JOURNAL OF UNIQUE LAWS AND STUDENTS

VOLUME II ISSUE I

JOURNAL OF UNIQUE LAWS AND STUDENTS

ISSN: 2583-1607

JULS

ISSN: 2583-1607

Volume II Issue I

Published: May 2022

JOURNAL OF UNIQUE LAWS AND STUDENTS

https://www.uniquelaw.in/volume-ii-issue-i

About JULS

Journal of Unique Laws and Students" (JULS) which shall provide law students, young lawyers and legal professionals to deliberate and express their critical thinking on impressionistic realms of Law. The JULS aims to provide cost free, open access academic deliberations among law students and young lawyers. It focuses on theme based, double peer reviewed volume publications which shall be selected from the call for entries of the journal.

PREFACE

The views expressed in the articles are purely and solely of the authors and the entire team of the Journal has no association with the same. Although all attempts have been made to ensure the correctness of the information published in the articles, the Editorial team shall not be held responsible for any errors that might have been caused due to oversight or otherwise. It is up to the rest of us to help make the journal a success story in the next several years.

Publisher Details

Mr. Anirvan Choudhuri
LL.M, LL.B, B.Com(H.)
Director, Ansh LexPraxis Legal Education LLP
Address: A/100 Kankarbagh Housing
Colony Patna - 800020
Contact no. - +91-7019862058
Email id: juls@uniquelaw.in

BOARD OF ADVISORS

Link- https://www.uniquelaw.in/volume-ii-issue-i

EDITORIAL BOARD

Link- https://www.uniquelaw.in/volume-ii-issue-i

EDITOR'S NOTE

Volume II Issue I of **Journal of Unique Laws and Students (JULS)**

The journal aims to present merit papers on the numerous legal issues and these topics are authored by various groups of individuals that have been reappraise and emended by our team of editors to attend the highest possible excellence. These research papers, case analysis and short notes are the result and we feel privileged to have been able to act as editors.

We thank to all our authors for their obedient submission to the third issue of the journal and also for their productive cooperation with the editorial team to garnish their work with perfection. We would also like to express our gratitude to our diligent editorial board, whose restless support and commitment made this Journal's Volume II a success.

Disha Nayak Saedesai	**Hon'ble Justice Dr. Saleem Marsoof**	**Preyas Haldar**
Editor-in-Chief	*Chief Patron*	*Executive Editor*

Link- https://www.uniquelaw.in/volume-ii-issue-i

TABLE OF CONTENTS

Vol. 2 Issue1 (May, 2022) ISSN: 2583-1607

A STUDY OF DEVELOPMENTS IN ARBITRATION LAW WITH REFERENCE TO AMAZON V. FUTURE RETAIL CASE

*AUTHOR- ARRYAN MOHANTY**

ABSTRACT

Arbitration Law is a form of legal process that falls under the domain of Alternate Dispute Resolution. The process of arbitration is quite different from litigation, in terms of formalities, flexibility and speed of disposal. This research paper covers the Scope of Arbitration Law in India, the Recent Developments, and the pivotal case of Amazon v. Future Retail.

With regards to the Scope of Arbitration, this paper covers subjects such as the definition of Arbitration, its characteristics; its advantages and disadvantages, such as quicker process despite high cost of hiring an arbitrator; its types, such as ad-hoc arbitration, domestic arbitration, international arbitration and international commercial arbitration. It also covers the laws that govern arbitration in India, with special reference to the Arbitration and Conciliation Act 1996. In terms of recent developments, this paper covers events such as the 2015 and 2019 amendments to the Arbitration and Conciliation Act 1996, which have played a crucial role in the arbitration sphere in India. This paper also delves into the concept of Emergency Arbitration and the inclusion of Emergency Arbitrator under the scope of Section 17(1) of the Act, 1996 as emphasized by the Supreme Court in the case of Amazon v. Future Retail.

Key Words: Arbitration, ADR, Emergency Arbitration, Fast Track Arbitration, Settlement

I. Introduction

The Arbitration and Conciliation Act, 1996 was introduced so that arbitration and conciliation can be conducted seamlessly in relation to Indian matters of arbitration being considered both internationally and domestically. Moreover, to make it certain that the processes of arbitration and conciliation are carried out in an equitable and efficient manner. Since the introduction of the 'Act' in 1996, the arbitration system in India has undergone many significant changes.

One such change was the recent case of *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors.*, which brought about some significant

* 2nd Year Law student at Symbiosis Law School, Nagpur; Available at: aryanmohanty482@gmail.com

modifications in the system. The changes mostly dealt with the status orders passed by Emergency Arbitrators and the maintainability of appeals made before a greater bench of the High Court after an order has already been passed by a single judge bench. This case also emphasized on the way Emergency Arbitrators help the judicial system by decongesting the same and making the whole process more efficient. Such changes are the essence of arbitration law which aids in improving the arbitration process by making it more efficient, fair and effective.

II. Arbitration Law and its Scope

Arbitration can be defined as a process where a dispute is put forward to an arbitrator, through an agreement between the parties, and this arbitrator has the power to make a decision that is binding in relation to the dispute.[2] It is thus a private form of dispute settlement unlike Litigation; an independent third party is consulted to adjudicate the dispute between the parties and eventually aid in its settlement..[3] Moreover, arbitration is an alternate form of dispute resolution to litigation, as it has a different process of settling disputes and rules to refer to, and the decision, or 'award', of the arbitrator is binding and final. This is in contrast to other Alternate Dispute Resolution methods like Mediation and Conciliation, where the mediator or conciliator are limited to only recommending a suitable outcome, making it optional for the parties to end the dispute by way of settlement.[4]

There are various forms of arbitration, such as domestic arbitration, where the arbitration takes place in one country, such as India; international arbitration, where proceedings take place outside the domestic territory; international commercial arbitration, where one of the parties may be from a foreign country; and ad-hoc arbitration, where the rules governing the arbitration process is formulated by the parties instead of following the set rules of the arbitral institution.[5] Another type of arbitration is Fast-Track Arbitration, where the procedures that tend to take time and cause delays are avoided, thus upholds the objective of settling the disputes as soon as possible.[6]

---

[2] WIPO, https://www.wipo.int/amc/en/arbitration/what-is-arb.html (last visited Jan. 12, 2022).
[3] MEDIATE.COM, https://www.mediate.com/articles/grant.cfm (last visited Jan. 12, 2022).
[4] STEWARTS, https://www.stewartslaw.com/expertise/international-arbitration/arbitration-process/ (last visited Jan. 12, 2022).
[5] Ria Verma, *Arbitration - types and significance*, iPleaders (Nov. 8, 2021), https://blog.ipleaders.in/arbitration-type-significance/#Domestic_arbitration.
[6] Ibid.

Some people are of the view that India had its own form of arbitration in the ancient era, where it was divided into three bodies: Panchayats, people with a similar profession and the local courts.[7] In modern India, the main source of law for arbitration is the Arbitration and Conciliation Act 1996, which took heavy inspiration from the 1985 UNCITRAL Model on International Commercial Arbitration, and UNCITRAL Arbitration Rules of 1976, which were made to help countries in reforming their arbitration laws.[8] Arbitration has been given the definition of any means of arbitration regardless of it being administered by a permanent arbitral institution.[9] Section 7(1) defines an Arbitration Agreement as an agreement between the parties for arbitration, and also notes that there must be a legal relationship between the parties.[10] The Act was amended in 2015 to broaden its purview in order to include international commercial arbitration, domestic arbitration and enforcement of foreign arbitral awards.[11] In 2021, there was another amendment to the Act; the 2021 amendments included an omission of the qualification requirements from the Act which were prerequisite to become an arbitrator, and brought back the provision for automatic stay on awards by the court, if the court was satisfied that the arbitration agreement, or award, had been influenced through fraud or corruption.[12] However, this amendment has been met with a lot of backlash, as the automatic stay provision had been removed in 2015 after the Supreme Court observed, in *National Aluminium Co. Ltd. vs. M/S Pressteel and Fabrications*[13], that it defeated the purpose of alternate dispute resolution as it allowed for a stay application of the award to be filed in court, and thus the arbitration process suffered incessant court intervention. It should also be noted that not all types of cases can be referred to arbitration. In *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd.*, the court prevented a few

[7] Nishant Nigam, *Benefits of Arbitration for Commercial Disputes in India*, Lawyered (Mar. 18, 2019), https://www.lawyered.in/legal-disrupt/articles/benefits-arbitration-method-dispute-resolution/.
[8] UNCITRAL, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (last visited Jan. 11, 2022).
[9] The Arbitration and Conciliation Act, 1996, §2(1), No. 26, Acts of Parliament, 1996 (India).
[10] The Arbitration and Conciliation Act, 1996, §7(1), No. 26, Acts of Parliament, 1996 (India).
[11] Jagdeep Singh Bakshi, *Arbitration law in India: Everything you want to know*, The Statesman (May 24, 2019, 5:40pm) https://www.thestatesman.com/india/arbitration-law-in-india-everything-you-want-to-know-1502757528.html.
[12] PRS LEGISLATIVE RESEARCH, https://prsindia.org/billtrack/the-arbitration-and-conciliation-amendment-ordinance-2020 (last visited Jan. 13, 2022).
[13] National Aluminium Co. Ltd. v. M/S Pressteel and Fabrications Ltd., AIR 2005 SC 1514.

types of cases from entering the arbitration domain, such as criminal offences, corruption related cases, fraud, insolvency and guardianship matters.[14]

Arbitration has many benefits, the biggest one being its ability to be time efficient, as it avoids the long procedures that are followed in litigation, and is thus more flexible and less formal.[15] Moreover, the legal process is confidential, which means that information of the parties would not be put on public record, and would be confined to the arbitration room itself.[16] The decision in the end is more agreeable as the solution is framed by the participation and indulgence of both the parties.[17]

However, there are a few disadvantages, such as costs, because good arbitrators may charge a high fee which would not be common in litigation. Also, the private nature of the process may lead to questions regarding the transparency of the process and its settlement.[18]

III. Recent Developments

Arbitration is submission of issues by two or more parties to the judgment of a third person which is the arbitrator who is to act in a judicial manner. Arbitration has been around for quite some time. People prefer to choose arbitration because it saves time and the arbitrator's decision is legally binding. The arbitration law has been amended six times with the last amendment in March, 2021. Some of the most notable changes or amendments in recent years have been discussed below.

The most substantial reforms were brought about by the Indian government through the 2015 Arbitration & Conciliation amendment Act. One such reform was in a section that was a bit ambiguous and lacked a clear definition. The Court was allowed under Section 34 of the 1996 Act to set aside an award if it was "opposed to public policy of India," but the term "opposed to public policy"

---

[14] Booz Allen & Hamilton Inc v. SBI Home Finance Ltd. & Ors., (2011) 5 SCC 532.
[15] UPCOUNSEL, https://www.upcounsel.com/what-are-the-advantages-and-disadvantages-of-arbitration#advantages-of-arbitration (last visited Jan. 13, 2022).
[16] LEGALNATURE, https://www.legalnature.com/guides/dispute-resolution-the-benefits-of-an-arbitration-agreement#what-are-the-benefits-of-such-an-agreement-for-dispute-resolution (last visited Jan. 13, 2022).
[17] *Supra* note 11.
[18] SAC ATTORNEYS LLP, https://www.sacattorneys.com/the-advantages-and-disadvantages-of-arbitration.html (last visited Jan. 13, 2022).

had never been defined. The phrase "opposed to public policy of India" became a frequent target of exploitation, resulting in a plethora of contradictory judicial rulings.[19] The lawmakers amended the law in such a way that now, only if the award was influenced or impacted by fraud or corruption, or if it was made in contravention of Sec. 75 or Sec. 81; or if it opposed Indian law's fundamental policy; or if it defied the most basic principles of morality or justice, was considered in contradiction with 'public policy of India.' Furthermore, an explanation stipulates that, in order to avoid any ambiguity, the test of "contradiction with Indian law's fundamental policy" shall not include a consideration of the dispute's merits.[20] The aim of this amendment was to stop the abuse of law by misusing or adding absurd interpretations of the above mentioned phrase.

Originally, the Indian arbitration system did not stipulate any criteria for arbitrators to be accredited. After the 2019 Amendment, a set of criteria for arbitrator's qualification was listed down. The section of 43J outlined the qualifications, experience, and other general standards for arbitrator accreditation, and referred to the Eighth Schedule for an entire list of attributes that must be met by an arbitrator. To be considered for an arbitrator's position, a person just needed to meet one of the listed criteria. Till the term of the Eighth Schedule's rule, anyone who was not able to meet the criteria was ineligible to arbitrate a dispute.[21] However, since the foreign lawyers were not able to meet the specified qualification criteria mentioned in the Act and the Schedule, a lot of questions were being raised against the same, this lead to the omission of the schedule through the Arbitration & Conciliation Amendment Act of 2021.

The 2019 Amendment Act also led to the deletion of the phrase – "at any time after the making of the arbitral award but before it is enforced…" stated in Section 17[22]. The above-mentioned clause was deleted on the ground that the arbitral tribunals have already performed their duty after the final award has

[19] Rao N. et al., CHANGING TRENDS OF INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA, Aut Aut Research Journal, 256, 260-261 (2021).
[20] Bishwendra Singh, *Impact of the Recent Reforms on Indian Arbitration Law,* Social Science Research Network (Aug. 11, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3648705.
[21] Shahi C. et at., Arbitration and Conciliation (Amendment) Act, 2021 : Why the Eighth Schedule is a Good Riddance?, 8, NVEO, 10392, 10402-10403 (2021).
[22] Arbitration and Conciliation Act, 1996, §17, No. 26, Acts of Parliament, 1996 (India).

been announced.[23] This means that the modified clause limits the Court's ability to hear applications during the arbitral proceedings or after the arbitral award has been issued. This change is noteworthy because, unlike in the past, passing an interim measure by the Court does not render the arbitral proceedings completely ineffective.[24]

The most recent judgment of the Supreme Court relating to Emergency Arbitration, defines the term Emergency Arbitration as a method of providing interim relief on accelerated basis, before the adjudication of the final award, by a sole arbitrator appointed by an arbitral institution. An emergency arbitrator's order is temporary but legally binding, although it can be changed or suspended by a substantive or formal tribunal after it is formed.[25] In the past, emergency arbitration was not specifically recognized in India. However, in the said ruling, the Supreme Court is of the view that emergency arbitration falls under the ambit of the Arbitration & Conciliation Act and that the arbitral tribunal's explanations include emergency arbitration within its scope.[26] Although there is no specific section that defines an emergency arbitration, but it falls under the ambit of arbitration tribunal, or in other words, the Arbitration and Conciliation Act now considers Emergency Arbitration as a part of it. Some institutions in India have given recognition to Emergency Arbitration (EA) and have formulated laws for the same. These include Delhi International Arbitration Center, Mumbai Center for International Arbitration and Madras High Court Arbitration Center.[27]

IV. Case Analysis

The case of *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors.*,[28] has brought in certain new developments and reforms in the field of

[23] Yadav V., THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019: A CRITICAL ANALYSIS, 8, IJMER, 45, 46 (2019).
[24] *Supra* note 18.
[25] Okpi Bernard Adaafu, *Interim Measures in International Commercial Arbitration,* Social Science Research Network (Mar, 01, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3791700.
[26] Pramod Nair, *Enforceability Of Emergency Arbitrator Decisions in India - The Decision in Amazon v. Future Retail,* Bar and Bench (Aug 07, 2021, 11:06 a.m.), https://www.barandbench.com/columns/the-decision-in-amazon-future-retail.
[27] Yadav V., Emergency Arbitration under Institutional Arbitration Rules: A Comparative Study, 3, IJL, 158, 159-160 (2017).
[28] Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors., AIR 2021 SC 3723.

arbitration law. These developments have already been discussed in the preceding section of this research work.

Facts- Future Retail Limited made a deal with Reliance Industries Limited to sell its supermarket chain Big Bazaar to the latter. The sale was of the wholesale and retail trade of Big Bazaar. Apart from Big Bazaar, food trade unit Foodhall and textile trade unit Brand Factory were also to be sold to Reliance Retail via the deal. Reliance Retail is a subsidiary of Reliance Industries Limited. The online shopping platform Amazon opposed this deal and took the matter to the Singapore International Arbitration Centre. Amazon claimed that it already had a contract with Future Coupons, a subsidiary of Future Retail whereby only Amazon was entitled to acquire shareholdings of Future Retail either wholly or partly. This acquisition could be done only during the period between three to ten years of the commencement of the agreement. Amazon contended that the deal with Reliance Retail constituted a breach of contract as the agreement was already in place. The matter was heard by an Emergency Arbitrator of the Singapore International Arbitration Centre (SIAC). The Emergency Arbitrator interdicted the deal from being executed. The matter was brought before a Single-Judge bench of Delhi High Court who held that the order passed by the Emergency Arbitrator is within the scope of Section 17(1)[29] of the Arbitration and Conciliation Act, 1996. The matter was appealed before a Division-Bench of Delhi High Court which stayed the order of the Single-Judge and subsequently the judgment. Special Leave Petition was filed and the matter was brought to the Supreme Court.

The Hon' Supreme Court highlighted two significant issues in this case and clarified the position of law on the same. These two issues involved were:

- Whether an 'arbitral tribunal' under sec. 17(1) of Arbitration and Conciliation Act, 1996, would include an Emergency Arbitrator? To this, the Court held that 'arbitral tribunal' would include Emergency Arbitrator under sec. 17(1) of the Arbitration Act. Sec. 17(1) deals with the interim measures that may be ordered by an arbitral tribunal.[30] The Court found that Emergency Arbitrators were in fact extremely helpful to the Judicial System as they helped in "decongesting the Civil Courts" and "affording expeditious interim reliefs to the parties" in a dispute. The Respondents

[29] The Arbitration and Conciliation Act, 1996, § 17(1), No. 26, Acts of Parliament, 1996 (India)
[30] *Supra* note 27.

had contended that the proceedings before the Emergency Arbitrator were coram non judice as the same did not fall within the purview of the Arbitration Act. This view was denied by the Court for the reasons already explained. The Court further held that institutional rules also play an important role when it comes to matters of the Arbitration law.

- Second issue that arose was whether the appeal made to the Division Bench of Delhi High Court by the respondents is in consonance with the existing provisions and propriety? To this, the Court held that no appeal whatsoever lies against an order of enforcement of the order passed by the Emergency Arbitrator. Appeal was made to the Division bench of Delhi High Court against the order of enforcement passed by a Single Judge bench. The Division Bench had stayed the implementation of the order of enforcement and the well-researched and comprehensive judgment of the Single Judge Bench. The Apex Court held that an appeal from the order of enforcement was not maintainable in the eyes of Law and hence the decision of the Division bench was set aside by the Supreme Court consisting of Hon' Justice Rohinton Fali Nariman and Hon' Justice B. R. Gavai.

Considering all these features, this judgment of the Hon' Supreme Court of India may be considered as a very important development when it comes to the position of Emergency Arbitrators[31] in Arbitral Law and the maintainability of appeal against the order of enforcement of the order passed by Emergency Arbitrators.

V. Conclusion

Arbitration is one among the most common methods of settling disputes in India. It is a mechanism in which an issue is submitted to an arbitrator, who has the authority to adjudicate upon the matter and pass a binding decision, based on a mutual agreement between the parties. In India, there is a distinct Act that governs arbitration and conciliation, hence the name – Arbitration and Conciliation Act. People prefer to settle issues through arbitration as the procedure is simpler, time saving and less expensive.

[31] Aashish Aryan, *Supreme Court rules on Future Retail v Amazon: what now*, The Indian Express (Aug 7, 2021, 8: 41 a.m.), https://indianexpress.com/article/explained/sc-rules-on-future-retail-v-amazon-what-now-7442342/.

As we have seen, there's been a history of arbitration that shows how important arbitration law is thereby making this research paper of much more significance. Because law is a dynamic field that is ever changing, the Arbitration and Conciliation Act of 1996 has been amended numerous times, the most recent in 2021. The section of recent developments talks about some of the key developments and the reason behind the amendments, relating to "public policy of India", emergency arbitration, qualifications for being arbitrator and eighth schedule. Additionally, a case analysis of the prime cases of 2021 has been given. The case of Amazon v. Future Retail prompted two of the major questions and so these two issues have also been discussed in detail.

Some findings are:

- Arbitration is a form of Alternative Dispute Resolution that can help ease the pressure off the more formal and lengthier litigation.
- India's main source of law for Arbitration, the Arbitration and Conciliation Act, 1996, is based on the pivotal 1985 UNCITRAL Model on International Commercial Arbitration.
- The case Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors., was important in clarifying the scope of Article 17(1) of the Arbitration Act with regards to Emergency Arbitrator, and the power to appeal against the order passed by an emergency arbitrator.

Some suggestions include:

- India must promote the concept of arbitration as a means of dispute resolution as it would greatly help in reducing the workload of the civil courts and a dedicated panel of arbitrators would lead to speedy disposal of cases , thus improving the functioning of the Indian Legal System.
- In order to keep arbitration accessible to everyone, the amount of fees demanded by arbitrators should be regulated, if the fees are unfairly high.

INTERNATIONAL HUMAN RIGHTS LAW

AUTHOR- AISHWARYA MAHAJAN[*]

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Preamble, Universal Declaration of Human Rights[32]

I. Introduction

International human rights law refers to the structure of international law system designed to spread and protect rights of humans at international, regional and domestic levels. These laws also consist of customary international laws and other treaties. By creation of a comprehensive body of human rights law, United Nations (UN) has showcased its great achievement. United Nations has defined a wide range of internationally followed rights which includes civil, cultural, political, social and economic rights. International human rights law is primarily made up of treaties and agreements between the sovereign states having binding legal effect on the parties.

Charter of the UN's and the Universal Declaration of Human Rights, were adopted by the General Assembly in 1945 and in 1948. Ever since United Nations has worked on human rights for children, women, minorities, disabled people and other vulnerable groups. UN attempts to protect them from various types of discrimination they faced in societies for a long period of time.

II. International Laws with regards to War: Ukraine v. Russia

The conflict between Ukraine and Russia is a clear implication of use of force as per international law. It was clear that Russia has violated Article 2 (4) of the UN Charter[33] when it used its military force against the political independence and territorial integrity of Ukraine. International law prohibits the use of any force

[*] 1st Year B.A LL.B Law student at Maharaja Agrasen Institute of Management Studies; Available at: aishwaryamahajan53@gmail.com

[32] Adopted and proclaimed by general assembly resolution 217 A(III) December 1948.

