment of the Jewish national home ...

the history of the mandate is the history of the struggle of the Palestinians against the Balfour Declaration, Jewish immigration and the establishment of a Jewish national home in Palestine. [12]

The view taken by the International Court of Justice in the question of the status of South-West Africa is that sovereignty was not transferred to the Mandatory Power:

> The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution [the Mandate] did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants".[13]

The Palestine Mandate was invalid on several grounds[14]: The first ground of invalidity of the Mandate is that by endorsing the Balfour Declaration and accepting the concept of the establishment of a Jewish national home in Palestine it violated the sovereignty of the people of Palestine and their natural rights of independence and self-determination. The second ground of invalidity of the Mandate is that it violated, in letter and spirit, Article 22 of the Covenant of

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"... One member of the Arab Higher Committee dealt more closely with the legal argument. He remarked that the terms of the Mandate are inconsistent with the provisions of Article 22 of the Covenant of the League of Nations. Paragraph 4 of that Article recognizes the existence of two juristic persons - one the community which should govern independently and the other the foreigner who is to assist and advise until the former is able to stand alone. But in Palestine there is one person who governs and who assists himself. Your Majesty is the Mandatory and Your Majesty's Government and their nominees are the Government of Palestine and, while the Preamble speaks of a Mandate, article 1 denies the existence of a Mandate in the proper sense by conferring upon what is called 'the Mandatory' full powers of legislation and administration. The community which is to be provisionally recognized as independent has no existence ...", British Government, *Palestine Royal Commission: Report* - Cmd. 5479 (1937), p. 108. cited in United Nations, note 6.

12 See note 1, p. 27

13 *Advisory Opinion regarding the Status of South-West Africa, ICJ Reports* 1950, p. 132.; According to Professor Quincy Wright: "Communities under 'A' Mandates doubtless approach very close to sovereignty", Quincy Wright, "Sovereignty of the Mandates", *American Journal of International Law*, vol. 17 (1923), p. 696.

14 See note 1, pp.30-33.

the League of Nations, under the authority of which it is purported to be made. The Mandate violated Article 22 in many respects: First, The Covenant had envisaged the mandate as the best method of achieving its basic objective of ensuring the well-being and development of the peoples inhabiting the mandated territories. It is clear that although the mandate system was conceived in the interest of the inhabitants of the mandated territory, the Palestine mandate ran counter to the basic concept of mandates. The contradictions inherent in the Mandate for Palestine arose from the incorporation in it of the Balfour Declaration.[15] As Lord Islington observed when he opposed the inclusion of the Balfour Declaration in the Palestine Mandate: "The Palestine Mandate is a real distortion of the mandatory system."[16] The same distinguished Lord added:

> When one sees in Article 22…that the well-being and development of such peoples should form a sacred trust of civilization, and when one takes that as the note of the mandatory system, I think your Lordships will see that we are straying down a very far path when we are postponing self-government in Palestine until such time as the population is flooded with an alien race.[17]

The Palestine mandate also ran counter to the specific concept of mandates envisaged by Article 22 for countries detached from Turkey at the end of the First World War. In the case of those countries, the intention was to limit the mandate to the rendering of temporary advice and assistance. The framers of the Palestine mandate did not restrict the Mandatory's role to the rendering of administrative advice and assistance, but granted the Mandatory "full powers of legislation and administration" (Article 1). Clearly this was an abuse of the purpose of the mandate under the Covenant. [18] Also, the grant of the Palestine mandate to Great Britain

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15 United Nations, note 6.

16 *Hansard's Reports*, House of Lords, 21 June 1922, p. 1000, cited in note 1, p.31.

17 *Ibid*., p.1002.

18 The whole concept of the Palestine mandate stands in marked contrast to the mandate for Syria and Lebanon which was given to France on 24 July 1922. This mandate conformed to Article 22 of the Covenant. It stated in its preamble: 'whereas the Principal Allied Powers have agreed that the territory of Syria and Lebanon…shall be entrusted to a Mandatory charged with the duty of rendering administrative advice and assistance to the population, in accordance

also violated the Covenant in that it ignored the wishes of the inhabitants, contrary to the provision in Article 22 which required that the wishes of the communities concerned must be a principal consideration in the selection of the mandatory. The Mandatory ignored even the tenuous safeguards laid down in favor of the original inhabitants of Palestine both in the Balfour Declaration and in the Mandate itself. [19]

IV. Resolution 181 (II) of 29 November 1947 and the Partition of Palestine: Issues of Legality

In 1939, the British Government announced in a White Paper that Palestine would be granted its independence within ten years. Since there was uncontrolled immigration of Jews to Palestine, it also announced the limitation of Jewish immigration into Palestine to 75,000 immigrants during the next five years. After this period, no Jewish immigration would be authorised except with Arab consent. In 1947, the situation of the British Government became impossible. Unable to permit any further Jewish immigration into Palestine against the wishes of the majority of its inhabitants, plagued by Zionist demands for more and more immigrants, and harassed by the Zionist campaign of violence, the British Government decided to refer to the UN the question of the future government of Palestine.

When this question came up for discussion at the UN in 1947, the Arab States raised the issue of the invalidity of the Mandate. They asked that the issue be referred by the General Assembly to the International Court of Justice for an advisory opinion. Sub-Committee 2 to the Ad Hoc Committee on the Palestine Question recommended that this legal issue, together with other issues, be referred to the ICJ. However, the recommendations of Sub-Committee 2 were defeated in the General Assembly, where it failed

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with the provisions of Article 22 (paragraph 4) of the Covenant of the League of Nations…"; Article 1 provided: "The Mandatory shall frame, within a period of three years from the coming into force of this mandate, an organic law for Syria and the Lebanon. This organic law shall be framed in agreement with the native authorities and shall take into account the rights, interests and wishes of all the population inhabiting the said territory…".

19 Article 6: "…the rights and position of other sections of the population are not prejudiced,…"

to obtain the required majority. The issue concerning the invalidity of the mandate was formulated as follows:

> Whether the provisions of the Mandate for Palestine regarding the establishment of a Jewish National Home in Palestine are in conformity or consistent with the objectives and provisions of the Covenant of the League of Nations (in particular Article 22), or are compatible with the provisions of the Mandate relating to the development of self-Government and the preservation of the rights and position of the Arabs of Palestine.[20]

The UN General Assembly adopted on 29 November 1947, (Resolution 181 (II), a resolution for the partition of Palestine.[21] The Arab States, as well as several others, declared that they would not consider themselves bound by the General Assembly recommendation since they considered that it was contrary to the United Nations Charter. The validity of the Resolution is questioned on the following grounds[22]: The first ground of invalidity of the resolution lies in the incompetence of the General Assembly of the UN to recommend the partition of Palestine or to create a Jewish State in that country. The Charter of the UN did not give the Organization any right of supervision over existing mandates. The trusteeship system envisaged by Article 77 of the Charter did not apply to territories held under Mandate, except if they came to be placed there under by means of trusteeship agreements.

The United Nations has no right to dictate a solution in Palestine unless a basis for such Authority can be worked out such as has not been done thus far. Such a basis might be found

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20 Official records of the 2nd Session of the General Assembly, Ad Hoc Committee on the Palestine Question, p.300, cited in note 1, p. 29.

21 Resolution 181 (II), 29 November 1947. When the British Government decided in 1947 to refer the future government of Palestine to the UN, the issue was subject of discussion at two sessions of the General Assembly. The General Assembly appointed a Special Committee (UNSCOP) to consider the problem. It came up with two plans, a majority and a minority plan. The majority plan proposed the termination of the mandate and the partition of Palestine, the creation of an Arab State and a Jewish State with economic union between them, and a *corpus separatum* for the city of Jerusalem which would be subjected to a special international regime to be administered by the UN.

22 See note 1, p.42.

by holding that sovereignty over Palestine, relinquished by Turkey in the Treaty of Lausanne, passed to the League of Nations, and has been inherited by the United Nations, a proposition which involves two hazardous steps. Or it might be held that the mandate is still in force and that supervision thereof has passed to the United Nations, which is much more realistic but still somewhat hazardous juridically. The Arabs deny the binding force of the mandate, now or ever, as they deny the validity of the Balfour Declaration on which it was based, and again they are quite correct juridically.[23]

In 1947, the Arab States questioned the competence of the General Assembly to recommend the partition of Palestine. Sub-Committee 2 to the Ad Hoc Committee on the Palestine Question accepted this argument and declared in its Report dated 11 November 1947:

> A study of Chapter XII of the United Nations leaves no room for doubt…neither the General Assembly nor any other organ of the United Nations is competent to entertain, still less to recommend or enforce, any solution other than the recognition of the independence of Palestine and that the settlement of the future government of Palestine is a matter solely for the people of Palestine…Moreover, partition involves the alienation of territory and the destruction of the integrity of the State of Palestine. The United Nations cannot make a disposition or alienation of territory, nor can it deprive the majority of the people of Palestine of their territory and transfer it to the exclusive use of a minority in their country.[24]

The resolution of the General Assembly for the partition of Palestine constituted an encroachment upon the sovereignty of the people of Palestine. This encroachment was not only contrary to principles of law, but also constituted a violation of Article 2(7) of the UN charter, which declares that nothing contained shall authorize the UN to intervene in matters that are essentially within the domestic jurisdiction of any state. Further, in 1947, the Arab

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23 Pitman B.Potter, "The Palestine problem Before the United Nations", *American Journal of International Law,* vol.42 (1948), p.860.

24 Official records of the 2nd Session of the General Assembly, Document A/AC 14/32, 11 November 1947, pp.276-278, cited in Note 1, p.43

States requested the General Assembly to refer the legal issues affecting the Palestine question, including the question of its competence to recommend or enforce any plan of partition of Palestine, to the International Court of Justice for an advisory opinion. It is no secret that the resolution for the partition of Palestine was obtained by means of undue influence and political pressure.[25] The Zionists gained to their cause President Truman,

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[25] The official record of the General Assembly also reflects the pressure that was brought to bear upon delegates and governments in order to vote in favour of partition. Mahmoud Fawzi, the Egyptian delegate, said: "Let us frankly say to the whole world that, despite all the pressure exerted in favour of partition, a majority of the United Nations could not stomach this violation of the principles of the charter." Camiille Chamoun, the Lebanese delegate, declared: "I can well imagine to what pressure, to what manoeuvres your sense of justice, equity and democracy has been exposed during the last thirty-six hours. I can also imagine how you have resisted all these attempts . . . in order to preserve . . . the democratic methods of our organisation. My friend, think of these democratic methods, of the freedom in voting which is sacred to each of our delegations. If we were to abandon this for the tyrannical system of tackling each delegation in hotel rooms, in bed, in corridors and ante-rooms, to threaten them with economic sanctions or to bribe them with promises in order to compel them to vote one way or another, think of what our Organisation would become in the future". Sir Mohammed Zafrullah khan, the delegate for Pakistan, stated: "It is with satisfaction that one notes, Mr President, that you are anxious to secure . . . an undistributed and uninfluenced discussion. whether the vote is going to be equally free and uninfluenced is no longer a matter for satisfaction . . .Those who have no access to what is going on behind the scenes have known enough from the press that . . . the deliberations . . . will not be left free." Mr Dihigo, the Cuban delegate, concluded his speech against partition in these words: "For these reasons, we feel bound to vote against the plan of partition . . . and to adhere firmly to our stand despite the negotiations and despite the pressure which has been brought to bear upon us". Fadel Jamali, the delegate of Iraq, stated: "Great pressure is being brought upon members who have already formulated their point of view, pressure designed to have them change there minds, and power politics is playing havoc with the independence of judgment of the members of this General Assembly . . . It is no secret that some great Powers are bringing pressure upon member States to have this plan adopted. If the United States this plan, we know very well that not be a United Nations, but a plan imposed by power politics". His Royal Highness Amir Faisal Al Saud, delegate of Saudi Arabia, declared: "We have felt, like many others, the pressure exerted on various representatives of this Organisation by some of the big Powers in order that the vote should be in favour of partition. For these reasons, the Government of Saudi Arabia registers on this historic occasion the fact that it does not consider itself bound by the

who put the weight of the US government in support of partition. In his *Memoirs* President Truman complains about Zionist pressure:

> The facts were that not only were there pressure movements around the United Nations unlike anything that had been seen there before but that White House, too, was subjected to a constant barrage. I do not think that I ever had as much pressure and propaganda aimed at the White House as I had in this instance. . . Some of the extreme Zionist leaders were even suggesting that we pressure sovereign nations into favourable votes in the General Assembly.[26]

V. Legal Consequences of Resolution 181 (II) of 1947

Israel declared its independence on 14 May 1948. The establishment of the State of Israel and the territorial acquisitions that followed amounted to serious violations of International law, including human rights and humanitarian law. During the months preceding the end of the Mandate, Jewish forces had moved to occupy key cities and areas in the territory designated for the Arab State. The major part of Jerusalem meant to be internationalized under the partition plan, had also been occupied by Jewish forces. On the termination of the Mandate, Jewish forces moved to occupy further territory beyond the boundaries specified by the Partition resolution.[27] Facing a threat to peace, unprecedented in the two years of the United Nations existence, and which the first two special sessions of the General Assembly had not been able to resolve, the

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resolution adopted today by the General Assembly". Sir Mohammed Zafrullah khan speaking for Pakistan said: "Partition totally lacks legal validity. We entertain no sense of grievance against those of our friends and fellow representatives who have been compelled, under heavy pressure, to change sides and to cast their votes in support of a proposal the justice and fairness of which do not commend themselves to them. Our feeling for them is one of sympathy that they should have been placed in a position of such embarrassment between their judgment and conscience, on the one side, and the pressure to which they and their Governments were being subjected, on the other". Official Records of the General Assembly, 2nd Session, 1947, Vol. II, pp.1330, 1341, 1366, 1385, 1389, 1425, 1426, as cited in note 1, pp.52-53.

26 Harry S. Truman, Memoirs, Vol.II, (Doubleday, New York, 1965), p.158, cited in note 1, p.49

27 *The Origins and Evolution of the Palestine Problem: 1917-1988,* Part-II, 1947-1977 (Division for Palestinian Rights, United Nations, 1990).

Security Council ordered a cease-fire on 29 May 1948, by which time Israel had consolidated its occupation of Palestinian territory beyond that allotted to it by the partition plan. In November 1948, the General Assembly passed another resolution that has become an important document in the Palestine question. Based on the Bernadotte recommendations, resolution 194 (III) had the provisions, among others, to call for the refugee problem to be dealt with in the following terms:

> ... the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible ...

The importance of this resolution derives principally from its specific establishment of the right of peaceful return of the Palestinians to their homes.

On 11 May 1949, one day before the signing of the Lausanne protocols, Israel was admitted to United Nations membership. In a statement to the Political Committee, the Israeli representative declared that his country would observe the principles of the United Nations Charter, and would implement its resolutions. Israel was the only State to have achieved statehood and received territory also through an act of the United Nations. The preamble of the resolution admitting Israel to United Nations membership specifically referred to Israel's undertakings to implement General Assembly resolutions 181 (II) and 194 (III), the two resolutions that formed the centre of the Palestine issue in the United Nations.[28]

The Arab-Israeli war of June 1967, however, brought immediate and direct repercussions on the Palestine question. Israel occupied the West Bank, the Gaza Strip and East Jerusalem as well as territories beyond to control far more than the area claimed by the World Zionist Organization in 1919. The great majority of Palestinians in the West Bank and Gaza were made refugees - many for the second time, having sought refuge in these areas during the

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[28] *Ibid.*

first exodus of 1948. Those that stayed in Israeli occupied territory after 1967 came to form a new category distinct from those within Israel's pre-1967 borders, who were entitled to Israeli citizenship. This new class was one of a people under foreign military occupation, subject to military rule, its repercussions and its consequences for the suppression of civil liberties and rights.[29]

Immediately after the cease-fire of June 1967, the Security Council unanimously passed resolution 237 (1967) which includes, provisions, among others, called upon the Government of Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place and to facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities; and recommended to the Governments concerned the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949.

VI. UN Security Council Resolution 242 of 22 November 1967: Issues of Legality

The Security Council, in its Resolution 242 of 22 November 1967,[30] while emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security, affirmed that the fulfillment of Charter principles required the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles: (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict; and (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force; and affirmed further the necessity of achieving a just settlement of the refugee problem.

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[29] *Ibid.*

[30] For a detailed analysis see, Quincy Wright, "The Middle East Problem", *American Journal of International Law*, vol.64 (1970), pp.270-281.

From the United Nations standpoint, Security Council resolution 242 (1967) was intended to establish a framework for peace in the Middle East. However, it did not explicitly mention Palestine; the only cognizance of the underlying issue of Palestine was in the reference to "the refugee problem". Further, on the territorial plane, resolution 242 (1967), by calling on Israel to withdraw to the pre-1967 war borders, implicitly endorsed Israel's jurisdiction over the territory occupied by Israel in the 1948 war beyond the lines laid down by the partition resolution. Syria and Iraq rejected the resolution, while Egypt and Jordan demanded Israeli withdrawal from all territories occupied in the 1967 war as a pre-condition to any negotiations.[31] The resolution has enabled Israel under the pressure of the occupation of Arab territories to extract Arab recognition of its legitimacy and conquests, and thus reap the benefits of aggression. Any condition attached to the aggressor's withdrawal is contrary to international law. In adopting its resolution of 22 November 1967, the Security Council was influenced much more by considerations relating to the maintenance of a *fait accompli* established by force rather than by the Purposes and Principles of the UN. Its formula for peace is incompatible with the UN Charter, with international law and with General Assembly resolutions. In effect, this formula seeks to establish peace, without restoring justice. [32]

On 22 October, the Security Council adopted resolution 338 (1973), which reaffirmed the principles of resolution 242 and called for negotiations aimed at "a just and durable peace in the Middle East".

VII. Violations of International Law, particularly Human Rights and Humanitarian Law in the Occupied Palestinian Territories (OPT)

The General Assembly has repeatedly reaffirmed the inalienable rights of the people of Palestine to self-determination without external interference and to national independence and sovereignty in Palestine. It has also reaffirmed the inalienable right of the Palestinians to return to their homes and property from which they

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31 United Nations, note 27.

32 See note 1, p. 156.

have been displaced and uprooted. The Assembly also emphasized that full respect for the realization of the inalienable rights of the people of Palestine was indispensable for a solution of the problem and recognized that the Palestinian people are a principal party in the establishment of a just and lasting peace in the Middle East.

The General Assembly in 1968 reasserted the right of the refugees to return to their homes, and established a "Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories".[33] The General Assembly has repeatedly passed resolutions criticizing Israel's actions in the occupied territories. The resolution passed in 1977,[34] gives an idea about the violations of international law committed by Israel in the OPT. the resolution condemned the following Israeli policies and practices:

(a) The annexation of parts of the occupied territories;

(b) The establishment of Israeli settlements therein and the transfer of an alien population thereto;

(c) The evacuation, deportation, expulsion, displacement and transfer of Arab inhabitants of the occupied territories, and the denial of their right of return;

(d) The confiscation and expropriation of Arab property in the occupied territories and all other transactions for the acquisition of land involving the Israeli authorities, institutions or nationals on the one hand, and the inhabitants or institutions of the occupied territories on the other;

(e) The destruction and demolition of Arab houses;

(f) Mass arrests, administrative detention and ill-treatment of the Arab population;

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33 General Assembly resolution 2443 (XXIII) of 19 December 1968.

34 General Assembly resolutions 32/91 C of 13 December 1977; votes: 98 in favour, 2 against, 32 abstentions; 3240 A (XXIX) of 29 November 1974; votes: 95 in favour, 4 against, 31 abstentions; 3525 A (XXX) of 15 December 1975; votes: 87 in favour, 7 against, 26 abstentions; 31/106 C of 16 December 1976; votes: 100 in favour, 5 against, 30 abstentions.

(g) The ill-treatment and torture of persons under detention;

(h) The pillaging of archaeological and cultural property;

(i) The interference with religious freedoms and practices as well as family rights and customs; and

(j) The illegal exploitation of the natural wealth,[35] resources and population of the occupied territories.

As a result of the Israeli policies and practices in establishing settlements in the Palestinian and other Arab territories, occupied since 1967, in resolution 446 (1979) the Security Council determined that the policy of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 had no legal validity and constituted a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East. [36] It called on Israel to abide scrupulously by the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories. [37]

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35 See Gamal Abouali, "Natural Resources under Occupation: The Status of Palestinian Water under International law", *Pace International Law Review*, vol. 10 (1998), p.411.

36 *The Origins and Evolution of the Palestine Problem: 1917-1988, Part-III, 1978-1983* (Division for Palestinian Rights, United Nations, 1990). Also see Jean-Marie Henckaerts, "Deportation and Transfer of Civilians in Time of War", *Vanderbilt Journal of Transnational Law,* vol.26 (1993), p.469.

37 United Nations, note 36. On 22 December 1987 the Council adopted resolution 605 (1987) by 14 votes in favour to none against with 1 abstention (United States of America). In that resolution the Security Council "strongly deplored the policies and practices of Israel, the occupying Power, which violate the human rights of the Palestinian people in the occupied territories, and in particular the opening of fire by the Israeli army, resulting in the killing and wounding of defenceless Palestinian civilians". It also reaffirmed that "the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 [was] applicable to the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem". The Security Council subsequently adopted four resolutions specifically on the question of

Bearing in mind the specific status and special character of the City of Jerusalem and the need for protection and preservation of the unique and spiritual dimension of the Holy Places in Jerusalem, in June 1980, in reaction to proposed legislative action by Israel to make a united Jerusalem its capital, the Security Council considered the question and adopted resolution 476 (1980), by which it deplored the persistence of Israel in changing the physical character, demographic composition, institutional structure and the status of the Holy City. The Security Council was gravely concerned about the legislative steps initiated in the Israeli Knesset with the aim of changing the character and the status of Jerusalem. After the enactment of the "Basic Law" by Israel the Security Council adopted resolution 478 (1980). In this resolution, the Security Council called upon those States that had established diplomatic missions at Jerusalem to withdraw such missions from the Holy City.

VIII. Palestinian Right to Resistance under International Law

The Palestine Liberation Organization (PLO), formed in 1964, adopted a new Covenant in 1968 committing all Palestinians to continue the fight for their rights, claiming that the international community had so far proved unable to discharge the responsibility

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deportations of Palestinians from the occupied territory. In resolutions 607 (1988) of 5 January 1988, 608 (1988) of 14 January 1988, 636 (1989) of 6 July 1989, and 641 (1989) of 30 August 1989, the Council called upon Israel to desist from deporting Palestinian civilians and to ensure the safe and immediate return to the occupied Palestinian territory of those already deported. The Security Council, alarmed at the dramatic escalation, condemned, by resolution 1322 (2000), this latest wave of violence in the Middle East and the excessive use of force against Palestinians. It also urged Israel to abide by the Fourth Geneva Convention and called for an immediate resumption of peace talks. The upsurge in violence greatly alarmed the Security Council, which in March 2002 adopted resolution 1397 (2002) demanding the "immediate cessation of all acts of violence, including all acts of terror, provocation, incitement and destruction", and reaffirming "a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders". On 30 March, the Security Council, in resolution 1402 (2002) called for a ceasefire and the withdrawal of Israeli forces from Palestinian cities. As the situation continued to deteriorate, the Council met again on 4 April and unanimously adopted resolution 1403 (2002) demanding immediate implementation of the ceasefire and troop withdrawals. In November 2003, the Security Council adopted resolution 1515 (2003), endorsing the Quartet Road Map.

it had borne for almost half a century.[38] On 13 November 1974, Mr. Yasser Arafat, Chairman of the Executive Committee of the PLO, addressed the General Assembly. In his speech, excerpts from which follow, he directly addressed the question of the terrorist image of the PLO:

> Those who call us terrorists wish to prevent world public opinion from discovering the truth about us and from seeing the justice on our faces. They seek to hide the terrorism and tyranny of their acts, and our own posture of self-defence.
>
> The difference between the revolutionary and the terrorist lies in the reason for which each fights. For whoever stands by a just cause and fights for the freedom and liberation of his land from the invaders, the settlers and the colonialists, cannot possibly be called terrorist, otherwise the Americans in their struggle for liberation from the British colonialists would have been terrorists; the European resistance against the Nazis would be terrorism, the struggle of the Asian, African and Latin American peoples would also be terrorism, and many of you who are in this Assembly hall were considered terrorists ...
>
> Need one remind this Assembly of the numerous resolutions adopted by it condemning Israeli aggressions committed against Arab countries, Israeli violations of human rights and articles of the Geneva Conventions, as well as the resolutions pertaining to the annexation of the city of Jerusalem and its restoration to its former status?
>
> I am a rebel and freedom is my cause. I know well that many of you present here today once stood in exactly the same resistance position

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[38] The Covenant termed Israel an illegal State, leading to Israel's refusal to deal with the PLO. The intensification of the armed struggle by the PLO to reassert the Palestinian national identity and its claim to the inherent right of self-determination increasingly focused world attention on the resolve of the Palestinian people to regain their national rights. In September 1974, a large number of States joined to propose that the item "The question of Palestine" be included as a separate item in the General Assembly agenda. On the recommendation of the Assembly's General Committee the Palestine question reappeared on the Assembly's agenda for the first time since 1952. In October 1974, by 105 votes in favour to 4 against (and 20 abstentions), the PLO was invited to participate in Assembly proceedings. The Assembly simultaneously conferred on the PLO the status of observer in the Assembly and in other international conferences held under United Nations auspices.

> as I now occupy and from which I must fight. You once had to convert dreams into reality by your struggle. Therefore you must now share my dream. I think this is exactly why I can ask you now to help, as together we bring out our dreams into a bright reality, our common dream for a peaceful future in Palestine's sacred land ...
>
> In my formal capacity as Chairman of the PLO and leader of the Palestinian revolution I proclaim before you that when we speak of our common hopes for the Palestine of tomorrow we include in our perspective all Jews now living in Palestine who choose to live with us there in peace and without discrimination.
>
> All along the Palestinian dreamt of return. Neither the Palestinian's allegiance to Palestine nor his determination to return waned: nothing could persuade him to relinquish his Palestinian identity or to forsake his homeland. The passage of time did not make him forget, as some hoped he would. When our people lost faith in the international community which persisted in ignoring its rights and when it became obvious that the Palestinians would not recuperate one inch of Palestine through exclusively political means, our people had no choice but to resort to armed struggle. Into that struggle it poured its material and human resources. We bravely faced the most vicious acts of Israeli terrorism which were aimed at diverting our struggle and arresting it ...
>
> We offer them the most generous solution, that we might live together in a framework of just peace in our democratic Palestine ...
>
> I appeal to you to enable our people to establish national independent sovereignty over its own land.
>
> Today I have come bearing an olive branch and a freedom-fighter's gun. Do not let the olive branch fall from my hand. I repeat: do not let the olive branch fall from my hand.
>
> War flares up in Palestine, and yet it is in Palestine that peace will be born.[39]

In early December 1987 the Palestinian problem entered a new phase. The massive uprising, *Intifada* of the Palestinian population erupted early that month in the occupied Gaza Strip and then spread to the rest of the occupied territory. Following these intense Gaza protests the Palestinian popular uprising flared up in the West Bank

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39 United Nations, note 27.

and Jerusalem. To subdue and disperse the all-out Palestinian protest demonstrations, IDF, special forces, police and Jewish settlers used live ammunition, indiscriminate beatings of Palestinians, as well as other means of repression. The First *Intifada* lasted till 1993.[40] At the end of September 2000, a new wave of protests and violence began in the occupied Palestinian territory after the leader of the opposition in Israel, Ariel Sharon (who would later become Prime Minister), visited the sacred Temple Mount/Haram al-Sharif compound in Jerusalem under heavy police escort on 28 September. This new wave of violence soon came to be known as the "second, or Al-Aqsa, intifada", named after the mosque at the centre of the Palestinian protests.[41]

According to Professor Richard Falk and Burns H. Weston, the illegality of the Israeli occupation regime itself set off an escalatory spiral of resistance and repression, and under these conditions all considerations of morality and reason establish a right of resistance in the population. This right of resistance is an implicit legal corollary of the fundamental legal rights associated with the primacy of sovereign identity and assuring the humane protection of the inhabitants. In their judgment, resistance to the activities of Israeli military forces under these circumstances is a legitimate exercise of Palestinian rights of self-determination.[42] Israel's defiant refusal to discharge this responsibility, including a refusal to comply with numerous resolutions issued by the United Nations, including the call for an immediate withdrawal from territory occupied in 1967, validates Palestinian resistance, although not violence against civilians.[43] Whether Palestinian exercise of such a right of resistance is prudent and wise under the circumstances of the conflict remains

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40 The Security Council subsequently adopted several resolutions specifically on the question of deportations of Palestinians from the occupied territory.