[33] Art. 2(1)-(5)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 UN.

and it also part of customary law and a jus cogens norm[34]. International law is more than unequivocal as this type of actions by Russia shows flagitious violation of international fundamental laws norms. Even after this situation, international laws remained limited, in its abilities and activities, to respond to Russian actions because of the veto power vested with Russia. As it is a clear indication of Russia violating international legal norms, due to lack of legal mechanism they could not be adequately addressed. So now, the international laws remained blocked when trying to address violation by many great powers, who will be having veto power within the security council.

Also, we saw that, international laws left the possibility open for Ukraine of a defensive use of force and of collective self-defence, by which Ukraine can request the assistance of another state to fend off troops of Russia. So, the NATO countries have thought to use force against Russia in order to protect Ukraine. And also, President Vladimir Putin and other Russian officials stated that they can use force as it is justified under article 51[35] of the UN Charter which do not have any support in law or fact. Russia cited some precedents to show that how the West has undermined the prohibition on use of force in the context of international law. Therefore, Russia clearly justifies the use of force as a means of self-defence from Ukraine and use of collective self-defence for two countries Donetsk and Luhansk people's republic[36].

For a century now, international law has a central objective to secure interstate peace, but the best ways for this are not necessarily clear and they likely extend beyond Article 2 (4) of the United Nations Charter.

Therefore, today international branch should look forward to reinvent in norms of territorial integrity and sovereignty through the process of international laws, even dealing with the occasional expense of humanitarian objectives. International community should adopt approaches to ensure peace within world's most powerful countries.

---

[34] The prohibition of use of force as it does not permit any derogation, neither by consent nor by treaty.

[35] Milena Sterio "*Russia v. Ukraine: The Limits of International Law*" INTLAWGRRLS https://ilg2.org/2022/02/28/russia-v-ukraine-the-limits-of-international-law/ (Last Visited 22nd May 2022, 1:00pm)

[36] Ingrid Wuerth "International Law and the Russian Invasion of Ukraine" LAWFARE BLOG https://www.lawfareblog.com/international-law-and-russian-invasion-ukraine last visited (22nd May 2022, 4pm).

III. Israel and Palestine: Securing Human Rights during use of Force and Armed Conflict

The rules which were regulating the use of force in law enforcement, which includes the response to civil unrest are derived from international human right law (IHRL). They are distinct from the more permissive rules which are regulating the use of force as conduct of hostilities, as derived from international humanitarian law. The rules regulating the use of force in law enforcement of hostilities, justify the force which is exceeding the levels given under IHRL and hence, increasing the risk of arbitrary deprivation of life.

International human rights law is highly viewed as it is applicable to occupation. This created dilemma for Israel as international humanitarian law and international human rights law do contain some conflicting policies and prescription goals with regards to the administration of occupied territory. So, the occupants seek help from United Nation Security Council order to work upon this tension and to secure legal and political protection for their actions. Security Council can create a selective legal framework applicable to a particular occupation under Chapter VII of the United Nation Charter[37].

The government of the state of Palestine have to conduct major effective investigations into all suspected violations of the international human rights law (IHRL). Investigation must be done with the standards of independence, impartiality, thoroughness, and effectiveness. They should ensure that there is transparency in the investigation. Individuals who has been found guilty should be held punishable and victims should be compensated without any discrimination. Government ensuring the state about the adoption of a comprehensive National Plan of Action toward Human Rights which will prioritize international human rights law and will establish concrete targets and select goals for integrating human rights into comply to national development efforts. Government of Israel will review the methods and mechanisms which are used to enforce the access restricted areas (ARAs)[38] in Gaza, as to ensure full compliance with international humanitarian law and international human rights law. The government of Israel will lift the blockade of Gaza to remedy the ongoing measures against the civil population. All these measures will address the security concern with international laws, including international humanitarian law and international human rights law. Failure to do so will again constitute

[37] Sets out the UN Security Council's powers to maintain peace.
[38] Access Restricted Areas (ARA) in the Gaza Strip, occupied Palestinian territory.

the violation towards the Israel's human rights obligations and will perpetuate with the culture of indemnity. Government has to review its use of administrative detention, to put an end to it at the earliest.

Human rights in Israel refers to human rights in the state of Israel both legally and in practice. This subject has been evaluated by intergovernmental organisations, NGOs and various human rights activists in context to Israeli-Palestinian conflict. In the territories of Palestinia the successive Israeli government has seen international criticism from different countries as well as from the international human rights groups.

Therefore, the accountability for violations of international law committed by the de facto authorities or by the armed groups in Gaza, which include killing of civilians, must be ensured by relevant actors.

IV. Exploitation and Human Trafficking: Women and Children's Human Rights

Trafficking of people is a complex and deeply troubling issue that depicts the nature of globalization and also the evolution of human rights and its practices. From past many years, the increasing intensity, the NGOs and other international community and various governments have noticed it increasing, they have been arguing that human trafficking is expanding in such a way that it represents one of the world's most serious human rights violation. The individuals who are put in the situation of prostitution or made to work in dangerous circumstances are sex workers, farm laborers or domestic servants. The problems related to human trafficking are so real and serious that there is a growing worldwide concern with number of serious contradictions and uncertainties. These are the problems which are not simply areas of intellectual discord, but they threaten the coherence and value of the preventative and potentials of anti-trafficking policies. Trafficking was reviewed in number of international statements such as, UN General Assembly, World Conference on Women in Beijing in 1995[39] and World

Conference on Human Rights in Vienna in 1993. Human trafficking has recently drawn significant international attention, as now there exist a body of international law on trafficking problems. The most interesting thing about evolution of international law and trafficking is the way in which international

[39] World conference on human rights, June 14-25, 1993, UN Doc. A/RES/50/167.

instruments have evolved as to respond quite similar problems through distinct and different approaches of the issue in hand.

There is an array of international agreements if we look back before the post - World War II creation of the modern Human Right System. Combating human trafficking poses as a long- standing concern of the international laws.

V. International Conventions

1. ***International convention for the suppression of the traffic of women and children****:* in Geneva on September 30, 1921, the international convention for the suppression of the traffic in children and women was signed and entered into force in respect to each state party for its ratification or act of accession[40]. The goal of this convention was to combat trafficking through the prosecution of the procurers, allotting licence and supervising of employment agencies and giving protection to immigrating women and children.
2. ***International convention for suppression of traffic in women of full age:*** the international convention for suppression of traffic in women of full age has been signed in Geneva on 11 October, 1933and it came into force on 24 August, 1934[41]. Article 1 was drafted to punish, prohibit, prosecute and prevent trafficking. Article 3 imposes a w a duty to cooperate in prosecution.

There are some general human rights instruments that prohibit trafficking, without addressing the issue directly. As the general assembly of the UN adopted and also proclaimed about the Universal Declaration of Human Rights (UDHR)[42].

- Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) has been approved by the general assembly resolution which came into force on 3rd September, 1981[43].
- The convention on the rights of the child was established to promote children's rights, and will be used to stop the sexual exploitation of

[40] International Convention for the Suppression of the Traffic in Women and Children, September 30, 1921, 9 L. N.T.S. 415.
[41] October 11, 1933, 150 L.N.T.S. 431.
[42] Universal Declaration of Human Rights, G.A. Res. 217A. art. 4, U.N. GAOR, 3d Sess, 1st plen. Mtg. UN. Doc A/810.
[43] December 18, 1979, 1249 U.N.T.S. 13 (CEDAW).

children[44]. The convention on the rights of the child is reinforced on the sale of children, child pornography and also on child prostitution[45].

- Declaration on the Elimination of Violence Against Women (EVAW) was established. Article 2, defines the scope of violence against the women which includes physical, sexual and psychological violence occurring within the general community, including rape, abuse, sexual harassment and intimidation at work and trafficking in women and forced prostitution[46].

The United Nations has always been working towards combating human trafficking. Its s main protocol is to punish, suppress and prevent trafficking among human beings and most importantly women and children. Even sub-organisations are also involved in campaigns to raise awareness to prevent trafficking, regional project to counter trafficking at various different levels.

VI. LGBTQIA+ Human Rights on an International Platform

The contemporary challenges for human rights norms are defining the protection against discrimination for sexual orientation, gender expression and gender identity as an international standard. As a polarized structure, the rights of lesbian, gay, bisexual, transgender, queer and others has shown engendered vague negotiation among international organisations. Human rights watch work for this community and with other activists they represent a multiplicity of issues. Discrimination against LGBTQIA+ community undermines the human rights principles highlighted in the Universal Declaration of human rights.

In a human right context, this community faces both distinct and common challenges. It is stated under international human rights law that they have to promote and protect the rights of human without discrimination.

Human right watch is involved in monitoring and documenting the serious issue of human rights violation from past many years in the world. Reports have been seen on trafficking of women and girls from Burma to Thailand, from Bangladesh to Pakistan and from Nepal to India. UN human rights mechanism have showcased their concern about violations from early 1990s. These mechanisms include various bodies of treaties compliance with international human rights

[44] November 20, 1989, 1577 U.N.T.S.3. The convention on the rights of the child came into force on. September 2, 1990. G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Nov 20, 1959).
[45] G.A. Res. 54/263, annex II, U.N. Doc. A/RES/54/263.
[46] Supra *note* 33.

treaties. As we know, for protecting LGBTQIA+ people from discrimination and violence does not require new norms of human rights law or measures but states need to safeguard the human rights of the community. This is clearly established in international human rights law. Core legal obligations of state for protecting the human rights of LGBTQIA+ people include *protect, prevent, repeal, prohibit and safeguard.*

According to research, in recent years, many states have tried to build human rights protection for LGBTQIA+ people such as:

- Decriminalizing the issue of same sex relations
- Penalizing biphobia, transphobic and homophobic hate as crime
- Recognising same-sex relationships, and giving transgender individuals identity documents which will reflect their preferred gender without any abusive requirements
- Adopting laws which will ban discrimination
- Providing training to official workers such as police, teachers, even social workers to sever the LGBTQIA+ community
- Initiating anti-bullying remedies in schools

VII. LGBTQIA+ rights at the United Nations

The Universal Declaration of Human Rights in condemning human rights based on violation on sexual orientation and gender identity[47]. 66 countries attempted to "undermine the international human rights framework by trying to normalise pedophilia, among other acts"[48]. In 2011 by the UN human right council, it was reported in documenting discrimination which LGBTQ people face by both law and society[49]. Later, updated in 2015 with a second UN.

The UN's formal institutes face major obstacles in achieving widespread support for LGBTQIA+ rights. The core group of LGBTQIA+, as an informal assembly, as these barriers coordinates the policy among countries and NGOs establishing LGBTQIA+ rights as a Human Rights norms.

[47] It was opposed by Russia, China, United States under the Bush administration, The Holy See, and the Organisation of the Islamic Conference.

[48] In a first, gay rights are pressed at the UN, https://www.nytimes.com/2008/12/19/world/19nations.html (Last visited 24th May, 1:00pm).

[49] Doc.no. A/HRC/29/23, 29th session, United Nations General Assembly, 4 May, 2015.

Human right council concerning the violence against LGBTQ individuals are related to commitments done under international law[50]. Ending the violence and discrimination against lesbians, gays, bisexual, transgender and intersex community against LGBTQIA+ individuals as a violation of international human rights laws.

In 2016, the United Nations Human Rights Council implemented an independent expert to research on issues of global violence and further related discrimination against the LGBTQIA+ community[51].

In March 2019, the UN Human Rights Council adopted rights of intersex people who have faced discriminatory regulations, practices and rules in which women and girls are required to reduce their blood testosterone levels who are athletes by undergoing unnecessary procedure which is humiliating and also a harmful medical process if they want to participate in women's event in competitive sports. The Unites Nations High Commissioner of human rights was requested to prepare a proper formal report on the discriminations faced in sports on the basis of race and gender. It was found out that the multiple and intersecting types of discrimination are faced by women and girls in their sports carrier, because of discrimination based on race and sex[52].

Therefore, LGBTQIA+ rights diplomacy got the power to transfer the societies and implement international human rights norms in different countries which have previously been averse for the adoption of this norm. Growing awareness for the LGBTQIA+ community and their rights in Eastern Europe, Asia, Middle Eastern, Caribbean and Africa, inspires the belief of an arc of history towards the progress that world is making. But, United Kingdom, Brazil and United States are the three examples of the countries whose government have shown very formal commitments for the LGBTQIA+ rights but still have seen a regression of these commitments because of the changes in politics and society. LGBTQIA+ rights can be recognised worldwide only when countries honour their human rights

[50] Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (doc.no. A/19/41, 19th session, United Nations General Assembly, 17 November, 2011).

[51] Mark Leon Goldberg, "For the first time, LGBT rights will be formally institutionalised into the human rights mechanisms of the United Nations.

[52] First United Nations resolution on the rights of intersex persons: United Nations calls to end discrimination of women and girls in sports, including women born with variations of sex characteristics, ILGA. 22 March, 2019.

commitments domestically and politically while understanding the changes on the international platform.

VIII. Conclusion

International Human Rights Law lays down a foundation which all states are bound to respect. As states become parties of international treaties, they start to assume obligations and duties under international laws to protect, to respect and fulfil human rights. Respect here means that, states must refrain them from interfering and curtailing the enjoyment rights under human rights. In order to protect would mean states to protect individuals and group of individuals against any human right abuse. The obligation to fulfil means that, state have to take positive actions in order to facilitate the enjoyment on the basis of human rights.

Through the concept of ratification of International Human Rights Treaties, governments are trying to take domestic measures and see whether legislation is compatible with their treaty obligations and their duties. The legal system at domestic level, therefore, provides the legal principle for the protection of human rights guaranteed under international laws. Whenever, legal proceedings of domestic system fail to address human rights abuse, procedure and its mechanism for individuals and groups of individuals complaints are available at various different regional and international stages to help and ensure that these

International human rights standards are respected, enforced and also implemented at the local levels.

Also, human trafficking is fundamentally a moral issue, as it tries to deal with the lives and dignity of individuals as human beings. Average of 2 million women and children live in sexual slavery, and many of them are said to be dead as a result of this dangerous conditions they have to live in. How can the world community, government, and other human beings can tolerate this wrongful practice as it is beyond human comprehension. Therefore, strict actions should be taken by the international community to protect the victims of these inhuman crimes.

Hence, human rights laws should have been in place during Israel-Palestine conflicts. As no human being should live in inhuman circumstances without enjoying their freedom and their rights. The peace rights should be allotted by giving everyone right to equality without any sort of discrimination. The casualties and devastation caused by Israel and Palestine should be considered

and they should provide reliefs to the families of people who died or got injured and also to the ones whose homes have been demolished or have lost their home and became homeless during the war.

Impact of these crimes must be considered and foreseen by the International Human Rights Law, as it is their duty to provide equal and safe platform to each and every individual all over the world.

INTERNATIONAL HUMAN RIGHTS LAW WITH REGARDS TO WARS: UKRAINE V. RUSSIA

AUTHOR- RISHI KHEMNANI[*]

ABSTRACT

Missiles slicing through the air and slamming into buildings and exploding, clouds of smoke emanating from housing complexes, people taking shelter in sub urban from shelling, crowd struggling to board trains, are the most doom scenes when war ensues; the scenes resemble from Taliban taking control over Afghanistan. Ukraine has become the victim in contestation of two major superpowers. The most destructive source is war, which can undermine a country's economy and destroys hope of survival. War can be defined as a form of mini-genocide in which everything and everyone who comes into contact with it is shattered, it has led to biggest refugee crisis after WWII. The globe is turned upside down as a result of the current crisis between Russia and Ukraine. The crisis, which began under the guise of a "special military operation" announced by Russian President Vladimir Putin, has taken a turn for the worst. It should be underlined that this is a flagrant violation of established international norms and procedures. It is a barbaric murder of the United Nations Charter, which exists expressly to protect member countries' integrity, thereby empowering them. Ironically, the Russian president has said unambiguously that his barefaced acts are justified by many international rules. Deciphering what is contained within these laws, as well as the amount to which they have been abused and violated, becomes critical. Even in the rarest of circumstances, war cannot triumph against natural peace and harmony, no matter how evidently it is justified.

Key Words: NATO, Denazification, UNGA Resolution 3314, Article 51 of UN Charter, Jus Cogens

I. Introduction

The waves of cold war have arisen abruptly, Russia's attack has triggered one of the worst crises since the cold war. Millions of people have transgressed the borders to seek shelter from the multiplying shelling happening in Kyiv. The world has been left in awe owing to ruthless actions of Moscow who has been insecure of, Ukraine joining NATO due to which it has listed several demands in front of the independent nation in lieu of withdrawing its troops, one of the demands enunciates that Ukraine should take a neutral stance with respect to joining of any military alliance. It all began with Russia accusing the Ukrainian

[*] 1st Year B.B.A LL.B Law student at Symbiosis Law School, Pune; Available at: rishikhemnani29@gmail.com

army of genocide in east Ukraine, primarily in the pro-Russian regions of Donetsk and Luhansk.[53] "Denazification" of Ukraine was ordered by Russian President Vladimir Putin, and was merely blabbering about the need to bring justice to the people who live there; his imbecile and scorn attitude towards international affairs will lead to hefty costs to be paid by countries within the gamut as well as globally. Prior to this, Russia began conducting military manoeuvres with Belarus[54], ostensibly to demonstrate the power of their weaponry, implying a full-scale invasion of Ukraine. All of these actions pointed to Russia's intention to warn Ukraine of the impending catastrophe, which it accomplished. If Russia had thought of shattering Ukraine and its defence forces, it has been proved wrong; as the mettle observed from the Ukraine's defence forces is commendable. Russian ties with Europe have taken a back seat. The inability of prominent organisations such as the United Nations demonstrates how far the crisis has proceeded. It will need enlightening and deliberative discussions, as well as serious speculations, to determine whether these organisations have lost their relevance and are failing to perform methodically and tirelessly enough to prevent more catastrophe. It is critical to focus on the many international rules and regulations that govern warlike situations, as well as how Russia has attempted to justify its bizarre actions under certain scant guises. As a result, these powerful organisations have a blemish on their record.

II. International Law: with regards to warlike Situations

The Russian actions have been extensively denounced, and they raise various problems about international law violations.

The philosophy of non-interference in domestic matters is the bedrock upon which the existing international order is built. The principle is incorporated into UN Charter article 2(4), which prohibits governments from using or threatening to use force against a state's territorial integrity or political independence. It outlaws any type of forcible trespassing on another state's territory, even if it's only for a few hours or days, like a 'in and out' operation. The Russian attack on

[53] News18. 2022. *Putin Recognised Donetsk, Luhansk, Then Termed Ukrainian Nationalism 'Flawed'. Here's Why*. [online] Available at: https://www.news18.com/news/world/putin-recognised-donetsk-luhansk-then-termed-ukrainian-nationalism-flawed-heres-why-4796825.html [Accessed 6 March 2022].

[54] Aljazeera.com. 2022. *Russia and Belarus extend military drills amid Ukraine tensions*. [online] Available at: https://www.aljazeera.com/news/2022/2/20/russia-and-belarus-extend-military-drills-amid-ukraine-tensions [Accessed 7 March 2022].

Ukraine is a violation of the non-intervention principle and, in international law, constitutes aggression.

Aggression is defined by the United Nations General Assembly Resolution 3314 (1974).[55] as a state's use of armed force against another state's sovereignty, territorial integrity, or political independence. Allowing one's territory to be utilised by another state in an act of aggression against a third state is also an act of aggression. As a result, Belarus can be held liable for aggression because it permitted Russia to utilise its territory to attack Ukraine. Aggression is also considered an international crime under customary international law and the Rome Statute establishing the International Criminal Court.

One of the main reasons for Russia's use of force against Ukraine is its aim to keep Ukraine out of NATO. Under article 2(4), this is a ruthless exhibition of violations of Ukraine's political independence, as a sovereign state is allowed to choose which organisations it wishes to join. Russia has also breached article 2(3), which requires states to settle their differences through peaceful means in order to maintain world peace and security.

Under international law, Ukraine has the right to self-defence if Russia uses force against it. Article 51 of the United Nations Charter allows a state to use individual or collective self-defence until the Security Council takes action to safeguard international peace and security. Because Russia is a permanent member vested with veto power, it appears unlikely that the UNSC will reach a resolution on this matter. Under international law, Ukraine, on the other hand, has the right to seek aid from other countries in the form of military assistance, weapon supplies, and so on.

Russia, on the other hand, has stated that it is acting in self-defence. This accusation is debatable, considering Ukraine has made no use of force or made any threats against Russia. Russia has warned that Ukraine might obtain nuclear weapons with the help of Western allies. However, in the Legality of Nuclear Threats case, the International Court of Justice (ICJ) held that mere possession of nuclear weapons does not always imply a threat.

As a result, even if Ukraine possesses nuclear weapons or acquires them in the future, it does not constitute a basis for Russia to invoke self-defence.

[55] 1974. *UNGA resolution 3314*. [ebook] United Nations, pp.142-143. Available at: https://crimeofaggression.info/documents/6/General_Assembly_%20Resolution_%203314.pdf [Accessed 7 March 2022].

Furthermore, simply being a member of a defence organisation like NATO does not automatically imply a threat of war against Russia. As a result, Russia is unable to use self-defence in this situation.

Russia cannot likewise claim anticipatory self-defence because, according to the Caroline test, such an invocation would necessitate an immediate and overwhelming need for self-defence, leaving no choice of means and no time for thought. In Russia, however, this is not the case.

III. Ostensible Justifications undertaken by Russia

Based on a comprehensive review of the numerous international rules and provisions, it is imperative to study the reasons on which Russia has based its justifications, which are immoral, unlawful and hollow on the surface. This leaves other stakeholders in a lurch to identify whether these actions are justified and to what extent.