41 *The Question of Palestine and the United Nations* (United Nations, New York, 2008).

42 Richard A. Falk & Burns H. Weston, "The Relevance of International Law to Palestinian Rights in The west Bank and Gaza: In Legal Defense of the Intifada", *Harvard International Law Journal,* vol.32 (1991), pp. 155-156.

43 Richard Falk, Facts, "Rights, and Remedies: Implementing International Law in the Israel/Palestine Conflict", *Hastings International and Comparative Law Review*, vol. 28 (2005), p.343.

a contested matter, but from a legal perspective such a right exists provided that it respects the limits on political violence embedded in international humanitarian law.[44]

IX. Israeli–Palestinian Agreements: An International Law Perspective

The historic event of the Israeli-Palestinian accord was formalized at a ceremony in Washington on 13 September 1993 where the Declaration of Principles on Interim Self-Government ('DOP') was signed by the Israeli Prime Minster Rabin and by PLO Chairman Arafat.[45] Peter Malanczuk analyses[46] the accord and opines that it is true that the 1969 Vienna Convention on the Law of Treaties only applies to treaties concluded between states. But that does not affect, as expressly acknowledged in Article 3 of the Convention, the legal validity of, and the application of international rules on the law of treaties to, agreements concluded between states and other 'subjects of international law'. Independently of the attitude taken by Israel towards the PLO in the past, in international practice the latter has become recognized as a national liberation movement with the right to self-determination, which, although it does not exercise effective territorial jurisdiction, is a partial subject of international law with the legal capacity to maintain diplomatic relations with states and international organizations recognizing it and to conclude treaties.

Moreover, there are two clear indications[47] in the agreements themselves that the parties consider them to be international law

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44 *Ibid*.

45 The DOP has four annexes concerned with elections, early withdrawal from the Gaza Strip and Jericho area, Israeli-Palestinian economic cooperation, and cooperation at the regional level. In addition, there are 'Agreed Minutes' which, as an 'integral part' of the Declaration, amplify various of its provisions. Finally, the Declaration is supplemented by an exchange of letters, dated 9 September 1993, which, inter alia, confirm the recognition by the PLO of Israel's right to exist, of the renunciation of terrorism and an undertaking to amend the Palestinian Covenant and the recognition by Israel of the PLO as the representative of the Palestinian people.

46 Peter Malanczuk, "Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law", *European Journal of International Law,* vol.1 *(1996), p. 489.*

47 *Ibid,* p. 490.

agreements. First, there is express reference in some provisions that certain action has to be taken 'in accordance with international law'. Second, the methods of dispute settlement provided for in the agreements are the typical ones under international law dispute settlement procedures. An additional argument can be found in the facts that the United Nations has endorsed the Israel-PLO Accord, that other states have signed as witnesses and that a multilateral international framework has been created in support of the Middle East Peace Process, all of which does not lend support to the view that the agreements are non-international ones. The agreements made between Israel and the PLO include the recognition by Israel of the PLO as the representative of the Palestinian people, and thereby are clearly governed by international law.

Thus, Israel and the PLO can be viewed as being under a legal obligation to continue with their negotiations on permanent status even if not all issues have been solved by the deadline set in 1999. In addition, while negotiations are in progress the parties are obliged to refrain from acts which would frustrate the object of the intended agreement. [48] Also, the basic relationship between Israel and the PLO has been fundamentally altered by steps of legal recognition, barring them in the future from treating each other only as *de facto* entities.[49] It is striking that the Declaration does not mention self-determination, either directly and explicitly, or indirectly (the only two UN texts to which it adverts are the famous Security Council Resolutions 242 (of 22 November 1967) and 338 (of 22 October 1973),

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48 *Ibid*, p. 492.

49 Also see, Eugene Cotran, 'Some Legal Aspects of the Declaration of Principles: A Palestinian View", in Eugene Cotran & Chibli Mallat (Eds.), *The Arab-Israeli Accords: Legal Perspectives* (Kluwer Law International, London, 1994), pp.67-80. The process of legal recognition commenced with the letter from the PLO chairman Arafat of 9 September 1993 stating that 'the PLO recognizes the right of the State of Israel to exist in peace and security.' The PLO further renounced the use of terrorism and other acts of violence. It also affirmed that 'those articles of the Palestinian Covenant which deny Israel's right to exist... are now inappropriate and no longer valid' and undertook to initiate the required changes in the Covenant. In his reply letter of 9 September 1993, Israel's Prime Minister confirmed in view of the commitments made by the PLO that 'the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people...'.

and none of them mentions self-determination). A vague and non-committal reference to the Palestinian right to self-determination might be distilled from Article III (3), where reference is made to 'the realization of the legitimate rights of the Palestinian people and their just requirements'. [50]

X. Legal implications of the ICJ Advisory Opinion on the Construction of a Wall in the OPT

On 8 December 2003, the United Nations General Assembly, decided to submit the question set forth in its resolution ES-10/14, adopted at its Tenth Emergency Special Session, for an advisory opinion to the ICJ on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

The International Court of Justice (ICJ), rendered its Advisory Opinion in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion)*. In its Opinion, the Court found unanimously that it has jurisdiction to give the advisory opinion requested by the United Nations General Assembly and decided by 14 votes to 1 to comply with that request. The following are the highlights of the Opinion:

> A) The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law (14 votes to 1).
>
> B) Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied

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[50] Antonio Cassese, "The Israel-PLO Agreement and Self-Determination", *European Journal of International Law*, vol.4 (1993), p. 568.

Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion (by 14 votes to 1).

C) Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem (by 14 votes to 1).

D) All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States Parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention (by 13 votes to 2).

E) The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion (by 14 votes to 1).

The United Nations General Assembly Tenth Resumed Emergency Special Session on 20 July 2004, overwhelmingly adopted a resolution[51] demanding Israel to comply with the ICJ Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[52]

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51 150 countries voted in favor of the resolution and six countries against, with ten abstentions.

52 It called upon the Israel to halt construction on its security barrier in the West Bank; tear down the portions built on the Palestinian land; and provide reparations to Palestinians whose lives have been harmed by the wall. The resolution also called on both Israel Government and the Palestinian Authority to immediately implement their obligations under the Road Map, which calls for a series of parallel and reciprocal steps by each party leading to two States

Two broad categories of issues should be addressed in the light of the Advisory Opinion:[53]

(i) How did the Court treat the numerous resolutions that have been adopted by the Security Council and General Assembly on this matter? In other words, how did the Court attached the United Nations into its answer?

(ii) Did the Court identify legal consequences or responsibilities that specifically affect the United Nations? Does it bear responsibilities that can be disaggregated from those borne by individual states which are also United Nations members; is there any necessary or appropriate inter-relationship or coordination between the United Nations' and Member States' legal responsibilities?

The Court's reliance on these resolutions might be an emanation of the UN's responsibility for Palestine:[54]

> Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and Partition Resolution concerning Palestine . . . This responsibility has been described by the General Assembly as 'a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy' (General Assembly resolution 57/107 of 3 December 2002).

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living side by side in peace by 2005. It called on all UN Member States to comply with their obligations as contained in the finding by the ICJ, which include a duty "not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem". It also called upon the Member States not to render aid or assistance in maintaining the situation created by such construction. The resolution requested the UN Secretary General to set up a register of all damage caused to all the natural or legal persons in connection with Israel's construction of the barrier.

53 Iain Scobbie, "Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine", *European Journal of International Law*, vol.16, no.5 (2005), p.942.

54 *Ibid,* p. 944.

> Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people. (Para-49)

On this view, the UN's responsibility is thus ultimately rooted in the Mandate for Palestine entrusted to Great Britain by the League of Nations in 1922 in fulfillment of Article 22(4) of the League Covenant. In the *Wall* Advisory Opinion, the International Court reaffirmed the views it had expressed on the nature of mandates in its *International Status of South West Africa* Advisory Opinion.

Article 22.4 of the League Covenant expressly provided for the creation of independent states in the territories detached from Turkey after the First World War. As the Court recalled in the *Wall* Advisory Opinion, however, it had ruled in the *Namibia* Advisory Opinion ([1971] ICJ Rep 16.) that:

> '. . . the ultimate objective of the sacred trust' referred to in Article 22, paragraph 1, of the Covenant of the League of Nations, 'was the self-determination . . . of the peoples concerned' (*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. 131, paras. 52–53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid*.; see also *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v Australia), Judgment, ICJ Reports 1995*, p. 102, para. 29).(para.88)

The Court further ruled that, with regard to the right of self-determination, the existence of a 'Palestinian people' was not in doubt and had been expressly recognized by Israel. In particular, the 28 September 1995 Israel-Palestine Interim Agreement on the West Bank and Gaza Strip referred repeatedly to the Palestine people and its 'legitimate rights'. The Court ruled that these rights included the right to self-determination, noting that the General Assembly had affirmed this repeatedly.[55] The Court noted that its task was simply: to determine in a comprehensive manner the legal consequences of

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55 Para.118

the construction of the wall, while the General Assembly – and the Security Council – may then draw conclusions from the Court's findings. The Court thus placed an obligation of result on the United Nations – the cessation of the Israel-Palestine conflict leading to 'a just and lasting peace in the region' and the establishment of an independent Palestinian state. [56]

However, what the General Assembly sought was an opinion as to what is legally required in regard to the wall. Thus, the Court was indicating what it views international law requires. That law is binding on Israel, as it is on all states. Thus, while the advisory opinion itself is not binding, the propositions the Court sets forth represent law that is binding.[57] In sum, the most far-reaching consequence of this opinion is best summarized by Judge Lauterpacht in the *Voting Procedures Case:*

> A state]…which consistently sets itself above the solemnly and repeatedly expressed judgment of the [UN], in particularly in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to the consequences legitimately following as a legal sanction. (*Voting Procedures on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion,* ICJ Rep. 1955, p. 67 at 120,)

The purpose of Advisory Opinions is to provide authoritative guidance on points of law arising from the functions of organs and specialized agencies of the U.N. But one cannot simply assume that because of the word "advisory" the ICJ's advice is without legal significance altogether.[58] It should not be forgotten that there is no higher judicial authority that can rule on the legal issues involved in

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56 Iain Scobbie, note 53.

57 Susan Akram & John Quigley, The International Court of Justice Advisory Opinion on the Legality of Israel's Wall in the Occupied Palestinian Territories: Legal Analysis and Potential Consequences (The Palestine Center, September 2004).

58 Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice V. The international court of justice", *Vanderbilt Journal of Transnational Law*, vol.40 (2007), p.1501.

this case. The issues addressed in the ICJ's opinion on the Wall formed the corpus of law that guides the U.N. on the question of Palestine.[59]

XI. Israeli War Crimes and Violations of International law in the OPT, particularly in the Gaza Strip: Question of Accountability under International Law

Israeli disengagement from Gaza in 2005 was considered as a major milestone in the Middle East peace process and the creation of an independent Palestinian State. However, the Israeli government's plan to remove troops and Jewish settlements from the Gaza Strip did not end Israel's occupation of the territory. Israeli forces are keeping control over Gaza's borders, coastline and airspace, and reserve the right to launch incursions at will. Israel continues to wield overwhelming power over the territory's economy and its access to trade. However, Gaza is only a small fraction of the land it occupied in the 1967 war. Moreover, Israeli forces will control the movement of Palestinians from Gaza to the West Bank. Unless Israel can guarantee a withdrawal from other occupied territories, the Gaza pullout, with all its conditionalities, will remain meaningless for Palestinians, and may even sow the seeds of more violent discontent in the region. For the Palestinians, Gaza is nothing without full Israeli withdrawal from the West Bank and East Jerusalem — the proposed capital of the State of Palestine — and without the right of Palestinian refugees to return to their homes in Israel.

Further, in clear violation of Israel's obligation under international humanitarian and human rights law, Israel's security cabinet convened by the Prime Minister Ehud Olmert on 19 September 2007 determined that Hamas has taken control of the Gaza Strip and turned it into hostile territory. Israel's decision to interrupt the provision of essential services, such as electricity and fuel, to the Gaza Strip which contravenes its obligations under international humanitarian and human rights towards the territory's civilian population. In its clear violation of responsibility under international human rights and humanitarian law to protect the

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59 *Ibid,* p.1504.

civilian population and civilian installations in Gaza, the Israel forces recently unleashed atrocities amounting to war crime in Gaza, killing numerous innocent civilians, most of them women and children. Israel devastated the infrastructure of Gaza, including schools. [60]

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[60] Taking note of the situation, UN Security Council resolution 1860 (2009) adopted on 8 January 2009 by a vote of 14 in favour with the United States abstaining, stressed the urgency of and called for an "immediate, durable and fully respected ceasefire, leading to the full withdrawal of Israeli forces from Gaza" and expressed its grave concern at the escalation of violence and emphasized that Palestinian and Israeli civilian populations must be protected in the densely packed territory.

Tenth emergency special session of the UN General Assembly on 16 January 2009 adopted a *resolution (ES-10/18)supporting the immediate ceasefire according to Security Council resolution 1860 (2009)* which demanded full respect for Security Council resolution 1860 (2009), including its urgent call for an immediate, durable and fully respected ceasefire, leading to the full withdrawal of Israeli forces from the Gaza Strip, and its call for the unimpeded provision and distribution throughout the Gaza Strip of humanitarian assistance, including food, fuel and medical treatment.

Further, the Human Rights Council on 12 January 2009 adopted a resolution on the grave violations of human rights in the Occupied Palestinian Territory including the recent aggression of the occupied Gaza Strip in which it strongly condemned the ongoing Israeli military operation which had resulted in massive violations of human rights of the Palestinian people and systematic destruction of the Palestinian infrastructure. On 26 March 2009 HRC in resolution condemned the Israeli military attacks and operations in the Occupied Palestinian Territory, particularly the recent ones in the occupied Gaza Strip, which have resulted in the killing and injury of thousands of Palestinians civilians, including a large number of women and children and also condemns the firing of crude rockets on Israeli civilians. The Human Rights Council also appointed Richard J. Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to lead an independent fact-finding mission to investigate international human rights and humanitarian law violations related to the recent conflict in the Gaza Strip.

United Nations also instituted a Board of Inquiry to review and investigate several incidents in the Gaza Strip between 27 December 2008 and 19 January 2009 and in which death or injuries occurred at, and/or damage was done to, United Nations premises or in the course of United Nations operations.

In his report,[61] Professor Richard Falk, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, in the light of Human Rights Council resolution S-9/1, focused on the main international law and human rights issues of the attacks by Israel on Gaza that commenced on 27 December 2008 and continued for 22 days. He challenged the widespread emphasis on whether Israeli force was disproportionate in relation to Palestinian threats to Israeli security, and focused on the question of whether Israeli force was legally justified at all. He concluded that such recourse to force was not legally justified given the circumstances and diplomatic alternatives available, and was potentially a crime against peace. Professor Falk explains his experience in the report:

> The mission to Gaza was to include a visit to the West Bank and East Jerusalem, and was supposed to commence with a scheduled meeting with the President of the Palestine Authority, Mahmoud Abbas. Entry was denied (by Israel) on 14 December 2008; the Special Rapporteur was detained in a facility close to Ben Gurion Airport, then expelled from Israel the day after. Such a refusal to cooperate with a United Nations representative, not to mention the somewhat humiliating treatment accorded (detention in a locked and dirty cell with five other detainees, and excessive body search), has set an unfortunate precedent with respect to the treatment of a representative of the Human Rights Council, and more generally of the United Nations itself. This precedent should be seriously challenged for the sake of both the mandate and, more broadly, to ensure that in future Member States accord appropriate respect and cooperation with official United Nations missions and activities. One possible form of challenge would be to seek an advisory opinion from the International Court of Justice as to the applicability of the Convention on the Privileges and Immunities of the United Nations.[62]

The Report suggested that with regard to Gaza, there was a further concern with respect to the nature of the legal obligations of Israel towards the Gazan population. Israel officially contended that, after the implementation of its disengagement plan in 2005, it was no

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61 *Human Rights Situation in Palestine and Other Occupied Arab Territories*: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, (Human Rights Council, A/HRC/10/20, 11 February 2009).

62 *Ibid*, p.4.

longer an occupying Power, and was therefore not responsible for observance of the obligations set forth in the Fourth Geneva Convention. That contention had been widely rejected by expert opinion, by the de facto realities of effective control and by official pronouncements by, for instance, the United Nations High Commissioner for Human Rights and the Secretary-General (A/HRC/8/17), the General Assembly in its resolutions 63/96 and 63/98, and the Security Council in its resolution 1860 (2009). Therefore, regardless of the international status of the Occupied Palestinian Territory with respect to the use of force, the obligations of the Fourth Geneva Convention, as well as those of international human rights law and international criminal law, are fully applicable.[63]

The Report also found that there was no way to reconcile the general purposes and specific prescriptions of international humanitarian law with the scale and nature of the Israeli military attacks commenced on 27 December 2008. Any assessment under international law of the attacks of 27 December should take into account the weakened condition of the Gazan civilian population resulting from the sustained unlawfulness of the pre-existing Israeli blockade that violated articles 33 (prohibition on collective punishment) and 55 (duty to provide food and health care to the occupied population) of the Fourth Geneva Convention. Considering the obligation of the occupying Power to care for the well-being of the civilian occupied population, mounting a comprehensive attack on a society already weakened by unlawful occupation practices would appear to aggravate the breach of responsibility described above owing to the difficulties of maintaining the principle of distinction.[64]

In unprecedented belligerent policy, Israel refused to allow the entire civilian population of Gaza, with the exception of 200 foreign wives, to leave the war zone during the 22 days of attack that commenced on 27 December. As the United Nations High Commissioner for Refugees stated on 6 January 2009, Gaza is "the

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63 *Ibid,* p.5.
64 *Ibid,* p.7.

only conflict in the world in which people are not even allowed to flee". International humanitarian law has not specifically and explicitly at this time anticipated such an abuse of civilians, but the policy as implemented would suggest the importance of an impartial investigation to determine whether such practices of "refugee denial" constitute a crime against humanity as understood in international criminal law.[65]

The Special Rapporteur does not propose another investigation but an expert inquiry to report on the implications of available evidence for international humanitarian law, especially the implications of war crimes of apparent violations. According to Professor Richard Falk, an investigation should also address the mechanisms of accountability evaluated in terms of jurisdictional competence and political plausibility if it determines that substantial grounds for holding individuals and other political actors criminally responsible exist. Report suggested that since Israel is not a member of the International Criminal Court, the most efficient mechanism for assessing accountability would be to establish, under the authority of the Security Council, an ad hoc criminal tribunal for occupied Gaza, following the precedents of the 1990s (although this does not seem politically plausible under current conditions). It would also be theoretically possible for the Security Council, acting under Chapter VII of the Charter, to refer the situation to the Court for further action. It is arguable (although contested) that the General Assembly might establish such a tribunal by invoking its authority to "establish such subsidiary organs as it deems necessary for the performance of its functions". Whether such an initiative is related to the functions of the Assembly is an unresolved matter.

There was also some question as to whether the fact that the Security Council, in its resolution 1860 (2009), decided to remain seized of the matter makes its constitutionally inappropriate for the Assembly to take any action relating to the situation in Gaza resulting from the Israeli military operations. Professor Falk opined that from the outlook of competence and plausibility, the most

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65 *Ibid*, p.11.

available accountability initiatives are associated with national criminal law procedures in those countries, such as Belgium and Spain that give to their courts legal authority to prosecute war crimes under the rubric of universal jurisdiction, provided that the accused individual is physically present. It is likely that such an option would be influenced by the existence of a persuasive report under the auspices of the United Nations that recommended accountability.[66]

It is noteworthy that Minister of Justice of the Palestinian National Authority on 22 January 2009 on behalf of the Palestinian National Authority, lodged a declaration pursuant to Article 12(3) of the Statute with the Registrar of the International Criminal Court. In accordance with the Rome Statute of the ICC (Statute), the Court's jurisdiction extends to war crimes, crimes against humanity and genocide committed on the territory of a State Party, or by a national of a State Party. In addition, alleged crimes can come under investigation and prosecution before the ICC if a relevant non-State Party or Parties voluntarily accept(s) the jurisdiction of the Court on an *ad hoc* basis (Article 12(3) of the Statute) or if the Security Council refers the situation to the Prosecutor (Article 13(b)). Issues of jurisdiction had to be independently assessed by the Court in order to determine whether or not to open an investigation, including whether the declaration by the Palestinian National Authority accepting the exercise of jurisdiction by the ICC meets statutory requirements; whether the alleged crimes fall within the category of

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66 *Ibid*, p.17. The above-mentioned situation has led the Minister for Justice of Israel, Daniel Friedman, to be designated to protect any Israeli detained abroad in accordance with the public pronouncement made by Prime Minister Olmert at a gathering of military officers a few days after the Gaza ceasefire went into effect: "The Government will stand like a fortified wall to protect each and every one of you from allegations." Israel also warned that it would retaliate in the event that Israelis are arrested and charged abroad. Note that potential initiatives in national judicial settings are not limited to battlefield specific offences, but can be extended to encompass alleged crimes at the highest political and military levels of Government. The case involving the indictment of the former head of State of Chile, Auguste Pinochet, adjudicated these issues in the Spanish and British legal systems, as well as in Chile itself, during the late 1990s and early 2000s.

crimes defined in the Statute, and whether there are national proceedings in relation to those crimes.

The fact that Israel has been able to maintain control of the Occupied Territories since 1967 does not diminish the U.N. obligation to take necessary action. If Israel cannot be convinced through negotiation to withdraw from the OPT, the U.N. is obliged by the U.N. Charter to take economic and diplomatic sanctions to force Israel out.[67]

XII. Consolidation of Asian-African Views on the Palestinian Issue: The Role of AALCO

As a consultative organization working in the field of international law, AALCO was always in the forefront in consolidating the views of the Asian-African Member States, in highlighting the illegalities committed by the Israel in the OPT. *Deportation of Palestinians and Other Israeli Practices Among them the Massive Immigration and Settlement of Jews in all Occupied Territories in Violation of International Law Particularly the Fourth Geneva Conventions of 1949* is one of the important agenda items on AALCO's agenda. This topic was taken up, at the initiative of the Government of the Islamic Republic of Iran at the AALCO's Twenty-Seventh Session which was held in Singapore (1988). During that Session the delegation of the Islamic Republic of Iran pointed out that: "The Zionist entity (Israel) had deported a number of Palestinians from Palestine, the deportation of people from occupied territory, both in past and recent times constitutes a violation of the principles of international law, as well as, provisions of international instruments and conventions such as the Hague Conventions of 1899 and 1907, the UN Charter of 1945, and the Geneva Convention Relative to Protection of Civilian Persons in time of War, 1949 all of which prohibit deportation as a form of punishment, in an occupied territory." The Government of Islamic Republic of Iran, after a preliminary exchange of views had submitted to the AALCO Secretariat a Memorandum, and the Secretariat was called upon to study the legal consequences of the

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[67] See John Quigley, "The United Nations Action against Iraq: A Precedent for Israel's Arab Territories?", *Duke Journal of Comparative and International Law*, vol. 2 (1992), pp.197-198.

deportation of Palestinians from occupied territories. The AALCO Secretariat reports prepared annually on this topic had comprehensively documented the violations of international law, particularly international humanitarian law in the OPT. The topic was seriously deliberated at the successive annual sessions and resolutions were adopted. The delegations attending the annual sessions highlighted the violations of international law, particularly international humanitarian law and human rights law committed by the Government of Israel in the OPT.

A resolution was adopted at the Forty-Seventh Annual Session of AALCO[68] held at New Delhi from 30th June to 4th July 2008 demanded that Israel, the Occupying Power, comply fully with the provisions and principles of the Charter of the United Nations, Universal Declaration of Human Rights, the Regulations annexed to the Hague Convention of 1907 and the Geneva Conventions in particular the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, in order to protect the rights of Palestinians. It further demanded that Israel stops and reverses the construction of the wall in the Occupied Palestinian territory and for an immediate cessation of all acts of violence, including all acts of terror, provocation, incitement and destruction of property and calls for the immediate and full withdrawal of Israeli (occupying) forces from Palestinian territories in implementation of Security Council Resolutions. It also called upon Israel to ensure the return of refugees and displaced Palestinians to their homes and the restoration to them of their properties, in compliance with the relevant UN resolutions;

XIII. Independent and Sovereign State of Palestine: An International Legal Obligation

Of historic significance to the Palestinian people are the decisions and final documents adopted by the nineteenth extraordinary session of Palestine National Council (PNC), the supreme legislative Palestinian body, held at Algiers, from 12 to 15 November 1988. On 31 July 1988 the creation of the Palestinian state became an inevitability when King Hussein of Jordan announced that he was

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[68] Res/47/S 4 (4 July 2008).

terminating all forms of administrative and legal ties with what he called the West Bank. And on I5 November 1988 the independent state of Palestine was proclaimed by the PNC meeting in Algiers, as well as in front of Al-Aksa Mosque in Jerusalem, the capital of the new state, after the close of prayers.[69] Indeed, as long ago as 1919 the Palestinian people were provisionally recognized as an independent nation by the League of Nations in League Covenant Article 22(4) as well as by the 1922 Mandate for Palestine that was awarded to Great Britain.[70] Pursuant to the basic right of self-determination of peoples as recognized by U.N. Charter Article 1(2) and by the International Court of Justice in its *Namibia* and *Western Sahara* Advisory Opinions, the Palestinian people have proceeded to proclaim their own independent state in the land they have continuously occupied for thousands of years.[71] In October 1974, by 105 votes in favour to 4 against (and 20 abstentions), the PLO was invited to participate in UN General Assembly proceedings. The Assembly simultaneously conferred on the PLO the status of observer in the Assembly and in other international conferences held under United Nations auspices. On 15 December 1988 the United Nations General Assembly adopted Resolution 43/177, essentially recognizing the new state of Palestine and according it observer state status throughout the United Nations Organization.

Francis A. Boyle in his legal analyses[72] of the Declaration of Independence and the Political Communiqué points out that: First, the Declaration of Independence explicitly accepts the General Assembly's Partition Resolution 181(11) of 1947. The acceptance of the Partition Resolution in their actual Declaration of Independence itself signals a genuine desire by the Palestinian people to transcend the past forty years of history and to reach an historic

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69 The establishment of the State of Palestine was immediately welcomed by the international community. Within a month, independent Palestine was recognized by almost 80 States in Africa, Asia, Europe and Latin America. *The Origins and Evolution of the Palestine Problem: 1917-1988*, Part-IV, 1984-1988 (Division for Palestinian Rights, United Nations, 1990).

70 Francis A. Boyle, "The Creation of the State of Palestine", *European Journal of International Law,* vol.1 (1990), p. 301.

71 *Ibid*, p. 302.

72 *Ibid,* pp. 303-304.

accommodation with Israel on the basis of a two-state solution. Second, in the Declaration of Independence the Palestine National Council declared its commitment to the purposes and principles of the United Nations Charter, to the Universal Declaration of Human Rights and to the policy and principles of non-alignment. Third, in the Declaration of Independence the Palestinian National Council declared that without prejudice to its natural right to defend the state of Palestine, the PNC rejected "the threat or use of force, violence and intimidation against its territorial integrity and political independence or those of any other state." Fourth, in the Political Communique' attached to the Declaration of Independence the Palestine National Council indicated its willingness to accept United Nations supervision over occupied Palestine on an interim basis in order to terminate Israeli occupation. Fifth, in the Political Communique' the Palestine National Council has called for the convocation of an International Peace Conference on the Middle East on the basis of U.N. Security Council Resolution 242 (1967) and 338 (1973) that shall guarantee the legitimate national rights of the Palestinian people, first and foremost among which is their right to self-determination. In other words, the Palestine National Council has now explicitly accepted Resolutions 242 and 338. The PNC's solemn acceptance of Resolutions 242 and 338 represents a significant concession by the Palestinians. Seventh, in the Political Communique' the PNC "once again states its rejection of terrorism in all its forms, including state terrorism..."

The establishment of the Independent, Sovereign and viable State of Palestine is an international legal obligation of the United Nations. If the U.N. is to maintain credibility as a body committed to international peace, it must not permit one country to make the rules for the world. Instead, it needs to address similar situations consistently. The U.N. must meaningfully address Israel's continuing and unlawful occupation. Whether there exists a double standard at the U.N.? This conclusion is exemplified in the starkly different methods the U.N. had instituted to address Iraq's invasion of Kuwait and Israel's invasion of Arab Territories. Both Israel and Iraq made legal arguments to justify their military actions in 1967 and 1990,

respectively. These justifications are not in accordance with international law.[73]

The U.N. General Assembly, refusing to take a position in 1967 on the initiation of the hostilities, has repeatedly and clearly called for an unconditional Israeli withdrawal.[74] However, The UN Security Council could not play its role provided in the UN Charter to end the Occupation in the OPT.[75] Avoiding potential United States vetoes in the Security Council, the General Assembly took a number

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73 Carlos Ortiz, "Does a Double Standard Exist at the United Nations?: A focus on Iraq, Israel and the Influence of the United States on the UN", *Wisconsin International Law Journal*, vol.22 (2004), p.415; Aiyaz Husain, "The United States and the Failure of UN Collective Security: Palestine, Kashmir, and Indonesia, 1947-1948", *American Journal of International Law,* vol.101. no.3 (2007), pp. 581-598.

74 For example, a 1983 General Assembly resolution stated "that the acquisition of territory by force is inadmissible under the Charter of the United Nations," and that "Israel must withdraw unconditionally from all the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem." The U.N. has also condemned Israel's annexation of East Jerusalem and its legislation designating Jerusalem as Israel's capital city. It has also declared Israel's legislation annexing the Golan Heights invalid. Perhaps the sternest resolution adopted by the U.N. regarding Israel's occupation is a General Assembly call for an end to economic and military aid to Israel because such aid helps Israel maintain the occupation. See John Quigley, note 67, pp. 218-219.

75 See, the purposes of the United Nations and Article 33, 36 and 37 of the UN Charter. Article 39 of the U.N. Charter states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." These provisions of Chapter VII of the U.N. Charter reflect the heart of the dream that inspired the creation of the U.N. The Security Council is charged to stop armed conflict wherever it might occur. While Articles 41 and 42 use the permissive "may," it was contemplated that the Council had an obligation to exercise its powers in the face of state aggression. The Charter gave the Security Council "primary responsibility for the maintenance of international peace and security . . . ." Article 39 imposes an absolute obligation on the Security Council, stating that it "shall" make a determination, where the peace has been broken and it "shall" take action under Article 41, and Article 42 if necessary, to restore the peace. John Quigley, Note 67, pp. 220.

of steps to promote Israel's withdrawal from the Occupied Territories.[76]

XIV. Conclusion

The crisis in Palestine, which has a history of more than nine decades, proves the point that sheer power and military superiority were the deciding factors in the modern world's most prolonged occupation. Starting from the Balfour Declaration, the basic principles of international law were not applied to address the just cause of the Palestinians. The Occupying Power, Israel was completely immune from the operation of international law. The International Community failed to introduce any effective sanctions to force Israel to abide by the many UN resolutions that were adopted against it. Independent, Sovereign and viable State of Palestine, free of all occupation is an international legal obligation of the United Nations and its member States and the cornerstone of the durable peace in the Middle East. The peace, that the international community envisages for Middle-East should be based on Justice and principles of international law, not on military power and subjugation. Further, Israel should be held accountable for the war crimes and other violations of international law, including human rights and humanitarian law. Peace with justice is achieved only when the aggressors and perpetuators of the heinous crimes are tried and punished. Thus, a mechanism could be formulated to

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76 In 1974, the General Assembly invited the Palestine Liberation Organization to participate in its work as an observer. The Assembly established three agencies to deal with the issue. In 1968 it set up the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, which reported on the treatment of the Arab populations in the Gaza Strip and West Bank. In 1975, it established the Committee on the Exercise of the Inalienable Rights of the Palestinian People, to seek a political solution. In 1977, the Assembly created an office within the U.N. Secretariat to assist the latter Committee -- the Special Unit on Palestinian Rights, which was upgraded in 1979 to the status of a division of the Secretariat. In 1983, the General Assembly called for an international conference at which Israel's withdrawal from the Occupied Territories would be negotiated. However, Israel refused to participate, and the United States opposed such a conference. The considerable efforts of the General Assembly, therefore, have had little success in wresting Occupied Territories from Israel. John Quigley, note 67, pp. 219-222.

prosecute and punish, the perpetuators of the war crimes committed in the OPT. Israel has a legal obligation to pay compensation to the Palestine nation for the decades of occupation and war crimes and wanton destruction it has committed on the defenseless Palestinians.

7

UNILATERAL SANCTIONS UNDER INTERNATIONAL LAW: A VIEW FROM THE SOUTH

S. Senthil Kumar*

I. Introduction

Sanctions[1] which are generally imposed by a country in pursuit of its particular foreign policy agenda with a coercive nature are commonly referred as unilateral sanctions.[2] The established practice is that imposition of sanctions should be done in accordance with the rule of law as well as the principles of the Charter of the United Nations. Such sanctions should be used only when all other remedies provided for in the Charter have been exhausted, and no other option exists for bringing a recalcitrant State into line.

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1 See generally on Sanctions, Josef L. Kunz, "Sanctions in International Law", *American Journal of International Law,* vol. 54 (1960), pp. 324-348; Tom J. Farer, "Political and Economic Coercion in Contemporary International Law" *American Journal of International Law,* vol. 79 (1985), pp. 405-415; Robert Caswell, "The Need for Planning and Coordination of Economic Sanctions", *New York Journal of International Law and Policy,* vol. 19 (1986-87), pp. 857-864; Adam Winkler, "Just Sanctions", *Human Rights Quarterly,* vol. 21, no.1 (1999), pp. 133-155; Emmanuel Decaux, "The Definition of Traditional Sanctions: Its Scope and Characteristics", *International Review of the Red Cross,* vol. 90, no. 870 (2008), pp. 249-257; Jeffrey Meyer, "Secondary Thoughts on Secondary Sanctions", *University of Pennsylvania Journal of International Law,* vol. 30, no. 3 (2009), pp. 905-968; W. Arnold Forster, "Sanctions", *Journal of the British Institute of International Affairs,* vol. 5, no.1 (1926), pp. 1-15; V.S. Mani, "Unilateral Sanctions and Extraterritoriality of Domestic Laws: A Perspective of Public International Law", in AALCC Report of the Seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed against Third Parties, 1998, p. 65-82.

2 Jeremy Matam Farall, *United Nations Sanctions and the Rule of Law* (United Kingdom: Cambridge University Press, 2007), p. 7.

The 1990s saw the popularity of unilaterally imposed sanctions which increased markedly as well, especially by the United States, the most prominent practitioner of this deadly instrument.[3] The proponents of sanctions often state that sanctions are imposed for purposes of persuading or forcing the regime of the target State to change its conduct or its behaviour. But, in real sense, it hardly brings any desired behavioural or policy change.[4] It deprives citizens of the target State, the basic necessities of life, leading to massive disruption and destruction of life especially in developing countries.[5] Sometimes, the unilateral sanctions are applied selectively depending upon the target State's vulnerability.

The unilateral sanctions and extraterritorial measures against other countries are not admissible under international law. It violates the basic norms of non-interference in internal affairs, sovereign equality, freedom of trade and peaceful settlement of disputes and presents a serious threat to international peace and security. This fact has been repeatedly reflected in the numerous resolutions of the different organs of the international community, particularly in the resolutions adopted by the UN General Assembly and various Regional Organizations.

The Asian-African Legal Consultative Organization (AALCO) consisting of forty-seven Member States of developing and least developed countries, has in fact continuously raised its voice against the extraterritorial application of national legislation: sanctions imposed against third parties. In the last two decades, large number of unilateral sanctions was imposed against the Member States of AALCO, which made serious adverse impact on the overall economic, commercial, political, social and cultural life of its population. Hence, AALCO consistently urges its Member States

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3 Joy Gordon, "A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions", *Ethics and International Affairs,* vol. 13 (1999), p. 123.

4 Joseph J. Collins & Gabrielle D. Bowdon, *Beyond Unilateral Economic Sanctions: Better Alternatives Sanctions for U.S. Foreign Policy* (1999), p. 3. The authors state that nearly all unilateral sanctions fail nearly all of the time.

5 Geoff Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal Tool*? (London/Sterling, Virginia: Pluto Press, 1999), p. 176. According to a data from the Iraqi Health Ministry with UNICEF support suggested that the sanctions regime has killed more than 878, 856 Iraqi children.

not to recognize and to reject the promulgation and application of unilateral extraterritorial coercive economic measures imposed by any State against any third party.[6]

This article tries to make a modest attempt to focus on the unilateral sanctions and its compatibility with the international law from the developing countries perspective. Firstly, it touches briefly upon the definition and conceptual aspects of the unilateral sanctions. Then, it examines the UN Charter provisions and relevant principles which establish that the unilateral sanctions contravene the established norms and practices of customary international law. To support those arguments, the international efforts of institutions such as UN, Human Rights Council, G77 countries and NAM are highlighted. It analyses the US practices on unilateral sanctions and its two important enactments, viz., Helms-Burton Act and Iran-Libya Sanctions Act. The article further focuses upon the work of AALCO on the Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties and its negative effects on its Member States.

II. Unilateral Sanctions: The Definitional and Conceptual Aspects

The term unilateralism is meaningful only where it relates to situations which are not clearly within the territorial jurisdiction of the State which takes legislative or enforcement action. Thus the term 'unilateralism' is closely related to the territorial limitations of State jurisdiction, or – to express it in a different way – the term 'unilateralism' can be associated with the term 'extraterritoriality', since States are not normally in a position to enforce their legislation outside their territorial jurisdiction, except by military action, unilateralism and extraterritoriality are also closely related to international sanctions.[7]

The concept of sanction has always been at the centre of the theoretical debates over the nature, structure and functions of

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6 Report of the Forty-Seventh Annual Session of AALCO (2008), p. 144, available in www.aalco.int.

7 Bernhard Jansen, "The Limits of Unilateralism from a European Perspective", *European Journal of International Law,* vol. 11, no.2 (2000), pp. 309-313 at p. 310.

international law, if not over the reality of its existence as a legal order.[8] Sanctions are linked to the general problem of compliance inherent in the prescriptive nature of any legal order.[9] There are some commonly agreed elements of the definition of sanctions and they are: it constitute legal consequences following on a violation of a legal obligation, they infringe the subjective legal rights of the party against whom they are directed, and they are measures which amount to a dispensation of the sanctioning state from a legal obligation, or in other words, a circumstance excluding wrongfulness.

A survey of the major philosophical and legal approaches to the question, where made by the natural law theorists, John Austin, Hans Kelsen, Herbert Hart who have shown the wide differences of views as regards the concept of sanctions in international law, the form they take, their content, conditions for their application and their purpose. For example, in Austinian terms, law is nothing but the command of the sovereign based on the power to inflict punishment, or for Hans Kelsen law is "the primary norm, which stipulates the sanction".[10]

Abi-Saab has defined sanction as a coercive response to an internationally wrongful act authorized by a competent social organ. It may be inferred from his definition that a 'competent social organ' is not an individual state acting in its own right, or even a small group of States so acting. Instead, it seems to refer to some competent social organ authorized to act on behalf of a collective interest, such as, for example, the Security Council.[11]

With regard to its role in the present context, Cleveland believes that unilateral sanctions can actually "have an importance beyond their classic role in seeking to punish and alter a foreign State's behavior – that of assisting in the international definition,

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8 Georges Abi Saab, "The Concept of Sanctions in International Law", in Vera-Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (The Hague: The Kluwer Law International, 2001), p. 29.

9 *Ibid*., p.4.

10 Hans Kelsen, *General Theory of Law and State* (Translated by Anders Wedberg) (Cambridge: Mass, 1945), p.61.

11 See, James Crawford, note 8, p. 58.

promulgation, recognition and domestic internalization of human rights norms.[12] Cleveland builds her theory on Harold Koh's "transnational legal process theory",[13] in which Koh offers in response to why "almost all nations observe almost all principles of international law almost all of the time. Koh argues that "norm internalization" – the process by which international norms are internalized into domestic legal structures – results from a vertical dynamic through which a variety of transnational actors (e.g., IGOs, NGOs and private citizens) repeatedly interact with each other and produce an interpretation or enunciation of an applicable international norm. Gradually this interpretation becomes internalized into States' domestic values and processes.[14] Through this repeated interactive process, occasional compliance with norms transforms into habitual obedience or a situation where States are motivated to obey international law out of a sense of internal acceptance of the norms, as opposed to a begrudging compliance when convenient.[15]

Drawing on Koh's theory, Cleveland argues that imposing economic sanctions can contribute to domestic internalization of international norms by incorporating attention to human rights concerns into the political processes of the sanctioning State. Specifically, the process of imposing, reviewing, and revoking sanctions provokes numerous government-to government interactions in which international norms can be invoked and clarified, thereby promoting norm internalization. According to Cleveland, unilateralism is not "inherently hegemonic" – when crafted in accordance with international law principles, unilateral measures "can complement rather than compete with, the development of a multilateral system.[16] But, a number of conditions

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12 Sarah H. Cleveland, "Norm Internalization and U.S. Economic Sanctions", *Yale Journal of International Law,* vol. 31 (2001), p. 73.

13 See Harold Hongju Koh, "Why do Nations Obey International Law?", *Yale Law Journal*, vol. 106 (1997), p. 2599.

14 Harlod Hongju Koh, "How is International Human Rights Law Enforced?", *Indiana Law Journal,* vol. 74 (1998), p. 1397.

15 Janie Chuang, "The United States as Global Sheriff", *Michigan Journal of International Law,* vol. 27 (2005-06), pp. 437-493.

16 See, Sarah H. Cleveland, note 13, p. 69.

must be met in order for the sanctions regime to achieve consistency with international law principles.

Danchin refutes the model of both Cleveland and Koh. He says that both the models are fundamentally at odds - the use of unilateral sanctions constitutes a typical example of the "power" or "realistic" view of State compliance (i.e., that States comply with international law only forced), whereas Koh's view is that true compliance with global norms is not so much the result of externally imposed sanctions as it is the result of internally felt norms. Danchin also argues that Koh's formula entails a broader range of actors at the transnational level - e.g. Inter-governmental Organizations (IGOs), Non-governmental Organizations (NGOs) and private individuals - than permitted in the "one-sided forum" unilateral sanctions typically create between the sanctioning and target States.[17]

III. Unilateral Sanctions and the Charter of the United Nations

The UN Charter does not define the term "sanctions", but sanctions are cited in it as measures that the Security Council may take under Chapter VII against a State in order to restore or maintain international peace and security.[18] Such measures may not include the use of armed force but may include the interruption of economic relations and communications as well as the severance of diplomatic relations. Thus unilateral resort to economic measures by any individual State to coerce another sovereign State to obtain from it

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17 Peter Danchin, "U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative", *Columbia Journal of Transnational Law,* vol. 41 (2002-03), pp. 33-136 at p. 123.

18 See generally on United Nations and Sanctions regime: P. Conlon, "Legal Problems at the Centre of the United Nations Sanctions", *Nordic Journal of International Law,* vol. 65 (1996), p. 73; Christopher C. Joyner, "Sanctions, Compliance and International Law: Reflections on the United Nations' Experience against Iraq", *Virginia Journal of International Law*, vol. 32 (1991), p.1; H. Kochler, "Ethical Aspects of Sanctions in International Law: The Practice of the Sanctions Policy and Human Rights", available at http://i-p-o.org/sanctp.htm.

the subordination of its sovereign right is illegal.[19] Prof. James Crawford points out that the UN Charter even though authorizes coercive responses, does not impose "sanctions" in the strict sense. Its powers are described not in terms of responses to internationally wrongful acts but to situations which it characterizes as threats to or breaches of the peace.[20]

While the developed western countries argue that the Charter does not expressly prohibit unilateral non-forcible interference such as economic sanctions or the curtailing of diplomatic relations by UN members, the developing countries continues their persistent argument that Articles 2 (3),[21] 2 (4) and 2 (7) implicitly bar economic and other non-forcible intervention.[22]

A. Principle of Non-Intervention

The very well established principle of non-intervention constitutes a foundation for avoidance of anarchy in world order and is thus a fundamental norm of international law incorporated in many legal instruments, various commentaries, resolutions of the United Nations General Assembly and also in several judgments of the International Court of Justice. It strongly rejects intervention and interference in both internal and external affairs of other States. This principle is considered as a corollary of the principle of sovereign

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19 M. Javad Zarif, "Extra-Territorial Sanctions in International Law", in AALCC's Report of the Seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties" Tehran, Islamic Republic of Iran, 1998, p. 8

20 See James Crawford, note 8, p. 57.

21 In his commentary on Article 2 (3) of the Charter, Prof. Christian Tomuschat, writes: "International practise is based on the assumption that such a general ban [on economic sanctions] does not in fact exist. Any other view is open to serious doubt, for it would be tantamount to conferring privileges on a wrong-doer" in *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 2002), p. 110.

22 A/RES/39/210 (1984): The UN General Assembly pronounced that, developed Countries should refrain from threatening or applying trade restrictions, blockades, embargoes and other economic sanctions, incompatible with the Charter of the United Nations and in violation of undertaking contracted, multilaterally or bilaterally, against developing countries as a form of political and economic coercion which affects their economic, political and social development.

equality of States. The ICJ in elaborating the non-intervention principle has ruled that:

> In the view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing matters in which each State is permitted by the principle of State sovereignty, to decide freely. One of these is the choice of political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.[23]

Further it observed that:

> The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.

The Court recalled that when on an earlier occasion in the *Corfu Channel* Case, it had before it a claim of the United Kingdom to a right of intervention in order to secure evidence from the territory of Albania for submission to an international tribunal, the Court held that:

> The alleged right of intervention as a manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and as such cannot whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[24]

The relevant principles of non-intervention embodied in the Friendly Relations Declaration of 1970 are:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms

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23 *Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ 1986,* p. 108

24 *ICJ Reports 1949*, Para 4 at p. 35.

of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from its subordination of the exercise of its sovereign rights and to secure from its advantage of any kind.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.[25]

B. Principle of Sovereign Equality of States

Under international law, sovereign equality of States is the cornerstone of the international legal system. As one of the defining ideas of 20th century, the principle of sovereign equality of States gained its supreme recognition in Article 2 (1) of the UN Charter under which "the Organization is based on the principle of sovereign equality of all its members." The equality of States means that the dignity, personality and independence of a State as well as its territorial integrity are respected.

R. P. Anand puts it as, all it means is that the States are equally entitled to be protected in the enjoyment of their rights and equally compelled to fulfill their obligations.[26] In the *Norwegian Ship Owners' Claims* Case (1922),[27] the Permanent Court of Arbitration concluded that "international law and justice are based upon the principle of equality between States".

The unilateral sanctions disregard the principle of sovereign equality. The 1970 Declaration on Friendly Relations provides:

"All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community,

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25 A/RES/25/2625 – Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 1970.

26 R.P. Anand, *Sovereign Equality of States in International Law*, (Delhi: Hope India Publications, 2008), p. 98.

27 United Nations, *Reports of International Arbitral Awards (RIAA),* vol. I, p. 331.

> notwithstanding the differences of an economic, social, political or other nature.
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> The principle of sovereign equality generates a range of operational rules. It obligates States to respect each other's sovereignty, each other's sovereign attributes, each other's political independence and international obligations. It casts a duty on a State not to frustrate the lawful agreements and other relations between other States. The respect for each other's territorial integrity and other attributes of sovereignty encompasses a duty of a State not to transgress upon the domestic jurisdiction of other States.[28]

Within the framework of international law, a State's jurisdiction within its territory is absolute and exclusive. The exercise by a State of its rights to jurisdiction is determined by the principles of territoriality, and nationality, the protective principle and the principle of universality. Save the principle of universality, a valid exercise of State jurisdiction based on any of the other principles must bear on matters, most closely related to, or having a direct, immediate and substantial nexus with the legitimate interests of a State, taking into account the legitimate of other States or the international community.[29]

C. Right to Self-Determination

International law guarantees the right of self-determination. The United Nations Declaration on the Granting of Independence to Colonial Territories and Peoples states that: "All people have the right to self-determination; by virtue of that right, they determine their political status and freely pursue their economic, social and cultural development".[30]

The purpose of many of the unilateral sanctions is to cause another State to change its policies or other practices. The right to

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28 See, Declaration, 1970, note 25.

29 See generally, R.Y. Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws", *British Yearbook of International Law,* vol. 33 (1957), pp. 146-175.

30 General Assembly Resolution 1514 (XV) of 14 December 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples); See also, General Assembly resolution 1654 (XVI) of 27 November 1961 (The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples).

self-determination is an important fundamental right of the developing Third World countries,[31] which considered it as a right to determine of their own choice of political, economic, social and cultural system, and it is no other State's business to dictate a particular from of government or to advise and ask for any changes in the exercise of sovereign rights of a country. Therefore, any unilateral measures restricting the right of the peoples of the target States to determine their approach is violation of the basic principles of international law.

IV. International/Regional Efforts to Curb Unilateral Sanctions

A. United Nations

At the multilateral level, the United Nations General Assembly adopted several resolutions[32] which rejected prima facie, the

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31 See generally on Third World related works: B.S. Chimni, *International law and World Order: A Critique of Contemporary Approaches,* (New Delhi: Newbury Park, CA: Sage, 1993); B.S. Chimni, "Third World Approaches to International Law: A Manifesto", in Antony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Chinedu Okafor (eds.), *The Third World and International Order: Law, Politics and Globalization* (Leiden: Brill Academic Publishers, Martinus Nijhoff, 2003); A.A. Fatouros, "International Law and the Third World", *Virginia Law Review,* vol. 50 (1964), pp. 783-823; Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions and the Third World", *New York University Journal of International Law and Policy,* vol. 32 (2000), pp. 243-290; Balaksrishnan Rajagopal, "Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy", in *Fifty Years of AALCO: Commemorative Essays in International Law (ed.),* 2007, pp. 148-169; Keith Aoki, "Space Invaders: Critical Geography, the "Third World" in International Law and Critical Race Theory", *Villanova Law Review*, vol. 45 (2000), p. 913; Makau Mutua, "What is TWAIL?" *American Society of International Law Proceedings*, vol. 94 (2000), p. 31; Joel Ngugi, "Making New Wine for Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization?" *U.C. Davis Journal of International Law and Policy*, vol. 8 (2002), p. 73; James Thuo Gathii, "Rejoinder: TWAILing International Law" *Michigan Law Review,* vol. 98 (2000), p. 2066; Vijayashri Sripati, International Territorial Administration through the TWAIL Looking Glass: A Review", *Human Rights Quarterly,* vol. 31 (2009), p. 541.

32 UN Press Release, General Assembly Adopts 46 Third Committee Texts on Human Rights Issues, Refugees, Self-Determination, Racism, Social Development, GA/10562 dated 19 December 2006. The UN General Assembly adopted a resolution, which out rightly rejects the use of coercive measures as a tool for political or economic pressure against any nation for impending the

unilateral measures by the developed countries and urged the States to take steps to avoid and to refrain from adopting any unilateral measures not in accordance with international law and the UN Charter that impeded the full achievement of economic and social development by the population of the affected countries, in particular children and women, that hindered their well-being and that created obstacles to the full enjoyment of their human rights, including the right of everyone to a standard of living adequate for their health and well-being. Further, it expressed its concern with regard to the extraterritorial effects of those measures, because they created new obstacles to the full enjoyment of all human rights by the peoples of other countries. Further, it urged all nations to abstain from adopting or implementing unilateral coercive measures that impeded the full enjoyment of all people to the right to food, medical attention and necessary social services.

In another situation, the Member States responded to the UN Secretary-General's request for views and relevant information on the issue of unilateral economic measures as a means of political and economic coercion against developing countries have expressed disagreement with such unilateral practices. Unilateral economic measures were viewed as actions that are contrary to the principles of the Charter of the United Nations, the norms of international law and the rules-based multilateral trading system embodied in the agreements of the World Trade Organization. Several replies made

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complete fulfillment of its citizens. The draft resolution was submitted by Cuba and it was adopted by a recorded vote of 131 in favour of 54 against with no abstention.

General Assembly resolution 60/185, entitled "Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries A/62/210 dated 6 August 2007. This item was conceived from various international soft law instruments and they are: Resolution 2625 (XXV) of Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 1970; Declaration and the Programme of Action on the Establishment of a New International Economic Order, 1974; Charter of Economic Rights and Duties of States, 1974; Paragraph 7 (iii) of the Ministerial Declaration on General Agreement on Tariffs and Trade at their thirty-eighth session, 1982; Resolution 152 (VI) of the United Nations Conference on Trade and Development entitled "Rejection of Coercive Economic Measures".

reference to paragraph 5 of the Doha Declaration of the Heads of State and Government of the Member Countries of the Group of 77 and China at the Second South Summit held in June 2005, which, *inter alia*, called on the international community to eliminate the use of unilateral coercive economic measures against developing countries.