Jus Cogens: Acts of violence are clearly prohibited by these peremptory norms, which are found at the very heart of international law, namely jus cogens. It is worth noting that jus cogens standards apply to all nations, regardless of any specific treaty commitments, and there is no room for derogation. Apart from the most basic rules of jus cogens, it's worth noting that both Russia and Ukraine are obligated by the United Nations Charter.[56]

Budapest memorandum: the agreement provided for Ukraine handing up the nuclear weapons it had at the time, its signatories — Russia, the United States, and the United Kingdom – in return of which gave a non-binding political declaration recognising Ukraine's sovereignty and integrity. It seems now it was clearly signed with an ill motive to weaken Ukraine as a defensive country to avoid it to further act as a deterrent against any sort of invasion. The ostensible purpose behind the agreement was to make Ukraine impotent to defend its territory against any hubristic attack.[57] Russia has effectively buried all its assurances, embers of which can be found on the land of war-torn country, and shockwaves of which can be witnessed across the globe.

---

[56] Marathe Om, Jus Cogens Explained, https://indianexpress.com/article/explained/iran-us-tension-qassem-soleimani-death-what-is-jus-cogens-6203579/#:~:text=January%205%2C%202020-,JUS%20COGENS%20or%20ius%20cogens%2C%20meaning%20%E2%80%9Ccompelling%20law%E2%80%9D%20in,since%20they%20hold%20fundamental%20values.

[57] Borda Zammit, Budapest Memorandum, https://theconversation.com/ukraine-war-what-is-the-budapest-memorandum-and-why-has-russias-invasion-torn-it-up-178184.

Theory of remedial secession[58]: In the most extreme instances, this theory proposes unilateral secession of a territory from its parent state. Even if an argument could be made for remedial secession, it would have to meet a very high bar, such as grave human rights breaches and widespread oppression of ethnic Russians by Ukraine. Russia's accusations of ethnic Russian genocide are unsubstantiated by any fact.

Self-defence under article 51 of UN charter[59]: Mr Putin has stated unequivocally that his actions were taken in self-defence. By definition, self-defence necessitates an attack on the party claiming the defence or on the interests of the party claiming the defence. However, Ukraine does not constitute a significant threat or threatens to act violently in the future. Furthermore, the right to self-defence is limited to states. In international law, Donetsk and Luhansk are not recognised as states. Let us assume that Russia's defence is justified. However, it must be proportionate to the harm caused, not breaching the limit of proportionality, as demonstrated by Russia's full-scale invasion of Ukraine.

Responsibility to protect (R2P): R2P originates from every state's obligation to protect its citizens from grave human rights abuses happening in other country, as well as the international community's responsibility to help governments in doing so. This notion has been controversially stretched to legitimise the use of force by third countries on the territory of a state that has failed to protect its citizens.[60] Again Russia ostensibly fails to table any evidence that ethnic Russians are facing any sort of torment in Ukraine. So, this doctrine is left to lurch. Test of proportionality and reasonableness shall not be ignored. A pertinent set of questions which pops up is that When is it appropriate to intervene in a specific circumstance? Who is the one who will make the final decision? Operation "Iraqi Freedom" and NATO bombings in Kosovo, both of

---

[58] Vidmar, Jure. "Remedial Secession in International Law: Theory and (Lack of) Practice." *St Antony's International Review*, vol. 6, no. 1, St. Antony's International Review, 2010, pp. 37–56, http://www.jstor.org/stable/26227069.

[59] Nations, U., n.d. *United Nations Charter article 51 (full text) | United Nations*. [online] United Nations. Available at: https://www.un.org/en/about-us/un-charter/full-text#:~:text=Article%2051,maintain%20international%20peace%20and%20security. [Accessed 9 March 2022].

[60] Nations, U., 2005. *The Responsibility to Protect | United Nations*. [online] United Nations. Available at: https://www.un.org/en/chronicle/article/responsibility-protect#:~:text=The%20responsibility%20to%20protect%20(commonly,and%20the%20responsibility%20of%20the [Accessed 9 March 2022].

which were not in compliance with UN use of force rules (the Charter in particular), but had varying degrees of legitimacy, are examples of such operations that took place without the approval of the UN Security Council. [61]. It seems there isn't any benchmark which is et to answer the questions.

ICC jurisdiction: The insensitive act of violence and threat posed by Russia is defined as aggression under the Rome Statute, which paved the way for the establishment of the ICC[62]. However, the chances of the case being heard by the ICC are bleak because it requires both the aggressor and the victim to be parties to the court, which none of the countries are, in the current scenario.

IV. Analysis

The crisis has pinched the flaw in working of Gigantic and reputed international organisations like UN, which finds itself in a helpless situation and appears to be a mute spectator, since the resolutions passed by it can be vetoed. It raises the question of efficacy of international laws. The accords, some of them non-binding, hold a persuasive value and have significance in the gamut of international laws. It seems that if they are jot down on paper just to rot. There is a distinction to be made between countries that are truly sovereign and those that have only nominal or restricted sovereignty. Russia regards Ukraine as a state with restricted sovereignty. Mr Putin's precarious game of recreating a "Russian empire" should be noted by the international community, as it has the potential to destroy the very foundations on which the post-World War rule-based international order has been painstakingly established. the crisis has the potential to dilapidate the security of Europe built post world war-II. Russia needs to understand that arms race is in annihilation to mankind or eventually it may face the music; to end the war it is crucial for both the major powers to accept the neutrality of Ukraine and Washington must restrict its sophisticated arms supply to Ukraine, or limit any such acts which may provoke Russia. A blind eye should not be turned to the fact that a nuclear war means the whole civilization vanishing. It will not be sufficient to just smooth over the challenges;

---

[61] See R. Goodman, Humanitarian Intervention and Pretexts for War, 'American Journal of International Law' □□□□, vol. □□□, at p. □□□, pp. □□□-□□□, □□□ https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1259&context=ils#:~:text=The%20most%20universally%20accepted%20basis,peace%2C%20or%20act%20of%20aggression.

[62] Legal.un.org.1998. *United Nations - Office of Legal Affairs*. [online] Available at: https://legal.un.org/icc/statute/99_corr/cstatute.html [Accessed 9 March 2022].

significant attention must be paid to the structure of the military withdrawal in order to reduce the risk of backsliding. The invasion and eventual fall of Kyiv by the Russian military will be a watershed moment in global geopolitics, and the world is now attempting to define the parameters of the post-Ukraine world order. A Sino-Russian alliance fighting the US and its allies is in the cards, but given their reliance on Russian gas, European countries have diverse perspectives on how to deal with Moscow over its invasion of Ukraine. India, which has had a special relationship with Moscow for many years, is in a similar scenario, but its contrary stand is considered as deplorable, it is high time that New Delhi needs to diversify its arms sources, a country which is regarded as champion of democracy and non-alignment it seems to be afraid of Putin's aggressive behaviour. Russia-China axis may pose a threat in already disputed islands across the Indian Ocean region, which ultimately instils the fear of erosion of international rule-based order. This will eventually add to further complications and a conundrum of World War 3 lies ahead. But for now, if Ukraine choose to confront Russian assault, a severe and terrible civil war is a probable prospect. However, Ukraine is on its own for the time being, and no other country is expected to send troops to assist Kyiv. This is the shaky reality of geopolitics in the early twentieth century, and a post-Ukraine global framework is taking shape.

The choice between war and peace will decide whether we become extinct or continue to survive as a species. The images sourced from Ukraine gives the terrible sabotage that war results in. Humanity has borne the brunt of hyper-masculine autocratic dictators who set out on the route to fantasy civilizational greatness, according to history. The international community should work together to ensure that this does not happen again. To restrain arbitrary state authority and counter imperial intentions, international law should be used. Otherwise, maintaining a rule-based international system will be a coarse dream. The relevance of international law has buoyed owing to the present crisis and with the fact that the world is interconnected, these laws have comprehensive procedures which can lay down the way forward post-crisis and for a mutually accepted peace plan, but they cease to carry binding force at times. If followed in true sense, needless to say it will be an elixir for billions' life and peace will be guaranteed. The US, NATO partners, and Ukraine must make it perfectly clear that NATO will not expand into Ukraine unless Russia ends the war and leaves the country. The countries aligned with Putin, as well as those who chose no side, would then tell Putin that now that NATO's enlargement has

been halted, it's time for Russia to quit the battlefield and return home. Negotiations may, of course, collapse if Russia's demands remain unacceptably high. But it should at the very least attempt, and try very hard, to see if peace can be established through Ukraine's neutrality, which is backed by international guarantees.

Mediation between the parties could offer a win-win situation; India can use it good offices to broker a peace deal and make them reach a truce until it's too late. Parties while mediating tend to focus on interests rather than position which in turn provides an amicable solution, ultimately peace triumphs. Blatantly pursuing series of sanctions with an aim to jolt particular country's economy will dilapidate the world economy as a whole and will have a boomerang effect, ultimately on the country who host these sanctions. Russia can be best described as "wounded bear with an imperial nostalgia", it is economically weak, but in terms of geographical landmass and military arsenal it has an edge. But for now, the war seems no sign of abating as both the sides have hardened their stance.

V. Conclusion

International laws rest on the rudimentary principle that state must uphold the dignity of the law made and by the whom the law is made. It continues to provide valid options to the international community for resolving not only the above conflict, but many others as well. The idea of "might is right" in the international organisations should be disregarded. The countries with enormous wealth and power tend to influence the working of the international organisational thereby paving the way for global governance to be democratic in nature. Ultimately, a restructuring of UNSC will lubricate the process, countries veto the resolutions which hurt their interest. It must be remembered that resolutions are unfurled for a better cause globally, rather than for self-gains. These laws aim to generate a sophisticated environment for the world order to flourish. International laws are enforced by the sovereign authorities i.e., state. A dim aspect of such laws is that the state who embraces authoritative nature is able to dominate global world order to an extent that it can block the functioning of UN. State by providing ostensible justification for their "special military" occupation tend to circumvent the spirit of the law, other example is NATO intervention in Kosovo and later declaring it as an independent state. ICJ and other such influential organs were put in place to keep a check on dominance of the herculean countries. Law must be respected in its entirety, for preserving the legal order. Route of force should

be adopted only when all the viable peaceful solutions cease to exist. Thus, there is no alternative to practicing and preaching the principles of law and no country can exist in isolation. There is a need for debate about the shape of international law, with effectiveness as the primary priority. The world is just too complicated for a set of standard laws. International law does not exist in a vacuum, so it is also necessary to consider the actual power dynamics in the world.

It is high time for NATO and western powers to intervene and persuade Russia to sit at the negotiating table rather than stand by and watch; thereby being a mute spectator. The crisis in Ukraine has opened opportunities for the U.S. to weaken Russia, its arch rival in the Europe. Hence, US should not fan the flames.

The efforts should not be one-sided; Ukraine should strive to strengthen its relations with Russia rather than aggravating it. The current US leadership appears to lack the necessary teeth to defuse the situation. The wings of the American eagle have been clipped due to a variety of domestic issues. Mr Putin has portrayed himself as a man of ice-cold determination and steely nerves. War will ultimately dampen the growth of the economy and will resist thriving of the chunk of industries which produce goods of necessity. The waves of dire economic crisis can be felt around the world. Fuel prices are oozing with every drop. Furthermore, sanctions will pose a major disdain to common man, who ultimately as collateral to the war bores the brunt of the crisis. Winds of change are waited for the bird of patriotism to fly high in the skies of jingoism. International laws are meant to be valued; wars vitiate the effect of such laws which ultimately impact their viability. Their impact will loosen the strings amongst the countries and further conflicts will tend to arise. Peace and harmony in its eternity shall not be devoid of, its practice will result in stable global order.

LGBTQIA+ HUMAN RIGHTS ON AN INTERNATIONAL PLATFORM

AUTHOR- LISANG NYATHI[*]

ABSTRACT

When human rights are spoken of as universal and indivisible, you would swear that the world is perfect. However, a closer observation of the contemporary reality across the globe shows beyond any iota of doubt that this is a mere theoretical phenomenon. Today those who envision a better future, have every reason to tremble, cry and mourn the loss of humanity. It is extremely heart-breaking that in the 21st century people still die for who they are, who they kiss, who they choose to have sex with, and how they want to identify themselves as. When they live as who they truly are, their dignity is violated, and their human rights are denied. How sad! Not only are LGBTQIA+ persons vulnerable to discrimination but human rights advocates are also exposed to the same risks. And society's unsurprising tendency to question their sexuality is just as annoying and nauseating. Consequently, very few are keen to explore these issues openly.

Nevertheless, the international platform has become a space to protect LGBTQIA+ human rights but there is still a lot to fight against. With great pride, this paper explores the LGBTQIA+ Human Rights on an International stage. It will examine, inter alia, the essence, origins, sources, and organizations involved in developing and protecting LGBTQIA+ human rights. A comparative methodology will also serve as the basis for an effective evaluation. This research offers a perfect opportunity to contribute unabashed personal opinions on what could be improved.

Keywords: **LGBTQIA+ Human Rights and International Platform, Eurpoean Union, European Court of Justice, UDHR, UN LGBTI Core Group**

I. Introduction:

The International concept of LGBTQIA+ Human Rights: What does it mean?

[*] 1st Year Law student at University of Trento; Available at: lisangnyathu@gmail.com

Throughout history, the concept of Human rights has been gaining momentum and magnitude and is still rapidly receiving a wide range of attention from all over the world. The emergence of the idea of democracy and constitutionalism in post-World War 2 has been the backbone of this ever-evolving concept. Yet at the same time, the conception of human rights and what it depicts still raises eyebrows, its universality is controversial, an epitome of a divided humanity. It's been years since this concept grasped the world, yet it is still being applied in a highly selective manner. Human rights have been reduced to a mere declaration or just a constitutional provision, yet in principle, when one speaks of human rights, they must intend a statement of truth about human nature. When human rights are spoken of, one describes the inherent natural entitlements that all human beings have simply by being human. Nonetheless, this has not been the reality of the international community, which lest we forget was rather aloof on the rights of lesbians, gays, bisexuals, transgender, queer, intersexual, and asexual people (LGBTQIA+) at its inception. All the historical declarations on human rights have always been kept mute on the rights of LGBTQIA⁺ personnel yet ironically these are the same rights they were said to protect. Which rights are human rights, and what are the criteria for the full enjoyment of those?

On the other hand, there is absolutely no doubt that the Universal Declaration on Human Rights (UDHR, 1948), marked the genesis of a phase for humanity. It is the first declaration to have affirmed that human rights are universal. However, still, it did not explicitly imagine or refer to the rights of LGBTQIA+ Individuals in a manner that could easily allow for the transformation, adaptation, and transition of rigid minds and societal conventions. It merely stated that "Now, therefore, the General Assembly proclaims this universal declaration of Human rights…" It said nothing about sexual identity and sexual orientation, and this has been the major problem. Nevertheless, even though, it excluded these phrases, it is also extremely astounding that this first-ever international declaration on universal human rights correctly asserted that "*All human beings are born free and equal in dignity and rights" [UDHR, article 1].* Likewise, article 2 provides that everyone is entitled to the freedoms and rights that are outlined in the declaration.[63]

[63] *Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), https://www.un.org/en/about-us/universal-declaration-of-human-rights.

*LGBTQIA+ is an acronym for Lesbian, Gays, Bisexual, Trans, Queer, Intersex and Asexual people.

The UDHR is a symbolic document in international human rights law and has been a premise inspiration for the development of international consensus on human rights, but how far and to what extent did it protect the LGBTQIA+ rights from the onset?

It may seem that the UDHR of 1948, given the articles mentioned above, et al, already reflected the meaning of the international fora, particularly the U.N on LGBTQIA+ human rights. It would also seem correct for one to interpret this declaration to the conclusion that even before the question of *'whether LGBTQIA+ rights are part of human rights'*, the answers and the solutions were already settled and provided for in advance by the UN through this declaration of 1948. Of course, the meaning is unequivocal, but can this interpretation be proven to be true? If one argued that the U.N through the UDHR in 1948 already protected the rights of LGBTQIA+ people would such an argument be considered accurate or be found to be sound?

These are questions that surround this international significant declaration, however, to affirm these rhetorical questions would be a gross misinterpretation and distortion of the international attitude towards the rights of LGBTQIA persons. Initially, homosexuality was classified by the World Health Organization [WHO] as a mental disorder under the international classification of diseases. This points out a long history of the vulnerability of sexual minorities, even at a period when rights had been already declared to be universal. As noted by Professor B. Ibhawoh (2014), "the human rights idea has not been an inclusive one". He further opines that the obstacles to the explicit inclusion of LGBT rights are "religious, socio-cultural and institutional," and thus he describes this as an *'exclusionary experience'* of the LGBTQ, proposing that careful attention should be paid to such since it hinders the idea of human rights. This argument further solidifies[64] and confirms what has already been underlined here. Consequently, what was once classified as an international disease has today become a human right of LGBTQIA+ individuals, which entails among other things, the right to sexual orientation, self-expression, and freedom of choice without discrimination.

This silence on the rights of LGBTQIA+ explains why even after this declaration they continued to suffer enormously from persecution, killing, torture,

[64] Bonny Ibhawoh, *Human rights for some: Universal human rights, sexual minorities, and the exclusionary impulse*, Vol. 69, N0 4, INT.J. 612, 614, 620.

discrimination, et al, injustices. It was not until 2011, that the UN Human Rights Council took a clear stance by adopting its first-ever resolution on human rights, sexual orientation, and gender identity, expressing concern about violence against LGBTQ people. Tess McEvoy (2021) commenting on this resolution, 10 years later, wrote about the expression of happiness by the LGBTI human rights defenders, who stated that "by publishing this report the UN has unequivocally affirmed that the protections guaranteed by the UDHR apply to every one of us". [65]This resolution has been a life-changing one, which gave answers to a lot of questions and settled many doubts over the international attitude to LGBTQIA+ Human rights.

Therefore, it is precise from the above, that the concept of LGBTQIA+ human rights has had a long history and still has a long way to go. Today, it is still controversial for many to answer whether this concept forms a new bundle of rights, however, the answer is that LGBTQIA rights do not entail new rights, they are part and parcel of human rights, such that only when they are spoken of, the concept of human rights as universal begins to make sense. International organizations, governmental and non-governmental both define LGBTQIA+ rights as human rights, these include but are not limited only to organizations like the United Nations, Amnesty International, the Council of Europe, Human Rights Watch, etc. The U.N Geneva speech of former United States Secretary, Hillary Clinton in 2011 grabbed wide international media attention when she affirmed that "Gay rights are human rights… and being gay is not a western invention, it is a human reality." [66]This has been a ground-breaking definition in the history of LGBTQIA+ rights and has been influential in the international discourse on human rights. As it is yet to be shown as the paper unfolds, the international organizations are fighting to consolidate the notion, that LGBTQIA+ rights are human rights.

Despite all these strong positive affirmations at the international level toward LGBTQIA rights as human rights, this is still an international vision, a dream

[65] Tess McEvoy, *LGBT: Ten years since the first SOGI resolution, LGBTI history continues to be made at the United Nations,* ISHR.CH, (June 25, 2011), https://ishr.ch/latest-updates/lgbti-ten-years-since-the-first-sogi-resolution-lgbti-history-continues-to-be-made-at-the-united-nations/.

[66] Amnesty international USA, *Clinton to United Nations: Gay rights are Human Rights,* AMNESTYUSA.ORG, (Dec 8, 2011), https://www.amnestyusa.org/clinton-to-united-nations-gay-rights-are-human-rights/.
See also> Jonathan Capehart, *Clinton's Geneva accord: Gay rights are human rights,* WASHPOST (Dec 7, 2011), https://www.washingtonpost.com/blogs/post-partisan/post/clintons-geneva-accord-gay-rights-are-human-rights/2011/03/04/gIQAPUipcO_blog.html.

rather than a reality. This is to say that human rights are universal in theory, in practice, they are enjoyed by only a few. All this is due to the reluctance of states in protecting human rights fully by pursuing effective and impartial implementation policies. According to a Joint statement by UN Independent Expert and UN Special Rapporteur on 24 March 2022, "Sixty-nine UN member states still have legislation criminalizing persons of diverse sexual orientation and gender identity."[67] No wonder, Graeme Reid (2014) a human rights advocate, once wrote in an article that "for LGBT people the law is a paradox".[68] Honestly, it is high time, and only now is, for people, societies, states, leaders, and young people to start accepting the reality that, LGBTQIA people are human beings like everyone else and that makes them entitled to the same rights that everyone is too.

This paper proposes that the international platform as an indispensable driving force in backing and supporting the rights of LGBTQIA+ individuals should first face and accept with honesty and soundness the reality of this community. International human rights laws and advocacy should be adopted and pursued with genuine intentions within the etymology of the very concepts. When LGBTQIA+ human rights are violated, despite our sexual orientation, we, as a society must share their humiliation.

II. Protection and Enforcement of LGBTQIA+ Human Rights on an International Platform: From a Comparative Perspective

This section identifies different international organizations, both governmental and non-governmental that are involved in the protection and enforcement of LGBTQIA+ human rights on an international platform. Numerous organizations partake in these activities; as such, it would not be possible to explicate all of them in this paper at least satisfactorily. In that regard, the following institutions have been selected in this research because of their predominant role. These organizations play a complementary role in many initiatives, all of which serve a significant mandate within their respective jurisdictions. As it will be shown, towards the conclusion, some of these international organizations have co-

[67] United Nations Human Rights, *UN experts issue joint statement on defenders of LGBT people's rights,* UNHR (Mar. 24, 2022), https://srdefenders.org/information/media-advisory-un-experts-issue-joint-statement-on-defenders-of-lgbt-peoples-rights/.

[68] Graeme Reid, *International Law, and the Uncertainty of Rights of LGBT People,* HRW.ORG (Sept. 6, 2014, 11:50 AM), https://www.hrw.org/news/2014/09/06/international-law-and-uncertainty-rights-lgbt-people.

operated to create the Yogyakarta Principles. One of the outstanding achievements at the international level regarding LGBTQIA+ human rights. Hence, the ambit of this section is to convey what is at the international level for LGBTQIA+ human rights.

III. LGBTQIA+ Human Rights at the United Nations

The establishment of the United Nations in 1945 by the 56 member states [at the time], marked a significant change in the history of human rights. Historically, human rights were highly embedded in domestic and constitutional traditions, but with the Universal Declaration of Human Rights by the UN on 10 December 1948, for the first time in history, human rights became the subject of international attention. United Nations' official website on UDHR confirms this point when it states that, "it sets out, for the first time, fundamental human rights to be universal…" [69]Subsequently, over the years this declaration has enormously influenced international human rights law and has been the basis of the claims for LGBTQIA+ human rights which is currently a controversial topic in the international human rights law.

The preamble of the UN Charter is a perfect reference to understanding the UN mechanism for the protection of LGBTQIA rights. It stipulates, inter alia, that "we the peoples of the United Nations determined…to reaffirm faith in fundamental human rights, in the dignity and worth of the human person…" [70]However, as it has been already underlined, although the United Nations was from the very beginning committed to the idea of protection of human rights as indicated in the said preamble, the notions of LGBTQIA+ rights were unknown, or at least it is correct to say that it was not an express matter. It is through a lot of pressure from victims, advocates, and excessive reports of human rights violations across the world, that the UN finally came out to clear the clouds of confusion and broke the silence, which marked a great development for those who identify as LGBTQIA+ community. Beverly Palesa Ditsi is one of the first lesbian individuals credited for openly raising and seeking the attention of the United Nations on this subject matter. Distie during the fourth UN World Conference in Beijing in 1995 opined that the UN "must similarly recognize that

[69] See> United Nations website, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[70] General Assembly, *Charter of the United Nations*, Oct 24, 1945, 1 UNTSXVI, https://www.un.org/en/about-us/un-charter/full-text.

discrimination based on sexual orientation is a violation of human rights". [71] She acknowledged the claim for universality of human rights but underlined that lesbian people are not protected since they were subjected to harassment. This depicts clearly that LGBTQIA+ rights have long been excluded from the international concept of human rights.

To date, countless initiatives have been taken by the UN, but some of these deserve a special mention in this paper. In 2011, the UN Human Rights Council adopted its first-ever resolution on human rights, sexual orientation, and gender identity, expressing concern over violence against LGBTQ people. [72]This resolution recognized the pressing need for UN intervention and the enforcement of LGBTQ human rights and has been described by many advocates as "a ground-breaking initiative", which further attests to its significance in the history of LGBTQIA+ human rights. Not only that, on 26 July 2013, the UN Human Rights Council launched its "*Free and Equal*" initiative, which is a global campaign against homophobia and transphobia. According to the UN website of the said initiative, it is stated that by 2017 this initiative had reached "2.4 billion social media feeds",[73] this is a huge impact. On the same website, the UN quotes its secretary General G. Antonio who appeals to governments and societies of the world to help fight discrimination against people based on their sexuality and gender identity. All of this represents a high level of determination to serve humanity equally by the United Nations and hence promoting international tolerance and acceptance of LGBTQIA persons as human beings deserving and worthy of the same treatment.

It is also of paramount importance to mention the UN LGBTI Core Group, which is an informal cross-regional group of UN Member states established in 2008, whose goal is to work closely with the United Nations on upholding human rights and freedoms for LGBTI individuals[74]. It focuses particularly on protection against violence and discrimination mainly through awareness campaigns. For example, the campaign with the theme "Leaving No One Behind" which was

[71] South Africa History Online, *Beverly Palesa Ditsie is the first out lesbian woman to address the United Nations about LGBT Rights*, SAHO (Apr. 10, 2017), https://www.sahistory.org.za/dated-event/beverly-palesa-ditsie-first-out-lesbian-woman-address-united-nations-about-lgbt-rights.
See also: United Nations Development Programme, *Statement delivered by Palesa Beverley Ditsie of South Africa International Gay and Lesbian Human Rights Commission,* UNDP (13 September 1995), https://www.un.org/esa/gopher-data/conf/fwcw/conf/ngo/13123944.txt. (*Transcript of her address*).
[72] HRC Res. 17/19, UN.DOC A/HRC/Res17/19 (Jul. 14, 2011).
[73] *See*> U.N, https://www.unfe.org/.
[74] See> the UN LGBTI website, https://unlgbticoregroup.org/.

organized in September 2021 addressed the need to end the criminalization of same-sex relationships and trans identities, highlighting that these will affect the realization of the Sustainable Goals. [75]All these exhibit the actions and the role of the UN in facilitating a democratic world that is free of discrimination. Discrimination indeed pulls humanity backward and stigma stands in the way of justice and progress. A just world would be a world, in which everyone could live with their differences without paying a price.

More importantly, the United Nations Human Rights Committee whose mandate is to monitor the implementation of the International Covenant on Civil and Political Rights (ICCPR) by the member states has and continues to effectively guarantee the enjoyment of these rights without discrimination. There are a variety of cases in which the Human Rights Committee has affirmed its commitment to consolidating LGBTQIA+ human rights within the UN agenda, which have shaped the course of sexual orientation and gender identity in many legal systems. The most well-known example in the jurisprudence of the UNHRC affirming the principle of non-discrimination is *Toonen vs Australia (*1994). [76]In this case, the UNHRC held that the law criminalizing homosexuality constituted unlawful interference with the right to privacy, protected and guaranteed by Article 17 of the ICCPR. [77]

Star Observer commented that the "Toonen v Australia decision was the first by a global body to say gay rights were protected". [78] Consequently, the judgment, in this case, resulted in the repeal of the last Australian sodomy laws. This judgment has been significant in influencing the rights of LGBTQIA in many African state parties to ICCPR in which individuals and national jurisdictions continuously invoke this principle of non-discrimination. To support this point, Malcolm Langford, and Cosette D. Creamer (2017),[79] cite the case, *National*

[75] UN LGBTI CORE GROUP, *Leaving No One Behind: Decriminalization of Sexual Orientation and Gender Identity,* UN LGBTI CORE GROUP.ORG (Sept. 22, 2021), https://unlgbticoregroup.org/past-events/.

[76] *Toonen v. Australia*, CCPR/C/50/D/488/1992, UNHRC (1994), https://www.refworld.org/cases,HRC,48298b8d2.html.

[77] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, art 17.

[78] Star. Observer, *The Legacy of Toonen v Australia*, STAROBSEVER (Apr.21, 2009), https://www.starobserver.com.au/news/national-news/new-south-wales-news/the-legacy-of-toonen-v-australia/5739.

[79] Langford, Malcolm, and Creamer, Cosette. D, *The Toonen Decision: Domestic and International Impact* (Nov. 2, 2017), 3, https://ssrn.com/abstract=3063850 or http://dx.doi.org/10.2139/ssrn.3063850 .

Coalition for Gay and Lesbian Equality v. Minister for Home Affairs, Constitutional Court of South Africa (2 December 1999) as a perfect example of which the South African Constitutional Court reasoned under the influence of this principle established in the said case. This South African case was the first to deal with the recognition of same-sex partnerships.

Recently, the UN General Assembly took a great stride in the protection of human rights by suspending Russia from the Human Rights Council. This action by the UN has a huge symbolic impact on protecting human rights and hence the LGBQTIA+ rights included. All this attests to what Paula Gerber and Joel Gory once coined when they wrote "The Human Rights Committee is the most influential international human rights body in the world".[80] All these examples cited here lead to the conclusion that the United Nations through its various mechanisms plays a fundamental role in promoting and protecting the human rights of LGBQTIA+ people although it still has a lot to improve.

IV. Areas of improvement

There is no international human rights organization that is free of flaws or faults but through constant improvement, the desired goal can be achieved. It is prudent at this juncture, to point out an area in which the United Nations can improve to effectively combat the violations of LGBTQIA human rights. The U.N needs to improve its enforcement mechanism by ensuring that the member states are all implementing the obligations of the treaties that protect the rights of LGBTQIA+ human rights. Advocacy alone is not always an effective tool for addressing violations but imposing strict sanctions or penalties on states which fail to eradicate discrimination on the ground of sexual orientation and gender identity may have a huge impact.

V. European Union and LGBTQIA+ HUMAN RIGHTS

The European Union is also another institution that has a huge impact on the protection of LGBTQIA+ human rights. But, unlike the United Nations, the European Union is a peculiar international organization of 27 Member states that functions entirely based on the principle of conferral stipulated in article 5

See also: Wilets, J. D. (1994). *PRESSURE FROM ABROAD*. Human Rights, 21(4), 22–43, http://www.jstor.org/stable/27879864.

[80] Gerber, P. & Gory, J. *The UN Human Rights Committee and LGBT rights: what is it doing? What could it be doing?* Human Rights Law Review, 14(3), 2014, 403 – 439, 405, https://doi.org/10.1093/hrlr/ngu019.

of the Treaty on the European Union.[81] For many scholars, including Petra Jeney (2010), this principle limits the role of the EU in protecting LGBTQIA+ human rights. He mentions for example that, "keeping with the Community's original economic mandate, the right not to be discriminated against long applied only in the field of employment."[82] This is accurate; however, this paper pursues the argument that the European Union has the potential to harness significant changes not only in continental Europe but globally which will see LGBTQIA+ human rights taking a solid ground on an international platform.

This is because, unlike the U.N, the European Union strictly ensures that its legislation, treaties, or regulations are implemented in a uniform manner in all the Member states, which is an impactful mechanism. As early as 1964 when the Union was formerly known as the European Community (EC), the European Court of Justice (ECJ), in Costa v. Enel's judgment asserted that "the executive force of community law cannot vary from one state to another". [83]This means that in practice the LGBTQIA+ human rights derived from the provisions of the European Union treaties should be protected in the same manner in all the Member states. States may not always reflect uniformity in their implementation of these laws, however, the EU has very strict sanctions for Member states which fail to fulfill their obligations. The European Commission has the power to bring an infringement procedure should the state disregard its obligations.

Before analyzing the concept of LGBTQIA+ human rights in this context, it is crucial to mention the development of the concept of human rights within the European Union. Traditionally, the European Court of Justice used to distance itself from the questions of human rights, for example, this is evinced in the case of *Friedrich Stork v. the High Authority of the ECSC* (1959). When the German Constitutional Court challenged the European Directive on the basis that it violated German Fundamental rights, the ECJ held that "the Court has no competence and is not empowered to examine a ground of complaint which maintains that when its decision is adopted, it infringed principles of German Fundamental law."[84] However, this case is a typical specimen showing that issues on human rights cannot be avoided because these are the foundations of

[81] Consolidated Version Treaty on the European Union, [2008] OJ C115/13, art 5.
[82] Petra Jeney, *Poor Judgement: Gay Rights and Sex Equality before the European Court of Justice,* Open Society Institute (2010), https://www.eipa.eu/wp-content/uploads/2017/10/Gay-rights-eu_Petra_Jeney.pdf.
[83] Case 6/64, Flaminio Costa v Enel, ECLI:C:1994:66.
[84] Case1/58, Friedrich Stork v. High Authority of the European Union and Stee; Community, ECLI:EU:C:1959:4.

human societies. In due course, the ECJ eventually confirmed in *Nold v Commission* (1974)[85] that fundamental rights form an integral part of the general principles of EU law, the observance of which it ensures. Therefore, today, this principle is enshrined in art 6 (3) TEU and it establishes as follows:

"*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*"[86]

As a result, the European Union plays an essential role in protecting the human rights of LGBTQIA+ persons through its Treaty provisions, the Charter of Fundamental Human Rights, general principles, and secondary legislation among other mechanisms. The following is an analysis of how these are used or can be used in the protection of LGBTQIA+ human rights within the European Union.

Treaties establishing the European Union

The two European Union treaties: the Treaty on the European Union and the Treaty on the Functioning of the European Union contain express provisions that directly confer human rights that LGBTQIA+ individuals can rely on in both vertical and horizontal relationships. These treaties, therefore, establish what can be called the legal basis which allows for the EU to protect LGBTQIA+ persons. Article 2 of the Treaty on the European Union (TEU) provides that the founding values of the EU are "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." [87]The inclusion of the phrase "minorities" is very important since it expressly shows that the LGBTQIA+ human rights are safeguarded within the European Union and so, these individuals can and should invoke this article before national courts to seek judicial remedy or effective protection should their rights derived from the Union within its competences be violated. In examining the role of the U.N, this research ascertained that the U.N sometimes faces the problem of vagueness and

[85] Case 4-73, Nold, Kohlen-und BaustoffgroBhandlung v Commission of the European Communities, E.C.R 1974-00491, ECLI:C:1974:51.
[86] Consolidated version of the treaty on the Functioning of the European Union, 2012 O.J. (326).
[87] *Id. at 24. [art 2].*

ambiguity regarding its policies. This creates uncertainty in the protection of LGBTQIA+ human rights, while clearly, the European Union overcomes this.

Article 19 of the Treaty on the Functioning of the European Union (TFEU) enables the Council to take appropriate action to combat discrimination based on other grounds including sexual orientation. [88]In practice, the European Union Institutions have proven to be reliable in enforcing and ensuring these obligations derived from the treaties that ensure that the LGBTQ community has access to all the rights and benefits that all other citizens of the Member states have from the Union. There are countless examples to complement this argument, but it is worth noting, that the European Commission as an executive branch has performed significant acts that will forever be cherished by the LGBTQIA+ persons in this fight for their human rights. For instance, last year (2021), the EU Commission took legal action based on art 267 TFEU against Hungary and Poland for violations of the fundamental rights of LGBTIQ people.[89] EU Commission President von der Leyen expressed in her speech at the European Parliament Plenary on the conclusions of the European Council meeting of 24-25 June 2021 her concern about Hungary and Poland laws:

"This law is shameful…Europe will never allow parts of our society to be stigmatized: be it because of whom they love, because of their age, their ethnicity, their political opinions, or other religious beliefs. When we stand up for parts of our society, we stand up for the freedom of the whole of our society."[90]

There is no doubt that the above statement utters a powerful message and exhibits the European Union's unconquerable desire for the protection of all people belonging to the Member states, including the minority groups. In February 2022, Hungary and Poland lost the EU funding fight over the rule of law condition that ties EU funds to democratic standards.[91] All of these reflect a strong response to violations of LGBTQIA+ human rights which shows that the European Union has dominant control over the implementation of its laws among its member states something that the U.N seems to be falling short of. This is because the EU is not a classic international organization, hence it has a

[88] Id. at 24 [art.19].
[89] TFEU, supra [23] art [267], 2012 O. J. CC *115.*
[90] Sabine Siebold, *It "is a shame"- EU to take steps against Hungary over the anti-LGBT bill,* Reuters [Jun 23, 2021, 5:51 PM], https://www.reuters.com/world/europe/eu-take-steps-against-hungary-over-anti-lgbt-bill-2021-06-23/.
[91]BBC, *Hungary, and Poland lose EU funding fight over laws, BBC, Feb 16, 2022],* https://www.bbc.com/news/world-europe-60400112.

huge impact on the enforcement of Union laws within the member states. On the other hand, classic international organizations, like the U.N tend to lack this capacity to effectively influence the implementation of international treaties that have an impact on LGBTQIA+ human rights because some states take a monistic and others a dualistic approach to international law. The European Union, in the case *Costa v. Enel*[92] and in *Van Gend en Loos v. Netherlands* (1963)[93] explicitly rejected the dualist international law approach which today has made it a powerful organization.

Charter of Fundamental Human Rights

The European Union Charter of Fundamental Human Rights which has the same legal standing as the treaties according to art 6 (1) TFEU[94], applies to every citizen of the member state, which means that the LGBTQIA+ persons can rely on its provisions to invoke the rights conferred upon them. The Preamble of the Charter establishes that fundamental rights are "indivisible, universal values of human dignity…"[95] The words *"indivisible* and *universal"* can be interpreted to the conclusion that fundamental rights apply to every human being without any discrimination and this is a powerful expression that underlines the protection of all people before the European Union, regardless of their sexuality, sexual orientation, or gender identity. This expression goes hand in hand with the UDHR, already examined above. The Charter of fundamental rights can be relied upon by LGBTQIA+ persons in both vertical (art 51 CFR) and horizontal legal relationships. However, the charter does not extend the competencies of the Union, it applies only within the fields of the European Union (Art 6, para 2 TFEU)[96]. Perhaps this is one of the major shortfalls but still, there is indeed a high level of protection of LGBTQIA+ human rights on an international platform.

European Court of Justice Case Law

The European Court of Justice (ECJ) has developed a countless number of principles and judgments that are today the cornerstone of the European Union Legal framework. It has also dealt with a huge number of litigations from LGBTQIA+ persons which have resulted in the Union taking important strides

[92] Case 6/64, Flaminio Costa v Enel, ECLI:C:1994:66.
[93] Case 26-62, *Nv Algemene Transsport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* ECLI:EU:C:1963:1.
[94] TFEU, supra, at 23, art [6(1).
[95] Charter of Fundamental Rights of the European Union, 2012, *OJ C 326 at [preamble].*
[96] TFEU, supra, at 23, art [6(2).

and clarifications to protect their human rights. The most well-known case law ground-breaking decision dates to the 1996 ECJ judgment on *P v S and Cornwall County Council.*[97] In this case, the plaintiff was dismissed from her employment following the termination of the contract after he commenced gender reassignment surgery. The ECJ ruled in favor of the applicant, arguing that the applicant was treated unfavorably, and hence this violated the then Directive 76/207/EC on the implementation of the principle of equal treatment for men and women…[98] This preliminary procedure of the EU (art 267 TFEU) [99]is also another mechanism that allows the European Union to effectively ensure the protection of LGBTQIA+ human rights since it enables the Court to give a uniform interpretation of the Union law. Nowadays, the principle of equal treatment has become fundamental within the European Union and in this way discrimination against people on the ground of sexual orientation is protected.

The principles of supremacy and direct effect are other mechanisms established by the ECJ that LGBTQIA+ individuals whose human rights are violated can invoke before a national competent tribunal or court. The principle of supremacy means that the European Union law prevails in situations of conflict with other aspects of national law in any European Union country. This is the reason why the EU Commission took an action against Hungary and Poland, in the previously cited case example. Therefore, this gives the European Commission the power to continuously use the infringement procedure (art 258 TFEU) to encourage the member states into adopting laws that support the rights of marginalized groups. On the other hand, the principle of direct effect entails that the European Union law may if appropriately framed confer rights on individuals that member states are bound to recognize. These may take the form of a direct horizontal effect (so, LGBTQIA+ people can use these against other individuals or private companies). The vertical direct effect allows for LGBTQIA+ persons to initiate legal proceedings against the state if it has violated their rights.

Having said all this so far, it may seem as if the European Union is a perfect organization for combating violations against LGBTQIA+ human rights, but that is not the point. The reality is that it does play a significant role because of its well-designed mechanisms but its role is limited to its competencies which

[97] Case C-13/94, P v S and County Council, E.C.R. 1996 1-02143.
[98] Council Directive76/207/EC, 1976 O.J. L 039.
[99] Consolidated Version of the Treaty on the Functioning of the European Union art. [267, 258], 2012 *O.J C 326/13,* [hereinafter TFEU], http://data.europa.eu/eli/treaty/tfeu_2012/oj.

means that in areas outside its competencies, the human rights of LGBTQIA+ persons are even more vulnerable and prone to violations by the member states. The solution to this impasse cannot be achieved immediately given that the EU is not a sovereign state, nor will it ever become one, it does not seem possible for now. Therefore, the best means to prevent enormous violations of LGBTQIA+ human rights, the European Union should rely on its current legal basis by ensuring that discrimination within those fields is completely unacceptable and eventually this will shape the overall attitude of the member states. History has shown that change is not a one-day event, it takes time to build peace, but once it has been firmly established it becomes the cornerstone of human societies. Therefore, although these international organizations face strong reluctance and non-cooperation from the member states, they give the LGBTQIA+ people hope for a better future.

The Council of Europe

One cannot fully comprehend the LGBTQIA+ human rights on an international platform without mentioning the Council of Europe (CoE), a human rights international organization of 46 Member states (MS) that devotes itself to the protection of human rights. Therefore, this section discusses the European Convention of Human Rights and the judicial body that ensures its enforcement, the European Court of Human Rights (ECtHR). The ECHR is also considered one of the most effective international treaties for the protection of LGBTQIA+ human rights. It establishes fundamental rights and freedoms that apply to all individuals of the member states. LGBTQIA+ persons continue to rely on these rights derived from the ECHR to claim judicial protection in their respective national courts and more effectively before the ECtHR. There are numerous examples in which reliance on this convention has led to landmark court decisions confirming the Council of Europe's commitment to the principle of non-discrimination on sexual orientation.

Articles 2 and 8 of the ECHR provide for the Right to Life and the right to respect for private family life[100]. The Dudgeon judgment[101] is one of the first cases of the European Court of Justice to deal with the violations of the ECHR. In this case, the United Kingdom Criminal Law Act 1885, Section 11, which prohibited homosexuality was challenged by a homosexual applicant arguing that it violated

[100] Council of Europe, *European Convention on Human Rights*, [hereinafter ECHR], art 2, 8, 1950.
[101] Duggeon v United Kingdom, Appl No. 7525/76, Eur. Ct. H.R (1981).

his rights guaranteed by the ECHR. The ECtHR upheld Dudgeon's complaint asserting that it amounted to an unjustified interference with his right to respect for private life guaranteed by the ECHR and this resulted in the decriminalization of homosexuality. From the time of this single decision alone until today, the European Court of Human Rights has been committed to eliminating discrimination against LGBTQIA+. This case decision was also cited by the US Supreme Court in *Lawrence v. Texas* (2003),[102] a landmark decision that found the sodomy law to be unconstitutional. Therefore, the ECHR has an important role in the development of LGBTQIA+ human rights.

Article 13 of the ECHR establishes the Right to an effective remedy[103]. The object of this right is to enable a victim of ECHR violations to seek judicial remedy before a national court, this could be anyone since the convention's rights and freedoms are addressed to everyone in the member states. Therefore, it provides a means for individuals to obtain relief at the national level for violations of their rights, so, in principle, LGBTQIA+ persons of the member states can activate this article whenever their rights are violated. This article also creates an obligation for the national courts to ensure that remedies are granted to those whose freedoms and rights have been infringed. It is not surprising that Carmelo Danisi (2011), described the European Convention on Human Rights as "a living instrument".[104] Indeed, it is a living instrument because it upholds and guarantees the protection of rights and freedoms of all people in the member states without discrimination on the ground of sexual orientation or gender identity.