The Organization for Economic Cooperation and Development (OECD) expressed the view that such measures should be used only as a last resort and their application should be consistent with international law.[33]

In 2008, the UN General Assembly voted overwhelmingly in favour of ending the 46 year old United States economic, trade embargo against Cuba, marking the seventeenth year in a row that the 192 Member body, the UN urging its Member States to lift the stiff sanctions imposed on the Caribbean island in 1962.[34] The draft resolution was submitted by Cuba and it was adopted by a recorded vote of 185 in favour to 3 against with 2 abstentions.[35]

Further, the General Assembly adopted the resolution expressing its concern at the continued promulgation and application by Member States of laws and regulations, the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation.

B. UN Human Rights Council

The United Nations Human Rights Council in its Ninth Session considered the item on, "Human Rights and Unilateral Coercive Measures" and adopted a resolution to that effect. The Council, *inter alia*, condemned the continued unilateral application and enforcement by certain powers of such measures as tools of political or economic pressure against any country, particularly against developing countries, with a view to preventing these countries from

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33 *Ibid*.

34 UN Press Release, "For Seventeenth Consecutive Year, General Assembly Overwhelmingly Calls for End to United States Economic, Trade Embargo Against Cuba", GA/10772 dated 29 October 2008.

35 A/RES/63/7 dated 11 December 2008.

exercising their right to decide, of their own free will, their own political, economic and social systems.

The Council requested the UN Secretary-General to seek the views and information from the Member States on the implications and negative effects of unilateral coercive measures on their populations and to report thereon to the Council.[36]

C. Group of 77 Countries

In a recent meeting of the G77 that consists of developing countries and China, it firmly rejected the imposition of laws and regulations with extraterritorial impact and all other forms of coercive economic measures, including unilateral sanctions against developing countries, and reiterated the urgent need to eliminate them immediately. They emphasized that such actions not only undermine the principles enshrined in the Charter of the United Nations and international law, but also severely threaten the freedom of trade and investment. They, therefore, called on the international community neither to recognize these measures nor apply them.[37]

D. Non-Aligned Movement (NAM)

The Fifteenth Summit of the Non-Aligned Meeting held in Arab Republic of Egypt in July 2009, had expressed its concern over the unilateral exercise of extraterritorial criminal and civil jurisdiction of national courts not emanating from international treaties and other obligations arising from international law, including international humanitarian law. In this regard, they condemned the enactment of politically motivated laws at the national level directed against other States, and stressed the negative impact of such measures on the rule of international law as well as on international relations, and called

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36 A/HRC/9/L.12 dated 17 July 2008 and A/HRC/9/2 dated 17 July 2008 the UN Secretary-General's Report on the agenda item.

37 The Group of 77 and China met in New York, at the United Nations Headquarters, on 26 September 2008 on the occasion of their Thirty-second Annual Meeting. Para 21 of the Ministerial Declaration, visit http://www.g77.org/doc/Declaration2008.htm (last accessed on 23 July 2009).

for the cessation of all such measures.[38] During the Fourteenth Ministerial Conference,[39] the Movement reiterated the need to

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[38] Para 17.2 of the Final Document of the XV Summit of Heads of State and Government of the Non-Aligned Meeting, Sharm el Sheikh, Arab Republic of Egypt, 11-16 July 2009, NAM2009/FD/Doc.1

[39] Fourteenth Ministerial Conference of Non-Aligned Movement entitled "Solidarity for Peace and Justice", Tehran, the Islamic Republic of Iran, 29-30 July 2008. NAM 2008/Doc.1/Rev.2 dated 30 July 2008.
Recognising the serious danger and threats posed by the actions and measures which seek to undermine international law and international legal instruments, as well as consistent with and guided by the Movement's principled positions thereof, the Ministers agreed to undertake the following measures, among others:

- Firmly oppose the unilateral evaluation and certification of the conduct of States as a means of exerting pressure on Non-Aligned Countries and other developing countries;
- Refrain from recognising, adopting or implementing extra-territorial or unilateral coercive measures or laws, including unilateral economic sanctions, other intimidating measures, and arbitrary travel restrictions, that seek to exert pressure on Non-Aligned Countries – threatening their sovereignty and independence, and their freedom of trade and investment – and prevent them from exercising their right to decide, by their own free will, their own political, economic and social systems, where such measures or laws constitute flagrant violations of the UN Charter, international law, the multilateral trading system as well as the norms and principles governing friendly relations among States; and in this regard, oppose and condemn these measures or laws and their continued application, persevere with efforts to effectively reverse them and urge other States to do likewise, as called for by the General Assembly and other UN organs; request States applying these measures or laws to revoke them fully and immediately;
- Support, in accordance with international law, the claim of affected states, including the targeted states, to compensation for the damage incurred as a consequence of the implementation of extraterritorial or unilateral coercive measures or laws;
- Oppose, while reiterating the utmost importance of preserving the delicate balance of rights and obligations of States as stipulated in the various international legally binding instruments to which they are party, the actions by a certain group of States to unilaterally reinterpret, redefine, redraft or apply selectively the provisions of these instruments to conform with their own views and interests and which might affect the rights of their States Parties as defined therein, and in this context, work towards ensuring that the integrity of these instruments is preserved by their States Parties;
- Oppose all attempts to introduce new concepts of international law aimed at internationalising certain elements contained in the so-called extra-territorial laws of certain States through multilateral agreements.

eliminate unilateral application of economic and trade measures by one State against another that affect the free flow of international trade. They urged States that have and continue to apply such laws and measures to refrain from promulgating and applying them in conformity with their obligations under the Charter of the United Nations and international law, which, *inter alia*, reaffirm the freedom of trade and navigation.

The Movement reiterated its strong concern at the growing resort to unilateralism and unilaterally imposed measures that undermine the UN Charter and international law, and further reiterated its commitment to promoting, preserving and strengthening multilateralism and the multilateral decision making process through the UN, by strictly adhering to its Charter and international law, with the aim of creating a just and equitable world order and global democratic governance, and not one based on monopoly by the powerful few. It also reaffirmed the objective of making the right to development a reality for everyone as set out in the UN Millennium Declaration, and give due consideration to the negative impact of unilateral economic and financial coercive measures on the realization of the right to development.

VI. Countermeasures and Unilateral Sanctions

As a legal basis, the proponents of unilateral sanctions mostly refer to the notion of countermeasures. However, it is not justifiable, in particular with respect to extraterritorial sanctions on that basis. Countermeasure is a tool that enables an injured State to take measures against a State which was responsible for an internationally wrongful act in order to induce that State to comply with its obligations. There are some pre-requisites. Countermeasure should not affect the basic principles of international law, in particular human rights law and international humanitarian law. Furthermore, countermeasures must be proportional and such conditions are not available in extraterritorial sanctions.

In the case concerning *Air Services Agreement of 27 March 1946 between the United States of America and France,*[40] the Tribunal in its arbitration award on 9 December 1978 recognized the relevance on the counter-measures in inter-state relations. The arbiters said that States are likely to resort to 'countermeasures', 'subject to the general rules of international law regarding armed constraint'. When confronted with a situation that in their view involves breach by another State of an international obligation towards them. This statement by the arbiters is all the more open to criticism for seeming to care not a whit for the scope and implications of the general cooperation obligation considered above. And it has been, moreover, heavily criticized by legal scholars. In particular, Pierre observed that the ruling accepted the American conception that a State can have recourse to unilateral countermeasures without even waiting for resumption or even the outcome of negotiations embarked on with the partner was felt to be at fault. The conception has since, fortunately, been implemented by Article 40 (1) of the Draft adopted its first reading by the International Law Commission (ILC) in 1996.[41]

The Tribunal further said: "it is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule. The Tribunal further recognized that the potential of counter-measures to aggravate the dispute. Hence it observed: "Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute.

The above ruling, however, echoed a provision proposed by the Special Rapporteur to the ILC precluding wrongfulness, Roberto Ago, in his reports, initially spoke of 'sanctions' rather than

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40 Reports of International Arbitral Awards, (RIAA), vol. XVIII, pp. 417-493, available at http://untreaty.un.org/cod/riaa/cases/vol_XVIII/417-493.pdf (accessed on 23 July 2009).

41 Pierre-Marie Dupuy, "The Place and Role of Unilateralism in Contemporary International Law", *European Journal of International Law,* vol. 11, no.2 (2000), p. 26.

unilateral countermeasures by a State which alleged that another was guilty of a wrongful act towards it. At his invitation, Article 30 of the Draft was adopted by the Commission. This provision established that the wrongfulness of such a 'countermeasure' disappears to the extent that it itself constitutes a response to an initial wrongful act committed by another State against its perpetrator.[42]

But, in any case, the unilateral measures are not justifiable as countermeasures. Contemporary international law restricts the extent to which an injured State may resort to economic or political coercion by way of countermeasures.[43] Firstly, only the injured or victim State is entitled to resort to countermeasures as defined and limited by international law. Secondly, resort to specific types of countermeasures is prohibited. The ILC listed the "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State" among the outlawed countermeasures.[44]

VII. Unilateral Sanctions: Hegemonic Actions of the United States of America

According to a recent study, the United States imposed 125 unilateral sanctions against 47 States between 2002 and 2006.[45] According to another estimate in the year 2001, about 75 of the world's nearly 192 countries were subjected to U.S. sanctions. Several have been sanctioned for multiple offenses.[46] The U.S. imposition of economic sanctions[47] which are unilateral in nature

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42 *Ibid.,* p. 26.

43 See, Javad Sharif, note 8, p. 7.

44 *Ibid,*

45 Michael P. Malloy, "Study of New U.S. Unilateral Sanctions, 1997-2006", USA Engage, 2006, available at www.usaengage.org (accessed on 20.07.2009).

46 Robin Wright, "Powell Intends to Curb Use of Diplomatic Sanctions", *Los Angeles Times*, 22 January 2001 at A1, cited in Adeno Addis, "Economic Sanctions and the Problem of Evil", *Human Rights Quarterly,* vol. 25 (2003), pp. 573-623 at p. 575, foot note 6.

47 There are many definitions for the term economic sanctions. See, generally, Andreas F. Lowenfeld, *International Economic Law,* (2002), 698 (defining economic sanctions as "measures of an economic—as contrasted with diplomatic or military-character taken by states to express disapproval of the

used to promote its foreign policy objectives including promoting democracy and human rights, combating nuclear proliferation, fighting trafficking in drugs and weapons and punishing territorial aggression.[48] It has also become the United States' policy tool of choice.[49] The U.S. unilateral sanctions have taken the form of statutes and laws conditioning foreign assistance on a country's compliance with human rights and labour standards etc. Criticizing these aspects, Christopher Wall observed that:

> The United States sometimes walks a fine line between hypocrisy and straightforward imperialism where it seeks to enforce rights embodied in human rights instruments that it has not ratified itself or where it flexes its economic muscle to dictate policy to smaller developing nations[50]

Human rights advocates argues that US unilateralism employs a 'new realist' approach for enforcing international norms to justify the use of sanctions against target States, but using entirely domestic norms and predominantly unilateral means to promote and protect

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acts of the target state or to induce that state to change some policy or practice or even its governmental structure... [and] are measures taken not for economic gain, and often at commercial sacrifice on the part of the state engaged in a program of denial."), and Gary Clyde Hufbauer, Jeffrey J. Schott and Kimberly Ann Elliott, *Economic Sanctions Reconsidered, History and Current Policy* (2d ed. 1990), p. 2 ("We define economic sanctions to mean the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations. 'Customary' means levels of trade and financial activity that would probably have occurred in the absence of sanctions."), and William H. Kaempfer and Anton D. Lowenberg, *International Economic Sanctions: A Public Choice Perspective* (1992), p. 37 (defining economic sanctions within the construct of public choice theory as "redistributional policies enacted as a consequence of interest group pressures in the sanctioning countries."), cited in E. Michael Alber, "Retooling Economic Sanctions; Legitimacy and Efficacy", August 20, 2008, available at http://works.bepress. com/e_michael_ abler/1/ (accessed on 20 July 2009).

48 W. Michael Reisman and Douglas L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Program", *European Journal of International Law,* vol. 9 (1998), p. 87.

49 Richard N. Haass, "Sanctioning Madness", *Foreign Affairs,* vol. 76 (1997), p. 74. Also see Ralph G. Carter, "Leadership at Risk: The Perils of Unilateralism", *Politics Science and Politics Society*, vol. 36, no.1 (Jan. 2003), pp.17-22

50 Christopher Wall, "Human Rights and Economic Sanctions: The New Imperialism", *Fordham International Law Journal,* vol. 22 (1998), p. 577.

those standards. In so far as the US seeks to enforce international norms, critics argue, it does so selectively, subject to the changing priorities of US domestic politics rather than a genuine respect for those norms.[51]

The US economic sanctions deprive citizens of the target State many of the basic necessities of life, leading to massive disruption and even destruction of life. The often high cost in life, liberty, and property that economic sanctions exact on innocent citizens and sectors of the target State are simply unacceptable even if at the end there was to be a change in the action and behaviour of the regime of the target State. According to Gordon,[52] it is morally unacceptable to impose suffering on innocent sectors of the target State, as economic sanctions do, for an objective that does not involve the prevention of the deaths of other innocent persons.

The experts argue that unilateral sanctions are, in practice, ineffective and worked against US foreign policy objectives[53]. Further, it adversely affected the common people of the targeted countries and thereby violates the basic human rights.

In many instances, unilateral sanctions are not only ineffective, but also a hindrance rather than a help to its self set goals. In Myanmar, for instance, failure to gain international support for US economic sanctions eventually led to talks that served as a forum for bashing the US self-appointed role "as the World's arbiter of human rights".[54]

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51 Peter Danchin, note 18, p. 41.

52 Joy Gordon, note 4, p. 123.

53 Gary Clyde Hufbauer and Barbara Oegg, "Economic Sanctions: Public Goals and Private Compensation", *Chicago Journal of International Law,* vol. 4 (2003), p. 305.

54 Patricia Stirling, "The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization", *American University Journal of International Law and Policy,* vol. 11 (1996), p. 15. He noted that after the implementation of US policy to isolate Myanmar economically, no Asian nation would cooperate with the US, however, forcing it to reopen talks with Myanmar's leaders". See, Charles William Maynes, "US Unilateralism and Its Dangers", *Review of International Studies,* vol. 25 (1999), pp. 515-518.

The United States has a distinction of perfecting unilateral sanctions on the international plane through the instrumentality of its domestic laws.[55] Indeed, this trend gathered momentum with the Cold War. "Through a variety of legislative and statutory provisions, the US has mastered the art of economic coercion and institutionalized retorsion as a system of first and second order compliance with (the American perception of) international law"[56] The period 1990-1996 was characterized by the US Administration and States promulgating a number of extraterritorial laws including Helms-Burton and the Iran-Libya Sanctions (Kennedy-D'Amato) Acts.[57]

A. The Helms-Burton Act

On March 12, 1996, the United States President signed into a law the Cuban Liberty and Democratic Solidarity Act (LIBERTAD) of 1996.[58]

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55 Roger Fischer, *Improving Compliance with International Law* (Charlottesville, 1981), quoted in V.S. Mani, "Unilateral Sanctions and Extraterritoriality of Domestic Laws: A Perspective of Public International Law", *Indian Journal of International Law*, vol. 38, no.1 (1998), pp. 1-27 at p.2.

56 Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, New York: 1984), p. 8.

57 Some of them are: The Andean Trade Preference Act; the Anti-Terrorism and Effective Death Penalty Act, 1996; The Arms Export Control Act (AECA); The Atomic Energy Act; The Cuban Democracy Act, 1992; The Department of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1990 (Commerce Appropriations Act); The Foreign Assistance Act; The Export-Import Bank Act; The Fisherman's Protective Act, 1967; The High Seas Drift Net Fisheries Enforcement Act, 1995; The International Emergency Economic Powers Act (*IEEPA); The International Financial Institutions Act; The Iran-Iraq Non-Proliferation Act, 1992 and The Iran Sanctions Act, 1990.

58 Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton Act), *International Legal Materials,* vol. 35 (1996), p. 397. See generally, Lucien J. Dhooge, "Fiddling with Fidel: An Analysis of the Cuban Liberty and Democratic Solidarity Act of 1996", *Arizona Journal of International and Comparative Law*" vol. 14 (1997), p. 575; Christine L. Quickenden, Note, "Helms-Burton and Canadian-American Relations at the Crossroads: The Need for an Effective, Bilateral Cuban Policy" *American University Journal of International Law and Policy,* vol. 12 (1997), p. 12; Antonella Troia, Note, "The Helms-Burton Controversy: An Examination of Arguments that the Cuban Liberty and Democratic Solidarity (Libertad Act) Act of 1996 violates the U.S. obligations under NAFTA", *Brooklyn Journal of International Law,* vol. 23 (1997), p. 603.

Generally known as the Helms-Burton Act, it was named for its principal sponsors, United States Senator Jesse Helms (R-N.C.) and United States Congressman Dan Burton (R-Ind.). LIBERTAD is a comprehensive attempt to codify all economic sanctions against Cuba, which have been imposed pursuant to executive orders issued by the earlier United States Presidents. LIBERTAD limits importation of certain crops and finished products that are known to originate from Cuba. It also prevents the President from diminishing his authority to annul current embargo conditions and allows him to grant foreign aid when there is a democratically elected government in Cuba. In addition it also establishes a cause of action for former Cuban nationals who are now United States citizens and United States nationals who lost property or assets in 1960. Finally, the Act authorizes the United States Secretary of State to assess which foreigners (family or business affiliation) have been "trafficking" in confiscated property, and deny them visas for entry and allows the United States Attorney General to deny entry to such foreigner(s).

The primary goals of LIBERTAD were designed to cripple Castro's regime, establish a political scene ripe for a democratic movement and reassert the economic interests of the United States to the world. These goals are clear in the different titles of the LIBERTAD. The Act has divided into four parts. Title I strengthens international sanctions against the Castro Government, Title II provides for assistance to a free and independent Cuba, Title III protects property rights of United States Nationals and Title IV excludes certain aliens, found to have trafficked in expropriated property from entering into the United States.

LIBERTAD contains a provision which grants the United States extraterritorial jurisdiction under Title III, under Section 301(9). It states that international law recognizes territorial jurisdiction, which prescribes laws for acts that have occurred outside the United States, but nevertheless, have substantial impact within United States territory. Although this provision of LIBERTAD is construed to give jurisdiction to Congress, an examination of past extraterritorial laws would not support LIBERTAD's aggressive assertion of extraterritorial jurisdiction.

Proponents of LIBERTAD argue that the Act is within the sovereign powers of the United States to prescribe such extraterritorial laws. Although, there has been a 36 year lapse between the conduct and the effect, the confiscations did and possibly still do have a considerable impact on the thousands of Cuban-Americans and the several United States companies who lost properties during the confiscations. Moreover, the United States government can assert that the international system is consistent with LIBERTAD, in that international law recognizes the ownership and use of property as a fundamental human right.[59]

Opponents contend that LIBERTAD goes beyond the limitations to prescribe as they are set forth in Restatement No. 403, where the exercise of jurisdiction by a foreign State would be limited or curtailed if it was to be found that the jurisdiction was unreasonable.[60]

The passage of the Cuban Democracy of Act 1992 had created great international opposition because the Act contained extraterritorial provisions. The European Union[61] did not take any formal action but voiced its opposition to this type of legislation. International reaction against the Helms-Burton was overwhelmingly positive, with virtually all US trading partners strongly condemning the US Bill. According to these allies, the Act violated "internationally accepted principles of free trade and finance," NAFTA and WTO rules.

The U.N. General Assembly has adopted a number of resolutions concerning extraterritorial acts and human rights violations. On November 24, 1992, the U.N. General Assembly adopted a resolution "expressing concern over measures having extraterritorial effect on

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59 Ernest Luciano, "A Helms-Burton Act Analysis: Is this Type of Extraterritorial Jurisdiction Consistent with our Treaty/Agreements, Customary International Law and Post Cold War Policy", *New England International and Comparative Law Annual,* vol. 3 (1997), p. 16; See also, L. Gierbolini, "The Helms-Burton Act: Inconsistency with International Law and Irrationality at their Maximum" *Journal of Transnational Law and Policy*, vol. 6, no.2 (1998), p. 295.

60 *Ibid*., p. 20.

61 See, C. Hoelscher, "The Helms-Burton Bill from a European point of View" *Tilburg Foreign Law Review,* vol. 6 (1996-97), p.241.

the sovereignty of other states and affirming support for the principles of sovereign equality and non-intervention. Opponents of LIBERTAD argued that Title III is an unprecedented provision mandating United States extraterritorial jurisdiction. Since 1992,[62] the U.N. General Assembly has repeatedly condemned United States actions to enforce United States law abroad. The international community, through the organs of the United Nation has consistently promoted territorial sovereignty and non-intervention in the foreign investment laws of other countries. Additionally, the General Assembly, in accordance with the resolutions, has repeatedly voted to dismantle the economic, commercial and financial embargo imposed against Cuba by the United States. Moreover, most of the world believes the best way to deal with Cuba is through a policy of constructive engagement, not by a policy the United States follows.

B. Iran-Libya Sanctions Act

On 5 August 1996, the US President signed into law the controversial bill, "The Iran- Libya Sanctions Act of 1996" (D' Amato Act) aimed at penalising foreign nationals or corporations whose investments in Iran or Libya contribute directly and significantly to the ability of these two countries to develop their petroleum resources.[63] Why does the D'Amato Act target the Iranian oil industry? The rationale is that the petroleum industry is the major economic activity in Iran and its role has remained significant in the country's economic structure. This is the part of Iran's economy which is very vulnerable and upon which the United States exerted its pressure.[64] The Act's ban on non-US companies from investing in the Iranian oil industry

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62 From 1992-2008, the United Nations General Assembly has adopted resolutions condemning and calling for an end to the unilateral economic embargo imposed by the United States against Cuba. As the years progress, more and more countries have been siding with Cuba on this issue. The United States closest trading partners (such as Great Britain) have finally sided with Cuba, calling for an end to the trade embargo.

63 Iran and Libya Sanctions Act of 1996 reproduced in *International Legal Materials (ILM)*, vol. 36 (1997), p. 529.

64 Homayoun Mafi, "The Dilemma of US Economic Sanctions on Iran: An Iranian Perspective" *Iranian Journal of International Affairs,* vol. XIX, no.4 (2007), pp. 99-121 at p. 106.

is to prevent these companies from participation in the development schemes of Iran's oil industry, because such development will reduce Iran's technological dependency on US oil companies. The sanctions are to be imposed if companies make investment of more than $ 40,000, 000 or more in any 12-month in Iran's oil fields.

The underlying premise of the sanctions is that both Iran and Libya pose a threat to the United States national security interests by attempting to acquire weapons of mass destruction and supporting the acts of international terrorism. The target of the Act is neither terrorism nor its sponsors, but the imposition of sanctions on persons who aid the development of oil industries of Iran and Libya in order to compel them to comply with the US foreign policy. In other words, the controversy surrounding the Act stem from its growing challenge to the rules of international law.[65] The statute as a subcategory of economic sanctions constitutes a secondary boycott seeking to discourage third-party nationals from doing business with the target country by binding persons beyond the US borders to its legislation.

Secondary boycott[66] is based on extraterritorial jurisdiction and therefore considered to be in violation of the rules of international law. In fact, resorting to a secondary boycott represents the lack of international consensus regarding the boycotted nation. As an unpalatable course of action, the secondary boycott not only influences legal acts of foreign firms in their own countries for trading with Iran or Libya, but also creates an unreasonable instrument of economic coercion.

The question is whether the D'Amato Act provides a useful paradigm of violating the GATT by departing from the principle of free trade.[67] The multilateral trading system is based on acceptance

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65 *Ibid,* p. 108.

66 Secondary boycott means sanctions which are applied not only against a target State, but also against any person or State that maintains relations or engages in transactions with the target State. In secondary boycott, the secondary target is being sanctioned directly for dealing with the primary target, even though such dealings may have no jurisdictional relationship to the sanctioning State.

67 On the issue of Unilateral Trade Sanctions, See generally, A. Jayagovind, "Legality of Unilateral Trade Sanctions", *Indian Journal of International Law,* vol.

of the rules and principles that exclude barriers to trade. The goal of a free trading system is to maximize world welfare and to minimize the amount of interference of governments that impinge the flow of trade. The distortions and impediments to international trade not only reduce the conduct of business operations on a world-wide basis, but also weaken the world trading system which aims at reinforcing and strengthening multilateral trade rules, principles and disciplines. Therefore, the main task of a State is to support a free commercial policy with the view of preventing market imperfections.

The provisions of the D'Amato Act are also contrary to the Agreement on Trade Related Investment Measures (TRIMs) as the legislation restricts third country investors conducting business in Iran and Libya. The rationale is that the agreement is designed to ensure that Member States do not apply investment measures that create restrictions in trade. US secondary boycott has been universally denounced as a violation of the principles and norms of international law, the United Nations Charter and World Trade Organization (WTO) Agreements.

Under the D'Amato Act, the President is not instructed to act as to keep US business in line with US foreign policy: he is instructed to act as a world policeman, imposing US law upon every person and every place on the planet. It does little to reassure those who think that many members of the US Congress do not understand international law at all, but see the world as one great federal State with the United States filling the role of the federal government.[68]

Opposing the unilateral sanctions of US, the European Union passed a blocking statute in November 1996, making it illegal for European companies to comply with the extraterritorial measures of the act. U.S. officials have been very reluctant to punish violators of the measures in order to avoid diplomatic and legal disputes and

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40, no.1 (2000), pp. 14-27; B.S. Chimni, "WTO and Environment: Legitimisation of Unilateral Trade Sanctions", *Economic and Political Weekly,* vol. 37, no. 2 (2002), pp. 133-137.

68 Vaughan Lowe, "US Extraterritorial Jurisdiction: The Helms-Burton and D-Amato Acts", *International Comparative Law and Quarterly,* vol. 46 (1997), p. 386.

trade wars that might jeopardize the future cooperation of other governments.[69] Nevertheless, such unilateral economic measures as the Helms-Burton Act (1996) punish companies doing business in Cuba, and the Iran-Libya Sanctions Act created ill will and resentment among U.S. allies.

VIII. AALCO'S Work on Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties

The Asian-African Legal Consultative Organization, (AALCO) included the agenda item entitled, "Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties" in its provisional agenda of the Thirty-Sixth Session at Tehran, 1997, following a reference made by the Government of Islamic Republic of Iran. The four major reasons for the inclusion of this item were: (i) that the limits of the exception to the principle of extra-territorial jurisdiction are not well established; (ii) that the practice of States indicates jurisdiction are not well established; (iii) that extraterritorial measures infringe various principles of international law; and (iv) that extra-territorial measures, on the one hand, affect trade and economic cooperation between developed and developing countries and interrupt cooperation among developed countries, on the other.[70]

Accordingly, a preliminary study prepared by the Secretariat was considered at the Thirty-Sixth Session (Tehran, 1997) of the AALCO which had pointed out that in the claims and counter claims that arose in exercise of extraterritorial jurisdiction involved the following principles: (i) principles concerning jurisdiction; (ii) sovereignty-in particular economic sovereignty – and non-interference in internal affairs of a State; (iii) genuine or substantial link between the State and the activity regulated; (iv) public policy and national interest; (v) lack of agreed prohibitions restricting

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69 F. Ugboaja Ohaegbulam, "U.S. Measures against Libya since the Explosion of Pan-Am Flight 103", *Mediterranean Quarterly,* vol. 11 (2000), p.1.

70 Explanatory Note on Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties- Note of the Secretary-General, AALCC/XXXVI/TEHRAN/97/S8. Annex I. (On the file of the author)

State's right to extend its jurisdiction; (vi) reciprocity or retaliation; and (vii) promoting respect for rule of law.