Further on, Article 1 of the ECHR provides for the obligations of the member states to respect human rights, it stipulates "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[105] The phrase "*secure to everyone"* shows that even the LGBTQIA+ human rights are to be protected. This explains why the ECtHR in Orlandi *and Others v. Italy* (2011) decision [106]condemned Italy for failing to

[102] Lawrence v. Texas, 539 U.S. 558 (2003).
[103] E.C.H.R, art 13.
[104] Carmelo Danisi, *How far can the European Union Court of Human Rights go in the fight against discrimination? Defining new standards in its non-discrimination jurisprudence*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, Vol. 9, No. 3-4, October 2011, 793-807,795, https://academic.oup.com/icon/article/9/3-4/793/657620?login=true.
[105] E.C.H.R., art 1.
[106] Orlandi and others v. Italy, App No. 26431/12, Eur. Ct. H.R (2011).

legally protect same-sex couples who married abroad. In this case, the Court found that the applicants were left in a vulnerable situation and thus imposed on Italy an obligation to abide by the ECHR. It would not be wrong to argue that this case is a clear epitome of the relevance of international law in regulating the rights of LGBTQIA+ people, particularly in same-sex marriages. The Italian legal system had left these couples without legal protection and thus art 8 of the ECHR [107]provided the applicants with a possibility to seek protection within the national legal framework.

VI. International Non-Governmental organizations and LGBTQIA+ Human Rights

It would be a great disrespect to ignore the role and the influence of International Non-governmental organizations in the fight for the rights of LGBTQIA+ human rights on an international platform. Both these international organizations play a fundamental complementary role in advancing the human rights of LGBTQIA+. Otherwise, without international non-governmental organizations [INGOs], there would be little progress at the international level to mention. As noted by Elisabeth Greif (2020) "Today, the claim for LGBTI rights can be described as a globalization process in which a broad coalition of actors plays an active role…" [108]Therefore, the studies reveal that there are numerous organizations of this type as such because it is not possible to examine all of them, only a few shall be mentioned in this paper. According to LGBT Movement Advancement Project (MAP), July 2008 survey, "most international LGBT organizations and programs are relatively new. Nearly 90 percent…have been established since 1990." [109]The INGOs mentioned below are those that envision LGBTQIA+ rights as human rights worthy of fighting for on a dynamic and transnational level.

The role of the Amnesty International Organization

Amnesty International engages in the protection of LGBTQIA+ human rights through advocacy to ensure that everyone has control over their sexual and reproductive choices. On the official website (*find below*) of the Amnesty

[107] European Convention on Human rights, supra, at 38, art. 8.

[108] Elisabeth Greif, *Upward Translations-The role of NGOs in promoting LGBT Human Rights under the Convention on All Forms of Discrimination Against Women (CEDAW*), March 2020, PEACE HUMAN RIGHTS GOVERNANCE, 4 (1), 9-34, 20, 21.

[109] Movement Advancement Project, *International LGBT Advocacy Organizations and Programs-An Overview,* MAP, July 2008, 1-59, 9, https://www.lgbtmap.org/file/international-lgbt-advocacy-organizations-and-programs.pdf.

International (AI), the AI calls for governments "to stop using criminal law to control people's sexuality and reproduction". It further argues that governments are "trying to dictate who we kiss, who we should love, how we should identify…". [110]Not only that, but AI also commits itself to fight discrimination against LGBTI people around the world by giving recommendations to governments on how to improve laws and protect the human rights of LGBTQIA+. Therefore, the organization puts pressure on governments through its global campaigns which help in raising awareness. For example, it is mentioned on its website that in May 2019 after a global campaign by Amnesty, Taiwan "became the first country in Asia to recognize same-sex marriages." [111]

A recent publication dated 8th April 2022, entitled "*Russia: Authorities closes down Amnesty International's Moscow Office"* is a clear indication that the governments are feeling the heat and the pressure exerted on them by this organization. Although this example is not immediately concerned with LGBTQIA+ human rights, it shows that AI organization is a true catalyst for change.[112] The Nobel Peace Prize Org. describes AI as a "world-embracing movement for the protection of human rights"[113]. It is not surprising that in 1977 AI received a Nobel Prize for "worldwide respect for human rights". In its activism, Amnesty international organization does not distinguish LGBTQAI persons from others, they understand that human rights as universal and indivisible. Therefore, AI with its powerful activism opposes discriminatory laws enacted to suppress the rights of sexual minority groups.

It also contributes to the accelerated protection of LGBTQIA+ human rights by taking immediate action following a violation of rights. It issues statements against decisions that are taken by courts to impair the human rights of

---

[110] *See*> Amnesty official website> https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/ [particularly the 'sexual and reproductive rights section'].

[111] Amnesty International, supra 46 [see specifically the section entitled "WHAT IS AMNESTY DOING TO PROMOTE LGBTI RIGHTS?"].

[112] Amnesty International, *Russia: Authorities closes down Amnesty International's Moscow Office*, Amnesty.Org [Apr. 8 2022], https://www.amnesty.org/en/latest/news/2022/04/russia-authorities-close-down-amnesty-internationals-moscow-office/.

See also> Madeline Halpert, *Russia Closes Amnesty International And Other Human Rights Organization Offices,* Forbes [Apr 8, 2022,02:58pm]. https://www.forbes.com/sites/madelinehalpert/2022/04/08/russia-closes-amnesty-international-and-other-human-rights-organizations-offices/?sh=59c5630da084.

[113] *See*> Nobel Peace Prize official website, https://www.nobelprize.org/prizes/peace/1977/summary/, [This website shows how Amnesty International has been described by the Nobel Peace Prize organization and why it was given an award in 1977].

LGBTQIA+ people. For example, on 24 May 2019, Kenya's High Court upheld laws criminalizing homosexual acts between consenting adults and this decision was challenged by Amnesty International Kenya.[114] However, even though these actions do not lead to an immediate end to violations of LGBTQIA+ human rights, they are piercing through the rigid societal mindsets, and they will eventually result to change.

Even though Amnesty International is a worldwide campaigning movement working to promote the human rights of LGBTQIA+ persons, its role and influence are limited mainly to advocacy. This means that national governments are always in a strong position to retaliate and disregard their activism in the fight for human rights. For instance, in 2020 Amnesty International was forced to shut down its offices in India, citing the government attacks to be the reason for this decision[115]. Not only that but also the defenders of the Human rights of LGBTQIA+ within AI are prone to violence in countries that criminalize homosexuality. Even so, AI is not the only organization that encounters these challenges even the LGBTQIA+ human rights defenders of the United Nations suffer from these violations. According to the U.N Special Rapporteur (2022) "…those who advocate for the rights of LGBT people often face additional risks".[116] These are challenges that threaten the solidarity of humanity. Therefore, in the face of resistance, such as this, patience and resilience are powerful tools that could be used to rebuild the social fabric and restore humanity.

International Lesbian, Gay, bisexual, Trans, and Intersex Association (ILGA)

ILGA is another fundamental International non-governmental organization (INGO) that is dedicated to advancing the human rights of all people. It was established 44 years ago (1978) and has since worked tirelessly to support the

---

[114] Amnesty International, *Amnesty international Kenya statement on court decision regarding LGBTQRights-24 May 2019,* AmestyKenya.Org [May 27, 2019], https://www.amnestykenya.org/amnesty-international-kenya-statement-on-court-decision-regarding-lgbtq-rights-24-may-2019/#:~:text=Amnesty%20International%20Kenya%20is%20concerned,against%20the%20order%20of%20nature.

[115] Shukanya Shantha, *Amnesty International India Shuts Down, Blames Government's 'Reprisal'*, The Wire [Sept 29, 2020], https://thewire.in/rights/amnesty-international-india-shuts-down-inquiries-investigating-agencies-ed-cbi.
See also> Yogita Limane, *Amnesty International to halt India Operations,* BBC News Mumbai [Sept 29, 2020], https://www.bbc.com/news/world-asia-india-54277329.

[116] United Nations Human Rights, supra, at 5.

visibility, inclusion, and equal representation of LGBTI communities. It pursues its mandate through advocacy, research projects, empowerment, and above all it serves as a representative organ for LGBTQIA+ at an international level. ILGA tackles different issues that affect Lesbians, Gays, Bisexuals, Trans, queer, Intersex, and Asexual people, especially discrimination. For example, ILGA has joined other activists in showing its disapproval of the Russian invasion of Ukraine. For instance, on 2 April 2022, ILGA-Europe posted on its Instagram page writing "At ILGA-Europe, we know that there will be great complexity and particular vulnerabilities in the experience of LGBTI refugees…" [117]

On Sunday 3 April 2022 ILGA condemned the Anti-LGBT Hungarian Referendum, arguing that, "It is in bad faith and does not reflect true humanity".[118] On top of that, it also challenges national governmental activities that are designed to violate the human dignity of LGBTQIA+ people, for instance, conversion therapy. The U.K decision not to ban conversion therapy for trans people meets strong defiance from ILGA which argues that all human beings must be treated equally and with sincere respect.[119] It can be seen so far, that INGOs that protect human rights of LGBTQIA+ mostly pursue the work of advocacy, while the above mentioned international governmental organizations like the U.N, Council of Europe, and European Union do not only partake in advocacy but also, they have a legislative influence on the member states. They may adopt treaties that the contracting states must enforce in their national legal systems, especially the European Union.

Yogyakarta Principles

The Yogyakarta Principles reflect the highest achievements of international organizations in advancing the Human rights of LGBTQIA+. They are the work of different human rights expert groups from 29 countries and were adopted by unanimity in Yogyakarta, Indonesia in November 2006. It is a set of 29 principles on the application of International Human Rights Law concerning Sexual orientation and Gender Identity. The Introduction to the Yogyakarta Principles explains why these were adopted in the first place. It has been already underlined in this research, that the international system of human rights law, has long been criticized for its ambiguity in the representation of LGBTQIA+. On that account, these principles demonstrate that there were adopted to "address these

[117] *See*>ILGA-Europe official Instagram page [particularly a post made on 2 April 2022].
[118] *Id.* at 53, [3 April 2022].
[119] See I.L.G.A. official website> https://ilga.org/,[for more details on its activities].

deficiencies"[120]. As such, it can be argued that these principles aim to complement the historical weaknesses of international human rights law, particularly its failure to give clarity on sexual orientation and gender identity. Therefore, this research argues that the Yogyakarta Principles serve as an LGBTQIA+ human rights friendly interpretation.

In these principles, human rights are explicitly interpreted in the light of sexual orientation and gender identity, therefore, providing a universal guide to the application of international human rights law to LGBTQIA+ persons. For example, the right to universal enjoyment of Human rights (principle 1). This right is presented almost the same way as that which is in article 1 of the UDHR (1948). Article 1 (UDHR) states *"All human beings are born free and equal in dignity and rights."* [121]On the other, the Yogyakarta Principle 1 establishes that "*All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights."* [122]Therefore, what distinguishes these two provisions is that the Yogyakarta Principles stretch further to clarify the universality of human rights. This is aimed at solving international human rights law uncertainty on the application of human rights. It becomes clear when taking this principle that LGBTQIA+ rights are human rights. These principles leave no room for doubt.

Not only do these principles seek to clarify LGBTQIA+ Human rights they also provide states with mandatory guidelines on how to implement these rights. For example, according to Principle 1(b), states should "*amend criminal law, to ensure that its consistency with the universal enjoyment of all human rights."* This provision means that criminalizing homosexuality would be against the notion of human rights' universality. That being the case, it can be argued that all the states or countries that have legislation criminalizing same-sex relationships are violating the international human rights law principles.

Another principle that is worthy of exploring is the Right to Life. Principle 4 of the YP stipulates that "Everyone has the right to life"[123] The same right is found in article 3 of the UDHR (1948)[124]. The difference between the two is that while

[120] Conference of International Legal Scholars, Yogyakarta, Indonesia, November 6-9, 2006, Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. [hereinafter Yogyakarta Principles], [preamble].
[121] UDHR, supra, at 1 [art 1].
[122] Yogyakarta Principles, supra, at 58, principle 1.
[123] *Id*. at 60 (1b).
[124] *Id*. at 60 [principle 4].

the right in article 3 is vague, principle 4 of YP (2006) is very comprehensive in that it leaves no questions on whether LGBTQIA+ persons are also protected within the international human rights framework. The YP briefly addresses all the questions of sexual orientation and gender identity and hence it can be described as a document that consolidates the humanity of all homosexual people.

Despite all this, the YP has been subject to a lot of scholarly criticism for its strict terminology. J. Cornides (2009) criticized the YP for continuously employing the phrase '*sexual orientation and gender identity',* he argued that "The reference is redundant. By adding it, the YP opens the question of whether 'sexual orientation and gender identity' enjoys a special status among all grounds of discrimination."[125] This research pursues the argument that this criticism is misconstrued, the inclusion of the phrase is very relevant to clear uncertainties within the international human rights fora. He further criticizes the right to life established in the YP (4) on the basis that it is "Redundant. Article 3 of the UDHR recognizes everyone's right to life." [126]The YP may not be a perfect document, however, clarity on sexual orientation and gender identity is indeed important for asserting the notion of LGBTQIA+ rights as human rights. For this reason, the argument put forward by D. Brown (2010), about the YP is found to be sound in this research. He argues in favor of the YP, propounding that "this is a remarkable assertion given that no major human rights treaty explicitly mentions discrimination based on sexual orientation and gender identity…" [127]. The Yogyakarta Principles are important because they address many of the problems highlighted above concerning the concept of international human rights for LGBTQIA+.

VII. Conclusion

This paper has demonstrated that the concept of LGBTQIA+ human rights is quite a new concept in international human rights law. It is grounded on fundamental principles of international human rights law such as non-discrimination and the principle of equality. The term itself has a symbolic meaning, it is aimed at spreading awareness and advocacy for sexual minorities and serves to underline that LGBTQIA+ rights are part and parcel of human

[125] J. Cornides, *A brief Commentary on the Yogyakarta Principles,* SELECTEDWORKS, Apr. 2009, 2-26, 6.
[126] J. Cornides, supra, at 63 [page 6].
[127] David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An introduction to the Yogyakarta Principles*, 31 Mich, J.INT'L L. 821 (2010), 822-879, 822,823.

rights. The enormous human rights violations against lesbians, Gays, Bisexuals, Transgender, Queer, Intersexual and Asexual people over the years have resulted in many international organizations taking appropriate measures to ensure equal treatment of all people. The international platform has proven to be leading in harnessing this cause, however, at the same time, they face a lot of challenges, especially on the domestic level. Consequently, today, regardless of various strategies and legal reforms that have been introduced, LGBTQIA+ human rights are violated daily. This research underlined that the journey to combating discrimination and to protecting the human rights of LGBTQIA+ has not been a rosy one. There are still a lot of challenges to be dealt with at the international level, however, despite these, the international platform offers a promising future for LGBTQIA+ persons and their human rights. It may not be now, tomorrow, or in the near future, but society will eventually give in, and all human beings will once again feel secure. This world is evolving at a rapid rate and hopefully, new attitudes will emerge.

ISRAEL AND PALESTINE: SECURING THE HUMAN RIGHTS DURING THE USE OF FORCE & AND ARMED CONFLICT

AUTHOR- ANURAGH KARAT[*]

ABSTRACT

Israel and Palestine conflict has been an ongoing discussion regarding whether it is right or wrong for the Human Rights abuses and the armed conflict that has been present in the region. This conflict has been going on for many years because of the sole reason that neither side are willing to surrender or make peace through speech. The views of many nations of the world is divided in three segments, some nations support both the sides, some others support Israel and there are some nations that support Palestine. This research paper is going to cover the aspects of the origin of the conflict, the reasoning behind the conflict being present for years and whether or not certain actions taken by the Israeli forces proved fruitful for securing peace in Palestine by the use of force and armed conflict.

Keywords: Conflict, Partition Plan, Nations, Force

I. Introduction

The ongoing war between Israel and Palestine dates back from the nineteenth century, where in 1947 Resolution 181 was adopted by the United Nations, which is popularly known as the Partition Plan. This plan was indeed an idea to divide the British ruled Palestine into a state between the Arabs and the Jews. The State of Israel was established on May 14, 1948, igniting the first Arab-Israeli War. The war concluded with Israel's triumph in 1949, although 750,000 Palestinians were expelled, and the land was split into three parts: Israel, West Bank (along the Jordan River), and the Gaza Strip. The region became prone to war and there was a lot of tension between Egypt, Israel, Jordan and Syria.

[*] 2nd year B.B.A LL.B student from Symbiosis Law School, Pune; Available at: karatanuragh9@gmail.com

Hence, this marked the beginning and the rise of tension in this region in terms of Human rights violation and Armed conflict.

II. Litrature review

Hajjar (2001), This article examines the evolution and transition of the Israeli-Palestinian human rights movement, with an emphasis on the West Bank and Gaza. The conflict is essentially a war for rights, pitting the Israeli state's prerogatives against the Palestinian population's national and human rights (i.e., right of self-determination, legal protections and civil liberties). However, the violation of rights have continued since the establishment of Palestinian Authority in 1994.[128]

Dallal (1987), This article seeks to demonstrate that strict respect to international and US legal norms by both Israel and the US might be a significant step towards ending the Palestinian-Israeli conflict. It also emphasizes on the implementation of the globally recognized human rights standards with the aim to minimize terrorism and bloodshed in the region. The article further proceeds to explain the well-known Human rights, list out several statues of the US, which prohibit them from interfering by providing foreign aid and the nations which will commit violations of the recognized international human rights. The article also explains Israel's human rights violations which are known internationally, and the state department not reporting it has indeed lead to the continuance of such violations by the Israelis. The article also illustrates about the international law sanctioned armed action for national liberation, equal rights, and self-determination for all oppressed peoples, including Palestinians.[129]

Hassan(2021) Munayyer(2021), This article discusses about the process of achieving peace, by centering rights present in the conflict. The author has clearly taken a stand regarding the matter about the US sending mixed signals and being supportive to both the parties, and he suggested a new approach for resolution of conflict allowing US to get better outcomes by doing less harm. One of the methods by which this can be achieved is by prioritizing rights and human security, this strategy aligns with President Joe Biden's overarching US national security policy, helps to enhance US relationships among normative actors, and

[128] Hajjar(2001), Journal of Palestine Studies, Human Rights in Israel/ Palestine: The History and the Politics of Movement, (30), 4.
[129] Dallal (1987), Syracuse Journal of International Law and Commerce, Israeli Human Rights Violations and Palestinian Violence, (14), No. 2, Art 2.

assist to restore US credibility and global status, notwithstanding the shift in focus. It also has the best chance of altering the political calculations that are now leading Israelis and Palestinians away from a long-term political solution.[130]

Harris (2008), This article speaks about the multiple political factors impacting Israel's occupation of the West Bank and Gaza Strip, as well as the viability of international law of occupation in general. Though ill-suited to current international relations and ill-equipped for long-term occupation, the law of occupation has almost uniformly been invoked as relevant to the Occupied Palestinian Territory (hereinafter referred to as OPT). Simultaneously, international human rights legislation is increasingly being seen as applicable to occupation. This puts Israel in a bind since international humanitarian law and international human rights law include contradictory prescriptions and policy objectives on the administration of seized land. This article examines these difficulties from the viewpoint of both the Israe and Palestine in order to determine why the proportionate benefit and loss in each situation is not immediately apparent. This article also explores how to assess the legality of Israeli behavior in the OPT in light of the contradictory international legal duties imposed by human rights law and occupation law. A comprehensive examination into the implications of these events finds that these political realities help to strengthen the Security Council's authority while undermining the utility and relevance of international law of occupation.[131]

III. Research methodolgy

The research methodology used for the current research mainly stems from various secondary sources including, inter-alia, journals, research articles, research paper, blogs and newspapers. The data collected from the secondary sources is referenced accurately for the ease of the readers.

IV. History of the conflict

The continuous conflict of Israel and Palestine stretches back to the nineteenth century, when the United Nations passed Resolution 181, often known as the

[130] Hassan(2021) & Munayyer(2021), *Approaching Peace: Centring Rights in Israel-Palestine Conflict Resolution*, Carnegie Endowment for International Peace, https://carnegieendowment.org/2021/04/29/approaching-peace-centering-rights-in-israel-palestine-conflict-resolution-pub-84397.

[131] Harris (2008), Israel Law Review, Human Rights, Israel and the Political Realities of Occupation, (41), pp 87- 174.

Partition Plan of 1947. This concept aimed to partition British-ruled Palestine into two states, one for Arabs and one for Jews. On May 14, 1948, the State of Israel was created, sparking the first Arab-Israeli War. Although 750,000 Palestinians were displaced, the conflict ended with Israel's victory in 1949, and the territory was divided into three parts: Israel, the West Bank (along the Jordan River), and the Gaza Strip. The region grew prone to conflict, and Egypt, Israel, Jordan, and Syria were all at odds.

Following the 1956 Suez Crisis and Israel's invasion of the Sinai Peninsula, the Egypt, Jordan, and Syria signed mutual defense treaties in the event that Israel's military were mobilized. Following a series of maneuvers by Egyptian President Abdel Gamal Nasser, Israel launched a preemptive strike against Egyptian and Syrian air forces in June 1967, starting off the Six-Day War. Israel took control of the Sinai Peninsula and Gaza Strip from Egypt, the West Bank and East Jerusalem from Jordan, and the Golan Heights from Syria after the war. Six years later, in the Yom Kippur War, also known as the October War, Egypt and Syria launched a two-front surprise attack on Israel to reclaim the lost territory. The dispute did not result in major gains for Egypt, Israel, or Syria, but Egyptian President Anwar al-Sadat declared the war a victory for Egypt because it allowed Egypt and Syria to negotiate over previously ceded territory. In 1987, thousands of Palestinians living close to the Gaza strip rose up against the Israeli government, which was otherwise known as the first intifada. The Oslo I Accords, signed in 1993, mediated the conflict by establishing a framework for Palestinian self-governance in the West Bank and Gaza, as well as mutual recognition between the Palestinian Authority and Israel's government. The Oslo II Accords, signed in 1995, added to the original accord by mandating Israel's total departure from six cities and 450 communities in the West Bank. Palestinians started the second intifada in 2000, motivated in part by Palestinian complaints about Israel's occupation of the West Bank, a stalled peace process, and former Israeli Prime Minister Ariel Sharon's visit to the al-Aqsa mosque—third Islam's holiest site—in September 2000. In response, the Israeli government authorized the construction of a barrier wall around the West Bank in 2002, despite resistance from the International Court of Justice and the International Criminal Court.

V. Situation of human rights in the region of palestine and israel

In the midst of war, human rights violation is something that is very common; people are abused by the armed forces for variety of reason which exclaims the aspect of creating awareness and bringing the truth into the light. According to Amnesty International, there exists arbitrary detention, torture and ill treatment of people in that region. Unfair military trials, protracted solitary incarceration, insufficient medical treatment, and unlawful transfer from the OPT to Israeli jails were all experienced by Palestinian inmates. At the end of 2021, 500 Palestinians were administratively held without accusation or trial, according to Addameer, a Palestinian prisoner advocacy organization. According to the 'Save the Children' report, over 80% of juvenile prisoners were beaten by cops, and 47% were denied access to a lawyer. According to the attorneys, Zakaria Zubeidi suffered fractured ribs and a broken jaw while in handcuffs, and Mohammed Al-Arida was struck on the head after being apprehended by Israeli police on 11th September. Five days prior, the Zakaria and Mohammed had escaped from Gilboa Prison in northern Israel.[132]

Apartheid, as defined by international law, is a state in which the Israel governs Palestinians through oppression and dominance. In the framework of their rights to nationality, freedom of movement, the best achievable level of health, family life, education, labour, and participation in public life, Palestinians experienced habitual and systematic discrimination, and therefore human right abuses.

The Palestinians who reside in Israel were prosecuted based on the incitement laws; however the Jewish supremacists and the politicians continue to incite violence based on racism. Police employed extreme force against Palestinian-Israeli civilians protesting evictions in East Jerusalem and military operations in Gaza, arresting hundreds of demonstration leaders and participants. The majority of those detained were charged with non-violent misdemeanors. On the 12th of May, Special Forces in Nazareth police station thrashed at least eight tied Palestinian detainees who had been held in custody during the protest.

Buildings in the OPT, particularly East Jerusalem, were demolished by Israeli authorities, displacing over 1,000 Palestinians in areas designated for Israeli settlers. Women were disproportionately affected among those forcefully evicted,

[132] Amnesty International (2021), ISRAEL AND OCCUPIED PALESTINIAN TERRITORIES 2021, https://www.amnesty.org/en/location/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/.

as their houses functioned as centers of employment and money generating, particularly in shepherding groups. In February and July, Israel's army razed Humza hamlet in the OPT's Jordan Valley, demolishing and seizing livestock enclosures, residential shelters, water cisterns, and food stockpiles. Seven Palestinian families were evicted from their houses in the Sheikh Jarrah neighborhood of occupied East Jerusalem, according to the Israeli Supreme Court. This came after years of eviction attempts, intimidation by Israeli settlers, and police brutality. Seven households in Silwan, another East Jerusalem neighborhood, were also facing eviction threats. Authorities destroyed structures in seven villages on several occasions, harming 100 Palestinian Israeli people. The settlement of al-'Araqib was razed by police on September 2nd. Since July 2010, the community had been bulldozed over 150 times. Al-'Araqib is one of the 35 Bedouin settlements in the area that are officially unrecognized.

On the contrary, systemic discrimination was taking place against women in the religious courts governing divorce and other personal laws. Based on the study of one of the women's rights activists, Mavoi Satum, almost 1700 women were being forced to live in abusive marriages.

The State Comptroller had noticed the insufficiency of financial and procedural law for protecting the women at risk. Domestic abuse claimed the lives of sixteen women, as per the Israel Observatory on Femicide. The Supreme Court decided in favor of equal access to assisted reproductive services for same-sex couples and single males, placing them on par with heterosexual couples and single women.

During the rise of the COVID 19 pandemic, Israel purchased around 30 million doses of the vaccines and around 64% of that population were the residents of East Jerusalem, migrant workers and Palestinian prisoners with two doses in October, for 4 million citizens the 3rd dose was registered. According to press reports, Israel supplied 5,000 doses to the Palestinian Authority in March and April, after sending thousands to diplomatic allies Guatemala, Honduras, and the Czech Republic in February.

But one of the biggest questions which needs to be answered is that, how is the Human Rights commission present in the Occupied Palestinian Territory failing?

The Human Rights Council has long been preoccupied with developments in the OPTs, particularly major human rights violations perpetrated by the occupying state, Israel. By the end of 2020, the Council had issued 70 resolutions and had conducted seven Special Sessions on the human rights situation in the OPT, significantly more than any other scenario.

One main reason is that the Council's activity on the OPThas historically been based on earning geopolitical points rather than promoting and preserving Palestinian rights, as stated in its infamous agenda item 7. The Item 7 has been used by the Organization of Islamic Cooperation to attack Israel and its supporters in the West, while western powers such as the United States and the United Kingdom have long used the presence of item 7 as an excuse – a kind of "get out of jail free card" – for refusing to engage in substantive discussions about the gross and systematized human rights violations in the Middle East. Even though the geopolitical games continue to take place, the stand taken by the Palestinian delegation in Geneva is silent and controlled or is being used as a puppet. In the OPT, like in all other countries, the UN's principal human rights organization focuses its efforts on putting out fires rather than preventing them from starting in the first place - on reacting to crises and conflict rather than addressing their core issues.

Palestinians in East Jerusalem began to demonstrate on May 6, 2021, in anticipation of an Israeli Supreme Court ruling on the deportation of six Palestinian families to make space for Jewish settlers. According to reports in the media, several demonstrators threw stones at Israeli police, who subsequently invaded the Al-Aqsa Mosque site. A planned march by far-right Jewish nationalists was disrupted by the violence. On May 10, Hamas issued an ultimatum to Israel, demanding to evacuate its security personnel from the Temple Mount compound. When the deadline passed, Hamas fired missiles into Israeli residential neighborhoods. In reply, Israel launched a bombing campaign against Gaza. Around 242 Palestinians, including 63 children, and 10 Israelis, including 2 children, were murdered as a result of the conflict.

Later during the 30th Council Special Session, the High Commissioner for human rights, Michelle Bachelet, stated that although Israel has the right to defend its inhabitants and communities, 'Palestinians have rights as well — the same rights.' They, too, have the right to live in their homes securely and freely, with enough and necessary services and opportunities, and with their right to

life and bodily integrity respected. However, the occupation's daily reality is that they are often denied essential rights.[133]

She exclaimed the two probable reasons which had led to the rise of tension;

a. Imminent evictions of Palestinian families and displacement from their neighbourhood of Shiekh Jarrah in occupied East Jerusalem.
b. Deployment of Israeli forces at the Al aqsa compound which restricts the access for the worshippers during the holy month of Ramadan.

Due to such stands taken in the present situation, there has been increase in the use of armed forces which has lead to widespread havoc and displacement of Palestinian Families. On the other end, to strike back as a revenge attack from the Palestinian end, many children as well as teenagers are being used as suicide bombers to retaliate the killing of soldiers. Hence, repeating the cycle of using armed forces, as done by the Israeli soldiers against Palestinians.

VI. Recommendations and suggestions

The ongoing war in Israel and Palestine is due to the wide variety of reasons as discussed above in the paper. To attain peace and prosperity, it is essential for both the parties to realize that war is not the solution, as it only leads to disharmony and killing of innocent people. To achieve long term serenity both parties have to respect the cultures and beliefs of each other. One can say that Israel is prolonging the war for their benefit but the same can be said upon the Hamas group which controls the Palestinians. As stated earlier, instead of standing as a neutral party, the US supported both the groups at some level, prolonging the war period and continuation of human rights violation in a 'no stability' region. . The Human Rights Commission set up in the region should start working as a group between the parties and lay down appropriate sanctions against the people committing or abetting human rights violation.

Another way to ensure peace and prosperity is to improve the communication channel of the State Department of US. The department should send accurate information relating to the violent acts of Israel army and should take steps to place stringent punishments against the accused. This step can also ensure that there are no violation of Human rights in the region.

[133] Marc Limon, *The Human Rights Council is failing the Palestinian People: here is how to change that*, Universal Rights Group Geneva, https://www.universal-rights.org/blog/the-human-rights-council-is-failing-the-palestinian-people-here-is-how-to-change-that/.

VII. Conclusion

"Peace cannot be achieved by force, it can only be achieved by understanding" as rightfully said by Albert Einstein, the same applies in the above situation relating to Palestinian and the Israelis. Keeping aside the economic and other political issues, if both the Arabs and the Jews try to understand and accept each other's differences peace can be achieved but considering the reality and how the world functions it is a long shot trying to understand one another. Due to geopolitical interferences as well as working to one's benefit, the war will always prolong due to differences in ideologies as well as other political advantages. A war is no solution to peace and the same applies with conflict, the world should condemn and not accept the acts violating the Human Rights. This paper has suggested certain recommendations through which the governments can ensure the abstinence of such acts which violate the Human Rights, these can be adopted as the initial step towards curbing conflicts in the region.

LGBTQIA+ HUMAN RIGHTS: A COMPARATIVE ANALYSIS OF RIGHTS IN INDIA AND USA

AUTHOR- ADITYA KASHYAP[*]

ABSTRACT

Right to Equality and Non-discrimination are some of the fundamental international human rights, Sexual orientation and gender identity are among the forbidden grounds of discrimination under international human rights law, according to United Nations human rights treaty bodies. So, it becomes important for us to consider LGBTQ rights. This research paper conducts a comparative analysis of the rights available to individuals of the LGBTQ community in India and the United States. This included matrimonial rights, familial rights, the right to quality, and the right against non-discrimination. Furthermore, this paper will also go on to analyze the effect that the violation of such rights can have on the individuals of the LGBTQ community.

Key Words: LGTBQ+, NALSA Case,

I. Introduction

Human rights have recently been an accepted scholarly focus for theorists within the academic discipline of international relations, albeit this acceptance is frequently given reluctantly. More recently, international theorists have recognized LGBTQ rights, sexuality, and gender politics in general as valid issues. Another strange assertion is that these are important aspects that may influence and steer our judgments of international politics. The study of international sexuality and gender politics is demonstrated to be important for international thought in general and human rights in particular.

On the international human rights stage, LGBTQ supporters have participated in two distinct types of activity. First, they have engaged in traditional human rights activism, using traditional human rights techniques such as monitoring and reporting to apply existing human rights norms to LGBTQ lives, specifically: the right to privacy in the criminal law context; the right to equality; the family

[*] 1st year B.B.A LL.B student from Symbiosis Law School, Pune; Available at: adityakashyap.1609@gmail.com

right; the right to non-discrimination; the right to freedom from torture (applicable in cases of "forced cures" for homosexuality and psychiatric mistreatment in general); and the right to recognition of their new gender.

The LGBTQIA+ community of India has millions of members; this number is much larger than that of numerous religious communities. Many rights and protections are available to communities of these numbers, however, a number of these rights and safety are not available to the LGBTQIA+ community. Even though rights and safety are available to the LGBTQIA+ community and there have been events that furthered the cause, i.e., the 2018 judgment in Navtej Singh Johar vs Union of India[134] legalizing homosexual relationships, Transgender Persons (Protection of Rights) Act, 2019[135], there still exists a lacuna in the field of LGBTQIA+ rights.

On the other hand, the legal landscape for lesbian, gay, bisexual, transgender, and queer (LGBTQIA+) families varies tremendously across the United States because the authority to decide what constitutes a family lies predominantly within the realm of state and local law. All the states have decriminalized same-sex sexual activity, additionally, same-sex marriages have been recognized by all the states and the same has been restated by the Supreme Court in Obergefell v. Hodges[3] and United States v. Windsor[136]. Furthermore, certain states have laws that specifically protect the LGBTQIA+ community from discrimination in employment, housing, etc. However, discrimination against the members of the LGBTQIA+ community still exists, and there are still areas wherein need to be made. Many LGBTQ Americans continue to confront legal and societal hurdles that non-LGBT citizens do not, particularly in regions with strong conservative populations. This can be seen in Public Employment especially in LGBTQ individuals pursuing a career in the armed forces, where large-scale homophobia still exists. Furthermore, the members of the queer community still face discrimination in employment and accessing other economic opportunities, and face much societal hatred and seclusion.

[134] Navtej Singh Johar vs Union of India AIR 2018 SC 43212018.

[135] Transgender Persons (Protection of Rights) Act, 2019, Act No. 40 of 2019, Act of Parliament (India) [3] Obergefell v. Hodges, 576 U.S. 644 (2015).

[136] United States v. Windsor, 570 U.S. 744 (2013).

II. Analysis

India

In India LGBTQIA+ community faced the worst decisions and inequality since the beginning. They fought a lot of battles against the laws for their rights but never succeeded. In *National Legal Service Authority V. UOI* it was the first time when trans genders were accepted and provided a new identity as 'third gender' by the Supreme Court Of India. Later in 2018 section 377 of IPC was decriminalized. In 2019 transgender person (Protection Of Rights) Bill was introduced to protect their rights.

A. Lacunae in the rights available to the LGBTQIA+ community.

i. **Familial Rights**

In *Navtej Singh Johar vs Union of India*, the SC of India in a landmark judgment legalized all consensual sex among adults including homosexual sex through the partial decriminalization of section 377 of IPC[137]. Furthermore, the Supreme Court in *Shafin Jahan v. Asokan K.M.*[6] stated that "The right to marry a person of one's choice is integral to Article 21 of the Constitution". Despite these judgments, there has been no way provided for same-sex couples in India to marry. Consequently, they are derived from the right to start a family. With the language surrounding the discussion over access to marriage, it is frequently depicted as a civil or human right. Love and individual freedom of choice.

However, the issue of marriage access is far bigger. Marriage provides economic security and asset-building opportunities (via tax breaks, joint credit applications for mortgages and other debts, and access to benefits such as social security), secures inheritance, and lowers costs for family formation and child-rearing through legal recognition of parenting relationships. There are no provisions regarding adoption by same-sex couples, even though is no restriction on a person from the LGBTQIA+ community from adopting, the only way to adopt is as a single parent and this would result in a scenario where one of the partners would have no parental right over the child. Furthermore, most of the personal laws governing marriages and adoption only have a binary notion of gender and exclude transgender individuals.

[137] Section 377, The Indian Penal Code, 1860, Act No. 45 of 1860, Act of Imperial Legislative Council (India)
[6] Shafin Jahan v. Asokan K.M, 16 SCC 368(2018).

ii. **Inheritance Rights of Transgender people**

Transgender Persons (Protection of Rights) Act, 2019[138] has numerous provisions but none of these address the issue of inheritance. There are numerous personal laws in India but most of these have a binary description for inheritance. The Hindu Succession Act, 1956[139] does not make any mention of transgender. Therefore, textually, by only referring to son and daughter, it makes any succession under the Act impossible for them.

The existing literature on the issue of Lacunae in the rights available to the LGBTQIA+ community talks about the lacking familial rights for the LGBTQIA+ community and how this right has been denied even after the 2018 judgment decriminalizing homosexual relationships. [Bose & Chothani (2021)[140], Agarwal (2021)[141]]

The authors also talk about the unreasonableness of declining same-sex marriage because it is against "natural order" given that procreation and having a child is not the utmost and primary goal of marriage. [Jain (2021)[142]]

The authors also talk about problems the lack of other civil rights such as adoption for same-sex couples, where they are not allowed to adopt a child

[138] Transgender Persons (Protection of Rights) Act, 2019, Act No. 40 of 2019, Act of Parliament (India).

[139] The Hindu Succession Act, 1956, Act 30 of 1956, Act of Parliament (India).

[140] Ms Rhea Bose, Dr Karsan Chothani, TRAVERSING THE LGBT MOVEMENT IN INDIA, Gap Gyan, https://www.gapgyan.org/res/articles/(41-44)%20TRAVERSING%20THE%20LGBT%20MOVEMENT%20IN%20INDIA.pdf (23rd December, 2021).

[141] Akshat Agarwal, Marriage equality in India: thinking beyond judicial challenges to secular marriage law, Taylor & Francis Online, www.tandfonline.com/doi/full/10.1080/24730580.2021.1974768?scroll=top&needAccess=true (22nd December, 2021).

[142] Priyanshi Jain, Is India ready for Same-sex marriage, Issue 3 March 2021, Jus Corpus Law Journal, (476-484), 2021.

without one of the partners foregoing the legal right over the child. [Rai (2020)[143], Vishwakarma (2020)[144], Singh (2021)[145]]

The authors also talk about the issue of Transgender rights at length. Authors talk about the problems faced by transgender during adoption given the fact that most personal laws talk about adoption from a binary gendered perspective. [John (2021)[146]]

The authors also talk about the problems in the various laws in India which only have a binary gendered perspective. The same is the case with the various succession laws such as the Hindu Succession Act, 1956[147] which only talks about male and female succession rights. [Gulati & Anand (2021)[148]]

However, all these authors just provide an overview of the topic and any authors barely go in-depth about how to tackle the issue and find a solution to issue.

B. Barriers to exercising the existing rights.

Even though vent, numerous rights have been made available to the LGBTQIA+ community, many barriers prevent individuals from accessing justice. These include social, cultural, and financial barriers. These barriers generally result from the stigma and bias which is related to the LGBTQIA+ community.

The existing literature on the issue talks in-depth about the barriers that individuals of the LGBTQIA+ face and how it affects their lives. The authors talk at length about how the stigma and bias associated with the community have resulted in a scenario where individuals from the LGBTQIA+ community are

---

143 Satvika Rai, Courts, the law and LGBT politics in India, (22nd December, 2021) https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1231.

144 Prof. Dr. Mithilesh Vishwakarma, THIRD GENDER MARRIAGE RIGHTS IN INDIA, ILSJCCl, (22nd Deceber, 2021) https://journal.indianlegalsolution.com/2020/01/15/third-gender-marriage-rights-in-india-dr-mithilesh-vishwakarma-kratika-arora/.

145 Shubhangi Singh, Adoption by Same-sex couples in India: A Right Long Overdue, IRALR, (21st December. 2021), https://www.iralr.in/post/adoption-by-same-sex-couples-in-india-a-right-long-overdue.

146 Blessy John, Transgender Rights as Human Rights, Volume 1, Juris Prudentia: An anthology on Human rights laws and society in India, 2021.

147 The Hindu Succession Act, 1956, Act 30 of 1956, Act of Parliament (India).

148 Karan Gulati and Tushar Anand, Inheritance rights of transgender persons in India, No. 350, National Institute of Public Finance and Policy, 2021.

unable to access healthcare services and facilities. [Arora (2021)[149], Pandya & Redcay (2020)[150]].

The authors also talk about factors that cause such a situation where the individuals of the LGBTQIA+ community are unable to access these including bullying, family and social rejection, financial barriers resulting from exclusion from society, etc. [Cray (2013)[151]] Despite all the existing literature there exist a lack of research in the issue of how barriers prevent individuals of LGBTQIA+ community from accessing justice and other existing crucial rights.

C. Economic Impact of discrimination of people of LGBTQIA+ community.

It has been long observed that individuals belonging to the LGBTQIA+ community suffer from discrimination in employment and terms of pay even if they are accepted by an employer. Furthermore, there is also an economic cost for the economy associated with a waste of human capital resulting from the exclusion from the workforce.

The authors on this issue of the economic talk in-depth about the economic impact of discrimination against people of the LGBTQIA+ community on the development of the economy and the financial impact on the individual.

The authors talk about how economic development is increased with the inclusion of individuals from the LGBTQIA+ community into the workforce. [Badgett, Rodgers & Waaldijk (2019)[152]] The author describes how the cost of stigma and exclusion is rooted in economic models of discrimination, and how such things can result in unemployment, underemployment, and lower productivity, and indirectly through behavioural feedback loops that reduce individual and social investment in human capital and health. This leads to

[149] Anmol Arora, India's LGBTQ+ community continues to face healthcare barriers, BMJ 2021, 375.
[150] Apurva Kumar Pandya & Alex Redcay, Access to health services: Barriers faced by the transgender population in India, Volume 25 Issue 2, Journal of Gay and Lesbian Mental Health, 2021.
[151] Andrew Cray, 3 Barriers that stand between LGBT and Healthier Futures, Center for American Progress, (22nd December,2021), https://www.americanprogress.org/article/3-barriers-that-stand-between-lgbt-youth-andhealthier-futures/.
[152] M. V. Lee Badgett, Kees Waaldijk & Yaana van der Meulen Rodgers, The Relationship between LGBT inclusion and economic development: Macro-level evidence, Volume 120, World Development, 2019, 1-14.

economic inefficiencies and lost economic output and lower growth. [Badgett (2013)[22]]

The author in "LGBT Community in India" talks extensively about how an individual of the LGBTQIA+ community who has been experienced social exclusion can suffer, the author talks about the results of such exclusion which include dropping out of school due to bullying and improper social discrimination, social exclusion resulting in difficulty in finding regular jobs, lack of support from family and society, regular migration to avoid stigma, etc. all these results in a worse financial situation for the individual [Kumar (2019)[153]]

Despite all these research papers and articles there still exists a gap in how much negative impact this stigma has on the economy at large and on the individual.

United States of America

While the familial rights missing in India, are available in the United States and are not available to the LGBTQ community in the United States. Furthermore, certain factors prevent Americans from accessing their rights.

D. Discrimination in Employment Opportunities

LGBT persons make up around 5% of the population, yet job discrimination based on sexual orientation and gender identity is still all too widespread. Even though numerous studies have concluded that sexual orientation and gender identity do not affect workplace performance, a large body of research using a variety of methodologies has consistently documented high levels of discrimination against lesbian, gay, bisexual, and transgender (LGBT) people at work over the last four decades[154][155][156][157].

[153] Sanjeev Kumar, LGBT Community in India: A Study, Educreation Publishing, 2019.

[154] Brad Sear S, Nan Hunter, & Christy Mallory, Documenting Discrimination on the basis of Sexual Identity and Gender Identity. (Sept.2009), http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment

[155] Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 432.

[156] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 967.

[157] Perry v. Brown, 671 F.3d 1052.

Scientific field research, controlled experiments, academic publications, court cases, and articles have proven widespread and ongoing workplace discrimination against LGBT persons. Furthermore, federal, state, and municipal courts, legislative bodies, and administrative agencies have all stated that LGBTQ individuals confront significant workplace discrimination. According to further studies, such prejudice has a detrimental impact on LGBT people's health, earnings, job possibilities, workplace productivity, and job satisfaction.

The discourse surrounding the LGBTQ rights movement's drive for civil rights is sometimes couched in terms of social equality and citizenship, but the underlying concerns are frequently economic. One of the primary concerns is that the lesbian, homosexual, bisexual, and transgender (LGBT) group experiences economic disadvantages that other people do not encounter owing to their sexual minority status. Current anti-discrimination rules are frequently advocated to save gay and lesbian people from losing their jobs or employment possibilities, and hence their livelihood.