The study had submitted that it might, perhaps, be necessary to delimit the scope of inquiry into the issue of extraterritorial application of national legislation in determining the parameters of the future work of the Organization on this item. It had asked for consideration to be given to the question, as to whether it should be a broad survey of questions of extraterritorial application of municipal legislation examining the relationship and limits between the public and private international law on the one hand, and the interplay between international law and municipal law on the other.

The study further recalled in this regard that, at the Forty-Fourth Session of the International Law Commission (1992), the Planning Group of the Enlarged Bureau of the Commission had established a Working Group on the long-term Programme to consider topics to be recommended. An outline on the topic "Extraterritorial Application of National Legislation" prepared by a Member of the ILC had inter alia suggested, "it appears quite clear that a study of the subject of Extraterritorial Application of National Laws by the International Law Commission would be important and timely. There is an ample body of State practice, case law, national study on international treaties, and a variety of scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions.[71] However, this topic has not till date been taken up by the ILC.

In the year 1998, a Seminar was coordinated by the AALCO and the Government of the Islamic Republic of Iran to invite the AALCO Member States' response to unilateral sanctions imposed through extraterritorial application of national legislations. It was generally agreed that the validity of any unilateral imposition of economic sanctions through extraterritorial application and national legislation must be tested against the accepted norms and general principles of

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71 See A/CN.4/454, p. 71.

international law.[72] It was emphasized that all the States have an obligation to seek settlement of their international disputes through peaceful means, an obligation to continue to seek such settlement, an obligation not aggravate the dispute pending peaceful resolution, and an obligation not to resort to counter measures until after all reasonably possible methods of peaceful settlement have failed.

The Seminar also suggested to undertake three studies namely: (i) A Study on Unilateral Sanctions, Counter Measures and Dispute Settlement Procedures offered by the WTO Agreements; (ii) A Study of the concept of the abuse of rights in international law, preferably under the presiding norm of good faith, with context of exercised extraterritorial application of national laws in pursuit of national policy objectives; and (iii) A Study of the Impact of Unilateral Sanctions on Trade Relations between States.[73]

In continuation of its work, AALCO considered this issue in its successive sessions. At its Annual Sessions, the Member States oppose the imposition of extraterritorial legislation as being contrary to international law and against good and friendly relations between States. The Member States view that extraterritorial measures are violative of the core principles of territorial integrity and political independence of States. It also hinders peaceful relations on the international front. The disputes are to be settled peacefully, without any form of interference in other State's internal affairs, and that the universal, inalienable and sovereign's rights of all States are to be recognized.

IX. Conclusions

Unilateral sanctions are, by very their nature contrary to the basis of international law. The unilateral enforcement of national legislation is devoid of that vital element of consent that hitherto has been the basis of international law. Today, the United States Government assertion's of extraterritorial jurisdiction is creating serious conflicts between the USA and the rest of the world. Whatever the purpose

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72 AALCC Report of the Seminar on the "Extra-territorial Application of National Legislation: Sanctions Imposed against Third Parties" held in Tehran, Islamic Republic of Iran, January 1998, p. 198. (on the file of the author).

73 *Ibid.,* p. 201.

of its enactments would be, it has been designed to compel States outside the United States' jurisdiction to comply with their ultimatum which clearly goes against the interests of developing and least developed countries. The extraterritorial laws are regarded as an infringement of the sovereignty of States, against the principles of non-intervention and sovereign equality of States. The use of extraterritorial economic and trade sanctions to enforce the American policies is unjustifiable and creates an anomaly under general international law.

AALCO as a legal intergovernmental Organization always emphasized during its Annual Sessions, that the unilateral sanctions are increasingly at odds with the evolving principles and rules of international economic and social cooperation that are embodied in the UN Charter and constituent treaties of multilateral trade and financial institutions. It believes that most of its Member States are being the prime targets of such unilateral imposition of sanctions having extraterritorial effects.[74] Therefore, AALCO continues to oppose the illegal extraterritorial application of national legislation towards third parties.

[74] *Yearbook of the Asian-African Legal Consultative Organization*, vol. IV (2006), p. 609.

8

SUPPRESSION OF TERRORISM FINANCING CONVENTION: A CRITIQUE OF THE LEGAL INSTRUMENT ENFORCING 'WAR ON TERROR' AGENDA

Shannu Narayan*

I. Introduction

The 'international community',[1] since 1937 has taken legal measures to combat terrorism and has adopted thirteen international conventions to control and combat the problem, which had by and large become threat to international peace and security. The United Nations had on its agenda, the fight against terrorism since the adoption of the Convention on Offences and Certain other Acts Committed on Board Aircraft, 1963. An overview of the modus operandi of the terrorist attacks, that paved way for the adoption of thirteen Conventions on measures to combat international terrorism,

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1 Bruno Simma and Andreas L. Paulus, "The 'International Community': Facing the Challenge of Globalisation" *European Journal of International Law,* vol. 9 (1998), pp. 266-277. In this article authors defines that the notion of 'international community' proceeds from the assumption that "it is international law which binds the parts together, affirming the existence of a 'community of States' on the one hand and lending the necessary normative structure to this community on the other: thus not only '*ubi societas, ibi jus'*, but also and above all *'ubi jus, ibi societus'*. While Georges Abi-Saab opines that international community is community of States, but without the social forces which make those States act or which transcend them, sometimes by acting through alternative circuits of their won construction. See Abi-Saab, Georges "Whither the International Community?" *European Journal of International Law,* vol. 9 (1998), pp. 248-265.

reveals that those attacks were intended to weaken those State assets which were one of the major investments of the attacked State and thereby cause human loss, economic loss and spread fear among the citizens. Suppressing financing of terrorism was regarded as very essential by the international community and in 1999 the International Convention for the Suppression of the Financing of Terrorism was adopted. The 9/11 attack on the World Trade Center concretized the focus towards suppressing the financing of terrorism.

The nature of crimes committed by the terrorists and terrorist organisations targets innocent victims in order to indirectly weaken their confidence in the State as a protector. In addition to this, the terrorist attacks intend to pass the message of ideological position or political differences[2]. For this study, the International Convention for the Suppression of the Financing of Terrorism, 1999[3] (hereafter referred as 'the Convention') - the legal instrument designed to counter financing of terrorism at the international level would be analysed. In order to substantiate the significance of this Convention, the United Nations Security Council Resolution 1373 adopted on 26 September 2001, would also be discussed. The article sets out the nature and impact of some of the measures on combating financing of terrorism prior to 9/11 attack and post-9/11 efforts initiated at the United Nations, having implications within a state crime framework and broader critiques of the war on terror, and highlights the paradigm shift to the term 'use of force' under international law.

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2 Rubenstein argues that the common sense in the conservative West divides the political universe into violent and nonviolent spheres. Unlike such thinking 'terrorism is associated with revolution and social disorder, not with politics as usual'. See Richard E. Rubenstein, *Alchemists of Revolution: Terrorism in the Modern World – The Terrorists mentality, its Origins and Consequences,* (I. B. Taurus & Co. Ltd, London, 1987) at p. 156.

3 The text of the Convention is available at http://untreaty.un.org/English/Terrorism/Conv12.pdf. At the Fifty-third session of the United Nations General Assembly (UNGA), France proposed a convention for the suppression of terrorist financing in order to combat terrorism from its base. On 8th December 1998, the Ad Hoc Committee was asked to elaborate a draft International Convention for the Suppression of Terrorist Financing to supplement related existing international instruments.

II. Background

A. International Efforts to Combat Terrorism

The League of Nations, in 1934, took the first major step to combat terrorism by envisioning the prevention and punishment of terrorism. This Convention came into existence in 1937, but could not enter into force due to the outbreak of the Second World War.[4] The gamut of international terrorism conventions could be categorized into conventions dealing with (i) aviation; (ii) status of victim; (iii) dangerous materials; (iv) vessels and fixed platforms; and (v) financing of terrorism.[5] The modus operandi of carrying out such terrorist attack was through aircraft hijacking, attacking airports, vessels and platforms, taking citizens or government servants/personnels as hostages, and use of nuclear materials, and so on. Series of aircraft hijacking forced the international community to take measures that would establish jurisdiction over offences committed on board aircraft registered in such State. This effort culminated in adoption of first three major international conventions on protection of aviation, like the (1) 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft;[6] (2) 1970 Convention for the Suppression of Unlawful Seizure of Aircraft;[7]

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4 Thomas M. Franck and B. Lockwood, "Preliminary Thoughts Towards an International Convention on Terrorism" *American Journal of International Law,* (1974), pp.68:69.

5 Asian-African Legal Consultative Organization, *A Preliminary Study on the Concept of International Terrorism,* (AALCO Secretariat, New Delhi, 2006) at p.16.

6 No. 10106, United Nations Treaty Series, 1969, pp: 219-240. This Convention applies to acts affecting in-flight safety authorizing the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft; and required the contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.

7 No. 12325, United Nations Treaty Series, 1973, 105-111. This Convention makes it an offence for any person on board an aircraft in flight to "unlawfully, by force or threat thereof, or any other form of intimidation, to seize or exercise control of that aircraft" or to attempt to do so. It requires State parties to make hijackings punishable by "severe penalties" and have custody of offenders to

and (3) 1971 Convention for the Suppression of Unlawful Activities against the Safety of Civil Aviation.[8]

The increasing terrorist attacks against individuals and internationally protected persons paved way for two international conventions namely, the (4) 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons;[9] and (5) 1979 International Convention against the Taking of Hostages[10]. The earlier convention defined an internationally protected person as 'a Head of State, Minister for Foreign Affairs, representative or official of a State or international organisation who is entitled to special protection in a foreign State, and his/her family'. The focus then shifted from these two categories to protecting the airports and according protection at sea from frequent terrorist attacks, hence the adoption of: (6) 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Extends and supplements the Montreal Convention on Air

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either extradite the offender or submit the case for prosecution; and assist each other in connection with criminal proceedings brought under the Convention.

8 No. 14118, United Nations Treaty Series, 1975, 177-184. The Convention declares that it is an offence if any person unlawfully and intentionally performs an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts.

9 No. 15410, United Nations Treaty Series, 1977, 167-172. It required parties to criminalize and make punishable "by appropriate penalties which take into account their grave nature" the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act "constituting participation as an accomplice".

10 No. 21931, United Nations Treaty Series, 1987, 205-211. Provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention".

Safety);[11] (7) 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;[12] and (8) 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.[13] It was evident that after attacks on all major areas of State's control, next target would be use of nuclear materials, plastic explosives and bombs; which in turn lead to adoption of (9) 1980 Convention on the Physical Protection of Nuclear Material;[14] (10) 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection;[15]

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11 Vol. 1589, A-14118, United Nations Treaty Series, 1990, 474-478.

12 No. 29004, United Nations Treaty Series, 1992, 221-234. This Convention stands significant since it established a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation; and considers it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships. This convention has a protocol which was adopted in 2005 which criminalizes the use of a ship as a device to further an act of terrorism; transport on board a ship various materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act of terrorism; transporting on board a ship of persons who have committed an act of terrorism; and introduces procedures for governing the boarding of a ship believed to have committed an offence under the Convention.

13 Vol. 1678, I-29004, United Nations Treaty Series, 1992, 304-310. It applies to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation.

14 No. 24631, United Nations Treaty Series, 1987, 124-132. Criminalizes the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage. Further, it makes it legally binding for States Parties to protect nuclear facilities and material in peaceful domestic use, storage as well as transport; and provides for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences.

15 The text of the Convention is available on http://untreaty.un.org/English/Terrorism/Conv10.pdf. Designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am flight 103 bombing); parties are obligated in their respective territories to ensure effective control over Parties are obligated in their respective territories to

(11) 1997 International Convention for the Suppression of Terrorist Bombings;[16] and (12) 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.[17]

On the definition of terrorism, the report by the High-Level Panel on Threats, Challenges and Change,[18] suggested the following factors to be included, like:

a) recognition, in the preamble, that State use of force against civilians is regulated by the Geneva Conventions and other instruments, and is of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;

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ensure effective control over "unmarked" plastic explosives which includes taking necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; preventing the movement of unmarked plastic explosives into or out of its territory; exercise strict and effective control over possession and transfer of unmarked explosives made or imported prior to the entry into force of the Convention; ensure that all stocks of unmarked explosives not held by the military or police are destroyed, consumed, marked, or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or police are destroyed, consumed, marked or rendered permanently ineffective within fifteen years; and, ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date of entry into force of the Convention for that State.

16 The text of the Convention is available at http://untreaty.un.org/English /Terrorism/Conv11.pdf, Creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

17 The text of the Convention is available at http://untreaty.un.org/English/ Terrorism/English_18_15.pdf, Covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors; Covers threats and attempts to commit such crimes or to participate in them, as an accomplice; Stipulates that offenders shall be either extradited or prosecuted; Encourages States to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings; and Deals with both crisis situations (assisting States to solve the situation) and post-crisis situations (rendering nuclear material safe through the International Atomic Energy Agency (IAEA).

18 The Panel was created under the auspices of the Secretary-general of the United nations, titled "A More Secured World: Our Shared Responsibility" Report of the Secretary-General's high-Level Panel on Threats, Challenges and Change, available at http://www.un.org/secureworld/.

(b) restatement that acts under the 12 preceding anti-terrorism conventions are terrorism, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the Geneva Conventions and Protocols;

(c) reference to the definitions contained in the Convention and Security Council resolution 1566 of 2004; and

(d) description of terrorism as 'any action, in addition to actions already specified by the existing conventions in aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 of 2004, that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature of context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The main criticisms that were raised against this report's broad definition was that it was contrary to the right to self-determination as enshrined in the Charter of the United Nations not recognizing the struggles of the national liberation movements fighting against colonial domination and alien occupation in the exercise of their right.

B. AALCO's Initiatives

"International Terrorism" has been a prominent topic in the work programme of AALCO[19]. The topic was placed on the agenda of the AALCO's Fortieth Session held in June 2001, upon a reference made by the Government of India. This topic was introduced foreseeing the relevance of the AALCO being considered as a forum to form a combined approach on international terrorism issues within the context of the on-going negotiations in the Ad Hoc Committee of the United Nations on elaboration of the comprehensive convention on

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[19] The Asian-African Legal Consultative Organization (AALCO) was established in 1956. The AALCO has been consistently working towards promotion of international law through assisting its Member States on international legal matters. AALCO acts as a common forum for the Asian-African countries for facilitating exchange of views and best practices among States. The Organization represents its Member States by presenting their comments and observations on the agenda items, made during the Annual sessions of AALCO on the work programme of International Law Commission, Sixth Committee and General Assembly of the United Nations.

international terrorism. The successive sessions directed the Secretariat to monitor and report on the progress in the Ad Hoc Committee of negotiations related to the drafting of a comprehensive international convention to combat terrorism; and requested the Secretariat to carry out, an in-depth study on this topic. Adhering to this mandate, the AALCO Secretariat published a study entitled: "A Preliminary Study on the Concept of International Terrorism". This study gave a broad outlook on the issue of terrorism as dealt at both international and regional level, besides dealing with the definitional aspect of the concept 'terrorism'.

The views that emerged while deliberating on the 'definition of terrorism'[20] as enumerated under the Draft Comprehensive Convention on International Terrorism, emphasizes on *the recognition of national liberation movements and right to self-determination of peoples*. The discussions resulted in deadlock on the definition of terrorism during the deliberation at the Sixth Committee at its Sixtieth session in 2005.

III. The Convention: An Overview

A. Characteristics of the Convention: Features and Intent

Any terrorist activity to be organized, conducted and executed needs funds and financial support. For all the three purposes, it was essential to earn, move and store the funds, wherein the terrorists aim to operate in relative obscurity, using mechanisms involving close-knit networks and industries lacking transparency. *Firstly,* they earn funds through highly profitable crimes such as counterfeit goods, contraband cigarettes, drug trafficking, etc. *Secondly*, to move assets, terrorists seek out mechanisms that enable them to conceal or launder their assets through non-transparent trade or financial transactions such as the use of charities, informal banking systems, bulk cash, and commodities that may serve as forms of currency, such as precious stones and metals. And *thirdly*, to store assets they

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[20] Article 2 of the Draft Comprehensive Convention on International Terrorism. The AALCO comprises of forty-seven member States from Asian and African continent. The importance attributed towards AALCO as a legal consultative body with rich history of constituting member States having a colonial past, in terms of this topic is very contemporary.

may use similar commodities, because they are likely to maintain value over a longer period of time and are easy to buy and sell outside the formal banking system.

The Convention mainly intends to block the flow of terrorist funds without disrupting the circulation of capital and the continuation of business across global financial markets. Terrorism includes a combination of violence and motivation.[21] Terrorism Financing is the means by which funds reach those who aim to carry out terrorist acts. According to the Convention, the main source of terrorist financing would be the transfer of 'funds'[22] and 'proceeds'[23] derived to carry out the terrorist activities. The Convention defines financing terrorism under Article 2 (1), which reads thus:

> any person commits an offence, if that person by any means, directly or indirectly, unlawfully and willfully, provides to collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out….

The efforts to counter terrorism financing had to extend beyond States and citizens as subjects of international law to involving the other affected parties too, like financial institutions including private financial institutions and law enforcement machineries. Presuming the close involvement of financial institution especially misuse of them by various terrorists groups in financing their activities, lead to considering that they ought to be regulated by and large, so that the State where they operate is not held responsible under international law when they have fully taken relevant measures to combat the offence. The obligations under this Convention[24] indicate that

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21 Article 2 (1) (b) of the Convention.

22 "Funds" shall mean assets of every kind, whether tangible or intangible, movable or immovable, however acquired and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit (Article 1 (1) of the Convention).

23 "Proceeds" means any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in article 2.

24 The Convention was adopted by the UNGA in resolutions 54/109 of 9 December 1999.

certain obligations are also addressed to private legal entities. Hence, it paved way for regulating those countries which had flexible banking, tax, and corporate laws, which were highly unlikely to have adopted this Convention which is well grounded on the principles of transparency, lifting bank secrecy, disclosure, cooperation and the prohibition of anonymous and suspicious transactions.

B. Obligations of States under the Convention

The Convention requires State Parties to fulfill the following obligations:

(a) take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or which also engage in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including exploitation of persons for purposes of funding terrorist activity;[25]

(b) hold those who manage, control any legal entity which is engaged in terrorist financing acts as criminally, civilly or administratively liable for such acts;[26]

(c) provide for the identification, freezing and seizure of any funds used or allocated for the purpose of conducting terrorist activities, as well as for the sharing of forfeited funds with other States on a case-by-case basis. Bank secrecy is no longer adequate justification for refusing to cooperate;[27]

(d) prohibit any person(s) from directly or indirectly, unlawfully, and willfully providing or collecting funds with the intention that they should be used, or in the knowledge that they are to be used, to carry out an act that constitutes an offense under one of the nine treaties listed in the annex. It shall not be necessary that the funds were actually used to carry out an offense;[28]

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25 Preambular Paragraph 6 of the Convention; See also paragraph 3 (f) of the General Assembly resolution 51/210 of 17 December 1996.

26 Article 5 of the Convention.

27 Article 8 of the Convention.

28 Article 2 (1) (a) of the Convention.

(e) to prohibit any act intended to cause death or serious bodily injury to a civilian, or to any other person not actively involved in a situation of armed conflict, when the purpose of such act is to intimidate a population, or to compel a government or an international organisation to either do, or to abstain from doing a specific act;[29] and

(f) to prohibit persons from attempting, participating in, organizing, contributing to, having knowledge of, or directing others to commit such offenses. Under no circumstances are the above offenses justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature.[30]

The Convention obligates State Parties to establish the aforementioned offenses as criminal offenses under their domestic law, in order to make these offences extraditable or subject to prosecution; vis-à-vis make such offenses punishable by appropriate penalties which take into account grave nature of offences[31]. The jurisdiction shall be established over the offenses when such offenses are committed in the territory of that State, on board a vessel flying the flag of that State, an aircraft registered under the laws of that State or operated by the government of that State, by a national of that State, in the territory of or against a national of that State, against a government facility of that State abroad, in an attempt to compel that State to do or abstain from doing an act, by a stateless person who has his/ her habitual residence in the territory of that state, or if an offender is within its territory and there are no other Parties who have claimed jurisdiction.

The States commit to prohibiting illegal activities of persons and organisations that knowingly encourage, instigate, organize, or engage in the commission of such offences in their territories. The Parties also commit to requiring financial institutions and other

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29 Article 2 (1) (b) of the Convention.
30 Article 6 of the Convention.
31 Article 4 of the Convention.

professions involved in financial transactions to maintain, for at least five years,

> (i) all necessary records on transactions, both domestic and international, utilizing the most efficient measures available for the identification and verification of customers' legal existence;
>
> (ii) reporting suspect or unusually large transactions; prohibiting the opening of accounts of which the holders or beneficiaries are unidentifiable; and
>
> (iii) detecting and freezing, or seizing any funds used or allocated for the purpose of committing such offenses, as well as proceeds and/or forfeitures derived from such offenses. States agree to give consideration to concluding agreements on the sharing funds with other State Parties, as well as compensating the victims of offenses with funds derived from the forfeitures, and by maintaining and facilitating communication between the appropriate agencies. Parties also agree to supervise the licensing of all money-transmission agencies and monitor the physical cross-border transportation of cash and bearer negotiable instruments.

States agree to take measures as may be necessary under their domestic law to investigate the facts regarding an offense, and ensure that the person(s) who committed the offense are taken into custody to be prosecuted or extradited. In either case, the State shall notify the Secretary-General of the United Nations of their intent. The Convention provides for the inclusion of such offenses as extraditable offenses, and, in case there is no extradition treaty between the Parties, then they could consider the Convention as a legal basis for extradition with respect to the offenses. If a Party does not extradite the person(s), it is obliged, to prosecute him/her. The Parties also commit to afford one another the greatest measure of assistance, and not to refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns bank secrecy, a fiscal offense, or a political offense. The Parties are entitled to refuse to extradite a person or afford legal assistance required under the Convention if they have substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting

or punishing a person on the grounds of race, religion, nationality, ethnic origin, or political opinion.

As a measure to hold legal persons who are in the capacity of managing or controlling any legal entity that has committed an offence as mentioned under Article 2 of the Convention, there has been an effort to include charitable associations, organizations and trusts intended to bring under law those entities which are not natural persons. Parties to the Convention are obliged to monitor and license money transmission agencies, as well as cross-border transportation of cash and bearer-negotiable instruments[32]. The convention is based on *aut dedere aut judicare* principle[33] and articulates extraditable nature of offences excluding political and fiscal offences[34].

C. Freezing of Assets of International Terrorists Organisations

The international legal measures to combat terrorist financing provides for the freezing of assets of the terrorists and terrorists organisations. This leads to certain questions like:

(i) identification of the person whose assets can be frozen, identification of the International terrorist organisations whose assets needs to be frozen; and

(ii) determining the yardstick for categorization as terrorists-related entities.

The first issue relates to identification of persons whose assets are to be frozen. The Convention speaks of "identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences..." Measures adopted in this respect must be 'without prejudice to the rights of the third parties acting in good faith', but no further clarification is provided in this point which is thus probably left to the domestic law of each State. States are permitted to give consideration to concluding regular case-by-case basis, and to use such funds to compensate the victims

32 Article 18 (2) of the Convention.
33 Article 10 of the Convention.
34 Article 6 and 13 of the Convention.

of terrorist acts or their families. This provision does not lay down any jurisdictional criteria for the blocking of funds, and thus does not address the issue of the potential extraterritorial reach of measures purporting to freeze terrorist assets. However, upon reading this provision with Article 18, the States are obliged to require banks and other financial institutions in the context of terrorist financing to identify their customers and to pay attention to suspicious transactions and to report such dealings.

In this regard, a sequence of Security Council resolutions that lead to the imposition of sanctions against the Taliban regime for not surrendering Osama Bin Laden needs to be mentioned. The Committee was named after the Security Council resolution 1267/Taliban Committee. The sequence of events follows as thus:

(i) In 1999 adoption of Security Council resolution 1267 imposed sanctions on the Taliban regime for failing to surrender Osama Bin Laden. The sanctions included the freezing of all funds directly or indirectly referable to the Taliban regime for their role in harbouring and training terrorists in their territory. The resolution called upon all States to prohibit their respective nationals and residents from making available the blocked funds or any other funds to the Taliban and to bring proceedings for the violation of the blocking measures.

(ii) The resolution 1333 of 2000, widened the scope of the measures, like extending the freezing and other prohibitions to the funds directly or indirectly attributable to Osama Bin Laden, to Al Qaeda (terrorist organisations) and to related individuals and entities. A Monitoring group was established consisting of five experts to control, *inter alia*, financial transactions and money laundering through Resolution 1363 of 2001 which was followed by Resolution 1390 which intended to lift the scope of application from Afghanistan to Taliban regime.

(iii) The resolution of 1455 of 2003 enhanced the effect of the freezes by imposing on Member States the obligation to transmit to the Sanctions Committee atleast every three months the list of persons whose assets are to be blocked and to submit the names

of persons belonging to the Taliban and Al Qaeda and of persons related to them.

The sanctions committee or the Al Qaeda and Taliban Sanctions Committee[35], as established in accordance with resolution 1267 had the power to designate persons whose assets are to be blocked.[36] The Committee is bestowed with the power to either insert or remove from the list of persons whose assets are to be frozen. The insertion of persons on the list is decided by the Taliban Committee at the request of any government or international organisation setting out the reasons for the request and information allowing the identification of the persons in question. Removal of any person from the list is subject to a request submitted to the Committee by the government of citizenship or residence of the person concerned, possibly jointly with the government having requested the inclusion on the list which must have been contacted in advance with a view to persuading it to submit a joint request.

The States are obliged to freeze the assets of individually identified persons included in a list maintained and updated by the UN itself through the Taliban Committee. Further, resolutions which more strictly dealt with international terrorism basically emphasized on cooperation on a bilateral basis in enforcing their respective freezing orders. Absence of definition of terrorism and of terrorists has lead to a dilemma in taking action against any terrorist organisations though there was unanimity in imposing sanctions on the Taliban regime. Even with this Committee, problems arise in the identification of individual members of these organisations, due to the absence of common substantive rules regarding the insertion or removal of persons on the list. Absence of substantive rules in identifying terrorist and related persons and of procedural rules on

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35 On 2 September 2003, the Security Council Committee established in accordance with Resolution 1267 adopted the name of "Security Council Committee concerning the Al Qaeda and the Taliban and Associated Individuals and Entities" which is briefly known as "Al Qaeda and Taliban Sanctions Committee" (Press Release SC/7865).

36 The procedure of the Taliban Committee is governed by Guidelines adopted on 7 November 2002 and amended on 10 April 2003.

the freezing assets; has bestowed the States with the responsibility to use their own methods to identify the persons who should be included in the list and how to freeze their assets.

Exercising State's right to enforce their freezing process, in another instance, the United States tried to enforce their freezing orders against Hezbollah in Lebanon, with the support of Security Council resolution 1373 of 2001; and with the support of Taliban Committee to freeze the assets of Somali born Swedish citizens. However, due to severe criticism from various States, the United States had to withdraw the process and remove the name of the Somali born Swedish citizens from the list. Lebanese authorities rejected the request on the ground that Hezbollah is not a terrorist organisation and this position was shared by certain other States too.[37]

Upon request by any State to enforce freezing orders, if the requested State does not comply with the request, what could be the consequences? If the request has been made under the Taliban Committee, then the States are required to freeze the assets of the persons on the list maintained by the Committee. Nevertheless, with regard to any other request, there is no uniform approach. However, with regard to Taliban Committee, when a State fails to comply, then the Security Council could adopts measures not implying the 'use of armed force' under Article 41 of the Charter of the United Nations.[38] The refusal by a State to cooperate with other States in the fight against financing terrorism, could justify the adoption by the Security Council of measures under Article 41 of the Charter. So far, only United States has opted for an armed campaign against the Taliban regime in Afghanistan following the events of 9/11.

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37 Angela D. Hardister, "Can We Buy Peace on Earth? The Price of Freezing Terrorist Assets in a Post-September 11 World" *North Carolina Journal of International Law and Commercial Regulation,* vol. 28 (2003), pp. 642-648.

38 Article 41 of the Charter reads thus; The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members if the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

IV. Neglected Convention Gains Importance

The issue of international terrorism has always existed which affected States worldwide; and was addressed by the United Nations, though it never was a priority until the 9/11 incident. This is evident from the adoption of the Security Council resolution 1373 of 2001 which invariably compelled the Security Council to take the primary responsibility to maintain international peace and security. Once combating international terrorism was on the priority list, financing of terrorists activities also became very significant issue that needed to be combated.

The UN Security Council resolution 1373 of 2001, which was adopted soon after the 9/11 attack, owes its allegiance to the 1998 terrorist attacks at the United States Embassies in Kenya and Tanzania, which was effectively retaliated by the United States[39] seeking the protection of Article 51 of the Charter of the United Nations. Further, the first Security Council resolution which was adopted after the 9/11 attack, explicitly affirmed 'the inherent right of individual or collective self-defense in accordance with the Charter'[40]. The Charter of the United Nations bestows the Security Council with primary responsibility to maintain international peace

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39 Ian Brownlie, *Principles of Public International Law*, (Oxford University Press, New Delhi, 2003) at p. 713, The United States reported the operations to the Security Council as follows;

"These attacks were carried out only after repeated efforts to convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with Bin Laden organisation. That organisation had issued a series of blatant warnings that 'strikes will continue from everywhere' against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing.

In doing so, the United States has acted pursuant to the right to self-defense confirmed by Article 51 of the Charter of United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality".

40 Security Council Resolution 1368 of 12 September 2001.

and security under Article 51 of the Charter[41], subject to the confirmation of existence of any 'threat to the peace, breach of the peace, or act of aggression'.[42] The Security Council resolution 1267 along with subsequent related resolutions, thereafter freezed all the financial assets of Al Qaeda and Taliban associates. The Security Council adopted Resolution 1368 on 11 September 2001, condemning the terrorist attacks against the United States and called upon the international community to strengthen its efforts to prevent and suppress terrorist acts by increased cooperation and full implementation of relevant international anti-terrorist conventions and Security Council resolutions, and to take all necessary steps to combat 'terrorism in all forms and manifestations'.

Hence, the Resolution 1373 builds upon a previous series of Security Council resolutions binding States to freeze the assets of individuals or entities related to Al Qaeda and the Taliban, including those designated upon a list maintained by the Security Council Committee established pursuant to Resolution 1267 concerning Al Qaeda, the Taliban and associated individuals and entities, which is known as the 1267 Committee.[43] This resolution obligates all UN member countries to:

(i) Criminalize actions to finance terrorism;

(ii) Deny all forms of support for terrorist groups;

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41 Article 51 of the Charter reads thus: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

42 Chapter VII, Article 39 of the Charter of the United Nations.

43 See Security Council Resolutions: S/RES/1526 (2004), S/RES/1455 (2003), S/RES/1452 (2002), S/RES/1390 (2002, S/RES/1388 (2002), S/RES/1363 (2001), S/RES/1333 (2000), S/RES/1267 (1999).

(iii) Suppress the provision of safe haven or support for terrorists, including freezing funds or assets of persons, organisations or entities involved in terrorist acts; and

(iv) Prohibit active or passive assistance to terrorists; and

(v) Cooperate with other countries in criminal investigations and sharing information about planned terrorist acts.

This resolution called for the States to prevent and suppress financing of terrorism and to criminalize the willful provision or collection of funds for such acts. Further, terrorist funds, financial assets and economic resources were to be frozen without delay. Paragraph 1 (d) of the resolution mandated the States to:

> Prohibit their nationals or any other persons and entities within their territories from making funds, financial assets or economic resources/financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts…

By the adoption of this resolution, the International Convention for the Suppression of the Financing of Terrorism, 1999[44] received an impetus as the resolution specifically urged member States to become parties and ratify the Convention. Thus, the much neglected Convention gained importance and entered into force on 10 April 2002 and, as of 31 October 2008 it has 167 State parties. This resolution plays a pivotal role in terms of suppression of financing of terrorism since Security Council invoked Chapter VII provisions of the Charter while deviating from its previous role towards legislating which leads to establishment of new binding rules in international law. The shift has been in the understanding of concept of terrorism, in response of the United Nations and establishment of new international legal regimes.[45]

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[44] Operative Paragraph 3 (d) reads thus: "Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;".

[45] Asian-African Legal Consultative Organization, *A Preliminary Study on the Concept of International Terrorism,* (AALCO Secretariat: New Delhi, 2006), pp: 90.

V. A Critique of the Post 9/11 "War on Terror" Agenda

The "War against Terrorism"[46] has been the mantra of the twenty-first century[47], especially in the wake of the 9/11 terrorist attack on the twin towers that shook the world's major 'imperialistic superpower'[48]. The subsequent set of agenda to combat terrorism in all its manifestations became the evident agenda which was triggered through various international organisations, especially the United Nations[49]. Combating the financing of terrorism was one of the major legal tools in the 'war against terrorism', that acts as the state's coercive powers supporting the need to extend cooperation to the extent of overlooking the national security issues in terms of information sharing. These measures dramatically expanded the discretionary power of law enforcement of the State to respond to political activity as crime and provide a mechanism through which governments could financially target individuals, charitable organisations, welfare and social justice organisations.

Hobsbawm while arguing on the increased use of unlimited violence observes that the ideological conviction that has dominated both international and internal conflicts since 1914 is that ones' cause is so just and the adversary's so terrible that all means to achieve victory or avoid defeat are not only legitimate but also necessary. Further, he contends that globalisation of the 'war against terror' since September 2001 and the revival of armed foreign intervention by a major power which formally denounced the hitherto accepted rules and conventions of international conflict in 2002 has transformed the

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46 The term 'war against terrorism' and 'war on terror' shall be used interchangeably throughout the article.

47 Upendra Baxi, "The War *on* Terror" and the "War *of* Terror": Nomadic Multitudes, Aggressive Incumbents, and the "New" International Law" *Osgoode Hall Law Journal,* vol. 43, no. 2 (2005), pp. 7-43.

48 Antony Anghie, *Imperialism, Sovereignty and the making of International Law,* (Cambridge University Press, Cambridge, 2004), p. 273.

49 General Assembly of the United Nations dealt with the issue of international terrorism since 1972; however since the 9/11 terrorist attack there was a gradual shift in the approach taken by the United Nations, wherein the Security Council took over the responsibility to deal with the measures to combat international terrorism.

situation for the worse.[50] The major transformations that has occurred after the 9/11 attack is the (i) 'pre-emptive self-defense'[51] couched under Article 51 of the Charter of the United Nations[52], (ii) privatization of the military[53], (iii) military intervention, and (iv) move to define terrorism with 'newness'[54] undermining the concept

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50 Eric Hobsbawm, *Globalisation, Democracy and Terrorism,* (Abacus, London, 2007).

51 On Pre-emptive Self Defense in War see James Thuo Gathii, Assessing Claims of New Doctrine of Pre-Emptive War under the Doctrine of Sources" *Osgoode Hall Law Journal,* vol. 43, no.2 (2005), pp: 67-103. See also Tawia Ansah, "War: Rhetoric and Norm-Creation in Response to Terror" *Vanderbilt Journal of International Law,* vol. 43 (2002-2003), pp: 797-860; Rahmatullah Khan, "The War on terrorism" *Indian Journal of International Law*, vol. 45, no. 1 (2005), pp: 1-16; V. S. Mani, "ISAF in Afghanistan: A Study in 'Nursing' after a Humanitarian Surgery" *Indian Journal of International Law*, vol. 45, no.1 (2005), pp: 17-41.

52 Upendra Baxi, supra note 47; Antony Anghie, "The War on Terror and Iraq in Historical Perspective" *Osgoode Hall Law Journal,* vol. 43, no. 2 (2005), pp. 45-66; See Antonio Cassese, "Terrorism is also disrupting some Crucial Legal Categories of International Law", *European Journal of International Law,* vol. 12 (2001), pp: 993-1001; See Nicholas Rostow, "Before and After: The Changed response to Terrorism since September 11th" *Cornell Journal of International Law,* vol. 35 (2002), pp: 475-490.

53 According to www.privatemilitary.org, "Private Military Companies (PMCs), Private Security Companies (PSCs), and firms in adjacent business sectors play growing roles in the implementation of the defense, development, and security agendas since the end of the Cold War. In the era of globalisation, these types of contractors are critical in raising and maintaining levels of security in unstable but economically important areas of the world. Ongoing global instability since 9/11 fosters a demand for private military and security services too. The contracting-out and outsourcing imperatives of governments further make private military and security solutions viable alternatives for authorities to consider." On the privatization aspect, see Simon Chesterman and Chia Lehnardt (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies,* (Oxford University Press, 2007).

54 Obiora Chinedu Okafor, "Newness, Imperialism and International Legal Reform in Our time: A TWAIL Perspective" *Osgoode Hall Law Journal,* vol. 43, no. 2 (2005), pp: 171-191. Richard Falk's observation on 9/11 is that it is a megaterrorist attack that would transform global history. It differs from the previous attacks due to its magnitude, scope, ideology and focus on transforming the world order as a whole. See Richard A. Falk, "Rediscovering International Law after September 11th" *Temple International and Comparative law Journal,* vol.16 (2002), pp: 359. Disputing this argument Okafor argues that the state-sponsored terrorism was repeatedly conducted by the United States – "the sole remaining global superpower" - against countries of the third world like

of right to self-determination and not taking into consideration national liberation movements[55].

The post 9/11 attempt to declare 'war on terror' scenario has successfully been able to make people's right to self-determination and struggles of national liberation movements irrelevant. Elimination of international terrorism, human rights issues and international terrorism, and so on were earlier on the agenda of the General Assembly, and throughout 1972 till 1994 the attempts were to protect the right to self-determination, in particular, the struggle of national liberation movements.[56] Thereafter, the language of these resolutions also changed in order to highlight the 'terrorism in all its manifestations and in all circumstances without any consideration for any political, ideological or philosophical reasons'[57]. This was one of the main reasons for disagreement in the 'definition of terrorism' as the 'Third World'[58] countries reiterated on the significance of freedom struggles and national liberation

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Angola, Mozambique, Nicaragua, El Salvador, etc., by joining hands with and supporting the non-state actors to overthrow the regime.

55 Malvina Halberstam, "The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing terrorism wherever and By Whomever Committed" *Columbia Journal of Transnational Law*, vol.41 (2002-2003), pp: 573-584.

56 Ibid, at p. 575.

57 See AALCO, supra note 9 at p.91.

58 For a detailed description of the countries constituting the "Third World" see Eric Hobsbawm, *The Age of Extremes: 1914-1991,* (Abacus, London, 1994), pp: 344-371. The Third World countries belong to the Latin American, Asian and African continents that have a common colonial past. In this regard, Young describes these countries as *Tricontinentals,* see Robert J. C. Young, *Postcolonialism: An Historical Introduction,* (Blackwell Publishers, Oxford, 2001). The Bandung Conference took place in 1955 at Bandung, Indonesia, and was intended to create a coalition of Third World States that would articulate political and economic issues specific to them and force these issues onto the international agenda. It brought together the first independent Asian and African States and essentially launched a political movement that continues to influence global politics. See Robert Mortimer, *The Third World Coalition in International Politics* (1984); B. S. Chimni, "The Past, Present and Future of International Law: A Critical Third World Approach", *Melbourne Journal of International Law,* vol.8 (2007), pp: 499-516; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance,* (Cambridge University Press, Cambridge, 2005).

movements, which were key associates of 'right to self-determination'.[59] The right to self-determination has evolved as a legal principle, based on the political and colonial scenario post-1945. The 'Declaration on the Granting of Independence to Colonial Countries and Peoples'[60] while proclaiming the 'inalienable right to complete freedom, the exercise of their sovereignty and integrity of their national territory, solemnly proclaimed the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'[61]. The Declaration reiterated the principles of equality, non-interference in the internal affairs of all States, and respect for sovereign rights of all peoples and their territorial integrity. The traditional notions of national liberation movements and people's struggles have taken a backseat in terms of importance. There is a growing trend of adhering to the definition of terrorism excluding the concerns of Third World countries. It is interesting to note that the concept of self-determination was included in General Assembly resolutions adopted in 1985 till 1993, though it included provisions that unequivocally condemned terrorism in all its manifestations. The resolutions incorporated a paragraph "reaffirming...the...right to self-determination...and upholding the legitimacy of the…struggle for self-determination, in particular the struggle of national liberation movements…"[62]

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59 The right to self-determination could be traced back to General Assembly resolution 1514 of 15 December 1960, read with Resolution 2189 of 1966 and 2326 of 1967; stressing on the right of colonized States and territories to exercise their right to self-determination of colonial rule. The rights of important groups became prominent in connection with the principle of right to self-determination, which has evolved as a legal principle from Article 1 paragraph 2 of the Charter read with Article 55. It was an attempt to recognize 'the right of cohesive national groups (peoples) to choose for themselves a form of political organisation and their relation to other groups. The choice may be independence as a State, association with other groups in a federal State, or autonomy or assimilation in a unitary (non-federal) State.'

60 General Assembly Resolution 1514 of 1960 of 14 December 1960 titled "Declaration on the granting of independence to colonial countries and peoples".

61 Preambular Paragraph of the resolution.

62 Halberstam, supra note 33.

Fact remains that through the adoption of the Security Council resolution 1373 of 2001, it was legitimizing the attacks by the United States in Afghanistan, under the guise of restoring peace and security by overthrowing the Taliban regime, which was giving shelter to the masterminds of the 9/11 attacks. This in turn has lead to providing fundamental modifications in the existing legal regime, like pre-emptive strike, targeted killings and use of force. The critiques argue that 9/11 should have not been considered as a reason for reinventing the established international legal norms particularly in the fields of use of force and protection of human rights, which should not be a platform for misuse to serve political interests. Mgbeoji opines that:

> …in the absence of a coherent, universal concept of terrorism and a common structure for its eradication has ultimately created a propagandistic narrative of terrorism. Without capturing the social and legal wrong that terrorism represents, the current rhetoric on terrorism degenerates into name-calling, validating the aphorism that one person's terrorist is another's freedom fighter.[63]

In terms of financing terrorism issues are concerned, major changes that has been brought into effect post 9/11 has been the entry into force of the Convention vide Security Council resolution 1373 of 2001, which has extended the scope to other actors within the State like the financial institutions, whether formal or informal. The subjects of international law, according to the positivist theory, States, have been bestowed with 'overwhelming importance and tend to regard international law as founded upon consent of States'[64]. However, under the guise of war on terror, there has been specific emphasis on private actors and their regulation. The intention is to safeguard and exonerate the private actors, especially the financial institutions from being used as channels of financing terrorism.

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63 Ikechi Mgbeoji, "The Bearded Bandit, The Outlaw Cop, and the naked Emperor: Towards a North-South (De)Construction of the Texts and Contexts of International law's (Dis)Engagement with Terrorism" *Osgoode Hall Law Journal,* vol. 43, no. 2 (2005), pp: 105-135 at p.111.

64 Malcolm Shaw, *International Law, (*Cambridge University Press, Cambridge, 2003) at p. 121.

Another major feature of this regime is the inclusion of provisions relating to the close monitoring of the charitable associations and organisations. In this regard, the misuse of non-profit organisations and charitable associations is the most distinctive feature of the fight against financing of terrorism and undisputedly the aspect which creates the most serious challenges from a law enforcement and crime prevention perspective. The Convention give significant importance to the misuse of charitable associations for the purposes of financing terrorism, thereby the General Assembly resolution 51/210 of 1996, stated that:

> …the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations, whether such financing is direct or indirect through organisations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds.

This provision became more relevant after the 9/11, wherein many Western scholars have argued for the implementation of this provision, specifically targeting those organisations that had some affiliation towards specific religion.[65] In order to implement the resolution, the charitable associations and organisations that were genuinely involved in financial transactions, were also branded as those which engaged in financing terrorism. This growing trend was

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[65] The concept of charity among the Muslims like the Zakat, which is one of the genuine way of giving charity, has been misinterpreted as a channel of reinforcing the religious-based ideology that would facilitate funding of terrorism. See, Jimmy Gurule, "Unfunding Terror: The Legal response to the Financing of Global Terrorism" Notre Dame Law School Legal Studies Research Paper No. 08-13, available at http://www.ssrn.com/link/notre-dame-legal-studies.html accessed on 20 July 2009.

detrimental to those associations that had goodwill and were dedicated to serve the humanity.

Anghie elaborates that War against terrorism (WAT) could be understood through three concepts like the doctrine of pre-emptive self-defense, concept of 'rogue States'[66] and idea of promoting democracy in order to transform these violent and threatening entities. He argues that the:

> War against terrorism (WAT) is now firmly and irrevocably in place, raising important questions as to how this WAT relates to the rich and old tradition of 'just war' theory[67]. The sense that we are now moving

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66 Label used by the Clinton administration (1993-2001) to characterize states 'beyond the international pale' who are hostile to the United States. Rogue states were portrayed as being contemptuous of international norms, bent on acquiring weapons of mass destruction, and being sponsors of terrorism. Rogue states were difficult if not impossible to deter, and their unpredictable behaviour was used as an argument by proponents of ballistic missile defence to argue in favour of installing such a system. The rogue state label was most consistently applied to Iraq, Iran, North Korea, Cuba, and Libya during the Clinton years. The policy implication was that such states ought to be isolated and contained, approaches that did not command universal agreement among America's allies. Toward the end of the Clinton administration, the term 'rogue state' was replaced by the more politically correct 'states of concern', an indication perhaps of the diplomatic disutility of the label. The label, however, has been resurrected by the George W. Bush administration, in part to justify its pursuit of National Missile Defense. More on it, See Noam Chomsky, *Rogue States: The Rule of Force in International Affairs,* (South End Press, 2000), See also http://www.thirdworldtraveler.com/Chomsky/Rogue_States_Chomsky.html.

67 According to Rawls, the well-ordered societies are on a higher level of legitimacy and therefore they are entitled to wage a "just war" against criminal States. Contrary to this, Habermas fears a development towards arbitrary world politics, dominated by a self-declared democratic super power, entitled to decide over war and peace. For Habermas the legitimacy of intervention depends on its justifiability on the basis of procedures that are grounded in international law. For both thinkers, thus, 'outlaw States' and despotic leaders constitute a formidable test of their different approaches. In this background, Rawls seems to exclusively want to resort to military humanitarian intervention when dealing with 'outlaw States'. Habermas, on the other hand, is very much aware of the Kantian distinction between morality and law, which leads him to exclude 'outlaw States' from his vocabulary; instead, he speaks of despotic governments and legal criminals who, after gross human rights violations, may become the object of official military sanction by a global executive power. More on it, See Regina Kreide, "Preventing Military Humanitarian

> back, in some curious fashion, to pre-modern times is also suggested by the fact that the terrorist bears important resemblances to the peoples of the Muslim world that have, for centuries, been the enemy against whom this theory has been applied.[68]

The underlying intention behind the Afghanistan and the Iraq war was to democratize those States that were termed as rogue States. This 'spreading democracy'[69] agenda, was propagated by vehemently arguing that democracy plays a crucial dual role in liberating the oppressed people of Islamic States and also in creating law-abiding societies that would be allies rather than threats to the imperialistic superpower.[70] The academic circle is not devoid of the criticisms of the war on terror agenda stating that it is 'an exercise in imperialism'[71].

VI. Summary and Conclusion

Significant changes in the financing terrorism laws could be attributed to the 9/11 terrorist attack. The Convention of 1999, which was dormant until then gained prominence since the Security Council resolution adopted thereafter urged member States to become parties to the Convention in order to join hands with global war on terror. The changes that marked the event was on three areas; *firstly,* human rights issues when applying the freezing of assets of the international terrorist organisation wherein an individual or an association once blacklisted would have very scarce remedy in terms of proving their innocence. *Secondly,* selective application of 'role of charitable associations and organisations' to particular religion; and blocking and declaring all the channels of those associations as used for terrorist financing. *Thirdly,* giving more powers to States to take coercive action against any blacklisted individual or associations

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Intervention? John Rawls and Jürgen Habermas on a Just Global Order", *German Law Journal*, vol. 10 (2009), pp. 93-113.

68 See supra note 3 at p.275.

69 See Hobsbawm, supra note 50, at pp. 112-119; M. Sornarajah, "Power and Justice: Third World Resistance in International Law, *Singapore Yearbook of International Law,* vol. 10, (2006), pp: 19-60.

70 Anghie, supra note 48, at p. 277.

71 Michael Ignatieff, "Nation-Building Lite', *New York Times Magazine,* 28 July 2002.

leaving the States with no option other than to cooperate with the affected State.

Among other changes that were evident since the enforcing of War on Terror agenda, wide interpretation has been provided to the traditional concepts in international law like 'use of force'. According to the Charter of the United Nations[72], States are refrained from threat or use of force against the territorial integrity or political independence of any State. The concept of territorial integrity is violated as and when there is a military intervention, even when the attack is on private actors in the State. For example, the recent attack by Colombia on the members of the Revolutionary Armed Forces of Colombia (FARC) located within Ecuador[73]. When being accused of violating international law by the Ecuador, Columbia justified its action under the right to use force in self-defense, even against a non-state actor. The issue at hand raises questions about the legality of the use of force by States against non-State actors that enjoy safe haven or refuge in the territory of other sovereign States.

In terms of political independence of States, it is significant to note that the Security Council resolution 1373 of 2001 has broad room for interpretation because of the inclusion of the phrase, 'States

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72 Article 2 (4) of the Charter of the United Nations;
"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

73 On March 1, 2008, Colombia attacked members of the Revolutionary Armed Forces of Colombia (FARC) located within Ecuador, killing the group's second highest-ranking member and 21 other militants. Ecuador accused Colombia of violating international law in launching the attack. Colombia justified its action under the right to use force in self-defense. Colombia's use of force against a non-State actor located within the territory of another sovereign State joins similar actions taken by other States (e.g., Israel, United States, and Turkey) in the global war against terrorism. This Insight examines the Colombia-Ecuador dispute in light of the controversies in international law about the legality of the use of force by States against non-State actors that enjoy safe haven or refuge in the territory of other sovereign States. For the detailed description, see, Tatiana Waisberg, "Colombia's Use of Force in Ecuador against a Terrorist Organization: International Law and the Use of Force against Non-State Actors" *American Society of International Law Insights*, vol. 12, no. 7 (2008).

shall take the necessary steps to prevent the commission of terrorist acts'. The War in Afghanistan and Iraq are the manifestations of the necessary steps taken against the terrorist acts, defying the concept of political independence contending that overthrowing the then existing regime is quintessential in maintaining international peace and security through winning the war on terror. In this regard, 'territorial integrity' and 'political independence' of sovereign States, the two main pillars of acclaiming sovereignty of States have been widely affected. Further, the traditional international law always argued for the relations among States with specific importance to Article 2 (4) principles. However, contemporarily those same principles have been used to regulate non-state actors too, be it financial institutions in terms of monitoring terrorism financing channels or any groups operating in any other country. In this context, it is necessary that the States, especially those from the third world and those categorized as rogue States be extremely cautious in safeguarding their interests and be well-equipped of the changing dimensions of traditional international law concepts that affect the sovereignty of the State.

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THE ROLE AND RESPONSIBILITIES OF INTERNATIONAL FINANCIAL INSTITUTIONS WITH RESPECT TO HUMAN RIGHTS: A CRITICAL REFLECTION

S. Pandiaraj*

I. Introduction

International law and International Institutions have exerted a profound influence in furthering the project of neo liberal globalization[1]. In this pursuit, the role of the policies and operations of the International Monetary Fund (IMF) and the World Bank (Bank or the Fund), the two most prominent International Financial Institutions (IFIs) remains critical in that, the IFIs use globalization to legitimate neo-liberal development policies**.** The IFIs exercise enormous powers over the workings of the international financial system as reflected in the fact that half of the world's population and two thirds of its government are bound by the policies they prescribe[2]. Though the number of States subject to neo liberal policy prescriptions of the IFIs have reduced of late, they still wield a lot of power, in that, they play a key role in the ability of governments,

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1 See, for important critical examinations of the role of international law and institutions in the project of globalization, B.S.Chimni, "Marxism and International law: A Contemporary Analysis", *Economic and Political Weekly,* vol. 34, (1999), pp. 337-49. Antony Anghie, "Time Present and Time Past : Globalization, International Financial Institutions and the Third World, *New York University Journal of International Law and Politics*, vol. 32, (2000), pp.243-90.

2 Ute Pieper and Lance Taylor, *The Revival of the Liberal Creed: The IMF, World Bank and Inequality in a Global Economy* (Cambridge University Press, Cambridge: 1998). pp. 37-63.

especially those of developing countries, to provide for the general welfare of the population.

For example, Structural Adjustment Programmes (SAPs) (known today as Poverty Reduction Strategies) which represent the principal mechanism through which the will of the IFIs is imposed on the global South, clearly points to the ability of the IFIs to tremendously shape the economic course of those countries. The SAPs that have been implemented at the behest of the IFIs have, as a number of impact studies on them have shown, exacerbated impoverishment, at least in the short-term. They have also caused widespread negative impact on human rights, particularly of the most vulnerable sections of the society. Also, the World Bank has been involved in hundreds of projects, such as the construction of dams and power plants, which have resulted directly or indirectly, in the forcible eviction of tens of millions of peoples from their homes, rendering them landless, jobless besides undermining their living standards. The potential of the policies of the IFIs to adversely affect the enjoyment of human rights has been exacerbated by the fact that IFIs have been generally reluctant to integrate human rights norms in their institutional framework.

In the light of the long and controversial relationship that the IFIs have had with human rights, this article seeks to ascertain how to translate human rights into concrete and binding obligations to limit the activities of IFIs. To this end, the objectives of the article are couched in the following two questions:

i. Do the IFIs have international human rights obligations?

ii. If yes, what is the source of these obligations?

However, it needs to be clarified here that, this article does not try to find out the precise scope of the human rights obligations of IFIs. The article proceeds in the following manner. The second part of this article will give a basic over view of IFIs as to their creation, structure and the changing nature of their functions. The third part will give concrete instances of examples of various activities in which IFIs have been accused of violating human rights norms. The fourth part will try to find out whether the IFIs have legal responsibility to respect human rights and to locate the source of

that responsibility. The concluding part, after briefly summarizing the arguments, points out to the effects of taking human rights seriously.