The issue of employment discrimination has been talked about extensively in various research papers. Furthermore, a clear link has been established between a negative workplace as a result of a person's sexual identity. An empirical study entitled "Documented Evidence of Employment Discrimination & Its Effects on LGBT People"[158], the study demonstrated that widespread and ongoing employment discrimination against LGBT people has been documented in scientific field studies, controlled experiments, academic Journals, court cases, administrative complaints to state and local governments, and complaints to community-based organizations, and in newspapers, books, and other media. LGBTQ individuals have encountered pervasive job discrimination. According to research, discrimination against LGBTQ persons has a detrimental impact on health, earnings, employment possibilities, workplace productivity, and job satisfaction. Furthermore, LGBT persons and their non-LGBT employees routinely report experiencing or witnessing workplace discrimination based on sexual orientation or gender identity. As recently as 2008, the GSS, a nationwide probability poll representative of the US population, discovered that 27 percent of LGB respondents had experienced sexual orientation-based discrimination in the five years preceding the survey. More precisely, 27% had experienced

[158] Sears, Brad; Mallory, Christ, Documented Evidence of Employment Discrimination & Its Effects on LGBT People.

workplace harassment, and 7% had been fired. The GSS discovered that among LGB adults who are open about their sexual orientation at work, and even higher proportion, 38 percent, experienced at least one type of discrimination in the five years preceding the study. This discrimination was even apparent in the case of transgender individuals. In the biggest poll of transgender persons to date, 78 percent of transgender respondents experienced at least one kind of harassment or abuse at work because of their gender identity; more specifically, 47 percent had been discriminated against in hiring, promotion, or job retention. This discrimination on such grounds was observed throughout the country, 70% of transgender respondents in a 2009 California poll and 67% of transgender respondents in a 2010 Utah survey reported experiencing workplace discrimination based on their gender identification.

As mentioned earlier, such discrimination in the workplace has some substantial drawbacks. Some of these impacts have been talked about in "EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE: EXISTENCE AND IMPACT"[159]. Wage and Employment

Disparities are one of the biggest concerns when it comes to drawbacks of discrimination. Numerous studies have been conducted which show that heterosexual men are paid more than gay men for the same work.[160] A pay gap of around 10-32% has been observed between gay and heterosexual men for the same work and productivity.[161] Furthermore, according to research, prejudice can have an impact on an individual's mental and physical health.

According to the "minority stress model," prejudice, stigma, and discrimination generate a social context defined by excessive stress, resulting in health

[159] Brad Sears, Christy Mallory, EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE: EXISTENCE AND IMPACT, Employment Discrimination Against LGBT People: Existence and Impact.

[160] Brad Sears, Christy Mallory, Documented Evidence of Employment Discrimination & Its Effects on LGBT.
People (July 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July2011.pdf; The Employment Non-Discrimination Act of 2011: Hearing on S.811 Before the Senate Comm. on Health, Education, Labor, and Pensions, 112th Cong. (June 12, 2011) http://williamsinstitute.law.ucla.edu/research/workplace/testimony-s811-061212.

[161] Adam P. Romero et al., Census Snapshot: united State S 2 (Dec. 2007), available at http://escholarship.org/uc/item/6nx232r4.

inequalities for sexual minorities compared to heterosexuals.[162][163] The Institute of Medicine of the National Academies, an independent organization of scientists that advises the federal government on health and health policy issues, echoed this sentiment in its study on "The Health of Lesbian, Gay, Bisexual, and Transgender People."[164]

E. Hardships resulting from Social Hatred and Exclusion

Right against discrimination is a basic international human right. The violation of this could lead to actual socio-economic headships. LGBTQ individuals are a diverse community with distinct strengths and problems. When compared to the overall population of older adults, this group has health, personal, and economic disadvantages; however, subgroups such as transgender and bisexual older adults and those living with HIV are more vulnerable to disparities and lower health outcomes. As this group expands, more study on variables that promote health equity while lowering prejudice and increasing competent care delivery is required. The LGBTQ community has been receiving much societal hatred and has been excluded from society merely based on their sexual and gender identity. More than a third of LGBTQ Americans face discrimination each year.[165] Furthermore, the same study went on to elaborate that 50% of LGBTQ Americans face moderate or significant psychological impact because of discrimination. Furthermore, half of LGBTQ Americans say they have hidden a personal relationship, and one-fifth to one-third have changed other elements of their personal or professional lives.

These impacts can be even more intense in the case of the youth. LGBT kids and young adults in the United States endure harassment, bullying, and exclusion from kindergarten through twelfth grade and in higher education, according to survey data, court cases, and anecdotal reports. For example, data from the 2017

[162] David R. Williams et al., Racial/Ethnic Discrimination and Health: Findings from Community Studies, 98 am. j. Pun. healthS29 (2008), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC2518588.

[163] Ilan H. Meyer, Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence, 129 Pychol. Bull. 674 (2003), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932; Institute Of Medicine, The Health of Lesbian, Gay, Bisexual and Transgender People: Building a foundation for Better understanding 211–22 (2011), available at www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx.

[164] Institute Of Medicine, The health Of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding (2011), www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-andTransgender-People.aspx.

[165] Sharita Gruberg, John Halpin, Lindsay Mahowald, The State of the LGBTQ Community in 2020, https://www.americanprogress.org/article/state-lgbtq-community-2020/#Ca=10.

YRBS revealed that LGB and transgender high school students were more likely than their non-LGBT classmates to report being bullied at school, engaging in a physical fight, and being threatened with a weapon on school grounds, among other negative effects.[166] According to the 2015 GLSEN National School Climate Survey of LGBTQ middle and high school students, 73 percent of respondents reported verbal harassment based on their sexual orientation at school, and 56 percent reported verbal harassment based on their gender expression at school in the previous year.[167]

Another area of concern is Family Rejection. According to research, many LGBT kids have troubled ties with their families or endure maltreatment from their parents as a result of their sexual orientation and gender identity. LGBT adolescents regarded non-accepting families as the most significant difficulty in their life in one study of the problems LGBTQ youth encounter.[168] This all results in people from the LGBTQ community suffering from more psychological issues and being disproportionately poor.[169] Along with this, people from the LGBTQ community also report worse health outcomes. 15% of LGBTQ Americans report delaying or avoiding medical treatment due to prejudice, including almost one-third of transgender people.[170]

[166] U.S. Ctrs. for Disease Control & Prevention, 2017 Youth Risk Behaviour Survey Results: Select U.S. States High School Surveys (2019), https://www.cdc.gov/healthyyouth/disparities/pdf/states_transgender_report.pdf.

[167] GLSEN, SCHOOL CLIMATE IN FLORIDA 1 (2017), https://www.glsen.org/sites/default/files/Florida%20State%20Snapshot%20-%20NSCS.pdf.

[168] Human Rights Campaign, Growing Up LGBT in America: HRC Youth Survey Report Key Findings 2 (2012), http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/Growing-Up-LGBT-inAmerica_Report.pdf.

[169] 7 M.V. Lee Badgett, Laura E. Durso & Alyssa Schneebaum, Williams Inst., New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBPoverty-Update-Jun-2013.pdf.

[170] Supra at 165.

III. Conclusion

"When all people are treated as equal, no matter who they are or whom they love, we are all free." This statement rings even truer in the context of LGBTQIA+ rights. Today, some of the very basic rights are not available to the LGBTQIA+ community in India. This includes matrimonial rights, familial rights, and even inheritance rights in the case of transgender individuals. Furthermore, other things such as access to healthcare, equal economic opportunities, equal education, and the right to equality and non-discrimination are also important. Most of the above-mentioned rights are available to American citizens, however available rights become moot if numerous barriers prevent one from accessing them. Despite the legal and constitutional guarantees Indians and Americans alike face discrimination and encounter barriers when they try to access their rights.

JURISDICTION OF CRIMES ON BOARD

AUTHOR- APOORVA SUDHAKAR[*]

ABSTRACT

We have often viewed various Media that depict various criminal activities occurring on board Planes. However, much like most popular media, a large amount of misinformation about such activities and any jurisdiction that may govern them have been caused as a direct result.

The paper attempts to simplify and clarify exactly who holds the jurisdiction to trial over any crimes committed on board Aeroplanes. Much like with crimes committed aboard sea vessels in the high seas, it is often assumed that the captain, or otherwise highest ranked Individual is considered the ultimate authority in such cases. Such misconceptions need clarification, and this paper will attempt to do so.

The main question and purpose of this paper, will be to simplify, and attempt to answer specifically exactly what jurisdiction exists that may cover any crimes committed on board aeroplanes. Much of the legislation on the topic is contained within the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Signed at Tokyo, on 14 September 1963, Popularly known as the Tokyo Convention of 1963.

The need for such a convention was in response to the wave of hijackings in 1958 where aircrafts were hijacked and used to divert to the US and vice versa in the 1961 wave of Hijackings there was a wave of diversions of aircraft from the United States to Cuba. To prevent further aircraft diversions, the Legal Committee of the ICAO met in Rome in 1962 to draft a convention on the subject of crimes committed on board an air-craft in international flight. This draft known as the Rome Draft was submitted to the States of the world for comment and a diplomatic conference was convened in Tokyo in the year 1963 for final approval.

Key Words: Tokyo Convention, ICAO, Passive Personality Principle, Jurisdiction, Convention on the Territorial Sea and the Contiguous Zone

I. Introduction

The main purpose of the research paper being attempted, is to recognize and clarify the issues of the jurisdiction of any and all crimes committed on board in-flight aeroplanes. Much like the issue with sea vessels, multiple international

[*] 4th year B.A LL.B student from ILS Law College, Pune; Available at: apoorvasudhakar07@gmail.com

conventions exist and are enacted specifically in order to attempt and abate the multiple jurisdictional issues that may arise as a result of the addition and popularity of airlines as the preferred method of international travel.
The question regarding Jurisdiction on-board aircrafts has been debated since the invention of aircrafts. It was a hotly debated topic, but no actual strides to clarify said issue had been made until the 1963 convention, popularly known as the Tokyo convention was signed, regulating the rights of States to exercise jurisdiction over crimes committed in aircraft, and generally governing the conduct and activities of people travelling by air.

The main issue in this debate had always been the problem posed by the commission on crimes on board in-flight aircraft, as multiple jurisdictions may apply, such as the state the aircraft is registered in, the state in whose airspace the criminal action took place, or in case of international airspace exactly how and who would hold jurisdiction over said action.

In essence the convention, and the various statutes signatory nations to the convention which currently include 186 and nearly every UN member. In particular, India adopted the Tokyo Convention Act in 1975, turning the treaty into formalised legal code within the nation. The task attempted in this paper is to study the benefits and downfalls the guidelines and laws as established by the treaty may have on various jurisdictional issues insofar as it affects crimes committed on board planes.

II. Methodology

The issue about jurisdiction for any offences committed on board has been researched and reviewed many times by noted authors as mentioned below already, since they have been diligent, there is very little research that is primary in nature, thus this paper will mostly deal with secondary data collected and collated by those older and wiser than myself.
It is my hope that a reader of my papers finds a unique perspective of my own whilst reading this paper and understand the current legislation for jurisdiction of crimes committed on board a plane. And any suggestion or improvements I believe may clarify and simplify such a murky and complicated jurisdictional issue, as is that for any crimes committed on board aircraft.

III. Literature Review

In essence, reviews of various legal documents, in particular the Tokyo Convention of 1963 , and the various committees and subcommittees that were the reason for such a convention. Other legal documents such as the Tokyo Convention Act of 1975 adopted by India, and various other statutes that are directly in line with the topic being researched.

Such documentary Review and Literary Research combined with statistical analysis as undertaken with senior research on this paper's topic such as J.G. McCarthy, M. Plachta, V.I. Ryzhy, G.S. Sanchez, W.P. Schwab, S. Shubber and building off their works and offering my own Perspective where they might differ from said esteemed researchers and Authors, Since the aforementioned authors and many others have already researched and collected data and offered their own views on the topic, my own perspectives and opinion should and will be considered as secondary research, which will hopefully build off said primary research in a meaningful and appreciable manner and offer my own interpretation on the main issue and the actions taken in order to alleviate them.

IV. Research question

This paper attempts to in essence discusses the many strengths and weaknesses of the Tokyo convention in particular, regarding the jurisdiction of crimes on-board Aircraft. It is against this background that Dr. Shubber analyses the convention which despite inherent weaknesses is worthy of study. In fact, in the last paragraph of his work, Dr. Shubber admits "*The Convention is not a perfect instrument in either substance or terminology, but it is a good step in the direction of combating crimes on board aircraft, in an age where one person in the aircraft may, by his conduct, endanger the lives of over 300 persons travelling by air.*"[171]

V. Jurisdiction aboard Aircraft

The Tokyo Convention , was the fundamental show of its inclination attempting to apply and uphold space upon infringement that were committed on board plane. There have been different events in the fundamental years to this show where guilty parties should be left free without major as the ward had not been portrayed doubtlessly enough for any court development to blame concerning this issue. Many cases exist where non-criminal matters were Among the more

[171] Sami Shubber, Jurisdiction over Crimes on Board Aircraft, 329, (1973).

eminent of such a model would be US versus Cordova, on a take-off from Puerto Rico to New York, worked by a plane pursued the U.S, Cordova took an interest in a fight with another pilgrim while the plane was flying over the high seas. Endeavours by bundle people to stop the fight achieved an escort being struck, and the pilot snacked by Cordova.
Right when the plane showed up at New York, Cordova was gotten and blamed for assault.

Regardless, around then there was no association district to blame offenses committed on board plane over the high seas. Under the public power law of that time, U.S. criminal rule was material to infringement executed in the space of the United States and those valid on vessels on the high seas. It was noted in U.S. v Cordova that a plane was not a 'vessel' and that 'on the high seas' doesn't really suggest 'over the high seas'. Because of this opening in U.S. rule, Cordova sorted out a brilliant strategy for making some separation from discipline. Regardless, soon sometime later such a need the U.S. rule was helped.

Nonappearance of room notwithstanding wasn't the central issue before the show. Consider what's happening proposed by Iryna Sopilko in her article, Where in, an Aircraft pursued Italy, worked by a carrier of China, was conveying an outing from let's say, New York to Beijing. On board such a flight when the plane was going through French airspace, wayfarer X (Russian Citizen) and another, Passenger Y, (U.S Citizen), wandered into a genuine battle. Voyager X committed underhandedness to Passenger Y, as such the Commander of the Aircraft, decided to land in the nearest region, That being an inside the area of Germany, to give clinical manual for Y besides, dispose of pioneer X from flight.

In this particular hypothetical, something like Six separate countries could ensure Jurisdiction. Since the horrendous direct happened in French Airspace, France could ensure locale over the issue, taking into account the normal rule, as the State whose space the plane was overflying while the compromising presentation was executed. The space of a state joins its property area, ordinary waters, and the airspace over its property and sea district. As the Craft was pursued Italy, it could in this way ensure area under the Law of the Flag, yet the carrier of the specialty was Chinese, thusly giving China Claim of ward. Germany could similarly ensure locale over the alleged in danger party, considering the affirmed was bound in said countries jurisdiction. In like manner, the U.S could

ensure ward as the overcomer of said dreadful approach to acting was an occupant applying the Passive Personality Principle. The Passive individual rule allows a State to proclaim space as for the offense committed against its public any put in the world. Simultaneously, the Russian Federation, as the public state of the violator, could in this way ensure ward on the ground that its Criminal Code applies to criminal offenses by each Russian public, whether the appearance being intimated a happened in the space of the Russian Federation or elsewhere abroad.[172]

In spite of the way that acts that recall an offense for State A may not be considered as an offense in State B or the contrary methodology for getting around.

Not just lawbreaker issues could have area organized, various births have happened, as certified by the International Civil Aviation Organization, spread out, 24 June 1946 noted, Nationalities of Births on board are additionally dumbfounded. For example, to imply an ICAO Report, A birth on board a French plane over Belgian space is considered to have occurred in France under both Belgian and French rule. Clearly, expecting the plane was a flying over British locale right now the birth happened., the birth is considered by France to have a happened in British region and by Great Britain to have happened in France. For this ongoing circumstance the youth would have no character, adjacent to on the off chance that the last not perpetually set up by that of its parents. There existed various issues as iterated early. These and in a general sense more jurisdictional issues lead to the fanning out of the ICAO, International Civil Aviation Organization. The ICAO was made by the Chicago Convention[173], which obliged the premise of that relationship, with the objectives, cover alia, of keeping an eye out for the necessities of the social classes of the world for safe air transport, and to drive security of outing in generally air course.

The sittings of the Legal subcommittee of the ICAO achieved different draft shows, for instance, the "Valid Status of Aircraft" called the Montreal Draft, "The Draft Show on Offenses and Certain Other Acts Occurring on Board Aircraft" called the Munich Draft. The Final Draft, also known as the Rome Draft, The Legal Committee thought that the text prepared was in a suitable condition for submission to a diplomatic conference, and for that purpose it presented the

[172] Criminal Code of the Russian Federation 1996, art. 12(1).
[173] Convention on International Civil Aviation, Art 43, 1944.

draft to the ICAO Council The Rome draft was placed before the International Conference on Air Law, held in Tokyo, on 20 August 1963. This draft was adopted as the Tokyo Convention, in effect from 4-12-1969.

This figured applies to commission or plan of commission of offenses or certain different circles back to stack up plane pursued a Contracting State in-lurch over the high seas and a couple district past the area of any State disregarding the airspace having a spot with any Contracting State.

On an extremely essential level area of infringement committed on board in flight, rest in the state of enlistment gave such state is a contracting state, signatory to the party. A Contracting State which isn't the State of selection may just steamed a plane in outing to rehearse its criminal district over an offense executed on board in the going with cases as it would influence said nations locale, offense did against nationals of such state or such offense is risk to the security of said state. The convention was also the first to properly recognize the powers and immunities of the aircraft commander who on international flights may restrain any person(s) he has reasonable cause to believe is committing or is about to commit an offence liable to interfere with the safety of persons or property on board or who is jeopardising good order and discipline[174].

Obviously in such circumstances where the plane could go through the airspace of another state over a close by flight. As such it very well may be seen by a fair exploring of the show, that the show sees that states have the right and, unbelievably, the obligation of ward concerning any horrible approach to acting committed upon plane sought after that state. In any case, a non-selected state could ensure region gave that the Nationality of said miscreant or the hardship is of said character. Obviously if the offenses are against the security of the non-enlisted state.

While the show plainly vests the condition of the State of choice of the plane with a nonexclusive region over offenses and acts committed on board[175], the Tokyo Convention tries to offer a reaction for such a circumstance wherein different states could guarantee rule and there exists a contention of wards. In addition, Article 3(2)[176] of the show gives that the condition of enrolment ought to expect to fan out its locale over such offenses. It follows, in this way, that despite how there is no particular course of action dealing with the need of states in practicing area, the Convention concludes a need of the condition of selection.

[174] Tokyo Convention, Chapter 3, 1963.
[175] Convention on Offences and Certain Other Acts Committed on Board Aircraft Art 3 (1963).
[176] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Art 3(2) (1963).

VI. Failures of the Tokyo Convention as Applicable to its Purpose

There are a few plans in the authentic show, which diminishing and hurt the capability of the Convention. For instance, the way things are fundamentally genuine to an Inflight plane, which the show portrays concerning, 'the explanations behind this Convention, a plane is seen as in take-off from the following when power is applied with an authoritative objective of outing until the second while the appearance run ends[177] initiating that an offense committed while such craftsmanship is disturbing to the runway isn't covered under the show.

Another issue being the way that the Convention doesn't portray or list what the offenses it very well may be applied to are, such issues are left up to the Respective picked states who could hold such area on the offenses. In that end, the jurisdictional issues could become murkier as what is an offense in the laws of one state without a doubt won't be one in the enrolled state.

Thus exemplifying issues with the enforcement of such jurisdiction as may exist in any case. Regardless, this way encapsulating issues with the need of such ward as may exist.

Article 2 of the show dissects in that end Without inclination to the plans of Article 4 and close by when the progress of the plane or of individuals or property organized so requires, no blueprint of this Convention will be translated as supporting or requiring any advancement in respect of offenses against healing laws of a political sort or those pondering racial or outrageous separation.' basically diminishing to how, no state is obliged to forgo or prosecute a person who has committed an offense of a political sort. Hence conceivable flight wrongdoers could search for a safe space, in a manner of speaking, in a state smart to their political motivations.

Along these lines lessening reasonableness, According to Article 4 of the Tokyo Convention, the guilty party ward of the ordinary State over offenses executed on board a plane in trip in its airspace becomes employable if: "(a) the offense really influences the space of such State." One can without an altogether remarkable stretch find relationship with a hindrance in the Convention on the Territorial Sea and the Contiguous Zone of 1958 which bestows, 'The criminal area of the waterfront State should not be rehearsed on board a foreign transport

[177] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Art 1 (3)(1963).

going through the close by sea ... , save simply in the going with cases: (a) If the results of the awful approach to acting unwind to the ocean front State,'16

The actually alluded to outline under Art 4 of the Tokyo Convention is evidently crude, as there is surely not a smart explanation concerning what might be an offense that overall effects the state whose airspace said offense was committed. A state could ensure any horrendous approaches to acting completed in its own airspace could incorporate to influencing the state as it clearly destroys said states control over infringement executed in its space. Thusly giving indeed another state space over conveyed offense if it so chooses to attempt and ensure jurisdiction.

Article 4(b) of the Tokyo Convention permits the familiar State to restrain a plane in flight, to rehearse its criminal district over offenses completed prepared, if the "offense has been executed ... against a public or dependable occupant of such State". Relative as the actually alluded to system, the Article 4 (b) by and large permits a seconds state region over offenses, gave A. said Offense happened in its airspace, and B. the offense was committed against an occupant or incredibly impressive occupant of such state. Adding fairly more complicated plan to the approaches of the Jurisdiction on board such plane as said offense would have happened.

The show also gives no strong measure to discuss objective expecting a jurisdictional solicitation occurs, nearby wariness, which didn't again have a say in the affirmed show and is a prompt discussion objective structure consistently used in such cases.