But before proceeding further, some preliminary remarks, as to the need to explore the human rights responsibility of IFIs at this juncture, are in order: First, globalization as pursued by the international institutions and legal regimes, has created a situation where the role and importance of nation-state is becoming irrelevant. The role of governments as direct violators of human rights, particularly economic, social and cultural rights (ESC rights) is becoming less important. Increasingly, private actors have become the sources of threats to human rights guaranteed by International Covenant on Economic Social and Cultural Right (ICESCR) as well as obstacles to their implementation. This has created a situation where on the one hand, globalization increases the demand for social protection whilst on the other hand, it decreases the capacity of States to provide it.

Secondly, accountability of non-state actors has been the most important frontier of human rights protection. In the post- Cold war era of increasing economic integration and free trade, non-state actors such as the IMF and the World Bank have gained increasing control over global, national and even local economic policies. These policies affect every one, especially in developing countries yet, the policy-makers are not elected and their decisions are not subject to popular or democratic oversight. Hence, demanding human rights accountability from these actors remain critical and has tremendous implications for the social well being of billions of peoples. As of today, there exists a 'legal accountability deficit' in that, the IFIs can not be held responsible in international law for the impact of their policies and decisions on the lives of ordinary people.

Lastly, a recent development in the field of ESC rights holds great promise: the adoption of Optional Protocol to the ICESCR by the UN General Assembly on 10th Dec. 2008. It represents a crucial advance in human rights which recognizes that violations of ESC rights are as serious as violations of civil and political rights. It would bring enforcement measures under the ICESCR into line with those connected to International Covenant on Civil and Political

Rights (ICCPR). The Protocol represents a clear consensus on the part of the international community that ESC rights may no longer be accorded a second class status. The adoption of the Protocol holds immense importance, since it (once in force) would clarify the nature of state obligation to protect vulnerable communities that are affected by the adverse impact of SAPs, debt policies, multilateral trade and investment. In other words, if violations of ESC rights are to be taken seriously, it is high time that IFIs are made accountable for their policies and prescriptions which gravely undermine the enjoyment of ESC rights, as we shall see later.

II. The Creation, Structure and Changing Functions of IFIs

The International Monetary Fund and the World Bank were created in 1944 at the Bretton Woods Conference with very specific purposes in mind: to assist in the reconstruction of Europe post-World War II. The establishment of IFIs marks the beginning of Keynesian macroeconomics, which advocates control over markets as well as state intervention in the economy, in contrast to liberalism which advocates non-intervention[3]. The IFIs perform a distinct and complementary role. The IMF's core task is to promote international monetary cooperation through surveillance and lending to countries with short-term balance of payment difficulties. The Bank's core task is development assistance.

According to Article 1 of its Articles of Agreement, the purposes of the IMF is to promote international monetary cooperation through consultation and collaboration; to promote orderly and stable exchange arrangements among members; to assist in the establishment of a multilateral system of payments for international trade; and to make the resources of the IMF "temporarily available" to Members 'under adequate safeguards' for the purpose of correcting their balance of payments problems "without resorting to measures destructive of national or international prosperity and to

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3 Costas Lapavitsas, "Mainstream Economics in the Neoliberal Era" in Saad-Filho and others (ed.,) *Neoliberalism: A Critical Reader* (Pluto Press, London: 2005), pp.30-40.

shorten the duration and lessen the severity of the disequilibria in the balance of payments of Members[4].

Pursuant to its Articles of Agreement, the objectives of the World Bank are: assisting in the reconstruction and development of the territories of Member States by facilitating the investment of capital for productive purposes; promoting private foreign investment by means of guarantees or participations in loans and other investments made by private investors; promoting the long range balanced growth of international trade and the maintenance of equilibrium in balance of payments by encouraging international investment; arranging loans made or guaranteed by it so that the more useful and urgent projects are dealt with first; and conducting its operations with due regard to the effect of international investment on business conditions in the territories of Member States[5]. It is indeed interesting to see that while the purposes of IFIs have not changed since their inception, their role and operations have changed substantially to meet the shifting needs of their expanding membership in an evolving world economy. In the early years, the division of labour between the IMF and the World Bank was fairly clear. Only in the 1980s when the Bank began lending for balance of payments purposes and for the creation of structural adjustment facilities did the line between these two institutions begin to blur[6].

A. The Changing Nature of IFIs

The role of the IMF has changed to a considerable extent since 1944 when it was set up to manage a system of stable exchange rates between States. Today, it has come to be primarily associated with

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4 Articles of Agreement of the IMF, Dec 27, 1945, UNTS 2, 39, Article 1[hereinafter the 'IMF Articles']

5 Articles of Agreement of the International Bank of Reconstruction and Development, Dec.27, 1945, UNTS 2, 13, Article 1 [herein after the 'Bank Articles']. It is to be remembered here that the World Bank is a family of institutions comprising of the IBRD (more popularly known as the WB), the International Financial Corporation (IFC), the International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA) and International Centre for Settlement of Investment Disputes (ICSID).

6 C.R. Goddard and Melissa H. Birch, "The International Monetary Fund" in C.R. Goddard, et al (ed.), *The International Political Economy: State Market Relations in a Changing Global Order* (Boulder; London: 1996), pp. 215-236.

development financing and recently, has been seen as a 'crisis manager' in developing Countries. This transformation has taken place both on account of the amendments made to its Articles of Agreement and its practice. This has also taken place in conjunction with a shift in focus of IMF from the developed countries to the developing countries.

When the U.S suspended the gold-convertibility of the dollar in 1971, the core mission of IMF, that of being the manager of a fixed exchange rate system, disappeared. The collapse of the par value system which was formalized with the adoption of the Second Amendment to the IMF Articles in 1978, gave each Member State the right to choose its own exchange rate policy. This had resulted in two important consequences. First, the second amendment resulted in the IMF dramatically expanding the scope of its Article IV consultations[7]. It could be mentioned here that Article IV consultations or surveillance missions as they are called, entail monitoring and reporting on the exchange rate policies of Member States and thereby helping to assure a stable international exchange system. Second, perhaps as an unintended consequence, the second amendment had created a defacto distinction between those countries that used or intended using IMF financing (IMF Supplier States) and those that did not (IMF Consumer States).

The debt crisis of 1980s[8] gave the IMF another role: lending to Countries on the brink of default thereby making the IMF the lender of the last resort and the global economic policemen as it stepped in and set up a system of dept repayment to the developed countries. As a response to the debt crisis, the IMF programmes aimed at 're-stabilising' and 'adjusting' the macroeconomic fundamentals' of debtor countries in order to secure repayment. These programmes,

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7 Joseph Gold, "*Legal and Institutional Aspects of the International Monetary System*": Selected Essays II (1984), at.647-50.

8 The widespread recession of the 1980s, which was accompanied by massively escalating oil prices led to what has been known as 'debt crisis' which originally broke out in 1982 in Mexico and entrapped all of Latin America and Sub-Saharan Africa. When states could no longer service their debt to foreign creditors, they had to accept the conditionalities imposed by IFIs. While the IFIs were originally not created for the purpose of third world debt relief, this is exactly what they became involved in.

which came to be called as Structural Adjustment Programmes (SAPs) in the 1980s, are known today as Poverty Reduction Strategy Papers. At its core, SAPs represent the neoliberal international development agenda. It was during this period that the IMF expanded the scope of its programmes by moving into the development field establishing its Structural Adjustment Facility (SAF) and Enhanced Structural Adjustment Facility (ESAF) and High Impact Adjustment Lending (HIAL). In this new capacity, Structural Adjustment came to be seen as poverty alleviation tools,[9] though the IMF is not legally obliged to pursue that goal. Infact, these facilities brought the IMF into what had traditionally been the domain of the Bank. Through these facilities, the IMF extends medium-term loans and sets strict economic conditionalities for broad sectors of a country's economy**.** Conditionality refers to the policies a Member is expected to follow in order to secure access to the resources of the Fund, i.e. to the conditions that have to be met for gaining access to the financial resources of the Fund. These policies are intended to help ensure that the Member country will overcome its external payments problem and thus be in a position to repay the Fund in a timely manner. These conditionalities which can include relaxation of labour laws, foreign investment incentives in natural resource sectors and privatization schemes –go far beyond the IMFs original purview of addressing short term external trade imbalances[10].

As for the Bank, during the 1960s and 1970s, it expanded its role to encourage "growth with equity" by investing in broader anti-poverty human development projects, including education, agriculture, health and nutrition, and rural development. As a result of the debt crisis in the 1980s, however, the Bank's focus turned to macroeconomic, structural adjustment lending. The Bank began the policy of "conditionality," requiring country recipients of structural loans to undergo financial reforms "regarding such areas as inflation, public deficits, liberalization of foreign trade and

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9 See, generally, Joslin Landell-Millis, *Helping the Poor: The IMF's New Facilities for Structural Adjustment* (International Monetary Fund, Washington :1988).

10 Ngaire Woods, *The Globalizers: The IMF, the World Bank and their Borrowers* (Cornell University Press, Ithaca, New York: 2006) Chapter 5.

investment, exchange rates, and land and tax reforms." The terms of "conditionality"-as the structural reforms were designed and mandated in concert with International Monetary Fund (IMF) – largely failed. It was also during mid-1980s that the Bank started to focus on environmental issues especially in the context of poverty alleviation.

Despite the differences that exist in the conditionalities imposed by the Bank and IMF, they reinforce each other. Taken together, the conditionality of the IMF and the World Bank have come to be labeled as "Washington Consensus"[11]. This consensus denotes a convergence of the policies of the Bank, the Fund, the US Treasury and later other institutions such as WTO. It needs to be remembered here that, apart from the collapse of the Bretton Woods system, the decade of 1980s coincided with the rise to power of 'new right' regimes in both the U.S and the UK. Though Reagan's U.S administration was marked by a distinct skepticism on the utility of inter-governmental cooperation in the international financial and monetary arena, it used the IMF as an useful instrument of American policies and forced the IMF to sing its own neo liberal tune. Hence, these originally Keynesian institutions became the central levers for enforcing neo liberal solutions in the global South. It needs to be underlined here that in the very period that IFIs have acquired more clout, the North-South divide has enhanced[12]. The nature and impact of these conditionalities on the people in general and the vulnerable sections of the population in particular will be analyzed in the next part of the article.

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11 John Williamson (ed.), *Latin America Adjustment: How Much has happened?* (Washington DC: Institute for International Economics, 1990) and John Williamson, 'The Washington Consensus Revisited 'in Louis Emmergi (ed.), *Economic and Social Development into the XXI Century* (John Hopkins University Press, Baltimore: 1997) pp.48-61.

12 For an illuminating analysis on the changing nature of IFIs in the context of their encounter with the third world states, See, Balakrishnan Rajagopal, "From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions", *Harvard International Law Journal*, vol.41, no.2, (2000) pp. 529-78, at p. 547. Also See, B.S. Chimni, "International Institutions Today: An Imperial Global State in the Making", *European Journal of International Law*, vol.15, no.1, (2004), pp.1-37, at p.28.

In the early 1990s, the IFIs took on the task of transforming the former Eastern Bloc States. These 'transitional economies' posed significant challenges to both these institutions and led to a rethinking of the role these institutions in the process and goals of policy reform. Privatization, for instance, has long been pushed by both of them as a way to reinvigorate investment and production in formerly state managed sectors. Hence, the demise of communism in the Eastern Europe and the Soviet Union discredited socialist economic systems thereby giving considerable weightage to the argument that market distribution was more viable than state allocation.

At about the same time, the IFIs in general and the World Bank in particular, had started advocating what it called the concept of 'good governance', as a condition for lending development assistance. In the opinion of the Bank, good governance includes the following main six characteristics:

1. Voice and accountability;
2. Government effectiveness;
3. The quality of regulatory framework;
4. The rule of law;
5. Independence of the judiciary; and
6. Curbing corruption[13]

The good governance approach had exerted a very powerful influence that it almost became an article of faith, with multilateral organizations, donors, and lenders increasingly basing their aid and loans on the condition that policies that ensure good governance are adopted. While the IMF tries to rationalize this 'mission creep' in

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[13] Daniel Kaufmann, Aart Kraay, and Pablo Zoido-Lobaton, "Aggregating Governance Indicators," *Policy Research Working Pape*r, No. 2195, World Bank, Washington DC, October 1999; and Daniel Kaufmann, Aart Kraay, and Pablo Zoido-Lobaton, "Governance Matters," *Policy Research Working Pape*r, No. 2196, World Bank, Washington DC, October 1999.

terms of its impact on balance of payments[14], the World Bank tries to justify it in terms of its need for furthering human rights and economic development arguing that proper implementation of Bank formulated development programmes can only be achieved by an accountable, transparent and democratic government[15]. The critical issues thrown up by this concept is detailed in the next part of the article.

B. Governance Structure

The basic governance structure of the two IFIs is very similar. The IMF is headed by a Managing Director (who as a mater of custom has always been a European) and the day- to-day work of the IMF is carried out by a Board of twenty four Executive Directors representing all of the IMF's 184 Members. Representation on the Executive Board is not equal. Only the largest shareholders –the U.S, Japan, Germany, France and the United Kingdom- have their own seats on the Executive Board as do China Russia and Saudi Arabia. The rest of the Fund's Member States are grouped into 16 Constituencies each with just one Executive Director who is elected for a two year term. What this means is that, most national governments have only the weakest links to the formal deliberations and decision-making processes of the institution. The lack of representation is compounded by their lack of influence in the informal processes of consultation and decision making. Similarly, the Bank has a President (who as a matter of custom has always been an American) and all the powers of the Bank are vested in a Board of Governors while, the day- to-day running of the Bank is entrusted to the Executive Directors of the Bank.

Decision-making in the IFIs are far removed from the principle of "One-Country, One -Vote". They follow a system of weighted voting according to which, voting is distributed in accordance with the size of a country's share-holding in the Fund (or "quota"). The quota,

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14 Jacques, J. Polak, "The Changing Nature of IMF Conditionality," *Essays in International Finance*, No. 184 (Princeton, New Jersey, Princeton University: 1991).

15 World Bank, *Development and Human Rights: The Role of the World Bank* (International Bank for Reconstruction and Development/World Bank, Washington D.C: 1998), p. 11.

which is determined by a formula that attempts to translate relative weight in the world economy into a share of votes, also determines a Member's maximum access to their resources. Accordingly, Directors from the countries of the Group of Eight (G-8) now control more than 60% of votes at the Bank and the IMF. Under this system, the U.S alone exercises roughly 17% of the vote. All the developing countries together do not account for more than 35% of the vote (including Saudi Arabia which is characterized as a developing country whereas it is actually a creditor Country).

Consequently, the voice of the third world is not heard even as the policies of IFIs inflict catastrophic consequences on the people of these states. There is an acute need to change this anti-democratic voting system since it may be hard to change the IFIs *software*-their lending policies-without changing its own institutional *hardware*-their governance structure.

Having seen the governance structures and the decision making methods of IFIs, let us now proceed to analyze their status as Specialized Agencies of the United Nations. The Bank and the IMF are Specialized Agencies of the United Nations[16] in the same way as ILO and WHO are. But several features distinguish the IMF and WB from other UN Organizations. The relationship agreements between the IFIs and the UN[17] clearly suggest that the IFIs are to be effectively immune from control by the UN. Thus, the agreement between the Fund and the UN states that the Fund, because of its special responsibilities is, and is required to function as, an independent international organization[18]. The independence of IFIs is further buttressed by the fact that, unlike sovereign States, the IFIs are not legally bound by decisions made by the Security Council. Rather, they are required, in the conduct of their activities, to have

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16 Specialized Agencies are autonomous international organizations having entered into 'Relationship Agreement' with the United Nations in accordance with Article 63 of the UN Charter.

17 Agreement between the UN and the International Monetary Fund, UN treaty Series 16 (1948) 330 and the Agreement between the UN and the World Bank 16 (1948).

18 Agreement between the UN and the International Monetary Fund, UN Treaty Series 16 (1948) 330, Article 1.

due regard for decisions of the Security Council[19]. The protection from 'political interference' seen here as emanating from the UN is also evident in a number of other provisions which deal with the specific activities of the Bank, as we shall see later. Hence, IFIs working relationship with the UN system is a very loose one.

III. Criticisms of the IFIs

A discussion of the relevance of the human rights law to the IFIs would be incomplete without at least a brief analysis of the ways in which their policies and operations can impact- directly or indirectly- upon the realization of human rights. In this part of the article, an attempt is made to give a bird's eye view of the main criticisms that have been made against the IFIs. Criticisms of the IFIs are as varied as its critics[20]. A primary area of criticism directed at IFIs concern the human rights impact of the Structural Adjustment Programmes (SAPs) imposed on the developing countries aimed at "*getting their macroeconomic fundamentals right*".

Throughout the 1980s and 1990s, the IFIs were a principal force in imposing SAPs on most countries of the South. The debt crisis which reached crisis proportions by 1982 gave the IFIs the leverage needed to impose SAPs on the debt-ridden countries of the South. Formulated as loan conditions by the IFIs, the SAPs were presented as a vehicle for economic stabilization, sustained economic growth and poverty reduction in developing countries. The basic problem with the imposition of SAPs is that it takes away the freedom of governments to make decisions on key economic and social policies for their own people. Though the exact conditions of SAPs varied depending upon the country in question, they did share some

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19 *Ibid*, Article VI.

20 Criticism of the WB and IMF grew during the 1980s. The critics focused on the environmental, social justice and human rights impacts of specific Bank projects; On the flawed model of development that such projects revealed; On the devastating human and environmental impact of Structural Adjustment conditions aimed at turning economies into 'export machines'. See, e.g., Waldon Bello and others, "*Dark Victory: The United States, Structural Adjustment and Global Poverty*" (Pluto Press, London : 1994), Susan George, "*The Debt Boomerang: How Third World Debt Harms us All*" (Pluto Press, London : 1992), Bruce Rich, "*Mortgaging the Earth: The World Bank, Environmental Impoverishment and the Crisis of Development*'" (Beacon Press, Boston : 1994).

standard common threads that were part of all the SAPs. They included:

- Devaluation of currency, in order to promote exports and render the country more attractive to foreign investors

- Reduction of public sector which includes the privatization of enterprises previously owned or operated by the govt.

- Elimination of subsidies to reduce government deficits

- Liberalization of trade in order to promote competition and free trade[21].

In other words, SAPs were designed to work on the principle of 'one-size-fits all' approach to development, in which each economy is treated as if it were more or less the same as every other country. These programmes are designed to increase efficiency, expand growth potential and increase resilience to shocks. The ideological roots of SAPs could be traced to the neoliberal political-economic premise which accords a place of pride to the power of the market as opposed to the State in terms of generating economic growth and resources needed for public goods to be distributed. This shifting of power from State to market has a negative consequence on the human rights situation of the vulnerable sections of the population. This policy directly worsens government human rights practices since a substantial involvement of government in society is essential for the protection of all human rights[22]. It needs to be stressed here that the State has been given a prominent role in the realization of human rights, as reflected in the Vienna Declaration and Programme of Action (1993) adopted at the end of the UN World Conference on Human Rights. It provides that:

> 'The promotion and protection of human rights is the first responsibility of governments[23]'.

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21 Walden Bello, "Structural Adjustment Programmes: Success for Whom?", in Jerry Mander and E.Goldsmith, (ed.), *The Case Against Global Economy* (Sierra Club Books, San Francisco: 1996) p.286.

22 See, Jack Donnely, *Universal Human Rights in Theory and Practice* (Ithaca , New York; Cornell University Press, 2003).

23 See, Vienna Declaration and Programme of Action, Part I, Para. 1

Accordingly, the shift (from State to market) entails massive retreats from the human rights obligations of States towards their own peoples. This is on account of one basic requirement emanating from neo liberal solution contained in SAPs viz., a reduction in state provision of social services This has immense socio-economic effects, particularly for those who are dependent to a great extent on state provision of employment, housing, health care and education[24]. In other words, in the scheme of the realization of human rights, particularly ESC rights, the State should be seen as part of the *solution* and not *problem*. It is in this context that Richard Falk has spoken of the "disabling of the State as guardian of the public good" in the face of a shift of power and autonomy from the State to markets[25]. This clearly brings home the point that, at a minimum, States should be held accountable for engaging in any international obligation which undermines their own capacity to implement human rights domestically.

The success of SAPs in generating economic stabilization and growth is also questionable. For instance, the United Nations Economic Commission on Africa has argued that it is doubtful that SAPs have had a positive impact in Africa, where Countries without SAPs have performed just as well, if not better, than those with SAPs[26].

The negative social effects of SAPs which was first documented in the UNICEF study 'Adjustment with a Human Face' offered a clear case for undertaking reforms in the SAPs imposed on developing countries. This report, based on the outcomes of SAPs in Latin America, Sub-Saharan Africa and parts of Asia, argued that, adjustment had had 'social costs' in terms of loss of employment and incomes, and had been accompanied by a series of adverse changes in social indicators such as school enrolments, maternal and child nutrition and the prevalence of certain diseases. It further argued

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24 A.Leftwich, "Governance, the State and the Politics of Development", *Development and Change*, vol. 25, (1994) pp.363-86.

25 Richard Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective*, (Transnational Publishers Inc., Ardsley, N.Y, 1998), at xxiv.

26 Cited in Alex Thomson, *An Introduction to African Politics* (Routledge, London: 2000) pp.9-10.

that adjustment to a changing world economy was necessary but had to be designed in such a way as to ensure that the poor did not carry a disproportionate share of the adjustment burden[27].

Critics of the SAPs have argued that they are designed with little regard for the specific needs of the particular country concerned and as such are defective inherently. The SAPs often have massively detrimental consequences for the most disadvantaged in recipient countries; health services are affected, food and fuel prices increase and unemployment intensifies; 'IMF riots' have taken place in African and Latin American Countries where these programmes were implemented[28]. Also, it has been persuasively argued that the implementation of neo liberal economic reforms is at least one significant cause of growing internal conflicts in the third world[29].

The World Bank, in its *World Development Report 2008* has finally acknowledged that the whole structural adjustment enterprise was a failure. It was indeed a damning admission[30]:

> "Structural adjustment in the 1980s dismantled the elaborate system of public agencies that provided farmers with access to land, credit, insurance inputs, and cooperative organization. The expectation was that removing the state would free the market for private actors to take over these functions-reducing their costs, improving their quality, and eliminating their regressive bias. Too often, that did not happen. In some places, the state's withdrawal was tentative at best, limiting private entry. Elsewhere, the private sector emerged only slowly and partially-main serving commercial farmers but leaving small holders exposed to extensive market failures, high transaction costs and risks, and service gaps. Incomplete markets and institutional gaps impose huge costs in forgone growth and welfare losses for smallholders, threatening their competitiveness and, in many cases, their survival."

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27 G.A. Cornia , Richard Jolly and F, Stewart F. (ed.), *Adjustment with a HumanFace*: *Protecting the Vulnerable and Promoting Growth* (Clarendon Press, Oxford: 1987) p.288.

28 See, Michael Chossudovsky, *The Globalization of Poverty: Impacts of IMF and World Bank reform* (Zed books, London : 1997).

29 Anne Oxford, "Locating the International: Military and Monetary Interventions After the Cold War", *Harvard International law Journal*, vol. 38, (1997) pp.443-85.

30 World Bank, World Development Report 2008: *Agriculture for Development* (OUP, Oxford: 2008). Chapter 6, pp.138.

The human rights bodies of the UN have noted with increasing concern the negative impact of neo liberal market globalization on human rights, particularly, ESC rights. An important study was prepared by Danilo Turk for Sub-Commission drawing attention to the disastrous lack of attention to ESC rights and the problematic role played by the IFIs. While taking a strong line against the impact of SAPs on human rights, he opined that SAPs loan conditions requiring the cutting of public expenditure on health and education, labour market deregulation, export oriented production and privatization have led to increased income disparity, human rights abuses and marginalization of the poor and rural population in many countries[31]. It has also been argued that economic programmes designed and implemented by IFIs work in the interest of the advanced industrialized countries. For instance, it has been argued that the conditionalities demanded from South Korea involving the opening up of South Korea's automobile and financial markets were the result of pressures exercised by the U.S and Japan[32].

The UN Committee on Economic, Social and Cultural Rights (the Committee) has not only recognized the relevance and importance of IFIs activities for the enjoyment of human rights (particularly ESC rights), but also the impact of their policies and programmes on the ability of State Parties to Covenant comply with their obligations to realize ESC rights.

For instance, the Committee has interpreted the ICESCR to require reform measures protective of vulnerable populations who might be negatively impacted by structural adjustment[33]. In recent years, the Committee has begun to urge States Party to take account

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31 See, Danilo Turk, *The Realization of Economic, Social and Cultural Rights*, UN.GAOR, Hum. Rts, Comm., 44th Session, Provisional Agenda Item 8, 1-37, U.N Doc.E/CN.4/Sub.2/1992/ 16 (1992) at.11-18. (outlining human rights violations including an increase in infant and child mortality rates as a result of WB and IMF policies and projects).

32 Devesh Kapur, "The IMF: A Cure or a Curse?", *Foreign Policy*, vol.114, (1998) pp. 114-29, p.123.

33 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Guinea, U.N. ESCOR, 14th Sess., 22d mtg. at Para 9, U.N. Doc. E/C.12/1/Add.5 (1996).

of their human rights obligations flowing from the Covenant in negotiations with IFIs[34]. The jurisprudence of the Committee reveals some convergence between the Committee's interpretation of the Covenant and the poverty reduction strategies of IFIs, i.e., between development and human rights.

The concept of good governance, as advocated by the IFIs, presents a number of critical issues. First, it needs to be remembered here that, traditionally, the Bank has not considered issues of political nature in determining whether to undertake aid programs in the recipient state, for under their traditional mandates, the Bank and IMF are to remain *apolitical*. The World Bank's core mandate under its Articles of Agreement does not encompass governance reform unrelated to its economic growth agenda. In other words, to the extent this concept embraces initiatives to reform the political institutions of a recipient Country, it is at odds with Article IV Section 10 of the Bank Articles which clearly prohibits the Bank from interfering in the political affairs/issues of the recipient States (about which more below). Besides, this concept of good governance seeks to confer new roles and functions on the Bank that are arguably inconsistent with its own Articles, the same provisions which it claims, prevent it from directly adhering to the obligations that international human rights law imposes.

Second, this campaign which is based on the logic that good governance promotes economic growth has given rise to the view that the Bank does promote human rights. This is problematic for the reason that by equating its own controversial and problematic economic policies with the promotion of human rights, the Bank basically reinterprets the character and content of these rights rendering them in a way which is consistent with the neo liberal economic policies furthered by the World Bank[35].

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34 See, *e.g.*, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nepal, U.N. ESCOR, 26th Sess., 55th mtg. At Para 38, U.N. Doc.E/C.12/1/Add.66 (2001).

35 James Thou Gathii, "Good Governance as a Counter-Insurgency Agenda to Oppositional and Transformative Projects in International Law", *Buffalo Human Rights Law Review*, vol.5,(1999) pp.107-74, p.107.

Third, in this entire discourse, the Bank as well as the international donor community is oblivious to the relationship between 'good governance' and attainment of basic economic, social and cultural rights. In other words, for the vast majority of poor in the developing world, good governance should also mean a better quality of life including access to health care, housing, education and development.

Fourth, as James Gathii has aptly pointed out, this association (between good governance and human rights) has given a measure of credibility to the neo-liberal macro economic programmes of the Bretton Woods institutions and their powerful Western industrial members[36].