Besides, the best obstructed assumption for the Tokyo Convention as shown by S.Shubber would be the way that it has solid locales for no instrument. Taking into account the opportunity of 'aut dedere aut judicare', wherein expecting the state in authentic commitment in regards to in danger party won't kill said blackguard, they'll be called by the state at present keeping said unpardonable party. In any case, article 16 (2) of the show states, 'nothing in this Convention will be considered to really commitment to permit discharge.' significance there is no risk with respect to the appearance state in veritable control over the indefensible party to truly take out the violator, and there is no responsibility in regards to such an appearance state, to charge the committed party beside a shallow evaluation either, along these lines completing the need to as the standard would state, 'Kill or Prosecute'.

VII. Conclusion

As mentioned above, the Tokyo convention of 1963, has made significant contributions to the issues regarding on board jurisdiction, in particular regarding crimes on board in flight aircrafts and established clearer rules of jurisdiction over offences committed on board.

In the field of On board jurisdiction, the Tokyo Convention, 1963 was the first and patently amongst the best advancements. Especially when one compares the convention to the previous regime for such jurisdiction as was under the remit of International Customary Law. Under the convention, the criminal laws of the State of registration of the aircraft have been endowed with extraterritorial effect, the number of States competent to exercise jurisdiction has been reduced, and the territorial States have conceded a certain measure of the exercise of their sovereign rights in this field.

As evident, the position that the state of registration will hold jurisdiction, and such state's laws being applicable extra-territorially is reminiscent of the position held by staṣtes on that of ships on the high seas. Combining this position with the limitations of the jurisdiction of the states being flown over having to abstain from attempting to claim Criminal jurisdiction, thus making the claim of the Registered state a rule rather than said jurisdiction being an exception to it.

The Legal Sub-committee of the ICAO that submitted the Rome Draft which was accepted after signing as the Tokyo Convention, had foresight to see there were several actions and activities that wouldn't constitute actual criminal offences in many signatory states but would cause many issues to the functioning of either the Aircraft or the professionals mainiating or flying said aircraft. This being the reason that the commander on such a flight, and the crew and attendants as applicable were empowered to take certain measures as deemed necessary for the protection of life, property and safety in the aircraft. Such rights as those granted by the Convention are essential for the protection of safety and life, and yet they do not constitute an encroachment on the liberty of the individual.

While the Tokyo convention has been a net positive in terms of assigning jurisdiction over Crimes Committed On-Board Aircraft, there are multiple deficiencies in the convention as were enumerated above. Which have been noted by, and many signatory states have passed legislation regarding such jurisdiction as may apply under the convention.

In India in particular, the Tokyo Convention Act, (1975) attempts to alleviate if not entirely remove any such issues as are found within the Convention. Article

3 of the act, imposes indian law on crimes to Indian registered Aircraft. The Art 4 of the same Act reads as follows, '***for the purposes of application of the Extradition Act, 1962 (34 of 1962), to crimes committed on board an aircraft in flight, any aircraft registered in a Convention country shall, at any time while that aircraft is in flight, be deemed to be within the jurisdiction of that country, whether or not it is for the time being also within the jurisdiction of any other'*** attempting to alleviate if not succeeding in the issue regarding the lack of extradition provisions in the convention.

Many such members to the convention have attempted and enforced such legislation, removing the ambiguity and inefficiencies present in the Convention. It should be noted that while the convention has its faults and deficiencies it is one of the very few if not the lone convention regarding Jurisdiction of Crimes Committed On-Board Aircraft. And as such it reserves a place of importance within said sphere of legislation and international law.

CURRENT INTERNATIONAL LAW FOR CYBER CRIMES: A NEED FOR NEXT STEP

AUTHOR- EKTA DIXIT *

I. Introduction

Through a wide variety of restrictions and regulations, the International Law regulates the relationship between nations and other international players (such as international organisations). From weapons control to international commerce, to environment, it has been used as a framework for governing global governance. The importance of international law in cyber environment has developed as governments pay greater attention to the 'governance of cyberspace' (the technological infrastructure that enables the global internet to work) and 'governance in cyberspace" (how states, industry, and individuals may utilise this technology).

However, apart from few exceptions such as the Budapest Convention on Cybercrime[178] and the African Union Convention[179] on Cyber Security and Personal Data Protection (yet to be in effect), the international law does not provide specific guidelines for cyberspace regulation.Moreover, it's a cutting-edge technology that's constantly evolving. As a result, for many years, it was unclear whether or not existing international law extended to the domain of Internet. The nation states and international organisations such as the UN's First Committee on Disarmament and International Security, the G20, European Union, the ASEAN, and the Organization of American States (OAS) have all stated that existing international law applies to states' use of information and communication technologies (ICTs). Thus, International Law is no more a question of whether, but rather how it functions.

While many other international challenges have their roots in nations, the governance of cyberspace has its roots in academic institutions and private players who built the internet (albeit with government funding). Internet corporations evolved as a result of internet commercialization, and their platforms now serve as the backdrop for most cyber activity, including state and

* LLM student from O.P.Jindal Global University; Available at: ektaadixit@gmail.com

[178] CONVENTION ON CYBERCRIME BUDAPEST.

[179] AFRICAN UNION CONVENTION ON CYBER SECURITY AND PERSONAL DATA PROTECTION.

government-sponsored cyber operations. Political contests in cyberspace have sparked the attention of states. As a result, significant players in cyberspace governance include, but are not limited to, governments.

State-specific laws are the focus of international law (and their creations, like international organizations). Cyberspace is governed by international law, although not exclusively. Other regulatory regimes (such as industry self-regulation) provide alternative vehicles because of industry and civil society actors. As an example, multi stakeholder governance has become the primary means of governing the internet's architecture. Non-state actors have also demonstrated an interest in the application of international law to internet governance. If you're interested in how international law is applied to cyberspace, for example, you may want to check the International Committee of Red Cross[180] and Independent Groups of Experts' for the two Tallinn documents (there are proposals for a third). According to Microsoft's President, Brad Smith, governments should draught a new "Digital Geneva Convention"[181] to govern state activity in the digital realm.

II. Existing Challenges on International Law and Governance on Cyberspace

Introducing international law into cyberspace is not a new concept. It has been suggested and denied by various legal professionals, corporate entities, and nations since 1996. The debate over international regulation of cyberspace is dominated by the three schools of law, i.e., the liberal institutionalists, cyber-libertarians, and statists. The institutionalist like Wu (1997) propagates the need of both, rule-based multilateralism and international institutions, in the management of cyberspace. There are others, such as John Barlow (1996) [182], who believe that cyberspace should stay free from repressive authority and oppression, they advocate for a free and open internet. Some others, like James Lewis[183] believe that it is the job of the nations to create national and

[180] *International humanitarian law and cyber operations during armed conflicts*, ICRC, available at https://www.icrc.org/en/document/international-humanitarian-law-and-cyber-operations-during-armed-conflicts.

[181] Brad Smith, *The need for a Digital Geneva Convention,* MICROSOFT, available at https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention.

[182] John Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (February 1996), available at http://homes.eff.org/-barlow/Declaration-Final.html.

[183] JAMES A. LEWIS, SOVEREIGNTY AND THE ROLE OF GOVERNMENT IN CYBERSPACE, *BROWN JOURNAL OF WORLD AFFAIRS,* 16(2): 55-65.

international laws that control cyberspace. We can see the influence of these three notions in international cyber law development. Because of these difficult arguments, binding and well-functioning international legislation on cyberspace is yet to emerge. As a foundation for these arguments, three key issues in the formulation of international law in cyberspace have been raised: jurisdiction, arbitration, and legal instruments and jurisprudence.

Basak Cali[184] argues that the jurisdictions in International law, are essentially determined by the subject matter of international law or the players involved in international relations as well as the territoriality within which it may be legally executed. Law or players in cyberspace varies from governmental actors, huge internet corporations, small-medium enterprises (SMEs), hackers, and individuals–not to mention that the internet intrinsically allows anonymity to its users. All of these diverse players have different views on how internet regulation should be carried out. Addressing which areas of law are appropriate for international regulation in cyberspace and which concerns should be addressed remain an enormous challenge. To add insult to injury, it's becoming more difficult to identify actors' actions in relation to their location. There have been several discussions over attribution of cyber activity, whether in academic writings or policymaking. However, there is no single dominating and prevailing voice in that discussion except for some attributions of cybercrime from state players to non-state actors in which it is reasonably accepted and working under international frameworks, such as Interpol, Europol, ASEANAPOL, and UNODC. International players cannot agree on the status of cyberspace as global commons, territory of physical states, or based on national origins in terms of domain.[185] As a consequence, establishing jurisdiction over international cyber law has been difficult till date.

As we've seen, arbitrators have their work cut out for them because of the myriad of variables and difficulties at play. Clear means for settling disputes and arbitration are required by public international law to guarantee that legislation is adopted and binds its signatories and subjects.[186] Because of the wide variety of participants in cyberspace, no globally agreed-upon legal standard has yet been achieved on who should be given the mandate of conflict resolution and arbitration systems. Cyberspace arbitration already exists, but much of it

[184] BASAK CALI, *INTERNATIONAL LAW FOR INTERNATIONAL RELATIONS* (Palgrave Macmillan 2015).
[185] LIAROPOULOS ANDREW, CYBERSPACE GOVERNANCE AND STATE SOVEREIGNTY IN *DEMOCRACY AND AN OPEN-ECONOMY WORLD ORDER* (Springer 2017).
[186] *Supra* note 13.

focuses on trade and crime, and operates inside the national legal system rather than on international level or in international courts. The impartiality of the legislation is jeopardised in the system like this, due to the high negotiating power in the hands of the government. However, international arbitration in cyberspace is not inconceivable.[187] Cyberspace problems might potentially be handled by the Permanent Court of Arbitration (PCA) in The Hague, Netherlands, since it already has a mandate to adjudicate on matters including outer space, energy, and environmental disputes. State actors must be on board to implement such mandates and powers on cyberspace instances.

The issues of legal instruments and jurisprudence in cyberspace must be taken into deliberation while considering arbitration. All of this occurs on two distinct scales, i.e., the national and the international level. In industrialised nations, legal structures for dealing with cyberspace are rather well-established. With HIPAA and Gramm-Leach-Billey Act of 1999 and Homeland Security Act of 1996, the federal government of the United States has three major regulations (2002). Cyberspace legislation has been established and implemented by France's national government since 1988. 152 FZ of the Russian Federal Law on Personal Data has also been accepted by the Russian federal government since 2006. They have contradictory views on cyberspace, however, Russia has controversially stipulated that security concerns take precedence over private rights, and the United States has a similar difficulty since Snowden's issue has come to public notice. If we examine cyber legal regimes in emerging nations like Malaysia and Indonesia, this discrepancy would expand.[188] Only a few countries, including the United States, have laws that explicitly allow the government to access citizens' personal information. Indonesia's planned cyber security bill was postponed owing to huge student protests over human right concerns. There is a lack of effective international legislation on cyberspace because of the disparity in statelegal frameworks. There is a dearth of international legislation governing cyber security. As far as international treaties are concerned, the Budapest Convention is the only one of its kind.[189] Due to the absence of a binding dispute resolution system and state-centered approach, the concentration on cybercrime

[187] KITTICHAISAREE, KRIANGSAK, *PUBLIC INTERNATIONAL LAW OF CYBERSPACE*, (Springer 2017).

[188] *Cybersecurity Laws and Regulations, Malaysia*, 2017 available at https://iclg.com/practice-areas-cyber-security-laws-and-regulations/malaysia.

[189] Markus Junianto Sihaloho & Nur Yasmin, *Jakarta Globe Cybersecurity Bill Postponed Until Houses Next Term, available at* https://jakartaglobe.id/context/cybersecurity-bill-postponed-until-houses-next-term/.

must not be ignored.[190] To encourage the formation of international law in cyberspace, there have been a number of talks. But international customary law requires practise and legal mechanisms that have been established on a national scale. The fact that different nations' legal systems on cyberspace differ so much, makes this an unlikely scenario. In addition to the ITU, ICANN, and Internet Governance Forum, there are other efforts to develop regulations on the basic rules, principles, and operationalities of cyberspace.[191] Sadly, none of them can avoid the fact that international law applies effectively to governments and tackles a wide range of concerns in cyberspace beyond crimes and technicality. Till date, none of these efforts have been able to produce internationally enforceable legal instruments. Because of this, international law on cyberspace is presently ineffective and difficult to enforce on state actors.

International Law on Cyber Space and Digital Sovereignty

By promoting digital sovereignty, international law on cyberspace is becoming progressively bereft of its intricacies and obstacles. Under the concept of "digit sovereignty", the International actors would be able to regulate and govern the use of digital resources, including information, communication, networks, and infrastructure.[192] As a result of China and Russia's cyber alliance on digital sovereignty, Snowden and Wikileaks cases, and the growth of GAFAs, this theory has gained support in the recent years (Google-Apple-Facebook-Amazon).

Cyber alliance between China and Russia on digital sovereignty is a crucial antecedent to digital sovereignty since both nations aggressively support such a notion in order to defend their national interests, which are mostly connected to economics and security concerns. The idea of non-interference in several global internet governance organisations such as ITU, ICANN, IANA, and the Internet Governance Forum underpins both nations' demands for greater control over their own cyberspace.[193] When it comes to internet neutrality, the concept of digital sovereignty has sparked controversy. However, nations like Saudi Arabia and Egypt, who accept the concept of state control, are influencing the paradigm change.[194] After Snowden and WikiLeaks came to light, they urged the EU to

[190] BROWN GARY & POELLET KEIRA, THE CUSTOMARY INTERNATIONAL LAW OF CYBERSPACE, *STRATEGIC STUDIES QUARTERLY* 126-145 (*Cyber Special Edition* 2012).

[191] *DEIBERT, RONALD J. & CRETE-NISHIHATA MASASHI, GLOBAL GOVERNANCE AND THE SPREAD OF CYBERSPACE CONTROLS, GLOBAL GOVERNANCE* 339-361 (2012).

[192] COUTURE, STEPHANE & TOUPIN, SOPHIE, "WHAT DOES THE NOTION OF "SOVEREIGNTY" MEAN WHEN REFERRING TO THE DIGITAL?", *NEW MEDIA & SOCIETY* 2305-2322 (2019).

[193] MUELLER MILTON, CHINA AND GLOBAL INTERNET GOVERNANCE: A TIGER BY THE TAIL, *SECURITY, IDENTITY, AND RESISTANCE IN ASIAN CYBERSPACE*, (Ronald Deibert ed. 2007).

[194] *Supra* note 20.

rethink the concept of allowing the internet to operate in a free and open market. There has been an increased focus on security and data protection issues in the EU discussion over whether to endorse.[195] Later, owing to the unrestrained actions of emerging huge online firms, such as GAFA, this worry has expanded to economic concerns. Europe's digital ecosystem had to be examined in light of the rapid rise of GAFA to prevent business monopoly and support innovation and internet capabilities in Europe.[196]

A new international law on cyberspace favours state actors in certain circumstances. Promotions and advancements in digital sovereignty could undermine the non-state actors and internet neutrality, which would raise questions about freedom and liberty in cyberspace. This erodes international agreement on cyber security law. Due to the fact that it will be regulated by states on a territorial basis, digital sovereignty has the potential to cause cyberspace fragmentation. If digital sovereignty is implemented, the internet as we know it today would be broken. Thus, international actors are less likely to agree on effective and enforceable international law on Internet. It also makes it more difficult to penalise and criticise state actors for their behaviour in arbitration process, due to the ingrained rule of non-interference in the digital sovereignty domain, as witnessed in the International Criminal Court. It is possible that this idea of digital sovereignty could bring together state actors to agree on international cyber law, but if this happened, the law itself would be dominated and determined by the interests of state actors rather than non-state actors such as businesses, citizens and civil societies.

III. The limited progress in the international harmonization

The international cooperation against cybercrime has been quite active and thorough throughout the years. However, no worldwide agreement on criminal law has been reached.Earlier, war crimes, crime against peace, crimes against humanity, genocide, torture and other crimes had been criminalised. According to specific court rulings, an international forum can achieve certain goals even before national legislation is passed. Traditionally, international criminal law had focused on harmonising substantive law, as well as coordinating procedural law, on offences that have existed in society since the dawn of humanity. Currently,

[195] Dworkin Anthony, *Surveillance, Privacy, and Security: Europe's Confused Response to Snowden*, *ECFR POLICY MEMO (2015)*.

[196] Stormshield, *Trust: The Foundation of Europes Digital Sovereignty (2018), available at* https://www.stormshield.com/trust-the-foundation-of-europes-digital-sovereignt/.

governments are keen to reach an international agreement on offences having a very short history of international accord. In the absence of trial practise, the lack of trial experience and expertise, the estrangement between legislators and the general public, and the differing interests of many nations, an international agreement in its lowest form is achieved. Many critics have expressed their assessments and criticisms on the Convention on Cybercrime throughout the writing stage and in particular when it was offered for implementation. While other international harmonisation progress has been made, the most important unsolved problem may be participation and consensus limitations.[197]

It has hitherto been the domain of industrialised nations to discuss international harmonisation. Every country that has signed on to a treaty must act in concert in order to maintain a common theatre of operations. The agreement is not directed towards a third party, and as a result, it has no effect on that party. Only a small percentage of the world's population is represented among the signatories to the Convention on Cybercrime. Global Internet penetration and global population growth has a direct correlation with cybercrime rates. In most of the current international harmonisation initiatives, the most populous nations are not included, thusreducing the effectiveness of the proposed measures. It is only possible to abolish the "safe haven for criminals" if practically all sovereign nations have access to one international agreement, and almost all internet users are subject to the jurisdiction of law enforcement. Despite the fact that member states may use an international text as a guide when creating their own laws, expectations should not be set too high when it comes to international measures. Second, a lesser degree of agreement has been attained, which is a constraint as well. Under contrast to international criminal law, which has seldom been punished in domestic law, cybercrime laws were first developed at the national level. On offences like genocide and crime against peace and comparable crimes in many nations before international treaties were in place local law was not in place. When it comes to cybercrime, nations with laws in place helped or pushed other countries without laws to agree. It is obvious that international collaboration in combating online crime has a greater slowness than local regulation. According to international instruments, domestic laws should be updated to implement the measures given in such treaties. In order to maintain efficient law enforcement, it is vital to agree on a broader range of concerns related to cybercrime. However, there is yet to be any unanimity on this point. There has to be a concerted effort from numerous international organisations.

[197] *Supra* note 19.

On the other hand, there seems to be a trend for international harmonisation to become more fragmented. Different interest groups have varying positions on the regulation or deregulation of the information community. Different participants have varying views on whether internet behaviours should be criminalised or decriminalised. Countermeasures are proposed by various organisations for the benefit of their member governments. Some groups oppose in totality any measures to limit access to information systems. Therefore, while one interest group is concerned about the abuse of information systems, another group may focus on the side-effects of anti-misuse measures. Diverse initiatives to harmonise international law are rife with conflict of interests and imbalances of power. Despite its length, this protracted round of talks has taken on the intrinsic character of international negotiations.

As a last trend, international harmony is becoming more regularised. Efforts to harmonise international standards have a less impact. As a universal international body, the UN's involvement in this area seems to be confined to establish an international treaty. There is a better option to the UN's "appeal" if member states don't want to legislate on cybercrime: a global accord. The above-mentioned coordinated action may provide the UN a chance to implement agreement established in other domains.

IV. Conclusion

Globalization does not simply imply a globalisation of wellbeing in any way. Transnational crimes are becoming more common as globalised information systems are becoming easily accessible. It is because of the network environment in which cybercrime operates that it is one of the most globalised offences of the present and one of the most technologically advanced dangers of the future. Taking action in two separate methods will help us to tackle this situation. Firstly, the information systems should be divided into portions that are separated by state borders. Secondly, to merge the legal system into a single entity that does away with the concept of state borders entirely. According to appearances, the first option is implausible. Despite the fact that all previous empires, including the Roman, Greek, and Mongolian, have become historical relics and those big empires are no longer common in the modern world, the division of information systems cannot be considered a hypothetical activity. Information systems have emerged as the one and only empire that does not have a physical presence on the ground.

Offenses committed in information systems are unlikely to result in legal consequences under this system. Instead, they are subject to punishment by the territory-based nations through which they pass. Thus, it is becoming more vital to build a system of international cooperation for combating cybercrime, since the severity of the crime is rising. Various international organisations have developed methods to address the issue in a variety of settings and at a variety of levels.[198]

The Worldwide Convention on Cybercrime is widely regarded as a watershed moment in the history of international harmonisation of cybercrime legislation. However, apart from the fact that it constitutes a substantial step forward, additional governments will be required to ratify the Convention and adhere by its obligations in order for it to function as a disincentive to further proliferation. International harmonisation focused on the convention, without a doubt, restricted in scope, and it must be expanded to include more participating member states and a broader range of concerns in order to be effective. The ultimate goal would only be reached by a formation of a global agreement on cybercrime prevention and prosecution. The United Nations may have a greater ability to put such universal regulations into effect.[199] However, we should not anticipate a prompt response from any of the international organisations, owing to the fact that the issue of crime, and more specifically, cybercrime, does not occupy the attention and interests of these organisations to a significant extent. While these organisations are preoccupied with dealing with more significant international matters, threats against essential information infrastructure will get more severe as time goes on, until they are prioritised and bought to the attention of these organisations'. Because of this, the growth of an international level of awareness, as well as the demand for an international level of consciousness from a national level of consciousness, continue to be the basis for successful activities. An urgent need exists to re-evaluate and, if required, update the current international legal framework, while also providing an international venue for wider debate and discussion with a view to improving and furthering international law-enforcement cooperation among national agencies.[200] This development should take into account the implications of novel

[198] PUTNAM & ELLIOTT, CHAPTER 2- INTERNATIONAL RESPONSES TO CYBER CRIME, THE TRANSNATIONAL DIMENSION OF CYBER CRIME AND TERRORISM 35-68 (Abraham D. Sofaer, and Seymour E. Goodman ed. 2001).

[199] P.N. GRABOSKY, GLOBAL DIMENSION OF CYBERCRIME, GLOBAL CRIME 146-157 (2d ed. 2004).

[200] GUEHAM, FARID, *DIGITAL SOVEREIGNTY – STEPS TOWARDS A NEW SYSTEM OF INTERNET GOVERNANCE* (Fondapol) (2007).

and emerging issues in international law-enforcement cooperation, as well as recommendations on capacity-building that are equally concerned with the situation in countries at various levels of development, in order to avoid a future in which information chaos reigns.