Fifth, even when the IFIs are advocating good governance principles of transparency and accountability to its Member States, they themselves do not apply the same principles in their own operations. It is to be remembered here that the lack of accountability of IFIs has been a source of constant critique. For example, Ngaire Woods has pointed out that the countries most affected by the policies of IFIs are generally the least represented on the Executive Boards of the IFIs and that IFIs activities have expanded enormously while their accountability has declined, as even the mechanisms in place are inadequate[37].

It also needs to be stressed hare that, it is no coincidence that, this concept gained currency when market-oriented SAPs pushed by the IFIs in the poor and developing world were increasingly coming under public scrutiny and criticism. In other words, the advent of good governance was intended as a way of explaining the failure of SAPs in terms of the governance deficit of the recipient countries rather than on flaws inherent in the remedies suggested by IFIs.

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36 James Thou Gathii, 'The Limits of the New International Rule of Law on Good Governance", in Edward K. Quashigah and Obiora C.Okafor, (ed.), 'Legitimate *Governance in Africa: International and Domestic Legal Perspectives*" (Kluwer Law International, The Hague: 1999).

37 Ngaire Woods, 'Making the IMF and the World Bank More Accountable', *International Affairs*, vol. 77, no.1, (2001) pp.83-100.

IV. The IFIs as Human Rights Duty-Bearers

This part of the article is concerned with the key question as to whether the IFIs have a legal obligation to comply with the requirements of the international human rights law or conversely whether they operate outside the purview of these norms and need only consider them as a matter of discretion or aspiration. To this extent, the sources of the international law obligations of IFIs are sought to be ascertained.

Even though the activities of the IFIs are governed primarily by their respective Articles of Agreement, the applicability of other international agreements, general international law, general principles of law and municipal law all have to be considered. Before an enquiry can be made into the question of the IFIs international legal obligations towards human rights law, it needs to be proved that IFIs possess international legal personality. If this is so, the IFIs can be referred to as subjects of international law and can, thus, be held accountable for their activities.

A. The IFIs as Subjects of International Law

The IFIs, which are inter governmental organizations, are subjects of international law and thus, capable of possessing rights and duties under international law. Any doubt as to whether an international organization qualifies as a 'subject' of international law or not, was put to rest by the International Court of Justice (ICJ) in its advisory opinion on Reparations for the Injuries Suffered in the Services of the United Nations[38] where it was held that the United Nations had international legal personality. The ICJ has reaffirmed this opinion in a range of its later opinions. For instance, in its advisory opinion on the Interpretation of the Agreement of 25March 1951 between the WHO and Egypt, it clarified that as subjects of international law, international organizations are bound by:

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[38] Reparation for Injuries Suffered in the Services of the United nations, Advisory opinion, (1949) 1 ICJ Reports 174, 179. (herein after Reparation Case)

> "Any obligation incumbent upon them under general rules of international law, under their Constitutions or under international agreements to which they are Parties."[39]

Hence, it can be safely inferred that, all other UN agencies including the IMF and the Worlds Bank, are subjects of international law even though international legal personality was not specifically conferred upon them within their Articles of Agreement. Besides, there is now a broad consensus among the scholars that international organizations, as a result of their international legal personality, are considered to be bound by general international law including any human rights norms that can be viewed as customary law or general principles of law[40]. The United Nations entities that have considered the question have also affirmed that international organizations are subjects of international duties. For instance, the Draft Articles on Responsibility of International Organizations adopted provisionally by the International Law Commission (ILC) provides that: [e]very internationally wrongful act of an international organization entails the international responsibility of the international organization[41]. Similarly, Special Rapporteures of the UN Commissions Human Rights have observed that as 'creatures of the international legal system intergovernmental organizations are bound by 'fundamental principles of international law such as the obligation to respect universal human rights norms[42].

Hence, the Bank and the IMF are bound by any obligations incumbent upon them under their Constitutions, international agreements to which they are party and general rules of international law including international human rights law.

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39 Interpretation of the Agreement of 25th March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, 73 at. 89-90.

40 August Reinisch, "The Changing International Legal Framework for Dealing With Non-State Actors," in Philip Alston (ed)., *Non State Actors and Human Rights* (OUP, Oxford : 2005), pp.37-89.

41 UN International Law Commission, *First Report on Responsibility of International Organizations*, Article 3 (1).

42 J. Oloka-Onyango and Deepika Udagama, *Economic Social and Cultural Rights*: *Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR, 53rd Session, U.N.Doc.E/CN.4/Sub.2/2001/10 (2001).

B. Obligations under the UN Charter

The most basic document laying the foundation of international human rights law is the UN Charter. The promotion and protection of human rights is one of the ends or purposes for the establishment of the United Nations. The Charter contains several different provisions that may give rise to human rights obligations for the ratifying States or for other entities with legal obligations stemming from the Charter. The two most important provisions which are relevant for our purposes are Article 55 which provides that:

With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion .

The next important provision is Article 56 that provides that;

> "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

Despite the generality of these provisions and contrary to what some scholars have commented, the ICJ has held that they do generate a binding obligation for Member States to respect human rights[43]. The Universal Declaration of Human Rights (UDHR) states that 'the common understanding of the peoples of the world

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[43] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970), 1971 ICJ Reports, 58 (Para 129)

concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community. The UDHR is viewed as representing an authoritative interpretation of the human rights provisions of the UN Charter[44].

Moreover while the IFIs Constituent instruments recognize that their Members retain sovereign power and exclusive authority over matters untouched by their obligations of membership in the Fund and the Bank, the decisions of the ICJ in the Barcelona Traction Case[45] and the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa[46]) have made it clear that the fundamental UN Charter based human rights obligations as elaborated in UDHR do not fall within the exclusive sovereign preserve.

Looking at Articles 55 –57 as a whole in conjunction with IMF/UN and Bank/UN relationship agreements, it is strongly arguable that cooperation between the IFIs and the UN in the economic and social fields should be based at least in part on the principles animating Chapter IX of the UN Charter[47]. These principles include at a minimum the human rights purposes as stated in Article 55 as elaborated in UDHR and the body of international human rights law built upon it.

C. Obligations as Specialized Agencies of United Nations

As we have already seen, both the Bank and the IMF are Specialized Agencies having entered into relationship agreements with the United Nations in accordance with Article 63 of the Charter. This is another indication of their international legal personality separate from their members which carries with it rights and obligations

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44 Philip Alston and Brunno Simma, 'The Sources of Human Rights Law: Customs, Jus cogens and General Principles' *Australian Year Book of International Law,* vol. 12 , (1992) pp 82-108, at 106.

45 Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970, p. 32

46 See, note 43 (South West Africa Case)

47 Balakrishan Rajagopal, "Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights" *Boston University International Law Journal*, vol.11, (1993) at pp 94-95.

according to international law. According to the relationship agreements the IFIs are, and are required to function as, independent international organizations. But it needs to be emphasized here that this provides an organizational independence from the United Nations, not from international law. This is reflected in the opinion of a number of scholars.

Amarasinghe, for instance, claims that international organizations may in certain circumstances assume obligations under treaties without being a Party to them[48]. He cites examples from space activities and environmental degradation to illustrate[49]. In a similar vein, in the Special Rapporteur on the draft Convention on the Law of Treaties between States and International Organizations or between International Organizations Reuter stated that:

> "…….it would be rather difficult to accept that international organizations, the vast majority of whose members are States Members of the UN, could disregard the rules of the Charter."[50]

On a very basic level, Skogly argues that the corollary of the relationship agreement must be that there are certain rights and obligations for the World Bank towards the United Nations. She notes: 'one would ….assume that part of the reasoning behind bringing these Organizations (the World Bank and the IMF) into a formalized relationship within the UN must have been to grant them, legally and practically, rights and obligations in relationship to the UN which would have been different if they were not brought into this relationship through the agreements[51]. Similarly, Danilo Turk, then Special Rapporteur of the Sub Commission on the Realization of ESC Rights confirmed that as a UN agency the World Bank is obliged to adhere to the terms of UN Charter. This includes the passages on human rights found in Articles 55 and 56 of the UN Charter.

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48 C.Amarasinghe, *Principles of the Institutional Law of International Organizations*(Cambridge, Cambridge University Press:2005), pp.399-406.

49 Ibid, p. 405.

50 Year Book of ILC, 1975, Vol.II UN Doc A/CN4/285, Commentary, Para 5.

51 Sigrun Skogly, *The Human Rights Obligations of World Bank and the International Monetary Fund* (Cavendish Publishing, London : 2001), pp.100.

Hence, the legal implications of the relationship agreements that IFIs have with the UN, on a fundamental level point to the fact that the principles of UN Charter do apply to them. It certainly includes the legal obligations of the IFIs so as not to conduct their actions in a manner contravening the principles and purposes of the Charter and to respect the human rights provisions of the Charter ('Do No Harm' Principle). In other words, the human rights 'bottom line' for both the Bank and the Fund lies in ensuring as far as practicable that, their actions do not impact negatively upon the abilities of their borrowing countries (in particular) to implement their human rights obligations that arise out of the treaties to which they are a Party. It would also imply that the IFIs are under an obligation to respect their Member's obligations under the Charter, in particular those arising from human rights provisions. These obligations, by virtue of Article 103 of the UN Charter are to be given primacy over other international obligations.

Moreover it needs to be remembered here, that the World Bank and the IMF are governed by their Member States. When they determine the policies of IFIs, they are bound by their States' international obligations including those arise from human rights law. Hence, the obligations of States extend beyond their own borders, as reflected in Articles 55 and 56 of UN Charter. It is in this context that the ICESCR mentions about the obligations with respect to international assistance and cooperation in a number of its provisions. This understanding has been reiterated by the Committee on ESCR, (whose task is that of monitoring compliance by State Parties with their obligations under the ICESCR) which in it is General Comment No:3 explicitly stated that: 'international cooperation for development… is an obligation of all States'.

Moreover, the importance of State's actions through international organizations as well as in their international cooperation generally in the implementation of ESC rights has been emphasized by the Committee on ESCR increasingly. For instance, in its General Comment No.2, while addressing the adverse effects of SAPs imposed by the international lending agencies on the realization of human rights, it commented that 'international measures to deal with the debt crisis should take full account of the need to protect

ESC rights through, *interalia*, international cooperation[52]. The role of the State Parties to the ICESCR has also been emphasized in this context thus:

> State Parties to the Covenant, as well as the relevant United Nations agencies, should […] make a particular effort to ensure that protection [of the most basic economic, social and cultural right] is, to the maximum extent possible built-in to programmes and policies designed to promote adjustment[53]'

Accordingly, the Committee, in the context of its "concluding observations" adopted for borrowing countries, has situated obligations under the ICESCR within the framework of IFIs activities, especially in the context of factors and difficulties impeding the implementation of the ICESCR[54]. Hence, the obligation of international assistance and cooperation would warrant a duty to assist actively towards the realization of human rights in general and ESC rights in particular, both on the part of States and international institutions.

D. Articles of Agreement

The legal framework within which the IFIs must operate with respect to human rights as well as its activities is anchored in their Articles Agreement. The words 'human rights' are found no where in the Articles of Agreement of either of the IFIs.

The principal argument put forward by the World Bank in order to deny its human rights obligations is contained in Article IV Section 10 of its Articles (the Political Prohibition Clause) which provides that:

The Bank and its Officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the

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52 See, Committee on ESCR, General Comment No.2 on International Technical Assistance Measures, 1990, para. , E/1990/23, Annex III, 88-89, para 9.

53 *Ibid*.

54 E/C/12/2000/21 at Para 152 (Egypt): the Committee is of the view …that some aspects of SAPs and economic liberalization policies introduced by the govt. of Egypt in concert with IFIs have impeded the implementation of the Covenant's provisions, particularly with regard to the most vulnerable groups of Egyptian society.

political character of the Member or Members concerned. Only economic considerations shall be relevant to their decisions and these considerations shall be weighted impartially in order to achieve the purposes stated in Article I.

The IMF lacks a similar provision in its Articles of Agreement but still claims that to pay attention to human rights would be contrary to its purposes (Article I, last Para) and invokes the general non-interference principle in international law which stands codified in Article 2 (7) of UN Charter. The logic adduced is that human rights belong to the sphere of domestic politics. It also stems from the role that the IMF has played traditionally as a short-term financial institution without a development agenda and the belief that its policies do not result in human rights violations.

The principal argument adduced by the Bank has met with resistance on various levels. At a more basic level, it could be argued that the imposition of SAPs by the IFIs in the developing countries by way of conditionalities does force them to open up their economies to world trade and finance. The SAPs attempt to condition the economic policies of the developing countries towards a particular ideological orientation which favours the interests of the IFIs major share holders rather than on technocratic considerations as contemplated by their Articles of Agreement. The way this has taken place has required the developing countries to reduce spending on essential things such as education, health care and development, which clearly points to the fact that 'economics is often driven by politics'.

Secondly, we should remember that many of the most controversial actions taken by the IFIs are actions taken outside of their original missions. For instance, the Bank's concern for good governance in developing countries raises a number of troubling issues. Despite the political prohibition clause occurring in its Articles, the Bank has taken up a number of issues traditionally related to the political affairs of the States under the broad rubric of good governance. This includes issues of corruption, tax reforms, and judicial reforms, creating a system of government which is accountable, transparent and democratic and even strengthening the role of the press. Similarly the IMF required the Asian Countries to

meet '50 to 80 detailed conditions covering every thing from the deregulation of garlic monopolies to taxes on cattle feed and new environmental laws' in return for assistance[55]. The standing of IMF to impose these conditions is highly questionable in terms of its Articles.

The main thrust of the argument being made here has been well captured by Antony Anghie thus: the Bank hardly can rely on one interpretation of its Articles of Agreement –which ostensibly permits it to undertake responsibility for governance issues for example- when that interpretation appears to conflict squarely with another provision in its Articles[56]. The fact that even when the IFIs advocate the good governance principles of transparency and accountability, they themselves do not apply the same in its own activities and operations needs to be underlined here. As for the IMF, it has been persuasively argued that it is improper on the part of IMF to become intimately and powerfully involved in domestic policy making on account of its own Articles, even though it does not have an explicit political prohibition clause as does the Bank. Moreover as we have seen already, the IMF has changed its character from that of a short term lender supporting countries with balance of payment problems, to that of a medium and long term financial institution with an increasingly development oriented mandate. As a result, it can not ignore the changing contours of development which now encompasses human rights.

Thirdly, in order to understand how politics informs the IFIs, one only needs to look at their voting and decision-making processes. Contrary to their Articles of Agreement, the decision-making of both these institutions seems to be based on the interests of majority share holders rather than on technocratic considerations contemplated by their Articles of Agreement. Also, as we have seen, the SAPs imposed by the IFIs have a profound impact on impoverishment and therefore, upon the domestic political economy of the recipient states. Moreover, in the name of good governance, the Bank has

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55 See, Devesh Kapur, note 26, p. 123.

56 See, Antony Anghie, note 1, p.267

come to concern itself with a number of issues traditionally related to the 'political affairs' of States.

Fourthly, it can no longer be maintained that the issue of human rights protection solely forms part of the domestic political affairs of a State. The general principle in international law of non-interference codified in Article 2 (7) of the UN Charter has become redundant in the light of the developments that have taken place in human rights law. As early as 1950, Lauterpacht wrote that "[an issue] is not essentially a matter of domestic jurisdiction if it has become the subject of international obligations undertaken by the State. It has been submitted that ….the respect and observance of human rights have become a subject of international obligation in the legal sense of the term[57]. This notion has come to be accepted both within the academic community[58] and within the UN and international community. For instance, the Vienna Declaration and Programme of Action adopted at the end of the second World Conference on Human Rights that took place in 1993, declares that:

> The promotion and protection of all human rights is a legitimate concern of the international community.[59]

It should therefore be reasonably inferred that at least gross and persistent violations of human rights should not be barred from international scrutiny due to the wordings of Article 2 (7) of the UN Charter and that the international community and the UN may make recommendations and investigate allegations of such situations without being in breach of the Charter.

Having seen some of the most important objections raised by the IFIs for not taking human rights principles into account in their operations, let us briefly turn to how this could possibly be done by the IFIs. One way of giving a role to human rights norms in the context of their Articles of Agreements is to attempt to reconcile conflicts between human rights and IFIs Articles of Agreement. This

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57 Hersh Lauterpacht, *International Law and Human rights* (Steven and Sons, London: 1950), pp.176.

58 Louis B.Sohn ,' The International Law of Human Rights: A Reply to Recent Criticism", *Hofstra Law Review*, vol.9, (1981) pp.349-50.

59 Vienna Declaration and Programme of Action 1993, Section II, para 2.

takes us to the role of the principles of interpretation contained in Vienna Convention on Law of Treaties 1969 (VCLT), which, it is generally accepted, have attained the status of customary law. Articles 31 and 32 of the VCLT reflect the fundamental rules of international law for present purposes. Article 31 sets down the general rule of interpretation as follows:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (*c*) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Furthermore, under Article 32 '[r]ecourse may be had to supplementary means of interpretation including the preparatory work of the treaty and circumstances of its conclusion in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31:

a. Leaves the meaning ambiguous or obscure; or

b. Leads to a result which is manifestly absurd or unreasonable.

It is now widely accepted that the Articles of Agreement of the Bank and the Fund constitute living documents required to be sufficiently flexible to respond to evolving operational circumstances. The need to adhere to what has been called the dynamic-evolutionary method of interpretation as opposed to the static or textual approach can hardly be exaggerated in this context. Indeed, this is the approach the Executive Board of the Bank has applied to its Articles in practice pursuant to the principle of 'institutional effectiveness' and in recognition of Constitutions as 'developing instruments'

Article 31 (3) of VCLT authorizes the interpreters to rely on a range of sources including 'subsequent practice' and allows consideration of 'any relevant rules of international law applicable in the relations between the Parties'. This provision could certainly be used as a potential tool to allow the mandates of the IFIs to be interpreted in the light of international human rights law as it stands today. Another argument that can be made in this context pertains to Article 103 of the UN Charter which is pivotal to the interpretation of the international obligations. It provides that in 'the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'

As noted earlier, the human rights provisions of the UN Charter could give rise to obligations on the part of Member States of United Nations to promote and protect human rights. Hence, it would appear that in the event of a conflict between a human rights obligation, particularly one that is universally recognized and a commitment ensuing from that of IFIs Articles of Agreements, operational directives and their general policies, the former should prevail or the latter must be interpreted to be consistent with the former. Human rights norms should always be taken into account when interpreting obligations arising under other treaties.

E. Obligations of IFIs under General International Law

One of the arguments that is frequently raised by the IFIs for denying their human rights obligations is that, they are not Parties to the UN human rights treaties and hence, not bound by them. Far from it. As noted earlier, International Organizations are, as stated by the ICJ in the WHO case, "bound by any obligations incumbent upon them" under customary international law[60]. Hence, even though international human rights law does not impose direct obligations on IFIs, they are bound by it to the extent that human rights law stands incorporated in international customs or general principles of international law.

Though there has been a debate about which human rights obligations have attained the status of customary law, international law is increasingly treating fundamental basic human rights as a part of customary international law. The UDHR itself 'that common standard of achievement for all peoples and all nations is now deemed to possess a normative, obligatory character that gives at least portions of it the status of customary international law. This is because, even though not a treaty, it is so widely accepted and revered by governments which invoke it, and that this acceptance has been so total and universal that, it may now be said to meet the tests of customary law namely, state practice and opinio juris[61]. It should be remembered here that even though the ICJ has not ruled on whether the UDHR has attained this status, it has made statements on specific human rights that were relevant to the case before the Court such as protection from slavery, prohibition of racial discrimination, the wrongful deprivation of freedom and the right to self-determination as belonging to the general rules of international law[62]. Rules in this category certainly apply to inter governmental organizations. Hence the IFIs are subject to the reach

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60 See, WHO Egypt Case, note 39, at, 89-90, Para 37.

61 See, Thomas Buergenthal, *International Human rights In a Nutshell* (1995)pp 29-38.

62 Barcelona Traction, Light and Power Co., ltd. (Belgium Vs Spain) ICJ reports 1970, Paras 33 and 34.

of international human rights law in so far as human rights law has attained the status of general rules.

As a kind of bottom line, it is indeed eminently arguable that, the IFIs have the obligation to respect general rules of human rights law and not to violate or become complicit in the violation of human rights norms by actions or omissions attributable to them. This obligation arises from the premise that the powers and functions of inter governmental organizations including IFIs should not be seen as to permit actions that are against general rules of international law and hence human rights law. What this means is that, core human rights obligations flowing from the major UN human rights treaties, to the extent that they reflect customary law, should provide a benchmark for the evaluation of the development policies of the Bank and the IMF from a legal perspective.

V. Concluding Observations

It is generally accepted today that, the IFIs have virtually become the 'managers of economic policies' of the developing Countries. The IFIs play a vital role in the ability of governments to provide for the general welfare of their populations, and the projects they fund often directly implicate both civil and political and economic social and cultural rights violations. Their potential for violations is directly related to the tremendous influence they exercise over the economies of developing countries: the World Bank is the largest source of international funding for development programs, and the imprimatur of the IMF is often the critical condition for access to other sources of funding and investment.

Structural Adjustment Programmes, which remain the principal mechanism through which the IFIs impose their economic wills on the global South, have had widespread and serious impacts on human welfare, as we have seen before. Beyond the substantive impacts, IFIs involvement in development decisions often move the locus of decision-making from the affected communities, making policies less transparent, participatory, and accountable to traditional democratic processes. This is indeed a clear case of '*Power without Responsibility*'.

Even though the IFIs have tried to respond to public criticism by introducing a number of specific concepts such as 'Adjustment with a Human Face', Social Dimension Funds' Comprehensive Developemnt Framework etc., into their work and creating internal accountably mechanisms[63], the basic philosophy and the belief in the unregulated free market have remained unchanged. Even today, the IFIs do not take into account the possibility that conditonalities attached to the loans given by them may themselves be in breach of human rights obligations. This brings home the point clearly that the need to make them legally accountable remains as important as ever. It is here that the role of human rights assumes cardinal importance in that one mechanism for ensuring accountability could be human rights. Despite the fact that only States have been the traditional bearers of human rights obligations, international law has evolved over the years and now recognizes that human rights law also binds international organization including the IFIs.

As argued earlier, the international legal personality of inter-governmental organizations entails the obligation to conform to general international law norms above and beyond the requirements of their Constituent Charters. Hence, as 'subjects' of international law, the IFIs not only possess rights, but also duties, which would include human rights protection. As "specialized agencies" of the United Nations, the Bank and the IMF are obligated to promote the UN's human rights mission and as international organizations, they are on a more basic level, responsible for not violating customary international law relating to human rights. This view has very much been echoed by the jurisprudence of the UN Committee on Economic, Social, and Cultural Rights which has underscored the human rights obligations of these institutions on a number of occasions.

As regards the justification of IFIs that they have to go strictly by economic considerations and not meddle with political issues such

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63 As regards accountability mechanisms, the internal mechanisms of IFIs are weak and the World Bank's Inspection Panel is useful but insufficient. This is because of a number of factors which include: Panel's non-judicial nature, its lack of decision-making power and the lack of independent oversight over the implementation of remedial measures.

as human rights, it can be argued that this is specious, not only because the IFIs are themselves affiliated to the UN, but also because, strictly speaking, there is no such thing as a politically neutral economic decision. Besides, the flexibility with which the IFIs have interpreted their mandate (arrogating to them the right to impose 'political conditionalities') offers ample scope for the incorporation of human rights dimensions to their policies and operations to the extend it enables the borrower's to fulfill their human rights obligations. Indeed it is even arguable that, to the extent that IFI's Articles prohibit them from taking human rights considerations in their activities, the Articles' themselves could be found to be incompatible with the general body of international human rights law, including jus cogens norms.

Integrating human rights within the operations and policies of IFIs would serve the cause of human rights in a number of ways: *First,* it will make sure that, human rights principles form a normative framework for development and a set of core values central to the 'humanization of development' processes and outcomes. The need to base human development on international standards is indeed reflected in a number of human rights instruments[64]. This has also been echoed by the Office of the High Commissioner of Human Rights (OHCHR)[65]. *Second*, any effort to recognize the importance of the ESC rights on an equal footing with CP rights would go a long way in promoting the interdependence and indivisibility of human rights as a whole. *Third,* recognition on the part of IFIs of their human rights obligations could in turn, influence States to honour their commitments effectively. *Lastly*, it

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64 On a more basic level, it is expressed in UN Charter Articles 1(3), 55 and 56 and reinforced by Article 28 of the UDHR which provides that: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' .This has been further elaborated by UN human rights treaty bodies.

65 According to the OHCHR: "A rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights…It includes the following elements; express linkage to human rights, accountability, empowerment, participation, non-discrimination and attention to vulnerable groups", See, www.unhchr.ch/development (under the heading 'rights-based approaches').

will also ensure that the right to participation, which has come to be accepted as an integral part of development strategies, is taken seriously. The importance of this right is well-captured in the Declaration on the Right to Development adopted by the UNGA in 1986, which clearly establishes the duty 'to formulate appropriate national development policies that aim at constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and the fair distribution of the benefits resulting there from[66]. After all, any development strategy that disregards popular participation and disturbs human rights tantamounts to the very negation of development.

VI. The Role of AALCO

The recent global economic meltdown, which is essentially the outcome of a deregulated financial architecture, has clearly proved certain important things beyond doubt: First, it has shown that the developing world is far from immune to the financial crisis originating in the West. Second, it has revealed how dysfunctional, the current international financial architecture is in managing today's global economy, with its propensity through which both financial euphoria and panic could be transmitted world wide. Third, the crisis represents the clear failure of the economic model of neo liberalism. In particular, the notions that markets know best, and that self-regulation is the best form of financial regulation have now been completely demystified. Lastly, it has clearly brought home the point that the Developing Countries have been advocating for far too long that, the international financial institutions need to be drastically reformed.

Hence, the need to question the economic paradigm that has been dominant for far too long and to replace it with a more

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66 See, Preamble, the Declaration on the Right to Development, (1986). A similar concern has been expressed by the Committee on ESC Rights which, in a statement on poverty and ICESCR has opined thus: 'the international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes'. See, UN Committee on Economic, Social and Cultural rights, 2001, Para 12. UN Doc.E/C.12/2001/10.

progressive and democratic alternative remains as acute as ever. In this context, the Asian-African Legal Consultative Organization (AALCO) wants to add its voice to the call for the revamping of global financial architecture. It is in pursuance of this, that the Secretary-General of AALCO Prof. Dr. Rahmat Bin Mohamad has proposed a new topic entitled: "Managing Global Financial Crisis: Sharing of Experience", to be included as an agenda item during the forthcoming Forty-Eighth Annual Session of AALCO. This topic, if accepted by the Member States, is planned to be dealt with in two parts: firstly, it would explore the ways and means through which the Member States of AALCO have dealt with this global crisis domestically. This is aimed at exchanging the views and experiences of Member States among themselves. Second, this would also explore the critical areas of reforms that the IFIs must undertake in order to enhance their legitimacy and effectiveness. The need, if any, to create any regional institutions/mechanisms which would give better services and a stronger voice to countries of Asian-African region would also be analyzed. Hence AALCO could play an important role in the ongoing international efforts to regulate the financial and banking sector. These efforts, which would be complementary and supportive to the current efforts undertaken, would go a significant way towards the progressive development of financial and banking regulations.